State of Connecticut
Commission on Human Rights and Opportunities
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April 18, 2018

CHRO ex rel. David Bruce Sloman v. NERAC Inc. and Kevin Bouley, CHRO No. 0840243 Fed No. 16a200800542

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 via email to the commission, complainants, complainant's attorney and respondent's attorney.

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. Bruce Sloman, Complainant

CHRO No. 0840243

v.

NERAC, Inc. and Kevin Bouley,

April 18, 2018

FINAL DECISION

SUMMARY

On January 17, 2008 Bruce Sloman ("Sloman" or "Complainant") filed a complaint, as amended on April 2, 2009 and November 20, 2009, with the Commission on Human Rights and Opportunities ("Commission" or "CHRO") alleging that Nerac, Inc. and Kevin Bouley ("Bouley") (collectively "Nerac", "the company", or the "Respondents") violated CONN. GEN. STAT. § 46a-60(a) (1). Complainant claims that the Respondents terminated his employment on January 12, 2007 because of his age, 61. (DOB 03/22/46).

Five different Complainants filed their underlying charges of discrimination against the Respondent for age discrimination; Karne Wynkoop (Wynkoop) July 31, 2007, Steven Warner and James Brule(Warner, Brule) November 6, 2007, Douglas Eitelman (Eitelman), and on January 17, 2008 Sloman. Each case was certified to public hearing on or about May 18, 2009. On August 11, 2009, the Commission, on behalf of each Complainant, moved to add Kevin Bouley. Due to the temporary absence of all Human Rights Referees to hear cases, from June 30, 2011 to December 2012, the proceedings were stayed. The undersigned became the presiding referee in these five cases in March of 2012. These cases were in various stages of pre-hearing procedure. A number of them were prepared and ready for a public hearing. A status conference with the parties was held on April 5, 2012, when a new hearing schedule was ordered. It was agreed at this time that the main body of pre-hearing preparation had been completed. These

cases were consolidated by the undersigned for hearing economy and to avoid witnesses testifying several times over many months. The hearings were held over the course of over 25 days and 4,500 pages of transcripts.

FACTS

NERAC GENERAL FACTS

All statutory and procedural prerequisites to the holding of the public hearing have been met and the case is properly before the Presiding Referee for hearing and decision. The complainant's exhibits are denoted as "C" followed by the exhibit number and the respondent's exhibits are denoted as "R" followed by the exhibit number. Those exhibits that were proffered by both the complainant and the respondent may be referred to by either designation. References to the transcript are designated as "Tr." followed by the page number. Exhibits were further designated by each individual complainant Wynkoop, Brule, Sloman, Eitleman and Warner.

History of Bouley's Ownership of NERAC

1. Dr. Wilde sold Nerac to Bouley in January of 1999. (Tr. 1315, 2071).
2. There were approximately 130 employees at that time. (Tr. 1316).
3. When Bouley bought Nerac, he, his wife Lorraine, and Russ Evans were on the Board of Directors. (Tr. 1371-72).
4. Bouley paid 5 ½ million dollars for Nerac and there were approximately 130 employees at the time. (Tr. 2072).
5. The numbers of employees fluctuated at Nerac. They had approximately 70 employees in 1993 and grew to about 250. It had about 50 employees in 2016. (Tr. 1840-41).
6. Bouley was involved in all the decisions including hiring and firing decisions. (Tr. 3291-92).

7. NERAC offered its client's bibliographic literature searches, delivering search content but not analysis. Nerac had access to databases not then available to the public at large, which it used to search for and provide information requested by its clients. (Tr. 4625-4628)

8. In October 2004, Bouley put in the Nerac Times the rollout of Skunkworks. Skunkworks was a leadership committee comprised of senior employees who met with an eye toward brainstorming ideas for improving Nerac. (Tr. 2945-46, 2865-66, 3789-91).

9. The Executive Committee (EC) in 2007 was comprised of Kevin Bouley, Bestie Petrie, John Ruest, Kevin Blackwell, and Gerri Potash. (Tr. 681, 691, 1338.).

New Business Model

10. In 2005-2006 NERAC endeavored to change its business model from just providing content to offering analysis of the content they provide. This was necessary, as many databases were available to the public through sites like Google. The transition lasted roughly three years from 2006-2009. (Tr. 503, 2111, 2113, 2126-27)

11. In 2006 and 2007, Nerac was in the midst of changing to a new business model—a model that emphasized Nerac' s ability to be a "trusted advisor" to its clients, to provide "value added analysis and advisory opinion" beyond the content-only type searches it had previously provided its customers. (Tr. 25-26, 2110-11, 2119, 2305, 2481)

12. The new business model was called "the New Nerac." During the transition to the New Nerac, the company continued to sell renewal contracts of the old model search product while trying to transition to the new model of putting an analysis component with the research. (Tr. 478-79, 499-500).

13. The change in Nerac's business model was, at least in part, the result of strategic planning sessions with an outside consultant, Barbara Colton, combined with the efforts of a large network of Nerac employees from various sectors of the company. (Tr. 1361-62, 2110-11).

14. Clients were asked to pay for larger research/analysis costs, rather than smaller search-only costs. (See Tr. 2163).

15. The old NERAC had a call center, which involved cold calling clients and getting small search only sales. The Call center also provided leads to salespeople. The call center was phased out in 2007 and 20 to 30 people were terminated (Tr.1369, 2129-35, 3328-29).

16. Selling research as opposed to search required deeper learning about Nerac's clients, and a deeper understanding of their businesses. (Tr. 3484 86, 3484, 86)

Adapting to New Business Model

17. When the shift to the New NERAC occurred, sales decreased. Before the shift, $500,000 a month would be a solid monthly average, whereas after the change to the new Nerac average monthly sales would hover around $200,000. (Tr. 3275-82, 3295).

18. During the transition to the new Nerac, the company "struggled as a company to figure out what was the problem, why things weren't occurring." (Tr. 1717-18).

19. Written marketing materials were not sent to current or prospective clients explaining the "new Nerac," however, there were changes to the web site. (Tr.479-481).

20. Bouley would repeatedly state that people tied to the old Nerac were not going to survive in the new Nerac unless they could handle radical change. (Tr. 3292-93).

21. Nerac employees openly expressed a belief that the new model would fail. Doug Eitelman, for example, coined the phrase "From search, to research, to bankruptcy." (Tr. 4636)

22. Nerac had an open door policy where employees were encouraged to speak freely, both positively and negatively, about the company. (Tr. 760-61, 2029-30, 2942-43).

