

**STATE OF CONNECTICUT
Department of Labor
200 Folly Brook Boulevard
Wethersfield, CT 06109**

FINAL DECISION

Complainant

Lisa Lauder
2 Walter Lane
Oxford, CT 06478

Employer

Sodexo
By: Robin G. Frederick, Esq.
Shipman & Goodwin
One Landmark Square
Stamford, CT 06901-2676


Certified No.: Z 712 661 840

Certified No.: Z 712 661 841

Case No.: FM 94-7

Date Mailed: September 17, 1997

Pursuant to Section 31-1-8 of the Regulations of Connecticut State Agencies, I am issuing my final decision in the above-referenced matter after reviewing the evidence in the case. I affirm in whole and incorporate the Proposed Decision of the hearing officer issued on August 21, 1997 as my final decision in this matter, a copy of which is attached hereto.


James P. Butler
Commissioner

cc: Heidi Lane

PROPOSED DECISION
OF
HEARING OFFICER

Lisa Lauder v. Sodexho, Inc.

Case No. FM 94-7

Date of Decision Mailed:

Hearing Date: May 19, 1997

Hearing Location: Employment Security Appeals Division
249 Thomaston Av.
Waterbury CT 06702-1010

Appearances:

For the Complainant: Lisa Lauder, Complainant.

For the Respondent: Robin Frederick, Attorney; Todd Lindsey, District Manager; Lisa Walker, Recruiter; Gerri Bateman, Recruiter.

For the Agency: Heidi Lane, Attorney.

Observers: J. Russell Curley, Complainant's father; Nichole McKinney.

CASE HISTORY

On March 11, 1994, the Wage and Workplace Standards Division of the Department of Labor received a complaint from the Complainant alleging Sodexho, Inc. had violated Sec. 31-51dd of the Connecticut General Statutes regarding an Act Concerning Family and Medical Leave from Employment.

On March 17, 1994, the Wage and Workplace Standards Division mailed to the employer a notice of complaint and the Division's intent to investigate this complaint.

After having investigated the complaint by the Complainant, the Division issued a determination on June 15, 1995 concluding that there was no reason to believe a violation of the Connecticut Family and Medical Leave Act had occurred. In issuing this decision, the Division advised the Complainant of her right to request a hearing before the Commissioner, provided a written request for such a hearing was received or postmarked within 21 calendar days of the mailing date of the determination.

On or around July 3, 1995, the Division received a request from the Complainant to exercise her right to a hearing before the Commissioner under Sec. 31-51ee-4 (e)(2) of the Connecticut State Agencies Regulations.

On or around February 7, 1997, Labor Deputy Commissioner Jean E. Zurbrigen designated Associate Appeals Referee John W. Blair, Jr. to act as the contested case hearing officer in the instant case, and advised the parties that a contested case hearing was scheduled to take place on March 27, 1997 at 9:30 a.m. in the Waterbury Appeals Division.

The contested case hearing was postponed from March 27, 1997 due to the Respondent's inability to produce its witnesses.

A contested case hearing was held on May 19, 1997 at the Employment Security Appeals Division, 249 Thomaston Av., Waterbury, Connecticut 06702-1010.

FINDINGS OF FACT

1. The Complainant began working for Sodexho, Inc. on December 13, 1989 as a Chief Clinical Dietician at the New Milford Hospital in the employer's Health Care Division.
2. On or about March 22, 1993, the Complainant began working for the employer as a District Nutritionist in the employer's Education Division.
3. In this new position, the Complainant was responsible for nutrition programs for between 11 and 13 accounts consisting of private schools and universities. The Complainant's job duties included meeting with students to see what their needs were as far as the foods available to them; addressing special health needs of those individuals who used the employer's services; providing ongoing nutritional education to students in a classroom setting; providing nutritional table to inform students and faculty on health issues; working with food service managers and their staffs regarding the promoting of Sodexho products called "Tasty Light Cuisine"; marketing special food products from certain manufacturers; acting as a liaison between students and food service management and; speaking in public for sports teams.
4. The Complainant's position was a unique value-added position nationally. No similar position existed in any other district.
5. On or about June 23, 1993, Bob Palmer, the Complainant's direct supervisor was replaced by Ken Filosa.
6. During a meeting which took place at about that time, Mr. Palmer advised the Complainant her position had been budgeted for the 1993 - 1994 fiscal year.
7. In early June, 1993, Todd Lindsey became the Regional Vice President for Educational Corporate Services. The Complainant was within Mr. Lindsey's chain of command.

8. At the time that Mr. Lindsey assumed this position, his region was generally losing money. In September, 1993, the division lost \$33,400.00; in October, 1993, it earned a profit of \$39,200.00; in November, 1993, it earned a profit of \$48,600.00; in December, 1993, it lost \$87,300.00 and; in January, 1994, it lost \$173,700.00.

9. On December 17, 1993, the employer approved the Complainant's request for paid/unpaid medical leave of absence effective December 3, 1993 and ending on February 24, 1994 under the Connecticut Family and Medical Leave Act. The Complainant was advised in writing that her salary continuation would expire on January 27, 1994.

10. On or about January 11, 1994, the Complainant received a call from one of the managers at Sacred Heart University saying that a student needed a consultation and that Mr. Filosa, her supervisor, had referred the student to the Complainant.

11. In an attempt to turn the division around, Mr. Lindsey decided to change several key management positions, eliminate the Complainant's position and change the District Manager's position.

