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June 14, 2016

CHRO ex rel. Barry Weinz v. Bill Selig Jewelers, Inc. CHRO No. 1110081 Fed No.16a20100149

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 via by via email to the commission, complainant, respondent and/or counsel.

Very Truly yours,

Kimberly D. Morris
Secretary II

cc.

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State of Connecticut
Commission on Human Rights and Opportunities
Office of Public Hearings

Commission on Human Rights and Opportunities
ex rel. Barry Weinz, Complainant

CHRO Case No. 1110081
Federal No. 16A 2010 0149

v.

Bill Selig Jewelers, Inc., Respondent

June 14, 2016

FINAL DECISION

I. PROCEDURAL BACKGROUND

On September 3, 2010, the complainant, Barry Weinz, of 9 Foothills Way, Bloomfield, Connecticut, filed an affidavit of illegal discriminatory practice (complaint) with the Connecticut Commission on Human Rights and Opportunities (commission) alleging that his employer, Bill Selig Jewelers, Inc. (respondent), whose address is 712 Hopmeadow Street, Simsbury, Connecticut, discriminated against him on the basis of age and physical disability when it terminated his employment on March 16, 2010, in violation the Connecticut Fair Employment Practices Act, specifically, General Statutes § 46a-60 (a) (1) and General Statutes § 46a-58 (a); 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. The commission is located at 25 Sigourney Street, Hartford, Connecticut.

A commission investigator made a reasonable cause finding, and on November 8, 2013, the matter came before the Office of Public Hearings for a public hearing pursuant to the certification process. In due course, on October 22, 2015, the chief human rights referee reassigned the case to the undersigned as presiding referee. A public hearing was held on December 2, 3, and 7, 2015. At the conclusion of the complainant's case in chief, the respondent made an oral motion for a directed verdict, or alternatively, a motion [to dismiss] for failure to present evidence establishing a prima facie case. The motion was based on the same-actor inference and insufficiency of the evidence to establish a claim of intentional discrimination (Tr. 180-183). The undersigned denied the motion from the bench (Tr. 183). Upon conclusion of its case in chief, the respondent rested. Briefs were filed on March 1, 2016, and March 4, 2016, at which time the record was closed.

II. PARTIES' POSITIONS

The complainant contends that he was the victim of intentional discrimination when the respondent discharged him from employment on the basis of his age and/or disability stemming from diabetic illness. The respondent contends that the quality of the complainant's work had deteriorated and he was no longer able to perform the essential functions of the job when he was discharged. The respondent further contends that evidence that the same individual who terminated complainant also hired him allows an inference that complainant's termination was not the result of unlawful discrimination.

III. FINDINGS OF FACT

The following relevant facts are derived from the pleadings, exhibits admitted and testimony adduced at the public hearing, and the record file in this matter. [1]

1. All procedural notices and jurisdictional prerequisites have been satisfied and this matter is properly before this presiding officer to hear the matter and render a decision (Record File.)

2. The complainant is a member of one or more protected classes because of his age (then sixty-seven years of age) and physical disability (diabetes) (Complaint ¶ 3, 6, 7, Answer; Tr. 14, 116-117).

3. Bill Selig Jewelers, Inc., consists of two retail stores, in Windsor and Simsbury; is owned and managed by Bill Selig (Selig); and at the time of the alleged incident employed more than ten employees (Complaint ¶ 2, Answer, Tr. 267-272).

4. Bill Selig Jewelers, Inc., is a fine jeweler (Tr. 220). Selig, the owner, is an experienced jeweler (Tr. 270-272).

5. As a young man, Selig founded the business in 1977 in his hometown of Windsor after discovering the art of jewelry-making and developing skills as a silversmith after college (Tr.268-271). He built the business, expanding to a second location in Simsbury ten or fifteen years later (Tr. 278).

6. Selig testified that he has a very good reputation in the community; his standards are very high, and his shop is "top notch." (Tr. 283).

7. Complainant was born in 1942 and learned the goldsmith's trade while he was in high school by working at a jewelry repair business in Hartford, Fred Roggi Jewelers, where he continued his apprenticeship for seventeen years (Tr. 14-17, C/Ex. 5).

8. In 1975, complainant left his position with Fred Roggi and opened his own jewelry repair business (Tr. 16 – 17).

9. In 1980 or 1981, an injury from a fall down a flight of stairs forced the complainant to stop working Tr. 17, 85). When he recovered he attempted to resume work as a goldsmith but was unable to remain seated for sufficiently long periods of time to perform repairs because of a fused spine from the injury (Tr. 17, 85). Prior to the problems with his back from the fall, complainant had suffered four heart attacks (Tr. 85).

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[1] References to testimony in the transcript are designated as "Tr.", followed by the page number. References to the complaint are designated as "Complaint ¶ ", followed by the paragraph number. The complainant's exhibits are designated as "C/Ex.", followed by the exhibit number.

10. In about 1985, complainant suffered a heart attack which required double bypass surgery. He applied for and was awarded full social security disability benefits. He remained out of work and continued to collect full disability benefits until 1993 when he was hired by the respondent (Tr. 17, 18, 20-21).

11. In August of 1993, respondent hired the complainant as a goldsmith when complainant was fifty-one years old (Complaint ¶ 3, 4, Answer). Respondent had full knowledge of complainant's age at the time (Tr. 276).

