UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GENEVIEVE SERAFIN,	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 3:98CV398 (CFD)
	:	
STATE OF CONNECTICUT,	:	
DEPARTMENT OF MENTAL HEALTH	:	
AND ADDICTION SERVICES	:	
Defendant.	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Genevieve Serafin brought this action against her former employer, the Connecticut Department of Mental Health and Addiction Services ("DMHAS"), alleging that the termination of her employment constituted illegal discrimination. Specifically, Serafin alleged that DMHAS unlawfully retaliated against her for exercising her First Amendment right to free speech, in violation of 42 U.S.C. § 1983, and that her firing also violated both the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., as well as the Family and Medical Leave Act ("FMLA" or "Act"), 29 U.S.C. § 2601 et seq. Finally, Serafin alleged that the defendant had committed the Connecticut common law tort of defamation.

All of Serafin's claims have been withdrawn by her or dismissed by the Court, except for her FMLA claim. See Docs. # 18, 72. The defendant has now filed a motion for summary judgment on the remaining Family and Medical Leave Act claim.

I. Background[1]

[1] The following facts are taken from the parties' Local Rule 56(a) statements, summary judgment briefs, and other evidence submitted by the parties. They are undisputed unless otherwise indicated.

In 1983, Serafin was hired as a staff nurse at Cedarcrest Regional Hospital ("Cedarcrest"), a short-term psychiatric care facility operated by DMHAS in Newington, Connecticut. From the outset of her employment with Cedarcrest, Serafin frequently was absent from work. These absences stemmed both from Serafin's own health problems, as well as those of her elderly mother.[2] Cedarcrest employees accrue leave time at the rate of 8.75 hours per month; Serafin tended to use her leave upon accruing it, and at times had to take unpaid leave because she had no further sick leave available to her. In addition, the collective bargaining agreement under which Serafin worked required that employees either provide supervisory personnel advance notice of any expected absences, or file a leave request form upon returning to work after an unexpected absence. Serafin did not always comply with these rules, and received written comments in her personnel file that she needed to improve her record of absenteeism. Notwithstanding her attendance problems, Serafin received good or above-average work evaluations in the first three years of her employment, and she was promoted to Night Shift Head Nurse around 1987.

The disputes between Serafin and Cedarcrest which led to her termination began in 1994. That year, Serafin took approximately 78 hours of paid sick time, 293 hours of unpaid sick time, and 22 hours of workers' compensation leave. Most of Serafin's unpaid, non-workers' compensation time (a total of around 42 days) was taken in short blocks of fewer than three days

[2] Serafin suffers from various health conditions, including migraines, allergies, back pain, knee pain, restless legs syndrome, foot injuries, upper respiratory infections, earaches, gastritis, and other viral infections. She has also been treated for anxiety and depression. Serafin was the sole caretaker for her mother from 1975 to 1999; during that period, Serafin's mother experienced various osteoporosis-related fractures and a pulmonary embolism.

at a time.[3] Serafin's attendance worsened in 1995. That year, she was absent from work for six days of paid sick leave, 60 days of unpaid sick leave, 30 days of unpaid personal leave, and 18 days of workers' compensation leave. In the first six months of 1996, Serafin took another 25 hours of paid sick leave, 310 hours of unpaid sick leave, four days of unauthorized leave, and a few hours of unpaid personal leave. These absences were of varying lengths and due to various health problems of either Serafin or her mother. Cedarcrest claims that Serafin did not provide proper documentation for all of this leave, or provided insufficient documentation (*e.g.*, a slip stating that she was "sick"). Serafin's general practice was to telephone around thirty minutes before the beginning of her shift, which Cedarcrest claims was insufficient notice under the terms of its attendance policy. Ultimately, Cedarcrest scheduled standby nurses for each of Serafin's shifts, because the hospital claimed it could not be certain whether Serafin would appear for work.

Although Serafin knew that she could have asked for a long-term medical leave, she did not do so because she expected the different ailments that caused her absences to improve in short order. Serafin did request four short-term medical leaves to care for her mother, all of which were approved by her supervisors at Cedarcrest: those leaves occurred December 20-26, 1994; April 7 to June 3, 1995; November 4-15, 1995; and January 17 to March 1, 1996.