12. The Complainant's position was eliminated because it was non-essential to the running of the day-to-day business, there were no similar positions in any other district and all other districts ran well without such a similar position.

13. That unique portion of the Complainant's duties relating to the general nutritional education of student bodies was eliminated although many of her duties were taken by the Account Manager.

14. Mr. Lindsey determined that, if a dietician was needed, one could be hired on a per diem basis.

15. Mr. Lindsey decided to eliminate the Complainant's position sometime shortly before January 20, 1994.

16. Mr. Lindsey's decision to eliminate the Complainant's position had no connection with the Complainant's going on her leave of absence.

17. On or about January 20, 1994, Mr. Filosa advised the Complainant that her position had been eliminated, stating that she was a luxury the company could no longer afford. He also advised the Complainant that she should feel free to collect unemployment benefits and that she could contact Gerri Bateman, then the Vice President of Human Resources, who was actively seeking a new position for her.

18. On January 21, 1994, Mr. Bateman told the Complainant that the company would do whatever was possible to help her locate a similar position, that if the employer was unsuccessful in this attempt, she could collect unemployment benefits and that she was still considered an employee as she was still being paid by the employer in accordance with the December 17, 1993 letter to her.

19. Despite her having met with two recruiters on February 15, 1994 who attempted to find a suitable opening for her and her having received bi-monthly job postings from the employer, the Complainant has never been placed into a new position by the employer.

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. 31-55dd. 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 provision of said section.

The Complainant does not contend that she was discharged due to discrimination by the employer.

The Agency determined that the Complainant was not discharged because she exercised her rights under the Connecticut Family and Medical Leave Act and that the employer's failure to reinstate her at the end of her leave does not constitute a violation of that Act. The Agency reasoned that the elimination of her District Nutritionist position was comparable to the elimination of an entire division, inasmuch as she was the only employee who performed that particular function. The Agency cited the Labor Commissioner's final decision in the case In the Matter of Sweet Life Foods, FM 93-5 (10/4/94) which found that "...and employer may not be required to restore a returning employee to his or her original position or its equivalent in the event of an elimination of an entire division..."

The Complainant contends that the employer violated the Act for the following reasons:

- 1) the employer was not excused due to claims of financial necessity;
- 2) the legislature did not intend to excuse the employer from compliance with the Act on the basis of changed or troubled circumstances;
- 3) the employer was not excused from reinstating the Complainant because it discovered it could “make do” without her;
- 4) the employer’s contention that the Complainant would have been laid off even if she had not gone on leave under Family and Medical Leave Act should be rejected because she was advised that her position had been budgeted for the 1993 -1994 fiscal year as of June 23, 1993;
- 5) the employer did not close a facility, an entire division or notify the claimant of a lay-off prior to exercising her rights under the Family and Medical Leave Act and;
- 6) the employer never offered the Complainant an equivalent position.

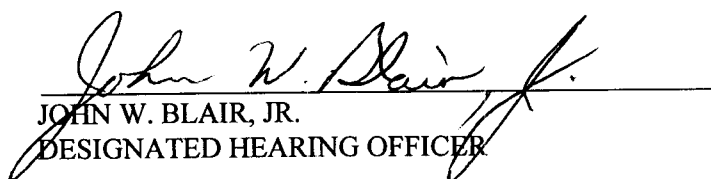
In the Moody case, the Commissioner specifically found that an employer was, in fact, not excused from compliance with the Act on the basis of changed or troubled economic circumstances. Consequently, the Complainant’s first two contentions are correct.

With regard to the Complainant’s third and fourth contentions, the Commissioner found in the Moody case that an employer is not excused from compliance with the Act simply because an employer learns in an employee’s absence that it can “make do” without that employee. However, the circumstances in the Moody case differ substantially from those in this case since, in the Moody case, the employer actually determined that it could “make do” without the employee after the employee had actually gone on the leave of absence. In this case, Todd Lindsey contended that the Complainant’s position was eliminated without any consideration of the fact that she was then on leave. Lacking any evidence to the contrary, the Hearing Officer accepts this contention as credible. Moreover, although the Complainant’s immediate supervisor said her position had been budgeted for for the 1993 -1994 fiscal year, he was not the person directly responsible for keeping the Complainant’s position in the budget. Consequently, the Complainant was not discharged due to the employer’s discovery that it could “make do” without her.

With regard to the Complainant’s contention that the employer should not be relieved of its obligations under the Family and Medical Leave Act, she contended that her situation was identical to that in the Moody case. However, this is not true. In the Moody case, all of the Complainant’s job duties had been re-assigned and the department in which that Complainant worked had, in fact, been expanded. Such was not the case in the present matter. The Complainant’s position was unique in that no other district had such a position. Further, at least one of the primary functions performed by the Complainant which made her position unique (general nutritional education of the student bodies) was totally eliminated. Although a large portion of the functions previously

performed by the Complainant continued to be performed after the elimination of her position, it appears that only those functions which were performed in other districts continued. Therefore, since the Complainant's position was unique throughout the company, the hearing officer is persuaded that the elimination of her position is comparable to the elimination of an entire division. Consequently, the employer was not required to restore the Complainant to an equivalent position.

Therefore, the hearing officer concludes that the Complainant was not discharged because she exercised her rights under the Connecticut Family and Medical Leave Act. The employer was not required to restore the Complainant to an equivalent position. The employer is not in violation of the Connecticut Family and Medical Leave Act.


JOHN W. BLAIR, JR.
DESIGNATED HEARING OFFICER