ESOP

23. Nerac had an Employee Stock Ownership Plan (ESOP). This was an employee benefit, funded by Nerac, where the company is part owned by the employees and part owned by the president

(Bouley). An employee became fully vested in the ESOP after six years of employment. (Tr. 753-56).

24. Bouley told employees that as ESOP owners of the company they were encouraged to speak out freely about their views of the company. (Tr. 2946-47).

25. The New Nerac allowed for losing clients if they refused to buy into the research model. (Tr. 1018-18).

26. Nerac had an ESOP Speak out Board on the company intranet where employees could post anonymously positive and negative comments about the company. (Tr. 76, 162, 2030, 2944, 3133-3139).

27. Employees could raise concerns about the company, including the new Nerac model, at company meetings. Nerac claims that raising such concerns would not be the basis of terminating or otherwise disciplining an employee. (Tr. 86-87).

Employee Movement

28. Bouley promoted Gerri Potash (Potash) to be V.P. of the analysts despite being younger and less qualified than other analysts are. (Tr. 2315, 3051-52, 3355, DOB Stip).

29. Nerac had a RIF of sales analysts in January 2008. Nerac provided affected employees the job titles and ages of those terminated. (Tr. 609, 618, 626-27, 673).

Health Insurance

30. Nerac since its early days was a self-insured company for medical insurance for its employees. Nerac was a self-funded plan with Connecticare as broker. Betsy Petrie ("Petrie"), then the human resources manager, met annually with Connecticare's representatives and a representative of the ESOP committee to discuss and review the costs of the insurance. Nerac offered domestic partner coverage, which was before 2006. Health insurance premiums increased every year. (Tr. 1683-94, 1830-31; Ex. C-Sloman-21).

31. In the period 2005-2009, medical insurance ranked as the fifth or sixth most expensive budget line item for the Respondent. Ranking above that would be computer equipment, maintenance and hardware, database expenditures, and royalties. Ranking below that were building maintenance, property maintenance, travel, and document expenditures. (Tr. 2259-60).

32. The Executive Committee in 2007 was comprised of Bouley, Petrie, John Ruest ("Ruest"), the Chief Financial Officer, ("CFO"), Kevin Blackwell ("Blackwell"), and Gerri Potash ("Potash"). The EC was involved in the January 2008 RIF. The EC conducted the interviews of the 82 employees. (Tr. 680-681, 691, 1338).

33. Wayne Simpson, ("Simpson") was a Nerac sales manager until approximately 2006 and was responsible for hiring some staff. (Tr. 2531).

34. At the time he was employed he reported to Bouley and Betsie Petrie (Petrie) who was the Human Resource manager. (Tr. 2533).

35. Simpson testified regarding an affidavit he executed in July 2007. In that affidavit, he averred that when he wanted to hire a younger female he interviewed, Betsy Petrie told him not hire young females because they tend to get pregnant and raise insurance costs. Petrie did not have decision-making authority and the woman was hired. (Tr. 2536)

36. Simpson also testified that Petrie said the same thing about insurance being more costly with regard to older men when he wanted to hire a man in his fifties. Petrie also interviewed that candidate, and ultimately the man was hired. (Tr. 2548-2550).

Corporate Culture

37. Scott Rogers (DOB 2/7/69) worked at Nerac from 1996-2008. He started as a technical researcher, then went to sales, and then, one to two years into his employment (1997 or 1998), became manager of a small group of engineers and scientists. The latter part of his employment he managed a group of about 30 engineers and scientists, part of the Intellectual Property group.

This group was located in the Tolland and was an open office complex with cubicles. There were several other groups located in the office. Most of the group Rogers supervised were in their 50's and 60's. (Tr. 2436-2438, 2240, 2442 -2444, DOB Stip.)

38. In late 2005, early 2006, a sales group of employees, primarily in their 20's, was transferred to Rogers' office. The sales group engaged in a party-like manner, floating balloons like a Jimmy Buffett concert, and shooting missiles across the room. (Tr. 2445-2448, 2452-2453)

39. Bouley was an avid bicyclist and often rode with employees who tended to be younger. (Tr. 3287)

40. Bouley testified that Nerac sponsored a professional bicycling team as a moving advertisement for the company. (Tr. 2191-2192)

41. Bouley also played in Nerac softball games. (Tr. 2192)

42. The culture and practice at Nerac was that there was an open door policy for employees to have communication access to management personnel. (Tr. 69).

SLOMAN FACTS

43. Complainant was born March 22, 1946 and was in 1996 when he was 50 years. (Tr. 2582, 2718).

44. Bouley, hired Complainant in 1996, when Complainant was approximately 50 years old. (D.O.B. Stip).

45. Complainant spent the majority of his time working as an outside sales representative. In 2007, he was a Regional Account Executive (RAE). (Exs. C-Sloman-1, C-Sloman-14).

46. Complainant's responsibilities included maintaining, creating and growing new business. (Tr. 2589).

47. In 2005 and 2006, Complainant was asked to sell for a startup company within Nera called Xscellence. He was very successful selling for them, however in 2006 he was asked to focus on Nerac sales only. (Tr. 2638-2639, 2685-2686).

48. In 2006 Complainant was made RAE for the "Plains" territory (covering Minnesota, Missouri, Nebraska, Kansas, and Oklahoma) and paid a base salary plus sales bonuses. Prior to 2006 he was not assigned to a particular territory. (Ex. C-Sloman-1, Tr. 2585, 2589).

49. In late 2006 or early 2007, Nerac provided Complainant with a Performance Plan. At this time, Complainant reported to Don Brough, whose date of birth was March 29, 1952. The document listed numerous areas in which Complainant needed to improve, including "getting others to appreciate and respond to the perceived value of [Nerac's] services," travelling to his territory more often, and other skills essential to sales success in Nerac's new business model. The document offered advice on how to improve in these areas. (Ex. R-Sloman-9).

50. The catalyst for the change was Respondent's desire to create an outside sales team responsible for managing the client relationship. (Tr. 2585).

51. Complainant's job duties as a Regional Account Executive also shifted toward focusing on larger dollar deals, and meeting with prospective clients. (Tr. 2585, 2589, 3274).

52. Beginning in or about May 2007, after Brough's employment ended, Bouley met with Complainant several times to discuss Complainant's pipeline and pipeline development opportunities. He also expressed concern to the management team that Complainant had not adopted "a more consultative and higher value sales methodology," consistent with Nerac's evolving business model. (Tr. 2159-2161).

53. Nerac hired John DeMeo, ("DeMao"), Director of Sales, in late May 2007. In July 2007, following a meeting with DeMeo where they discussed his sales goals and the necessity to have more and larger opportunities. (Ex. C-Sloman-17, Tr. 2752-53, 4565, 4567).

54. In August of 2007, Complainant reported to DeMao. He placed Complainant and three (3) others on a Performance Improvement Plan (PIP). The document listed numerous areas where Complainant needed to improve. Some of the areas listed for improvement were, "getting others

to appreciate and respond to the perceived value of [Nerac's] services," travelling to his territory more often, and other skills essential to sales success in Nerac's new business model, helping Peggy Melby, the Client Services Manager he was partnered with, maintain and grow the old business. (Tr. 2589-2590).

55. In late 2006, Mr. Sloman made a new sale to ConAgra in the amount of $100,000, for which he received $6,000, representing a six percent commission. (Tr. 1964-1967, 4686).

56. Con Agra was not part of the Plains territory it was in the JRQ territory. Despite being given a commission for the sale; Complainant was not credited for the sale towards his Plains territory goal. Complainant felt this was very unfair. (Tr. 2634-2635)

57. In July 20075, Blackwell e-mailed Complainant to tell him that the Plains territory was 10th out of 16 territories, and that his performance level was nearing a "critical" level. Blackwell added that Complainant was underperforming several RAEs who were newer to Nerac than he was and, that Complainant had attained only 21% of his year-to-date new sales goal, and that Complainant had to improve. (See Ex. C-Sloman-36 Tr. 2733-2744).

58. In 2007, Complainant and his peers each had a new sales goal of $60,000 per month, $180,000 per quarter, and $720,000 per year. (Ex. R-Sloman-7, Tr. 2722).

59. Complainant's new sales achievement through October 2007 was $145,232.25, As compared to his prorated sales goal for the first ten months of the year($60,000 per month x 10 months, or $600,000), Complainant attained less than 25% of his new sales goal through October 2007.(Tr. Tr. 2724-2725). Id.

60. In August 2007, DeMeo informed Nerac's Executive Committee that he intended to place RAEs on performance improvement plans (PIPS) if they had failed to attain at least 35% of their goal for the first half of 2007. (Ex. C-Sloman-1).

61. Four employees were put on PIPS, Complainant, Chris Erskine, Dan Morrison and Ken Quinn. (Ex. R-Sloman-1, Tr. 4573-45774).

62. The Performance Agreements required that the RAEs to attain 75% of their goal. However, at the end of the PIP period, DeMeo determined that only employees who were under 50% of their reduced goal would be terminated. (Ex. R-Sloman-1, Tr. 4575-4576).

63. Complainant and Erskine were under 50% of their goal and thus selected for termination. Erskine 39 years old. (R-Sloman-1, Tr. 4576-4577).

64. Quinn and Morrison were over 50% of their goals and retained. Both were over forty, (40). Id.

65. Complainant's last day at Nerac was October 16, 2007. (Ex. C-Sloman-1)

66. DeMeo's date of birth is September 9, 1958. In October 2007 when Complainant was terminated, he was 49 years old. (D.O.B Stip).

67. Complainant was offered a Separation Agreement upon leaving Nerac. (Exs. C-Sloman-1, R-Sloman-1).

68. Complainant accepted the Agreement, signed off two days after his termination, and was given his severance payment from Nerac after he signed the Agreement and release. (Exs. C-Sloman-1, R-Sloman-1, Tr.2710-2711).

69. The Separation Agreement with Complainant contained a section titled "Release and Waiver of All Claims Against Nerac," "Age Discrimination in Employment Act of 1967 (including the amendments of the Older Workers Benefit Protection Act of 1990)...the Connecticut Fair Employment Practices Act and any other federal, state or local law dealing with discrimination on any basis, including, without limitation, ...age. "The release further provided that Complainant, "shall not recover any payment or benefit obtained by a state or federal agency, or by other person or entity, from Nerac regarding your employment or termination of employment." (Exs. C-Sloman-1, R-Sloman-1).

II

LAW AND ANALYSIS

Complainants claims that Respondent violated General Statutes § 46a-60(a)(1) of the Connecticut Fair Employment Act (CFPA). Our State's legislature intended the pertinent provisions of the Connecticut statute to mirror those of the federal antidiscrimination laws, Connecticut courts—along with this administrative tribunal—generally follow the analogous federal law when analyzing CFEPA claims. *Board of Education of the City of Norwalk v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 505 n.18 (2003); *Craine v. Trinity College*, 259 Conn. 625, 636-37 (2002). Connecticut courts look to federal courts in interpreting the proof required under CFEPA, *see Levy v. Commission on Human Rights & Opportunities,* 236 Conn. 96 (1996), "Claims under CFEPA are analyzed in the same manner as those under Title VII." *Kearney v. City of Bridgeport Police Dep't,* 573 F. Supp. 2d 562, 573 (D. Conn. 2008). "It is also noted the Connecticut Fair Employment Practices Act (CFEPA) became effective in 1947; General Statutes (Rev. to 1947) §§ 1360i to 1366i; and was amended in 1959 to add a prohibition against age discrimination in employment. Thus, our statutes predate, by many years, Title VII, which was enacted in 1964, and the ADEA, which was enacted in 1967. Moreover, Connecticut courts have observed that "CFEPA defines important rights designed to rid the workplace of discrimination ... As such, the act is composed of remedial statutes, which are to be construed liberally to effectuate their beneficent purposes." (Citations omitted; internal quotation marks omitted.). Our Supreme Court has also stated, "we have ... recognized that, under certain circumstances, federal law defines the beginning and not the end of our approach to the subject. (Citations omitted; internal quotation marks omitted.) *State v. Commission on Human Rights & Opportunities,* 211 Conn. 464, 470, 559 A.2d 1120 (1989)." *Wagner v. Bd. of Trustees for Connecticut State Univ.,* No. HHDCV085023775S, 2012 WL 669544, at 11 (Conn. Super. Ct. Jan. 30, 2012)

"In a Title VII discrimination case "where there is no direct or overt evidence of discriminatory conduct," courts apply the "three-part burden shifting framework of McDonnell Douglas Corp. v. Green,

411 U.S. 792, 802-04 . . . ." *Weinstock v. Columbia University*, 224 F.3d 33, 42 (2d Cir. 2000). According to the burden-shifting test from McDonnell Douglas, the plaintiff "first bears the minimal burden of setting out a prima facie discrimination case. McPherson v. N.Y. City Dep't of Educ., 457 F.3d 211, 215 (2d Cir. 2006). See e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination.); *Craine v. Trinity College,* 259 Conn. 625, 637 (2002) (Under this analysis, the employee must first make a prima facie case of discrimination.). In order to establish a prima facie case of discrimination, the complainant must show that he: (1) is a member of a protected class, (2) is qualified for the employment position, (3) suffered an adverse employment action, and (4) that the circumstances surrounding the adverse employment action give rise to an inference of discrimination." (Internal quotation marks omitted) *Weinstock v. Columbia University*, 224 F.3d 33, 42 (2d Cir. 2000); *Board of Education of the City of Norwalk v. CHRO*, 266 Conn. 492 (2003).). "Unlike its federal counterpart, however, the Connecticut employment discrimination provisions contain no specific age limitation." Commission on Human Rights and Opportunities ex rel. *Adam Szydlo, Complainant v. EDAC Technologies Corporation,* Respondent, 2007 WL 4258347, at 7.

Claims of disparate treatment brought under CFEPA, like those under federal anti-discrimination statutes, can be analyzed as either "pretext" cases or "mixed motive" cases. *Levy v. Commission on Human Rights & Opportunities,* 236 Conn. 96, 105-06 (1996). The pretext model relies upon the burden shifting analysis first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and modified thereafter in cases such as *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In a mixed motive case, the tribunal applies the use of the mixed motive analysis established in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The evidence presented by the Complainant does not give

rise to a mixed motive analysis in the current case. The complainant relies primarily on inferential evidence more suited to the burden shifting analysis of *McDonnell Douglas Corp. v. Green,* supra.

A

Release

Respondents argue that because Complainant signed a release and separation agreement upon termination, on or about October 18, 2007, he waived his right to bring suit and collect any potential damages. Nerac paid Complainant $17,547.20, he accepted the payment. "'A release agreement is a contract. It is well settled that a release, being a contract whereby a party abandons a claim to a person against whom that claim exists, is subject to rules governing the construction of contracts.'" *Dunn v. Etzel,* 166 Conn. App. 386, 392 (2016) quoting *Giano v. Salvatore,* 136 Conn.App. 834, 841, 46 A.3d 996, cert. denied, 307 Conn. 926, 55 A.3d 567 (2012). "A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Dunn*, 166 Conn. App. at 392 quoting *Audubon Parking Associates Ltd. Partnership v. Barclay & Stubbs, Inc.*, 225 Conn. 804, 811 (1993).

Under Connecticut law, "[w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." *Mulligan v. Rioux,* 229 Conn. 716, 740 (1994) quoting *Thompson & Peck, Inc. v. Harbor Marine Contracting Corp.,* 203 Conn. 123, 131 (1987). "A contract is unambiguous when its language is clear and conveys a definite and precise intent.... [A]ny ambiguity in a contract must emanate from the language used by the parties.... The contract must be viewed in its entirety, with each provision read in light of the other provisions ... and every provision must be given effect if it is possible to do so.... If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." *Dunn*, 166 Conn. App. at 392-93 quoting *Electric Cable Compounds, Inc. v. Seymour,* 95 Conn. App. 523, 529 (2006). Complainant agreed to waive

and release Nerac from all claims, demands, actions or liabilities, including claims brought under the Connecticut Fair Employment Practices Act ("CFEPA")[1]. "[A] release of employment discrimination claims, even those based on race, gender or age, does not violate public policy when such a release is part of the negotiated resolution of an employment related dispute ... To the contrary, public policy favors voluntary settlement of employment discrimination claims ..." (Citations omitted; internal quotation marks omitted.) *Jeffress v. Yale University*, Superior Court, judicial district of New Haven at New Haven, Docket No. 386866 (August 28, 1997) (Silbert, J.); see also *Laniok v. Advisory Committee* 935 F.2d 1360, 1365 (2d Cir.1991) (waiver of ADEA claim valid if made knowingly and voluntarily).

In the present case, the purpose of the release entered into by the parties' was to waive the plaintiff's ability to file an action pursuant to several statutes, including the ADEA. In 1990, Congress amended the ADEA by passing the OWBPA, 29 U.S.C. § 626(f). The OWBPA provides guidelines for employers to follow regarding the waiver of claims falling under the ADEA. The OWBPA states, in relevant part: "An individual may not waive any right or claim under this chapter [the ADEA] unless the waiver is knowing and voluntary.... [A] waiver may not be considered knowing and voluntary unless at a minimum: (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; (B) the waiver specifically refers to rights or claims arising under this chapter; (C) the individual does not waive rights or claims that may arise after the date of the waiver is executed; (D) the individual waives rights or

[1] Complainant's release in relevant part stated, "You agree that you have elected this Agreement on your own behalf and also on behalf of any heirs, agents, representatives, successors and assigns that you may have now or in the future. You also agree that the release and waiver stated in Agreement covers, but is not limited to, claims arising Age Discrimination Employment Act of 1967 (including the amendments of the Older Workers Benefit Protection Act of 1990), Title VII of the Civil Rights Act of 1964 , the Employee Retirement Income Security Act of 1974, the Workers Adjustment and Retraining Notification Act of 1988, (also known as "WARN), the Americans with Disabilities Act of 1990, The Family Medical Leave Act of 1993, Connecticut Fair Employment Practice Act and any other federal, state or local law dealing with discrimination on any basis, including, without limitation, sex, national origin, veteran status, marital status, religion; disability, sexual orientation, reservist status or age. You also that the release and waiver stated in this Agreement includes claims based on contract or tort theories, whether based on common law or otherwise".

claims only in exchange for consideration in addition to anything of value to which the individual already is entitled ..." 29 U.S.C. § 626(f)(1)(A)-(D).

"The policy of the Older Workers Benefit Protection Act is ... clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed strict specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee 'may not waive' an ADEA claim unless the employer complies with the statute." *Oubre v. Entergy Operations, Inc.* supra, 118 S.Ct. 841.

In the present case, the Complainant filed a claim with the Connecticut CHRO. Complainant argues that because he was never informed at the time of the October 2007 terminations, of Pires (age 64) who was supervised by Scott Rogers, Cross (age 64), and Rice (age 51) who were terminated after Sloman, violated the OWBPA2 and therefore, invalidates the release. However, the OWBPA applies

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[2] In 1990, Congress enacted the Older Workers Benefit Protection Act ("OWBPA"), which "amend[ed] the ADEA[ ] to impose specific requirements for releases covering ADEA claims." *Ridinger*, 651 F.3d at 313 (alteration and internal quotation marks omitted). "A purported waiver of ADEA claims is governed by [OWBPA], which states that 'an individual may waive his rights only if the waiver is knowing and voluntary.' " *Wahab v. Estee Lauder Cos., Inc.*, No. 12–CV–3932, 2014 WL 4904592, at *16 (E.D.N.Y. July 17, 2014) (quoting 29 U.S.C. § 626(f)(1)), adopted by 2014 WL 4906511 (E.D.N.Y. Sept. 30, 2014) (some internal quotation marks omitted). The OWBPA provides that "a waiver may not be considered knowing and voluntary unless at a minimum" the following conditions are met:
(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
267 (B) the waiver specifically refers to rights or claims arising under this chapter;
(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or
(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

exclusively to the ADEA and not to state law claims. *Moniz v. Pfizer, Inc.,* No. 550562, 1999 WL 989438, at 6 (Conn. Super. Ct. Oct. 19, 1999). See *Massachusetts v. Bull HN Information Systems,*" 16 F.Sup.2d 90, 107 (D.Mass.1998).("Section 626(f)(4) of the OWBPA has been interpreted to apply exclusively to claims brought under the EEOC, and has no effect on state age discrimination laws.) See *also McCormack v. IBM,* 145 F. Supp. 3d 258, 266–68 (S.D.N.Y. 2015)

Moreover, with respect to the ADEA, complainant was not terminated, "in connection with an exit incentive or other employment termination program offered to a group or class of employees. The Complainant is not entitled to be informed regarding, "(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. 29 U.S.C.A. § 626 (West). "While the language of the OWBPA provides little guidance as to the contours of what constitutes an employment termination program offered to a group or class of employees, the legislative history of the OWBPA provides clear guidance as to whether AlliedSignal's reduction in force was part of such a program. The legislative history is, in pertinent part, as follows: In the context of ADEA waivers, the Committee recognizes a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. Individual

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(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—
(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.
29 U.S.C. § 626(f). "The OWBPA strictures on waivers are strict and unqualified [,]" and "[a]n employee may not waive an ADEA claim unless the employer complies with the statute." *Ridinger*, 651 F.3d at 314 (alteration, citations, and internal quotation marks omitted). The Equal Opportunity Commission ("EEOC") has promulgated regulations pursuant to the OWBPA that "repeat and reflect these strictures." Id.

separation agreements are a result of actual or expected adverse action against an individual employee. The employee understands that the action is being taken against him and he may engage in arms-length negotiation to resolve any differences with the employer.

Group termination and reduction programs stand in stark contrast to the individual separation... The trademark of involuntary termination programs is a standardized formula or package of employee benefits that is available to more than one employee... [T]he terms of the programs generally are not subject to negotiation between the parties. In addition, employees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics. Indeed, the employer generally advises them that the termination is not a function of their individual status. Under these circumstances, the need for adequate information and access to advice before waivers are signed is especially acute." S.Rep. No. 101–263, at 63–64 (1990), reprinted in 1990 U.S.C.C.A.N. 1509. *Suhy v. Allied Signal*, 44 F. Supp. 2d 432, 434–35 (D. Conn. 1999). Sloman's severance was calculated based on his years of service.

Complainant was not part of the January 2008 RIF, he was not terminated in connection with an exit incentive or other employment termination program . No evidence was presented regarding Erskine's exit plan. There evidence did not demonstrate that Complainant was under duress, or induced fraudulently to sign the agreement. Even if Complainant had a "sincere belief that his termination was the product of unlawful discrimination [it] is insufficient to support an allegation of fraudulent inducement when no other evidence support[ed] this claim." Id. at 638–39 (emphasis added). Similarly, in Frumkin, the court granted the defendant's motion for summary judgment on the plaintiff's ADEA claims because the plaintiff signed a release of his claims. *Frumkin v. Int'l Bus. Machines Corp.*, 801 F. Supp. 1029 at 1042 (S.D.N.Y. 1992). The district court rejected the plaintiff's fraudulent inducement claim because it found that the plaintiff adduced no evidence of any genuinely disputed factual issue that the

purported elimination of the [plaintiff's department] ... amounted to a subterfuge to induce [the p]laintiff's execution of the release and separation from [the defendant]." (Internal quotations omitted) *McCormack v. IBM,* 145 F. Supp. 3d 258, 274 (S.D.N.Y. 2015). While Complainant testified he might not have signed the agreement if knew of the October terminations that is pure conjecture. Further, several of the employees that Complainant proposed to be comparators were terminated after or before Complainant, or were supervised and terminated by different people

As a matter of law, the release in this case is clear and unambiguous, there is no evidence that would invalidate the release and must be enforced by this Tribunal. See *Dunn,* 166 Conn. App. at 399 (affirming summary judgment where clear terms of the general release barred lawsuit and there were no exceptions written into the release); *Samuel v. City of Hartford*, 154 Conn. App. 138, 146 (2014) (affirming dismissal of counts that were barred by the express terms of a release); *Teal v. State,* No. HHDCV116018549S, 2015 WL 9809754, at 5 (Conn. Super. Ct. Dec. 15, 2015) (granting summary judgment where clear terms of the release bar the claims brought by plaintiff); *Donnell v. Connecticut Tech. High Sch. Sys.,* No. HHDCV146052478S, 2015 WL 4172718, at 2 (Conn. Super. Ct. June 5, 2015)(dismissing lawsuit where the claims were barred by the express terms of the release); *Cuevas v. Connecticut Container Corp.,* No. CV126027877, 2013 WL 6926165, at 6 (Conn. Super. Ct. Dec. 17, 2013)(granting summary judgment where clear terms of the release bar the claims brought by plaintiff).

B.

PRIMA FACIA CASE[3]

Although it is unlikely, arguendo, the release is invalid on some other grounds, the Complainant failed to establish a prima facia case. In order to establish a prima facie case of discrimination, the complainant must show that he: (1) is a member of a protected class, (2) is qualified for the employment

[3] The prima facie case is presented arguendo that release was construed as invalid.

position, (3) suffered an adverse employment action, and (4) that the circumstances surrounding the adverse employment action give rise to an inference of discrimination." (Internal citations and quotation marks omitted) *Board of Education of the City of Norwalk v. CHRO,* 266 Conn. 492 (2003). Complainant must offer evidence of a nexus between his termination and discriminatory animus. It is not enough to have something happen that was merely unfair, it must be a discriminatory act.

1. Stray Remarks

"Remarks may serve as sufficient evidence of age discrimination if they are: 1) age related, 2) proximate in time to the employment decision, 3) made by an individual with authority over the employment decision at issue, and 4) related to the employment decision at issue." (Internal quotations omitted) *Powell v. Dallas Morning News L.P.*, 776 F. Supp. 2d 240, 269 (N.D. Tex. 2011), aff'd sub nom. *Powell v. Dallas Morning News, LP*, 486 F. App'x 469 (5th Cir. 2012). "[T]he stray remarks of a decision maker, without more, cannot prove a claim of employment discrimination ...." *Weichman v. Chubb &Son,* 552 F.Supp.2d 271, 284 (D.Conn.2008) (quoting *Abdu-Brisson v. Delta Air Lines, Inc.,* 239 F.3d 456, 468 (2d Cir.2001). Nevertheless, "the evidence is not to be viewed in a vacuum. There must be at least a logical connection between the complainant's prima facie case and the illegal discrimination, which it purports to establish. If this isolated remark had been combined with other evidence of discriminatory animus, it might assume a more ominous significance. 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 ...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." (Internal citations and quotation marks omitted). *Commission on Human Rights and Opportunities ex rel. Barry Weinz, Complainant v. Bill Selig Jewelers, Inc.*, Respondent, 2016 WL 9446632, at 9.

However, "the court should not categorize a remark as 'stray' or 'not stray' and then disregard that remark if it falls under the 'stray' category." *Weichman,* 552 F.Supp.2d at 284 (citing *Tomassi v. Insignia Fin. Group, Inc.*, 478 F.3d 111, 115-16 (2d Cir.2007). "Instead, the court must consider all the evidence in its proper context .... [T]he more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative the remark will be." *Id.* Stray remarks combined with additional evidence of discrimination "give more of an ominous significance to remarks of ... decision maker." *Haves v. Compass Group USA, Inc.,* 343 F.Supp.2d 112, 120 (D.Conn. 2004)(Supervisor and regional vice president often described older managers to be old school). The "more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination. *Wagner v. Bd. of Trustees for Connecticut State Univ., No.* HHDCV085023775S, 2012 WL 669544, at 10 (Conn. Super. Ct. Jan. 30, 2012).

Stray remarks by an employer do not prove discriminatory animus unless there is a causal connection to plaintiff's alleged adverse employment action. *Trojanowski v. Blakeslee Prestress, Inc.,* No. 3:08CV548WWE, 2009 WL 3340426, at 4 (D. Conn. Oct. 15, 2009). Petrie's statement as direct, inculpatory evidence that the complainant's age was a significant factor behind the determination to lay off the complainant is not probative of discriminatory animus nor is there a demonstrated causal connection. Petrie also did not supervise or t Complainant, several years elapsed between the comment and his termination. There is no evidence to connect the remark to Complainant's termination.

2. Protected Class When Hired

"[Any inference of age animus is undermined [where Complainant] was well within the protected age group when she was hired .... (internal quotations omitted) Bruder, 2013 WL 789231, at 7 (citing Baguer v. Spanish Broad. Sys., Inc., No. 04–CV–8393, 2010 WL 2813632, at 14 (S.D.N.Y. July 12, 2010) (finding that even assuming there was an inference of discrimination based on the age difference between plaintiff and her replacement, it was undermined by the plaintiff's age at hiring, stating, '[b]eing in the protected class when hired undermines any inference of age discrimination'), aff'd, 423 Fed.Appx. 102 (2d Cir.2011); *Mathews v. Huntington*, 499 F.Supp.2d 258, 267 (E.D.N.Y.2007) ([T]he inference of discrimination is further weakened by the fact that plaintiff, who was sixty-one years old at the time of his hiring, was well within the protected class when first hired.) "While ... the ... hiring of a replacement employee significantly younger ... in combination with other evidence, might indicate age discrimination, such evidence alone is not enough on which a reasonable jury could find that the ... nondiscriminatory reason for terminating her employment was pretextual. (Footnotes omitted.) *Farina v. Branford Board of Education*, Civil Action No. 3:09–CV–49 (JCH), 2010 WL 3829160, 6 (D.Conn.2010) (citing Brennan v. Metropolitan Opera Assn., Inc., 192 F.3d 310, 317 (2d Cir.1999)." (Internal quotation marks omitted). *Benedetto v. Dietze & Assocs., LLC,* No. UWYCV126015898S, 2014 WL 1814284, (Conn. Super. Ct. Apr. 10, 2014), aff'd, 159 Conn. App. 874, 125 A.3d 536 (2015). When Complainant was hired in 1996, he was fifty (50), therefore in a protected class.

DaMeo was forty-nine (49) years old when Complaint was terminated, which made DeMeo a member of a protected class. An older decision maker is a "well-recognized inference against discrimination ... where the person who participated in the allegedly adverse decision is also a member of the same protected class. (internal citation omitted), Consequently if a decision maker is in same protected class as plaintiff, claims of discrimination become less plausible." (Internal quotation marks and citation omitted). *Hasemann v. United Parcel Serv. of Am., Inc.*, No. 3:11-CV-554 VLB, 2013 WL 696424,

at *8 (D. Conn. Feb. 26, 2013); Browne v. CNN Am., Inc., No. 98 Civ. 1768, 1999 WL 1084236, at *4 (S.D.N.Y. Dec. 1, 1999) ("The fact that ... the ultimate decision maker was a member of the [same] protected class [as Plaintiff] enhances the inference that age discrimination was not the motive behind ... [the] termination of [Plaintiff]"); (S . D.N.Y.1985)); *Williams v. Brooklyn Union Gas Co.*, 819 F.Supp. 214, 225 (E.D.N.Y.1993) (dismissing age discrimination claims where the employees responsible for the plaintiff's termination were older than plaintiff or approximately the same age); *Pisana v. Merril Lynch & Co., Inc.*, No.93Civ.4541(LMM), 1995 WL 438715, at 5 (S.D.N.Y. July 24, 1995) (finding that fact that decision makers were close to plaintiffs age or older "weakens any suggestion of age discrimination.").

3. Statistical Evidence

A RIF occurred in January 2008, well after any of the five complainants were terminated. The complainant would like the tribunal find that each of the Complainants terminated contributed to the balance of employees that were over forty (40) to under forty (40) who were let go in the RIF. The only evidence the complainant presented was bare statistics of the RIF which they were not part. Even if Complainants were part of the RIF, "statistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its [adverse employment] decision.... This is because a[n] [employer's] overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer.... Without an indication of a connection between the statistics, the practices of the employer, and the employee's case, statistics alone are likely to be inadequate to show that the employer's decision ... was impermissibly based on [a protected trait]." (Citations omitted; internal quotation marks omitted.) *Bd. of Educ. of City of Norwalk v. Commission on Human Rights & Opportunities,* 266 Conn. 492, 516, 832 A.2d 660, 674 (2003).

Standing alone, statistical evidence is only sufficient to establish discriminatory intent in individual disparate treatment actions only when it shows a "stark pattern of discrimination...." [4] (Internal quotation marks omitted) *Perez-Dickson v. City of Bridgeport*, 304 Conn. 483, 517–19, 43 A.3d 69, 94–96 (2012). "The statistics," were merely the names, ages, and positions of the employees who were considered for lay off and those that were actually terminated. There can be no provable conclusions drawn from these numbers. Looking at the bare facts of the statistics, they tend to show that there were roughly an equal number of employees over and under the age of forty. Complainant, further argues that when you compare employees over fifty (50) ,instead of the federal threshold of forty (40), the effect is different. When you compare the percentage of employees over Fifty (50) that were terminated with those younger that were under fifty (50), the percentage of over Fifty (50) is disproportionally higher. Therefore, they argue that disproportionate number of employees over fifty shows a discriminatory intent arguing that, the Respondent, by terminating others over forty (40) prior to the RIF manipulating the ratio of older and younger employees in the RIF. That is a conclusory statement with no evidence to support it.

This tribunal has no information as to the total number of employees, what positions where included, how many employees were in each position, and their respective ages, standard deviations, the ratio of over fifty (50) employees to those under Fifty (50) and if the terminations as compared to the total population of employees. Even if the tribunal had that information without an expert, the figures would be no more illuminating. Lastly, and most importantly, Complainant was not part of the RIF. He was

[4] See also Ottaviani v. State University of New York, 875 F.2d 365, 371 (2d Cir.1989) (in individual disparate treatment actions, [w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination" [emphasis added; internal quotation marks omitted]), cert. denied, 493 U.S. 1021, 110 S.Ct. 721, 107 L.Ed.2d 740 (1990); Chesna v. United States Dept. of Defense, 850 F.Supp. 110, 117–18 (D.Conn.1994) (to prove intentional discrimination in violation of equal protection clause through circumstantial evidence of disparate treatment, plaintiff must show stark pattern of discrimination); Statistical evidence may ... be utilized in a disparate treatment case. However, because discriminatory intent must be shown in such a case, statistical evidence must meet a more exacting standard.); Smith College v. Massachusetts Commission Against Discrimination, 376 Mass. 221, 228 n. 9, 380 N.E.2d 121 (1978) (in individual disparate treatment action, "gross statistical disparities alone may constitute prima facie proof of a practice of discrimination"

terminated several months before the RIF occurred. The complainant did not offer any proof that there was a nexus between the post termination RIF by Respondent his termination.

Moreover, The U.S. Supreme Court defined "me too" evidence as "testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff." See also *Houston v. Easton Area Sch. Dist., No.* 03–3494, 2010 WL 4236924, at 8, n. 6 (E.D.Pa. Oct. 25, 2010), aff'd on other grounds, 444 F. App'x 523 (3d Cir.2011), cert. denied, 132 S.Ct. 1807 (2012). "[T]he Supreme Court considered the admissibility of 'me too' evidence in an employment discrimination case, holding that the evidence was neither per se admissible nor per se inadmissible, but rather, [t]he question whether evidence of discrimination [against other employees] by other supervisors is relevant in an individual [discrimination] case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. ... [A] number of factors are relevant to this determination: (1) whether the evidence is logically or reasonably tied to the decision made with respect to the plaintiff; (2) whether the same "bad actors" were involved in the "other" conduct and in the challenged conduct; (3) whether the other acts and the challenged conduct were in close temporal and geographic proximity; (4) whether decision makers within the organization knew of the decisions of others; (5) whether the other affected employees and the plaintiff were similarly situated; and (6) the nature of the employees' allegations. (Internal citations and quotation marks omitted." *Murray v. Miron,* No. 3:11 CV 629 JGM, 2015 WL 4041340, at 8 (D. Conn. July 1, 2015).

Complainant alleged that other terminated employees such as Pires, Cross, Betters, Santry and Bulloch were also terminated because of discrimination. Ms. Bulloch, Ms. Santry and Mr. Betters held different positions from Complainant, reported to different managers, and were terminated for different reasons. Further, they were terminated either long before Complainant, or after his termination.

Employees like Bulloch and Santry, although they did not testify themselves, were both well under 40 years old. The only qualifying comparator evidence that the Complainant produced was that of another RAE, Chris Eskine, who was 39 and younger than the Complainant was. None of the proposed comparator employees qualifies when taking the aforementioned factors into consideration.

4. Corporate Climate and Business Decisions

Changes to a company's product line, whether sound or not, are business decisions. "Often business decisions may force the company to eliminate jobs held by members in a protected category. The ADEA was not intended to protect older workers from the often-harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations. The record reveals that [Respondent] made a strategic and fundamental change in the way it does business in order to attain financial goals of reduced expenses and increased sales". (Internal citations and quotation marks omitted*). Butcher v. Gerber Prod. Co.*, 88 F. Supp. 2d 788, 798 (W.D. Mich. 2000). It is undisputed that between 2006 and present day that Nerac lost more than half its workforce and revenue went down significantly. The loss of employees was a natural result of that type of downsizing.

