NO. CV 08 4017925S	:	SUPERIOR COURT
JOAQUINA VELEZ	:	JUDICIAL DISTRICT OF
	:	NEW BRITAIN
V.		
PATRICIA MAYFIELD, COMMISSIONER DEPARTMENT OF LABOR, STATE OF CONNECTICUT, AND RELATED MANAGEMENT COMPANY	:	MAY 14, 2010

MEMORANDUM OF DECISION

The plaintiff, Joaquina Velez, appeals from a May 12, 2008 final decision of the defendant department of labor (DOL) dismissing her complaint against her employer, Related Management Company (Related), alleging a violation of her rights pursuant to the Connecticut Family and Medical Leave Act (CFMLA), General Statutes § 31-55kk, et seq.

The following facts appear of record. See Return of Record (ROR), pp. 275-276. For approximately twenty-two years, from April 25, 1983 to July 18, 2005, the plaintiff worked for Related as a full-time office manager for an apartment complex located at 643 Broad Street, Hartford.

On April 7, 2005, the plaintiff fell and fractured her hand on the defendant's premises. The plaintiff claimed that she was able to perform her duties but that Related involuntarily placed her on medical leave. The plaintiff alleged that she attempted to

return to work with a doctor's note on May 2, 2005 but that Related required the plaintiff to be fully recovered. On July 18, 2005, Related terminated the plaintiff's employment. Following her termination, the plaintiff's doctor provided a note stating the plaintiff could return to work with a restriction that she not lift more than five pounds. On August 11, 2005, the plaintiff informed Related that she was physically able to perform her job and requested that she be reinstated. Related declined to rehire the plaintiff even though the plaintiff's former position remained open.

On October 14, 2005, the plaintiff filed a complaint with DOL that Related had violated her rights under the CFMLA. (ROR, p. 274.) On December 12, 2006, DOL sent plaintiff's counsel a letter indicating its intent to dismiss the plaintiff's complaint. DOL contended that the defendant was not covered by CFMLA because Related's records showed that it did not employ 75 employees in Connecticut on October 1, 2004. On December 15, 2006, the plaintiff made a written request for a public hearing on the issue of whether Related was subject to the requirements of the CFMLA.

The hearing officer twice issued a notice of contested case hearing and pre-hearing order. Both the plaintiff and Related received orders requiring that by April 16, 2007, the parties provide the hearing officer with witness lists and copies of documents that the parties would seek to introduce at the hearing.

The plaintiff timely complied with the orders but Related did not. The plaintiff

then moved for default for Related's failure to comply. On May 3, 2007, DOL received a letter from Related stating it did not intend to appear at the public hearing. (ROR, p. 186.) The plaintiff was informed of Related's non-appearance at the public hearing on May 7, 2007. Because Related did not appear at the public hearing, the plaintiff claimed that it was deprived of the opportunity to cross-examine Related or any of its witnesses regarding the number of employees it employs within and outside of Connecticut.

At the public hearing and in various briefs to the hearing officer, the plaintiff moved for default against Related. (ROR, p. 191.) In the alternative, the plaintiff argued that because the language of the CFMLA does not require that an employer employ 75 employees within Connecticut, a decision that the defendant is covered by the CFMLA should have been rendered.

The hearing officer issued a proposed decision on October 29, 2007, refusing to default the defendant (ROR, p. 8) and dismissing the plaintiff's CFMLA complaint (ROR, p. 16), asserting that DOL lacked jurisdiction because the defendant did not employ 75 or more employees within Connecticut.

In his decision, the hearing officer made the following findings of fact:

1. From April 25, 1983, until on or about July 18, 2004, the complainant, Ms. Velez, worked for the respondent, Related. The claimant worked full-time as an 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 FMLA. 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 Connecticut.

(ROR, pp. 9-10.)

On May 12, 2008, DOL's commissioner approved the hearing officer's decision. (ROR, pp. 2-4.)

On June, 25, 2008, the plaintiff commenced an appeal to the Superior Court from DOL's decision.[1] On August 1, 2009, the court ordered the parties to re-brief the matter. On October 5, 2009, the court conducted a hearing on the merits. At the hearing, the court concluded that the plaintiff should have had an opportunity at the DOL hearing to establish the total number of employees the defendant employed throughout the United States. The court remanded the matter for a finding of the total number of employees the defendant employed throughout the country because the appeal was not complete and

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[1] Because DOL's hearing officer dismissed the plaintiff's complaint, the plaintiff is aggrieved for purposes of General Statutes § 4-183 (a).

"employer" as provided for in § 31-51kk (4).

Section 31-51qq-2 of the regulations provides at the caption: "What employers are covered by the act? (See 29 C.F.R. § 825.104)." The regulation reads, in part, as follows: "(a) 'Employer' is defined in section 31-51qq-1 (i) of the Regulations . . . . (b) Normally, the legal entity which employs the employee is employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or division."