As Serafin's absences became more frequent and lengthy starting in 1994, Cedarcrest correspondingly increased its scrutiny of her absenteeism. In September 1994, Cedarcrest Director of Nursing Ellen Kaplan wrote to Serafin that she was not meeting DMHAS guidelines

[3] This illness-related and workers' compensation leave was in addition to vacation and funeral time taken by Serafin in 1994.

for employee attendance, that her absenteeism was a continuing problem, and that she would be subject to more severe disciplinary action if her attendance did not improve. See Doc. # 98, Exh. 2A. In November 1995, Cedarcrest Director of Human Resources Thomas Tokarz wrote to Serafin, seeking medical documentation for a recent absence for which Serafin lacked accrued sick leave. In his letter, Tokarz noted that Serafin's "continued [lengthy] absence [would] be dealt with in accordance with the DMHAS Attendance Policy." Arbitrator's Decision and Award [Doc. # 98, Exh.1B], at 13. Tokarz again wrote to Serafin in December 1995, reminding her that all family leave must be requested in advance.[4] At Serafin's performance review in 1994, she was appraised as "Unsatisfactory," and in 1995 she rated "Fair." The most frequent reason given for Serafin's low ratings was her attendance problem.[5]

Serafin frequently was absent during the first six months of 1996. She spent two weeks during that period on family leave to care for her mother, while the remainder of her absences were due to Serafin's own illnesses. Various Cedarcrest officials wrote to Serafin during this time of the need to request absences in writing and to submit medical documentation for her own sick leave. On May 29, 1996, Serafin was suspended for three days for her failure to comply with Cedarcrest's absence policy. Her suspension letter read, in part:

> During the period from January 1, 1996 to March 29, 1996 you were absent for a total of 39.25 days. You again failed to provide the necessary request for unpaid leave or to submit appropriate documentation. . . .Your attendance was addressed via counseling and your Service Rating of October 1, 1995. It has steadily

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[4] In this letter, Tokarz nonetheless approved Serafin's retroactive request for family leave. The leave in question was Serafin's short-term family medical leave of November 4-15, 1995.

[5] Indeed, although some of those evaluating Serafin raised other criticisms of her, all identified her attendance as seriously affecting her job performance. At the same time, even when Serafin's overall job rating was at its lowest, she continued to receive good or above-average ratings for her nursing knowledge and skill at patient care.

> worsened to the point where additional staff is scheduled to replace you when you are scheduled to work. In addition, you repeatedly fail to request and document your absences appropriately. You clearly have the worst attendance at Cedarcrest Hospital. You must immediately improve and sustain this improvement or you will be terminated from State Service.
>
> You must request in writing any period of absence for personal sickness, illness in your family or any other reason for leave without pay. Unless you follow procedures in requesting leave it will be considered unauthorized leave. . . .

Arbitrator's Decision and Award at 17-18.

Serafin served her suspension in early June 1996, but her attendance record did not improve thereafter. On July 8, 1996, Tokarz notified Serafin by mail that she was being placed on paid administrative leave effective that day, because of her attendance record and other disciplinary infractions.[6] In that letter, Serafin was notified that her current infraction "along with [her] previous transgressions, constitute[d] grounds for dismissal." Id. at 28-29. Serafin was informed that an investigatory interview with her lawyer and Cedarcrest officials would be held to discuss these issues. That interview was held on July 23, 1996.

On August 12, 1996, Serafin was formally terminated by Cedarcrest Superintendent Dr. David Hunter. Hunter's letter stated that Serafin was being terminated for "insubordination, misconduct and unsatisfactory attendance record including unauthorized leave":

> Based upon an attendance review covering the period from October 1, 1995 to March 26, 1996 you were issued a three day suspension for unsatisfactory

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[6] These disciplinary infractions, which included refusing orders from supervisors and allegedly falsifying a document monitoring the use of controlled substances by Cedarcrest patients, also were claimed by Cedarcrest as reasons for Serafin's eventual termination. The infractions were examined by the state Voluntary Labor Arbitration Tribunal when evaluating the legality of Serafin's termination; while the arbitrator concluded that discipline for these infractions was appropriate, he stated that Serafin's attendance record overshadowed all other concerns and was the principal problem militating for her termination. At any rate, the sole issue before the Court is whether Serafin's termination for excessive absenteeism violated the federal Family and Medical Leave Act. Therefore, the Court will not examine the other disputes between Serafin and Cedarcrest.