In addition, the Complainant argued that the corporate culture is youth orientated. Complainant argued one example was that the company sponsored a young professional bicycling team. Bouley would practice with them occasionally and go on bike trips with younger employees. Corporations have been sponsoring everything from NASCAR teams to volleyball teams, and promoting company teams such as softball and basketball since before the age discrimination laws were written. Bouley testified that he felt the team was a moving billboard to advertise the company, which is rasion d'etre of corporate sponsorship. Complainant also argued that Bouley's manner of dress, bike shorts, backwards ball caps and keeping bicycles in his office showed that he favored younger people over older people. It could also show he was very fond of bikes and as the primary owner of the company felt he could dress any way he

pleased. The evidence presented lacked any nexus between the biking activities and age discrimination. The testimony consisted of conclusory allegations without any supporting evidence.

Additionally, the Complainant argued that the marketing group consisted generally of younger employees who were housed with the scientific researchers, who generally tended to be older. The Complainant argued that marketing group was, inter alia, loud, rowdy, played with "nerf guns" that shot Styrofoam missiles and played loud music. The researchers objected, as they needed a quieter more sedate area to focus on research and writing. When complaints were made about the group's behavior, it took approximately a year to relocate them. This tribunal cannot infer any discriminatory animus for taking too long to relocate a group. The Complainant cited no law to support those allegations and this tribunal was unable to locate any relevant law in the country that said a rowdy atmosphere implied age discrimination.

"Circumstantial evidence establishing the existence of a discriminatory atmosphere at the defendant's workplace in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff.... While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add 'color' to the employer's decision-making processes and to the influences behind the actions taken with respect to the individual plaintiff. However, without evidence that illegal animus affected the contested employment decision itself, such 'atmospheric' evidence is not enough to withstand summary judgment." (Internal quotation marks and citations omitted). *Butcher v. Gerber Prod. Co.,* 88 F. Supp. 2d 788, 795 (W.D. Mich. 2000).

C.

CIRCUMSTANTIAL EVIDENCE AND BURDEN OF PROOF

"The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor." *Craine v. Trinity College,* supra, 259 Conn. at 638,

791 A.2d 518. The Respondent argued that it terminated Complainant due to his poor performance. The employer must state a nondiscriminatory or non-retaliatory reason. "To rebut the plaintiff's prima facie case, the defendant does not have the burden of establishing that the basis was sound ... Simply stating a basis for the decision other than the plaintiff's [membership in the protected class is] enough." *Wagner v. v. Bd. of Trustees for Conn. State Univ.*, 2012 WL 669544, *13 (Conn. Super. Ct. Jan. 30, 2012.) (quoting *Craine v. Trinity College.* 259 Conn. 625, 643 (2002)). The Respondent's burden is only one of production not of persuasion. Complainant must show that his performance did not motivate the Respondent, but instead was merely a pretext for intentional age discrimination.

"The credibility of witnesses is a matter within the province of the administrative agency. Murphy v. Commissioner of Motor Vehicles, 254 Conn. 333, 347 n. 16 (2000); Elf v. Department of Public Health, 66 Conn. App. 410, 422 (2001). The hearing officer has the prerogative to assess the credibility of witnesses and believe or disbelieve any evidence presented. *Levy v. Commission on Human Rights & Opportunities*, 35 Conn. App. 474, 489, aff'd, 236 Conn. 96 (1996)." *Commission on Human Rights and Opportunities ex rel. Adam Szydlo, Complainant v. EDAC Technologies Corporation, Respondent*, 2007 WL 4258347, at 10.

There is a plethora of cases where conclusory allegations could not rise to the level for meeting a prima facie case at the summary judgment level. "Summary judgment against a plaintiff in an employment discrimination case is appropriate if the plaintiff offers only 'unsupported assertions,' 'conjecture or surmise,' or 'conclusory statements' to support an essential element of his case. [B]are allegations, however scandalous, cannot withstand summary judgment where they are unsupported by evidence in admissible form." (Internal citations and quotation marks omitted), *Deebs v. Alstom Transp., Inc.*, 550 F. Supp. 2d 385, 392 (W.D.N.Y. 2008), aff'd, 346 F. App'x 654 (2d Cir. 2009; See also, *Trojanowski v. Blakeslee Prestress, Inc.*, No. 3:08CV548WWE, 2009 WL 3340426, at 3 (D. Conn. Oct. 15, 2009).

The evidence presented in this case, taken in its entirety, cannot meet the de minimus burden of proving causation with regard to the 4th element of the prima facie case. This tribunal finds that Complainant's evidence, while diverse, did not give rise to an inference of discrimination under any category despite being a de minimus standard. The sum of the parts was not greater than whole. Nevertheless, arguendo, the Complainant sufficiently demonstrated a prima facie case, therefore, created a presumption of unlawful discrimination by the Respondent, the burden of production shifts to Respondent to articulate a legitimate, nondiscriminatory reason for its actions. The Respondent articulated a legitimate business reason that was not rebutted successfully. Respondent argued that Complainant was terminated based on his poor performance in 2007 and inability to adapt to selling the New Nerac. The Complainant could not, overcome by the preponderance of the evidence, based on any testimony or documentary evidence presented, to show the Respondent's reason was a pretext.

Complainant was permitted to amend his complaint and add Mr. Bouley as an individual defendant, on an "aiding and abetting" theory under Conn. Gen. Stat. § 46a-60(a)(5). If the claim against Nerac fails, then the aiding and abetting claim against Mr. Bouley necessarily fails, as there is no discrimination to aid or abet. See *Miller v. Edward Jones & Co.*, 355 F. supp. 2d 629, 2005 U.S. Dist. LEXIS 1705 (D.Conn. 2005).

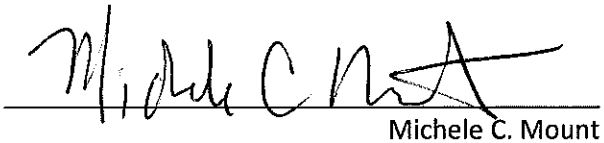
III

CONCLUSION

The age discrimination claim fails because the Complainant signed the unambiguous release, he accepted the consideration paid, therefore, waived his right to bring the present claim. Further, even if the release can be construed as invalid, Complainant did not meet his burden of presenting evidence that was sufficient to prove a prima facie case. Again arguendo, if he did make out a prima facie case he failed

to rebut the legitimate, nondiscriminatory reason of poor performance that the Respondent gave regarding its decision to terminate the Complainant.

It is so Ordered this 18th day of April 2018.



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