

State of Connecticut

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January 10, 2014

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RE: CHRO ex rel. Corrine Perry v. State of CT, Department of Public Safety, State Police, CHRO No. 0830218; Fed No. 16a200800402.

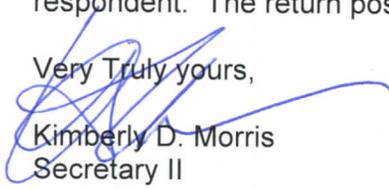
FINAL DECISION

Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent by certified mail, return receipt requested to the complainant and the respondent. The return post office receipt shall be proof of such service.

Very Truly yours,


Kimberly D. Morris
Secretary II

cc.

Ellen E. Bromley, Presiding Human Rights Referee
John B. Williams, Esq.
Katrena Engstrom, Esq.
A. Reynolds Gordon, Esq.
Antoria Howard, AAG

Certified No. 7011 2000 0002 0985 9873 (C. Perry)
Certified No. 7011 2000 0002 0985 9880 (J. Janeiro/State)
Certified No. 7011 2000 0002 0985 9897 (D. Hellier/State)

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and
Opportunities ex rel.
Corrine Perry, Complainant

CHRO No. 0830218
Fed No. 16a200800402

v.

State of Connecticut, Department
of Public Safety, Respondent

January 10, 2014

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FINAL DECISION
I.
PROCEDURAL BACKGROUND

On December 11, 2007 Corinne Perry (Complainant) filed a complaint with the Connecticut Commission on Human Rights and Opportunities (the Commission or CHRO) alleging that the State of Connecticut Department of Public Safety (Respondent) failed to select her as a trooper trainee on the basis of her age, sex and physical disability. By doing so, Complainant charged, Respondent had violated Connecticut General Statutes §46a-60(a) (1) (CFEPA) and §46a-58(a) (through her claims of violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e ["Title VII"] and the Civil Rights Act of 1991; the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634; and the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.)¹

The Commission investigated the charges in the complaint and issued a finding of reasonable cause. On October 28, 2010, following unsuccessful attempts at conciliation, the complaint was certified in accordance with Connecticut General Statute § 46a-84(a), and the Regulations of Connecticut State Agencies § 46a-54-77 (d)(2)(C) (the Regulations). On November 5, 2010, Human Rights Referee Donna Maria Wilkerson Brilliant was assigned to act as presiding referee in the matter and proper notices for public hearing were issued to all parties.

On November 19, 2010, Respondent filed an answer and special defenses to the complaint, denying all discrimination charges and alleging legitimate non-discriminatory reasons for its employment action.

The matter was reassigned to the undersigned on January 19, 2012. Thereafter, on November 13, 14, 15 and 20, 2012, I conducted a duly noticed public hearing at the Office of Public Hearings (OPH), 25 Sigourney Street, Hartford, Connecticut. Attorney

¹On February 7, 2011, Complainant amended her complaint, adding factual specificity to its original allegations, as well as a retaliation claim.

Katrina Engstrom (John R. Williams & Associates, LLC, 51 Elm Street, Suite 409, New Haven, Connecticut 06510) appeared on behalf of Complainant; Alix Simonetti, Human Rights Attorney III, appeared on behalf of the Commission (25 Sigourney Street, Hartford, Connecticut 06106); and Antoria Howard, Assistant Attorney General (Office of Attorney General, 55 Elm Street, Hartford, Connecticut 06106) appeared on behalf of Respondent. The parties filed post hearing briefs as per scheduling orders and the record closed on April 23, 2013.

For the reasons set forth hereinafter, I find that Complainant has failed to prove that Respondent discriminated against her in violation of state or federal law. Judgment is entered in favor of Respondent and the complaint is dismissed.

II. FINDINGS OF FACT

The following facts are derived from the pleadings, the exhibits admitted into evidence and the testimony of witnesses at the public hearing. References to the parties' exhibits are identified by the introducing party, Complainant ("C") or Respondent ("R"), followed by the applicable number. Record exhibits are identified as such. References to the hearing transcript are identified by "Tr." followed by page and line number(s). Only those facts deemed necessary to an understanding of the issues raised at the public hearing and discussed in this decision are set forth herein.

Complainant was 48 and a (cancer free) breast cancer survivor in May, 2006 when she applied to Respondent for a state trooper position, or more accurately, applied to become a member of Respondent's 118th training troop. (Record-1).

The application, screening and selection process for the position of trooper trainee proceeds in multiple competitive phases. During the initial phase applicants complete and submit, signed and notarized "Personal History Report[s],"² in which they are required to disclose details pertaining to their personal, family, educational, job search, employment, military, motor vehicle, criminal and legal histories. (R-2). During this phase they must take and pass a written examination,³ an observational test and a physical fitness/agility assessment.⁴ (C-3).

