October 31, 1997

Cheryl Gray
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Viacom Broadcasting, Inc.
d/b/a WVIT - TV, Channel 30
By: Burton Kainen, Esq.
and Diana Garfield, Esq.
55 Farmington Avenue
Hartford, CT 06105

Re: Case No. FM 93-4
In the Matter of Gray v. Viacom Broadcasting, Inc. d/b/a WVIT- TV, Channel 30

Certified No. Z 712 661 646

Certified No. Z 712 661 649

FINAL DECISION OF THE LABOR COMMISSIONER

Pursuant to Section 31-1-8 of the Regulations of Connecticut State Agencies, I am issuing my final decision in the above-referenced matter. I have considered the entire record in this matter, including the briefs submitted by the parties and the content of the oral arguments raised on August 27, 1997.

I affirm and incorporate the Proposed Decision of the Hearing Officer issued on August 15, 1997, a copy of which is attached hereto, as my final decision in this matter, with the following modifications:

I agree with the Hearing Officer that the record of this case establishes that a violation of the FMLA occurred through the employer's termination of the Complainant's employment while she was exercising her rights under the Act. The FMLA does not provide employees on leave with an "absolute immunity." However, the Act does protect employees, such as the Complainant, in cases where it is clear from the record that the decision to terminate the Complainant was not made prior to the Complainant's going on leave or for newly-discovered reasons while the Complainant was on leave. Rather, the record establishes that the employer apprised the Complainant through written memoranda, immediately before the Complainant went on leave, that her performance needed to improve immediately. As the issuance of the memoranda occurred contemporaneously with the commencement of the Complainant's leave, the Complainant was never given the opportunity to improve her performance prior to her termination. In light of this, I find that the Hearing Officer properly found that the employer's termination of the Complainant under such circumstances constituted a violation of the Act.
On the issue of damages, I respectfully disagree with the Hearing Officer and find that Attorney Moniz provided far more than minimal participation in the instant case and sought to protect his client’s interests during the administrative process. I am compelled to take note, however, of the Connecticut Supreme Court’s recent decision in *Bridgeport Hospital v. Commission on Human Rights & Opportunities*, 232 Conn. 91 (1995), wherein the Court held that “absent express statutory authorization [in Section 46a-86(a) of the Connecticut General Statutes] for the awarding of [compensatory damages and attorneys fees],” no authority existed to support an award of such damages. *Bridgeport Hospital v. Commission on Human Rights & Opportunities*, 232 Conn. at 98. Similarly, in the instant case, because the specific language of Connecticut’s Family Medical Leave Act and the regulations promulgated thereunder do not authorize the issuance of an award of damages for attorney’s fees, I am constrained by the prevailing language and am not empowered to order attorney’s fees for the Complainant in this case.

James P. Butler  
Labor Commissioner

cc: Attorney Heidi Lane  
Office of Program Policy
I. CASE HISTORY

In or around 1994, the complainant, Cheryl Gray (hereinafter referred to as Gray) filed a complaint with the Wage and Workplace Standards Division of the Department of Labor (hereinafter referred to as the Agency) alleging that the respondent employer, Viacom Broadcasting, Inc. d/b/a WVIT-TV, Channel 30 (hereinafter referred to as WVIT-TV) violated the provisions of Conn. Gen. Stat. §31-51cc, et. seq., an Act Concerning Family and Medical Leave from Employment (hereinafter referred to as the Connecticut FMLA.)

On or around July 17, 1995, the Agency issued a complaint alleging that the employer violated Sections 31-51cc and 31-51dd of the Connecticut General Statutes. In this complaint, the Agency
notified the employer of its right to appear at a contested case hearing to show cause why an order
should not enter directing the respondent employer to restore any rights, benefits, entitlements or
protection afforded to the complainant under the Connecticut FMLA, and/or to reinstate the
complainant and/or to pay monetary damages for any loss which was the direct result of the
respondent employer's violations of the statutes. The Agency further notified the parties of a pre-
hearing conference before Attorney Stephen C. Lattanzio, the hearing officer designated by the
Labor Commissioner for mediation purposes only.

On or around August 18, 1995, the parties participated in a pre-hearing conference before Hearing
Officer Lattanzio. No settlement agreement was entered into by the parties.

On or around November 17, 1995, Deputy Labor Commissioner Jean Zurbrigen designated Attorney
Amy Stillman Kulig to act as the contested case hearing officer in the instant case.

On or around January 24, 1996, Attorney Kulig issued an addendum to the agency's contested case
hearing notice which specifically informed the parties that the matter would be heard on March 4,
1996, and March 5, 1996.

A contested case hearing was held before Attorney Kulig on March 4, 1996, at the State of
Connecticut Department of Labor Annex, 38 Wolcott Hill Road, Wethersfield, CT.
II. FINDINGS OF FACT

1. Respondent WVIT-TV, is a commercial broadcast television station and the local NBC affiliate in the Connecticut market.

2. At all times relevant to this matter, WVIT-TV was a corporation subject to the provisions of the Connecticut FMLA.

3. Complainant Gray was employed at WVIT-TV from February 1988, to September 30, 1992, as a general assignment news reporter.

4. Gray's position at WVIT-TV was her first full-time television job in which she appeared on the air. Her duties included writing news stories, presenting news stories on the air, and working with the other newsroom employees to produce an on-air product.

5. While at WVIT-TV, Gray was a member of the American Federation of Television and Radio Artists (AFTRA). Her salary and terms of employment were determined by the AFTRA-WVIT collective bargaining agreement.

6. Alfred Bova held the position of vice president/general manager of WVIT-TV throughout Gray's employment. He is the station's highest-ranking management
employee.

7. Steven Schwaid commenced work as news director of WVIT-TV in May 1992, and was Gray’s supervisor. Schwaid was hired with the specific mandate to improve the quality and ratings of the news programming.