> attendance and failure to comply with attendance procedures. That letter [of suspension] included very clear expectations for your attendance and instructions on what you needed to do receive approved leave. Since April 1, 1996 you have been absent on 7 occasions totaling 11 days and 1.25 hours, the last two days of which were unauthorized leave. Your attendance has not improved and you have failed to comply with the procedures for requesting leave of absence resulting in unauthorized leave. . . . [Y]our behavior has degenerated to the point that we must terminate you for the good of the hospital. The effective date of your dismissal is the close of business on August 15, 1996.

Doc. # 98, Exh. 1A.

On August 19, 1996, Serafin filed a grievance under the collective bargaining agreement between her union and the State of Connecticut, arguing that no just cause existed for terminating her. The grievance proceeded to voluntary arbitration (in which Serafin's union did not participate), and an arbitration hearing took place on October 8 and 22, 1997.[7] Among Serafin's claims in the arbitration was that her firing violated the FMLA.

On January 14, 1998, the arbitrator concluded that just cause existed for Serafin's termination, principally because Serafin "has been unable to attend her job with any reasonable regularity. . . . Indeed I am convinced that in the case of this Grievant, further attempts at progressive discipline short of termination would have been an exercise in futility." Arbitrator's Decision and Award at 53. The arbitrator rejected Serafin's argument that many of her leave

[7] According to the defendant's Local Rule 56(a) statement of undisputed facts, which has not been challenged by the plaintiff, Serafin initiated, prosecuted, and paid for her half of the voluntary arbitration's costs independently of her union. Serafin was represented by private counsel throughout the arbitration process. The collective bargaining agreement between Serafin's union and the State of Connecticut provides that individual employees may proceed to arbitration without union participation "in cases of dismissal, disciplinary demotion or suspension . . ." In dismissal or suspension cases "when the Union is not a party, one-half the cost [of arbitration] shall be borne by the State and the other half by the employee submitting to arbitration." See Doc. # 98, Exh. 5 at 93-94. This appears to be the procedure followed in Serafin's case. Serafin does not dispute that she independently proceeded to voluntary arbitration, though she points out that such arbitration was conducted pursuant to her collective bargaining agreement.

requests were protected under the FMLA, and therefore she could not be discharged for taking such leave:

> . . . [I]t does not appear to me that there was a clear conflict between the discipline of the Grievant and her rights under the FMLA. Apart from absences that were arguably FMLA leaves, the Grievant's attendance record was dismal and had been for years. By almost any reasonable standard her absences were excessive and showed no prospect of improvement. The Department had just cause to discipline the Grievant for excessive absenteeism.

Id. at 48.

Serafin then tried to vacate the arbitration award, alleging that it had been procured by corruption, fraud, or undue means, and that the arbitrator had demonstrated bias against her. Her motion to vacate was denied by both the Connecticut Superior Court and the Connecticut Appellate Court, both courts finding that her claims had been fully and fairly addressed at the arbitration. See Serafin v. Connecticut, 776 A.2d 525, 47 Conn. Supp. 57 (Conn. Sup. Ct. 2000), aff'd 772 A.2d 781, 63 Conn. App. 214 (Conn. App. Ct. 2001).

In March 1998, the plaintiff filed the instant action.

II. Standard of Review

In a summary judgment motion, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable

jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. After discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. Celotex, 477 U.S. at 323.

The Court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992). Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991).

Finally, the Second Circuit has declared that a "trial court must be especially cautious in deciding whether to grant [summary judgment] in a discrimination case, because the employer's intent is often at issue and careful scrutiny may reveal circumstantial evidence supporting an inference of discrimination." Belfi v. Prendergast, 191 F.3d 129, 135 (2d Cir. 1999) (citing Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 87 (2d Cir. 1996) and Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994)). Nevertheless, "a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997).