Complainant submitted her personal history report (signed and sworn on July 7, 2006) and took the required tests in June and July, 2006. She scored 82% on the written examination, 83% on the observational test and passed the fitness assessment. (Record-1; C-16; Record-6).

In September, 2006, Complainant learned that her test score average had been below the cutoff for Respondent's 118th training troop. It was, however, sufficient to keep her in

² Form DPS-921-C (Rev. 08/04).

³ Administered by the Connecticut Department of Administrative Services ("DAS").

⁴ Administered jointly by respondent and DAS.

the competition for membership in its next (Respondent's 119th) training troop. (C-1; Record-6).

Applicants qualified to move beyond the first phase of Respondent's selection process are invited to do so by acknowledging and accepting the terms and conditions of a Connecticut Department of Public Safety form agreement known as a "conditional offer of probationary employment" (conditional offer).⁵ Conditional offers are contingent upon recipients' successful completion of: a polygraph examination; a background investigation; medical and psychological examinations; a drug screening; and selection by Respondent's "Selection Management Committee as the most qualified candidate among the available applicants." In their conditional offers recipients are explicitly informed that failure to satisfy any of the contingencies stated therein will result in the conditional offer's immediate rescission. Receipt of a conditional offer does not signify that an applicant is, or will become a trooper trainee. (Tr. 157:13-158:7; 244:19-254:7).

On January 30, 2007, Respondent extended a conditional offer to Complainant who accepted and countersigned the form agreement, acknowledging thereby that she had read, understood and agreed to abide by its terms. (R-6; Tr. 157:13-158:7; 244:19-254:7).

Respondent's Recruitment and Selection Unit (the Selection Unit) is responsible for overseeing the administrative processes pursuant to which candidates for trooper trainee appointments are selected. (R-9; Tr. 241:8-11; 247:19, 245). Upon receipt of an applicant's signed acceptance of a conditional offer, Selection Unit personnel photocopy his or her personal history report and, under cover of a transmittal memo requesting that a background investigation be begun, forward it, along with the individual's previously signed authorizations, to Respondent's Background Investigation Unit (the Background Unit). (Tr. 249:3-8; R-9).

An applicant's sworn personal history report serves as the foundation for his or her background investigation and, among other investigatory mandates, Respondent requires its background investigators to verify all of the information provided therein. Standard forms are used to confirm birth dates, current and previous employment,⁶ education and the results of neighborhood checks. Credit, criminal and motor vehicle history verifications may be incorporated into background reports in the form of computer runs received from relevant agencies. Investigators are instructed to include all of the information they receive from such agencies in their background investigation files. (Tr. 397:11-399:10; R-1; R-9).

⁵ form DPS-674-C (Rev. 10/98)

⁶ Respondent requires background investigators to speak with relevant employers or supervisors in order to complete this form which, in addition to verifying employment dates, seeks responses to specific questions pertaining to job performance. (Tr. 250:13-15).

On March 8, 2007, State Trooper Richard Jamaitus, an experienced member of the Background Unit⁷ was given a copy of Complainant's personal history report and assigned to perform her background investigation. After he had familiarized himself with her file, Trooper Jamaitus arranged to interview Complainant. The interview took place on April 4, 2007 at her home which, as Trooper Jamaitus later described in the summary section of his background investigation report, was "clean and well kept." He also reported that Complainant had been prepared, organized, direct, well-spoken and meticulous in documenting the information she provided to him at the interview. (Tr. 395:5-19; Tr. 396; Tr. 397:11-17; Tr. 248:24; Tr. 249:1-8; R-7).

During the interview Trooper Jamaitus administered Respondent's "Personal Interview Questionnaire" (the questionnaire) -- over one hundred and fifty (150) "yes" or "no" questions seeking details pertaining to applicants' motor vehicle, employment, military, financial, criminal and personal histories -- to Complainant. (C-13). Respondent uses the questionnaire to help establish whether there are aspects of an applicant's history that would disqualify⁸ him or her from service as a state trooper (R-10), and to supplement or update information contained in his or her personal history report.

As required by Respondent: Trooper Jamaitus obtained additional details and explanations from Complainant with respect to each of fifteen (15) (questionnaire) questions that she had answered in the affirmative and included the explanatory information, as well as the results of mandated investigatory follow-up in the summary section of his final background report. (C-13; R-2).

