

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

November 6, 2015

Memorandum of Decision

CHRO No. 0710348 - Commission on Human Rights and Opportunities ex rel. Ann Weichman, Complainant v. State of Connecticut, Department of Environmental Protection, Respondent

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I. Procedural Background

On April 4, 2007, Ann Weichman (the “complainant” or “Weichman”) filed an affidavit of illegal discriminatory practice (“affidavit” or “complaint”) with the Commission on Human Rights and Opportunities (“commission”) alleging that the Connecticut Department of Environmental Protection (“respondent” or “DEP”) had discriminated against the complainant on the basis of her physical disability and/or her age.

The physical disability claim is based on alleged violation of Connecticut General Statutes § 46a-60(a)(1)¹ and § 46a-58(a),² enforcing the substantive provisions of the

¹ Conn. Gen. Stat. § 46a-60(a)(1), states,

It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability or physical disability, including, but not limited to, blindness[.]

² Conn. Gen. Stat. § 46a-58(a), states,

It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin,

alienage, color, race, sex, gender identity or expression, sexual orientation, blindness or physical disability.

Although section 46-58(a) has its origins in a Connecticut criminal statute dating from 1884 (that reflected what is now 42 USC § 1983), in 1975, with the passage of Public Act 75-462 (An Act Concerning the Powers of the Human Rights and Opportunities Commission), the tribunal established to adjudicate complaints it received from the commission was authorized to hear such complaints that alleged a violation of then Conn. Gen. Stat. § 53-34. Section 73 of Public Act No. 15-5 of the June 2015 Special Session (An Act Implementing Provisions of the State Budget for the Biennium Ending June 30, 2017, concerning General Government, Education, Health and Human Services and Bonds of the State) amended section 46a-58(a) to add "mental disability" as a protected class.

There are different damages available for a violation of § 46a-58(a) than there are for a violation of § 46a-60. The damages that may be awarded for the violation of any state or federal law enforceable via § 46a-58(a) are provided for in subsections (a) and (c) of § 46a-86, while damages for a violation of § 46a-60 are available pursuant to subsections (a) and (b) of § 46a-86. These damages provisions state:

(a) If, upon all the evidence presented at the hearing conducted pursuant to section 46a-84, the presiding officer finds that a respondent has engaged in any discriminatory practice, the presiding officer shall state the presiding officer's findings of fact and shall issue and file with the commission and cause to be served on the respondent an order requiring the respondent to cease and desist from the discriminatory practice and further requiring the respondent to take such affirmative action as in the judgment of the presiding officer will effectuate the purpose of this chapter...

(b) In addition to any other action taken under this section, upon a finding of a discriminatory employment practice, the presiding officer may order the hiring or reinstatement of employees, with or without back pay, or restoration to membership in any respondent labor organization, provided, liability for back pay shall not accrue from a date more than two years prior to the filing or issuance of the complaint and, provided further, interim earnings, including unemployment compensation and welfare assistance or amounts which could have been earned with reasonable diligence on the part of the person to whom back pay is awarded shall be deducted from the amount of back pay to which such person is otherwise entitled. The amount of any such deduction for interim unemployment compensation or welfare assistance shall be paid by the respondent to the commission which shall transfer such amount to the appropriate state or local agency.

(c) In addition to any other action taken under this section, upon a finding of a discriminatory practice prohibited by section 46a-58, 46a-59, 46a-64, 46a-64c, 46a-81b,

Americans with Disabilities Act as amended, 42 U.S.C. 12101, et seq. ("ADA").³ The age claim is based on an alleged violation of 46a-60(a)(1).⁴

On September 1, 2009, the complainant filed an amended complaint adding the claim of sex discrimination. This claim is based on an alleged violation of § 46a-60(a)(1) and § 46a-58(a), enforcing the substantive provisions (but not the remedial provisions)

46a-81d or 46a-81e, the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, the expense incurred by the complainant for obtaining alternate housing or space, storage of goods and effects, moving costs and other costs actually incurred by the complainant as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs. The amount of attorney's fees allowed shall not be contingent upon the amount of damages requested by or awarded to the complainant.

³ 42 U.S.C.A. § 12112, states, in pertinent part --

(a) No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

...

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

⁴ The complainant indicated on the original affidavit that the respondent had violated the substantive provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"). Section 46a-58(a) does not include "age" among its protected classes; therefore, this tribunal is not authorized to find a violation of the substantive provisions of the ADEA under that section.

of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended (“Title VII”).⁵

The original complaint was certified by the commission to the office of public hearings (“OPH”) on or about November 10, 2008, after the commission made a reasonable cause finding, on or about October 24, 2008. The case was decertified and returned to the commission on or about July 13, 2009. On or about January 12, 2010, the case was certified by an assistant commission counsel and returned to OPH.

The case was assigned to human rights referee Jon P. Fitzgerald, who issued a notice of contested case proceeding and hearing conference dated January 14, 2010. The referee issued the scheduling order on February 19, 2010. May 17, 2011, was the first day of the public hearing. On March 5, 2013, the case was reassigned to human rights referee Alvin R. Wilson, Jr., who presided over 17 additional days of hearings that occurred between May 2013 and November 2014. All statutory and procedural prerequisites having been satisfied, the complaint is properly before this tribunal for hearing and decision.

The complainant was not represented by an attorney. Commission counsel Alix Simonetti presented the case in support of the alleged violations. Assistant Attorney General Ann E. Lynch represented the respondent. On April 8, 2015, commission counsel submitted a post-hearing brief, which included proposed findings of fact. On June 8, 2015, respondent’s counsel submitted a post-hearing brief and proposed finding of fact. Commission counsel submitted a reply brief on July 29, 2015. Thereafter, the record was closed.

For the following reasons, after a thorough consideration of the evidence presented and an assessment of the credibility of the witnesses, the undersigned concludes that there has been insufficient evidence adduced to establish that the

⁵ Subsection (a) of 42 USC § 2000e-2 states --

It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

respondent's decision to terminate the complainant was motivated by a discriminatory animus. Additionally, I conclude that the evidence does not support the conclusion that the respondent failed to provide the complainant a reasonable accommodation. The complaint is dismissed.