8. Schwaid reported directly to Bova. These two individuals had an understanding that Schwaid was to stem any loss of viewers during the May 1992 sweeps period and then make or recommend necessary changes to be put into place by early fall, 1992, in anticipation of the November rating period.

9. Schwaid and Bova had a further understanding that Schwaid would make recommendations to Bova relative to personnel changes, including terminations and reassignments of current employees.

10. Schwaid conducted group meetings and issued memoranda to the news staff to communicate his policies and expectations. Schwaid’s policies and expectations differed from those of the previous news director.

11. In June 1992, Gray requested an unpaid, three-day leave of absence because her father-in-law was ill. Schwaid wanted Gray to utilize vacation leave for this purpose.
12. Gray requested assistance of AFTRA regarding the June leave issue. The respondent employer agreed through the union to allow Gray to take a paid leave without utilizing vacation leave and work three days scheduled by Schwaid at a later date.


14. On or around July 31, 1992, Schwaid and Gray had a discussion regarding the complainant's job performance in which Schwaid advised Gray that he did not know where she fit on the news team or if he wanted her to be part of that team.

15. During the July 31, 1992 meeting, Schwaid sharply criticized Gray's writing and on-air appearances. Schwaid advised Gray that her live shots were poor and that she was becoming a parody of herself on the air. Schwaid also criticized Gray's ability to work with others in the newsroom, citing a lack of trust between Gray and her coworkers.

16. Schwaid informed Gray on July 31, 1992, that if she did not improve her job performance and "professionalism," he would terminate her employment in the fall.

17. Gray related the substance of her July 31, 1992 conversation with Schwaid to
Mildred MacNeil, vice president of news and public affairs. MacNeil informed Gray that Schwaid was “out to get her” at Bova’s directive and that Bova had wanted Gray terminated for the past two to three years.

18. Bova was dissatisfied with Gray’s performance prior to Schwaid’s arrival at WVIT-TV and anticipated that Schwaid would assess Gray’s performance as a reporter as poor.

19. On or around August 11, 1992, Gray filed a complaint with the EEOC alleging discrimination by the respondent employer on the basis of race.

20. On or around August 19, 1992, Schwaid issued a memorandum to Gray to follow up on their July 31, 1992 discussion. In this memorandum, Schwaid indicated that Gray’s job performance and working relationships needed immediate improvement.

21. In his August 19, 1992 memorandum to Gray, Schwaid indicated that Gray was not a “team player” and cited a specific example to support his position. Schwaid also stated, “You hold grudges, work people against other people and don’t serve as a positive force in the newsroom.”

22. Schwaid also indicated in the August 19, 1992 memorandum that Gray’s story focus, writing and delivery needed improvement and that she lacked creativity and
originality. In the same memorandum, Schwaid specifically stated as follows relative to Gray's story delivery: "We have talked repeatedly about your standups. They have become sing songy, the hand movements don't work and you are almost becoming a caricature of yourself."

23. Schwaid also criticized Gray's live shots in his August 19, 1992 memorandum, citing a specific example of a story he found confusing and contradictory. Schwaid indicated that the producers had been working around Gray and were avoiding using her live shots.

24. Schwaid concluded his August 19, 1992 memorandum to Gray as follows: "Cheryl, these are extremely significant issues that require immediate attention from you. I will be glad to meet with you regularly to review your performance and on-air work."

25. Gray filed a grievance as the result of her July 31, 1992 discussion with Schwaid and his follow-up memorandum, and her dissatisfaction with her on-air assignments. The respondent employer had reduced Gray's on-air assignments as the result of its dissatisfaction with her performance on the air.

26. Pursuant to Gray's grievance, a meeting was held on August 26, 1992. After that meeting, Bova directed Schwaid to contact John Kailen, the Assistant Executive Director of AFTRA, and let him know that the respondent employer's dissatisfaction
with Gray extended beyond her on-air assignments which were the subject of Gray's grievance. Bova advised Schwaid to inform Kailen that Gray's employment was in jeopardy and that her termination was likely.

27. Bova wanted to share with Kailen the respondent employer's doubts about Gray's continued employment in order to create trust between management and Kailen, who was fairly new to his union position. The employer did not want Kailen to feel that the employer had misled him or withheld information from him relative to Gray.

28. Schwaid informed Kailen per Bova's directive that he did not think Gray would "make it" and that the employer did not believe she had a future with WVIT-TV.

29. Bova also told Schwaid to make it clear to Gray that he was dissatisfied with Gray's performance and the specific reasons for that dissatisfaction.

30. On or around August 26, 1996, Schwaid issued a memorandum to Gray criticizing specific aspects of a Woody Allen story reported by Gray. Schwaid also verbally reviewed the contents of the memorandum with Gray. Schwaid concluded the memorandum by saying, "I want to make it clear that there must be immediate improvement."

31. On or before August 26, 1992, Gray came to believe that Schwaid intended to
terminate her employment.

32. When Gray's spouse picked her up after work on August 26, 1992, Gray informed him that she felt like she was having a stroke. For this reason, he drove her to the John Dempsey Hospital Emergency Department.

33. Gray's symptoms on August 26, 1992, included a severe burning sensation in her shoulder, neck and back.

34. The emergency room personnel indicated to Gray that her blood pressure was very high. The emergency room physician prescribed certain medication and provided Gray with a note indicating that she should not return to work until August 31, 1992.

35. Gray called Schwaid on August 27, 1992, and informed him that she would not be reporting to work and would fax medical documentation to the employer.

36. Gray faxed the return-to-work note and hospital discharge summary to Lee Daly, payroll officer, on August 27, 1992. Schwaid may only have seen the return-to-work portion of the information faxed by Gray to the employer.

37. Schwaid called Gray on August 27, 1992, to more specifically inquire into the nature and cause of the medical condition which was precluding her from returning to work.
Gray provided Schwaid no specifics as to her medical condition but invited him to call the John Dempsey Hospital Emergency Department.