When Trooper Jamaitus asked Complainant whether she had ever been suspended from a position (C-13, question 24), she answered "yes" and explained that she had received a three (3) day suspension from her job at SSC Security and Investigations (SSC) after refusing an assignment that would have required her to work two consecutive double shifts. She also informed him that the suspension had later been overturned. Trooper Jamaitus included the explanatory information under the heading of "Questionnaire Results" in the summary section of the background investigation, and also in (the summary's) "Previous Employment" section where he noted as well that Complainant's answer to this question was consistent with the answer she had provided to the City of New Haven in its applicant questionnaire, and that (in the New Haven application) Complainant had explained that because her responsibilities included operating a vehicle, her refusal to work consecutive double shifts had been based on safety concerns. (R-7). SSC's responses to Respondent's standard form employer verification confirm Complainant's explanation, indicate that the company viewed her job performance favorably and would recommend that she be hired as a trooper trainee.

⁷ In addition to having previously performed background investigations for Respondent, Trooper Jamaitus' experience included investigations undertaken on behalf of the Connecticut Department of Children and Families, the state's Special Revenue division and its Governor.

⁸ Disqualifying information may include, but is not limited to disclosures pertaining to: criminal activity; drug use (type, frequency and recency are considered); poor motor vehicle driving history; questionable employment history, including discipline, unsatisfactory performance and improper behavior; and dishonesty, including lying in the selection process.

Trooper Jamaitus included the standard form employer verification in the main body of his background investigation report. (R-1, 176, 177).

When Trooper Jamaitus asked Complainant if she had ever terminated employment without giving two weeks' notice (C-13, question 21), she answered "yes" and explained that she had given just a couple of days' notice before leaving her position as an armed security officer for RPS Security, Inc., (RPS) because of issues with work orders and contract violations. As required, Trooper Jamaitus included this explanation under "Questionnaire Results" in the summary section of Complainant's background investigation report. Under "Previous Employment" he confirmed Complainant's three month tenure at RPS (from September 2006 to December 2006) and reported negative comments about her attitude and priorities by quoting directly from RPS' responses to Respondent's standard form employment verification (which Trooper Jamaitus included as a standalone document in the main body of the background investigation report). (R-7; R-1).

At the interview, Complainant updated her employment status, informing Trooper Jamaitus that she had begun working for Metroguard Security Services, Inc., (Metroguard) as an armed security officer in September, 2006. Trooper Jamaitus listed Metroguard under "Present Employment" in the summary section of Complainant's background investigation report and, quoting from Respondent's standard form employment verification (which he included as a standalone document in the main body of the background investigation report) reported that Metroguard's vice president had recommended Complainant for the trooper trainee position, notwithstanding attendance and sick time issues. (R-7; R-1).

On May 2, 2007, Complainant wrote to Trooper Jamaitus to inform him that as of April 30, 2007, she had taken a position as a driver for Armored Transit Systems (AT). Trooper Jamaitus included Complainant's letter in the main body of her background investigation report. (R-1, p. 294). He did not list this job under "Present Employment" in his investigative summary, nor, with respect to same, did he include a standard employment verification form in the main body of the background investigation report. (R-7).

Trooper trainee applicants are required to list "prior peace officer applications," including application dates, names of relevant police departments or other law enforcement agencies, and application disposition information, both in their personal history reports and in response to Respondent's personal interview questionnaire (R-1; C-13, question 145). Beyond simply verifying the information that applicants provide, background investigators are instructed to seek copies of medical reports, polygraphs and background investigations from the relevant departments or agencies, to review them for inconsistencies, and, if available, to include copies of available documents in the background investigations they perform for Respondent. Background investigators and the Selection Unit, are allowed to rely upon information contained in other agencies' files. (Tr. 264:3-21).

In 2002, Complainant applied to the Connecticut Department of Public Safety for the position of state police trainee. She passed the written test, but did not continue with the application process. (R-2).

In 2004, Complainant applied to the Stamford Police Department, but was not selected as a police officer when she did not pass the polygraph. (R-1, p. 208).

In 2005, Complainant applied to the Newtown Police Department. She passed the written test, but failed to appear for the agility test and was eliminated from the process. (R-2; C-13; R-7)

In 2005, Complainant applied to the Darien Police Department, but was eliminated from consideration when she did not pass the written examination. (C-13; R-7)

In February 2006, Complainant applied to the Bridgeport Police Department. She passed the written test, but when she failed to appear for the oral examination she was disqualified from further participation in the process. (R-2; R-7).

In 2006, Complainant applied to the Stamford Police Department. (R-2, Sec. K).

In 2006, Complainant applied to the Norwalk Police Department. (C-13; R-7)

In 2006, Complainant applied to the New Haven Police Department. She was eliminated from consideration after her background investigation was deemed unsatisfactory. (R-7).

