STATE OF CONNECTICUT
DEPARTMENT OF LABOR
200 FOLLY BROOK BOULEVARD
WETHERSFIELD, CT 06109

COMPLAINANT:  
Robert Lewandowski  
190 Mountain Street  
Hartford, CT 06106-4247

v.

EMPLOYER:  
The Hartford Financial Services Group  
By: Stephen Harris, Esq.  
Hartford Plaza HO-1-143  
Hartford, CT 06115

DATE MAILED: March 4, 2008

FINAL DECISION

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 record in the case. I affirm and incorporate the Proposed Decision of the hearing officer issued on October 22, 2007 (a copy of which is attached hereto) as my final decision.

[Signature]
Patricia H. Mayfield  
Commissioner
October 22, 2007

Commissioner Patricia Mayfield
Department of Labor
200 Folly Brook Blvd.
Wethersfield, CT 06109

Dear Commissioner Mayfield:

Enclosed please find my proposed decision in the matter of Robert J. Lewandowski v. The Hartford Financial Services Group, Inc., FMLA 2005-30, along with the case file and tape recording of the contested case hearing.

By a copy of this letter, I am advising parties that pursuant to Conn. Agencies Regs. §31-1-7(a), each party adversely affected by the proposed decision has the right to file an exception and present a brief and oral argument to you before you render the final decision. I am directing the parties that anyone wishing to file an exception must do so in writing within ten days of the date of this letter; any party wishing to file a brief or present an oral argument to you should contact your office within ten days for further instructions.

Very truly yours,

Ronald Coleman
Designated Hearing Officer

cc: Robert Lewandowski
The Hartford Financial Services Group, Inc.
Stephen B. Harris, Esq.
Heidi Lane, Principal Attorney, Division of Wage and Workplace Standards
STATE OF CONNECTICUT  
Department of Labor  
200 Folly Brook Boulevard  
Wethersfield, Connecticut 06109  

PROPOSED FINAL DECISION OF HEARING OFFICER  

Robert J. Lewandowski v. The Hartford Financial Services Group, Inc.  

Docket No.: FMLA 2005-30  

Date Decision is Mailed:  

Hearing Date: August 23, 2007  

Appearances:  

For the Complainant: Robert J. Lewandowski, pro se  

For the Respondent: Attorney Stephen B. Harris; Roderick Pelletier, Assistant Vice President / Director of Corporate Controller Operations; and Sharon Courey, Resource Manager.  

CASE HISTORY  

On May 4, 2005, the complainant filed a complaint with the State of Connecticut Department of Labor, Wage and Workplace Standards Division (hereinafter referred to as Wage and Workplace Standards Division), alleging that his former employer, The Hartford Financial Services Group, Inc. (hereinafter referred to as The Hartford), violated the provisions of General Statutes §§ 31-51cc, et seq., An Act Concerning Family and Medical Leave from Employment (hereinafter referred to as the CFMLA).  

On June 3, 2005, the respondent responded to the Wage and Workplace Standards Division, contending that the complaint was without merit.  

On May 5, 2006, the Wage and Workplace Standards Division notified the parties that it had investigated the complainant’s complaint and determined that the respondent did not violate the provisions of the CFMLA.  

On May 22, 2006, the complainant requested a contested case hearing before the Labor Commissioner.  

On June 29, 2006, the Labor Commissioner designated Ronald Coleman as the hearing officer.  

On August 23, 2007, hearing officer Ronald Coleman conducted a contested case hearing concerning the complainant’s complaint. The hearing officer conducted the hearing at the Connecticut Department of Labor Annex offices, 38 Wolcott Hill Road, Wethersfield, Connecticut.
FINDINGS OF FACT

1. At all times relevant to this decision, the respondent was subject to the CFMLA.

2. From August 1997, through August 20, 2004, the claimant worked at The Hartford in the accounts payable department.

3. Until 2001, the accounts payable department’s imaging unit manually scanned a number of forms utilized by accounts payable, including security forms, vendor adds, invoices, employee reimbursements and expense journal vouchers.

4. In 2001, the respondent began using ViewStar, an automated imaging system.

5. In 2003, the respondent reduced its imaging unit from five employees to two employees. The respondent no longer needed five manual imagers because much of the accounts payables workload had become paperless and could be supported by the ViewStar system.

