COMPLAINANT
Joaquina Velez

By: Peter Gosselin, Esq.
Livingston, Adler, Pulda
Meiklejohn & Kelly
557 Prospect Avenue
Hartford, CT 06105-2922

EMPLOYER
Related Management Company

By: Sherry Scurfield, Senior VP
Related Management Company
423 West 55th Street
New York, NY 10019

Docket No.: FM 2005-49

Date Mailed:

FINAL DECISION

The undersigned, Patricia H. Mayfield, Commissioner of the State of Connecticut Department of Labor, hereby issues her final decision in the complaint captioned Joaquina Velez v. Related Management Company, Case No. FM 2005-49. This decision is issued pursuant to Conn. Gen. Stat. § 4-180 and Sections 31-1-8 and 31-51qq-47 of the Regulations of Connecticut State Agencies.

Following the issuance of the Proposed Decision of Hearing Officer Miguel Rivera on October 29, 2007, the Complainant, Joaquina Velez, requested an opportunity to file exceptions and present briefs and oral argument. In response thereto, on November 21, 2007, the undersigned issued an order setting December 21, 2007, as the deadline for submission of briefs. Complainant requested an extension of that deadline, and the undersigned ordered that briefs would be due by January 20, 2008. On January 7,
2008, Respondent, Related Management, submitted a letter informing the Commissioner that it would not be filing briefs or presenting oral argument, and that rather it would rely on the Proposed Final Decision of the Hearing Officer.

On March 5, 2008, the undersigned issued an order setting the date of oral argument for April 8, 2008, and on that date the undersigned commenced a hearing affording Complainant an opportunity for oral argument pertaining to the Proposed Final Decision and to fully address any legal claims and exceptions thereto. At said hearing, counsel for the Complainant, Joaquina Velez, was fully heard. Upon the close of the hearing, the undersigned took the matter under advisement.

Having had the opportunity to review the thorough brief submitted by Complainant, fully reviewing the administrative record in this case and giving due consideration to the oral argument presented on April 8, 2008, I hereby issue my final decision.

WHEREFORE, I affirm in whole and incorporate the Proposed Final Decision of the Hearing Officer issued on October 29, 2007, as my final decision in this matter, a copy of which is attached hereto.

In so ruling, I wish to emphasize that this decision does not reach the question of whether the agency may ever issue a default ruling against a respondent in a proceeding. Since resolution of that issue is not necessary to disposition of this matter, I will defer consideration of that issue. As the Hearing Officer correctly found, in this case Complainant failed to show that Respondent, Related Management, had 75 or more employees and was therefore subject to the Connecticut Family and Medical Leave Act.
Moreover, the Hearing Officer correctly invoked the agency's determination in *Jenco v. United Airlines*, Decision of the Commissioner, FMLA 2004-47 (August 9, 2006), in concluding that Respondent must have 75 or more employees in the State of Connecticut to be subject to the Act. A complainant must do more than simply contend that the employer *could* have more than 75 employees in Connecticut, particularly when the agency's own records (*i.e.*, the quarterly earnings reports) show otherwise. Without tangible evidence, it is unreasonable for the hearing officer to find fault with the quarterly earnings reports filed by employers with the agency.

5-12-08
Dated

[Signature]
Patricia H. Mayfield
Commissioner
STATE OF CONNECTICUT  
Department of Labor  
200 Folly Brook Boulevard  
Wethersfield, Connecticut 06109

PROPOSED FINAL DECISION OF HEARING OFFICER

Joaquina Velez v. Related Management Company

Docket No.: FMLA 2005-49

Date Decision is Mailed: October 29, 2007

Hearing Dates: May 7, 2007

Appearances:

For the Complainant: Joaquina Velez with Attorney Peter Gosselin, Livingston, Adler, Pulda, Meiklejohn & Kelly.

For the Respondent: Did not appear.

CASE HISTORY

On October 18, 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 her former employer, Related Management Company, 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 July 11, 2006, the respondent responded to the Wage and Workplace Standards Division, contending that the complaint was without merit and that it is not subject to the CFMLA.

On December 12, 2006, the Wage and Workplace Standards Division notified the parties that it had investigated the complainant’s complaint and determined that the respondent was not subject to the CFMLA.