In 2007, Complainant applied to the Monroe Police Department. She passed the written examination and the agility test, but was eliminated from consideration when she did not take the oral examination. (C-13; R-7)

On January 29, 2007, Complainant received a medical approval which stated that she was medically capable of participating in "the basic recruit training program" of the New Haven Police Department. Respondent had access to this medical approval and, in reliance thereon, considered Complainant to be in good medical condition. (R-4; R-5; Tr-158:8-159:5).

Applicants' employment in self-owned businesses is verified by obtaining file information from relevant state licensing and taxing agencies. Respondent does not require background investigators to interview or obtain references from business clients of self-employed applicants. (Tr. 250:13-252:7).

Respondent requires background investigators to gather information about applicants' relationships within their communities through neighborhood canvasses, and to include

at least three "neighborhood/references" set forth on a standard form,⁹ in their background investigation reports. (Tr. 250:3-12; R-1, pp. 183-185).

After completing a trooper trainee background investigation, the investigator prepares a summary of the investigation which he or she forwards it to the supervisor of the Background Unit for review and (unless deemed "deficient" and returned to the investigator for correction) incorporation into the full investigative file, which includes copies of all documents upon which the summary is based. (Tr. 406:13- 408:1; R-9).

Trooper Jamaitus' violated no policies or procedures during the course of his background investigation of Complainant. The file summary he submitted contained no deficiencies. (Tr. 250:3-252:2; 397:11-403:21; 409:6-13).

The Background Unit forwards each completed background investigation to the Selection Unit where it is date-stamped, reviewed for completeness, filed in its subject's application folder, and stored in a banker's box (along with other completed applicant folders), pending review and assessment by the members of Respondent's Selection Management Committee. (Tr. 251-252, R-7).

Respondent's Selection Management Committee is responsible for reviewing the qualifications of trooper trainee applicants and applying Respondent's selection standards to them in a fair, objective and uniform manner. The Selection Management Committee includes six (6) voting members appointed by Respondent's Commissioner. Each is experienced in the field of law enforcement and familiar with the duties and responsibilities of state troopers. Demographically, their appointments reflect the diversity of a wider population. The Commanding Officer of Respondent's Selection and Investigative Support Section (the Commanding Officer), and Respondent's Affirmative Action Administrator (or designee), serve as ex-officio members of the committee.

Trooper Jamaitus did not know the identities of the Selection Management Committee members. (Tr. 408:24, 409:1-5).

In some instances, the Commanding Officer will call upon the Selection Management Committee to review individual polygraph examinations and/or background investigations containing potentially disqualifying information that has been brought to light during the testing and selection processes. In such instances, the Selection Management Committee is responsible for deciding whether the nature of the information is such that the applicant subject to it should be allowed to continue to compete in the selection process, or whether he/she must be disqualified. (Tr. 310:19-312:6).

⁹ In completing Respondent's standard form, background investigators must identify each neighbor to whom they speak, describe his or her residential/geographical proximity to, and length of time each has known the applicant. A neighborhood interviewee is not required to have an actual relationship with the subject applicant. Background investigators are allowed to include neighbors' answers, based on relevant observation, to ten "yes" or "no" questions about an applicant's maturity, associations, family stability and respect for property, as well as additional comments and explanations, to inform their background investigations.

Complainant's application file, including the background investigation performed by Trooper Jamaitus, contained no information that would disqualify her for service as a state trooper.¹⁰ (C-3. Response to question 12-H; R-1, p. 506; Tr. 310:19-312:6).

In 2007, Major Christopher Arciero, Lt. David Aflalo, Lt. Marianne Daly, Lt. Alaric Fox, Sgt. David Rosado and Sgt. Chanford Pierce were the voting members of Respondent's Selection Management Committee. Four of the six were over the age of forty; three were white males; one a white female; one a Hispanic male; and one an African-American male. (C-3; R-11, Tr. 285:11-286:3; 209:22-310:18; 333:8-334:7; 361:19-21; Respondent's Brief p. 5 #22).

Each Selection Management Committee member is independently responsible for reviewing and assessing the background investigation and polygraph report of every applicant under consideration for employment. Respondent instructs committee members to consider, but not to limit their consideration to each applicant's: employment history; motor vehicle history; criminal history; drug use; financial history; education; training; police/military service; community service and personal references and, guided by applicant scoring criteria, to assign each file a score between .5 (Poor) and 4.0 (Excellent). (C-15). Each applicant's score is added to points previously awarded to him or her based on the objective results of his or her first phase examinations.¹¹ (R-8; R-10; Tr. 245; Tr. 316)

Trooper Jamaitus did not know what numerical score would be necessary for Complainant to proceed to the training academy. (Tr. 408:24, 409:1-5).