38. Upon receiving a copy of her personnel file after her termination, Gray for the first time read a memorandum from Schwaid to Gray dated August 27, 1992. In this memorandum, Schwaid specifically criticized Gray's handling of a story on Hurricane Andrew. Schwaid concluded the memorandum by saying, "I want to make it clear that there must be immediate improvement."

39. On or around August 28, 1992, John Kailin faxed a letter to Schwaid stating, "Your actions send clear messages to Gray that any actions she might take in order to meet required criteria may very well be futile."

40. Gray returned to the University of Connecticut Health Center for a follow-up visit on August 31, 1992. A record of that visit indicates that Gray's symptoms were not relieved by her use of a cervical collar and prescription medication. The medical documentation also indicates: "paracervical spasm."

41. The emergency room physician provided Gray with a statement dated August 31, 1992, which indicated that Gray should not return to work until September 10, 1992, or pending further evaluation by Dr. Koury. Gray faxed this statement and record of visit to the employer on August 31, 1992. Gray also telephoned Schwaid on August
31, 1992, to advise him that she could not return to work until September 10, 1992.

42. Dr. Koury is a physician specializing in pain management who practices in Michigan. He had treated Gray previously as the result of a car accident.

43. On or about September 4, 1992, Gray went to Michigan. On September 9, 1992, Gray saw Dr. Koury and Dr. Bohm, who works with Dr. Koury.

44. On or around September 9, 1992, Dr. Bohm gave Gray documentation indicating a diagnosis of "myofascial dysfunction" and a new return-to-work date of September 30, 1992. Gray called Tom Sequin, the respondent employer's business manager, and faxed this information to him.

45. After seeing Dr. Koury and Dr. Bohm, Gray began a course of treatment that involved trigger point injections, which she received two to three times a week. The injections were administered in the operating room under anesthesia.

46. Sequin sent Gray two forms that needed to be completed. One document was entitled "Attending Physician's Statement of Disability" and the other was entitled "Group Disability Claim for Short-Term Disability." Gray was instructed to return these forms to Prudential, the employer's insurance carrier, which she did.
47. The respondent employer does not post or otherwise provide written notification of employees' rights under the Connecticut FMLA.

48. The respondent employer instructs its employees to direct questions regarding sick and disability leave to Tom Sequin or Leona Daly, payroll officer. Gray followed all instructions issued by Sequin and Daly relative to taking a leave of absence.

49. Gray went to a scheduled doctor's appointment on September 30, 1992. Gray's physician determined that she was not able to return to work and gave her a new return-to-work date of October 30, 1992.

50. After this doctor's appointment, Gray called Sequin and told him that her doctor had determined that she was not able to return to work at that time. She also faxed Sequin the documentation from her September 30, 1992 appointment.

51. Gray's union contract includes a sick leave/disability policy which provides for short-term disability payments of up to twenty-six weeks for employees who have utilized their ten sick days within the calendar year. For the first thirteen weeks of a disability, employees receive their full salary. For the second thirteen weeks, employees receive eighty per cent of their salary.

52. Gray's union contract further provides that the respondent employer shall keep any
employee's position open for at least six months subject to the condition that, at the employer's discretion, the employee provide a physician's certificate as to the existence or continuance of the illness or disability.

53. On September 29, 1992, the Prudential Insurance Company approved Gray for benefits effective August 27, 1992, on the basis of myofascial dysfunction.

54. On or around September 30, 1992, the respondent employer mailed to Gray a notice that she was terminated effective September 30, 1992, pursuant to Article V, Section 5.06, Paragraph D of the WVIT-AFTRA collective bargaining agreement. Gray received two weeks' pay in lieu of notice and eleven weeks' severance pay, including four additional weeks above those due Gray based on her years of service.

55. Article V, Section 5.06, Paragraph D of the WVIT-AFTRA collective bargaining agreement provides as follows:

Notwithstanding [the contract section relative to discharges for just cause], on-air personalities hired after January 1, 1979, would (sic) be subject to discharge for unsuitability as determined by the employer and such discharges will not be subject to grievance or arbitration as long as the discharged employee is given an additional four (4) weeks' severance pay.

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56. The employer also terminated a general assignment reporter in addition to Gray and a sports anchor/reporter effective September 30, 1992. Additionally, the employer terminated an assignment editor effective October 1, 1992.

57. The employer made its final decision as to the group of employees to be terminated and the effective date of those terminations sometime between August 27, 1992, and September 30, 1992.

58. Gray’s position remained open after her termination until it was filled by a newly hired employee.

59. Gray's treatment program for myofascial dysfunction included physical therapy and psychiatric counseling in addition to trigger point injections.

60. Gray attended physical therapy twice a week as part of her treatment program. The physical therapy became more aggressive as the trigger point injections diminished.

61. As part of her treatment program, Gray saw a psychiatrist every week for no more than ten weeks.

63. Gray's symptoms varied day to day but continued throughout her course of treatment.

64. Gray earned approximately $42,000 per year while working for the respondent employer. Gray received a pay increase in August, 1992, at which time her weekly pay became $740.


66. Gray's union contract provides that employees will be covered by a group life, health and dental plan subject to an employee contribution specified by the respondent employer.

67. After her termination, Gray continued health insurance for herself and her husband through the employer pursuant to COBRA, at a cost of $530 per month.