II. Findings of Fact

1. On or about May 31, 2006, the complainant submitted an application for the position of Fiscal Administrative Officer ("FAO") with the respondent. The application stated the dates that the complainant earned her associates degree (1968 – liberal arts), bachelor's degree (1970 - mathematics), and master's degree (MBA - 1988).
2. Nancy Lent, DEP Fiscal Administrative Supervisor, and Peter Kukiel, Chief of the Fiscal Administrative Services Office, reviewed the complainant's application prior to selecting her for an interviewing. Weichman was interviewed in early July 2006.
3. Kukiel had graduated from college in 1971. He and Lent estimated that the complainant was likely in her mid to late 50 years of age.
4. As part of her application package, the complainant stated she used Excel and Word in numerous prior jobs.
5. After Kukiel and Lent reviewed the complainant's job application and had interviewed her, they believed that she had significant experience performing financial and expense reporting, handling contracts, and proficiency with Excel. The complainant's responses to various questions, during her interview, left Kukiel and Lent with the impression that she was technically and quantitatively oriented, as well as being a perfectionist and very detail oriented. Kukiel and Lent believed these were important qualities for position. Based on the pension, actuarial, and underwriting work experience that Weichman claimed to have, Kukiel and Lent expected that she had the skills to adapt to the respondent's financial reporting requirements and perform the FAO job.
6. During the interview, Weichman stated that she had experience preparing financial reports. She also stated that she was not familiar with procurement, budgets and grant applications, and CORE.
7. Although the complainant was scored the third backup candidate from the pool considered by the respondent, after the other applicants who rated higher turned down job offers, Lent and Kukiel, primarily based upon the complainant's representations that she possessed sufficient skills, offered her the position.

8. Kukiel would not have agreed to hire the complainant if she had told him that she needed to be trained in all aspects of the job because the FAO job is not a trainee position.
9. The respondent sent the complainant a letter, dated July 31, 2006, that confirmed terms of her employment, including that she was "required to serve a six-month working test period...." The complainant was aware that she was subject to the working test period.
10. The complainant started her FAO position on August 4, 2006. Lent was her supervisor. During the first month on the job, Lent provided a great deal of orientation, instruction, and guidance to the complainant on various aspects of her job duties. Lent gave the complainant extensive one-on-one attention so that Weichman could learn skills necessary to perform the job. Lent provided information to the complainant about how to prepare expense reports, ensured the complainant received training in Core, Excel, Word, Enterprise Project Management ("EPM") and typing skills. During the month of August 2006, Weichman was the only new FAO reporting to Lent.
11. During her working test period, the complainant successfully completed some of her tasks and Lent acknowledged this fact. However, soon after Weichman started her employment with DEP, it became apparent that she did not have the computer skills required for the job that she claimed to have during her interview. For example, the complainant was not proficient with Excel nor was she able to perform basic functions, e.g., format tables and repaginate documents, using the agency's word processing software, Word. The complainant was not able to create professional looking work product.
12. The respondent sent Weichman to classes so that she could acquire the necessary Word and Excel skills. After attending the Word and Excel classes, the complainant failed to exhibit the proficiency level that Lent considered necessary to do the FAO job.
13. Lent was concerned that after three months on the job, the complainant was unable to perform a thorough expense report analysis. Weichman could create expense reports but was not analyzing them or drawing conclusions based upon the information in the expense reports. Expense report analysis was a critically important aspect of the FAO job, in part, because the reports were used by DEP bureau managers to monitor what funds remained available to them for the balance of the fiscal year.
14. Lent was concerned that after five months on the job, she still needed to show Weichman things that needed to be in the expense report analysis. The complainant was having problems with what Lent considered basic job duties as of January 2007.

At this time, Lent had concluded that the complainant was unable to learn tasks after repeated instruction; was reluctant or unable to refer to notes she had taken and resources provided; and did not retain and follow written and oral instructions.

15. Lent shared her concerns about the complainant's performance with Kukiel. Lent also informed Kukiel of remedial efforts taken so that Weichman could improve her Excel and Word skills, in addition to one-on-one training that Lent provided.
16. Lent spoke with Diane Ragali, a principal human resources specialist at DEP, for advice on what could be done to help the complainant improve her performance. Lent also discussed with Ragali whether a job could be created for Weichman that did not require her to perform certain essential the functions of the FAO job. Ragali responded that doing so would not serve the interests of the DEP because that FAO job still needed to be performed.
17. The complainant admitted that each month she had to ask Lent how to conduct an expense report analysis. This occurred despite the fact that the complainant had access to the programs required to conduct the analysis because she had access to Core and had been provided training on how to use them. Weichman admitted that she was unable to run basic queries without Lent's assistance.
18. Lent discovered that the complainant was unable to run necessary queries and had a grants and contract manager give her the information instead of retrieving it herself from Core. After learning this, Lent told Weichman that if she was unable to run the queries, she should see Lent and not go to the manager.
19. In October 2006, Lent asked Weichman, at least three times, to obtain and copy certain federal grant applications to identify budget information. The complainant failed to get the information in what Lent considered to be a timely manner.
20. On November 8, 2006, four months into her working test period, Lent and Kukiel met with the complainant to review her performance. Lent expressed concerns about Weichman's lack of ability to handle multiple assignments and the quality of the expense reports she created.
21. After the November 8, 2006 mid-working test period review, the complainant requested additional training on voucher lookups, balance reports, general ledgers, basic purchase orders, information lookup, and queries. Although Lent had already provided this training to the complainant, and was surprised at Weichman's request, she provided the training again.
22. On November 27, 2006, the complainant approached Lent and asked her how to perform a certain calculation in Excel. Lent became aware that the Weichman had been doing calculations by hand, rather than using Excel to determine figures. All

business officers supervised by Lent were expected to use Excel to perform calculation.

23. On December 13, 2006, Weichman asked Lent if a contract could be sent to the Office of the Attorney General for review without current executive order language. The complainant received information about this issue months earlier.
24. On December 15, 2006, the complainant asked Lent what expense items needed further investigation and how to look up that information for expense reports. Kukiel expected that within the first week on the job, a FAO would have known what items needed further investigation and how to look up information for expense reports.
25. Some time in December 2006, Kukiel and Lent determined that the complainant did not demonstrate sufficient improvement in her ability to do the functions of the FAO position.
26. On January 2, 2007, complainant asked Lent how to add a space between paragraphs in a document without adding a paragraph mark. At this point, Weichman did not possess basic Word skills, although she had been sent to an Advance Word class in November 2006. The complainant asked Lent if she could take a beginner's Word class.
27. In January 2007, the complainant asked for additional training on how to analyze expense reports. In January 2007, Lent was frustrated that Weichman was not able to grasp and apply instructions that Lent had repeatedly given to her, since August 2006, regarding CORE. Although the complainant took notes when she was given training, she did not use the notes. Additionally, although Weichman was given access to the CORE job aides, she did not use them. The complainant was unable to learn, retain, and use information that was given to her and that was necessary to do her job.
28. On January 16, 2007, the complainant brought a contract to Lent. Weichman did not know, after more than five months on the job, whether the document was a grant or a personal services agreement. Kukiel expected that an FAO who had been employed for five months would know the difference. Lent had told the complainant the difference previously and noted that the information was also available on the DEP intranet where instructions were provided for processing grants and contracts.
29. In January 2007, Lent decided that the complainant did not have the necessary skills and abilities to perform the FAO job. Lent, once again, discussed her concerns with Kukiel.