On various dates in August and September 2007, the members of the Selection Management Committee independently reviewed and scored Complainant's application file. Each had access to and was able to review all of the documents in her file. (R-1; Tr. 253:20-254:3; 286:20-288:4; 314:3-315:16; 335:2-18; 388:23-390:1).

In reviewing Complainant's file, Selection Management Committee member David Rosado considered the entire file including, but not limited to Complainant's education, work history and credit history. After his review Sgt. Rosado gave Complainant's file a subjective score of 2.5 (bringing her total score to 4.5), which was in the Good category. (R-10; R-11; Tr. 288:5-292:16; 303:17-305:2).

¹⁰ Disqualifying information may include, but is not limited to disclosures pertaining to: criminal activity; drug use (type, frequency and recentness are considered); poor motor vehicle driving history; questionable employment history, including discipline, unsatisfactory performance and improper behavior; and dishonesty, including lying in the selection process.

¹¹ Complainant received a total of 2.0 points (of a possible 3.0) for her first phase examinations. Applicants who score over 88% on the written examination are awarded 1.5 points; those with scores between 80% and 87% are awarded 1.0 point; and applicants scoring between 65% and 75% receive half a point. Applicants who score over 88% on the observational test are awarded 1.5 points; applicants with scores between 82% and 87% are awarded 1.0 point; and applicants scoring between 75% and 81% receive half a point (C-15).

In reviewing Complainant's file, Alaric Fox considered the entire file including, but not limited to her inconsistent answers on polygraph reports, employment and neighbor references, and police activity in and around her home. After his review, Lt. Fox gave Complainant's file a score of 2 (total score of 4), which was in the Good category. (R-10; R-11; Tr. 314:3-316:2).

In reviewing Complainant's file, Marianne Daly considered the entire file including, but not limited to Complainant's work history, education, the references she received from neighbors and special skills such as her ability to speak Spanish. After her review, Lt. Daly gave Complainant's file a score of 2.5 (total score of 4.5) which was in the Good category. (R-10; R-11; Tr. 336:9-337:22).

In reviewing Complainant's file, David Aflalo considered the entire file including, but not limited to Complainant's demeanor during her interview with Trooper Jamaitus, her organizational skills, the calls she had made to the Stratford police, credit and tax information and her education and employment histories. After his review Lt. Aflalo gave Complainant's file a score of 3.5 (total score of 5.5) which was in the Excellent category. (R-10; R-11; Tr. 379:23-386:1).

Selection Management Committee member Christopher Arciero gave complainant's file a score of 2 (total score of 4.0); Chanford Pierce gave her file a score of 2.5 (total score of 4.4). Both ratings were in the Good category. (R-11).

At the time they rate the individual files, the members of the Selection Management Committee do not know what score an applicant will need to achieve in order to move beyond the background investigation stage to the next stage in the selection process. (Tr. 282). In fact, Respondent is unable to determine what the cutoff score will be until after all the files in the relevant applicant pool have been rated by each member of the Selection Management Committee and forwarded to the Selection Unit to be totaled, averaged and then numerically ranked by administrative personnel. (Tr. 258:3-259:17; R-8; R-10).

After all applicant files have been reviewed, scored and ranked, Respondent establishes a numerical cutoff point to determine which applicants will be allowed continue on in the selection process. Because Respondent's ability to hire is determined by the availability of funding and the number of trooper trainee openings, the cutoff number may eliminate qualified applicants from further competition. (Tr. 282).

Complainant's file received an average aggregate score of 4.50 from the Selection Management Committee. Although this rating was in the Good category, it was lower than the 5.0 cutoff for membership in Respondent's 119th training troop. (R-11; R-21; Tr. 258:3-8).

By correspondence dated September 17, 2007, Complainant was informed that she had not ranked high enough on the cumulative score that included the results of the written

and observational examinations, as well as an assessment of her experience, employment, education and training. (R-21).

III. ANALYSIS

Complainant has charged that Respondent discriminated against her when it failed to select her as a trooper trainee due to her age and gender.¹² When a plaintiff claims disparate treatment the case is governed by the tripartite shifting burdens set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Accordingly, Complainant must establish a prima facie case by demonstrating that (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was subjected to an adverse employment action; and (4) the adverse employment action occurred under circumstances that permit an inference of discrimination. See *Jacobs v. General Electric Co.*, 275 Conn. 395, 400-01 (2005).

