STATE OF CONNECTICUT
DEPARTMENT OF LABOR

Robert F. Tessier
DEPUTY COMMISSIONER

FINAL DECISION

MARTHA LANZA V. UNITED ARTISTS ENTERTAINMENT COMPANY/TCI

Case No. FM 92-4

Date Final Decision is mailed: January 10, 1994

Date Hearing Officer Decision was mailed: October 1, 1993

Hearing Dates: July 14, 1993 and July 16, 1993

Hearing Location: Wethersfield, CT.

Appearances:

For the complainant: Attorney Mark Soycher; Martha Lanza, complainant; Thomas A. Diesel, Community Affairs Manager.

For the Respondent Employer: Attorney Mary F. Riley; Attorney Margaret Strange; Peter Cirelli, Marketing Manager, United Artists/TCI; Ronald Roe, General Manager, United Artists/TCI.

For the Administrator: Attorney Heidi Lane.

Observers: Kevin Lawlor, legal intern; Karen Marchetti, Human Resource Manager, United Artists/TCI; Attorneys Elaine Parsons, George Wentworth, and John Vole, Labor Department, Department of Program Policy; Octavio Reuben Lanza.

CASE HISTORY

On June 16, 1992, the 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) alleging that her former employer, United Artists Entertainment Company/TCI violated the provisions of Connecticut General Statutes ((31-55cc, et seq.), An Act Concerning Family and Medical Leave from Employment (hereinafter known as the Family and Medical Leave Act).
On June 18, 1992, the Working Conditions Division notified the Respondent, United Artists/TCI, of the filing of the complaint and requested that the Respondent conduct an investigation and advise the Working Conditions Division of the results of its investigation.

In correspondence dated July 17, 1992, the Respondent furnished the Working Conditions Division with the results of its investigation and indicated its belief that the complaint was meritless.

On May 18, 1993, the Working Conditions Division issued an agency complaint against the Respondent, charging the Respondent with violating the provisions of the Family and Medical Leave Act.

A contested case hearing was held on July 14 and 16, 1993 at the Connecticut Labor Department, 200 Folly Brook Boulevard in Wethersfield, Connecticut before Attorney Sheila S. Wells, who was appointed the hearing officer in the matter by Labor Commissioner Ronald F. Petronella.

FINDINGS OF FACT

1. The Respondent, United Artists/TCI, is a foreign corporation with an office located in West Hartford, Connecticut, which has been subject to the Family and Medical Leave Act, Conn. Gen. Stat. §§ 31-55cc, et seq., at all relevant times.

2. The Complainant, Martha Lanza, was employed by the Respondent for almost eleven years. The Complainant served as a Customer Service Supervisor from 1985 until December 20, 1991.


4. As a Customer Service Supervisor, the Complainant supervised between ten and fourteen Customer Service Representatives (hereinafter known as CSRs) handling telephone orders and sales calls, arranging for installations, and handling complaints and billing questions. The Complainant provided supervisory coverage in the lobby once a week during a shift change. While covering the lobby, the Complainant would prepare the bank account and balance CSR accounts. The Complainant also trained CSRs in sales, product knowledge, prices, codes and customer retention skills. The Complainant had attended courses in training and telemarketing in 1990.

5. The complainant is fluent in Spanish and used her skills frequently in assisting Spanish-speaking customers and monitoring Spanish-speaking CSRs.
6. One of the Customer Service Supervisors, Elizabeth Mahoney, regularly worked on weekends. Management staff and data processing support are not available to assist the Customer Service Supervisor on weekends. The weekend Supervisor has other unique concerns such as building security, checking dispatch pools for service outages, and managing pay-for-view events. Lead representatives have the authority to act as supervisor in the Customer Service Supervisor's absence. On occasion, other Customer Service Supervisors, including the Complainant, would work weekends to assist Mahoney with a special pay-for-view event or when a problem developed.

7. Kim Reidda, the Customer Service Center Supervisor, supervised CSRs in the Lobby who attended to customers who walked in to exchange converter boxes or make payments. The position involved collecting payments of thousands of dollars from the lobby and two satellite offices, maintaining the converter inventory, ordering of necessary equipment and supplies from the warehouse on a daily basis, and handling communications with the satellite offices.

8. The Complainant requested and was granted a medical leave of absence pursuant to the Family and Medical Leave Act for major surgery in June, 1991. The Complainant was out of work between June 29, 1991 and August 19, 1991.

9. The Complainant had an excused absence for one day in September, 1990 and for another day in March, 1991.

10. While she was out on medical leave, the Complainant's job duties were assigned to Patricia Dollak, another Customer Service Supervisor. The Lead Customer Service Supervisor, Virginia Harrington, provided the Complainant with memoranda issued while she was on her leave. The Complainant also completed a CSR review and took an interactive management training course during her leave.

11. When she returned from her leave on August 19, 1991, the Complainant resumed her position as a Customer Service Supervisor at the same rate of pay and without the loss of benefits.

12. The Respondent's written attendance policy, which became effective on November 1, 1990, and was in effect at the time of the claimant's leave, provides for corrective action for violating the attendance policy. Certain absences, including vacation, holiday, funeral, military leaves and jury duty, are not to be considered in determining if corrective counseling is warranted. All other time off, including legitimate illness time with proper medical documentation, falls under corrective counseling guidelines. (Com. Ex. 12).

13. The corrective action policy contained in the Respondent's attendance policy provides that when absences reach four days on two or more occasions or when a pattern of absences is evident, the supervisor should caution the employee that further absence may result in corrective action. When an employee has six or more days absent on three or more occasions in a twelve-month period, a verbal warning should issue. A written warning is to be issued where there are eight days of absence on four or more occasions within a twelve-month period. The policy provides for a final written
warning in lieu of suspension after ten days of absence on five or more occasions within a twelve-month period, and the employee is warned that further absences may result in his or her termination. (Com. Ex. 12).

14. The Complainant was not given a verbal or written warning as part of the Respondent’s corrective action policy.

15. The Complainant was given an annual performance evaluation prepared by her supervisor, Peter Cirelli, on or about September 25, 1991. The Complainant was rated as "effective," or consistently meeting performance standards, in the performance factors of job knowledge, quality of work, communications, and personal appearance. The Complainant was rated as "highly effective," or consistently meeting and often exceeding performance standards, in attitude and cooperation and in service quality. The Complainant was rated "outstanding," or consistently exceeding performance standards, in quantity of work, teamwork, and initiative. In the final factor, attendance and punctuality, the Complainant was rated "unsatisfactory." (Com. Ex. 6).

16. An unsatisfactory attendance rating results from "10 or more days [absent] in 12 months or less; 3 or more occasions." A note in the Complainant’s evaluation reads, "Martha has missed a lot of time due to surgery but hasn’t missed work on many different occurrences. However, since she has missed 10+ days on 3 occurrences, she is rated as unsatisfactory in this category." (Com. Ex. 6).