III. PROVISIONS OF LAW


(a) For the purposes of sections 31-55cc to 31-55gg, inclusive:
(1) "Person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons;
(2) "Employer" means a person engaged in any activity, enterprise or business who has employees, but shall not include the state, a municipality or a local or regional board of education or a private or parochial elementary or secondary school;

(3) "Employee" means any person engaged in service to an employer in the business of his employer;

(4) "Eligible employee" means any person engaged in service to an employer in the business of his employer for (A) twelve months or more and (B) one thousand or more hours in the twelve-month period preceding the first day of the leave:

(5) "Serious illness" means a disabling physical or mental illness, injury, impairment or condition that involves (A) inpatient care in a hospital, as defined in section 19a-490, a nursing home licensed pursuant to chapter 368v or a hospice or (B) outpatient care requiring continuing treatment or supervision by a health care provider;

(6) "Parent" means a natural parent, foster parent, adoptive parent, stepparent or legal guardian of an eligible employee or an eligible employee's spouse;

(7) "Child" means a natural, adopted or foster child, a stepchild or a legal ward provided such child or ward is (A) under the age of eighteen or (B) eighteen years of age or older and unable to care for himself because of a serious illness.

(b) Except as provided in subsections (c) and (d) of this section and section 31-51ff, each eligible employee shall be entitled to a maximum of sixteen weeks of unpaid leave of absence within any two-year period. Such leave may be taken as (1) a family leave of absence upon the birth or adoption of a child of such employee, or upon the serious illness of a child, spouse or parent of such employee or (2) a medical leave of absence upon the serious illness of such employee. Such two-year period shall commence with the first day a leave of absence is taken pursuant to this subsection. Upon the expiration of any such leave of absence, the eligible employee shall be entitled to (A) return to the employee's original job from which the leave of absence was provided for, if not available, to an equivalent position with equivalent pay, except that in the case of a medical leave, if the employee is medically unable to perform the employee's original job upon the expiration of such leave, the employer shall transfer such employee to work suitable to this physical condition where such work is available, and (B) all accumulated seniority, retirement, fringe benefit and other service credits the employee had at the commencement of such leave. Employers may allow such service credits to accrue during the period of the leave of absence.

(c) If a husband and wife are employed by the same employer, the total number of weeks of leave to which both may be entitled under this section shall be the maximum allowed to an individual eligible employee in any two-year period except if the leave if a medical leave or for the serious illness of a child each spouse shall be entitled to the maximum leave provided in such period.

(d) To the extent the eligible employee is entitled to any other leave or benefits, the
benefits granted by this section for a family or medical leave of absence shall be reduced by the amount of other leave or benefits provided by the employer to an eligible employee upon (1) the birth or adoption of a child, (2) the serious illness of a child, spouse or parent or (3) the serious illness of the employee.

(e) Any eligible employee who requests a medical leave of absence due to such employee's serious illness or a family leave of absence due to the serious illness of a child, spouse or parent pursuant to subsection (b) of this section shall provide the employer with at least two weeks' advance notification, if possible, and shall provide his employer with written certification from the physician or other health care provider of such employee, child, spouse or parent of the nature of such illness and its probable duration. Upon the request of the employer, the eligible employee requesting a medical leave of absence shall submit himself to examine by a physician or surgeon selected and paid for by the employer. If the need for the leave is foreseeable based on planned medical treatment, the eligible employee shall make a reasonable effort to schedule the treatment so as not to unduly disrupt the operations of the employer, subject to the approval of the health care provider of the eligible employee, his child, spouse or parent. Any eligible employee who takes a medical leave of absence pursuant to subsection (b) of this section shall provide his employer with at least two weeks' advance notification of the date he intends to return to work.

(f) Any eligible employee who requests a family leave of absence pursuant to subsection (b) of this section shall (1) provide the employer with prior notice of an expected birth or adoption in a reasonable manner if such leave is foreseeable and (2) submit to the employer, prior to the inception of such leave, a signed statement of such employee's intent to return to the employee's position upon the termination of such leave. Any eligible employee who takes a family leave of absence pursuant to subsection (b) of this section shall provide his employer with at least two weeks' advance notification of the date he intends to return to work.

Sec. 51dd. Family and Medical Leave: Prohibition of discrimination.

No employer who is subject to the provisions of section 31-51cc shall discharge, or cause to be discharged, or in any manner discriminate against any eligible employee because such employee has exercised the rights afforded to him pursuant to the provisions of said section.

IV. DISCUSSION

A. The Proceedings in the Instant Case Were Conducted in Accordance with State Regulations and Satisfied the Requirements of Due Process.
Despite the respondent employer’s assertion to the contrary, the proceedings in the instant case complied with both state law and the requirements of due process. The Connecticut legislature authorized the Commissioner of the Department of Labor to adopt regulations pursuant to Connecticut’s Uniform Administrative Procedure Act which would establish the procedures and guidelines necessary to implement the provisions of Connecticut’s FMLA, including but not limited to procedures for hearings and redress for an employee who believes the employer has violated the Act. See Conn. Gen. Stat. §31-51ee. Pursuant to this authority, the Department of Labor adopted Conn. Agencies Regs. §31-51ee-6, which provides that the contested case hearing rules of procedure found at Conn. Agencies Regs. §31-1-1 to 31-1-9, inclusive, shall apply to any hearing scheduled as the result of the Labor Department’s issuance of a complaint following its investigation of a claim filed under Connecticut’s FMLA or as the result of a complainant’s request for hearing following the Department’s notice to the parties that it will not issue a complaint. While the employer is correct in stating that the contested case regulations found at §31-1-1 to 31-1-9 do not explicitly designate the Agency as a party to the proceedings in a contested case, the regulations must be read in conjunction with the statutory framework from which the regulations derive their authority.

Specifically, Connecticut’s Uniform Administrative Procedure Act clearly provides that, in a contested case, each party and the agency shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency and (2) at a hearing, to respond, to cross-examine other parties, intervenors and witnesses, and to present evidence and argument on all issues involved. Conn. Gen. Stat. §4-177c(a).
Therefore, the hearing officer acted properly in allowing the Agency (specifically, the Department of Labor’s Division of Wage and Workplace Standards) to request production and actively participate in the contested case hearing relative to the instant case.