Complainant easily satisfied three elements of her prima facie case. She is a member of at least two protected classes¹³ and she suffered an adverse employment action when Respondent failed to select her as a trooper trainee, a position for which she was at least minimally qualified. Although I do not believe that her failure to survive the competitive process pursuant to which Respondent selects trooper trainees occurred under circumstances which, if left unexplained, raise an inference of discrimination, because the burden of establishing a prima facie case is one of production, not proof, (*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000)), and is generally understood not to be onerous, I am going to grant *arguendo* that Complainant has met that de minimus standard and analyze and decide this case accordingly. See *CHRO ex Rel. Samuel Andoh v. Southern CT State University*, CHRO No. 0630311 (2011).

Once a complainant has established a prima facie case, the burden of production shifts to the respondent who must overcome the rebuttable presumption of discriminatory intent established thereby by articulating (again, it is not necessary to prove) a legitimate, non-discriminatory reason for its employment decision. See *McDonnell Douglas* at 802.

Respondent did not dispute that Complainant appeared qualified to become a trooper trainee at the point in the selection process when she was eliminated from consideration. Nevertheless, Respondent met its production burden, successfully rebutting Complainant's prima facie case, by offering evidence of the facially neutral selection process pursuant to which it scores and ranks trooper trainee applicant files to explain that notwithstanding the fact that the score assigned to Complainant's application file fell within the "good" category, when compared to the scores of all other

¹² Original complaint included a disability claim, but complainant dropped claim in post hearing brief (.9) and we will not address it in this decision.

¹³ ADA

applicants whose files had been reviewed and ranked, her score had not been numerically high enough to make the “cut off” for the 119th training class. Respondent also explained that the number of applicants who will be selected to fill any given class is unknown at the inception of the application process, but dependent upon its operational needs at the time of selection, as well upon the amount of available funding in its budget.

Thus, if her claims are to prevail, Complainant must prove that Respondent’s proffered reason was not the true reason for its employment decision and that she has been the victim of intentional discrimination. Evidence of discriminatory statements, discriminatory treatment or unequal applications of Respondent’s policy may enable her to succeed either directly, by persuading the court that a discriminatory motive more likely motivated the employer, or indirectly, by showing that the employer’s proffered explanation is unworthy of credence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

“Cat’s Paw” theory of causation

In this case, Complainant attempted to prove her discrimination claim directly, on a subordinate bias theory. She claimed that due to discriminatory animus Trooper Jamaitus prepared a background investigation in which he emphasized arguably adverse personal information about her and minimized the importance of more supportive information about her qualifications, intending thereby to co-opt the independence of the decision makers and cause them not to hire her. In an opening statement, Complainant’s attorney explained: “[O]ur theory is that unfortunately the Department [Respondent] relied on an investigator who did an inaccurate, incomplete [background] investigation. We believe it was intentional on his part primarily due to age discrimination.¹⁴ And so we believe that that investigation tainted the process, so that’s basically our focus. And we would rely on the cat’s paw theory of liability.” (Tr. 5:17-24).¹⁵

The “cat’s paw” doctrine can impose liability in a situation where a supervisor charged with making personnel decisions must rely on information, recommendations and evaluations provided by subordinate(s) who lack decision making power, but use the decision maker, who harbors no discriminatory animus, as a dupe in a deliberate

¹⁴Although Complainant never specifically dropped her disability claims, she did not pursue them at the public hearing and failed to address them in her post-hearing brief. Pursuant to Regulation 46a-54-93a (closing arguments and briefs), “[t]he presiding officer may deem the failure to brief any claim to be a waiver of said claim.” Accordingly, I find that Complainant has waived her disability claim and therefore will not address whether, as a cancer survivor she suffered from a chronic condition that allows for protection under the CFEPAs physical disability discrimination provisions or whether, notwithstanding Respondent’s knowledge of her bout with cancer, at the time she applied for the trooper trainee position, she was cancer free and therefore, as a matter of law, not disabled.

¹⁵Complainant did not seriously contend that [any of] the members of Respondent’s Selection Management Committee, or the Commanding Officer of its Investigative and Support Section (the actual decision makers) harbored animus toward any of the protected classes of which she is a member. Her counsel made a weak pass at insinuating such animus when, cross-examining Selection Management Committee member Fox, she asked if he knew whether Respondent had ever recommended that the state legislature impose an upper age limit for trooper trainee applicants. When Lt. Fox answered “no,” Attorney Engstrom introduced a Department of Public Safety committee’s report to the Connecticut General Assembly that included such a recommendation, but offered no proof that Lt. Fox, who had served on the committee’s recruitment subcommittee either knew of, or was involved in the work of its hiring selection subcommittee, or its recommendation. (C-29).