III. Family and Medical Leave Act

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., was enacted to remedy discrimination against workers who also had significant family responsibilities. Based upon Congressional findings that "there is inadequate job security for employees who have

serious health conditions that prevent them from working for temporary periods" and that "the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men," the Act provides qualifying employees 12 weeks of unpaid leave per year following their own disabling health problem, the serious illness of a family member, or to care for a newborn or newly adopted child.[8] See 29 U.S.C. § 2601(a)(4)-(5); 29 U.S.C. § 2612(a)(1). FMLA leave does not have to be taken in a single bloc; leave "must be granted, when 'medically necessary,' on an intermittent or part-time basis." Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002) (quoting 29 U.S.C. § 2612(b)(1)). Finally, the Act prohibits employers from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of" an employee's FMLA rights, and provides employees a private right of action to recover money damages and equitable relief from discriminatory employers.[9] 29 U.S.C. § 2615(a)(1)-(2), § 2617(a)(2).

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[8] In order to be eligible for FMLA protection, an employee must have worked for the employer from whom leave is requested for at least 12 months, and must have accrued at least 1,250 hours of service with that employer in the preceding 12-month period. The FMLA does not apply to federal government employees, nor to employees working at a job site of fewer than 50 total employees. See 29 U.S.C. § 2611(2). The defendant has reserved the right to contest whether Serafin qualifies as an "eligible employee" under the FMLA, but concedes her eligibility for the limited purpose of this motion for summary judgment.

[9] In Nevada Dep't. of Human Res. v. Hibbs, 538 U.S. 721 (2003), the Supreme Court held that Congress validly had abrogated the states' Eleventh Amendment immunity in passing the FMLA. Therefore, state employees may sue for money damages if the state violates the family-care provisions of the Act. Id. at 725. Hibbs expressed no opinion on whether a state may be sued for violating the section of the Act providing medical leave for *one's own* illness or disability. The Second Circuit Court of Appeals previously has found that sovereign immunity bars suits against the states for violating that provision of the FMLA. See Hale v. Mann, 219 F.3d 61, 68-69 (2d Cir. 2000). Serafin correspondingly bases jurisdiction for her suit on the holding in Hibbs, and limits her claim to whether Cedarcrest failed to properly credit her FMLA leave for the numerous absences attributable to caring for her mother. See Response to Defendant's Motion for Summary Judgment [Doc. #99] at 4.

An employee seeking FMLA leave does not have to invoke the Act specifically; nevertheless, she must provide her employer notice of a request for leave, coupled with a "qualifying reason" for leave under the Act. See 29 C.F.R. § 825.208(a)(2); see also Hoffman v. Prof'l Med Team, 394 F.3d 414, 418 (6th Cir. 2005). Moreover, the FMLA is a minimum requirement for employers. As long as an employer provides at least 12 weeks of leave per year to an employee, other paid leave may be designated FMLA leave and used to "offset the maximum entitlements under the employer's more generous policies." Ragsdale, 535 U.S. at 87 (quoting 60 Fed. Reg. 2230 (1995)).

IV. Discussion

The defendant argues that it is entitled to summary judgment on plaintiff's remaining claim under the FMLA, because that claim was raised in plaintiff's state proceedings and further litigation is barred under the doctrines of res judicata and collateral estoppel. Alternatively, the defendant argues that plaintiff's FMLA claim fails as a matter of law. These arguments are evaluated in turn.

A. Res Judicata/Collateral Estoppel

The defendant argues that Serafin is barred under the doctrines of res judicata and collateral estoppel from pursuing her FMLA claim in this Court, because she previously submitted this claim to voluntary arbitration, thereby waiving her right to judicial review. DMHAS further argues that Serafin is precluded from litigating this claim because the Connecticut Commission on Human Rights and Opportunities ("CHRO") also conducted a Merit Assessment Review of Serafin's termination, and determined that it neither was retaliatory nor

discriminatory.

Res judicata is a judicial doctrine encompassing two different principles, commonly referred to as claim preclusion and issue preclusion. Claim preclusion is the theory that a prior judgment on a given claim should have the effect of foreclosing all subsequent litigation on that claim, "whether or not relitigation of the claim raises the same issues as the earlier suit." New Hampshire v. Maine, 532 U.S. 742, 748 (2001). Issue preclusion, also known as collateral estoppel, stands for the notion that a prior judgment should foreclose those parties' "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," regardless of whether the issue subsequently arises in the same claim or a different one. Id; see also Allen v. McCurry, 449 U.S. 90, 94 (1980); Burgos v. Hopkins, 14 F.3d 787, 789 (2d Cir. 1994); United States v. Envicon Dev. Corp., 153 F. Supp. 2d 114, 123 (D. Conn. 2001).

