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

COMPLAINANT:
Patrick A. Marando, Jr.
56 Highwood Avenue
Southington, CT 06489

Certified No.: 7000 1530 0000 9433 3208

EMPLOYER:
Stop and Shop, Inc.

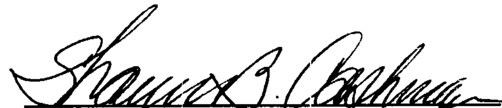
By: Arthur Murphy, Esq.
Crown Colony Plaza
300 Crown Colony Drive
Suite 410
P.O. Box 9126
Quincy, MA 02269-9126

Certified No.: 7000 1530 0000 9433 3215

Date Mailed: March 18, 2004

FINAL DECISION

Pursuant to Section 31-1-8 of the Regulations of Connecticut State Agencies, after reviewing the evidence, and after hearing oral argument, I issue my Final Decision in the above-referenced matter. I affirm in whole and incorporate the Proposed Decision of the Hearing Officer issued on September 18, 2003, a copy of which is attached hereto, as my Final Decision in this matter.



Shaun B. Cashman
Commissioner

cc: Attorney Neale Belgrade
Office of Program Policy

DOCKET NO. FM 2000-44

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Attorney for employer:
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P O Box 9126
Quincy, MA 02269-9126

Date Mailed to Interested Parties:
September 18, 2003

CASE HISTORY

On February 4, 2002, the Wage and Workplace Standards Division of the State of Connecticut Department of Labor issued a decision notifying parties it did not find the respondent employer Stop & Shop Co., Inc. violated the Family and Medical Leave Act, General Statutes Section 31-51kk, when it allowed the complainant, Patrick A. Marando Jr., to resign in lieu of being discharged from the respondent.

On February 8, 2002, the complainant filed a timely request for a contested case hearing under Section 31-51qq-44 (e) of the Regulations of Connecticut State Agencies. On March 12, 2002, the Division requested a hearing officer be assigned the case. On April 3, 2002, the Division requested a mediator be assigned the case before it went to hearing. Mediation did not result in settlement.

On February 28, 2003, Janice Dombrowski, the hearing officer designated by Commissioner Shawn Cashman, heard the case.

APPEARANCES

The complainant, Patrick Marando, appeared with C. Parker. Attorney A. Murphy; Attorney C. Magendamtz; Richard Meehan, Director Labor Relations; Edward Ruddie, Director of Distribution and David Cheeseman, Maintenance Manager appeared for the respondent.

FINDINGS OF FACT

1. The respondent, Stop & Shop, employed the complainant, Patrick Marando, in the maintenance department in its New Haven, CT facility on the second shift. The complainant is a member of the Teamster Union, Local 443. The respondent is subject to the Connecticut Family and Medical Leave Act (hereinafter referred to as CFMLA).

2. The complainant secured the employment years ago with the help of an uncle. The complainant is grateful for his uncle's help and holds the family name in high regard.

3. The complainant resided with his uncle Sisto Lavorgna since September 1998. The complainant and his uncle owned Lavorgna Fuel Oil. The complainant continues to own the business. Lavorgna Fuel Oil is a small fuel oil delivery and service company in Southington, CT. The complainant's grandfather originally owned the business. The complainant promised his grandfather that he would keep the business going and care for his uncle.

4. The complainant has worked for the family business throughout his employment with the respondent. He had requested the second shift in 1998 to work as needed with his uncle in the oil delivery business. By August 2000, the complainant owned 67% of the business.

5. On June 20, 2000, the complainant requested a leave of absence to care for his uncle who had cancer. The respondent denied the complainant's request on June 22, 2000, because a leave to care for an uncle is not covered under the union contract or the CFMLA.

6. On July 7, 2000, the complainant requested a CFMLA leave for himself, due to "mental distress." The request was for two weeks and then as needed. The complainant provided the necessary medical forms and the respondent granted the leave.

7. The respondent was aware that the complainant worked at the oil business throughout his employment with the respondent. In fact, the complainant occasionally drove a Lavorgna Fuel Oil truck to his job with the respondent. The complainant told the respondent that he was under stress working full time for the respondent, caring for his uncle, and working for the oil business.

8. The respondent does not prohibit an employee from working a second job during hours that the employee is not scheduled to work for the respondent. The complainant was aware that the respondent does not grant leaves of absence to employees to work for other employers during the hours employees were scheduled to work for the respondent.

9. The complainant began his CFMLA leave on July 31, 2000. The leave ended on August 15, 2000.

10. During the leave period, the complainant made a minimum of twenty-nine oil deliveries and six service calls for Lavorgna Fuel Oil Service. Some deliveries and work were tape recorded by a private investigation firm hired by the respondent to determine whether the complainant was working while on leave. The complainant did perform some work for Lavorgna Fuel Oil after 4:00 p.m., which was the complainant's scheduled start time for the respondent.