On December 15, 2006, the complainant requested a hearing before the Labor Commissioner or her designee.
On December 26, 2006, Labor Commissioner Patricia Mayfield designated Miguel Rivera as hearing officer.

On May 7, 2007, Hearing Officer Rivera conducted a contested case hearing concerning the complainant’s complaint. The hearing officer conducted the hearing at the Connecticut Department of Labor, 3580 Main Street, 2nd Floor, Room 212, Hartford, Connecticut.

RULING ON COMPLAINTANT’S MOTION FOR DEFAULT AGAINST RESPONDENT

On April 25, 2007, the complainant filed a motion for default based on the respondent’s notification that it did not intend to appear for the contested case hearing. In her brief filed July 16, 2007, and her objections filed on August 22 and September 17, 2007, the complainant renewed her request that the hearing officer find a CFMLA violation by default and limit further proceedings to a hearing on damages.

At the outset, the undersigned notes that the complainant has cited no legal authority or precedent in support of her claim that the Labor Commissioner may enter a default judgment against the respondent. In her final decision, the Commissioner may order redress against the respondent only if it is an “employer” subject to the CFMLA. See Regs., Conn. State Agencies § 31-51qq-47. In order to conclude that the respondent is a covered employer, it must be found that it employs seventy-five or more employees. See Regs., Conn. State Agencies § 31-51qq-1(i); see also Schuster v. Mooreland Partners, FMLA 2005-65 (8/3/07)(respondent’s mistaken belief that it is subject to the CFMLA cannot confer jurisdiction when, in fact, it employed less than seventy-five employees). A finding of fact as to the number of employees must be based “exclusively on the evidence in the record.” Regs., Conn. State Agencies § 31-1-8. (Emphasis added.) Thus, this hearing officer cannot make a finding that the respondent employed seventy-five or more employees unless there is evidence of such in the record. The hearing officer has no authority to adopt the allegations in the complaint as findings of fact simply because the respondent failed to attend the contested case hearing.

Moreover, the complainant has not alleged sufficient facts to satisfy the prima facie elements of her claim, or to support a conclusion that the respondent is subject to the CFMLA. An employer is subject to the CFMLA only if it employs seventy-five or more employees in the State of Connecticut. See Jenco v. United Airlines, FMLA 2004-47 (8/9/06); see also Custin v. Boise Cascade, FMLA 97-3 (8/16/01). The complainant alleges only that the respondent employs more than seventy-five employees. The complainant’s failing to state that the respondent employs more than seventy-five employees in Connecticut was not a mere drafting error. Compare Tate v. Farmland Industries, Inc., 268 F.3d 989, 996 (10th Cir., Oct. 10, 2001)(district court erred in dismissing for failure to state a claim where plaintiff’s failure to specifically allege that he had worked the required number of hours to qualify for FMLA protection was
a technical defect easily cured by amendment). The complainant concedes that the respondent does not employ seventy-five employees in the State of Connecticut.\(^1\)

For the foregoing reasons, this hearing officer denies the complainant’s motion for default.

**RULING ON COMPLAINANT’S OBJECTION TO SUPPLEMENTING THE RECORD**

The Wage and Workplace Standards Division determined that the respondent employed fewer than seventy-five employees in Connecticut based on “Department of Labor records and information provided by Related Management Company.” After it dismissed the complainant’s complaint, and received the complainant’s request for a hearing, the Division forwarded its file to the designated hearing officer. The Division did not participate in the contested case hearing, at which the undersigned hearing officer entered into the record what appeared to be all of the relevant documents from the case file, including the complaint, the respondent’s response, the complainant’s rebuttal, the Wage and Workplace Standards Division’s decision, the complainant’s request for a hearing, and correspondence between the parties and the Division.