1. Preclusive Effects of Arbitration

In response to DMHAS' claims, Serafin argues that an arbitration proceeding cannot constitute a prior adjudication for res judicata purposes. She cites the case of Beason v. United Techs. Corp., 37 F. Supp. 2d 127 (D. Conn. 1999), in support of her argument. Beason involved a plaintiff who sued his employer for violations of the Americans with Disabilities Act ("ADA") and the Connecticut Fair Employment Practices Act. Beason's union initially had brought a grievance against the employer on Beason's behalf. Pursuant to the union's collective bargaining agreement, that grievance was submitted to mandatory arbitration. The arbitrator ultimately denied the grievance and ruled that the employer had not violated the ADA. While the grievance was pending, however, Beason submitted his own complaint to the CHRO, which concluded that

there was reasonable cause to believe that Beason indeed had been discriminated against. Beason then filed suit in federal court, at which point his employer argued both that Beason was required to submit his claims to mandatory arbitration and that the prior arbitration barred any further review. See Beason, 37 F. Supp. 2d at 128-29.

In its ruling in Beason, this Court concluded that the relevant collective bargaining agreement only required arbitration of contractual disputes, but was silent with respect to statutory disputes like those arising under the ADA. Beason therefore faced no requirement to arbitrate. Id. at 129-30. Nor was Beason barred from bringing his own suit in federal court by reason of the earlier arbitration; a union could not waive an employee's statutory right to a judicial forum for employment discrimination claims, particularly when the union may have lacked unity of interest with the individual employee in the arbitration process. Id. at 131-32.

The instant situation somewhat differs from that in Beason. Here, Serafin chose to engage in voluntary arbitration permitted under the terms of her collective bargaining agreement, but that arbitration was conducted independently of the union, which did not even participate in the proceedings. Serafin submitted her dispute to arbitration, retained private counsel to assist her in the arbitration process, and paid for one-half of the arbitrator's fees entirely on her own. Moreover, Serafin actively pursued a federal FMLA claim as part of the arbitration, arguing that the FMLA (and its Connecticut statutory analog) entitled her "to 28 weeks of leave in a two-year period," that she "did not exhaust her entitlement to FMLA leave," and that she could not be disciplined for taking such leave. See Brief of Grievant [Doc. # 98, Exh. 1C] at 18-20. Serafin further claimed during the arbitration that the defendant's treatment of her leave violated the FMLA, and that her termination was invalid because of this allegedly unlawful conduct:

> [Serafin claims that DMHAS] failed to designate the Grievant's leave as FMLA leave, failed to provide the Grievant with statutorily required notices concerning the FMLA, and terminated the Grievant for excessive absenteeism, all in violation of the FMLA. A termination which violates the Grievant's rights under federal law is public policy and cannot constitute just cause under any circumstances.

Arbitrator's Decision and Award, at 40.

Beason stands for the proposition that a collective bargaining agreement not specifically stating that it covers statutory disputes cannot be used to compel an employee's arbitration of statutory claims, nor can a union-controlled arbitration of an employee's statutory claim serve to waive that employee's right to seek judicial relief. The question here is whether Serafin, having *chosen* to arbitrate a federal statutory claim, has herself waived any rights to litigate that claim.

The Supreme Court has held that a general clause in a collective bargaining agreement compelling arbitration of all disputes is insufficient to waive an employee's right to a federal judicial forum for statutory discrimination claims. See, e.g., Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 82 (1998); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 740-43 (1981); Alexander v. Gardner-Denver, 415 U.S. 36, 51 (1974). The Court, however, also has suggested that a waiver of judicial rights in a collective bargaining agreement may be enforceable if it is sufficiently "clear and unmistakable." Wright, 525 U.S. at 82, n.2. And the Court has upheld the arbitration of statutory rights when an individual explicitly has agreed to arbitration. See, e.g., Circuit City Stores v. Adams, 532 U.S. 105, (2001) (holding that respondent's employment application, which included clause mandating binding arbitration of all federal statutory claims, constituted an enforceable agreement under the Federal Arbitration Act); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90-92 (holding that arbitration provision in mobile home financing agreement was enforceable as to respondent's Truth in Lending Act claim,

despite fact that provision was silent as to how parties would shoulder costs of arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (affirming that a claim under the Age Discrimination in Employment Act could be subject to compulsory arbitration when affected employee signed a securities registration form containing an arbitration agreement).

