STATE OF CONNECTICUT
DEPARTMENT OF LABOR

Ronald F. Petronella
COMMISSIONER

January 18, 1995

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re: Case No. FM 91-12
Catherine Haggquist v. Greenwich Hospital Association, Inc.

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 reviewed the written record in this matter, including exceptions to the Hearing Officer's proposed decision, which were filed in July, 1994. I hereby affirm in whole and incorporate the Proposed Decision of the Hearing Officer issued on June 22, 1994 as my final decision in this matter, a copy of which is attached hereto.

Ronald F. Petronella
Labor Commissioner

Att.

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PROPOSED DECISION OF HEARING OFFICER

Catherine Haggquist v. Greenwich Hospital Advertising, Inc.

CASE NO.: FM 91-12

DATE DECISION MAILED: June 22, 1994

DATE OF PRE-CONFERENCE HEARING: November 3, 1993

LOCATION: Wethersfield, CT

APPEARANCES:

For the Plaintiff/Complainant: Peggy Braden Moore, Esq.; and
Catherine Haggquist, Plaintiff

For the Respondent/Employer: Lorraine M. Cortese-Costa, Esq.

For the Department of Labor: Heidi Lane, Esq.

CASE HISTORY

The plaintiff/complainant (hereinafter referred to as "Complainant") filed a complaint with the State of Connecticut, Department of Labor, Division of Occupational Safety and Health, Working Conditions Division (hereinafter referred to as "Working Conditions Division") on August 28, 1991, alleging that her former employer, Greenwich Hospital Association, Inc., violated the provisions of Connecticut General Statutes §§31-51cc, et. seq., An Act Concerning Family and Medical Leave from employment (hereinafter known as "the Family and Medical Leave Act").

On December 12, 1991, the Division of Working Conditions notified the parties that it had investigated the complainant's complaint and determined that no violation of Connecticut General Statutes §31-51cc et. seq., had occurred. The Division of Working Conditions also notified the parties that no further action would be taken in this matter.

On February 6, 1992, the complainant filed a request for a contested case hearing before the Labor Commissioner. On October 13, 1992, the Labor Commissioner designated Attorney Stephen C. Lattanzio as the hearing officer in this matter. A pre-hearing conference was held on November 3, 1993, at which time the parties agreed to stipulate to facts for the purpose of resolving the issue of whether the Family and Medical Leave Act was applicable to the leave of absence taken by the complainant from May 3, 1990 through August 31, 1990. The parties submitted a stipulation of relevant facts on December 22, 1993, and subsequently filed briefs and reply briefs pursuant to a schedule that was agreed upon by the parties at the pre-hearing conference.

FINDINGS OF FACT

By a stipulation dated December 22, 1993, the parties agreed to the following facts for purposes of determining whether the complainant's complaint comes within the purview of the Family and Medical Leave Act, Conn. Gen. Stat. §31-55cc, et. seq.,:

1. Catherine Haggquist was employed by Greenwich Hospital Association as a Medical/Surgical Buyer. She began her employment with Greenwich Hospital Association on March 26, 1984.

2. Ms. Haggquist submitted a letter to Greenwich Hospital dated April 16, 1990, a copy of which is attached hereto and made a part hereof.

3. Ms. Haggquist's last day of work at Greenwich Hospital was May 3, 1990. Ms. Haggquist received three (3) letters from Greenwich Hospital Association, dated May 16, 1990, June 8, 1990 and June 18, 1990, copies of which are attached hereto and made a part hereof. These letters state the conditions of Ms. Haggquist's medical leave of absence from Greenwich Hospital.

4. Greenwich Hospital Association hired a Medical/Surgical Buyer on June 14, 1990. The individual began employment at Greenwich Hospital on July 2, 1990.

5. There was no communication from Greenwich Hospital Association to Catherine Haggquist from June 18, 1990 to September 3, 1990.

6. On August 31, 1990, Catherine Haggquist informed Greenwich Hospital Association that she was prepared to return to work.

7. On September 4, 1990, Greenwich Hospital Association informed Ms. Haggquist that the Medical/Surgical Buyer position was not available to her.

8. Ms. Haggquist did not return to work at Greenwich Hospital.

ISSUE

Whether the Family and Medical Leave Act, Conn. Gen. Stat. §31-51cc, et seq., which became applicable to employers of two hundred and fifty or more employees effective July 1, 1990, may govern and control the terms of a three-month leave of absence which commenced on June 3, 1990 and was in progress on the effective date of the Act?