Section 31-51qq-3 of the regulations provides at the caption: "In determining whether an employer is covered by FMLA, what does it mean to employ 75 or more employees on October first annually? (See 29 C.F.R. § 825.105)." The regulation reads, in part, as follows: "(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."

Section 31-51qq-6 of the regulations provides at the caption: "Which employees are 'eligible' to take a leave under FMLA? (See 29 C.F.R. § 825.110)." Subsection (a) of the regulation provides that "[a]n 'eligible employee' is defined in section 31-51qq-1 (f) of the Regulations . . . ." Subsections (b), (c) and (d) further describes the meaning of the "12 months of service" and "1000 hours" requirements.

"Eligible employee" is defined in 29 C.F.R. § 825.110 and subsections (b), (c), and (d) of § 31-51qq-6 largely tracks the language of the federal regulation. However, § 31-55qq-6 of the regulations does **not** have the language in subsection (a) (3) of 29

CFR § 825.110, namely, that "[a]n 'eligible employee' is an employee of a covered employer who: . . . Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite."

Section 31-51qq-42 of the regulations provides at the caption: "What employers are covered by the FMLA?" The regulation provides as follows: "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." (Emphasis added.)

The issue in this case is: where an employer has less than 75 employees in Connecticut, may a Connecticut employee qualify for the provisions of the CFMLA by counting the employer's total workforce, including out-of-state employees, so that the Connecticut employee would satisfy the 75-employee threshold provided for in § 31-51kk (4)?

DOL's commissioner approved the hearing officer's decision that the employee may not qualify under CFMLA by using total workforce numbers. On appeal, the court must decide whether, in making this ruling, DOL acted "unreasonably, arbitrarily, illegally or in abuse of its discretion." *Connecticut Assn. Of Not-for-Profit Providers for the Aging* v. *Dept. of Social Services*, 244 Conn. 378, 390, 709 A.2d 1116 (1998); *Autotote Enterprises, Inc.* v. *State*, 278 Conn. 150, 154, 898 A.2d 141 (2006). This is a

matter of statutory construction for the court to decide. *Livingston* v. *Dept. of Consumer Protection*, 120 Conn. App. 92, 97, __ A.2d __ (2010).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature . . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply . . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider 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 a statute shall not be considered . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citations omitted.) *Fairchild Heights, Inc.* v. *Amaro*, 293 Conn. 1, 8-9, 976 A.2d 668 (2009).

Finally, the court must adopt a construction that makes a statute effective and workable. *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 157, 788 A.2d 1158 (2002). "The law favors a rational statutory construction and we presume that the legislature intended a sensible result." (Citation omitted.) *Wiele* v. *Board of Assessment Appeals*, 119 Conn. App. 544, 551-52, 988 A.2d 889 (2010).

These principles raise two preliminary matters. First, DOL in two prior decisions (*Custin* and *Jenco*) concluded that § 31-51kk (4) did not allow the counting of out-of-

state employees. DOL asks the court to defer to these decisions. However, the two decisions have never received review by a court at any level. Therefore, deference is appropriate only if these DOL decisions are "time-tested and reasonable." *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010). Even if "time-tested," the court does not find these decisions reasonable and will not employ the deferential standard in its ruling.

The second issue is whether to consult extratextual legislative history. The wording of § 31-51kk (4) explicitly provides that there is a 75-employee threshold. Arguably there is ambiguity in looking at the entire scheme of the CFMLA to determine which employees may be counted. But even if the legislative history is consulted, DOL points only to statements made in 1989 by House of Representative members Cocco, Wollenberg and Larson that the 75-employee threshold was enacted to eliminate imposition of the CFMLA on Connecticut small businesses. Representative Lawlor's remarks in 1996, that Connecticut was attempting to mirror the federal Family Medical Leave Act, are not sufficiently helpful to the court.

Looking at the statute rationally, the court can only conclude that it contains no geographic limitation on counting employees. This case is no different from *Secretary of OPM* v. *Employees' Review Board*, 267 Conn. 255, 837 A.2d 770 (2004). In *OPM*, a Connecticut statute regarding state employees taking three "personal days" did not define the word "day." The definition became critical because the plaintiff contended that she was entitled to three 10-hour personal days as she worked four days of ten hours. OPM

argued that she was only entitled to three 8-hour days, as the standard work schedule was five days of eight hours. The Supreme Court adopted the plaintiff's interpretation, but suggested a solution – the law might be amended as had a parallel federal statute. Congress resolved the problem of non-standard work schedules by making a "day" equate to an "eight hour day" for purposes of "annual leave."

In *OPM,* the Supreme Court refused to impose a solution by judicial fiat; that was the task of the General Assembly. Id., 274. Similarly, while our legislature might restrict the 75-employee limit in § 31-51kk (4) to Connecticut, it is not the judicial function to "impute to the legislature an intent to limit [a] term where such intent does not otherwise appear in the language of the statute." Id.