6. Prior to April 13, 2004, the claimant worked as a senior accounting technician in the accounts payable department. In that capacity, the claimant was responsible for processing invoices.

7. On April 13, 2004, the employer transferred the claimant to the imaging unit, where he worked with one other image processor. Although the complainant continued to perform some of his prior duties, more than fifty percent of his time in the imaging unit was spent manually scanning documents.

8. In July 2004, the complainant’s elderly mother fell and was injured. She was admitted to the hospital for one week and subsequently discharged to a nursing facility for short-term rehabilitation.

9. On August 27, 2004, the respondent approved the complainant’s request for CFMLA leave, effective August 20, 2004, through November 19, 2004. The complainant took a leave pursuant to the CFMLA in order to care for his mother.

10. By August 2004, 69% of the accounts payable workload had become paperless and could be supported by the ViewStar automated imaging system.

11. By September 2004, 72% of the accounts payable volume was electronic and could be supported by the ViewStar automated imaging system.

12. Prior to November 5, 2004, accounts payable managers brought the significant reduction in manual imaging work to the attention of Roderick Pelletier, Director of Controller Operations. Management met to discuss the continued reduction in imaging work and how the respondent should proceed.

13. On or about November 5, 2004, the employer decided to eliminate the imaging unit. As a result, the positions held by the complainant and the other imager were eliminated.
14. On November 5, 2004, the respondent notified the complainant by letter that “your employment with The Hartford will be terminated as of November 5, 2003.” [sic]. The letter advised the claimant that he would be in a paid transition period through January 6, 2005, during which time he would not be expected to work so that he could engage in a full-time job search.

15. The termination letter also advised the complainant that if he did not secure another position offer at The Hartford, the complainant would be eligible for nineteen weeks of severance pay at the conclusion of the transition period.

16. The respondent paid the complainant throughout the entire notice period, until his employment terminated on January 6, 2005. The respondent paid the complainant’s severance pay in semi-monthly installments. The final payment was made on May 19, 2005.

17. The respondent has not reinstated the manual imaging unit or positions. The respondent has not hired new employees to replace the complainant or the other imager.
I. PROVISIONS OF LAW

Section 31-51ll. Family and medical leave: Length of Leave; eligibility; intermittent or reduced leave schedules; substitution of accrued paid leave; notice to employer provides, in relevant part, that:

(a)(1) Subject to section 31-51mm, an eligible employee shall be entitled to a total of sixteen workweeks of leave during any twenty-four month period, such twenty-four-month period to be determined utilizing any one of the following methods: (A) consecutive calendar years; (B) a fixed twenty-four-month period, such as two consecutive fiscal years or a twenty-four month period measured forward from an employee’s first date of employment; (C) a twenty-four month period measured forward from an employee’s first day of leave taken under sections 31-51kk to 31-51qq, inclusive; or (D) a rolling twenty-four-month period measured backward from an employee’s first day of leave taken under sections 31-51kk to 31-51qq, inclusive.

(2) Leave under this subsection may be taken for one or more of the following reasons:

(A) Upon the birth of a son or daughter of the employee; (B) Upon the placement of a son or daughter with the employee for adoption or foster care; (C) In order to care for the spouse, or a son, daughter or parent of the employee, if such spouse, son, daughter or parent has a serious health condition; (D) Because of a serious health condition of the employee; or (E) In order to serve as an organ or bone marrow donor.

Section 31-51nn. Family and medical leave: Employment and Benefits Protection.

(a) An eligible employee who takes leave under section 31-51ll for the intended purpose of the leave shall be entitled on return from such leave (1) to be restored by the employer to the position of employment held by the employee when the leave commenced; (2) if the original position of employment is not available, to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; or, (3) 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, to be transferred to work suitable to such employee’s physical condition if such work is available.
Section 31-51pp  Family and medical leave: Prohibited acts.

(a)(1) It shall be a violation of sections 5-248a and 31-51kk to 31-51qq, inclusive, for any employer to interfere with, restrain or deny the exercise of, or the attempt to exercise, any right provided under said sections.

(2) It shall be a violation of sections 5-248a and 31-51kk to 31-51qq, inclusive, for any employer to discharge or cause to be discharged, or in any manner discriminate, against an individual for opposing any practice made unlawful by said sections or because such employee has exercised the rights afforded such employee under said sections.