In her July 16, 2007 brief, the complainant argues that fundamental fairness precludes this hearing officer from relying on the Division’s conclusion that the respondent employs fewer than seventy-five employees because the records it relied upon in making that determination were not in the record of the contested case hearing. Although the complainant at no time disputed the respondent’s representation that it employed only 36 employees in Connecticut, the hearing officer nonetheless requested that the Wage and Workplace Standards Division produce a copy of the records that it relied upon in making its decision. In response to this request, the Wage and Workplace Standards Division provided a report run on August 30, 2007, which lists the quarterly wages and number of employees reported by the employer from the second quarter of 2003 through the first quarter of 2005. The Division also produced a business inquiry for Related Management Corporation, which was printed from the Secretary of State’s website on August 27, 2007.\(^2\)

Subsequent to the hearing, this hearing officer discovered that the Division’s original file contained an October 24, 2005 printout of the complainant’s quarterly wages from Related Management from the third and fourth quarters of 2001 and the fourth quarter of 2003 through the second quarter of 2005. Attached to the complainant’s wages is another October 24, 2005 printout entitled, “Wages by Employer By Quarter”, which shows that Related Management employed a total of 35 employees in Connecticut during the fourth quarter of 2004. In light of this discovery, it makes little sense to

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\(^1\) In pages 9-10 of her brief, the complainant states that some of the respondent’s seventy-five employees were employed in Connecticut. The complainant also states that “it is reasonable to infer that this New York-based real estate management company and its dozen other divisions jointly employ at least seventy-five employees inside and outside of Connecticut.”

\(^2\) Additionally, the respondent mailed the hearing officer copies of its Annual Statement of Deposits & Filings for Tax Years 2005 and 2004, and for the first quarter of 2007. The hearing officer is not considering these documents in reaching his decision.
supplement the record with the Division’s recent recreation of its investigation, instead of the October 24, 2005 printout that the Division clearly relied upon to determine the number of individuals employed by the respondent in Connecticut.

The hearing officer recognizes that the complainant did not examine these documents at the contested case hearing. However, the 2005 report reflects the same number of employees for the fourth quarter of 2004 as does the August 2007 printout which the Division supplied to the parties in response to the hearing officer’s request. The complainant had an opportunity to examine and object to the quarterly report. In her objection, the complainant did not refute that the respondent employed only thirty-five individuals in Connecticut during the fourth quarter of 2004, nor did she seek another hearing in order to present rebuttal evidence. The complainant objects to the admission of the quarterly report on the basis that she was unable to question the respondent about the number of employees it employed at its out-of-state divisions.

This hearing officer concludes that the complainant is not prejudiced by his supplementing the record with the quarterly earnings report at this stage of the proceedings. The complainant has not established that she would have proceeded any differently at the contested case hearing if the quarterly earnings report had been introduced at that time. As the complainant noted, Section 31-51qq-42 of the Connecticut State Agencies Regulations provides that the employee quarterly earnings reports are to be used to determine the number of employees for purposes of the CFMLA. The complainant does not claim that she would have objected to the quarterly earnings report, which is a record maintained by the Labor Department in the ordinary course of its business. She has not at any time denied the respondent’s representation, and the Division’s conclusion, that the respondent employed only thirty-five employees in Connecticut. Instead, she maintains that “it is reasonable to infer that this New York-based real estate management company and its dozen other divisions jointly employ at least seventy-five employees inside and outside of Connecticut.” Although the complainant was well aware that the respondent was not going to appear for the contested case hearing, she did not subpoena a single witness from the respondent or from any of the other divisions which the complainant’s brief indicates are listed on the respondent’s website. Thus, she would not have cross-examined any witnesses regarding the quarterly earnings report if she had examined it at the time of the contested hearing.

The record is supplemented with the October 24, 2005 printouts of the complainant’s quarterly wages and the respondent’s quarterly Wage report for the fourth quarter of 2004.

**FINDINGS OF FACT**

1. From April 25, 1983, until on or about July 18, 2005, the complainant, Joaquina Velez, worked for the respondent, Related Management Company. The claimant worked full-time as office manager at the respondent’s apartment complex at 643 Broad Street, Hartford, Connecticut.

2. On or about April 12, 2005, the claimant stopped working because she had suffered an injury.

3. On April 15, 2005, the respondent notified the claimant that her absence was designated as leave pursuant to the Family and Medical Leave Act. The respondent advised the claimant that she was
entitled to twelve weeks of FMLA leave and that she would be administratively terminated from employment upon exhaustion of her leave.

4. On or about July 18, 2005, the respondent terminated the complainant's employment.

5. As of October 1, 2004, the respondent employed thirty-five employees in the State of Connecticut.

PROPOSED 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-3 of the Connecticut State Agencies Regulations provides:

In determining whether an employer is covered by FMLA, what does it mean to employ 75 or more employees on October first annually?

