

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

MICHELINA ABBATE,	:	CASE NO. 3:03CV1858 (DJS)
Plaintiff,	:	
	:	
- v -	:	
	:	
CENDANT MOBILITY SERVICES	:	
CORPORATION,	:	
Defendant.	:	

MEMORANDUM OF DECISION

The plaintiff, Michelina Abbate (“Abbate”), brings the present action alleging employment discrimination and violations of Connecticut’s Family and Medical Leave Act against the defendant, Cendant Mobility Services Corp. (“Cendant”). Now pending is the defendant’s motion to dismiss plaintiff’s state law claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The motion to dismiss **[doc. #11]** is **GRANTED**. Counts Two, Four and Five of the plaintiff’s complaint are dismissed.

STATEMENT OF FACTS

_____The facts relevant to this motion are simple and undisputed. Plaintiff Abbate was absent from her position with Cendant for a period of thirteen weeks in the fall of 2001 as a result of treatment for an illness. Her attempt to return to work was rebuffed by her employer and she was terminated on December 20, 2001. At all relevant times, Abbate was an employee within the definition of the Connecticut Family and Medical Leave Act (“CFMLA”). Pursuant to that law she was entitled to sixteen weeks of leave time and either continued employment in her old job or a comparable alternative position upon her return to work. The CFMLA has a

180 day statute of limitations for claims filed with the relevant administrative body. Abbate has never filed a claim with the Connecticut Labor Commissioner as required by the CFMLA.

STANDARD OF REVIEW

When considering a Rule 12(b)(1) motion to dismiss, the court accepts as true all factual allegations in the complaint but does not draw inferences favorable to the party asserting jurisdiction. Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998). Jurisdiction must be affirmatively proved. Id. The court may consider affidavits and other material beyond the pleadings to resolve the jurisdictional question. Exchange Nat. Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-1131 (2d Cir. 1976).

DISCUSSION

Cendant moves for dismissal of Counts Two (disability discrimination under Connecticut law), Four (age discrimination under Connecticut law) and Five (violation of the Connecticut Family and Medical Leave Act, C.G.S. §31-51kk) of Abbate's complaint. Plaintiff concedes that Counts Two and Four should be dismissed for lack of subject matter jurisdiction, and the court now dismisses those claims. Defendant argues that Count Five should also be dismissed either on the ground that the claim was filed outside the applicable limitations period or on the ground that the Connecticut Family and Medical Leave Act ("CFMLA") does not create a private right of action, but rather permits only appeals after the exhaustion of the exclusive administrative remedy. The court will first address the existence of a cause of action and then, only if a valid claim can exist, turn to the statute of limitations defense.

The CFMLA, C.G.S. §§31-51kk through 31-51qq, contains no language that would

authorize a private plaintiff to bring a suit in either state or federal court to vindicate her rights under the statute. Rather than provide a direct cause of action, the Connecticut legislature required the state Labor Commissioner to promulgate regulations pursuant to the CFMLA that would include procedures for redress under the Act. Those regulations, published at Conn. Agencies Regs. §31-51qq, et. seq., include a comprehensive administrative scheme for alleging violations of the CFMLA and securing relief under the statute. “Any employee, or his authorized representative, may file a complaint with the Labor Department if he believes” that his rights under CFMLA were violated by his employer. Conn. Agencies Regs. §31-51qq-43. The Labor Commissioner has the power to offer a full plate of remedies, including restoration of rights and benefits, damages and reinstatement to a lost job. Conn. Agencies Regs. §31-51qq-47.

Plaintiff points to the phrase “may file a complaint with the Labor Department” as evidence that the administrative scheme is not exclusive, but merely optional, and so exhaustion is not required. The court in Persky v. Cendant Corporation, 114 F.Supp.2d 105 (D.Conn. 2000), considered and rejected this exact argument. Judge Burns held that the word “may” does not mean that an individual may either seek vindication before the Labor Commissioner or in court but rather means that a claimant may seek redress or do nothing. Further, Judge Burns held that “exhaustion of administrative remedies is required under CFMLA prior to judicial action being initiated.” Persky, 114 F.Supp.2d at 107. This court agrees substantially with the Persky analysis and concurs in the ultimate result.

Plaintiff further argues that the statute does not contain an explicit exhaustion requirement and that it would be inconsistent with the intent of the state legislature to read such a requirement into the statute. Specifically, Abbate asserts that the state legislature

intended, when it revised the CFMLA in 1996, to make the Act compatible with the Federal Family and Medical Leave Act. The Federal version of this law does contain an express provision for a cause of action. Compatibility, it is proposed, requires the court to permit an analogous state law claim.

When the statutory requirement of exhaustion is not explicit, courts may consider legislative intent as a guide to whether the doctrine is consistent with the statutory scheme. Patsy v. Florida Board of Regents, 457 U.S. 496, 502 n.4 (1982). Also, the court will look to the “overall comprehensive scheme for remedying a violation of the statute.” Persky, 114 F.Supp.2d at 107. Especially important is the existence of administrative relief available to a plaintiff. See, Howell v. I.N.S., 72 F.3d 288, 291 (2d Cir. 1995); Persky, 114 F.Supp.2d at 107.

Although the parties delve deeply into the legislative history, the court finds little in the material useful to its analysis. The only certainty to be drawn from the legislative history is that the legislature sought to make the definitions and standards employed under the CFMLA consistent with its federal counterpart. The absence of discussion regarding a cause of action or a requirement of exhaustion does not have significance when determining what effect the actual law has once it is passed. Here, the administrative scheme provides a claimant with a complete set of potential remedies and a sound process for hearing and resolving claims. The fact that this system is administrative rather than judicial does not make it less competent or valuable. The CFMLA is both sweeping and comprehensive and therefore the court holds that exhaustion of the available administrative remedies is required before seeking judicial action.