17. Employees receive points for the ratings in each performance factor. An "unsatisfactory" rating is assigned 0 points, 1 point for "partially effective," 2 points for "effective," 3 points for "highly effective," and 4 points for "outstanding." Each performance factor is weighted, from one weight factor for initiative and personal appearance, two weight factors for job knowledge, quality of work, quantity of work, and attitude and cooperation, to three weight factors for communications, teamwork, service quality, and attendance and punctuality. An overall rating is calculated by multiplying the weight factor by the value of the points received in each performance factor and adding the figures together. (Com. Ex. 6).

18. The Complainant received a total rating of 55 points. (4 points for job knowledge, 4 points for quality of work, 8 points for quantity of work, 4 points for initiative, 6 points for communications, 12 points for teamwork, 6 points for attitude and cooperation, 9 points for service quality, 2 points for personal appearance, and 0 points for attendance and punctuality). (Com. Ex. 6).

19. The comments in the performance evaluation suggested areas where the Complainant could improve her performance. In the job knowledge performance factor, Peter Cirelli indicated that the Complainant was not as strong in her understanding of some of the technical components of the job as some of the supervisory staff, that she has given misinformation to subordinates, and that some subordinates were reluctant to ask questions of the Complainant. In the quality of work factor, Cirelli recommended that the Complainant work on the accuracy of information she presented and on using good judgment in answering questions posed by CSRs. Cirelli also indicated that the Complainant had room for improvement in communications. Specifically, Cirelli noted, the Complainant sometimes misunderstood what needed to be communicated and thus misinformed her people. (Com. Ex. 6).
20. The Complainant met with Cirelli and signed the performance evaluation without protest. The Complainant received a merit increase following her performance evaluation.

21. Several days later, the Complainant submitted a memorandum to Cirelli thanking him for the thoughtful review and explaining that some of the comments had come as a surprise. The claimant expressed an interest in obtaining direction from Cirelli on a more immediate and regular basis.


23. In November, 1991, Cirelli noticed a CSR preparing to send a truck to disconnect a bulk billing account which should have been handled on the computer. The CSR told Cirelli that the Complainant had directed him to send the truck. (Ex. Ex. E).

24. On another occasion, Cirelli became aware that a CSR had received a rate letter which had been superseded by another more current letter, and thus was not to be distributed to CSRs. The CSR indicated to Cirelli that the Complainant had given it to her. (Ex. Ex. F).

25. In early November, 1991, the Complainant noticed that one of the other supervisors, Christina Gianakos, was treating her abruptly. The Complainant spoke to Gianakos, but her conduct, which the Complainant perceived as rude and demeaning, continued. The Complainant then approached a member of the Human Resource staff to ask for advice in handling the situation, and was advised to talk to Gianakos or her supervisor, Cirelli. The claimant explained that she had already spoken with Gianakos to no avail, and that she was unwilling to speak to Cirelli of the matter because she had heard rumors that Cirelli and Gianakos had a personal relationship.

26. The following day, the Lead Customer Service Supervisor, Virginia Harrington, told the Complainant that the staff member from Human Resources had spoken to her about the Complainant’s problem with Gianakos. The Complainant was upset about the breach in confidentiality.

27. A couple of days later, Cirelli approached the claimant and told her that she should concentrate on her own performance and not complain about the other supervisors.

28. On or about November 20, 1991, an incident occurred while the Complainant was providing supervisory coverage in the lobby. The Complainant observed a CSR speaking in a loud tone of voice to a tearful customer. The Complainant intervened, calmed the customer down, and assisted her with her problem. The customer explained that she was angry and upset because the CSR had treated her rudely and embarrassed her. The Complainant apologized for the employer. She later spoke with the CSR, an individual whom she did not normally supervise, who stated that he had followed company policy. The Complainant explained that the problem was not what he said but with how he had presented his response, and she requested that the CSR write a note of apology to the customer. The Complainant spoke to Cirelli immediately after the incident, and he indicated that he approved of her action.
29. When Kim Reidda, the CSR's usual supervisor, learned of the incident, she reversed the Complainant's directive with Cirelli's support. The Complainant wrote Reidda a letter expressing that she was hurt and disappointed with Reidda's action. Reidda gave Cirelli a copy of the letter. (Er. Ex I).

30. On or about November 22, 1991, Cirelli held a meeting with the Complainant in which they discussed performance issues. Cirelli stated that the Complainant seemed more sensitive and insecure since she had returned from her leave and requested that she delegate some of her ancillary duties so that she could concentrate on sales training. (Er. Ex. H). On December 10, 1991, Cirelli and the Complainant discussed the Complainant's perception that Cirelli was unapproachable and was treating the Complainant differently than the other supervisors. They discussed Cirelli's management style and the Complainant expressed her feeling that she was not receiving adequate support from Cirelli. (Er. Ex. G).

31. In notes contained in a Discussion Planner prepared by Cirelli around the time of the November 22, 1991 meeting, which were not presented to the Complainant, Cirelli observed that the Complainant was not acting rationally, that she was overly emotional and sensitive to his constructive criticism, that she had become confrontational with fellow supervisors, and that she seemed obsessed with losing her job (Er. Ex. H).

32. On August 19, 1991, Customer Service Center Supervisor Kim Reidda received her annual performance evaluation. Reidda received ratings of "partially effective," or occasionally performing below job standards and needing improvement, in six of the ten performance factors. Reidda was rated "partially effective" in job knowledge and quality of work. Cirelli indicated that Reidda's "ability to get the job done is hampered by her weak leadership skills." In attendance and punctuality, Reidda was rated as "partially effective" and she received 3 points. She had eight occurrences of absenteeism over nine and three-quarter days. Reidda had an overall performance rating of 44 points. (Com. Ex. 13).

33. The Customer Service Trainer, Julia "Bee" Davis, received a performance evaluation prepared by Peter Cirelli on about September 28, 1991. In that evaluation, Davis was rated "effective" in attendance and punctuality, and received two points with a weight factor of three, or six points. Davis' overall rating was 53 points. Cirelli noted that Davis had missed 3 days of work on two occurrences over the review period, excluding her surgery and time missed in disability. (Com. Ex. 14). Davis was still employed by the Respondent at the time of the July, 1993 hearing.

34. Nine or ten individuals in the Customer Operations Department, including Davis, took a leave of absence under the Family and Medical Leave Act in 1991.

35. The Lead Customer Service Supervisor, Virginia Harrington, had previously taken a leave of absence for surgery and was subsequently promoted. When Harrington became aware of rumors of impending layoffs in December, 1991, she volunteered to be laid off.
36. The Complainant had formerly received excellent performance ratings. (Ex. Ex. G). Her former supervisor, Thomas "Tad" Diesel, considered the Complainant one of the finest supervisors with whom he had ever worked. The Complainant was honored as the most valuable supervisor of the year in 1988, and she and her husband were given a trip to Hawaii.

37. Diesel, a personal friend of the Complainant, supervised the Complainant from 1987 until he was promoted to the position of Director of Community and Government Affairs in September, 1989. He supervised the Complainant again briefly as interim director in August and September, 1990.

38. Around September, 1990, Diesel took a medical leave of absence. He returned to his position after the leave at the same salary and without loss of benefits and was subsequently promoted.

39. In September, 1990, Peter Cirelli was appointed Director of Customer Operations. In a discussion with General Manager Ron Roe shortly after his appointment, Roe indicated that he had heard that some of the supervisors in Customer Operations had purportedly weaker supervisory skills than the others and that they needed additional training. Roe did not identify any individuals.

40. Approximately three months later, Cirelli told Roe that he thought the Complainant and Redda were the weaker supervisors. Roe confirmed that this was what he had heard.

41. At the end of 1991, the Respondent merged with TCI. After the merger, the Respondent received expense guidelines from the new parent company requiring it to reduce expenses by $500,000. General Manager Ron Roe met with his six department directors to consider ways to reduce expenditures. Proposals ranged from lowering utilities to payroll deductions as a last resort. Roe ultimately determined that staff reductions could not be avoided.

42. Roe directed the Directors of Customer Operations, Engineering, Human Resources, Government Affairs, Finance, and Advertising and Sales to consider which positions could be eliminated from their respective departments. The guidelines Roe gave were to maintain front line service to minimize the impact on the customer base, to avoid playing "musical chairs" by eliminating positions but retaining the individual who filled the position in a different capacity, to particularly look at managerial positions which had become redundant because of the merger, and to look at positions which had several people performing the same function. Where several employees were performing the same job function and the Director determined that one of the employees could be eliminated, Roe indicated that eliminations were to be made on the basis of performance.

43. Cirelli initially told Roe that he could not spare any individuals from the Customer Operations Department. After meeting with Roe on a number of occasions, Roe told Cirelli to reevaluate his position and to eliminate some positions. Roe and Cirelli decided to eliminate three positions in the department.
44. Harrington, the Lead Customer Service Supervisor, volunteered for layoff. Cirelli determined that the position was not critical and thus could be eliminated. He further determined that the specialized supervisory position of Customer Service Trainer was critical in that there would be a continued need to train newly hired CSRs. Cirelli decided that the Customer Service Center position was unique because of its cash handling and payment responsibilities. Cirelli concluded that Redda alone knew the functions of the position.

45. Cirelli determined that a lower level Customer Service employee's position could be eliminated.

46. Of the four Customer Service Supervisors, Cirelli decided he could eliminate one position. Cirelli determined that the individual who covered the weekend shifts, Mahoney, was a critical employee since she was the only supervisor who had experience working without management support. Of the three remaining Customer Service Supervisors who worked similar Monday through Friday schedules, Cirelli considered their performance levels. One of the criteria Cirelli used to evaluate performance was the performance evaluation, including the relative point value, to get a sense of how the individuals compared as overall employees. Cirelli also considered the comments he had made relating to the Supervisors' knowledge of the job and quality of work, and his observations of their performance from the time of the evaluations until the time of the layoff.

47. Cirelli concluded that Christine Gianakos was the superior performer due to the total of 64 points which she received on her evaluation, her outstanding evaluation in the categories of job knowledge and quality of work, and her performance since her last evaluation. Gianakos, who had six days of absence over two occasions and a six-hour absence on another, was rated as "partially effective" in attendance, and received 3 points. (Com. Ex. 18).

48. Diesel had Gianakos perform the director's functions in his absence when he went out on his medical leave in 1990.

49. The two remaining individuals, the Complainant and Paticia Dollak, both had overall performance ratings of 55 points. Cirelli selected Dollak as a superior performer to the Complainant based on Dollak's performance from the time of her last evaluation and her job knowledge. Cirelli determined the Complainant to be the weaker performer based in large measure on her relative lack of knowledge of the technical components of the job and understanding of cable data, and errors the Complainant had made in judgment and presentation of information.

50. In Dollak's September 10, 1990 performance evaluation on her performance in her capacity as a Data Processing Assistant, Dollak's supervisor gave her a "fair" performance summary and noted that Dollak had used up all of her sick time and had had problems with arriving promptly on a consistent basis when she was scheduled to report at 7:00 a.m. (Com. Ex. 17). Cirelli did not rely on this evaluation in his decision because it involved Dollak's performance in a position other than Customer Service Supervisor.
51. Dollak’s last performance evaluation before the layoffs had been prepared on May 12, 1991. Between January, 1991, when Dollak was promoted to Customer Service Supervisor, and May 12, 1991, Dollak missed three days of work on three occasions. Dollak was rated “partially effective” for attendance and punctuality, and received three points. Cirelli noted that one of Dollak’s goals over the next six months was to improve attendance. (Com. Ex. 15).

52. Dollak was rated as "highly effective" in job knowledge and quality of work in May, 1991. (Com. Ex. 15).

53. Dollak’s attendance record for the remaining seven months of 1991 shows nine absences on two occasions and two incidents of tardiness. (Com. Ex. 19). In her May, 1992 performance evaluation, which included the period between May, 1991 and the layoffs, a new evaluation form was utilized and attendance was not specifically addressed. Dollak’s attendance was not addressed under the category of dependability. (Com. Ex. 16).

54. After Cirelli told Roe of his decision to lay the Complainant off, they discussed the assessment process and Roe concurred with Cirelli’s decision.

55. On December 20, 1991, Peter Cirelli met with Harrington and the Complainant and, reading from a prepared script, advised them that their services were no longer needed and that the decision to lay them off was due to a reorganization and was not a reflection on their performance. Cirelli explained that their layoffs were an economic decision and were not based on unsatisfactory performance. Cirelli told the Complainant that, although she excelled in sales, those skills were not needed.

56. Diesel learned of the decision to lay the Complainant off at a social gathering on the evening of December 19, 1991. He asked Roe if he would intervene. Roe indicated that it was solely Cirelli’s decision to lay the Complainant off. Diesel approached Cirelli shortly thereafter and expressed his opinion that Cirelli had made a poor decision because the Complainant was the finest supervisor in the department. Cirelli told Diesel that he had difficulty making the decision. Cirelli stated that he felt it necessary to make the decision because he believed Roe personally disliked the Complainant and he was not willing to argue out of fear for his own job security. (Com. Ex. 21).

57. Roe later told Diesel that it was Cirelli’s decision as Director to evaluate the Complainant’s performance and that he would not interfere with the Director’s responsibility and authority. Roe also indicated to Diesel that he had questioned Cirelli’s decision to lay the Complainant off. (Com. Ex. 22). Roe stated that it would not have been his decision. (Com. Ex. 21).

58. Approximately two months after the Complainant was laid off, Diesel learned from Roe that Cirelli was angered by Diesel’s request that Roe intervene. Diesel apologized to Cirelli for his actions. In the course of the conversation, Cirelli told Diesel that the Complainant had changed after her operation and had started to take everything personally, and that he decided to select the Complainant for the layoff because he believed that it was what Roe wanted. (Com. Ex. 22).
59. The Complainant called Roe the day after she was laid off to protest the decision to lay her off as unfair because she had been with the employer for so many years. The Complainant also indicated that she believed she was treated unfairly because the relationship between Cirelli and Glanakos was personal and not just a business association. (Ex. Ex. K).

60. When confronted by Roe, Cirelli denied that he had a personal relationship with Glanakos. The General Manager’s Administrative Assistant investigated but found nothing to substantiate the allegation. (Ex. Ex. L).

61. The Complainant, who worked a forty hour work week, was paid wages by the Respondent through the end of 1991. In 1991, the Complainant earned $31,418.57 in reported wages and $2,585.33 in 401(k) payments. (Com. Ex. 8).

62. After being laid off, the Complainant attended employment workshops, studied classified advertisements, engaged in "networking" and sent numerous copies of her resume to prospective employers. The Complainant was invited to three or four interviews.

63. In March, 1992, the Complainant was offered a position in sales, earning $6.00 per hour. The Complainant refused the offer because of the low rate of pay and the distance of the worksite from her home.

64. Following her layoff, the Complainant collected $288 weekly in unemployment compensation benefits over twenty-six weeks.

65. The Complainant initially confined her search to supervisory positions. When she failed to secure such a position, she broadened her search.

66. The Complainant started volunteering at New Britain General Hospital. In August, 1992, she started working for New Britain General Hospital as an Admitting Representative. The Complainant currently works thirty-two hours per week, from 8:00 a.m. to 3:00 p.m., and is paid $9.29 per hour. Her gross weekly earnings are approximately $297.00. (Com. Ex. 11).

67. In November, 1992, the Complainant started working twenty hours per week at Northeast Utilities as a Credit and Collections Representative. The Complainant's hours are from 4:00 p.m. to 8:00 p.m., and she receives an hourly wage of $10.45. Her gross weekly earnings are $209.00. (Com. Ex. 10).

68. In 1992, the Complainant earned $4987.72 from New Britain General Hospital, $1463.00 from Northeast Utilities, and $752.40 from Accounting Futures, Inc. (Com. Ex. 9).

69. The Complainant is not employed in a supervisory capacity.

70. The Complainant had been working toward a college degree in marketing management after her former supervisor, Diesel, had recommended in 1987 that she do so. The Respondent had reimbursed the Complainant for the classes she had taken. The Complainant had not earned her degree by December, 1991, because of the time constraints of being a working mother. The Complainant took one class at Tunxis Community College in the Spring of 1992.
71. The Complainant has suffered from depression and low self-esteem since the loss of her position, and has consulted with a psychologist and undergone counseling since early 1992. She initially attended weekly sessions. At the time of the hearing, the Complainant was attending monthly sessions. The Complainant was treated with the antidepressant drug Prozac for four or five months in 1992.

72. The Complainant filed a complaint on June 16, 1992 with the State of Connecticut Commission on Human Rights and Opportunities (CCHRO) alleging retaliation and termination on the basis of age, sex, race, physical disabilities, and sexual favoritism. The complaint is pending. (Ex. Ex. B).

73. The Complainant had the greatest length of service of the supervisors in the Customer Operational Department and was the oldest of the supervisors.

74. The Respondent’s attendance policy in 1991, which was utilized by the Respondent in the Complainant’s 1991 performance evaluation, considered as an attendance violation a leave taken pursuant to the Family and Medical Leave Act. The parties have stipulated that the Respondent’s attendance policy did not conform to the requirements of the Family and Medical Leave Act.
DECISION ON RESPONDENT'S MOTIONS

In the course of the hearing, the Respondent moved to disqualify the hearing officer on the basis that the Respondent's due process right to an independent hearing was violated by the Labor Commissioner's assignment of a hearing officer who is employed by the Connecticut Department of Labor.\textsuperscript{1} The Respondent objected to any potential award of damages on the basis that there is no statutory authority for the Department of Labor to award damages,\textsuperscript{2} and moved to dismiss the case on the grounds that the Department of Labor is without authority to issue a complaint or to conduct an investigation, and that an investigation had not been conducted.\textsuperscript{3} The Respondent moved to dismiss the case after the Working Conditions Division and the Complainant presented their case. The Respondent's motions were denied.

DECISION

Section 31-51cc of the Connecticut General Statutes provides, in relevant part, as follows:

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

(a) For the purposes of sections 31-51cc 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:

(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, 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 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 such 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.
A. THE COMPLAINANT WAS RETURNED TO HER ORIGINAL POSITION WITH ALL ACCUMULATED SENIORITY, FRINGE BENEFITS AND SERVICE CREDITS FOLLOWING THE EXPIRATION OF THE LEAVE OF ABSENCE.

Section 31-51cc(b) of the Family and Medical Leave Act provides that an employee able to perform his or her job is entitled to return to the original job from which the leave was taken or, if not available, to an equivalent position with equivalent pay. An employee is also entitled, upon expiration of the leave, to all accumulated fringe benefits and seniority.

When the Complainant returned from a medical leave of absence granted for serious illness on August 19, 1991, she resumed her duties as a Customer Service Supervisor, a position which she held for over five years. The Complainant, who chose to perform some of her job duties even while on leave, was restored to the identical position with the same salary and benefits. She received a merit increase in her salary after her performance evaluation in September, 1991. The Complainant continued to perform the same duties until November 22, 1991, when her supervisor, Director of Customer Operations, Peter Cirelli, directed her to transfer some of her duties which he considered ancillary to other Customer Service Supervisors and to concentrate on sales training.

The evidence in the record reveals that the Respondent returned the Complainant to her original position and restored her fringe benefits and seniority as required by the Family and Medical Leave Act.

B. THE RESPONDENT/EMPLOYER DISCRIMINATED AGAINST THE COMPLAINANT AND CAUSED HER TO BE DISCHARGED BECAUSE SHE EXERCISED THE RIGHTS AFFORDED TO HER PURSUANT TO THE FAMILY AND MEDICAL LEAVE ACT.

Section 31-55cc of the Connecticut General Statutes provides that no employer subject to the Family and Medical Leave Act may discharge or cause to be discharged, or in any manner discriminate against any eligible employee because the employee has exercised rights afforded by the Act.

In interpreting and applying the Family and Medical Leave Act, it is appropriate to look for guidance in the theories and concepts developed in case law expounding federal employment discrimination law under Title VII of the 1964 Civil Rights Act. See Wroblewski v. Lexington Gardens, Inc., 188 Conn. 44 (1982); Ford v. Blue Cross & Blue Shield of Connecticut, Inc., 216 Conn. 40 (1990); Diane Cormier v. Textron Lwcoming, FM 92-1 (12/3/92). 4/ The United States Supreme Court has recognized three theories of discrimination in federal discrimination cases, each theory with a distinct prima facie case and corresponding burden of proof. Miko v. Commission on Human Rights and Opportunities, 220 Conn. 192, 204 (1991).