(a) Any employee whose name appears on the employer's payroll for the week including October first shall be considered employed for that week and shall be counted, whether or not any compensation is received for the week.

(b) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee shall later return to active employment. If there is no present employer/employee relationship (as when an employee is laid off, whether temporarily or permanently), such individual is not counted. Part-time employees, like full-time employees, are considered to be employed for the week including October first, as long as they are maintained on the payroll.

(c) Once an employer meets the 75 or more employee threshold on October first, the employer remains covered until the number of employees is determined on the following October first.

Section 31-55qq-3 of the Connecticut State Agencies Regulations provides:

What employers are covered by the FMLA?

In order to determine which employers may have employed a sufficient number of employees as of October first of the previous year to be covered under the Act, the Commissioner may rely upon data contained in the Employee Quarterly Earnings Report required pursuant to Section 31-225a(j) of the General Statutes (Chapter 567-Unemployment Compensation) for the third quarter of the prior calendar year.

Section 31-225a(j) of the General Statutes provides:

Each employer subject to this chapter shall submit quarterly, on forms supplied by the administrator, a listing of wage information, including the name of each employee receiving wages in employment subject to this chapter, such employee's Social Security account number and the amount of wages paid to such employee during such calendar quarter.

Section 31-222 of the General Statutes provides, in relevant part, that:
(2) The term "employment" shall include an individual's entire service performed within, or both within and without, this state, (A) if the service is localized in this state, or (B) if the service is not localized in any state but some of the service is performed in this state, and if (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state, or (ii) neither the base of operations nor the place from which such service is directed or controlled is in any state in which some part of the service is performed but the individual's residence is in this state.

(3) Services not covered under subdivision (2) of this subsection and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state, or of the federal government, shall be deemed to be employment subject to this chapter, if the administrator approves the election of the employer for whom such services are performed, that the entire service of the individual performing such services shall be deemed to be employment subject to this chapter.

(4) Services shall be deemed to be localized within a state if (A) the service is performed entirely within such state, or (B) the service is performed both within and without such state but the service performed without such state is incidental to the individual's service within the state; for example, is temporary, or transitory in nature, or consists of isolated transactions.

Section 1-2z of the General Statutes provides:

Plain Meaning Rule. The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

II. PARTIES' CONTENTIONS/ISSUE STATEMENT

The complainant contends that the respondent is subject to the CFMLA because it did not appear at the contested case hearing to present evidence in support of its claim that it employs less than seventy-five employees in Connecticut. The complainant also urges the hearing officer to reject the hearing officer's reasoning in Jenco v. United Airlines, FMLA 2004-47 (8/28/06). Specifically, she argues that the hearing officer can consider the respondent's out-of-state employees, and those of its related companies, in determining whether the seventy-five employee threshold set forth in the CFMLA has been satisfied. The complainant maintains that the respondent, which is a large real estate management company based in New York, has numerous divisions which employ, in the aggregate, at least seventy-five employees.
The preliminary issue raised by this case is whether the respondent is an employer subject to the CFMLA.

III. DISCUSSION

A. AN EMPLOYER IS NOT SUBJECT TO CONNECTICUT’S FAMILY AND MEDICAL LEAVE ACT UNLESS IT EMPLOYES AT LEAST SEVENTY-FIVE EMPLOYEES WITHIN THE STATE OF CONNECTICUT.

Section 31-51kk(4) of the General Statutes defines an “employer” as a person engaged in any activity, enterprise or business who employs seventy-five or more employees. The State of Connecticut Department of Labor has interpreted this statutory provision to apply to employers who employ more than seventy-five employees in the State of Connecticut. Jenco v. United Airlines, FMLA 2004-47 (8/28/07); see also Custin v. Boise Cascade, FMLA 1997-3 (8/16/01). The complainant contends that the plain language of General Statutes § 31-51kk(4) compels the conclusion that any employer with seventy-five or more employees is subject to the CFMLA, regardless of the state in which they are employed. The complainant maintains that Jenco was wrongly decided, and that the hearing officer in Jenco erred by engaging in statutory interpretation rather than applying the plain language of General Statutes § 31-51kk(4).