30. On January 19, 2007, the complainant was called into a meeting with Lent, Kukieli and Ragali. Weichman was told that her employment was being terminated, effective immediately.
31. The respondent hired Jose Lebron, in September 2006, in the position of FAO. Lebron was 41 years old at the time. He received his bachelors degree in accounting in 1999. He stopped working for the respondent in January 2009.
32. Lebron worked as a financial analyst at Pitney Bowes from 1999 to 2003. While at Pitney Bowes, Lebron used Lotus, Excel, and Sequel database management software. Sequel's programming language is the same as Core-CT.
33. From 2003 to 2006, Lebron worked for the City of Waterbury Police Department in the position of Accountant III. His job responsibilities included overseeing a \$25 million budget, financial and building management, handling equipment and uniforms for police officers, payroll, and grants management.
34. Lebron began working for the respondent as a FAO on September 1, 2006. He reported to Lent. She provided Lebron training on grant preparation, expense reports, CORE-CT. After Lebron was hired, he needed very little training due to his education and previous employment experience. He had attained many skills required to be successful in the FAO job prior to being hired by DEP. While working for Lent, Lebron quickly acquired the additional knowledge required to do the job.
35. Lebron had used Excel for many years. When the respondent hired Lebron in September 2006, he was proficient at using existing queries that were written for his department to extract information from Core into Excel to create expense reports because he was familiar with Core's programming language.
36. Lebron may have called the complainant cuckoo; he also may have agreed with the complainant's own statement that she was needy. He may have made fun of the complainant in jest. Lebron never called Weichman stupid.
37. After observing Lebron sitting in a non-adjustable chair, Lent learned that his adjustable chair was broken. An adjustable replacement chair was ordered and provided for Lebron to use. He described it to be the standard issue chair that most employees used in his office.
38. On or about August 16, 2006, the complainant told Lent that her chair was uncomfortable and that she wanted an old style flat chair. On August 16, 2006, Lent sent an email Robert Brandon asking him to look for a chair of that description for the complainant. Two chairs were brought to the complainant to try out, but neither satisfied her.

39. Next, Lent gave the complainant a catalog to identify a suitable chair. This was the normal practice of the respondent, at that time. Weichman looked in a few stores but could not find a suitable chair. The complainant believed that searching for a chair was too time consuming and stopped looking for one.
40. Lent offered to get Weichman a chair similar to the one she was using in her office, but the complainant declined. Lent offered to purchase an ergonomic swivel desk chair but the complainant stated it would not be comfortable. Lent did not require Weichman to produce any verification from a doctor that she, in fact, had a back issue that required an accommodation before taking steps to address complainant's request for a new chair.
41. In mid-October 2006, the complainant asked Lent if the heat could be turned down. The complainant wore short sleeve shirts, "summer" pants, and sandals to work; she used a fan in her cubicle. Lebron and Lent, whose cubicles were directly next to Weichman's, were chilly from time to time.
42. On November 3, 2006, the complainant spoke with Jacqueline Aronson, in the respondent's human resources department about the temperature in her work area. She did not mention needing a new chair or any other accommodation in connection with any alleged back pain. Aronson told Weichman that she needed to provide sufficient information from a medical professional so that the scope of an accommodation for the temperature adjustment, if needed, could be determined.
43. Aronson suggested that Weichman contact building services to check the vent and the thermostat controlling the heat in her work area. After the complainant contacted Ed Stratton, in respondent's building services department, a contractor was called to check the vent. It was functioning correctly, and that the temperature was approximately 74 degrees in her work area. The temperature in her work area was never hotter than 74-75 degrees. This turned out to be in the acceptable range subsequently identified by Weichman's doctor, Susan M. Stone MD – 70 to 74 degrees – on January 10, 2007.
44. Aronson went out on medical leave on November 28, 2006. As of November 28, 2006, Weichman had not provided the requested information from a medical professional to Aronson.
45. On December 2, 2006, Weichman received two notes from her physician, Susan M. Stone. R-19. Dr. Stone wrote, "Due to patient's back pain, patient needs a new work chair and ergonomic study of work station." She also wrote, "please allow patient to move work location due to overheating and contribution to allergic rhinitis." Stone never visited the complainant's work location.

46. Prior to December 4, 2006, the respondent never received from the complainant any information in writing from any of her medical providers stating that she may require any type of accommodation for any disability.
47. On or about December 4, 2006, Weichman gave copies of the two notes written by Dr. Stone to Kukiel, Lent, and the respondent's human resources department. Lent went to Kukiel and to the HR department with her copy of the notes and discovered that both had received copies from the complainant.
48. On December 21, 2006, Diane Ragali, principal human resource specialist, in respondent's HR department, notified Weichman that additional information would be needed to address her requests. Ragali wrote,

"On or about 11/3/06 you met with Jackie Aronson in regard to your needs for a new work location. At this meeting she indicated that you would need to provide a medical certification [Form P33A] documenting: 1) The specifics of the illness; 2) The acceptable temperature range; 3) State specifically that you could not work in this type of atmosphere; and 4) Options in addition to moving work station, i.e., fans, etc."

"The medical note submitted [on December 4, 2006] does not provide this detailed information. Please have your treating physician complete the required form (link above) so that we can more thoroughly evaluate your needs and our ability to assist you in this matter."

"In regard to the ergonomic study, I will also need a medical certificate documenting the medical need for an ergonomically correct chair. This will assist in determining what type of chair is required to meet your medical condition."

"If you have any questions or would like to discuss this in more detail, please do not hesitate to contact me at x2715. I appreciate your patience and apologize for the delay."

49. On January 16, 2007, Weichman submitted two medical certificates (Form P33A) completed by Dr. Stone on January 10, 2007, both indicating that the complainant's last visit had been December 2, 2006. Stone wrote on one P33A that "the patient needs ergonomically correct chair to help minimize back pain that occurs in current chair. Also needs ergonomic study of work station." On the other she wrote, "patient's allergic rhinitis is exacerbated by location in office. Please move location of desk to help alleviate symptoms. Heat in current location also makes patient short of breath & diaphoretic & dehydrated. Acceptable temperature 70-74 degrees."

50. When Ragali received the P33A forms on January 16, 2007, she already knew that the respondent had decided to terminate the complainant's employment, so Ragali did nothing further to address Weichman's concerns regarding a chair, ergonomic study, or the temperature in her work area.
51. The respondent modified the process it used to assess the qualifications of job applicants in response to its failure to thoroughly vet the complainant's actual abilities before offering her the FAO position.
52. The complainant sued two of her former employers for discrimination. Travelers for age discrimination and Chubb Insurance Company for disability discrimination.

III. Analysis

The first question to be answered is whether the complainant was subjected to disparate treatment in violation of either (1) § 46a-60(a)(1) on the basis of her age, sex, and/or physical disability or (2) § 46a-58(a) on the basis of sex (enforcing the substantive provisions of title VII) or on the basis of her physical disabilities (enforcing the substantive provisions of the ADA). Each of the complainant's distinct disparate treatment claims is evaluated under the standard set forth in McDonnell-Douglas v. Green, 411 U.S. 792 (1973) and its progeny.⁶ The second issue to be resolved is whether

⁶ A claim of disparate treatment based on disability is distinct from a claim of failure to provide a reasonable accommodation; therefore, a reasonable accommodation claim is not analyzed using the McDonnell-Douglas burden-shifting method of proof. Bultmeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1283-1284 (7th Cir.1996) ("Because this is not a disparate treatment case, the McDonnell-Douglas burden-shifting method of proof is unnecessary and inappropriate here.") The Curry court, although clarifying that §46a-60(a)(1) requires employers to provide reasonable accommodation, also discussed the distinct standards for deciding a claim of disparate treatment of an individual with a disability. The Curry court stated that, "[i]n the disability context, a prima facie cases for disparate treatment is established under the McDonnell-Douglas Corp. framework if the plaintiff shows: (1) he suffers from a disability or handicap, as defined by the [applicable statute]; (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation; and that (3) the defendant took an adverse employment actions against him because of, in whole or in part, his protected disability." Curry, 286 Conn at 426. See also Humphrey v. Memorial Hospital's Association, 239 F.3d 1128, 1133 (9th Cir.2001)("To prevail on a claim of unlawful discharge under the ADA, the plaintiff must establish that he is a qualified individual with a disability and that the employer terminated him because of his disability." (citation omitted)).

the respondent violated the requirement that an employer provide a reasonable accommodation that allows an "otherwise qualified" employee with a disability to perform the essential functions of the job held pursuant to either § 46a-60(a)(1) or § 46a-58(a), enforcing the substantive provisions of the ADA.

IV. Disparate Treatment Law

The commission cites numerous cases to elucidate the McDonnell Douglas test, long utilized by courts to analyze cases alleging discrimination on the basis of the various protected classes covered under federal and state laws.⁷ C-brief 30-34. The commission asserts that "[t]he essence of a disparate treatment claim is difference in treatment" and that "[t]he critical issue in this case, therefore[,] is whether the [c]omplainant was treated differently than another similarly situated employee who was male." C-brief 32. The commission then states that, "[t]o establish a prima facie case of individual disparate treatment because of sex, the [c]omplainant must prove the following: (a) [c]omplainant was a member of protected class[;] (b) she was qualified for the position[;] she was treated negatively; (d) a similarly situated (sic) outside her protected class was treated differently."

C-brief 33 (citing EEOC v. Flasher Company, 986 F.2d [1312] (10th Cir.1992) and McAlester v. United Airlines, 851 F.2d 1249, 1260 (10th Cir.1988)).

⁷ The commission cites the following cases – Wroblewski v. Lexington Gardens, Inc., 188 Conn. 44, 53-54 (1982); McDonnell-Douglas, 411 U.S. at 802; Board of Education v. CHRO, 176 Conn. 533, 537 (1979); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981); International Brotherhood of Teamsters v. United States, 431 U.S. 348 (1977), Trans World Airlines v. Thurston, 469 U.S. 111, 121; Miko v. CHRO, 220 Conn. 192, 205 (1991); Ierardi v. CHRO, 15 Conn. App. 569, 579 (1988); Department of Health Services v. CHRO, 198 Conn 479, 489 (1986); State v. CHRO, 211 Conn. 454, 464 (1989)(quoting Evening Sentinel v. NOW, 168 Conn. 26, 34-35, n.5 (1975); Furnco Construction Co., 438 U.S. 567, 577 (1978); EEOC v. Flasher Company, 986 F.2d 1249, 1260 (10th Cir. 1992); McAlester v. United Airlines, 851 F.2d 1249, 1260 (10th Cir. 1988); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1180 (2d Cir.1992); Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir.1988). Additionally, C-brief 41-42, discussing "pretext," cites Geddes v. Benefits Review Board, 735 F.2d 1412 (D.C. Cir.1984); Miko, 216 Conn at 207; Ford v. Blue Cross & Blue Shield, 216 Conn. at 53; Zaken v. Boerer, 964 F.—1319 (2d Cir.1992); Adriani v. CHRO, 220 Conn. 307 (1991); Lowe v Commack Union Free School District, 886 F.2d 1364 (2d Cir.1989), citing Paolillo v. Dresser Industries, Inc., 865 F.2d 37, 40 (2d Cir.1989); DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993), citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

More precisely, the applicable test for a disparate treatment claim, brought under either section 46a-60(a)(1) or section 46a-58(a), enforcing Title VII or the ADA, requires a finding that the employer's adverse employment action was motivated by a discriminatory animus based upon the complainant's protected class. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-42, (2000) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 ... (1993)). "The principal inquiry in a disparate treatment case is whether the plaintiff was subjected to different treatment because of his or her protected status." Levy v. CHRO, 236 Conn. 96, 104 (1996). It is the complainant's ultimate burden to prove that the respondent intentionally discriminated against her; "the burden of persuasion remains with the plaintiff." *Id.*, at 108.

Recognizing that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), the Courts of Appeals ... have employed some variant of the framework articulated in McDonnell Douglas [411 U.S. 792 (1983)] to analyze [discrimination] claims that are based principally on circumstantial evidence.

Reeves, 530 U.S. 133, 141-42 (2000).

[T]he employee must first make a prima facie case of discrimination. The employer must then rebut that case by stating a legitimate, nondiscriminatory justification for the employment decision in question. Once the employer has done so, the employee must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias.

Craine v. Trinity College, 259 Conn. 625, 637 (2000) (citing McDonnell Douglas at 802-804).

In a previous decision (CHRO ex rel. Hudson v. the New London Public Schools, CHRO No. 0840264, Memorandum of Decision, April 6, 2015), the undersigned noted that in Craine the Connecticut Supreme Court incorrectly cited the United States Supreme Court's decision in Reeves to support the proposition that, "The burden of establishing a prima facie case is a burden of production, not a burden of proof, and therefore involves no credibility assessment by the fact finder. Reeves v. Sanderson

Plumbing Products, Inc., 530 U.S. 133, 142, ... (2000).” Craine v. Trinity Coll., 259 Conn. 625, 638 (2002).⁸

The Reeves Court, however, was describing the respondent’s burden at the second stage of the McDonnell Douglas test, not the complainant’s burden at the first stage, when it wrote, “[t]he burden therefore shifted to respondent to ‘produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.’ Burdine, [450 U.S.], at 254, 101 S.Ct. 1089. This burden is one of production, not persuasion; it ‘can involve no credibility assessment.’ St. Mary’s Honor Center, [509 U.S.], at 509, 113 S.Ct. 2742. “ Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000).

Regarding the plaintiff’s burden at the prima facie stage, the Reeves Court cited Burdine, 450 U.S. at 252-253, which stated “[i]n McDonnell Douglas ... we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff had the burden of proving by the preponderance of the evidence a prima facie case of discrimination....” Previously, in St. Mary’s Honor Center, the U.S. Supreme Court stated that McDonnell Douglas requires that a plaintiff “first establish, by a preponderance of the evidence, a ‘prima facie’ case of ... discrimination.” 509 U.S. at 506.

Therefore, to satisfy her obligation to establish a prima facie case under the first prong of the McDonnell Douglas test on the age, sex, and/or physical disability claims, the complainant must show, by a preponderance of the evidence, that: (1) she belongs to a protected class; (2) she was qualified for the position held; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred in circumstances giving rise to an inference of discrimination on the basis of her membership in that class. Levy, 236 Conn. at 107 (citing Burdine, 450 U.S. at 252-253). The complainant’s burden of establishing a prima facie case at this stage is not onerous and does not require proof of discriminatory intent. Levy, 236 Conn. at 107-108 (citing Burdine, 450 U.S. at 253-254). See also Tomick v. United Parcel Service, Inc., 157 Conn.App. 312, 327 (“The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff’s favor.”)

⁸ This appears to be the only time that the Connecticut Supreme Court misstated the complainant’s burden to establish by a preponderance of the evidence its prima facie case at the first stage of the McDonnell Douglas test.

The court in EEOC v. Flasher, 986 F.2d 1312 (10th Cir.1992), held that “a mere finding of disparate treatment, without a finding that the disparate treatment was the result of intentional discrimination based upon protected class characteristics, does not prove a claim under Title VII.” 986 F.2d at 1317. The 10th Circuit aptly described the obligation of the courts and this tribunal, writing “[i]n the final analysis, the court is required to weigh all the evidence and to assess the credibility of witnesses in order to determine whether the plaintiff was the victim of intentional discrimination based upon protected class characteristics.... The plaintiff can prevail either directly by proving that the employer acted with discriminatory motive or indirectly by showing that the stated reason for the discharge was a ‘pretext for the sort of discrimination prohibited by [the law]’ – that is, that the facially nondiscriminatory reason was a ‘cover-up for a ... discriminatory decision.’ McDonnell Douglas, 411 U.S. at 804-05....” Flasher, 986 F.2d at 1317 (citations omitted).

Therefore, the complainant must prove illegal discrimination, once the respondent has offered a legitimate reason for terminating the complainant’s employment. *Id.* “[T]he fact-finder is charged to determine which of the reasons for the defendant’s actions it believes: the discriminatory reason advanced by the plaintiff or the reasons proffered by the defendant” Flasher, 986 F.2d at 1317, n.5.

Neither federal discrimination laws nor the relevant provisions of the Connecticut Fair Employment Practices Act “make[] unexplained differences in treatment per se illegal,” nor do these laws “make inconsistent or irrational employment practices illegal.” See Flasher, 986 F.2d at 1319. These laws prohibit “only intentional discrimination based upon an employee’s protected class characteristics.” *Id.* Once a respondent has offered a facially non-discriminatory reason for the adverse employment action taken, the complainant must prove that the disparity in treatment was based upon the complainant’s protected class status. *Id.*

V. Disparate Treatment Analysis

The commission attempts to demonstrate that there is evidence to support the conclusion that the first prong of the McDonnell Douglas test has been satisfied. First, it notes that the complainant belongs to a variety of protected classes on the basis of her age, physical disabilities, and gender.⁹ C-brief 34-35.

⁹ Based on the evidence adduced during this hearing, it is unlikely that the complainant is disabled pursuant to the ADA definition, and therefore, no violation of 46a-58(a)

Next, the commission asserts that the complainant “was qualified for the position at the time of her hire and at her discharge.” C-brief 35. Contrary to the commission’s assertion, no reasonable fact finder could find that the preponderance of the evidence proffered during this public hearing supports the conclusion that the complainant was qualified for the FAO position at the time of her discharge.

There is no dispute that the respondent, specifically Lent and Kukiel, believed that Weichman had the qualifications necessary to be hired for the FAO position.¹⁰ There is also no dispute that the complainant was required to perform the job to the satisfaction of her supervisor to retain the position after the six-month working test period ended. The fact that Weichman was given the opportunity to prove she was qualified, failed to do so in Lent’s opinion, and subsequently was terminated, is not proof that Lent possessed a discriminatory animus based on age, sex, or disability.

The commission attempts to establish that the respondent’s determination that the complainant was not qualified is a pretext by arguing that Lent failed to provide the complainant with adequate on-the-job training, and that Lent failed to do so because she possessed a discriminatory animus. To establish this fact, the commission relies on the complainant’s testimony alleging that during her interview, she told Kukiel and Lent that she “would need training in all aspects of the work,” they promised her “she would be trained in all aspects of the job,” and that the respondent, subsequently, failed to provide sufficient training. C-brief 35-37 and 42-43.

The commission notes that the “[c]omplainant did receive some training from Nancy Lent towards the beginning of her employment,” that it was “not extensive,” it needed to be “revisited to address different and changing circumstances.” C-brief 36. The commission states that Lent was “a Super User of Excel and had used CORE since its inception,” and sent the “[c]omplainant to external sources for training outside the agency in Word and Excel.” *Id.* The commission speculates that “[o]n the basis of the [r]espondent’s continued provision of training, per agreement, [c]omplainant would have been qualified.” C-brief 37.

enforcing the substantive provisions of the ADA would be possible. See 42 U.S.C. § 12102. In fact, the commission argues only that the complainant is disabled as defined in Conn. Gen. Stat. § 46a-51(15). See commission’s brief, p. 27 and its post-hearing reply brief, pp. 25-33.

¹⁰ Lent admitted that, as a result of the experience with the vetting of the complainant’s qualifications, the respondent subsequently modified the way it evaluated the skills of its applicants. See Transcript, dated November 18, 2014, p. 2243.

The commission next argues that Weichman was treated “negatively” by Lent. C-brief 37.¹¹ To establish that the complainant was treated negatively, the commission appears to rely on the complainant’s representation that Lent paid less attention to Weichman after her co-worker, Lebron, who is male and was 41 years old, was hired. Id. Next, to establish that the complainant was treated “negatively,” the commission reiterates that “[f]or the [c]omplainant to succeed in her employment at DEP it was essential that she continue to have training and follow up training,” that Lent deprived her of that training, and, then, unfairly reviewed Weichman’s performance. C-brief 38. The commission asserts that Lent was inclined to review the complainant harshly because she requested a new chair and cooler working environment. C-brief 38. The commission argues that Lent’s alleged inattention to the complainant, caused Weichman’s inability to perform.

The commission also offers as evidence of disparate treatment that Lent did not require Lebron, the complainant’s co-worker, to attend a typing course, although Lent sent Weichman to one. C-brief 43. The fact that Lent sent Weichman to a typing class, but did not send Lebron, is not evidence that Lent possessed a discriminatory animus based on age, sex, or disability.

It appears that the commission is attempting to argue that Lebron was a similarly situated employee who was treated differently. However, there is no evidence that Lebron and the complainant were similarly situated. That is, there is no evidence that Lebron was not qualified and not terminated. To the contrary, the evidence reveals that before Lebron was hired by the respondent, he was proficient in the use of Excel and programming language that Core utilized, and that after he began working for the respondent, he quickly was able to learn and utilize the skills and information obtained via on-the-job training.

The evidence also establishes that the complainant did not possess skills that she listed in her resume and represented during her interview with the respondent. The

¹¹ The commission’s formulation of the prongs of the de minimus prima facie case is, (1) complainant is a member of a statutorily protected class; (2) she held the position and would have been qualified if she received the promised training; (3) she was treated “negatively”; and (4) the employer retained and fairly treated similarly situated employees not in her protected class.” C-brief 33. The undersigned notes that state and federal law prohibit employers from discriminating against employees and applicants on the basis of protected characteristics. Those laws do not prohibit all differences in treatment. A complainant must prove by the preponderance of the evidence that they were the subject of discrimination based on some protected status.

evidence reveals that during her tenure with the respondent, the complainant was not proficient working with computer programs and databases – Core, Excel and Word – essential to accomplishing her job. The complainant was not able to complete projects she was responsible for in a timely manner and was not able to perform required expense report analysis after five months of employment. These were some of the reasons that the respondent cited as the basis of its decision to terminate the complainant's employment before the end of her probationary period. The evidence reveals that the complainant's skills were not sufficiently competent. There is no evidence to dispute this fact.

Instead, the commission argues that with more training, the complainant "would have been qualified." C-brief 37. There is no evidence to support the conclusion that the respondent, because of the complainant's age, sex, or purported disabilities, did not provide adequate training opportunities for the complainant, or withheld training. To the contrary, the evidence reveals that to improve Weichman's skills during her six-month working test period, the respondent provided the complainant both Excel and Word training and Lent provided additional guidance and Lent provided adequate one-on-one training.

Lent also sought assistance from the respondent's human resources department in order to determine ways to improve Weichman's performance. Lent also asked whether a job could be created for the complainant that did not require her to do all of the functions of an FAO, but was told that would not be in the best interest of the respondent.

The fact that the complainant was unable to perform up to the standards of her supervisor is not evidence of discrimination, absent proof that others not in her protected class failed to perform up to those standards and were not terminated. No such evidence was offered.

The undersigned is not persuaded by the commission's assertions. To the contrary, I concluded that on the basis of the evidence adduced during the hearing, no reasonable fact finder could determine either that Lent or the respondent failed to provide the complainant adequate training or, most importantly, that Lent possessed any discriminatory motive. Instead the evidence reveals that, as of January 2007, near the end of her six-month working test period, Weichman did not meet her supervisor's reasonable performance expectations.

The reason that the respondent dismissed the complainant was because she did not possess the necessary skills to do the FAO job. No evidence has been offered to

persuade this tribunal that the respondent's action was a pretext for discrimination on the basis of age, sex, or disability.

VI. Disability Discrimination – Failure to Accommodate

Having determined that the evidence does not establish that the respondent's decision to terminate her employment was a pretext, i.e., that the complainant was, in fact, qualified, the only remaining issue is whether the evidence establishes that respondent violated the requirement to provide a reasonable accommodation that the Connecticut Supreme Court in Curry v. Allan S. Goodman, Inc., 286 Conn. 390 (2008), determined to be contained in § 46a-60(a)(1).

The commission asserts in its post-hearing brief that the respondent failed to provide the complainant a reasonable accommodation in violation of §46a-60(a)(1) by not giving Weichman a new chair and a cooler working environment. C-brief 26-28. The commission pointed to the Curry decision and stated that the "court held that if a person with a disability requests reasonable accommodation from an employer, that the employer has a duty to provide reasonable accommodation."¹² C-brief 26. The commission quoted Curry, 286 Conn. 415-416, to establish that the court had relied on "federal precedent concerning employment discrimination for guidance in enforcing [Connecticut] antidiscrimination statutes." C-brief 26.