Section 31-51qq-25 of the Regulations of Connecticut State Agencies provides, in relevant part, as follows:

(a) The FMLA prohibits interference with an employee’s rights under the law, and with legal proceedings or inquiries relating to an employee’s rights. More specifically, the law contains the following employee protections:
   (1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.
   (2) An employer is prohibited from discharging or causing to be discharged or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act or because such employee has exercised the rights afforded to such employee under the Act....
(b) Any violations of the Act or these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. ‘Interfering with’ the exercise of an employee’s rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities....
(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits, the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ‘no fault’ attendance policies.
II. PARTIES' CONTENTIONS/ISSUE STATEMENT

The complainant contends that the employer “set him up” by involuntarily transferring him to the imaging unit shortly before it was eliminated. The complainant maintains that the respondent interfered with his rights under the CFMLA by eliminating his position while he still had two weeks of approved CFMLA leave remaining. The complainant contends that the respondent eliminated his position because he exercised his right to take CFMLA leave.

The respondent denies that it discharged or otherwise discriminated against the complainant because he took CFMLA leave. The respondent contends that the complainant’s position was eliminated as part of a business restructuring that also affected another employee.

The issues in this case are whether the respondent violated the CFMLA by interfering with, restraining or denying the exercise or attempt to exercise any right provided by the CFMLA and/or whether the respondent discharged, caused to be discharged, or in any manner discriminated against the complainant for exercising his right to leave under the CFMLA.

III. DISCUSSION

A. THE RESPONDENT DID NOT INTERFERE WITH THE COMPLAINANT'S RIGHTS UNDER THE CONNECTICUT FAMILY AND MEDICAL LEAVE ACT.

Section 31-55qq-25(a) of the Regulations of Connecticut State Agencies provides that an employer may not engage in conduct that interferes with an employee’s rights under the CFMLA. The regulation further provides that an employer will interfere with an employee’s exercise of his or her rights under the CFMLA if it discourages the employee from requesting or using his or her entitlement to leave under the Act. See Regs., Conn. State Agencies § 31-51qq-25(b). The CFMLA was amended in 1996 to ensure compatibility with the federal FMLA and to reduce any potential for confusion for employers who are subject to both Acts. 39 H.R. Proc., Pt 11, 1996 Sess., pp. 3752-53. The regulations of the federal Department of Labor also provide that an employer interferes with an employee’s rights under the federal FMLA (hereinafter known as “FMLA”) when that employer discourages the employee from requesting or taking FMLA leave. 29 C.F.R. § 825.220.

In Cendant Corporation v. Commissioner of Labor, 276 Conn. 16, 883 A. 2d 784 (2005), the Connecticut Supreme Court relied on federal FMLA cases for guidance and affirmed the Superior Court ruling that an employee who alleges that his or her employer interfered with his or her rights under the CFMLA need not prove that her employer intended to interfere with those rights. The Court, in a case of first impression, specifically rejected the McDonnell Douglas Corp. burden-shifting framework in analyzing a claim of interference. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. ED. 2d 668 (1973). Rather, the Court adopted the strict liability theory used by the majority of federal courts in cases alleging interference with an employee’s FMLA rights. The Court reasoned that the strict liability standard is consistent with the mandatory language of the statute; that it shall be a violation of the CFMLA for an employer to interfere with, restrain or deny
any right provided by the statute. The Court also noted that the strict liability standard is consistent with the applicable regulations implementing the state and federal FMLAs, which shift the burden to the employer to prove that a complainant would not have retained his or her position if she had not asked for or taken a leave.

The intent of the employer is thus irrelevant in establishing an employer’s liability for interfering with an employee’s CFMLA rights. An employee needs to prove by a preponderance of the evidence that he or she was exercising his or her rights under the CFMLA and that the employer interfered with those rights or failed to provide benefits under the Act. “[Interference] claims...do not require that an employee prove that the employer acted with any particular intent - a mere showing that the employee was entitled to the benefit and the employer refused to provide it suffices to establish liability under the FMLA....” Cendant Corporation v. Commissioner of Labor, supra at 29 (quoting Cross v. Southwest Recreational Industries, Inc., 17 F. Sup. 2d 1362, 1368). However, even under the strict liability standard, an employer is not required to retain an employee who is on CFMLA leave if the employer would not have retained the employee if the employee had not taken CFMLA leave. If an employee is laid off while on CFMLA leave and employment is terminated, the employer’s responsibility to continue employee’s CFMLA leave and restore the employee ceases at the time the employee is laid off. See Regs., Conn. State Agencies § 31-51qq-24(a)(1). However, the employer has the burden to show by way of an affirmative defense that the employee would have been laid off during the CFMLA leave and would not otherwise have been employed. Cendant Corporation v. Commissioner of Labor, supra at 32-33; Smith v. Differ Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 963 (10th Cir. 2002).