12. When he hired the complainant, Selig knew the complainant had had a heart attack and double-bypass cardiac surgery and was disabled; that complainant had been out of work because of various disabilities for four or five years and was receiving full social security disability benefits. He also knew the complainant had a fused spine, was unable to sit at his bench for long periods of time, needed to stand up and move around frequently, and Selig accommodated him (Tr. 18, 19, 20-21, 73, 103, 272- 274, 276).

13. Selig was understanding about complainant's disability. Complainant considered Selig a good employer (Tr. 94-95). Complainant enjoyed working with Selig and admitted Selig was a great employer (Tr. 100).

14. Initially, Selig knew that complainant could only work part-time, twenty to twenty-two hours per week, because he was still recovering from double bypass surgery and receiving social security disability benefits, and Selig accommodated him. When complainant's social security disability benefits came to an end about a year later and complainant desired to work full time, Selig provided him with full time work (Tr. 104).

15. When complainant began collecting social security at age 65, he asked to work fewer hours and Selig reduced his hours (Tr. 292-293).

16. As a goldsmith working for respondent, complainant's job generally was to repair and modify jewelry. He soldered and adjusted the size of rings, repaired chains and pendants, set stones, assembled mountings, polished jewelry, and made castings. The type of work performed by the complainant, and that he was trained to do, is referred to in the trade as "bench work" (Tr. 21-22, 281).

17. Complainant's specialty was jewelry repair work. Selig testified that "he was very good at it." (Tr. 281). Selig testified that initially the respondent was "a very talented goldsmith" and "very good at his job." (Tr. 273, 281, 315).

18. During most of his employment with respondent, complainant worked at the respondent's Windsor store at a work bench on the second floor (Tr. 23). Later complainant split his time between respondent's Windsor store and respondent's Simsbury store (Tr. 23, 217-219).

19. As the owner of Bill Selig Jewelers, Inc., Selig had diverse other responsibilities and relied on the complainant for much of the bench work. But when Selig did jewelry repair work he often worked in close proximity to the complainant, in the same room much of the time. At the Windsor store, Selig had a work bench in the same room as the complainant's, across the room

and along another wall. At the Simsbury store, complainant worked at a bench side by side with Selig (Tr. 23, 278-279).

20. For the last nine or ten years of his employment with respondent, complainant's hands would shake and cramp (Tr. 108-110, 258, 262). When complainant's hands cramped, another employee, would go to the store to buy quinine water to relieve complainant's cramps so he could continue to work (Tr. 108 – 109, 263).

21. The shakiness of complainant's hands progressed over time (Tr. 114 -115, 263-264). Toward the end of his employment complainant would have to pry his fingers apart in order to have control over them so he could work. At the time of his termination, complainant's ability to control his hands was worsening (Tr. 109-110; 263, 279).

22. In the early 2000s, complainant was diagnosed with diabetes and immediately informed Selig about his disease (Tr. 24, 116-117, 296-297). Complainant frequently spoke with Selig about his medical conditions, including his diabetic illness (Tr. 279-280, 282, 296). Respondent was aware of complainant's diabetes and did not see it as job-limiting (Tr. 60, 113-118, 279-282).

23. Untreated, complainant's diabetes would cause him to faint because of low blood sugar (Tr. 25). Diabetes can affect all bodily functions (Tr. 254).

24. Initially, complainant treated his diabetic condition using only oral medications three times a day (Tr. 24, 117). In 2008 or 2009, complainant began to require insulin shots to control his sugar level (Tr. 24, 117) and told Selig that he was taking insulin shots (Tr. 62, 282).

25. Complainant resisted taking insulin shots three times a day as his physician had recommended because he was afraid of needles and unable to administer the insulin injection to himself during the day at work (Tr. 80, 280). The complainant took insulin by injection twice a day at home, in the morning and the evening when his wife or daughter could administer the injections (Tr. 24, 63). With the consent of his medical doctor, complainant took insulin by pill, rather than by injection, during the afternoon when he was at work (Tr. 64-65). Selig knew it was difficult for complainant to control his diabetes because complainant had told him of his fear of needles (Tr. 60, 279-282, 296).

26. Complainant developed a diabetes-related toe infection, which required surgery and four to six weeks to heal because of poor blood flow to his foot, and Selig paid complainant the entire time he was out of work (Tr. 280-281).

27. Four or five years before he terminated the complainant, Selig noticed deterioration in the quality of the complainant's work (Tr. 282-284). At first, he noticed that when complainant set diamonds in a prong (known as a Tiffany setting), the diamonds were set crooked, always at the same slight tilt. So Selig took over that work himself (Tr. 283, 315-317).

28. Selig spoke to complainant about his consistently setting diamonds at the same wrong angle and asked him if he knew why that was happening. Complainant had no response (Tr. 317-318).

29. When complainant was first hired, his work would be fine and did not need much correction (Tr. 194). Initially, complainant was able to set stones well, but later his ability to properly set stones

deteriorated and the work needed to be redone. Toward the end of complainant's employ, the quality of his work became increasingly inconsistent. Rings would not be sized correctly; solders or polishing would not be done properly; the prong work was inconsistent (Tr. 197-201, 262). The risk of diminishing the integrity of the piece increases with each reworking (Tr. 227-228, 287-89).