DECISION

Section 31-51cc. Family and medical leave: Definitions of leave; eligibility.

> (a) For the purposes of sections 31-55c 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 had 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;

(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 or, if not available, to an equivalent position with equivalent pay, except that in the case of a medical leave, the employer shall transfer such employee to work suitable to his 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. Employer 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 is 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.

Section 31-55dd of the Connecticut General Statutes provides as follows:

> **Sec. 31-51dd. Family and medical leave: Prohibition of discrimination.** No employer who is subject to the provisions of section 31-55cc 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.

Section 31-51ff of the Connecticut General Statutes provides in relevant part:

> **Sec. 31-51ff. Family and medical leave: Phase-in provision.** (a) The provisions of sections 31-51cc to 31-51ee, inclusive, shall apply to employers of two hundred and fifty or more employees as follows: From July 1, 1990, to June 30, 1991, inclusive, the maximum leave shall be twelve weeks and on or after July 1, 1991, the maximum leave shall be in accordance with section 31-51cc.
>
> (c) For the purposes of this section, the number of employees of an employer shall be determined on October first annually.

A. THE CONNECTICUT FAMILY AND MEDICAL LEAVE ACT DOES NOT APPLY TO A LEAVE OF ABSENCE FROM AN EMPLOYER WITH TWO HUNDRED AND FIFTY OR MORE EMPLOYEES WHICH WAS ALREADY IN PROGRESS ON JULY 1, 1990.

It is undisputed that the Connecticut Family and Medical Leave Act was made applicable to employers of two hundred and fifty or more employees effective July 1, 1990. Conn. Gen. Stat. §31-51ff. The parties further agree that as of the Act's effective date, the complainant's leave of absence, which was granted effective June 3, 1990, was already in progress. The sole issue in the instant case is whether the Family and Medical Leave Act may apply to a leave which was granted prior to and in progress on the effective date of the Act.

The complainant submits that the Act is silent on this question and that there has been no case law developed within the short history of the Act to provide guidance on this issue. It is the complainant's position that because the legislature did not expressly address this issue, the legislature did not intend to exclude employees situated similarly to the complainant on the effective date of the Act.

The respondent and the Department of Labor take a contrary position. The responcent contends that if, as the complainant maintains, the intent of the legislature is at issue, the language and legislative history of the Act evince no intention by the legislature to have its provisions apply retroactively. Similarly, the Department of Labor submits that because all of the employer's personnel actions occurred prior to the effective date of the Act, it would be inequitable to impose liability on the employer for violating a law that was not yet in effect.

1. Under Connecticut Law, newly enacted statutes that effect substantial changes in the law do not apply to pending events unless it clearly and unequivocally appears that such was the intention of the legislature.

The central issue raised by the instant facts concerns the extent to which, if at all, that the Family and Medical Leave Act may apply retroactively to personnel actions and leaves of absence commenced prior to the effective date of the Act. In its simplest terms, the question is whether the Act operates retrospectively or prospectively only.[7]1

A retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty in respect to transactions or consider actions already past. See 73 Am Jur. 2d, Statutes §348 (1974). In the absence of an express constitutional prohibition, retrospective laws are not prohibited per se merely because they relate to antecedent events. However, courts in most jurisdictions observe a strict rule of construction against retrospective applications.

As the complainant and respondent note in their respective briefs, it is the intention of the legislature that controls whether a newly enacted statute may operate retrospectively or only prospectively. Our Supreme Court stated in Demarest v. Zoning Commission, 134 Conn. 572, 574 (1948):

> [w]hether a statute will be given a retrospective effect presents primarily a question of legislative intent, and where the legislature makes no specific provision, as it did not in the law before us, the matter becomes one of presumed intent. It is a general rule that, in so far as a new law might affect substantive rights, the legislature, unless it has indicated a contrary intent, is presumed to have intended that it should not apply to pending proceedings, but that where its terms are general and affect only procedural matters it applies in all proceedings, whether pending or not.

As in many other jurisdictions, Connecticut has statutes governing the retrospective application of newly enacted laws. Section 1-1(u) of Connecticut General Statutes provides that "[t]he passage or repeal of an act shall not affect any action then pending." In addition, Section 55-3 of the Connecticut General Statutes provides that "[n]o provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect."

