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Commission on Human Rights and Opportunities
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April 18, 2018

CHRO ex rel. Dawn Wynkoop v. NERAC Inc. and Kevin Bouley, CHRO No. 0840008 Fed No. 16a200701438

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 OPPORTUNTIES
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities
Ex rel. Dawn Wynkoop,
Complainant

CHRO No. 0840008

v.

NERAC, Inc. and Kevin Bouley,
Respondents

April 18, 2018

FINAL DECISION

SUMMARY

On July 11, 2007, Dawn Wynkoop ("Wynkoop" 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 her employment on January 12, 2007 because of her age (DOB 02/08/56).

Five different Complainants filed their underlying charges of discrimination on July 11, 2007 against the Respondent for age discrimination; (Wynkoop), July 31, 2007 (Warner, Brule), November 6, 2007 (Eitelman), and January 17, 2008 (Sloman), respectively. 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.

I

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 clients 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. Nerac understood that it would lose some clients during this transition. ***

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

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

17. 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

18. 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).

19. 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).

20. 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).

21. 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).

22. 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)

23. 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).

Employee Stock Ownership Program

24. 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).

25. 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).

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

27. 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, 3133-39).

28. 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

29. 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).

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

Health Insurance

31. 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).

32. 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).

33. 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).

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

35. At the time he was employed he reported to Bouley and Petrie. (Tr. 2533).

36. 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 have higher insurance costs. Petrie did not have decision-making authority and the woman was hired. (Tr. 2536)

37. Simpson also testified that Petrie said the same thing about insurance costs 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

38. 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 other groups, located in the Tolland office. Most of the group Rogers supervised were in their 50's and 60's. (Tr. 2436-2438, 2240, 2442 -2444, DOB Stip.)

39. 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)

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

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

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

43. 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).

WYNKOOP FACTS

44. Complainant was born February 8, 1956. (D.O.B Strip)

45. Nerac hired Complainant in January 2004, when she was one month short of her 48th birthday, and terminated her in January 2007, when she was 50 years old. (Tr. 3482, 1098-1100).

46. Nerac increased Complainant's salary on July 9, 2004 and January 18, 2005 (when Complainant was 48 years and increased it again on June 1, 2005 when Complainant was age 49. (Exs. R-Wynkoop- 17, R-Wynkoop -24; Tr. 1133-1134).

47. On or around March 30, 2005, Complainant, then 49 years old, interviewed for another position at Nerac. In Complainant's follow-up email to Bouley she stated that she "should have been better prepared" for the interview. In that e-mail, she related an experience she had with a customer about selling information and search. (Ex. R-Wynkoop-22)

48. On April 1, 2005, her then-supervisor, Wayne Simpson, issued Complainant a written warning due to unacceptable performance, specifically, her low sales compared to her peers. (Ex. R-Wynkoop-23).

49. In mid-2005, Paul Harger recruited Complainant to leave that role as a Nerac salesperson, and transition to his team to work as a Client Relations Specialist (later retitled Client Services Representative, and then Client Service Manager (CSM). (Tr. 179-180, 1136, 1140-1141).

50. Client Service Managers were assigned territories. Complainant's territory was New England North (NEN). (Tr. 394).

51. There were about 16 other CSM's in addition to Complainant. (Tr. 392)

52. Complainant was responsible for driving revenues by maintaining a high contract renewal rate. Renewal rate compares revenues in a given month within the CSM's territory, against revenues in that same month from the prior year. The minimum requirement for CSMs was an 80% renewal rate. (Tr. 252-53, 390-92, 987-988, 1141).

53. The payments that came in from the companies fluctuated; one month Complainant had 242% (two hundred and forty-two percent) of what had come in for the month in the prior year. Complainant kept her numbers for all the months of the year on the whiteboard in her office. (Tr. 990-91).

54. Complainant had to ensure that renewal contracts were issued to clients in a timely manner, and they had to maintain a healthy pipeline. Further, they were responsible for getting clients to transition to the new Nerac. (Tr. 19, 21, 33, 1137).

55. Complaint made three outside sales calls toward the end of her employment. One trip was to New Balance in Massachusetts with Don Brough. She made the trip to New Balance because Nerac was in between hiring a new outside sales representative that ordinarily would have done

that in the northern New England region. The trip was to pursue new NERAC project-type related analysis work. It was a successful meeting. (Tr. 992-994).

56. After a bounce-back month in June 2006, Complainant then attained only a 40% renewal rate in July 2006, a 79% renewal rate in August 2006, and a 77% renewal rate in September 2006. (Ex. R-Wynkoop-4; Tr. 263-266, 395-396)

57. On December 7, 2006, Mr. Harger ranked his employees in three categories: Outstanding, Getting it Done, and Underperforming. Complainant was one of only two employees ranked as Underperforming. (Ex. R-Wyncoop-4).

58. Mr. Harger rated Peggy Melbye (born February 26, 1954; approximately two years older than Complainant) and Barry Stringer (May 9, 1950; approximately six years older than Complainant) as "Outstanding." (Ex. R-Wyncoop-4, DOB Stip.).

59. One employee listed as "Getting it Done," was Nancy Paul, born on May 28, 1950, and thus was approximately six years older than Complainant. Ms. Paul remains employed at Nerac to this day. (Ex. R-Wyncoop-4, Tr. 397-398)

60. Curt Betters was also listed as "Getting it Done," was 61 born on December 20, 1948, and more than seven years older than Complainant was at the time or her termination. Mr. Betters remained at Nerac until February 2009. (Id.)

61. Complainant was ranked as "underperforming." (Ex. R-Wynkoop-4)

62. Complaint was never put on an improvement plan or disciplined with regard to her renewal rate by Mr. Harger. (Tr. 393).

63. Mr. Harger terminated the employment of both employees whom he had rated as Underperforming. See (Ex. R-Wynkoop-4).

64. Kathy Pieramico, The other underperforming employee was not terminated until later in 2007, because Ms. Pieramico excelled in transitioning clients to the new Nerac business model, and Mr. Harger's believed she might be able to improve to a satisfactory level. (Tr. 432-434).

65. Complainant disagreed that her own performance was unacceptable. (Tr. 432-434).

66. Two employee were listed as "Getting it Done," one was Nancy Paul, she was born on May 28, 1950, approximately six years older than Complainant. The other, Curt Betters, was also listed as "Getting it Done." He was born on December 20, 1948, and more than seven years older than Complainant was. Paul is still and employee and Betters left in 2009. (Tr. 396-397, 2379, 2882).

67. Barbara Baltz was selected to replace Wynkoop in the NEN territory. Wynkoop was 50 years of age on January 12, 2007; Baltz was 45 years of age. (DOB Stip.).

68. Barbara Baltz improved the NEN territory performance from when Complainant covered the territory. (Ex. R-Wyncoop-9, Tr. 403, 407-410).

69. Co-workers perceived that Baltz and Complainant appeared to be roughly the same age. (See Tr. 4203-04).

II

LAW AND ANALYSIS

Complainants alleged that Respondent violated General Statutes §§ 46a-58(a) and 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. Commisson 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)

The goals of the federal Age Discrimination in Employment Act (ADEA) are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621 (b). The ADEA makes it unlawful; inter alia, for an employer to discharge any individual because of such individual's age. 29 U.S.C. § 623 (a) (1)." *Commission on Human Rights and Opportunities ex rel. Adam Szydlo, Complainant v. EDAC Technologies Corporation, Respondent*, 2007 WL 4258347, at 7.

"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). "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

PRIMA FACIE 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 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 meets the first prong of the prima facie case, that Complainant is a member of a protected class. She was over 40 and alleged age discrimination based on being older. The Complainant met second element, that she is qualified for the employment position, as she was recruited by the Respondent for her last position from another Nerac position and was given a couple of promotions and raises. If Respondents thought she was unqualified, they not have offered her the position. The third element, that Complainant suffered an adverse employment action is also met based on the adverse employment action of her termination.

The fourth prong that the circumstances surrounding the adverse employment action gives rise to an inference of discrimination must be analyzed in relation to the different types of evidence presented. The primary evidence presented by the Complainant relates to her disagreement over her performance, being replaced by a younger employee,1 the general culture of the company, statistics relating to a reduction in workforce (RIF) (which occurred 6 almost a year after complainant was terminated) and on an alleged hostile remarks made by Petrie to another employee. However, while there are multiple categories of evidence, there is no direct evidence presented, therefore we will look at the circumstances surrounding the termination.

1. **Performance**

"An employee's personal disagreement with his employer's evaluation of him is not enough to create an inference of discrimination. Dismissals are often preceded by adverse performance reviews. Were we to view this pattern as suspect, without more, many employees would be able to appeal their personnel evaluations to a jury. See also *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1039 (10th Cir.1993) (employee's own assessment of his job performance is inadequate to raise issue of fact for trial); *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir.1991) ("The fact that an employee disagrees with an employer's evaluation of him does not prove pretext"); *Jimoh v. Ernst & Young*, 908 F.Supp. 220, 226

[1] Babara Baltz Complainant's replacement was forty-five (45), five years younger than Complainant was.

(S.D.N.Y.1995) (to prove discrimination claim plaintiff must do more than simply disagree with his employer's business decisions)." (Internal citation and quotations marks omitted. *Wado v. Xerox Corp.*, 991 F. Supp. 174, 188 (W.D.N.Y. 1998), aff'd sub nom. *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999). *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 430, 118 S. Ct. 838, 843, 139 L. Ed. 2d 849 (1998).

Complainant disagreed with her performance stating that her yearly renewal rate was 95% and argued that she was exceeding her goals and that she should not have been terminated. Nonetheless, there is credible evidence that managers found her performance was not up the levels of over other employees. Complainant performed well regarding her renewal rate percentage. However, she was having difficulty selling the business model of the New Nerac. In December of 2006, the Complainant's performance was graded as, "underperforming." Two employees who were older than Complainant were rated as "outstanding," and two other older co-workers rated as "getting it done," remained at NERAC. Complainant provided little evidence with regard to her overall performance to overcome Respondent's evidence that she was underperforming according to their standards. The comparator evidence indicts the exact opposite, where several employees older than she was, and were ranked hirer than she was were retained. Further, there is no evidence that Mr. Harger harbored any discriminatory intent.

2. **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. Complainant was hired approximately two years after the alleged remark at the age of almost 48, which is a protected class. The context of the remark was with regard to hiring not terminating. Moreover, the Complainant cannot point to any employee who was not hired or terminated because of the remark. The Complainant's situation lacked a temporal nexus to the employment decision and are too weak to raise a reasonable inference of discrimination. See *Butcher v. Gerber Prod. Co.*, 88 F. Supp. 2d 788, 795 (W.D. Mich. 2000), which is similar in many respects to the instant case, except that the dismissal was predicated on summary judgment.[2] The alleged remarks lacked a temporal nexus to the employment decision and are too weak to raise a reasonable inference of 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 the over to under forty employees that 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

[2] Butcher involved similar allegations and evidence to that presented here. The evidence consisted of ageist remarks, more plentiful to that presented here, statistical data, a change to the corporate mission and an elimination of a sales force. The court found that "the record reveals that [Defendant]r made a strategic and fundamental change in the way it does business in order to attain financial goals of reduced expenses and increased sales. The [Defendants] carried its burden to articulate a legitimate non-discriminatory reason for its actions. The Plaintiffs have not submitted sufficient evidence to show that the articulated reasons were pretextual. No reasonable jury could find from the Plaintiffs' evidence viewed in the light most favorable to them that they were discriminated against on the basis of age.

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...." [3] (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 tends to show that there were roughly an equal number of employees over and under the age of forty. Complainant's other argument is 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 is disproportionally higher. Therefore, they argue that disproportionate number of employees over fifty shows a discriminatory intent because Respondent

[3] 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"

attempted to manipulate 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, 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 had comparable ratio as the total population of employees. Even if the tribunal had that information without an expert, testimony would be no more illuminating. Lastly, and most importantly, Complainant was not part of the RIF. She was terminated almost a year before the RIF occurred. The complainant did not offer any proof that there was a nexus between the post termination RIF and her termination.

4. **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.) Complainant was in a protected when 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). However, "[w]here an employer replaces a member of the protected class with another member of the protected class, that fact may undermine any inference of discrimination. ... Where a member of the plaintiff's protected class is contemporaneously hired as a replacement, the offering of proof of intentional discrimination appears extremely difficult, if not practically impossible. Where no other evidence giving rise to an inference of discrimination has been presented, the fact that a plaintiff is replaced with an individual within his protected class undermines his attempt to establish a prima facie case of discrimination." (Internal citations, quotation marks and parentheses omitted). *Ehrbar v. Forest Hills Hosp.,* 131 F. Supp. 3d 5, 26–27 (E.D.N.Y. 2015).