Specifically, the commission quoted, in pertinent part, the following passage – In order to survive a motion for summary judgment on a reasonable accommodation claim, the plaintiff must produce enough evidence for a reasonable jury to find that (1) he is disabled within the meaning of the [statute], (2) he was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonably accommodate it." (Internal quotation marks omitted.) Freadman v. Metropolitan Property & Casualty Ins. Co., 484 F.3d 91, 102 (1st Cir.2007) (citing elements under ADA); see also Rodal v. Anesthesia Group of Onondaga, P. C., 369 F.3d 113, 118 (2d Cir.2004) (same); Ezikovich v.

¹² In Curry the complainant suffered a back injury which directly interfered with the essential duties of his job -- lifting and moving cases of beverages. In this case there is no evidence that Weichman's alleged disabilities impacted, in any material way, her ability to perform the essential functions of her job – e.g., reviewing contracts and grants ; using computer software and databases to perform analysis expense; and creating financial reports and other documents.

Commission on Human Rights & Opportunities, supra, 57 Conn.App. at 774, 750 A.2d 494 (same). If the employee has made such a prima facie showing, the burden shifts to the employer to show that such an accommodation would impose an undue hardship on its business. Freadman v. Metropolitan Property & Casualty Ins. Co., supra, at 103.

Curry v. Allan S. Goodman, Inc., 286 Conn. 390, 415-16 (2008). C-brief 26.

The Second Circuit stated that a plaintiff must prove the following to make out a prima facie case of disability discrimination arising from a failure to accommodate: “(1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.” Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 184 (2d Cir.2006) (quoting Rodal v. Anesthesia Group of Onondaga, P. C., 369 F.3d 113, 118 (2d Cir.2004)) (internal quotation mark omitted).” McBride v. BIC Consumer Products Mfg. Co., 583 F.3d 92, 97 (2d Cir. 2009)

The Curry court stated that, just as with the ADA, a “reasonable accommodation is a part of the employee’s prima facie case that focuses on an individual employee’s particular disability and the job requirements – i.e., that, despite their protected trait, they will be able to perform the essential functions of the job with some type of assistance. Under this framework, if the employee makes such a showing, then the burden of production shifts to the employer to show that the accommodation would constitute an undue hardship.” Curry, 286 Conn at 409-410 (citing US Airways, Inc. v. Barnett, 535 U.S. 391, 401-402 (2002).

Although, it is well settled that courts and this tribunal “look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both,” see Tomick v. United Postal Service, Inc., 157 Conn.App. 312, 326 (2015)(citations omitted), little attention is given in collective arguments of the parties to any legal authority explaining the significance of the prong of the test cited by both the Second Circuit and the Connecticut Supreme Court regarding the ability of an employee with a disability to perform the essential functions of the job with or without a reasonable accommodation.

The Second Circuit has concluded that in order to establish a violation of the ADA for failure to provide a reasonable accommodation; a plaintiff must “[make] a sufficient

showing that, inter alia, she is qualified for the position at issue.” McBride v. BIC Consumer Products Mfg. Co., Inc., 583 F.3d 92, 102 (2d Cir. 2009). The provisions of the ADA relating to employment protect only a “qualified individual,” one who with or without a reasonable accommodation by the employer can perform the essential functions of the job. See 42 U.S.C. §§ 12111(8) and 12112.

“[I]f she can’t perform the essential functions of her job, so that she would have been fired anyway, there has been no violation ... and she has no right to relief.” Miller v. Illinois Dept. of Corrections, 107 F.3d 483, 485 (7th Cir.1997). The complainant must show that she could perform the essential functions of the job, either with or without reasonable accommodation. Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1284 (7th Cir. 1996) (citing 29 C.F.R. app. § 1630.2(m)). See also, Sclafani v. P.C. Richard & Son, 668 F.Supp.2d 423, 443 (E.D.N.Y. 2009)(Because plaintiff has presented no evidence she could perform the essential functions of her job, her claim must fail.).

The ADA prohibits, inter alia, an employer from discriminating against an “individual with a disability” who, with “reasonable accommodation,” can perform the essential functions of the job. 42 U.S.C. §§ 12112(a) and (b). According to the Equal Employment Opportunities Commission (“EEOC”), “[a]n individual with a disability is considered ‘qualified’ if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation.” 29 C.F.R. pt. 1630, app. § 1630.2(o) (2011).¹³ The EEOC notes that the ADA delineates three categories of reasonable accommodation – (1) accommodations required to ensure equal opportunity in the application process; (2) accommodations that enable employee’s with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable employees with disabilities to enjoy equal

¹³ The First Circuit noted that “[t]he EEOC published as an appendix to the regulations a section-by-section ‘Interpretive Guidance on Title I of the Americans with Disabilities Act.’ 29 C.F.R. Pt. 1630, App. We have looked to this source in interpreting the ADA. See Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 16 (1st Cir.1994). Such administrative interpretations of the Act by the enforcing agency, ‘while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 672 (1st Cir. 1995) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986)). The EEOC guidance commands “deference only to the extent its reasoning actually proves persuasive.” Hwang v. Kansas State University, 753 F.3d 1159, 1163 (10th Cir.2014)(citing Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 111 n.6 (2002); EEOC v. C.R. England, Inc., 644 F.3d 1028, 1047 n.16 (10th Cir.2011)).

benefits and privileges of employment as are enjoyed by employees without disabilities. 29 C.F.R. pt. 1630, app. § 1630.2(o) (2011).

The EEOC guidance regarding “qualified individual,” also states, in pertinent part, that --

The ADA prohibits discrimination on the basis of disability against a qualified individual. The determination of whether an individual with a disability is “qualified” should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. ... The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions... The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. The determination should be based on the capabilities of the individual with a disability at the time of the employment decision

29 C.F.R. pt. 1630, app. § 1630.2(m). The EEOC guidance also states, in pertinent part, that --

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated.... The term ‘otherwise qualified’ is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of § 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is ‘otherwise qualified,’ ... if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job’s essential function....

29 C.F.R. Pt. 1630, app. § 1630.9.

Reflecting the EEOC's interpretation of the ADA, the Connecticut Supreme Court in Curry, noted that in order to succeed on a reasonable accommodation claim, "the plaintiff has the burden of showing that an accommodation would enable him to perform the functions of the job and that, 'at least on the face of things,' it is feasible for the employer to provide the accommodation. (Internal quotation marks omitted.) US Airways, Inc. v. Barnett, supra, 535 U.S. at 401-402, 122 S.Ct. 1516." Curry v. Allan S. Goodman, Inc., 286 Conn. 390, 419 (2008).