The hearing officer further concludes that the proceedings in the instant case satisfied the elements of due process. A fair trial in a fair tribunal is a basic requirement of due process. This requirement applies to administrative agencies that adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Withrow v. Larkin*, 421 U.S. 35, 46-7 (1974). However, the respondent employer’s assertion that the Department of Labor’s role as both investigator and adjudicator is violative of due process is without merit. The United States Supreme Court has specifically ruled that “... an initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.” *Withrow v. Larkin*, *supra*, 38.

The respondent employer has offered no evidence of bias or the risk of bias or prejudgment in this case other than that inherent in the fact that a division of the Department of Labor investigated and the Labor Commissioner, upon review of the hearing officer’s proposed decision, will now adjudicate the claim. *See Withrow v. Larkin*, *supra*, 421 U.S. 55, citing *United States v. Morgan*, 313 U.S. 409, 421 (1941). Thus, the respondent employer has failed to show a high risk of unfairness in this case. Accordingly, the respondent employer’s due process claim is unavailing, and the hearing officer turns her attention to the merits of the complainant’s claims under the Connecticut FMLA.
B. The Respondent Employer Did Not Discharge the Complainant Because She Exercised The Rights Afforded To Her Pursuant To The Connecticut Family And Medical Leave Act.

It is undisputed in the instant case that the complainant Cheryl Gray was exercising her right to a medical leave pursuant to Connecticut’s FMLA at the time of her discharge. There is no claim by the employer that Gray was not suffering from a serious illness as defined by the Act or that she had not taken adequate steps to invoke the Act’s protections. At issue, however, is whether WVIT-TV discharged Gray because she was exercising her rights under the FMLA.


The theory of discrimination outlined in federal law, adopted in Connecticut and applicable to the instant case, is the “disparate treatment” theory. The principal inquiry in a “disparate treatment” case is whether the complainant was subjected to different treatment because of his or her protected status. Levy v. Commission on Human Rights & Opportunities, 236 Conn. 96, 103 (1996). In a “disparate treatment” case, there are two general methods of allocating the burdens of proof: (1) the

All parties in the instant case concur that the proper analytical framework in this case is the pretext model. Neither the complainant nor the agency maintain that they have established a prima facie case under the mixed-motive model, which requires proof by a preponderance of the evidence that an impermissible factor played a "motivating" or "substantial" role in the employment decision. See Price Waterhouse v. Hopkins, supra, 490 U.S. 258; Levy v. Commission on Human Rights & Opportunities, supra, 236 Conn. 105. Under the pretext model, a plaintiff may establish a prima facie case of discrimination through inference by presenting facts that are sufficient to remove the most likely bona fide reasons for an employment action. Levy v. Commission on Human Rights & Opportunities, supra, 107. From a showing that an employment decision was not made for legitimate reasons, a fact finder may infer that the decision was made for illegitimate reasons. Id.

The burden of establishing a prima facie case under the pretext model is not onerous. Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. 253; Levy v. Commission on Human Rights & Opportunities, supra, 107. In the case of a discharge that is alleged to be discriminatory, the complainant need only prove that (1) he or she is a member of a protected class; (2) he or she was qualified for the position; (3) he or she was discharged; and (4) the position remained open and was ultimately filled by an individual who was not a member of a protected class. See St. Mary's Honor

Once the complainant has established a prima facie case of discrimination, a presumption of discrimination is created, but the burden of persuasion remains with the complainant, because the initial prima facie case does not require proof of discriminatory intent. See Levy v. Commission on Human Rights & Opportunities, supra, 236 Conn. 108. The burden of production (not persuasion) shifts to the respondent, which must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. 254-5; St. Mary's Honor Center v. Hicks, supra, 509 U.S. 507. Should the respondent carry this burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination. Texas Dept of Community Affairs v. Burdine, supra, 253; St. Mary's Honor Center v. Hicks, supra, 507-8. In St. Mary's Honor Center v. Hicks, the United States Supreme Court ruled that "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Center v. Hicks, supra, 515.

In the instant case, the complainant met her initial burden of establishing a prima facie case of discrimination. The complainant is clearly a member of the class protected by Connecticut's FMLA in that she was indisputably exercising her rights under the Act at the time of her discharge. The complainant possessed the objective qualifications necessary for the position; there is no evidence
to establish that she lacked the qualifications or experience required at the time of hire. While the respondent employer maintains that Gray failed to establish that she was qualified for the job because her performance in that position was inadequate, the employer's subjective evaluation of the complaint's performance is more properly a part of the respondent's burden of articulating a non-discriminatory reason for the discharge, with the complainant then having an opportunity to address the issue of pretext. The evidence in the record also establishes that Gray was discharged and that her position remained open and was ultimately filled by an individual who was not a member of the protected class. Thus, all four elements of the prima facie case have been met in this case.

Nevertheless, the complainant failed to carry her burden of persuading the hearing officer that (1) the respondent employer's stated reason for the discharge (dissatisfaction with Gray's job performance) was false and (2) the real reason for the discharge was Gray's exercise of her rights under the Connecticut FMLA. The hearing officer found the testimony of both Schwaid and Bova credible as to their sincere belief that Gray was not a good assignment reporter. Bova credibly testified that when he hired Schwaid, he expected Schwaid to be dissatisfied with Gray as he became acquainted with her performance, and Gray admitted that the employer's vice president of news and public affairs had advised her that Bova had wanted to terminate her for two to three years. Schwaid, too, was clearly dissatisfied with Gray's performance. His criticism of Gray prior to the August, 1992 commencement of her leave was consistent, specific and severe. It included telling Gray that he did not know where she fit on the news team; that he did not know if he wanted her on that team; that she would be terminated in the fall of 1992, if she did not improve; and that she was "almost becoming a caricature of [her]self." Schwaid also criticized specific stories and issued two
memoranda to Gray about her job performance prior to her leave. Additionally, Schwaid (at Bova's
directive) communicated the respondent employer's dissatisfaction with Gray's job performance and
the likelihood of her termination to the union director immediately prior to the commencement of
Gray's leave. It is not necessary to determine whether the employer's assessment of Gray's
performance was correct; the relevant inquiry is whether the employer was indeed dissatisfied with
Gray's job performance and whether this dissatisfaction was a false reason for termination. Based
upon all of the foregoing, the hearing officer is persuaded that the employer's dissatisfaction with
Gray's work was not a false reason for discharge.