In determining whether the arbitration of a particular statutory claim is permissible, the Supreme Court has established a two-prong test. See Green Tree, 531 U.S. at 90. First is whether the parties agreed to submit their claims to arbitration. Id. If such an agreement is present, then an examination of the statutory text is necessary. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985).

Serafin passes the first prong of this test. She voluntarily elected to take her grievance to arbitration, a choice that was not compelled either by her union or by the State. Nor did Serafin limit the scope of her arbitration submission to contractual claims; indeed, she made her FMLA claim a centerpiece of her argument that DMHAS lacked just cause to terminate her. The record shows that Serafin "made the bargain to arbitrate," and more specifically, made the bargain to arbitrate her Family and Medical Leave Act claims.

Turning to the second prong of the test, this Court finds nothing in the text of the FMLA indicating that Congress intended to preclude an individual's waiver of judicial remedies under the Act. 29 U.S.C. § 2617 provides that "an action to recover the damages or equitable relief prescribed [by the Act] . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction . . . ." The Supreme Court has construed similar language as

allowing for arbitration; in its reasoning, "arbitration agreements, 'like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.'" Gilmer, 500 U.S. at 29 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989)).

The Court therefore finds nothing inherently impermissible or unenforceable in Serafin's decision to arbitrate her FMLA rights.[10] Whether that arbitration may be used to collaterally estop Serafin from further litigation, however, requires an examination of Connecticut law. See Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 729 (2d Cir. 2001) (stating, in a case brought under the FMLA, that state law governs matters of collateral estoppel).

Connecticut General Statutes § 31-51bb provides broad protections for workers seeking to vindicate constitutional and statutory rights. That statute reads:

> No employee shall be denied the right to pursue, in a court of competent jurisdiction, a cause of action arising under the state or federal Constitution or under a state statute solely because the employee is covered by a collective bargaining agreement. Nothing in this section shall be construed to give an employee the right to pursue a cause of action in a court of competent jurisdiction for breach of any provision of a collective bargaining agreement or other claims dependent upon the provisions of a collective bargaining agreement.

Conn. Gen. Stat. § 31-51bb (2004). The Connecticut Supreme Court analyzed § 31-51bb in Genovese v. Gallo Wine Merchants, 226 Conn. 475, 628 A.2d 946 (Conn. 1993), and concluded that the statute's legislative history "supports the conclusion that the legislature intended to

[10] The Court notes but distinguishes the Second Circuit's ruling in Rogers v. NewYork Univ., 220 F.3d 73 (2d Cir. 2000). Rogers involved a collective bargaining agreement which mentioned in one clause that employees were entitled to the protections of the FMLA. In a separate grievance and arbitration clause, the agreement provided for arbitration of all disputes. The Second Circuit held that the arbitration clause was too "broad and general" and fell "far short of a specific agreement to submit all federal claims to arbitration." Id. at 76. Unlike Rogers, the instant plaintiff was not compelled to arbitrate and has only been found to have waived her right to a judicial forum for the federal statutory claim that she actually arbitrated.

permit an employee, despite his prior voluntary submission of a related claim to final arbitration under a collective bargaining agreement, to pursue a statutory cause of action in the Superior Court." Genovese, 226 Conn. at 493.

The Second Circuit relied on Genovese in its decision in Fayer v. Town of Middlebury, 258 F. 3d 117 (2d Cir. 2001). Upon his being terminated as a Middlebury town mechanic, Fayer filed an unfair labor practice complaint with the Connecticut Board of Labor Relations. Fayer's union also filed grievances on his behalf. When those grievances were denied, the Union proceeded to arbitrate the issue of whether Middlebury had just cause to terminate Fayer. The arbitration panel ruled for Middlebury, and the award was confirmed by the Connecticut Superior and Appellate Courts.