30. The work of a jeweler is intricate work and requires the ability to hold and to see very small objects (Tr. 254).

31. Checkers at the Windsor store and the Simsbury store checked the jewelry repair work to make sure it was done properly and on time (Tr. 192, 195, 200, 261).

32. During the final one and one-half to two years of his employment, Esther Boleski (Boleski), who worked at the Windsor store and checked complainant's work, had to "kick back" complainant's work to be corrected about one quarter of the time so customers would be satisfied with the work (Tr. 195, 200). Annette DiClementi, manager of the Simsbury store, had to send work back to complainant to be corrected (Tr. 261). Selig had to repair complainant's work with increasing frequency, and during the final six months of complainant's tenure, Sharran Bennett (Bennett), the Windsor store manager, would either send the work to a separate shop or Selig would do much of complainant's work (Tr. 228 - 229).

33. Complainant frequently did not complete his work on time, either because it took him longer to complete the work or because the work was unsatisfactory and needed to be redone. Boleski had to call customers and tell them the work would not be completed on time (Tr. 207).

34. When complainant was no longer able to do his own polishing, Selig hired a new employee, Mary Johnson, to take over complainant's polishing work (Tr. 205-206, 223-225, 302).

35. During the complainant's final year, the head of a diamond in a customer's wedding set fell out and was lost two weeks after complainant had repaired the prong, and respondent had to replace it (Tr. 227, 236-239, 319).

36. Complainant fell asleep at work. In the Windsor shop, Boleski and Bennett both would find complainant "nodding off," sometimes once or twice a week toward the end (Tr. 210, 223-224, 231). Complainant admitted he fell asleep at his bench (Tr. 210).

37. Complainant's organizational skills deteriorated and his desk was "a mess." (Tr. 224-226, 232-233).

38. Boleski and Bennett spoke with Selig frequently about problems with the quality of complainant's work and that the work needed to be redone correctly (Tr. 202-204, 232). Boleski testified that the complainant's work deteriorated to the point where he "couldn't do the work." (Tr. 214).

39. Complainant was aware that Selig became increasingly frustrated with complainant's work product. Two years before complainant's termination, Selig criticized complainant's work saying to him that it wasn't first-rate quality or "top-notch." (Tr. 74, 75, 97, 99).

40. Employees of the respondent who worked closely with complainant for years, including Selig himself, liked complainant, spoke highly and respectfully of him, and were concerned about his health (Tr. 217, 220, 221, 253, 257, 261, 263, 293, 296, 297). They knew that complainant once had been an excellent jeweler but recognized that during the final years of his employment with respondent, the quality of complainant's bench work had deteriorated (Tr. 193, 217-218, 220, 221, 261, 273, 281,282).

41. All jewelers use a magnifier that fits like a visor and is called a diopter. A five diopter magnifier is the minimum and doubles the magnification. A ten diopter shortens the focal length from twelve inches to six inches (Tr. 284-285).

42. Selig noticed inconsistencies in complainant's work-product which led Selig to believe complainant was having trouble with his eyesight. To accommodate complainant, Selig purchased a ten diopter magnifier to assist him, but complainant refused to use it (Tr. 234, 285-286).

43. Selig asked complainant about his eyesight, but complainant never answered him (Tr. 286). Complainant testified that his eyesight was fine and he can see very clearly at short distances without the use of corrective lenses (Tr. 26, 110-111, C/Ex. 3).

44. Occasionally Selig spoke with complainant about his plans for retirement. Complainant replied that he wanted to work as long as he could (Tr. 28).

45. Six months to a year before complainant's termination Selig hired a new assistant manager, Michael Szwed (Szwed), to run the repair department, assist with sales and customer service, and operate a new piece of equipment, a laser welder (Tr. 295, 304).

46. To accommodate complainant when his work started to deteriorate, Selig "tried to test the waters" and offered him the opportunity for other positions in the business. Four or five times, Selig offered complainant work with customers selling jewelry or taking charge of repairs instead of working full time at the bench, but complainant refused because he didn't like working with people, didn't want to work with customers (Tr. 122, 291-292, 328-331).

47. There came a time when the quality of complainant's work product deteriorated to the point where Selig had to let him go (Tr. 282, 330-331, 336).

48. On March 16, 2010, Selig terminated the complainant (Complaint ¶ 12, Answer, Tr. 293).

49. According to the complainant, when Selig discharged him he said: "[Y]our diabetes is affecting your work and I can't have it anymore ... I've got to let you go." Complainant also testified that Selig said "you're making mistakes" and that "the diabetes is affecting [his] work." (Complaint ¶ 12, Tr. 59-60).

50. According to Selig, when he discharged the complainant, he "mentioned complainant's diabetes but not in the context that Barry put in his complaint." (Tr. 333). "My initial statement to Barry was that I don't know if it's because of your diabetes that you're having problems with your eyesight, and I believe that's all ... I said that I don't know what the reason is that you can no

longer do the work, but you cannot do the work to my satisfaction anymore." (Answer to Complaint ¶ 12, Tr. 333).

51. At the time of his termination, the quality of complainant's bench work had deteriorated and the complainant no longer was able to satisfactorily perform the fundamental job duties of the position with the respondent (Tr. 261, 282).