Although the complainant attempted to show that Schwaid's criticism was a fabrication in retaliation
for her taking time off in early July, 1992, to attend to an ill relative and evidence of his lack of
tolerance for leaves related to family or medical issues, the disagreement over the use of vacation
leave was a relatively minor one, and the resolution reached on the issue was not unsatisfactory to
the employer. It is important to note that the employer was acting within its rights to require the
complainant to use vacation leave for this purpose. See Conn. Gen. Stat. §31-51cc(c). Moreover,
Gray admitted that Schwaid had criticized her performance, though to a lesser degree, prior to the
disagreement over time off in July. Schwaid only commenced work with the employer in May, 1992, and it is logical that he would be less critical and outspoken during the first few months of his
employment while he was familiarizing himself with his duties and the reporters' work.

The complainant argues that she has proved discrimination by the subject employer because the final
decision to terminate Gray was not made or communicated to her before the leave, the employer was
still leaving the door open for Gray to improve, and the only intervening event was Gray's medical leave. However, on the basis of the evidence in the record before the hearing officer, including the severity of the respondent employer's criticism of Gray's performance and its communications with the union director prior to Gray's leave, the hearing officer is convinced that had the employer decided to make its personnel changes in August, 1992, rather than in the fall, Gray would have been terminated at that point, prior to her leave. Indeed, the union official followed his private conversation with Schwaid with a letter stating that the respondent employer's actions sent a clear message that any actions Gray might take to meet the employer's standards under Schwaid might well be futile. Additionally, Gray testified at the contested case hearing that she believed prior to her leave that she was to be fired. The employer merely postponed making a final, definite decision until it was ready to discharge a group of employees.3

Although the employer did offer Gray the opportunity to improve her job performance prior to taking her leave, the hearing officer finds that offer to have been afforded by the employer merely for the convenience of a group termination rather than evidence that the respondent intended to work with and retain the complainant. The employer clearly did not believe Gray capable of satisfying its performance expectations. Moreover, Gray conceded the probable futility of a period for improvement. Thus, the hearing officer cannot adopt the complainant's view that the respondent employer's offer of an opportunity to improve belies its contention of dissatisfaction with her performance as the true reason for discharge, with the real reason being the exercise of her rights under the Connecticut FMLA.
On the basis of the foregoing, the hearing officer concludes that the complainant failed to show that dissatisfaction with Gray's job performance was a false reason for her discharge or that the real reason was the exercise of her rights under the Connecticut FMLA. Accordingly, the hearing officer further concludes that the respondent employer did not discharge the complainant because she exercised her rights under the Act.

C. **Although It Did Not Discharge The Complainant For Exercising Her Rights Under The Connecticut FMLA, The Respondent Employer Violated The Act By Discharging The Complainant While Exercising Her Rights Under That Act.**

1. An employer may violate the Connecticut FMLA even in the absence of discrimination.

The Commissioner of the Department of Labor has held that an employer may violate the Connecticut FMLA by non-discriminatory conduct. *Moody v. Sweet Life Foods*, FM 93-5 (10/4/94). The plain language of Conn. Gen. Stat. §31-51ee acknowledges that a violation of the Connecticut FMLA can occur in the absence of discrimination. Specifically, this section authorizes the Labor Commissioner to adopt regulations:

> which establish procedures and guidelines necessary to implement the provisions of Sections 31-51cc to 31-51gg, inclusive, including but not limited to procedures for hearing and redress for an employee who believes that there is a violation by the employer of such employee of any provision of said sections....

Emphasis added.
The statute clearly contemplates that a violation of Section 31-51cc, which details an employer's obligations under the Act, including the duties to provide leave and to reinstate an employee to his or her former position or its equivalent, may constitute a violation entitling an employee to relief, in addition to or in lieu of a violation of 31-51dd, which prohibits an employer from discriminating against an employee because he or she exercised her rights under the Connecticut FMLA.

Moreover, the regulations adopted by the Labor Commissioner provide that an employee is eligible for redress under the Connecticut FMLA if the employer has “(1) has violated any provision of the Act with respect to an eligible employee, or (2) has discharged, or caused to be discharged, or in any manner discriminated against an eligible employee for exercising rights afforded to him by the Act.” (Emphasis added.) Conn. Agencies Regs. §31-51ee-7. Administrative agency regulations are presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute. See Travelers Insurance Co. v. Kulla, 216 Conn. 390, 399; 529 A 2d. 525 (1990). Drawing from the principles of statutory construction, the use of the disjunctive “or” indicates a clear legislative intent of separability, Bahre v. Hogbloom, 162 Conn. 549, 555, 295 A 2d. 547 (1972), and can only be construed in the sense of “and” when the legislative intent to do so is clear and unmistakable. Gunzer v. Town of New Fairfield et al., 19 Conn. Sup. 231, 235, 111 A 2d. 30 (1955). The language of §31-51ee evinces the legislature's intent to recognize violations of the Connecticut FMLA other than by discriminatory conduct. Moreover, the Act's legislative history does not reveal any evidence that a discriminatory motive is required for an employer to violate the act's provisions.
Thus, an employee is eligible for redress if the employer either violates the Act’s provisions or discharges or otherwise discriminates against the employee for exercising her rights under the Act. Therefore, the issue presented herein is whether the respondent employer violated the Connecticut FMLA even though it did not discriminate against Gray because she exercised her rights under that Act.

2. The respondent employer violated the Connecticut FMLA by discharging the complainant while she was exercising her rights under the FMLA and by failing to extend to her an offer of reinstatement.