At the same time, Fayer filed suit in federal district court, claiming that Middlebury had violated the First and Fourteenth Amendments in connection with his termination. A federal magistrate judge granted summary judgment to Middlebury, finding that the court-approved arbitration should be accorded res judicata effect under Connecticut law, and therefore was entitled to full faith and credit under 28 U.S.C. § 1738 (which requires federal courts to grant state court judgments the same preclusive effect that they would have in courts of the issuing state). See id. at 119-21.

The Fayer court reversed the magistrate judge's decision. Relying on Genovese's interpretation of § 31-51bb, the Second Circuit held that "Connecticut courts would not grant preclusive effect to the state court [arbitration] confirmation judgments so as to bar Fayer from litigating his federal First Amendment claims." Fayer, 258 F.3d at 125. Since Connecticut would not consider the arbitration to preclude Fayer's subsequent federal constitutional litigation,

neither could the federal courts grant the arbitration preclusive effect under the full faith and credit statute.[11] Id.

Serafin's case, however, is distinguished from both Genovese and Fayer. First, Conn. Gen. Stat. § 31-51bb only allows workers to pursue a post-arbitration "cause of action arising under the state or federal Constitution or under a state statute." As neither the text of § 31-51bb nor the statute's legislative history indicates that it was intended to apply to federal statutory claims, the Court finds that § 31-51bb cannot apply to causes of action arising under *federal* statutes such as the FMLA. Therefore, the normal Connecticut rule on res judicata would apply, that a prior judgment on a particular cause of action "is conclusive with respect to any claims relating to the cause of action which were actually made or might have been made." Corey v. Avco-Lycoming Div., 163 Conn. 309, 317, 307 A.2d 155 (Conn. 1972).[12]

In conclusion, the Court finds no reason why the prior arbitration in this case should not

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[11] The Fayer Court expressed its discomfort with granting full faith and credit to confirmed decisions of state arbitrators given Connecticut's "special narrow procedure for confirming, vacating, or modifying arbitration awards. . . . Thus the Connecticut courts that [reviewed the award in Fayer's case] did not have the authority to entertain the federal constitutional claims that Fayer now asserts." Fayer, 258 F.3d at 124-25. While Serafin's arbitration award was confirmed under similar procedures, her federal statutory claim (unlike Fayer's) was fully considered and resolved in the underlying arbitration. The Court expresses no opinion as to whether the judgment confirming the arbitration award in the instant case would be entitled to full faith and credit under 28 U.S.C. § 1738, but rather holds that the arbitration precludes further suit based on the principles of res judicata.

[12] Serafin's arbitration was confirmed by the Connecticut Superior Court, and that decision was affirmed by the Connecticut Appellate Court. Also, under Connecticut law (the § 31-51bb exception notwithstanding), "an arbitration award is accorded the benefits of the doctrine of res judicata in much the same manner as the judgment of a court." Corey, 163 Conn. at 319; see also Fink v. Golenbock, 238 Conn. 183, 195, 680 A.2d 1243 (Conn. 1996) ("[T]he doctrine of res judicata applies to the decisions of an arbitration panel, especially in a case in which the decisions are made for a purpose similar to those of a court and in proceedings similar to judicial proceedings.")

be subject to the doctrine of res judicata and bar the instant litigation. Serafin made an voluntary decision to arbitrate, and chose to include her federal statutory claims under the FMLA as part of that arbitration. The arbitrator, after evaluating those FMLA claims, returned a decision in favor of the defendant. Despite Serafin's attempts to vacate the arbitration award, it was twice confirmed by Connecticut courts. The defendant is entitled to avoid further litigation on the same claims. Therefore, the Court grants summary judgment in favor of the defendant on this basis.

2. Preclusive Effects of CHRO Review

The defendant additionally argues that the plaintiff should be precluded from pursuing this action since she had filed a complaint of employment discrimination before the Connecticut Commission on Human Rights and Opportunities, which agency dismissed plaintiff's complaint on the ground that there was "no reasonable possibility that further investigation . . . [would] result in a finding of reasonable cause." See Doc. # 98, Exh. F at 1.