52. Selig described his decision to terminate complainant as: "horrible. Terrible. Very difficult for me to do." (Tr. 293).

53. Complainant would not have been terminated if he had been willing to transfer to other positions in the business, but complainant consistently expressed no interest in work other than bench work (Tr. 291).

54. Selig liked complainant and wanted to help him "do what he wanted to do. He was important to me." (Tr. 294).

55. One week after complainant's termination, Selig offered complainant a full set of tools and free bench space in the Windsor store so he could do other kinds of jewelry work as an independent contractor. Complainant declined the offer (Tr. 297-301, 304, 339).

56. After complainant's termination, Selig offered to loan him money without any expectation of repayment and gave complainant a check for $1,000, which was never cashed (Tr. 126, 298). Selig continued to send checks to the complainant out of his personal account, and those were never cashed (Tr. 298-299).

57. After complainant's termination, Szwed helped Selig with the jewelry repair work for a few months. A few months after complainant's termination, Selig hired Deidra Porter (Porter) as a new jeweler. Porter was about fifty years of age at the time (Tr. 295-296, 314).

58. After complainant's employment with respondent ended, complainant took on contract work from Raymond Roy, owner of the Gold and Diamond Exchange, beginning in about 2013. Complainant works at a bench in Roy's store on an as-need basis. There are no time constraints on the work complainant performs for Roy (Tr. 145-146).

59. The majority of the work complainant performs for Roy involves setting and sizing. Complainant's work passes Roy's expectations and the expectations of his customers (Tr. 138-139). Roy has paid complainant a total of about $5000 since 2013, for about one hundred jobs (Tr. 140).

60. Both before and after respondent terminated complainant, complainant performed work for Joseph Piccuirro, owner of the Diamond Gold Connection in Hartford (Tr. 245-246). In the beginning, complainant's work was for the most part satisfactory, but the quality of his work deteriorated. Piccuirro had to return jobs to complainant to be redone and eventually had to find a new goldsmith (Tr. 248).

IV. ANALYSIS AND CONCLUSION
Applicable Statutes

Complainant alleges that respondent terminated complainant's employment because of his age and his physical disability [2] in violation of the Connecticut Fair Employment Act (CFEPA), specifically General Statutes § 46a-60 (a) (1) [3] and General Statutes § 46a-58 (a).[4] Complainant also alleges discrimination based on complainant's age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634 (ADEA); [5] and physical disability in violation of the Americans with Disabilities Act, 42 U.S.C. 12101, et seq. (ADA).[6] The commission has no direct jurisdiction to enforce violations of federal law. Deprivations of rights secured or protected by federal antidiscrimination law constitute violations of General Statutes § 46a-58 (a), however, and the commission treats such deprivations as purely state law violations. *City of Shelton v. Collins*, 2014 WL 1032765 (D. Conn. March 14, 2014), aff'd sub nom., *City of Shelton v. Hughes*, 578 Fed. Appx. 53 (2d Cir. 2014).

The statutory definition of "employer" in the ADA establishes a fifteen-employee statutory minimum for the act to be applicable to private employers. 42 U.S.C. § 12111 (5). The statutory definition of "employer" in the ADEA establishes a twenty-employee statutory minimum for the act to be applicable. 29 U.S.C. § 630 (a). The complainant carries the burden of demonstrating a violation of the statute and that the statute applies. Complainant has not met that burden. Complainant has not alleged or established either the requisite number of employees (fifteen) for the respondent to qualify as an employer subject to the ADA, or the requisite number of employees (twenty) to qualify as an employer subject to the ADEA (Complaint ¶ 2, Answer). Complainant's ADA and ADEA claims, through General Statutes § 46a-58 (a), fail because respondent is not a covered entity subject to the jurisdiction of this tribunal with respect to those claims.

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[2] Under the CFEPA, a physically disabled person is "any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." General Statutes § 46a-51 (15).

[3] General Statutes § 46a-60 (a) (1) provides in pertinent part that "[i]t shall be a discriminatory practice in violation of this section: (1) [f]or an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, ... 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 ... age ... [or] physical disability, including, but not limited to, blindness."

[4] General Statutes § 46a-58 (a) provides in pertinent part that: "[i]t 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" inter alia "physical disability."

[5] The ADA prohibits discrimination against any "qualified individual on the basis of disability in regard to," inter alia, "discharge of employees." 42 U.S.C. § 12112 (a).

[6] The ADEA provides that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623 (a).

Further, because respondent is not subject to the ADA, there is no conversion of an alleged violation of the federal antidiscrimination law on the basis of physical disability into a violation of our Connecticut antidiscrimination laws.[7] See *Trimachi v. Connecticut Workers Compensation Committee*, 2000 WL 872451,*7 (Conn. Super. June 14, 2000). And our Supreme Court has ruled that Section 46a-58 (a) does not apply to state employment discrimination claims. *Commission on Human Rights & Opportunities v. Truelove & Maclean*, 238 Conn. 337, 346-348 (1996). Section 46a-58 (a) therefore cannot encompass the complainant's state claims asserted pursuant to Section 46a-60 (a) either.

Accordingly, the only claims that are before the tribunal are those claims of age-related discrimination and disability-related discrimination arising under Section 48a-60 (a) (1).

Standard

Our courts and this tribunal generally look to the analogous federal law for guidance when analyzing state employment discrimination claims. *Board of Education of Norwalk v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 505 n. 18; *Craine v. Trinity College*, 259 Conn. 635, 637 n. 6 (2002); *Tomik v. United States Parcel Service, Inc.*, 157 Conn. App. 312, 328 (2015).

Under our employment discrimination statutes, claims of disparate treatment are analyzed for liability under one of two theories: the mixed-motive *Price-Waterhouse* model; *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); or the pretext *McDonnell Douglas* model; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Levy v. Commission on Human Rights & Opportunities,* 236 Conn. 96, 104-105 (1996). In the present matter, the parties have a lively dispute regarding the method of proof. The complainant argues that Selig's reference to complainant's diabetes when he terminated the complainant constitutes direct evidence of disability discrimination and the mixed-motive *Price Waterhouse* method of analysis applies with respect to the claim of disability-related discrimination. The respondent argues that the correct legal standard is the method of proof set forth in *McDonnell Douglas*. Respondent also argues that it may be inferred that discrimination was not a motivating factor in complainant's discharge because the same person hired and fired him. *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461, 463-464 (6th Cir.1995), cert denied, 516 U.S. 1078 (1996).

Price Waterhouse Framework: Application

Turning first to the evidentiary standard under *Price Waterhouse*, when the complainant proves by a preponderance of the evidence that discrimination played a motivating role in the employment decision, the respondent may avoid liability only by proving by a preponderance of the evidence that a legitimate, non-discriminatory reason existed at the time of the disputed action and that reason was the actual motivating cause. *Levy v. Commission on Human Rights & Opportunities*, supra, 236 Conn. 106-107; *Miko v. Commission on Human Rights & Opportunities,* 220 Conn. 192, 207 (1991). Complainant has the initial burden of showing that he was a member of a protected class and that an impermissible factor more likely than not played a motivating role in the employment decision. *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. 105, citing *Miko v. Commission on Human Rights & Opportunities*, supra, 205, quoting *Price Waterhouse v. Hopkins*, supra, 241. If the complainant's prima facie case is sufficiently revealing of a discriminatory factor motivating the employer's decision, the burden of production and persuasion shifts to the respondent to prove by a preponderance of the

[7] Age is not a protected class under General Statutes § 46a-58 (a), which cannot be used to sustain complainant's claims of employment discrimination pursuant to the ADEA.

evidence that a legitimate, nondiscriminatory reason existed at the time of the decision and had motivated that decision. *Price Waterhouse v. Hopkins*, supra, 258; *Levy v. Commission on Human Rights & Opportunities,* supra, 106.

"Both the Second Circuit Court of Appeals and the Federal District Court of Connecticut emphasize that 'to warrant a mixed-motive burden shift the [complainant] must be able to produce [whether by direct or circumstantial evidence, or both] a 'smoking gun' or at least 'a thick cloud of smoke' to support his allegations of discriminatory treatment." *Commission on Human Rights & Opportunities ex rel. Szydlo v. ED AC Technologies Corp.*, 2007 WL 4258347 *9, quoting *Raskin v. Wyatt Company*, 125 F.3d 55, 60-61 (2d Cir. 1997).

At issue is whether Selig's remark is direct evidence of a facially discriminatory employment action or otherwise "smoking gun" evidence sufficient to trigger the respondent's burden of persuasion. "The critical inquiry in [a mixed-motive case] is whether [a] discriminatory motive was a factor in the decision *"at the moment it was made."* (Emphasis in original.) *Price Waterhouse v. Hopkins*, supra, 490 U.S. 241 (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in the judgment), quoted in *Miko v. Commission on Human Rights & Opportunities*, supra, 220 Conn. 205. For complainant to prove by a preponderance of the evidence that an illegitimate discriminatory consideration played a motivating role in the employment decision, the undersigned, as the trier of fact, would have to reasonably find that Selig's remark "'[R]eflect[s] a discriminatory attitude ... or ... demonstrate[s] a discriminatory animus in the decisional process.'..." *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. 109, quoting *Beshears v. Asbill* 930 F.2d 1348, 1354 (8th Cir.1991); See *Snow v. Dari-Farms ice Cream Co., Inc.* 2013 WL 1010669 *12-14 (Conn. Super. Feb. 13, 2013); *Commission on Human Rights & Opportunities ex rel. Peterson v. Hartford Police Department,* 2008 WL 5455392 *17.

"[A]ll comments pertaining to a protected class are not equally probative of discrimination." *Snow v. Dari-Farms ice Cream Co., Inc.* supra,*12, quoting *Tomassi v. Insignia Financial Group*, 478 F.3d 111, 115 (2d Cir.2007). Context is important. The evidence "is not to be viewed in a vacuum." *Board of Education of Norwalk v. Commission on Human Rights & Opportunities*, supra, 266 Conn. 516. There must be at least a logical connection between the complainant's prima facie case and the illegal discrimination which it purports to establish. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *Feliciano v. AutoZone, Inc.*, 316 Conn. 65, 75 (2005). If this isolated remark had been combined with other evidence of discriminatory animus, it might assume a more ominous significance. See *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 56 (2d Cir.1998); *Hayes v. Compass Group USA, Inc.*, 343 F.Supp.2d 112, 120 (D. Conn.2004); *Weichman v. Chubb & Son*, 552 F. Supp. 2d 271, 284 (D. Conn. 2008), citing *Tomassi v. Insignia Financial Group, Inc.,* supra, 115-26. However, complainant offered no evidence establishing that the remark was infected by the alleged discriminatory animus. It simply was a "stray remark" within the doctrine first articulated by U.S. Supreme Court Justice O'Connor in a concurring opinion in *Price-Waterhouse,* where she said: "Stray remarks in the workplace ... cannot justify requiring the employer to prove that its hiring and promotion decisions were based on legitimate criteria." *Price Waterhouse v. Hopkins*, supra, 490 U.S. 277 (O'Connor, J., concurring in judgment). "'[T]he stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination ...'" *Weichman v. Chubb,* supra, quoting *Abdu-Brisson v. Delta Air Lines*, 239 F. 3d 456, 468 (2d Cir.2001). Unlike direct evidence of discriminatory animus, stray remarks standing alone do not suffice to shift the burden of persuasion to the employer to prove that its employment decision was based on a legitimate factor. See *Weichman v. Chubb,* supra, 285.

In the context of complainant's entire seventeen-year employment history, it simply cannot be said that Selig's statement may be viewed as reflecting the alleged discriminatory attitude at the time the employment decision was made. Selig hired complainant knowing that he suffered from debilitating physical problems, made numerous accommodations to complainant's illnesses and medical problems including his diabetes, throughout complainant's employment tenure, and was a good employer. When Selig hired him, complainant could only work part-time because he had coronary problems and was receiving social security benefits, and Selig accommodated him until complainant was able to work full time. Selig knew the complainant could not sit at the bench for long periods of time because of a fused spine and Selig accommodated him. Complainant told Selig about his diabetic illness when he was first diagnosed in 2000, and testified that Selig had no problem with it. Complainant admitted that Selig was "very understanding" and a "good employer." When complainant required foot surgery because of complications from diabetes, Selig voluntarily paid complainant's full salary during an extended recovery period of four to six weeks. When complainant's hands cramped at work, a co-worker would purchase quinine water for him to relieve the cramps so complainant could continue to work. When Selig thought a decline in the quality of complainant's work might be due to problems with his eyesight, Selig bought a special ten-diopter magnifying lens to assist complainant with his work. When complainant could no longer do his own polishing work, Selig hired a new employee to do the polishing for him. When complainant no longer had the ability to set diamonds properly, Selig assumed all of that work himself. In the final months of complainant's tenure, the manager of the Windsor store sent complainant's work out to a separate shop. When complainant began collecting social security and wanted to reduce his hours, Selig accommodated him. Selig offered complainant the opportunity to transition to other positions in the business when he was no longer able to do bench work, but complainant was not interested in working with customers. Based on the many accommodations, considerations, and allowances the respondent accorded to complainant throughout the employment history, it is illogical to conclude that discriminatory animus, rather than a decline in complainant's job performance, motivated the employment decision at issue.

In that important context, the isolated remark by itself has no tendency to show that improper discriminatory attitudes or assumptions relating to the complainant's diabetes motivated the respondent in the employment decision and fails to establish that an illegitimate criterion was more likely than not a motivating factor in the decision. See *Levy v. Commission on Human Rights & Opportunities*, supra, 236 Conn. 105. Therefore, the complainant is not entitled to the benefit of a shift in the burden of persuasion to the respondent.

I turn next to an analysis under the *McDonnell Douglas* pretext methodology.

McDonnell Douglas Framework: Application

In discriminatory discharge cases such as the present one, the complainant establishes a prima facie case by showing that (1) he was a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to a presumption of discrimination. *Feliciano v. AutoZone, Inc.,* supra, 316 Conn. 73-74; *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 705 (2006). The formulation is slightly different in disability discrimination claims where a failure to accommodate must also be alleged. In disability discrimination cases, the employee must establish as part of the second prong that

he was able to perform the essential functions of the job with or without a reasonable accommodation.[8] *Curry v. Allen S. Goodman, Inc.*, 286 Conn. 390, 409, 415-416 (2008); *Festa v. Board of Education of East Haven,* 145 Conn. App. 103, 113-114 (2014); *Langello v. West Haven Board of Education*, 142 Conn. App. 248, 259-260 (2012); *Commission on Human Rights & Opportunities ex rel. Secundo v. The Housing Authority of Hartford,* 2000 WL 35575649,*17.

That complainant was a member of protected class, age and physical disability,[9] and was discharged from his employment is not contested. Complainant therefore easily satisfies two prongs of his prima facie case under the state claims of both age-related discrimination and disability-related discrimination. The complainant next must demonstrate that he was qualified for the position at the time of his removal and that there are circumstances giving rise to an inference of discrimination in complainant's termination.

Respondent contends that complainant, who at one time had been qualified for the position of jeweler and goldsmith, was no longer qualified at the time of his termination and therefore failed to satisfy a necessary element of his prima facie case under the *McDonnell Douglas* test. Respondent further argues that even if complainant satisfied the minimal burden of establishing a prima facie case, respondent articulated a legitimate, nondiscriminatory reason for the employment decision which the complainant has not proved to be pretextual or unworthy of credence. Respondent also contends that because the same individual who hired the complainant also fired him there is an inference that complainant's termination was not the result of unlawful discrimination.

While there is some doubt about whether the complainant satisfies the second element, the complainant's burden is a not a heavy one. *Levy v. Commission on Human Rights & Opportunities*, supra, 236 Conn. 107. Complainant established that he had worked as a skilled jeweler for many years, including seventeen years with the respondent. He provided testimony of his own training and employment experience as a goldsmith, first as an apprentice to a Hartford jeweler for seventeen years, then opening his own jewelry repair business in 1975. Following a series of medical problems in the 1980s when complainant was unable to work, respondent hired him in 1993 to work as goldsmith and to repair jewelry, initially part time until complainant was able to work full time. Since his separation from the respondent, complainant has done occasional work setting and sizing as an independent contractor for Raymond Roy, owner of Gold and Diamond Exchange, and the work has been done to Roy's satisfaction.

The *McDonnell Douglas* analysis is not a rigid formula. The elements of a prima facie case should be flexible, based on the factual scenario presented; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 n. 6 (1981); and "should be modified appropriately depending on the respective factual

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[8] With regard to the second prima facie element, there was no allegation or evidence that complainant suggested or made a formal request for reasonable accommodation based on his diabetes. See *Curry v. Allen S. Goodman, Inc.*, 286 Conn. 390, 415-416 (2008); *Festa v. Board of Education of East Haven*, 145 Conn. App. 103, 113-116 (2014): *Langello v. West Haven Board of Education*, 142 Conn. App. 248, 264-266 (2012); *Commission on Human Rights & Opportunities ex rel. Secundo v. The Housing Authority of Hartford,* 2000 WL 35575649, *17. Nevertheless, the evidence shows that numerous accommodations and allowances were made. See discussion, infra, p. 11.

[9] Diabetes has been found to be a disability under the CFEPA. *Willoughby v. Container Corp.,* 2013 U.S. Dist. WL 6198210 *9 (D. Conn. 2013); *Chasse v. Computer Sciences Corp.,* 453 F. Supp. 2d 503, 516-517 (2006).

scenario..." (Internal citation omitted). *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 108 n.20 (1996). All of the *McDonnell Douglas* prima facie elements ... [are] not necessarily applicable in every respect to differing factual scenarios." *McDonnell Douglas Corp. v. Green*, supra, 411 U.S. 802 n. 13.

Applying a minimal standard of proof and evaluating the prima facie case solely on the basis of evidence presented by the complainant, I conclude that complainant met this slight evidentiary burden of establishing the second element for his prima facie case of discrimination based on age and disability.

Having determined the complainant satisfied the first, second, and third elements needed for his prima facie case, I next turn to the fourth prima facie element and analyze the claims of disability-related discrimination and age-related discrimination separately. "Nothing in McDonnell Douglas ... limits the type of circumstantial evidence that may be used to establish the fourth prong of a prima facie case of ... discrimination." *Craine v Trinity College*, supra, 259 Conn. 640-41. Recognizing the need for adjustments for "differing factual scenarios;" *McDonnell Douglas Corp. v. Green*, supra, 411 U.S. 802 n. 13; Selig's remark about complainant's diabetes at the time of his termination, when judged without resort to respondent's testimony, is sufficient to create an inference of disability-related discrimination satisfying the fourth prima facie element of the disability discrimination claim, even though greater proof ultimately would be required to persuade the tribunal by a preponderance of the evidence that intentional discrimination motivated complainant's discharge. With respect to the inference of discriminatory intent requirement under the age discrimination claim, complainant points to replacement evidence showing that several months after complainant's termination, Selig hired a female jeweler who was then about fifty years old and more than fifteen years younger than complainant at the time. For the purposes of making out a prima facie case, evidence that an employee within the protected class was replaced by a substantially younger job applicant is sufficient to meet the minimal burden to rise to an inference of discrimination sufficient to satisfy the fourth prima facie element. See *Craine v. Trinity College*, supra, 259 Conn. 639-641; *Benedetto v. Dietz & Associates*, LLC, 2014 WL 1814284 *4 (Conn. Super. April 10, 2014), citing *Byrnie v. Town of Cromwell,* 243 F.3d 93, 102 (2d Cir.2001). Based on these undisputed facts, the complainant presented sufficient evidence of age discrimination to satisfy the fourth prima facie element of the *McDonnell Douglas* framework.

Assuming the complainant did satisfy the modest initial burden of establishing a prima facie case of discrimination based on age and/or disability under *McDonnell Douglas*, the matter moves to the second stage of the *McDonnell Douglas* model and the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for the employment decision.

In the second stage of *McDonnell Douglas*, the respondent articulated a legitimate, nondiscriminatory reason for its employment decision sufficient to rebut the complainant's prima facie case, as follows. Respondent amply articulated numerous performance issues beginning as early as five years before complainant's termination when Selig noticed small changes in the quality of complainant's work. Initially, there were difficulties with complainant's performance setting diamonds, known as prong work, without need for correction. Complainant's performance issues continued in the following years, escalating in the final one and one-half to two years of his employment. Complainant failed to complete his work on time. Co-workers noticed mistakes requiring complainant's work to be redone with increasing frequency, up to one quarter of the time. Complainant's hands shook and cramped. He would have to pry his fingers apart in order to have control over them so he could continue to work. He fell asleep at work at his bench. His work bench was disorganized and messy. A wedding diamond that complainant set for a customer fell out, was lost, and had to be replaced. When complainant was no

longer able to do his own polishing, a new employee was hired to do his polishing work for him. In the final year of complainant's employment, the manager of the Windsor store sent complainant's work out to be done at a separate shop, or Selig would do much of the complainant's work himself. In articulating a legitimate, nondiscriminatory reason for the employment action, namely that complainant was no longer able to perform the essential functions demanded of the position, respondent has met and exceeded the necessary burden of production under the second stage of *McDonnell Douglas*.