This hearing officer is persuaded that Jenco was correctly decided. The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. General Statutes § 1-2z. Thus, the definition of “employer” as a business with at least seventy-five employees, set forth in General Statutes § 31-51kk(4), must be read in light of the statute’s implementing regulations, which “have the force of statutes and constitute state law.” Acro Technology, Inc. v. Administrator, 25 Conn. App. 130, 135 (1991). Section 31-55qq-3 of the Connecticut State Agencies Regulations establishes the mechanism for determining the number of employees for purposes of determining if an employer is subject to the CFMLA. It provides that the Commissioner may rely upon the quarterly earnings reports that employers are required to file pursuant to the Connecticut Unemployment Compensation Act, Regs., Conn. State Agencies § 31-55qq-3. The quarterly earnings reports only include employees in Connecticut. See General Statutes §§ 31-225a(j) and 31-222. By establishing the quarterly earnings reports for Connecticut employees as the method for determining the number of employees, section § 31-55qq-3 clearly interprets the statutory definition of employer to mean a business that employs seventy-five or more employees in the State of Connecticut. The construction placed upon a statute or regulation by the agency responsible for its enforcement and administration is entitled to great deference. Bennett v. Administrator, Unemployment Compensation Act, 34 Conn. App. 620, 626 (1994).

There is no basis to conclude that the statute’s seventy-five employee threshold includes out-of-state employees, considering that the regulation which sets forth the mechanism for determining the number of employees counts only employees in the state of Connecticut. Furthermore, as noted in Jenco, such an interpretation would permit an employee working anywhere to seek redress under the CFMLA.
against an employer with minimal attachment to the State of Connecticut. Because the plain language of the text would yield absurd and unworkable results, the meaning of the statutory definition of “employer” must be ascertained in light of its legislative history and relationship to other provisions of the CFMLA.

The complainant argues that Section 31-55qq-3 of the Regulations of Connecticut State Agencies does not mandate how the number of employees is determined because it states that the agency “may” rely on the quarterly report. As addressed in Jenco, the regulatory language was revised from “shall” to “may” in recognition of the fact that a business may employ more than seventy-five employees in Connecticut throughout the quarter, but may have employed less than seventy-five employees on October 1. The change in the regulatory language was intended to benefit such employers by allowing them to submit additional evidence of the number of employees they employed as of October 1. There is nothing in the regulation’s history to suggest that the revision was intended to give the Division authority to count out-of-state employees toward the seventy-five employee threshold. Jenco at 9-10 (regulation was amended to allow the Division to supplement the quarterly reports with more weekly payroll records to determine the number of employees during the week containing October 1). Moreover, as explained in Jenco, the legislative history also does not indicate that the legislature intended to include employees outside of the State of Connecticut.

For the foregoing reasons, the undersigned concurs with the Commissioner’s reasoning in Jenco and concludes that the CFMLA applies only to employers who employ seventy-five employees in the State of Connecticut.

B. THE RESPONDENT DOES NOT EMPLOY SEVENTY-FIVE OR MORE EMPLOYEES WITHIN THE STATE OF CONNECTICUT.

The party challenging the Labor Department’s action in a CFMLA case has the burden of proof. Cendent Corp. v. Commissioner of Labor, 2004 WL 574880 (March 9, 2004), aff’d Cendent Corp. v. Commissioner of Labor, 276 Conn. 16 (2005). Thus, the burden of establishing that an entity is an “employer” for purposes of the CFMLA rests with the complainant, who must produce evidence to support this claim. See Brown v. SBC Communications, Inc., 2005 WL 2076584 (E.D. Wis.

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3 The complainant claims that this concern is merely a “paper tiger.” However, this was precisely the factual scenario in Custin v. Boise Cascade, FMLA 1997-3 (8/16/01). The respondent, an Ohio corporation, owned one sales office in the State of Connecticut which employed less than seventy-five employees. The complainant, whose address of record was in Rhode Island, split her time between the Connecticut sales office and another sales office in Massachusetts. The Commissioner rejected the argument that the Labor Department must look outside the boundaries of Connecticut to determine whether the employer had the requisite number of employees to be subject to the CFMLA.
2005)\(^4\)(defendant’s motion for summary judgment granted because plaintiff offered no evidence to support claim that he was jointly employed by a parent company); see also Missak v. Lakeland Engineering Equipment Co., 2005 WL 2764825 (D. Neb. 2005)(defendant’s motion for summary judgment granted because plaintiff offered no evidence to support her claim that the defendant employed more than fifty people within a seventy-five mile radius). The complainant argues that the respondent should be considered a covered employer under the CFMLA because “there is no testimony in the record that respondent does not employ a sufficient number of employees to be covered.” This hearing officer disagrees.