The first theory is that of disparate treatment. See McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In McDonnell Douglas v. Green, supra, the United States Supreme Court set out a tripartite burden of proof, which first required an individual claiming discrimination to establish a prima facie showing that he or she is a member of a protected class and that he or she was treated
differently from similarly situated individuals who were not members of a protected class. The burden of production then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's treatment. If the employer meets this burden of production, the employee must then be given an opportunity to show that the employer's articulated reasons are pretextual. The ultimate burden of persuasion, however, remains with the employee. In the reduction-in-force situation, where an employer is making cutbacks due to economic necessity, the fact that an individual is within a protected class and is discharged may be insufficient to establish a prima facie case of discrimination without additional evidence that the protected category was a factor in the termination. See Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985).

The second theory of discrimination is the disparate impact theory, which applies to patterns and practices which are facially neutral but discriminatory as applied. This theory does not require evidence of a subjective intent to discriminate. See Wards v. Cove Packing Co. v. Antonio, 490 U.S. 642, 645-46, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). The theory is not relevant to a claim of discrimination based on direct evidence. Miko v. Commission on Human Rights and Opportunities, supra.

The third theory of discrimination is that of direct evidence. The standard set forth in Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)(plurality opinion), applies rather than the disparate treatment theory when the employee presents direct evidence of discrimination, such as statements by the decision makers related to the decision-making process, or a policy which is discriminatory on its face. See Miko v. Commission on Human Rights & Opportunities, supra. When the alleged victim produces sufficiently persuasive evidence that a discriminatory motive was relied upon, the employer must establish that a legitimate reason which existed at the time of its actions, standing alone, actually led to the decision. The accused discriminator cannot simply articulate a legitimate reason for its actions as in the disparate treatment theory. The employer may avoid liability only by proving by a preponderance of the evidence that the same decision would have been reached even if the illegitimate criterion had not played a role in the decision. The critical inquiry is whether the discriminatory motive was a factor in the decision at the moment it was made. See Price Waterhouse v. Hopkins, supra; Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1568-9 (2d Cir. 1989).

The employee has the burden of persuasion in the direct evidence theory on the issue of whether there was a discriminatory motive in making the decision. Once the employee has introduced sufficiently persuasive evidence that the employer relied on a discriminatory motive, the employer bears the burden of showing by a preponderance of the evidence that a legitimate reason existed at the time of the decision and motivated that decision. Miko v. Commission on Human Rights and Opportunities, supra.
The Complainant in the instant case has established that she was a member of the protected class of individuals who have exercised their rights under the Family and Medical Leave Act. The Complainant has further established that her absence for a medical leave pursuant to the Family and Medical Leave Act was a factor relied upon by the Respondent in her September, 1991 performance evaluation and that, because she had had more than three occurrences of absenteeism including the medical leave, she was given an "unsatisfactory" rating. This rating, in turn, led to her receiving zero points for attendance and punctuality and earning an overall performance rating of fifty-five points. The Respondent, United Artists/TCI, has stipulated that the Complainant's 1991 performance evaluation considered attendance and that the existing attendance policy did not conform to the requirements of the Family and Medical Leave Act. The application of an attendance policy which is violative of the Family and Medical Leave Act to an individual who has exercised her rights to a medical leave pursuant to the Act constitutes discriminatory conduct against such an employee.

In so ruling, the hearing officer acknowledges that in Chiaia v. Pepperidge Farm, Inc., 24 Conn. App. 362, 588 A.2d 652 (1991), cert. den. 219 Conn. 907, 593 A.2d 907 (1991), the Connecticut Appellate Court found that an employer's neutral application of an absence control policy, which provided for the discharge of an employee after the employee was absent for twelve months, did not violate the prohibition of Conn. Gen. Stat. (31-290a(a) against discharging or discriminating against an employee who exercises rights afforded by the Workers' Compensation Act. The language of the provision closely parallels the language of Conn. Gen. Stat. (31-55dd. The court relied in large measure on the Workers' Compensation Act's not requiring an employer to retain an employee unable to perform his or her work because that inability arose from a work-related injury or illness. The court relied on the employer's neutral application of the absence control policy and noted the serious losses businesses would suffer if employers were prevented from filling employment vacancies after a reasonable time had lapsed.

The Supreme Judicial Court of Maine, however, has held that an employer's progressive, no-fault absenteeism policy which provided for an automatic suspension without pay for a certain number of absences was discriminatory when applied against an employee who was suspended after he had returned from a two-month leave of absence during which he received workers' compensation benefits. The court held that the employee's suspension, which was triggered by the absence caused by his work-related injury, was substantially and significantly rooted in his exercise of rights afforded by the Workers' Compensation Act. The court noted the beneficial results and general humanitarian purpose intended by the Workers' Compensation Act, and held that the "no-fault" absenteeism policy, while facially neutral, subverted the purpose of the Workers' Compensation Act by labelling the employee's protected absence as an unexcused absence. Lindsay v. Great Northern Paper Co., 582 A.2d 151 (Me. 1987).
Unlike Chiaia v. Pecorello Farm, Inc., supra, which involved an employer’s right to replace a worker who was unable to return to work for a year and the consequential loss to the business of holding a position open indefinitely, Lindsay v. Great Northern Paper Co., supra, involved an employer penalizing an employee who exercised his right to a leave granted under a remedial social program by subjecting the employee to sanctions in a progressive discipline program. Like the Complainant in the instant Family and Medical Leave case, the plaintiff in Lindsay was discharged in part for exercising rights granted by the Act, and thus he was, in essence, deprived of his rights under the Act. Although not adopted by the Connecticut Appellate Court in its interpretation of the provision prohibiting discrimination against individuals who exercise rights afforded by the Workers’ Compensation Act, Conn. Gen. Stat. (31-290a(a), Lindsay is well reasoned and the facts are similar to those in the instant Family and Medical Leave case.

Moreover, in the present case, the employer’s attendance policy is not neutral in that it penalizes employees who are absent while on a leave protected by the Family and Medical Leave Act, but excuses absences resulting from military leaves, jury duty, holidays, vacations and funerals. Nor has the policy been applied neutrally among those employees who took protected leaves, since the employer did not charge leave time which was taken pursuant to the Family and Medical Leave Act against Davis in her performance evaluation, which was prepared within days of the claimant’s evaluation.

A review of case law interpreting a similar family and medical leave provision reveals that courts have considered an employer to have violated the provision by taking disciplinary action against an employee for exercising his or her right to a family or medical leave. The Wisconsin Court of Appeals Court has had occasion to consider whether an employee’s discharge for accumulating twenty-one points under the employer’s Absence and Lateness policy, wherein an employee is assessed three points for each excused and reported absence regardless of the reason for the absence, was a violation of the Wisconsin Family and Medical Leave Act, (WFMLA), Sec. 103-10. In MPT v. Dep’t of Ind., Labor & Human Rel., 464 N.W.2d 79 (Wis. App. 1990), the Court of Appeals found the employer’s discharge violated the Act because two of the employee’s absences, which accounted for five points, were for medical leave protected by the WFMLA. In Haas v. Dep’t of Ind., Labor & Human Rel., 479 N.W.2d 229 (Wis. App. 1991), the Wisconsin Court of Appeals held that a written warning for “excessive absenteeism” after the employee missed work to care for her child under a leave protected by the WFMLA interfered with the employee’s right to take protected leave, since the company’s personnel policies treated the accumulation of such warnings as grounds for dismissal. The statutory language of Wis. Stat. (103.10(1)(a) provides that an employer may not in any way “interfere with [or] restrain an employee’s right to take leave protected by the WFMLA.