Sections 1-1(u) and 55-3 of the Connecticut General Statutes have codified the rule of presumed legislative intent that was discussed in Demarest, supra. Neither statute, however, has the force of a rule of law. They have been held to be "merely declaratory of the usual rule of construction." Lavieri v. Ulysses, et al., 149 Conn. 396, 402 (1962). Therefore, if a legislative enactment were to contain language that unequivocally and certainly embraced a retrospective application, there is nothing in Conn. Gen. Stat. §§1-1(u) or 55-3 which would prevent it from so operating. McNally v. Zoning Commission, 225 Conn. 1, 9 (1993); Schieffelin & Co. v. Dept. of Liquor Control, et al., 194 Conn. 165 (1984). However, in the absence of unequivocal statutory language indicating retroactive application or dispositive legislative history illuminating such intent, there is a presumption that the statute is intended to modify the existing law and is to be applied prospectively. Aetna Casualty and Surety Company v. Bontiveron Lighting et.al., 3 Conn. App. 697 (1985).

In the matter at bar, it is undisputed that the language and legislative history pertaining to Conn. Gen. Stat. §31-51cc et seq., are silent on the issue of retrospective operation. Where a statute is silent as to its retroactive applicability, the question of whether the statute is prospective or retroactive depends, in some measure, on whether the act affects substantive or procedural rights. Jones Destruction, Inc. v. Upjohn, 161 Conn. 191 (1971). It is especially true that a statute will be regarded as operating only prospectively where it creates a new liability in connection with a past event or transaction. See 73 Am Jur 2d, Statutes §350 (1974). As with most jurisdictions, Connecticut courts favor a prospective interpretation of statutes that affect substantive rights. In re Judical Inquiry No. 85-01, 221 Conn. 625, 632 (1992), on remand 27 Conn. App. 923 (1992). Our Courts have held that the word "obligations" in Conn. Gen. Stat. §55-3 refers solely to obligations of substantive law. Carvette v. Marion Power Shovel Co., 157 Conn. 92 (1968). Thus, there is a general presumption that legislation affecting substantive rights is intended to apply prospectively only. See East Village Associates, Inc. v. Town of Monroe, 173 Conn. 328 (1977).

It is clear that the Family and Medical Leave Act is substantive in nature because it creates new obligations and imposes new duties on employers that were non-existent prior to its enactment on July 1, 1990. Inasmuch as the Family and Medical Leave Act may be characterized as substantive and the legislature has not expressly and unequivocally endorsed a retrospective application of the law to matters pending on the effective date of the statute. it is reasonable to construe the legislature's silence on the retroactivity issue against the complainant. It is the complainant's burden

to establish that it was the legislature's clear and unequivocal intent to apply the statute, which affected the substantive rights of the respondent, to leaves of absence that were in progress on the July 1, 1990 effective date of the statute. Since the complainant admits that the language of the Act and its legislative history are silent on the question of retroactive operation, it cannot be found that the complainant has produced sufficient evidence of legislative intent to rebut the presumption that statutes affecting substantive rights do not affect pending actions. See Sherry H. v. Probate Court, 177 Conn. 93 (1979). Therefore, as a new enactment that does not by its express language or legislative history indicate that it should be applied to leaves of absence in progress on July 1, 1990, it is concluded that the Family and Medical Leave Act should not be applied retroactively to the complainant's leave of absence.

2. The Federal Family and Medical Leave Act of 1993, §29 U.S.C. 2601 et seq., is not applicable to the complainant's leave of absence because the federal law was not in existence at the time of the complainant's leave.

In her brief, the complainant suggests that under the general principles of federal preemption, the Connecticut Department of Labor is obligated to accept the federal government's interpretation of the federal Family and Medical Leave Act, which does not exclude coverage of leaves of absence taken prior to or in progress on the effective date of the federal Act.[12] Specifically, the complainant contends that the Connecticut Labor Department would be required to adopt the federal interpretation pertaining to leaves in progress on the effective date "if Haggquist's situation were occurring after August 5, 1993 [the effective date of the federal Family and Medical Leave Act]."

It is beyond dispute that the State's interpretation of Conn. Gen. Stat. §31-51cc et seq., as to leaves in progress would not be able to withstand federal preemption scrutiny if the federal statute had co-existed with the state statute as of the date of the complainant's leave. However, the undisputed evidence reveals that the federal Act did not become effective until August 5, 1993, more than three years after the enactment of the Connecticut statute. Because the federal Act was not in existence as of the date of the claimant's leave, the Connecticut Department of Labor's interpretation of the state Act, that it was not intended to operate retroactively, could not have possibly conflicted with the operation of the yet to be enacted federal law. Therefore, the interpretation expressed by the respondent and the Department of Labor is not in violation of the general principles of federal preemption.