11. The respondent has union contracts with at least five unions and has a personal leave policy for non-union workers. Three of the five contracts (Local 371, 919, 1262) have wording that specifically prohibits an employee on any approved leave from working elsewhere without the "express permission in writing" from Stop & Shop. The respondent's personal leave policy has similar wording.

12. The complainant's union contract (Local 443) only addresses a leave of absence under Article IX 2) TERMINATION OF SENIORITY (a) Seniority shall be broken only by: 4. Unauthorized leave of absence. No other references are made to a leave of absence in this contract.

13. On August 30, 2000, the respondent suspended the complainant pending termination for a "family leave discrepancy," working for another employer while on leave. The complainant and his union grieved the suspension.

14. The complainant initially denied that he had worked for Lavorgna Fuel Oil while on leave. The respondent showed the complainant the video tape from the private investigator. After viewing the videotape, the complainant admitted that he had worked for Lavorgna Fuel Oil while he was on leave. The respondent then initiated the complainant's termination.

15. On September 6, 2000, the complainant through his union requested a voluntary separation in lieu of discharge. The respondent agreed and the complainant provided it with a resignation.

16. The respondent has never granted a leave of absence request made to allow an employee who wants to work another position. The respondent has discharged other employees who were working while on an authorized leave of absence.

ISSUE

The issue is whether the respondent discharged the complainant in retaliation for exercising his rights under the Connecticut Family and Medical Leave Act. Additionally the respondent requests that the complainant's complaint be dismissed based on his requesting to voluntarily leave the job and the fact that he signed a waiver of claims against the respondent when he resigned his job.

DENIAL OF RESPONDENT'S REQUEST TO DISMISS THE COMPLAINANT'S CFMLA COMPLAINT

Preliminarily, the hearing officer denies the respondent's request to dismiss the complainant's CFMLA complaint based on the waiver of rights by the complainant when he signed the resignation and general release form. Under the federal FMLA, the waiver of FMLA rights contained in an employee's separation agreement is unenforceable as a matter of law. Family and Medical Leave

Act of 1993, § 105, 29 U.S.C.A. § 2615; 29 C.F.R. § 825.220(d). The pertinent FMLA regulation states that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. § 825.220(d).

In *Chevron U.S.A., Inc. v. National Resources Defenses Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the United States Supreme Court held that § 825.220(d) is a permissible construction of the FMLA and consistent with Congress' expressed intent that "it shall be unlawful for any . . . employer to interfere with, restrain or deny the exercise of any right provided under [the FMLA]." 29 U.S.C.§ 2615. The plain language of 29 C.F.R. § 825.220(d), a valid Department of Labor regulation, makes the waiver of FMLA rights contained in the complainant's separation release unenforceable. Similarly, Section 31-51qq-25(d) of the Connecticut State Agencies Regulations provides, in pertinent part: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot 'trade off' the right to take FMLA leave against some other benefit offered by the employer." The complainant was not coerced into signing the release, but he certainly did not knowingly and voluntarily waive his state claim under the CFMLA.

PROVISIONS OF GENERAL STATUTES

Section 31-51nn(a) of the General Statutes provides: (a) Any eligible employee who takes leave under General Statutes § 31-51 for the intended purpose of the leave will 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 employment benefits, pay and other terms and conditions of employment.

Section 31-51pp(a) of the General Statutes provides: (1) It will 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 rate provided under said section. (2) it will 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 other 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.

COMPLAINANT'S CONTENTIONS

The complainant contends that he did nothing knowingly wrong when he continued to work at Lavorgna Fuel Oil while he was on CFMLA leave from the respondent. He argues that he was not told he could not work, that he was not given the rules, and that the respondent's treatment of him

was unfair given his length of service and relatively clean record. The complainant further maintains that his contract does not prohibit from working while on leave, and he alleges that at least one other employee who worked while on FMLA leave was not similarly disciplined.

RESPONDENT'S ANSWER

The respondent contends that even if the complainant did not knowingly violate the respondent's leave policy, he has failed to prove discrimination or retaliation by the respondent for exercising his rights under the CFMLA. The respondent further contends that it has uniformly enforced its policy of prohibiting its employees from working while on CFMLA leave.