The respondent employer argues that it did not violate the Connecticut FMLA because, once it discharged the complainant, she was no longer an “eligible employee” entitled to the Act’s protections. This argument is circular and unavailing. First, the Act defines an “eligible employee” as a person engaged in service to an employer for a specified period “preceding the first day of the leave” (emphasis added). Thus, eligibility is based upon an employee’s service prior to the commencement of a leave of absence pursuant to the Act; the fact that the employee’s services are terminated thereafter does not alter the employee’s eligibility, which is determined at the commencement of the leave. More important, the employer’s reading of the statute completely vitiates the statute itself. If an employer could render an employee ineligible for the act’s protections simply by terminating the employee, it could evade the obligations of the Act in every instance, and the Act would become meaningless.
The complainant in the instant case qualified for the protections of the Act. She had been engaged in service to a covered employer for twelve months or more prior to the commencement of her leave. See Conn. Gen. Stat. §31-51cc(a)(4). She suffered from a "serious illness," in that her condition was a disabling physical or mental illness, injury, impairment or condition that involved outpatient care requiring continuing treatment or supervision by a health care provider. See Conn. Gen. Stat. §51cc(a)(5). She invoked the Act's protections by advising the employer of her serious illness, her need to take a leave of absence, and her intent to return to work. See Moody v. Sweet Life Foods, FM 93-5 (10/4/94). Although the employer was extremely dissatisfied with Gray's job performance, it neither made nor communicated to Gray a final decision to terminate her employment prior to the start of her leave. Thus, Gray was entitled to continue on leave until she was ready to return to work or until her leave had expired, whichever occurred first. When her leave entitlement expired, Gray was also entitled to restoration to her original position, its equivalent or an available position within any medical restriction. See Conn. Gen. Stat. §§51cc(b)(A) and 51cc(b)(A). Therefore, the respondent employer's failure to afford Gray her full leave entitlement and to extend her an offer of reinstatement constituted violations of the Connecticut FMLA.

The clear purpose of the Connecticut FMLA is to provide to a seriously ill employee a leave of absence of up to sixteen weeks and protection from discharge during or upon return from that leave. By virtue of the Act's clear and unambiguous language, an employee whose health requires an absence from work for an extended period is entitled to retain his or her employment status for a specified period, and, at the end of that period, to return to work in his or her original position, its equivalent, or an available position within his or her medical restrictions. See Conn. Gen. Stat. §31-
51cc(b).

To hold otherwise in this case would have a chilling effect on an employee’s exercise of his or her rights under the Connecticut FMLA and would allow an employer to easily circumvent its obligations under the Act. An employer that had made no decision to terminate an employee prior to the commencement of the individual’s leave and that had discovered nothing new about the employee in terms of misconduct or the employee’s qualifications during the leave could simply “review” the employee’s job performance while that employee was exercising his or her right to a leave, and fire the employee. The employer thus could evade any contractual obligation it has to provide sick pay, disability insurance or health benefits. Moreover, allowing this type of conduct by the employer would cause employees to be afraid to exercise their statutory right to take a leave, thwarting the legislative purpose in enacting the Connecticut FMLA. Therefore, as a matter of public policy, an employer should not be permitted to discharge an employee during a FMLA leave for poor job performance where the decision to discharge is neither made nor communicated to the employee prior to commencement of the leave.

The respondent argues that precluding an employer from discharging an employee during a leave pursuant to the Connecticut FMLA prevents an employer from taking the reasonable action of terminating an employee for serious misconduct discovered during the leave and encourages an employee fearing termination to insulate himself or herself from disciplinary action by taking a leave pursuant to the Act. The employer’s objections are without foundation. It is ludicrous to assume that an employee could or would bear or adopt a child or develop a serious illness in order
to avoid disciplinary action. More important, the employer in the instant case did not discover anything new about the complainant's job performance during her leave -- no misconduct, no falsification of the objective qualifications of her position. The respondent employer simply assessed Gray's qualifications and decided to terminate her employment.\textsuperscript{4}

In the absence of any evidence in the record to establish that Gray had taken any other leave(s) under the Act within the previous two-year period, she was entitled to a maximum of sixteen weeks' leave after August 27, 1992. Therefore, the hearing officer specifically finds that the respondent employer violated the Act by failing to allow Gray leave through December 17, 1992.

The respondent employer also violated the Act by failing to offer Gray reinstatement as of December 17, 1992. The record discloses that Gray was not physically able to work as of December 17, 1992, when her leave was due to expire. On that date, Gray was still undergoing an intensive course of treatment for her medical condition in the state of Michigan. Gray testified that, while they varied day to day, the symptoms of her medical condition continued throughout her course of treatment, which did not end until February, 1993. Therefore, in the absence of any medical or other competent evidence to the contrary, the hearing officer concludes that Gray was not able to return to work at WVIT-TV in any capacity at the expiration of her leave of absence. However, the respondent employer had a duty to offer Gray reinstatement to her original position or an equivalent position as of December 17, 1992, and upon indication from the complainant that she was physically unable to return to these positions, to inquire into her physical limitations and offer any available position within these restrictions.\textsuperscript{5} The respondent employer's failure to do so in this case constitutes a
violation of the Act's provisions. Nevertheless, the complainant's inability to work as of the expiration of her leave entitlement vitiates any entitlement to reinstatement to a position or to damages attributable to the period after December 17, 1992, as more fully discussed in Section V below.

In ruling that the employer should have extended an offer of reinstatement to Gray, the hearing officer does not intend to suggest that the employer would be required to retain her services indefinitely if dissatisfied with her job performance. Had Gray not taken a leave under the Connecticut FMLA, the respondent employer would have offered Gray a period of approximately four weeks to improve her job performance. Thus, it might be reasonable to expect the employer to afford Gray that same opportunity upon return from a leave, had she accepted reinstatement. However, the question of whether the employer could have restored Gray and then immediately discharged her is academic in this case.