Serafin's complaint to the CHRO claimed that she was terminated for exercising her First Amendment rights and because DMHAS discriminated against her mental disability. Serafin claimed violations of several Connecticut statues, the Americans with Disabilities Act, the Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964. She did not raise any claims under the Family and Medical Leave Act before the CHRO.[13]

Any person claiming to be aggrieved by an alleged discriminatory practice is allowed to file a complaint with the CHRO. Conn. Gen. Stat. § 46a-82(a). While the complaint is still

[13] The FMLA contains no requirement that the plaintiff first exhaust administrative remedies before filing suit. See 29 U.S.C. § 2617(a)-(b); Persky v. Cendant Corp., 114 F. Supp. 2d 105, 107 (D. Conn. 2000). Therefore, Serafin was under no obligation to present her FMLA claim to the CHRO.

pending, but 210 days after its filing, the complainant may request a release from the CHRO, unless the CHRO has scheduled the case for public hearing. Conn. Gen. Stat. § 46a-101; Matejek v. New England Technical Inst. of Conn., Inc., 1998 Conn. Super. LEXIS 998, *1 (Conn. Super. Apr. 7, 1998). The release entitles the complainant to bring a civil action in Connecticut Superior Court. Conn. Gen. Stat. § 46a-100.

If a complainant does not request a release while the case is pending, and the complaint is dismissed by the CHRO, he or she may continue to seek relief under one of several options. First, "if a complaint is dismissed pursuant to subsection (b) of section 46a-83 . . . and the complainant does not request reconsideration of such a dismissal," the complainant may bring a civil action based on the complained-of conduct within ninety days of that dismissal. Conn. Gen. Stat. § 46a-83a. Alternatively, the complainant may take a direct administrative appeal of the CHRO's dismissal to the Connecticut Superior Court. Conn. Gen. Stat. § 46a-94a(a). Finally, the complainant may seek agency reconsideration of the initial dismissal, and if reconsideration is denied, that decision may be appealed to the Connecticut Superior Court. Conn. Gen. Stat. § 46a-94a(a).

The CHRO dismissed Serafin's complaint pursuant to § 46a-83(b) on May 8, 1997. On the record before this Court, Serafin neither petitioned for reconsideration of that dismissal, nor appealed the administrative decision to the courts. The Supreme Court has previously ruled, in evaluating Title VII claims, that "unreviewed decisions of state administrative agencies will not bar a subsequent de novo trial under Title VII in federal court." Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 728 (2d Cir. 2001) (citing Univ. of Tennessee v. Elliott, 478 U.S. 788, 795-96 (1986)). The FMLA is silent as to what preclusive effect, if any, state

administrative agency factual determinations have on subsequent federal litigation. Id. at 729. The Second Circuit has directed district courts to look to the relevant state law of res judicata and collateral estoppel for guidance on such questions. Id.

Under Connecticut law, "'for an issue to be subject to collateral estoppel, (1) it must have been fully and fairly litigated in the first action, (2) it also must have been actually decided and (3) the decision must have been necessary to the judgment.'" Golino v. New Haven, 950 F.2d 864, 869 (2d Cir. 1991) (quoting Aetna Casualty and Surety Co. v. Jones, 220 Conn. 285, 296, 596 A.2d 414 (Conn. 1991)); see also Foley v. Danbury, 2001 U.S. Dist. LEXIS 3352, *12 (D. Conn. Mar. 9, 2001) ("Res judicata will only be applied to the judgments of an administrative agency if 'both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings.'") (quoting Utah Construction & Mining Co., 384 U.S. 394, 422 (1965)).

As Serafin's FMLA claim was neither raised nor litigated in her proceedings before the CHRO, that proceeding can not be used to preclude her from bringing a federal action under that statute.[14] The Court denies defendant's motion for summary judgment on this basis.

B. Serafin's FMLA Claim as a Matter of Law

Having granted summary judgment for the defendant on the basis of res judicata, the Court declines to reach the merits of Serafin's claim under the Family and Medical Leave Act.

[14]Of course, this does not imply that other proceedings (e.g., the prior arbitration) may not be invoked to preclude Serafin from raising the instant claim. See the discussion in section IV.A.1, supra.

V. Conclusion

For the above reasons, the Court GRANTS Defendant's Motion for Summary Judgment [Doc. # 96]. The Clerk is directed to enter judgment in favor of the defendant and close this case.

So ordered this ___9th__ day of March 2005 at Hartford, Connecticut.

/s/ CFD

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE