STATE OF CONNECTICUT
DEPARTMENT OF LABOR
200 Folly Brook Boulevard
Wethersfield, CT 06109

DOCKET NO. FM 2005-65

COMPLAINANT

Karen M. Schuster

By: Daniel T. Driesen, Esq.
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White Plains, NY 10603

EMPLOYER

Mooreland Holdings LLC aka
Mooreland Partners LLC

By: Lauren K. Kluger, Esq.
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800 Third Avenue, 21st Floor
New York, NY 10022-7604

Ambrose Employer Group

By: Neal Axelrod, Esq.
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New York, NY 10038

DATE MAILED: August 3, 2007

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 May 8, 2007 (a copy of which is attached hereto) as my final decision.

[Signature]
Patricia H. Mayfield
Commissioner
PROPOSED DECISION DISMISSING COMPLAINANT'S APPEAL

CASE HISTORY

On December 29, 2005, the complainant filed a complaint with the Connecticut Department of Labor Wage & Workplace Standards Division (hereinafter referred to as "the Division), alleging that her former employer, Mooreland Partners, LLC (hereinafter referred to as "Mooreland"), "and its affiliated company, Ambrose Employer Group," (hereinafter referred to as "Ambrose") violated the provisions of General Statutes §§ 31-51cc, et seq., An Act Concerning Family & Medical Leave from Employment (hereinafter referred to as "the CFMLA").

On February 23, 2006, the Division notified the parties that the complaint was dismissed for lack of jurisdiction, because the respondent Mooreland employed substantially fewer than seventy-five individuals, and was, therefore, not subject to the CFMLA.
On March 15, 2006, the complainant requested a hearing before the Labor Commissioner. The complainant also provided the Division with additional evidence and requested that it reconsider its decision to dismiss the complaint. On March 27, 2006, the Division denied the complainant’s request for reconsideration. The Labor Commissioner designated Associate Appeals Referee Karen D. Schumaker to hear the case.

On January 10, 2007, the Division filed a petition to intervene in the matter. Hearing Officer Schumaker granted the petition to intervene on January 22, 2007.

On January 25, 2007, Hearing Officer Schumaker conducted a contested case hearing on behalf of the Labor Commissioner in order to determine if the respondent is an employer subject to the CFMLA. The hearing was conducted at the offices of the Connecticut Department of Labor, 350 Fairfield Avenue, Bridgeport, Connecticut.

FINDINGS OF FACT

1. On December 22, 2003, respondent Mooreland Partners, LLC (hereinafter “Mooreland”) hired the complainant as office manager, at an annual salary of $60,000, with a $5,000 bonus contingent on performance.

2. Mooreland, an investment bank which opened in 2003, employed no more than seven individuals in its Greenwich, Connecticut office at all times relevant to these proceedings. Mooreland has no other offices in the State of Connecticut.


4. Ambrose, which has its corporate headquarters in New York, is a professional employer organization (hereinafter “PEO”), which provides companies with outsourced and off-site payroll, benefit administration and human resource administration services.

5. Pursuant to the agreement, Ambrose paid and reported wages, withheld, paid and reported taxes, processed wage garnishments, and furnished pay statements and year-end wage statements (e.g. IRS Form W-2) for Mooreland’s employees. Each payroll period, Mooreland was required to make a payment to Ambrose which included the funds that Ambrose used to pay the Mooreland employees’ wages.

6. Pursuant to the agreement, Ambrose procured workers’ compensation insurance for Mooreland’s employees.

7. Pursuant to the agreement, Ambrose maintained and administered employee benefit plans for Mooreland’s employees.
8. Pursuant to the agreement, Mooreland agreed to adopt Ambrose’s Family and Medical Leave and Equal Opportunity & Anti-Harassment Policies.

9. In exchange for these services, Mooreland paid Ambrose a one-time, per-employee initiation fee, and a monthly, per-employee administration fee.

10. The agreement did not provide that Mooreland’s employees would leave Mooreland’s employ, be hired by Ambrose, and be leased back to Mooreland. Instead, the agreement provided that Ambrose would “co-employ” Mooreland’s workers. The complainant never performed any services for Ambrose, but continued to perform employee functions for Mooreland exclusively.

11. The complainant’s compensation did not change as a result of the client service agreement. Ambrose had no right under the agreement to determine the amount of compensation that Mooreland’s employees would receive.

12. After September 1, 2004, Mooreland continued to direct the complainant’s day-to-day activities exclusively. Although the agreement provided that Ambrose reserved the right of direction and control over Mooreland’s employees, it never exercised that right. Pursuant to the agreement, Ambrose had no right to any work produced by the complainant for Mooreland.

13. Pursuant to the agreement, Mooreland retained the authority to hire, terminate, discipline and reassign its employees. Although the agreement provided that Ambrose reserved the right to hire, terminate, discipline and reassign Mooreland’s employees, it never exercised that right.

14. Pursuant to the agreement, Mooreland was solely responsible for conducting an annual review of the complainant’s performance.

15. Ambrose has similar client service agreements with several other, unrelated companies in Connecticut. Pursuant to these agreements, Ambrose provides administrative services for a total of one hundred and one (101) “co-employees” in Connecticut.

16. In December 2004, the complainant informed Mooreland she was pregnant, with an expected delivery date of June 2005.

17. On April 1, 2005, Mooreland proposed a twelve-week leave following the birth of the complainant’s child.

18. On April 4, 2005, the complainant’s physician advised her to stop working due to complications
related to her pregnancy. On April 4, 2005, the complainant also advised Mooreland that she expected a sixteen-week leave in accordance with the Connecticut Family and Medical Leave Act (CFMLA).

19. On April 13, 2005, Mooreland advised the complainant that she was eligible “under the FMLA and CT state statute to 16 weeks leave without pay and benefit coverage commencing April 4, 2005”.

20. On July 25, 2005, the complainant returned to work for Mooreland, following a sixteen-week leave of absence.

21. On September 1, 2005, Mooreland terminated the complainant’s employment.

**DECISION**

I. PROVISIONS OF LAW

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 other manner discriminate, against any individual for opposing any practice made unlawful by said sections or because such employee has exercised the rights afforded to such employee under said sections.

Section 31-51kk(4) of the General Statutes provides:

"Employer" means a person engaged in any activity, enterprise or business who employs seventy-five or more employees, and includes any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer and any successor in interest of an employer, but shall not include the state, a municipality, a local or regional board of education, or a private or parochial elementary or secondary school. The number of employees of an employer shall be determined on October first annually.
Section 31-55qq-l(i) of the Connecticut State Agencies Regulations provides:

"Employer" means a person engaged in any activity, enterprise or business who employs 75 or more employees. The term "employer" includes:
(1) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
(2) any successor in interest of the employer.

The term "employer" does not include the state, a municipality, a local or regional board of education, or a private or parochial elementary or secondary school. For purposes of sections 31-51qq-1 through 31-51qq-48 inclusive, the number of employees of an employer shall be determined on October first annually.

Section 31-55qq-l(i) of the Connecticut State Agencies Regulations: How is "joint employment" treated under FMLA?

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally shall be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee’s service or to interchange employees;

(2) Where an employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee’s employment and may be deemed to share control of the employee, directly or indirectly, because an employer controls, is controlled by, or is under common control with the other employer.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment shall ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

II. ISSUES
The complainant alleges that the respondents violated the CFMLA. The preliminary issue raised by the complainant is whether the respondents are employers subject to the CFMLA.

III. COMPLAINANT’S CONTENTIONS

The complainant contends that respondents Mooreland and Ambrose jointly employed the complainant. The complainant maintains that Ambrose was a joint employer because it administered payroll and benefits, and because it retained the right to hire, fire, discipline and reassign Mooreland’s employees, including the complainant.

The complainant contends all employees of both entities must be counted toward the seventy-five employee threshold. The complainant maintains that the Division’s failing to include the approximately one hundred and one (101) individuals co-employed by Ambrose in the State of Connecticut runs contrary to public policy. The complainant further contends that the respondents effectively waived any claim that they are not subject to the Connecticut Family and Medical Leave Act (CFMLA) by notifying the complainant in writing that she was entitled to a sixteen-week leave of absence under the "FMLA and CT state statute."

IV. DISCUSSION

A. RESPONDENT MOORELAND PARTNERS, LLC IS NOT AN "EMPLOYER" SUBJECT TO THE CFMLA BECAUSE IT DOES NOT EMPLOY SEVENTY-FIVE OR MORE EMPLOYEES IN THE STATE OF CONNECTICUT.

In enacting the CFMLA, the General Assembly sought to balance the interests of Connecticut workers and those of Connecticut’s employers, particularly small employers. See Jenco v. United Airlines, FMLA Docket No. FM 2004-47 (August 28, 2006). The General Assembly made a policy decision to exclude employers with less than seventy-five employees in the State of Connecticut from the CFMLA’s provisions. See General Statutes § 31-51kk(4); see also Regs., Conn. State Agencies § 31-55qq-l(l). During all times relevant to these proceedings, Mooreland employed no more than seven individuals in Connecticut. Thus, Mooreland is not subject to the CFMLA.

B. RESPONDENTS MOORELAND PARTNERS, LLC AND AMBROSE EMPLOYER GROUP, LLC WERE NOT "JOINT EMPLOYERS" FOR PURPOSES OF THE CFMLA.

1. Ambrose is not a joint employer as defined by the CFMLA statute and its regulations.

Joint employment exists where the employee performs work which simultaneously benefits two or more employers. Regs., Conn. State Agencies § 31-55qq-4. An employee means "any person engaged in service to an employer in the business of the employer." Regs., Conn. State Agencies § 31-51qq-l(h). The complainant did not perform any work for the benefit of Ambrose, a
professional employer organization (PEO) which merely administered payroll, benefits and some human resources functions for Mooreland.

Although joint employment is not determined by the application of any single criterion, but by an evaluation of the relationship as a whole, Section 31-51qq-4(a) of the Connecticut State Agencies Regulations sets forth the circumstances under which a joint employment relationship will generally be found to exist: where there is an arrangement between employers to share employees’ services or to interchange employees; where employer acts directly or indirectly in the interest of the other employer in relation to the employee; where employers are not completely disassociated with respect to the employee and may be deemed to share control of the employee; and where a temporary or leasing agency supplies employees to a second employer.

In this case, Ambrose did not supply employees to Mooreland through a temporary help or leasing arrangement. The complainant provided services only to Mooreland, which exclusively directed and supervised the complainant’s work. Although the client service agreement provides that Ambrose reserved the right to control Mooreland’s employees, it never exercised this right. Ambrose acted on Mooreland’s behalf in relation to its employees only with respect to payroll, benefit and human resource services. In determining whether two entities jointly employed an individual, the mere fact that one company purchases administrative services from another company is not dispositive. See Cruz-Lovo v. Ryder System, Inc., 298 F. Supp.2d 1248 (S.D. Fla. 2003).

2. Ambrose is not a joint employer pursuant to the "economic reality" test articulated by the courts.

In determining whether a joint employment relationship exists for purposes of the federal FMLA, the courts have considered the Fair Labor Standards Act (FLSA) case law and regulations. See Cruz-Lovo, Id. at 1255.¹ In Zheng v. Liberty Apparel, 355 F.3d 61 (2nd Cir. 2003), the 2nd Circuit held that whether an entity is a joint employer is based on ""the circumstances of the whole activity," viewed in light of the "economic reality." (Citing Rutherford Food Corp. v. McComb 331 U.S. 722, 730 (1947), and Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961)). Factors to be considered include, but are not limited to: whether the entity had the power to hire and fire the employee; whether the entity supervised and controlled employees’ work schedules and conditions of employment; whether the entity determined the rate and method of payment; and whether the entity maintained employment records.

The record reveals that although Ambrose contractually reserved the right to hire and fire, it never exercised that right. In Cruz-Lovo v. Ryder Systems, Inc., 298 F.Supp.2d at 1256, the court rejected the argument that the putative employer had the authority to hire and fire the complainant

¹ In a September 11, 2000 advisory opinion, the U.S. Department of Labor stated: "The standards established under the Fair Labor Standards Act (FLSA) are used to determine joint employment under the FMLA."
by virtue of a generic "at-will" clause in the employment contract. The court pointed out that the contractual language did not shed any light on the actual working relationship, and that to determine whether joint employment exists, "the court must examine the actual relationship between the parties to find whether the worker was economically dependant on the alleged employer." Id. In the instant case, Ambrose did not control the hiring and firing of Mooreland's employees. Thus, it is distinguishable from Russell v. Bronson, 345 F. Supp.2d 761 (E.D. Mich. 2004), which found a joint employment relationship between a direct employer and a PEO. In Russell, all of the small employer's workers became employees of the PEO and were leased back to the small employer, which could only fire employees under certain circumstances. The PEO retained the ultimate authority to hire, fire and discipline employees. In the instant case, the complainant never left the employ of Mooreland, which continued to have the unrestricted right to hire and fire employees at any time.

The agreement contains similar language stating that Ambrose reserved the right of direction and control. In actuality, Ambrose also never supervised Mooreland's employees nor controlled their hours and conditions of employment. Mooreland was exclusively responsible for training the complainant, setting her hours, supervising her work and reviewing her performance. Mooreland set the complainant's salary, which did not change as a result of the client service agreement between Mooreland and Ambrose. Mooreland also provided Ambrose with the funds to pay Mooreland's employees. Ambrose merely administered payroll for Mooreland. The fact that a PEO performs the ministerial and administrative tasks of cutting payroll checks, paying taxes to the appropriate government agencies, and paying premiums with funds provided by the employer does not weigh in favor of finding joint employment. See Jeanneret v. Aron's East Coast Towing, Inc., No. 01-8001, 2002 WL 32114470 at 7-8 (S.D. Fla. June 29, 2002). The record contains no evidence that Ambrose maintained any employment records other than those related to its role as payroll administrator.

In Zheng, the court clarified that although these factors can be sufficient to establish joint employment, all factors must be considered. Some of the additional factors it identified, from Rutherford, are whether the putative joint employer's premises and equipment are used by its putative joint employee; whether the employee performed line work or work that "lies on the usual path" of the putative employer's business; whether the putative joint employer is a subcontractor that only serves the employer instead of seeking business from a variety of contractors; whether employees are tied to the putative joint employer rather than the subcontractor who is their ostensible direct employer; the degree to which the putative joint employer supervises the employee's work; and whether the putative joint employees worked exclusively or predominantly for the putative joint employer.

None of these additional factors weigh in favor of finding joint employment. The complainant did not work in Ambrose's offices, use its equipment or perform work related to Ambrose's business. Ambrose did not supervise the complainant's work because the complainant did not provide any services to Ambrose. The client service agreement reflected that the complainant worked for Mooreland directly, and was not a subterfuge arrangement like the subcontractor agreement in Rutherford. The complainant was economically dependent on Mooreland, which could
have selected another entity to provide payroll and related services without any material changes to the complainant's direct employment with Mooreland.

The economic reality is that Ambrose did not employ the complainant, but merely provided administrative support to her employer. This hearing officer is not persuaded that an employer that would otherwise not be subject to the CFMLA waives the small employer exemption intended by the legislature by virtue of engaging an outside firm to administer its payroll and benefits. Small employers are more likely to contract with other entities for administrative services. Firms which are too small to achieve the realizable economies of scale or scope in their industry will go under unless they can do so. See *Hukill v. Auto Care, Inc.*, 192 F.3d 437 (C.A.4 Va. 1999).

C. **EVEN IF THE RESPONDENTS' EMPLOYEES WERE AGGREGATED UNDER THE JOINT EMPLOYMENT DOCTRINE, THE THRESHOLD REQUIRING SEVENTY-FIVE EMPLOYEES HAS NOT BEEN SATISFIED IN THIS CASE.**

Section 31-51qq-4(d) of the Regulations of Connecticut State Agencies provides: "Employees jointly employed by two employers must be counted by both employers." Mooreland and Ambrose only "co-employed" seven employees. The employees who were "co-employed" by Ambrose and its other client companies in Connecticut are not employed jointly by Ambrose and Mooreland. Therefore, these employees cannot be counted toward the seventy-five employee threshold. In *Arculeo v. On-Site Sales & Marketing, LLC*, 425 F.3d 193, 197 (2nd Cir. 2005), the Second Circuit addressed whether employees of different entities may be aggregated under the joint employer doctrine to satisfy Title VII's fifteen-employee threshold. The court found that aggregation of employees under the joint employer doctrine would function quite differently from aggregation of employees under the single employer doctrine, in that "it does not follow that all of the employees of both employers are part of an integrated entity." The court reasoned that while the employees jointly employed by both entities count toward the threshold, there is no "logical justification for adding together all of the employees of both employers, unless the circumstances justify the conclusion that all the employees of one are jointly employed by the other." Thus, even if Mooreland and Ambrose jointly employed the complainant, they only had seven employees in common and do not meet the CFMLA threshold.

D. **THERE IS NO AUTHORITY TO FIND THAT THE RESPONDENTS SHOULD BE SUBJECT TO THE CFMLA BECAUSE THE COMPLAINANT WAS ERRONEOUSLY ADVISED THAT SHE WAS ENTITLED TO A SIXTEEN-WEEK LEAVE OF ABSENCE UNDER THE CFMLA.**

Although it has less than seventy-five employees, Mooreland notified the complainant in writing that she was entitled to a sixteen-week leave under the CFMLA, which she received. The complainant contends that, as an equitable matter, Mooreland and Ambrose are now estopped from claiming that they are not subject to the CFMLA. The complainant cites a Connecticut Superior Court case, *Fleming v. Asea Brown Boveri*, 2006 WL 224161 (January 6, 2006), for the proposition that an employer may not disclaim employer status under the single or joint employer theories if it
represented to the employee that it was his or her employer. However, in Fleming, the court did not impose liability based on any equitable theory. Instead, the court found that the plaintiff was employed by the parent company which had purchased all of the stock of the plaintiff’s direct employer and offered the plaintiff employment "for a position with Asea Brown, Inc.". Id. at 2. In the instant case, Ambrose had no ownership interest in Mooreland and there is no evidence Ambrose represented to the complainant that it was her employer.

Moreover, the court’s reasoning in Fleming would not support a finding of joint employment in the instant case. The court acknowledged that the fact that the putative employer managed the employee benefit plan for employees of its subsidiaries would not, in and of itself, establish an employer-employee relationship. Id. at 4. In applying the joint employment analysis, the court relied on the facts that both entities did the hiring and firing, and that Asea Brown set the salaries of the subsidiary where the plaintiff worked. Id. at 5. As stated above, Ambrose exercised no control over the hiring, firing and salaries of Mooreland’s employees.

The complainant has cited no legal authority for its position that an employer with less than seventy-five employees can become an employer subject to the CFMLA by virtue of its own mistake. Due to its misunderstanding of the law, Mooreland granted the complainant sixteen weeks of leave when it had no obligation to do so under the CFMLA. The Supreme Court has held that an employer should not be penalized for providing any employee with more generous leave than that required by the FMLA. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). The Division argues that the employer’s mistaken belief that it is subject to the CFMLA cannot confer jurisdiction where there is none. This hearing officer agrees. The Commissioner has no authority to order an employer to provide any of the relief set forth in Section 31-55-qq-47 of the Regulations of Connecticut State Agencies if that employer is not covered by the CFMLA.

CONCLUSION

The complainant has not established that she was jointly employed by Ambrose and Mooreland. The complainant worked exclusively for Mooreland, which is not subject to the CFMLA because it employed less than seventy-five individuals. Therefore, the complainant is not entitled to any relief under the CFMLA. The complainant is dismissed.

Karen D. Schumaker

2 In Ragsdale, the Supreme Court invalidated an FMLA regulation which penalized employers for failing to designate leave as FMLA leave, whether or not the employee was harmed by the failure to designate. Unlike the instant case, there was no dispute that the defendant Wolverine World Wide, Inc. was an employer subject to the FMLA.
Designated Hearing Officer
Employment Security Appeals Division
350 Fairfield Avenue, 6th Floor, Suite 601
Bridgeport, Connecticut 06604
CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to counsel for all parties by certified mail, postage prepaid, return receipt requested, on May 8, 2007, and that a copy of the foregoing was mailed to the complainant and the respondent by regular mail, postage prepaid, on May 8, 2007.

Karen D. Schumaker
Designated Hearing Officer
Employment Security Appeals Division
350 Fairfield Avenue, 6th Floor, Suite 601
Bridgeport, Connecticut 06604