The Complainant's replacement was five years younger than she was. Testimony presented indicated there was a perception that Complainant and her replacement were contemporaries. Further, her replacement was also in a protected class. Additionally, under Baltz, Complainant's replacement, the NEN territory showed improvement over when Complainant had the territory. The evidence presented is insufficient to show any inference of discrimination based on hiring Baltz to replace Complainant.

5. **Comparator Evidence**

"[A] litigant may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than she was. Id., at 639, 791 A.2d 518; see also *Paylan v. St. Mary's Hospital Corp.,* 118 Conn.App. 258, 266, 983 A.2d 56 (2009). To be probative, this evidence must establish that the plaintiff and the individuals to whom she seeks to compare herself were "similarly situated in all *material* respects...." (Emphasis added; internal quotation marks omitted.) *Paylan v. St. Mary's Hospital Corp.,* supra, at 269, 983 A.2d 56; see also *Shumway v. United Parcel Service, Inc.,* 118 F.3d 60, 64 (2d Cir.1997). "[A]n employee offered for comparison will be deemed

to be similarly situated in all material respects if (1) ... the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) ... the conduct for which the employer imposed discipline was of comparable seriousness. *Graham v. Long Island Rail Road,* [230 F.3d 34, 40 (2d Cir.2000)]." (Internal quotation marks omitted.) (Internal citation omitted). *Perez-Dickson v. City of Bridgeport*, 304 Conn. 483, 514, 43 A.3d 69, 93 (2012). All the comparisons used by the Complainant were employees that were not part of Complainant's group, nor did they have the same manager.

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 such as Curt Betters, Jennifer Santry and Kathryn Bulloch were also terminated because of discrimination. Ms. Bulloch, Ms. Santry and Mr. Betters held different positions from Complainant, reported to managers other than Mr. Harger, were terminated for different reasons. Further, they were terminated either long before Complainant, or well after her termination. Employees like Ms. Bulloch and Ms. Santry, although they did not testify themselves, were both well under 40 years old[4]. Complainant could not produce any satisfactory comparator evidence to satisfy any of the factors to establish discrimination.

6. **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)

The Complainant argued that the corporate culture is youth orientated because 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 raison d'etre of corporate sponsorship. Complainant also argued that

[4] The two women alleged to have had pregnancy discrimination claims, not age discrimination claims. (See *Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. 379, 383 (2008)). Mr. Betters who was older than Complainant never alleged age discrimination.

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.

"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 [complaint]. However, without evidence that illegal animus affected the contested employment decision itself, such 'atmospheric' evidence is not enough to withstand summary judgment." Dobbs–Weinstein v. Vanderbilt University, 1 F.Supp.2d 783, 798 (M.D.Tenn.1998), cert. denied, 529 U.S. 1019, 120 S.Ct. 1421, 146 L.Ed.2d 313 (2000)." (Internal citations and quotations omitted), Butcher v. Gerber Prod. Co., 88 F. Supp. 2d 788, 795 (W.D. Mich. 2000). This tribunal cannot infer any discriminatory animus for the Respondent taking too long to relocate a group. The Complainant cited no law to support these allegations and this tribunal was unable to locate any relevant law in the country that said a rowdy atmosphere implied age discrimination.

B.

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 her 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 her 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 are many cases where conclusory allegations could not rise to the level of 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.

Assuming, arguendo, that 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 her poor performance 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.

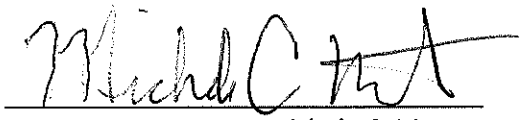
Complainant was permitted to amend her complaint and add Mr. Bouley as an individual defendant, on an "aiding and abetting" theory under Conn. Gen. Stat. § 46a-60(a)(5). If the claim against Nerac fails, then the aiding and abetting claim against Mr. Bouley necessarily fails, as there is no discrimination 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 plaintiff did not meet her burden of presenting evidence that was sufficient to rebut the legitimate, nondiscriminatory reason that the Respondent gave for its decision to terminate the Complainant.

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



Michele C. Mount,
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