ANALYSIS AND CONCLUSION

The complainant has offered no evidence the respondent interfered with the exercise of his rights under the Connecticut FMLA. If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA. Regs., Conn. State Agencies §31-51qq-37(g). The respondent has a uniformly applied policy concerning secondary employment that it enforces during leaves of absence, including leaves under the CFMLA. Three of five union contracts prohibit employees from working while on leave. The personal policy for non-union workers contains the same prohibition. Although the contract governing the facility where the complainant was employed is silent concerning leaves of absence, the respondent has terminated other employees who were governed by this contract when it became aware that the employee had worked or was working while on a leave of absence. The respondent has uniformly enforced the policy for all of its employees whether or not they belonged to a union.

The complainant acknowledges that the respondent was unaware that some of its employees worked while they were on leaves of absences, and that he personally did not inform the respondent that a particular employee was violating the respondent's leave policy. The complainant did not advise the employer because he was aware that the offending employees would be subject to discipline for this action, and "it was not his place to cause trouble." The complainant further testified that it is common sense not to ask for a leave of absence to work another job. The complainant also acknowledged that the respondent would probably have discharged other employees who worked while on leave if they had discovered this activity.

The complainant argues that he requested the leave of absence because he was ill and not because he had to make deliveries for Lavorgna Fuel Oil. Because the complainant did not, in his own mind, take the leave to work at the secondary business does not mean that the respondent retaliated or discriminated against him. The respondent has satisfied its burden of production that it had a legitimate reason for discharging the complainant under its policies. The complainant has not

provided any pretextural reason for his termination. See *Baung v. Energy Corp.*, 1999 U.S. Dist. LEXIS 9418 (E.D.La 1999). The employer has consistently handled all employees on FMLA leaves the same regarding working while on an approved leave. The only employees who were not disciplined for working while on FMLA leave were those employees who worked without the respondent's knowledge.

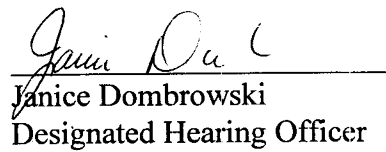
The respondent's investigation of the complainant's activities while he was on leave was initiated because it was aware of the complainant's sideline business and his prior request for a leave to assist his uncle which it had denied as not covered under the CFMLA. Even if the respondent's investigation was poorly done, the courts have stated that they do "not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high handed its decisional process, no matter how mistaken the firm's manager," the laws barring discrimination do not interfere. *McCoy v. WGN,* 957 F.2d 368, 373 (internal citations omitted). See *Kariotis v. Navistar Interna'l Trans. Corp.*, 131 F.3d 672, 681 (7th Cir. 1997).

The respondent terminated the complainant based on its good faith, reasonable belief that the complainant did not use the CFMLA leave time for its intended purpose. In *Kariotis*, the Seventh Circuit held that an employer who honestly believes that it is discharging an employee for misusing FMLA leave is not liable for violating FMLA if in fact, the employer was mistaken in its belief. In *Moughari v. Publix Super Markets*, 1998 WL 307454 (N.D.Fla.), aff'd without opinion, 170 F.3d 188 (11th Cir.1999), the district court held that whether the use of the leave was correct, whether the employer's conclusion about the use of the time was correct, and whether the employer failed to properly advise the employee about his FMLA rights, the termination did not constitute a violation of FMLA based on the good faith, reasonable belief of the employer that the employee was misusing FMLA leave time. See also *Medley v. Polk Company* (2001), 260 F.3d 1202 [7 WHCases2d 257], citing *Stonum v. U.S. Airways, Inc.*(1999), 83 F.Supp.2d 894 [7 WH Cases2d 1302]; *Williamson v. Parker Hannifan Corp.*(2002), 208 F.Supp.2d 1248 [7 WH Cases2d 1682]. An employer who honestly believes that it is discharging a fraudulent employee may also not be liable for intentional discrimination under the FMLA. Family and Medical Leave Act of 1993, § 2 et seq., 29 U.S.C.A. § 2601, et seq. The complainant has offered no evidence or proof to the contrary. In fact, the complainant acknowledged in his testimony before this hearing officer that the respondent would have acted the same under similar circumstances involving an employee who had engaged in outside employment while on CFMLA leave.

PROPOSED DECISION

The complainant has failed to prove the respondent did not act in good faith, and did not act on a reasonable belief that the complainant was misusing his CFMLA leave. The complainant has failed to prove that the respondent retaliated against him for taking CFMLA leave or that there was any

discriminatory reason for the respondent's investigation of his activities while he was out on CFMLA leave or for the respondent discharging him when he returned from his CFMLA leave. The complainant has also failed to prove that the respondent interfered with his rights under the CFMLA. The hearing officer does not find the employer violated any provision of the CFMLA by terminating the complainant and proposes the complainant's case be **dismissed.**



Janice Dombrowski
Designated Hearing Officer