In the third stage of *McDonnell Douglas*, the burden of production shifts back to the complainant to prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision. In this stage, "[The] burden [of production] now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. *[The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."* (Emphasis added.) *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981)" (Internal quotation marks omitted). *Jacobs v. General Electric Co.*, 275 Conn. 395, 401 (2005).

Respondent argues that the same-actor inference should be recognized in the present case. The same-actor inference originated in *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991), an age discrimination case, where the Fourth Circuit held that "in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." Id., 797; See, e.g., *Carlton v. Mystic Transportation., Inc.* 202 F.3d 129, 137038 (2d Cir. 2000), cert. denied 530 U.S. 1261 (2000); *Grady v. Affiliated Central, Inc.* 130 F.3d 560 (2d Cir.1997), cert. denied, 525 U.S. 936 (1998); *Buhrmaster v. Overnite Transportation Co.*, supra, 61 F.3d 464.

In considering whether the inference should be recognized here, the undersigned notes both the long time span between the hiring of complainant in 1993 and his discharge in 2010, and also disabilities are diverse. Complainant was receiving social security disability benefits because of coronary problems when Selig hired him, but he was not diagnosed with diabetes until seven years later in about 2000. Given the somewhat unique characteristics of various disabilities and the differences between individuals with disabilities, as well as the lack of temporal proximity between the beginning and the end of his employment, the circumstances of the complainant's hiring and firing by the same individual do not necessarily lead to an inference of nondiscrimination in the present case. For these reasons, the same-actor inference is so tenuous as to be excluded.

The ultimate question in this employment discrimination case is whether the complainant has proved by a preponderance of the evidence that his discharge was due to intentional discrimination based on age and/or physical disability. *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 142 (2000); *Texas Department of Community Affairs v. Burdine*, supra, 450 U.S. 253; *Board of Education of Norwalk v. Commission on Human Rights & Opportunities*, supra, 266 Conn. 506. Complainant offered no credible evidence that respondent's stated reason for terminating him was "not the true reason for the employment decision." *Jacobs v. General Electric Co.*, supra, 275 Conn. 401.

An experienced and, by all accounts, proficient goldsmith and jeweler for many decades throughout his adult life, complainant unquestionably had been qualified for the position when respondent hired him. And, with reasonable accommodation during periods when complainant was disabled for various reasons, including from lingering effects of a serious back injury, multiple heart attacks and double

bypass surgery, and later when he began to suffer from diabetic illness, complainant remained able to continue to perform the essential functions of his job on either a full time or part time basis. However, the overwhelming weight of the evidence also shows that the quality of complainant's work declined, eventually to the point where complainant simply was no longer able to satisfactorily perform the job.

All of the witnesses who worked closely with complainant for years, including Selig himself, testified that they liked complainant, spoke highly and respectfully of him, knew that complainant once had been an excellent jeweler, but that during the final one and a half to two years of his employment with respondent, the quality of complainant's bench work had deteriorated to the point where he was no longer able to perform the functions of the position up to the standards that the respondent expected of him. Even though he was no longer able to function satisfactorily as a jeweler and goldsmith for the firm, respondent offered complainant other opportunities to remain employed, either in another capacity with the employer or as an independent contractor within the establishment and retain a good relationship with the employer.

Complainant's subjective belief in his own qualifications is not a substitute for the employer's determinations of its own business needs and of the qualifications required of complainant to perform the essential functions of the position to respondent's own high standards. The employment decision to terminate the complainant was made because at the time of his termination, the quality of complainant's bench work had deteriorated and he was no longer able to satisfactorily perform the essential functions demanded of the job. The undersigned cannot substitute my judgment for the employer's business judgment in making the at-issue employment decision, as long as age or physical disability was not a motivating factor in the decision. Here they were not.

Conclusion

With respect to complainant's claims pursuant to General Statutes § 46a-58 (a), the claimant has not met his burden of demonstrating that the ADA and ADEA threshold for number of employees has been crossed.

With respect to the claims of discrimination pursuant to 46a-60 (a) (1), the claimant has failed to prove by a preponderance of the evidence that the termination of his employment by the respondent was due to intentional discrimination against him age and/or disability, either through direct evidence that discrimination played a motivating role in the employment decision, or by establishing that the legitimate, nondiscriminatory reason for the employment decision proffered by the respondent was pretextual and not the true reason for the employment action.

ORDER

Therefore, based on the foregoing it is hereby ordered that the complaint filed herein be, and the same hereby is, **Dismissed.**

Elissa T. Wright

Hon. Elissa T. Wright
Presiding Human Rights Referee

Cc: Thomas Meiklejohn, Esq. – via email only
Alix Simonetti, Esq. – via email only
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