The commission does not argue that the accommodation requested by the complainant would enable her to perform the essential functions of her job. Instead, the argument is that with more training the complainant would be able to perform the job.

Although the respondent does not refer to the EEOC guidance, it addresses the connection between an employer's obligation to provide an accommodation and whether granting the accommodation impacts the ability of an employee to perform the essential function of the job held. The respondent notes that the U.S. Supreme Court "defines an individual as 'otherwise qualified' if she 'is able to meet all of a position's requirements in spite of her handicap.' R-brief 11 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n. 17 (1987)(The complainant alleged a violation of the Rehabilitation Act of 1973).¹⁴

The respondent argues that "[the] complainant did not establish that with an accommodation of a flat style chair or with lower temperatures, she would have been qualified to perform her job." R-brief 12. The respondent also asserts that "[c]omplainant failed to present even a shred of evidence that she could have performed the essential functions of her job if she had a different office chair or the temperature were lower in her work area.... Complainant cannot prevail because she cannot show that she could perform the essential functions of her job with or without the reasonable accommodations she sought...." R-brief 15.

Despite the substantial evidence that the complainant's performance was inadequate, and did not meet the expectations of her supervisor, the commission asserts the complainant was able to perform the essential functions of the job with or without a reasonable accommodation because the respondent hired her. C-brief 27. In

¹⁴ Federal courts read section 504 of the Rehabilitation Act and the ADA to impose identical requirements and consider claims in tandem. See, e.g., Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir.1999).

support of that assertion, the commission notes that when the respondent hired the complainant, the understanding was that the respondent would train the complainant to do the job. C-brief 27-28. The commission also notes that complainant successfully performed some of her job functions. C-brief 28.

As discussed previously, no reasonable fact finder could conclude, based on the evidence adduced at this hearing, that the complainant was qualified for the FAO position at the time of her discharge. Therefore, the undersigned cannot find that, by not providing the complainant a new chair or a cooler working environment, the respondent deprived her of an accommodation that would have enabled her to perform the essential functions of her job.

VII. Interactive Process

The Curry court looked to federal precedent for guidance in enforcing the state's disability discrimination law, and concluded that, once a disabled individual has suggested to his employer a reasonable accommodation, § 46a-60(a)(1), just as the ADA, requires "that the employer and employee engage in an informal, interactive process ... [to] identify the precise limitations resulting from the disability and potential accommodations that could overcome those limitations." Curry, 286 Conn at 415-416 (citing 29 C.F.R. § 1630.2(o)(3)).¹⁵ "In this effort, the employee must come forward with some suggestion of accommodation, and the employer must make a good faith effort to participate in that discussion." *Id.* at 416 (citing Humphrey v. Memorial Hospitals Assn., 239 F.3d 1128, 1137 (9th Cir.2001), cert denied, 535 U.S. 1011 (2002); Saksena v. Dept. of Revenue Svcs., CHRO Opinion No. 9940089).

"The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process." Barnett v. U.S. Air, 228 F.3d 1105, 1114-1115 (9th Cir.2000); Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th

¹⁵ 29 C.F.R. § 1630.2(o)(3) says that "it may be necessary for the [employer] to initiate an informal interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." See also Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 735-736 (5th Cir. 1999)(quoting 29 C.F.R. § 1630.2(o)(3)). "The EEOC's interpretive guidelines reinforce this directive, but also stress that the interactive process requires the input of the employee as well as the employer." Loulseged, 178 F.3d at 736 (citing 29 C.F.R. Pt. 1630, App. § 1630.9).

Cir.1996)("A party that obstructs or delays the interactive process is acting in bad faith"). A requirement of the interactive process is that an employer makes a reasonable effort to understand the needs of an employee whose disability impairs the employee's ability to communicate his or her needs effectively, if the employer has notice of the disability and the impairment. See Bultemeyer v. Fort Wayne Community Schools, 100 F.3d at 1285-87; Hunt-Golliday v. Metropolitan Water Reclamation District, 104 F.3d 1004, 1013-13-1014 (7th Cir.1997).

"[A]n employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations. On the other hand ... '[t]he ADA ... is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made.'" Taylor v. Phoenixville School District, 184 F.3d 296, 317-318 (1999)(citing Mengine, 114 F.3d at 420 (quoting Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir.1997))).

It must be noted, however, that the Second Circuit has held: 'an employer's failure to engage in a sufficient interactive process does not form the basis of a claim under the ADA and evidence thereof does not allow a plaintiff to avoid summary judgment unless she also establishes that, at least with the aid of some identified accommodation, she was qualified for the position at issue.'" Sclafani, 668 F. Supp.2d [423], 443 [(E.D.N.Y. 2009)], citing McBride v. BIC Consumer Prod. Mfg. Co., 583 F.3d 92, 101 (2d Cir.2009).

To establish the respondent failed to engage in a meaningful interactive process, the commission notes that "Lent tried to address [c]omplainant's request [for a chair] on her own," and that when Lent's efforts did not work, she should have sent Weichman to the Human Resources department for assistance, instead of urging the complainant to search for a chair that would suit her needs. C-brief 28-29. In this regard, the commission's argument is that Lent mishandled Weichman's request for a new chair. C-brief 28-29. The commission also argues that the respondent did not take the complainant's request for a cooler working environment seriously. C-brief 30.

Assuming arguendo that Lent mishandled the complainant's request for a replacement chair, there is no evidence that providing the chair to the complainant would have improved her work performance and transformed her into a qualified employee. Additionally, the evidence reveals that once the complainant, on November

3, 2006, alerted the respondent's human resources office of her concerns with the temperature in her work area, the respondent took appropriate actions to address her concerns.

In the opinion of the undersigned, the communication between the complainant and the respondent's agents, and the totality of the efforts made by the respondent to have the complainant provide sufficient information from her medical provider(s) to delineate the nature of her disabilities and the appropriate scope of any necessary accommodations, appear to be exactly the type of interactive process envisioned by the EEOC. The fact that a final resolution had not been achieved at the time that the respondent terminated the complainant's employment, approximately two months later, does not undermine this conclusion.

Decision and Order

In light of the foregoing, I find in favor of the respondent. It is hereby ordered, in accordance with the provisions of subdivision (4) of subsection (d) of section 46a-54-88a of the Regulations of Connecticut State Agencies, that the complaint be, and hereby is, dismissed in its entirety.

It is so ordered this 6th day of November 2015.



Alvin R. Wilson, Jr.
Presiding Human Rights Referee