The same analysis was given in the case of *Essex Crane* v. *Director, Division on Civil Rights*, 682 A.2d 750 (N.J. App. 1996), which considered a statute that limited New Jersey's Family Leave Act to employers of 50 or more employees. The plaintiff questioned a regulation that stated that the "50 or more employees" requirement was satisfied by counting out-of-state employees. Turning to the statutory language, the court rejected the plaintiff's argument, finding the regulation followed from the clear statutory language. "The only limit the Legislature placed on the Act's scope is the requirement that an employer have at least 50 employees. . . . We concede that policy reasons may exist to support a limitation on the Act's scope. That policy decision, however, must be made by the Legislature. . . . We cannot conclude that counting all employees and not merely New Jersey employees violates standards of reasonableness or common sense, or

leads to an absurd or anomalous result. . . . The Legislature lifted the Act's burden from employers with fewer than 50 employees. It did not require that all those employees be based in New Jersey, though it easily could have done so. Moreover, not all employers with less than 50 New Jersey employees are small businesses. Some may have hundreds or thousands of employees in neighboring states or in other parts of the country." Id., 752-53.[2]

DOL and Related argue that the statute becomes clear when § 31-51qq-42 of the regulations is considered. As seen above, however, § 31-51qq-1 (i) of the regulations defines an employer as a person who employs 75 or more employees; and § 31-51qq-3, states that "[a]ny employee whose name appears on the employer's payroll for the week including October first . . . . shall be counted."

The most rational meaning for § 31-51qq-42 is that it provides a mechanism for DOL, if it chooses, to rely upon the Employee Quarterly Earnings Report under Unemployment Compensation for the third quarter. The authority given by § 31-51qq-42 cannot be used to disallow the specific language of the other DOL regulations mandating that "any employee" be counted.

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DOL and Related claim that *counting* all employees will lead to the "absurd result" that an employee from another state will become eligible to use the CFMLA. They also fear that DOL will have to investigate claims arising out of state. But this result does not follow. The Superior Court has ruled that out-of-state employees of Connecticut corporations cannot seek protection under the state labor statutes. See, e.g., *Goldberg* v. *Goodwill Industries*, Superior Court, judicial district of Hartford, Docket No. CV 05 4009642 (January 3, 2006, *Keller, J.*).

Finally, the court's conclusion that DOL incorrectly refused to count out-of-state employees is strengthened by two lines of cases, raised by the court in its re-briefing order of August 11, 2009. First, it is accepted in a related labor law area – workers compensation – that out-of-state employees may be counted for jurisdictional purposes. See, e.g., *Martin* v. *Furman Lumber Co.*, 134 Vt. 1, 4, 346 A.2d 640, 642 (1975); 2 A. Larson, Workers Compensation, § 74.03[4] (2008).

Secondly, the threshold of 75 or more "employees" as set forth in General Statutes § 31-51kk (4) is a so-called small employer exception. Its purpose, similar to other anti-discrimination statutes, is to relieve the burden on Connecticut's small employers and to protect personal relationships in small businesses. See *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 706-08, 802 A.2d 731 (2002) (describing the burden as "crushing"); *Cyr* v. *Mountain Grove Cemetery Assn.*, Superior Court, judicial district of Fairfield, Docket No. CV 03 0401575 (August 4, 2004, *Thim, J.*) (a CFMLA case relying on *Thibodeau); Baker* v. *Iowa City*, 750 N.W. 2d 93 (Iowa, 2008), citing A. Bonfield, *State Civil Rights Statutes*, 49 Iowa L.Rev. 1067, 1108-09 (1963).

In light of the purpose[3] behind the 75-person exemption in § 31-51kk (4), the court cannot interpret the term "employee" as restricted to Connecticut employees so as to prohibit multi-state linking of employees. Such an interpretation would not only ignore the purpose of protecting Connecticut's small employers but also skew the

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[3] This purpose is also supported by the legislative history cited by DOL. Much of the 1989 debate concerned lessening the burden of the CFMLA on small businesses.

exemption in favor of entities that employ few Connecticut residents but have large numbers of personnel in other states.

For the foregoing reasons, the court concludes that DOL has made an error of law. Therefore, pursuant to § 4-183 (j), this matter is remanded for further proceedings on the merits.[4]

Henry S. Cohn, Judge

[4] The court finds it unnecessary to discuss the application of *Arbaugh Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) in the context of this case. It should be noted, however, that in *Arbaugh*, the Supreme Court held that a numerosity requirement in Title VII of the Civil Rights Act of 1964 was not a jurisdictional prerequisite to the bringing of an employment discrimination claim, but was merely one of the elements of the claim that a plaintiff must prove at trial in order to prevail.