scheme to trigger a discriminatory employment action. *EEOC v BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 484-85 (10th Cir. 2006); *United Technology Corp./Pratt and Whitney Aircraft Div. v. Commission on Human Rights*, 72 Conn. App. 212 (2002). If a supervisor performs an act motivated by discriminatory animus that is intended to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer could be held liable. *Staub v. Proctor Hospital*, 562 U.S. ___, 131 S.Ct. 1186, 1194 (2011).¹⁶

Thus, to establish liability on a cat's paw basis, Complainant must prove: 1) that Respondent's background investigator, Trooper Jamaitus was motivated by discriminatory animus when he conducted her background investigation; 2) that so motivated he compiled a background investigation report and summary intending to cause an adverse employment action; and 3) that the decision makers' (the members of Respondent's Selection Management Committee and the Commanding Officer's) reliance upon the tainted report was the (proximate or "but for") cause of Respondent's failure to select Complainant as a member of its 119th training troop. See *Rajaravivarma v. Bd. of Trs. for the Connecticut State Univ. Sys.*, 2012 WL 1019877, at *20 (D.Conn. Mar. 26, 2012).

Direct Evidence of Discriminatory Bias

Complainant relied primarily on the testimony of State Trooper Steven Salvatore (to whom she is now married) to establish evidence of Trooper Jamaitus' discriminatory animus. Trooper Salvatore testified that when he and Trooper Jamaitus (now retired) had been colleagues, they used to speak with each other on a regular basis (Tr. 203:20-23). He recalled having spoken with Trooper Jamaitus about Complainant twice during the pendency of her trooper trainee application. On the first occasion Trooper Jamaitus had simply mentioned that he had met and interviewed Trooper Salvatore's (then) "girlfriend." On a subsequent occasion Trooper Salvatore had sought out Trooper Jamaitus to ask if the latter knew when Complainant's file would be complete. Trooper Salvatore testified that Trooper Jamaitus had responded to his question by asking "what does she want to be a trooper for, we're only going to get five or ten years out of her[.]" and that he "took [Trooper Jamaitus' answer] as a reflection [that] because she [Complainant] was 50 years old -- or almost 50 -- and we wouldn't get a lot of time out of

¹⁶ Although *Staub* was decided under the Uniformed Services and Reemployment Rights Act (USERRA), its resolution is applicable to the subordinate-liability standard for Title VII and other federal antidiscrimination statutes. Both Title VII and USERRA require that a plaintiff demonstrate discrimination by showing that the proscribed bias was a "motivating factor" in the adverse decision. 38 U.S.S. 4311(c) (USERRA), 42 U.S.C. 2000e-2(m), 2000e-5(g)(2)(B) (Title VII). The Court in *Staub* emphasized that the "motivating factor" causation standard is simply the traditional tort law standard of proximate cause, requiring only "some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those link(s) that are too remote, purely contingent, or indirect. 131 S.Ct. at 1192. (internal quotation marks omitted). By contrast, liability under the ADEA exists if an employee suffers adverse employment action "because of such individual's age." 29 U.S.C. 623(a)(1). Thus, "to establish a disparate treatment claim under the plain language of the ADEA, . . . a plaintiff must prove that age was the but-for cause of the employer's adverse decision." *Gross*, 557 U.S. at 176. A "but-for" cause requires a closer link than mere proximate causation; it requires that the proscribed animus have a determinative influence on the employer's adverse decision. *Id.* Accordingly, *Staub's* proximate causation standard would not apply to cat's paw cases involving age discrimination because the ADEA requires a "but-for" link between the discriminatory animus and the adverse employment action as opposed showing that the animus was a "motivating factor" in the decision.

her and we'd spend all that money putting her through the academy." (Tr. 203:12-24; 204:1-16). Trooper Jamaitus did not mention anything about Complainant's status as a breast cancer survivor or a woman in either conversation (Tr. 209:15-22).

In her Post-Hearing Memorandum (p. 2) Complainant claimed that "Counsel for respondent avoided questioning Richard Jamaitus about his disparaging remark concerning complainant's age . . ." and that "Jamaitus did not take the opportunity to deny such a remark when he testified on November 20." These claims are untrue. Actually, Trooper Jamaitus had testified that although he could not specifically recall making the alleged comment, if, in fact he had referred to a ten year tenure, it would have been a reference to the length of time it takes to vest in Respondent's pension plan. (Tr. 404:19-24; 405:1-6).¹⁷

Even absent this explanation, Trooper Jamaitus' comment lacks the specificity necessary to establish discriminatory motive or intent with direct evidence. *Getschmann v. James River Paper Co., Inc.*, 822 F. Supp 75, 78 (D. Conn. 1993) (supervisor's remark that "it sometimes is difficult to teach an old dog new tricks," "too slender a reed to carry the weight of the charge" in ADEA case where employer presented overwhelming evidence of non-discriminatory reason), *aff'd*, at 7 F.3d 221 (2d Cir. 1993). Evidence is considered to be direct if "it consists of statements by a decision maker that directly reflect the alleged animus and bear squarely on the contested employment decision. *Febres v. Challenger Carribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000).