The hearing officer notes the employer's argument that if it is found to have violated the Act by terminating Gray, she will be afforded greater rights than if she had actively been at work during the period of her leave. However, by ruling that the employer could not terminate Gray during her medical leave, the hearing officer is merely ensuring that her statutory right to a leave is effectuated.

For the foregoing reasons, the hearing officer concludes that the respondent employer violated the Connecticut FMLA, both by discharging the complainant and by failing to offer her reinstatement at the expiration of that leave. Therefore, the complainant is entitled to redress.
V. PROPOSED ORDER ON DAMAGES

Section 31-51ee of the Connecticut General Statutes authorizes the Labor Commissioner to adopt regulations which establish procedures to implement the Connecticut Family and Medical Leave Act, including procedures for redress for an employee who believes there has been a violation of the Act by an employer. Section 31-51ee-7 of the Regulations of Connecticut State Agencies, adopted pursuant to that statute, provides that when the Commissioner concludes that an employer has violated any provision of the Act with respect to an eligible employee or has discharged, or caused to be discharged, or in any manner discriminated against an eligible employee for exercising rights afforded by the Act, the Commissioner may order the employer to comply with the applicable requirements of the Act and to remedy the harm incurred by the employer as a result of the employer’s violation, discharge or discrimination. The relief may include, but is not limited to, restoration of any rights, benefits, entitlement or protections afforded an employee by the Act, reinstatement to employment, back pay and other monetary compensation for losses directly resulting from the employer’s violation, discharge or discrimination.

Pursuant to the above-cited authority, the hearing officer enters the following orders:

Because the complainant was not able to work at the expiration of her leave entitlement under the Connecticut FMLA, the hearing officer concludes that the complainant is not entitled to reinstatement or to any monetary damages as of December 17, 1992, the date upon which Gray’s leave entitlement expired.
The complainant is entitled to the disability income she would have been paid had she been permitted to retain her status as an employee through December 17, 1992. Specifically, the complainant was paid four weeks' disability pay at the level of her full salary ($740 per week) through September 30, 1992, and was entitled to nine additional weeks' pay at that level. Thereafter, she was entitled to eighty percent of her full salary for each of the remaining three weeks prior to December 17, 1996. Therefore, she is entitled to (9 X $740.00) plus (3 X $592.00) or $8,436.00. The complainant is also entitled to prejudgement interest calculated in the amount of ten percent a year, based upon the statutory rate for civil actions and the respondent employer's wrongful retention of proper wages. See Conn. Gen. Stat. §37-3a; E. Paul Kovacs & Company, Inc. v. Alpert, 180 Conn. 120, 128, 429 A 2d. 829 (1980); Nor'easter Group, Inc. v. Colossale Concrete, Inc., 207 Conn. 468, 482, 542 A2d. 692 (1988); Moody v. Sweet Life Foods, FM 93-5 (10/4/94).

There is no obligation under the Connecticut FMLA for an employer to continue its co-payment for an employee's health insurance benefits.7 However, had the employer not wrongfully discharged the complainant, it would have continued to pay a percentage of the complainant's health insurance benefits pursuant to Article V, Section 5.10 of its contract with AFTRA. After her termination, Gray paid $530.00 per month to continue health insurance for herself and her husband pursuant to COBRA. Gray is entitled to the difference between $530.00 and the cost to her for health insurance for herself and her husband prior to her termination, for the period between September 30, 1992, and December 17, 1992.
The hearing officer declines to award attorney’s fees because the participation of private counsel in this case was minimal, and was provided in addition to the representation afforded by Agency attorney Heidi Lane, who fully protected the complainant’s interests without charge.

Amy Stillman Kulig
Attorney
Designated Hearing Officer

ASK:dmd
FOOTNOTES

1/ The hearing officer notes that the respondent articulates the fourth prong of the prima facie case in the pretext model in the more general terms quoted in Burdine, which was not a discharge case. However, in Burdine, the Supreme Court noted that the prima facie elements should be modified appropriately depending on the factual scenario. Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. 253 n. 6., and thus the articulation of the test applicable to a discharge case and implicitly adopted by the United States Supreme Court in St. Mary's Honor Center v. Hicks, supra, 509 U.S. 506, is appropriate.

2/ In so ruling, it is noted that in St. Mary's Honor Center v. Hicks, supra, the Supreme Court did not question the District Court's finding that the employee, whose job performance was unsatisfactory to the employer, established a prima facie case by proving, along with the other elements, that he was qualified to hold the position from which he was demoted and then discharged.

3/ The hearing officer did not find Schwaid or Bova credible as to making a final decision prior to Gray's leave, particularly in light of Schwaid's prior admission to the contrary while under oath at a deposition conducted in a related federal matter.

4/ Because this case involves a discharge for poor performance, there is no need to address a situation in which an employer discovers evidence of misconduct during an employee's leave and takes immediate steps to discharge the employee during the leave.

5/ The Connecticut FMLA provides that, where an employee is medically unable to perform the duties of his or her original position upon the expiration of the leave, the employer "shall transfer such employee to work suitable to this physical condition where such work is available." Conn. Gen. Stat. §31-51c(b)(2)(A). Since the complainant in the instant case was unable to work in any capacity, the hearing officer does not reach the issue of whether "work suitable to [the] physical condition" means a position equivalent to complainant's original position in pay or skill level.

6/ It is also noted that, while the federal regulations indicate that such a result is to be avoided, see 29 C.F.R. §825.216(a), there is no requirement that a state family and medical leave act conform to the federal act. The federal FMLA specifically indicates that "nothing in (the federal FMLA) shall be construed to supersede any provision of any state or local law that provides greater family or medical leave rights than the rights established under [the federal FMLA]." 29 U.S.C. §401b.

7/ Compare the federal Family and Medical Leave Act, at 29 U.S.C. §104(c)(1).