In the instant case, the Complainant has shown that the Respondent’s attendance policy and evaluation procedure, which discriminate on their face against employees who exercise their rights under the Family and Medical Leave Act, were applied in an inconsistent manner. Another supervisor who took a leave of absence for surgery and missed work because of a disability, and who also received a performance evaluation prepared by the Complainant’s
supervisor, Peter Cirelli, in September, 1991, was not penalized for taking a medical leave in her performance evaluation. Lulia Davis received an "effective" rating and a corresponding six points based on three days of absence occurring on two occasions, after excluding time off for surgery and disability. Cirelli indicated that his failure to include Davis time out from work while on medical leave of absence as a factor in the attendance category of her performance evaluation was a mistake, yet the evaluation was prepared within days of Cirelli's completion of the Complainant's evaluation. The evidence in the record indicates that other members of the employer's management team who took leaves of absence, including the Lead Customer Service Supervisor and former Director of Customer Operations, were not penalized in any way for taking those leaves.5/

Furthermore, other individuals who had poor attendance did not receive similar treatment. The Customer Service Center Supervisor, Kim Reidda, who was charged with nine and three-quarter days of absence over eight occurrences, received a "partially effective" rating in attendance and a corresponding three points on her evaluation. Patricia Dollak, a Customer Service Supervisor who had tied with the claimant in overall performance with fifty-five points and who was ultimately selected for retention rather than the Complainant, had three days of absences on three occasions in the first six months in the position. This netted her a "partially effective" rating in May, 1991, and three points toward her overall rating. In the next seven months prior to the layoff, Dollak accrued nine absences on two occasions plus two incidents of tardiness. Although her attendance in the year prior to the layoff would merit an unsatisfactory rating, Dollak was not penalized for her poor attendance at least in part because of the timing of the performance evaluations and the layoffs and changes in the evaluation form by May, 1992.

The record further reveals that the overall performance evaluation rating was one of the three factors utilized by Peter Cirelli in his decision to lay the claimant off. Cirelli considered the ratings as a measure of how the individual supervisors compared as overall employees. The Complainant, with her unsatisfactory rating in attendance resulting from the Respondent's consideration of her medical leave, was tied with Dollak at fifty-five points and rated considerably lower than Glanakos at sixty-four points. Reidda and Davis, individuals against whom the Complainant was not directly compared, rated forty-four and fifty-three points respectively.

The Complainant has presented sufficiently persuasive direct evidence of discrimination on the basis of her exercise of rights afforded by the Family and Medical Leave Act in the Respondent's decision to discharge her based in part on a performance evaluation rating which penalized her for having taken a medical leave of absence.6/ The applicable legal standard for determining whether the Complainant's discharge was discriminatory is the direct evidence theory.7/ See Miko v. Commission on Human Rights and Opportunities, 220 Conn. 192, 205 (1991); Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality opinion). In the "mixed motives" case, when the Complainant has introduced sufficiently persuasive direct evidence that prohibited discrimination was a motivating factor in the decision to terminate her, the Respondent bears the burden of proving that its decision to terminate the Complainant resulted from weighing non-discriminatory factors and would have been the same even if the Complainant's unsatisfactory attendance rating had not been a factor in its decision.
The Complainant’s supervisor, Cirelli, testified that the decision to terminate the complainant was based on a three-prong analysis which included a comparison of the overall performance evaluations, a comparison of the individuals’ knowledge of the job and quality of their work, and the individuals’ performance between the time of their last performance evaluations and the time of the layoff.

Gianakos received sixty-four points in overall performance whereas the Complainant and Dollak both received fifty-five points. Gianakos was rated as excellent in the performance categories of job knowledge and quality of work, Dollak was rated as highly effective and the Complainant as effective in both categories.

Cirelli rated Gianakos as generally superior in performance through the time of the layoff. Although the six-month performance review conducted in May, 1991, indicated that Dollak’s work was done on time and that she was organized and managed her time well, in her May, 1992 performance evaluation, which included the seven months between May, 1991 and the Complainant’s layoff in December, 1991, weak areas were noted in Dollak’s performance such as inconsistent initiative, lack of dependability, and difficulty setting priorities and completing her work on time. Dollak was given a slightly above average overall rating, with job knowledge listed as a strong point. Based on attendance records, Dollak’s problematic attendance noted in her six-month review in May, 1991, had continued.

In the months prior to the Complainant’s layoff, Cirelli documented two errors made by the Complainant in the presentation of information, reversed his initial support of the Complainant’s taking disciplinary action against a service center employee she was supervising on a temporary basis, and removed some of the Complainant’s job duties, ostensibly so that she could better concentrate on her more important duties of sales training. One month later, Cirelli laid the Complainant off, indicating that her expertise in sales was no longer required. Cirelli later told Diesel that he had observed changes in the Complainant’s attitude after she returned from her medical leave. The Complainant, after receiving a somewhat disappointing performance evaluation followed by Cirelli’s documentation of performance incidents, understandably became more insecure and sensitive to Cirelli’s actions. Personality differences became evident as Cirelli and the Complainant discussed Cirelli’s management techniques. However, the Respondent has not established that any serious deficiencies existed in the Complainant’s performance.

Despite Cirelli’s testimony that his decision to lay the Complainant off would not have changed had the Complainant been credited with satisfactory attendance in her performance evaluation, this hearing officer is not convinced that the same result would have occurred if the claimant’s medical leave had not been factored into her performance review. If attendance had not been a factor in the overall performance evaluation, the Complainant would still have received fifty-five points, whereas Dollak would have only been rated at fifty-two points. If attendance were considered and the claimant had not been penalized with a poor attendance rating after taking a medical leave of absence, she would have been given an overall performance evaluation of "effective," as she had five or fewer occasions of absence in a twelve-month period. Considering the weight factor of three, she would have received six additional points and an overall performance rating of
sixty-one, or a clearly superior overall performance compared to Dollak’s fifty-five points. Dollak would have prevailed in a comparison of job knowledge, but it is far less clear that Dollak’s work quality, which suffered according to her May, 1992 review, remained superior to the Complainant’s. The Complainant had unique strengths in her training experience and knowledge of Spanish. Furthermore, the performance problems assigned to the Complainant during her final weeks appear to be largely attributable to a personality conflict which was exacerbated by Cirelli’s impression that the Complainant had changed after her operation. Finally, Cirelli had contemporaneously offered conflicting reasons for selecting the Complainant for layoff to his peer, Diesel, which raises a question as to Cirelli’s motives in making the decision to terminate the Complainant.