Moreover, there is no merit to the complainant's contention that the state's interpretation of its statute cannot stand after the enactment of the federal Family and Medical Leave Act. Although the federal interpretation applies to all leaves in progress on or after August 5, 1993, the complainant cites no authority by which the state agency is compelled to adopt the federal interpretation and apply it to leaves that were to taken three years prior to the effective date of the federal Act. In the absence of such authority, the complainant's contention that the federal interpretation of its statute must overrule the Connecticut Labor Department's interpretation of the state statute is rejected.

3. As the agency entrusted with the administration application and enforcement of the Family and Medical Leave Act, the Department of Labor's interpretation of the statute shall be accorded great deference.

Rather than rely on the federal Family and Medical Leave Act for guidance, the respondent and the Department of Labor maintain that the Labor Department's interpretation of Conn. Gen. Stat. §31-51cc et seq. should be given deference because that agency has developed expertise in the application of the Act during the three and one-half years since it took effect.

In the absence of an unequivocal expression of legislative intent in the language of the statute or its legislative history, it is appropriate, particularly in an administrative context, to seek the construction given to the statute by the agency charged with its enforcement. KENNETH C. DAVIS ET AL., Administrative Law Treatise §3.1 (3rd ed. 1994). Although it is acknowledged that the issue at bar is one of first impression under the Family and Medical Leave Act, where the agency's practical construction of the statute is reasonable, it is usually considered to be "high evidence of what the law is." Board of Trustees v. FOIC, 181 Conn. 544, 552 (1980).

In the instant case, the Labor Department's interpretation of the Act must be viewed as reasonable in light of the facts and the state of the law in 1990. It is thus concluded that the agency's interpretation that the Family and Medical Leave Act was not intended to apply retrospectively is entitled to considerable deference.

CONCLUSION

As the designated representative of the Labor Department Commissioner and the authorized hearing officer in this matter, the undersigned has reached the following decision:

The Connecticut Family and Medical Leave Act, Conn. Gen. Stat. §31-51cc et seq., does not indicate by its express language or legislative history that it was intended to operate retrospectively to its date of enactment. In the absence of such language, it is presumed that retroactivity was not intended by the legislature, particularly since the Act was substantive in nature and exposed the respondent to liabilities that did not exist prior to the effective date of the Act. Accordingly, the Act is not applicable to the complainant's leave of absence, which commenced on June 3, 1990 and was in progress on the July 1, 1990 effective date of the Act.

The complainant's complaint is dismissed for lack of jurisdiction.

Stephen C. Lattanzio
Hearing Officer

FOOTNOTES

[1/] The hearing officer recognizes, but does not adopt, a third possible analysis of the foregoing facts. In the event that the date that triggers the application of the Act is not the date on which the complainant commenced her leave, it may be possible to afford a prospective application that is consistent with Connecticut Law by considering the date of the Act's enactment, July 1, 1990, as the date that triggers applicability. In this manner, it would be possible to convey all of the Act's rights and obligations on the parties as of July 1, 1990, and thereby mitigate the inherent unfairness of a purely retrospective application to June 3, 1990, the effective date of the complainant's leave of absence. However, because this theory of construction still genuinely impacts the employer retroactively, by making it responsible after July 1, 1990 for a duty that was not contemplated prior to July 1, 1990, it is rejected by the hearing officer as a possible compromise position in this matter.

[2/] Section 825.103 of 29 CFR Part 325 provides in relevant part:

> **§825.103 How does the Act effect leave in progress on, or taken before, the effective date of the Act?**
>
> (a) The right to take FMLA leave begins on the Act's effective date. Any leave taken prior the Act's effective date may not be counted for purposes of FMLA. If leave qualifying as FMLA leave was underway prior to the effective date of the Act and continues after the Act's effective date, only that portion of leave taken on or after August 5, 1993, may be counted against the employee's leave entitlement under the FMLA.
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> * * *
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> (c) Starting on the Act's effective date, an employee is entitled to FMLA leave if the reason for the leave is qualifying under the Act, even if the event occasioning the need for leave (e.g. the birth of a child) occurred before the effective date (so long as any other requirements are satisfied).