In the instant case, the complainant worked with one other employee in the respondent’s imaging department at the time of the layoff. In that position, the majority of the complainant’s workload consisted of manual imaging. In 2001, the respondent began using View Star, which is an automated imaging system. The View Star system began to reduce the amount of manual imaging that needed to be performed. As the amount of manual imaging decreased, the respondent reduced its imaging unit staff. In 2003, the respondent reduced its imaging unit staff from five employees to two employees. By August 2004, 69% of the accounts payable workload had become paperless and could be supported by the View Star system. By September 2004, 72% of the accounts payable volume was electronic and could be supported by the View Star System. The undersigned hearing officer is persuaded that these business conditions caused the respondent to lay off the complainant and the other worker in the imaging department. The respondent has met its burden of establishing that the claimant would have been laid off regardless of the CFMLA leave and would not otherwise have been employed.

Furthermore, the respondent did not lay off the complainant during the CFMLA leave. The complainant’s CFMLA commenced on August 20, 2004, and ended on November 19, 2004. Although the respondent eliminated the complainant’s position on November 5, 2004, the respondent maintained the complainant on a 60-day paid notice period through January 6, 2005. Thus, the claimant was not laid off until after his CFMLA leave had expired. For the foregoing reasons, this hearing officer concludes that the respondent did not interfere with the complainant’s rights under the CFMLA.
B. THE RESPONDENT DID NOT DISCRIMINATE AGAINST THE COMPLAINANT BECAUSE HE EXERCISED HIS RIGHT TO LEAVE UNDER THE CONNECTICUT FAMILY AND MEDICAL LEAVE ACT.

An employer will violate the CFMLA if it in any manner discriminates against an employee for exercising his or her rights afforded under the CFMLA. General Statutes § 31-51pp(a)(2). Connecticut courts have relied upon federal precedent for guidance in enforcing Connecticut’s statutes that prohibit employers from discriminating against their employees. See *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 103 (1996); *Ford v. Blue Cross and Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53 (1990). Connecticut’s Labor Commissioner has similarly relied upon precedent established under the federal FMLA in adjudicating claims of discrimination under the CFMLA. See *Cormier v. Textron Lycoming*, Decision of the Labor Commissioner, FM 92-1 (December 23, 1992); *Lanza v. United Artist Entertainment Company*, Decision of the Labor Commissioner, FM 92-4 (January 10, 1994).

Where the complaint alleges a retaliatory discharge for exercising his or her rights under the federal FMLA and there is no direct evidence of the employer’s intent, the *McDonnell Douglas Corp.* burden shifting framework applies. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 93 S. Ct 1817, 36 L.Ed.2d 668 (1973); *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 578 A.2d 1054 (1990). First, the complainant must establish, by a preponderance of the evidence, a prima facie case of retaliation. If the complainant successfully establishes the prima facie case, the burden of production shifts to the employer to rebut the presumption of discrimination by offering nondiscriminatory reasons for the adverse employment action. The complainant then has the burden of presenting evidence that the proffered reasons are false and are a pretext for discrimination, which permits the trier of fact to infer the ultimate fact of intentional discrimination. See *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). To carry the burden of showing pretext, the employee must show that the proffered justification for the termination is unworthy of credence. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

The complainant in this case contends that the respondent “set him up” when it transferred him to the imaging unit in April of 2004. However, the respondent took this action more than three months prior to the complainant’s mother’s fall, which was the incident precipitating the complainant’s request for CFMLA leave. At the time of the transfer, the respondent would not have had any knowledge that the complainant would subsequently file for leave under the CFMLA. Thus, the complainant has not established any causal connection between his leave and his transfer to the imaging unit.