In a mixed motive case where an individual’s protected conduct was a motivating factor and a substantial cause of the employer’s employment decision, the Respondent can prevail if it proves that the adverse action would have been taken if the proper reason alone had existed. See, e.g., Brock v. Casev Truck Sales, Inc., 839 F.2d 872 (2nd Cir. 1988). In the present case, the Respondent has not established that it would have reached the same employment decision had it not considered the discriminatory reasons for terminating the claimant. The Respondent has not established by a preponderance of the evidence that the Complainant would have been discharged even if the Respondent had not considered the Complainant’s unsatisfactory attendance rating resulting from her exercise of her rights under the Family and Medical Leave Act to a medical leave of absence.

Accordingly, the record supports a finding that the Complainant was discharged and otherwise discriminated against because of her exercise of rights afforded her pursuant to the Family and Medical Leave Act.

ORDER

Section 31-51ee of the Connecticut General Statutes authorizes the Labor Commissioner to adopt regulations which establish procedures to implement the Family and Medical Leave Act, Conn. Gen. Stat. §§ 31-51cc-6g, inclusive, 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 provides that when the Commissioner concludes that an employer has violated any provision of the Act with respect to an eligible employee or 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, entitlements or protections afforded an employee by the Act, reinstatement to employment, back pay and other monetary compensation for loss directly resulting from the employer’s violation, discharge or discrimination.
The record establishes that the Respondent employer violated the Family and Medical Leave Act by providing in its personnel policies adverse consequences for an employee who exercises his or her right to a medical leave protected by the Family and Medical Leave Act. The Respondent violated the Act through its attendance policy, which provided that corrective action could be taken if an employee took time off for legitimate illness with proper medical documentation, and through its employee performance evaluation procedure, in which an individual's performance evaluation was negatively affected by the individual's exercise of the right to a medical leave protected by the Family and Medical Leave Act.

Accordingly, the Respondent is ordered to discontinue the use of the attendance policy, performance evaluation policy, and any other personnel policy which in any way penalizes or has an adverse consequence to any individual who exercises his or her rights under the Family and Medical Leave Act.

The record further establishes that the Respondent employer violated the Family and Medical Leave Act in discriminating against the Complainant because she exercised rights afforded by the Family and Medical Leave Act by penalizing her in her annual performance evaluation, reducing her rating because she took a medical leave protected by the Act, and by discharging her based on the performance evaluation which negatively reflected the Complainant's exercise of her right to take medical leave for serious illness. The Respondent relied in part on impermissible criteria in its decision to terminate the Complainant rather than another Customer Service Supervisor, and in part on its legitimate non-discriminatory assessment that it needed to retain those employees with the greatest knowledge of the technical aspects of the job.

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:

United Artists Entertainment/TCI has discharged and discriminated against Martha Lanza for exercising the rights afforded to her by the Family and Medical Leave Act. The Respondent is ordered to discontinue its discriminatory practices and to comply with the applicable requirements of the Act. Based on the above, the Complainant is entitled to an award of damages by the Labor Commissioner, which directly resulted from the Respondent's discharge and discrimination in violation of the Family and Medical Leave Act. However, since Complainant has withdrawn her claim for damages pursuant to a confidential settlement agreement with the Respondent, no damage award will be made in this case.

Deputy Commissioner Robert F. Tessier
FOOTNOTES

1/Although the hearing officer is for administrative purposes an employee of the Department of Labor, she serves under the direction of the Chairman of the Board of Review rather than the Commissioner of Labor. See Conn. Gen. Stat. §§ 31-237a; 31-237e. In adjudications within the unemployment compensation system, the Labor Commissioner is a party before the Appeals Division. See Conn. Gen. Stat. §31-242. Furthermore, the rules of procedure for a hearing in contested cases before the Labor Commissioner, Conn. Agencies Regs. §31-1-1(f), and the statutory provision governing the procedure for appointing a hearing officer in a contested case, Conn. Gen. Stat. §4-160, provide that the hearing officer may be a staff employee of the Labor Department.

2/Section 31-51ee of the Connecticut General Statutes provides that the Labor Commissioner shall adopt regulations which establish procedures and guidelines to implement the Family and Medical Leave Act, including, but not limited to, procedures for hearing and redress for an employee who believes that there has been a violation of the Act by an employer. Redress is defined as the satisfaction for an injury or for damages sustained, and as damages or equitable relief in Black's Law Dictionary, 1150 (5th ed. 1979).

The Regulations authorized by the statute were promulgated pursuant to Sections 4-168, et seq., of the Connecticut General Statutes, approved as to legal sufficiency by the Office of the Attorney General, and approved by the Legislative Regulation Review Committee. The Respondent's contention that the Act authorizes the Commissioner of Labor to adopt procedures for redress but does not authorize damages or provide Complainants with a substantive right to damages is an illogical interpretation of the statute.

3/The Respondent maintains that the Working Conditions Division did not conduct an investigation and thus it moved that the case be dismissed. Unlike the statutory provision governing the Connecticut Commission on Human Rights and Opportunities, Conn. Gen. Stat. §46a-83, which directs the agency to investigate and affords parties and representatives an opportunity to provide written or oral comments on the evidence in the Commission's files prior to determining if there is reasonable cause, the Family and Medical Leave Act merely provides that the Labor Commissioner adopt procedures and guidelines necessary to implement the Act. Pursuant to Conn. Agencies Regs. §31-51ee-4, the Division of Working Conditions is required to investigate complaints, but the nature of the investigation is not specified. The record reveals that, in correspondence dated June 18, 1992, the Working Conditions Division requested that the Respondent investigate the Complainant's allegations. On July 17, 1992, the Respondent provided the Working Conditions Division with a three-page letter which included the results of its inquiry. The Division of Working Conditions submitted into the record documents from the Complainant's personnel file, which it obtained in the course of its investigation.
Although federal law may provide guidance, there are no obligations for a hearing officer to apply federal procedural law or to be limited to federal law in interpreting Connecticut statutes. See Veeder-Root Co. v. CHRO, 211 Conn. 464, 470 (1989). Guidance may also be found in the interpretation of family and medical leave statutes in other jurisdictions and in the interpretation of similar state statutes, such as the Workers' Compensation Act and other statutes prohibiting discriminatory practice.

Davis was not penalized for taking a medical leave on her performance evaluation. The record does not reveal when Harrington took a leave of absence or whether the Respondent had at least 250 employees and thus was subject to the Family and Medical Leave Act when Diesel took a leave in August and September, 1990. However, even if the other leaves were not taken pursuant to the Act, it is probative that others who took medical leaves were not treated in the same way as the Complainant when she exercised her rights to take a medical leave pursuant to the Act.

The Respondent, maintains in its brief that there is no evidence that it has discriminated against any other employees who exercised their rights under the Family and Medical Leave Act. The Respondent, citing Adriani v. Commission on Human Rights And Opportunities, 220 Conn. 307 (1991), contends that the fact that it has not discriminated against other employees who took medical or family leave is a factor to consider in determining whether it discharged or discriminated against the Complainant for taking a leave. However, this is not a persuasive argument in light of the direct evidence that the Complainant's taking of a medical leave and her exercising her rights under the Family and Medical Leave Act was a factor in the Respondent's decision to lay her off, and evidence that the Complainant was not treated the same as at least one other employee, Davis, who took a protected medical leave of absence.