An agency’s findings of fact must be supported by substantial evidence in the administrative record. See Southern New England Telephone Company v. Cashman, 283 Conn. 644, 648, 931 A.2d 142 (2007). As stated previously, the findings of fact in this case must be based “exclusively on the evidence in the record.” Regs., Conn. State Agencies § 31-1-8. Thus, this hearing officer cannot find that the respondent employs at least seventy-five employees in the State of Connecticut based on nothing more than the complainant’s conclusory allegation that “the respondent employs more than seventy-five employees” and the respondent’s failure to appear at the contested case hearing. To do so would ignore exhibits introduced into the record at the contested case hearing and in the record as supplemented. These documents include the respondent’s answer, in which Sherry Scurfield, Senior Vice President, represented that the respondent employs only thirty-six employees in Connecticut, and the Division’s decision which reported that its investigation revealed that the respondent employed substantially less than seventy-five employees in Connecticut. The quarterly earnings report with which the record has been supplemented confirms that the respondent employed thirty-five employees in Connecticut as of October 1, 2004.

The complainant has not produced any evidence whatsoever that the respondent employs at least seventy-five employees in Connecticut. Although she was on notice that the respondent did not intend to participate in the contested case hearing,\(^5\) and claims that examining the respondent’s witness(s) was critical to her case, the complainant did not subpoena any witnesses or documents from the respondent. The claimant argues that her cross-examination of the respondent’s witness(s) would likely have established that its offices in New York and other related companies employ sufficient employees to meet the seventy-five employee threshold. Significantly, however, the complainant has never claimed that the respondent employs at least seventy-five employees in Connecticut, nor has she

\(^4\) The Labor Commissioner and Connecticut courts have relied upon federal FMLA cases for guidance in analyzing claims brought under the CFMLA. See Cendant Corporation v. Commissioner of Labor, 276 Conn. 16, 883 A. 2d 784 (2005); see also 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).

\(^5\) The hearing officer does not agree with the complainant’s assertion that the respondent violated his prehearing order. This hearing officer did not order the respondent to appear, but instead ordered the parties to submit a list of their proposed witnesses and documentary evidence. The respondent complied with this order by notifying the hearing officer and the parties that it did not intend to present any witnesses or evidence at the hearing.
at any time denied the respondent’s representation or the Division’s conclusion that the respondent employed less than seventy-five employees in Connecticut. This hearing officer finds that the complainant has not met her burden of establishing that the respondent is an “employer” subject to the CFMLA.  

IV. CONCLUSION

The complainant has failed to demonstrate that the respondent is an employer subject to the CFMLA. Therefore, the complainant has not established that she is entitled to redress under the CFMLA. Accordingly, the undersigned hearing officer recommends that the Commissioner dismiss the complaint.

Miguel Rivera
Designated Hearing Officer
Department of Labor
3580 Main Street, 2nd Floor
Hartford, CT 06120

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 8, 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.

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6 We note that the Supreme Court has recently held that Title VII’s employee numerosity requirement is not a jurisdictional requirement but an element of the plaintiff’s claim for relief. Arbaugh v. Y&H Corporation, d/b/a Moonlight Café, 546 U.S. 500, 126 S.Ct. 1235 (2006). Several circuit courts have applied the Supreme Court’s holding in Arbaugh to claims brought under the FMLA. See Minard v. ITC Deltacom Communications, Inc., 447 F.3d 352 (5th Cir. 2006); Cobb v. Contra Transport, Inc., 452 F.3d 543 (6th Cir. 2006); Hackworth v. Progressive Casualty Insurance Company, 468 F.3d (10th Cir. 2006). The Second Circuit has not specifically addressed this issue in an FMLA case; however, it held that the threshold number of employees for application of Title VII is not jurisdictional prior to the Supreme Court’s decision in Arbaugh, which cited the 2nd Circuit’s reasoning. Regardless of whether the seventy-five employee threshold is a jurisdictional prerequisite, or an element of the complaint’s CFMLA claim, the Commissioner cannot grant the complainant redress under General Statutes § 31-55pp(c)(2).