Circumstantial Evidence of Discriminatory Bias

Complainant claims that Trooper Jamaitus purposefully manipulated information contained in the (five hundred fifteen [515] page) background investigation report he had performed on her to maximize or emphasize arguably adverse aspects of her background, while minimizing the importance of more supportive information about her character and qualifications, and that he intentionally skewed information in the report's summary section in an effort to co-opt the independence of the members of the Selection Management Committee in order to eliminate her as a trooper trainee candidate. (Complainant's Post Hearing Memorandum, pp. 13-15).

Complainant testified extensively. She took issue with the fact that Trooper Jamaitus had not stressed positive information about her academic record, fluent Spanish, work ethic and eligibility for a weapons permit by reiterating it in the summary section of his background investigation file (although he had appropriately categorized and included it within the larger file). More significantly, she provided explanatory detail to information contained in the background investigation report that she considered less than positive, presenting 'her side of the story' with respect to apparent job hopping and an ongoing problem with one of her neighbors (including its effect on her reputation within the neighborhood and encounters with the Stratford police that had resulted therefrom), in

¹⁷ Upon direct examination, Trooper Jamaitus also confirmed his awareness of Complainant's status as a breast cancer survivor, but testified that neither that status, nor her age, nor her gender had influenced his investigation. (Tr. 405:7-21). Complainant's attorney chose not cross examine Trooper Jamaitus on any of these points. (Tr. 409:20 – 413:13).

essence citing Trooper Jamaitus' failure to include such explanations and defenses in the background investigation file as circumstantial evidence of discriminatory animus and intent.

Complainant's testimony indicates that she has confused the role of background investigator with that of applicant advocate and misconceived the chief function of the background investigation, which is to verify information provided by applicants.

For example, she claimed that Trooper Jamaitus acted with discriminatory motive by including less than perfect references from two of her past employers in both the main body and summary sections of her background investigation report, while failing to interview and include in the report mitigating positive references from long term clients of her home maintenance business. (R-1; Tr. 47-50). In fact, however, Respondent requires its background investigators to verify claims of self-employment by confirming the legitimacy of such businesses and applicants' compliance with relevant licensing and/or other applicable regulations, by obtaining copies or other confirmation of required governmental filings and/or payments, and including it in their background investigation reports. Accordingly, in verifying Complainant's self-employment, Trooper Jamaitus simply followed Respondent's protocol. (Tr. 250; 281; 403; R-1, p. 173).

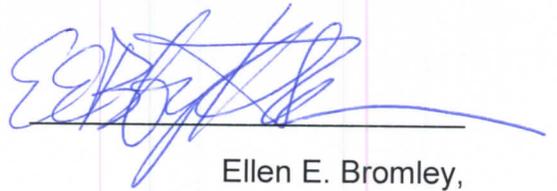
Further, the record shows that each member of Respondent's Selection Management Committee who reviewed the background investigation report prepared by Trooper Jamaitus, after due consideration of the information provided therein (her personal, family, educational, employment, financial, business, motor vehicle, legal and community histories) had, in scoring Complainant's application file, deemed it to be in the "good" category and had found Complainant to be eligible for selection as a trooper trainee.

While I do not doubt Complainant's personal conviction that the failure to hire her was undeserved and unfair, for the "cat's paw" doctrine to be viable the record must contain evidence sufficient to prove that Trooper Jamaitus harbored and acted with discriminatory animus, intentionally performing an investigation that would cause Respondent to eliminate Complainant from consideration as a trooper trainee.¹⁸

Accordingly, the complaint is DISMISSED.

¹⁸Because Complainant has not proven that Trooper Jamaitus acted with discriminatory motive, there is no need to analyze the extent to which Selection Management Committee members may have relied upon the background investigation report and summary. I do note, however, that a necessary element of the cat's paw theory of liability is uncritical reliance by the decision maker[s] on facts provided by a biased agent. Absent such reliance, there is no basis for subordinate bias liability. In this case all testifying members of the Selection Management Committee confirmed that Complainant's age and sex were known to them, but had not played a role in their grading of her file and that each had reviewed its entire contents.

It is so ordered this 10th day of January 2014.



Ellen E. Bromley,
Presiding Human Rights Referee

cc.

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