At the May 14 hearing, the Respondent objected to the admission into the record of a letter, dated April 23, 1992, from its Attorney, James E. Hautzinger, to the Complainant's attorney, Mark Soicher. (Com. Ex. 7). This letter was in response to Attorney Soicher's letter of March 18, 1992. (Er. Ex. A). The document was admitted into the record over the Respondent's objection that it should be excluded as it was prepared in response to a settlement demand and thus is not admissible as a statement in the course of settlement negotiations.

An offer of compromise, if made to buy peace, is not admissible against the party making it as an admission of liability. Stanahan v. East Haddam, 11 Conn. 507, 512-519 (1836). The rule that statements made in the course of settlement negotiations are inadmissible reflects a strong public policy of promoting settlement disputes. See Colin Tait, Tait & Laplante's Handbook of Connecticut Evidence, (11, 5, 4(b) (2d ed. 1988 & Supp. 1992). If there is a question as to the motive of the declarant in making the statement, the statement should be excluded. Danahy v. Cuneo, 130 Conn. 213, 215-217, 33 A.2d 132 (1943). However, a statement is admissible if it is an admission of liability and not merely an offer of compromise intended to buy one's peace. Rizzio v. Montano, 93 Conn. 289, 293, 105 A. 625 (1919).
Although federal law protects all statements made during settlement negotiation, the exclusionary rule in Connecticut has not been extended as far. See Evans Products Co. v. Clinton Building Supply, Inc., 174 Conn. 512, 391 A.2d 157 (1973), in which the Connecticut Supreme Court stated that the test is whether a party is making an admission intended to concede a fact hypothetically for the purpose of effecting a compromise or to declare the existence of a fact. In Evans, an outright acknowledgment of an overdue debt contained in a letter written by the party's attorney was held not to be a hypothetical concession where there was little indication that the attorney intended to effect a compromise.

The statute governing hearings based on complaints filed with the Connecticut Commission on Human Rights and Opportunity specifically provides that any endeavors or negotiation for conciliation are not to be received in evidence. Conn. Gen. Stat. 46a-84(e). However, this provision follows another provision which specifically directs the investigator of a complaint before the CHCRO to attempt, by conference, conciliation or persuasion, to eliminate a practice where there is reasonable cause to believe that a discriminatory practice has been committed. The law developed around the statutes prohibiting discriminatory practice pursuant to which the CHCRO operates generally provides a useful model for interpreting the Family and Medical Leave Act, since it also prohibits discriminatory practice. However, there is no similar directive to attempt to settle cases under the Family and Medical Leave Act, although settlement is encouraged. There is no statutory prohibition against receiving evidence of any endeavors for settlement into the record.

Section 31-55ee of the Connecticut Family and Medical Leave Act provides that the Labor Commissioner shall adopt regulations to establish procedures and guidelines. Section 31-51ee-6 of the Regulations of Connecticut State Agencies provides that the Rules of Procedure for Hearings in contested cases conducted by the Labor Commissioner, Conn. Agencies Regs. 31-1-1 through 31-1-9, apply to hearings held pursuant to the Family and Medical Leave Act. Pursuant to 31-1-5(f) of the Regulations, the rules of evidence prescribed in Conn. Gen. Stat. 4-178 apply. This statutory provision does not address evidence obtained through settlement endeavors.

The March 18, 1992 letter sent to the Respondent by Attorney Soycher set forth the Complainant's position that she had been subjected to discriminatory treatment and advised the Respondent that the Complainant intended to file charges with the Connecticut Commission on Human Rights and Opportunities and the Equal Employment Opportunity Commission. The letter also included a proposal for a settlement of terms or a request to engage in alternative dispute resolution.

The Respondent's April 23, 1992 response was a rejection of the Complainant's settlement proposals. After its investigation of the allegations, the Respondent indicated that it had concluded that the Complainant had not been terminated because of her age, ethnic origin, medical condition or sexual favoritism, and proceeded to expound on the reasons it did lay the Complainant off. This included a discussion of the utilization of the performance rating and the effect of the employer's "no fault" attendance policy, in which even legitimate illnesses such as the
Complainant’s absence for surgery under the Family and Medical Leave Act would be included in the rating. The Respondent’s explanation set forth in Attorney Hautzinger’s letter is not a hypothetical statement made in order to effect a settlement, but an admission made at the time the Respondent rejected the Complainant’s overture to enter into settlement negotiations.

Moreover, the only reference to the April 23, 1992 letter in the record other than the Respondent’s objection to its admission was the Complainant’s contention that it was through the letter that she first realized that she had been adversely affected by taking a leave under the Family and Medical Leave Act. Upon cross-examination, the Complainant admitted that she suspected it might be a factor in the Respondent’s decision to terminate her prior to receiving the letter, and that the letter only confirmed her suspicions.

In any event, the hearing officer did not rely on either of the documents in deciding this case. The conclusion that the claimant’s attendance, including her absence during a leave protected by the Family and Medical Leave Act, was a factor in determining her overall performance rating, which was one of the three factors in determining which employee would be laid off, was made from factual findings based on Cirelli’s testimony at the July 14, 1993 hearing.

7/When the Complainant presents direct evidence of discrimination, the McDonnell Douglas standard does not apply. See Miko v. Commission on Human Rights and Opportunities, supra at 204. However, if the McDonnell Douglas formulation were the applicable standard, the Complainant has established a prima facie case by proving that she exercised her rights pursuant to the Family and Medical Leave Act, she was qualified as a Customer Service Supervisor, she had performed satisfactorily in that position, she was laid off despite her satisfactory performance, and the three individuals who were retained in the position had not exercised rights under the Family and Medical Leave Act. See Diane Cormier v. Textron Lvcoming, FM 92-1 (12/3/92).

Establishment of a prima facie case creates a presumption that the Respondent unlawfully discriminated against the Complainant, which the Respondent must rebut by setting forth reasons for its actions which would support a finding that unlawful discrimination was not the cause of the employment action. Once the Respondent carries the burden of production by introducing evidence that, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the action, the presumption is rebutted. The Complainant bears the ultimate burden of showing that she has been a victim of intentional discrimination. St. Mary’s Honor Center, et al. v. Hicks, 61 U.S.L.W. 4782 (1993).

Since the Complainant has established that her exercise of her rights under the Family and Medical Leave Act was a factor in the Respondent’s decision to lay her off through the Respondent’s use of the performance rating scale in its decision, the analysis is appropriately one of direct evidence, or whether the employer can establish by a preponderance of the evidence that it would have reached the same decision without consideration of the impermissible criterion. See Price Waterhouse v. Hopkins, supra; Miko v. Commission on Human Rights and Opportunities, supra.
The Hearing Officer's decision, as modified, is attached hereto as my final decision in this matter.

Robert F. Tessier
Deputy Commissioner

cc: Attorney Mary Riley — CERTIFIED NO. 0129750054
Attorney Margaret Strange
Attorney Mark Soycher
Attorney Heidi Lane