The complainant further contends that the respondent eliminated his position because he exercised his rights under the CFMLA. Although the respondent made the decision to lay off the complainant during his CFMLA leave, this hearing officer does not find that the leave was a factor in the respondent’s reorganization. Close temporal proximity between the complainant’s exercise of rights under the Family and Medical Leave Act and the adverse employment action can reasonably lead to an inference of retaliation. *Smith v. Diffe Ford Mercury, Inc.*, 298 F. 3rd 955, 961 (10th Cir. 2002); see also *Cendant Corporation v. Commissioner of Labor*, 276 Conn. 16, 883 A. 2d 784 (2005). However,
a mere coincidence of timing can rarely be sufficient to establish a submissible case of retaliatory discharge. See Smith v. Allen Health Systems, Inc., 302 F.3d 827, 832 (8th Cir. 2002). The technology that ultimately made the complainant's position obsolete was implemented more than two years before he exercised his rights under the CFMLA. The record reveals that the other worker's position in the imaging department was also eliminated, even though that individual was not on or had not applied for CFMLA leave. This hearing officer concludes that the complainant has not established a prima facie case of retaliation.

Even if the complainant had established a prima facie case, the employer has successfully rebutted the presumption of discrimination. An employer can demonstrate that it did not discriminate against an employee for taking CFMLA leave by establishing that it eliminated a position or division because its functions were no longer needed by the employer's operations. See Lauder v. Sodexo, FM 1994-7 (9/7/97) (no CFMLA violation found where the employer eliminated the complainant's position because her primary functions were no longer essential to the respondent's operations). In the instant case, the respondent has established that it implemented automated technology which eliminated the need for a manual imaging unit. Thus, the respondent has demonstrated that it had a legitimate, non-discriminatory reason for laying off the claimant. While a satisfactory evidentiary explanation by the employer for its actions destroys the legally mandatory inference of discrimination arising from the employee's prima facie case, the evidence and inferences that properly can be drawn from the evidence presented by the employee must be considered in determining whether the employer's explanation is pretextual. See Hodgens v. General Dynamics Corp., 144 F.3d 151, 161 (1st Cir. 1998). If the defendant's proffered reasons are rejected, the trier of fact may infer the ultimate fact of intentional discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. at 511. The complainant contends that the workload did not decrease, and that someone else is now performing the manual imaging he used to perform. However, the complainant has failed to produce any evidence to support this claim. Based on the record in this case, the complainant has not met his burden of proving that the respondent's reasons for eliminating his position were pretextual or that the respondent's actual motive for discharging the complainant was because he exercised his right to take leave under the CFMLA.

1 During the hearing on August 23, 2007, the complainant requested that the undersigned hearing officer order the employer to produce work records showing the volume of manual imaging being performed during the period in question. The complainant had not previously made this request, even though more than one year elapsed between his request for a contested case hearing and the date the hearing was held. The notice of the August 23, 2007 hearing ordered the parties to provide the hearing officer with a list of all witnesses and documents which the parties intend to present at the hearing. The complainant did not contact the hearing officer or the Labor Department office to indicate that he believed there were additional records that the respondent should present at the hearing. The undersigned hearing officer denied the complainant's request, because it should have been made prior to the contested case hearing. Moreover, the hearing officer is not persuaded that such records would produce a different outcome in this case. The respondent produced a November 5, 2004 memo that memorialized its decision and business rationale for eliminating the complainant's division, as well as first-hand testimony that the new technology had dramatically reduced the manual imaging workload.
IV. CONCLUSION

The complainant has failed to demonstrate that the respondent interfered with or restrained his right to leave under the CFMLA pursuant to General Statutes § 31-51pp(a)(1) and Regs., Conn. State Agencies §§ 31-51qq-25(a)(1) and (b).

The complainant has not met his burden of proving that the respondent eliminated his position in retaliation for his exercising his right to CFMLA leave pursuant to General Statutes § 31-51pp(a)(2) and Regs., Conn. State Agencies §§ 31-51qq-25(a)(2) and (c). Therefore, the complainant is not entitled to redress.

Ronald Coleman, Designated Hearing Officer

The parties are advised of their right to file an exception and present a brief and/or oral argument to the Commissioner before a final decision is issued. The deadline for filing an exception is November 1, 2007.

Mail any exceptions and briefs to: Commissioner of Labor, 200 Folly Brook Boulevard, Wethersfield, Connecticut, 06109. Refer to the docket number in any correspondence submitted.