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Commission on Human Rights and Opportunities
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April 18, 2018

CHRO ex rel. Douglas Eitelman v. NERAC Inc. and Kevin Bouley, CHRO No. 0840162 Fed No. 16a200800265

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. Douglas Eitelman,
Complainant

CHRO No. 0840162

v.

NERAC, Inc. and Kevin Bouley,
Respondents

April 18, 2018

FINAL DECISION

SUMMARY

On November 6, 2007 Douglas Eitelman ("Complainant' or "Eitelman") 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 May 1 1, 2007, because of his age (DOB 7/5/51).

Five different Complainants filed their underlying charges of discrimination 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.

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 also 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 the decisions including hiring and firing decisions. (Tr. 3291-92).

7. NERAC offered bibliographic literature searches, delivering search content but not analysis to its clients. 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 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 indicated that raising such concerns would not be the basis of terminating or otherwise disciplining an employee. (Tr. 86-87).

28. As an ESOP company, employees as beneficial shareholders would have an interest in discussing issues that they felt would adversely affect the company. (Tr. 1785, 1842-43).

Employee Movement

29. Bouley promoted Gerri Potash (Potash) to be V.P. of the analysts despite being younger and less qualified than other analysts were. (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 their insurance would get more expensive. 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 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).

38. In Simpson's testimony, he admitted that Petrie never used the words older people in contradiction to his earlier testimony and did not recall writing the affidavit, but did recall signing it. (Tr. -2535- 2537).

Corporate Culture

39. 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.)

40. 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)

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

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

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

44. The culture and practice at Nerac was that there was an open door policy for employees.

EITELMAN FACTS

45. Eitelman was the top sales person for his two decades at Nerac. The company hired Eitelman in January of 1994. After a brief break in his employment in 1994, he continued working at Nerac until his termination on May 11 2007. (Tr. 3264-3266)

46. In 1994, Eitelman was instrumental in setting up a transition in the sales model from sales being handled by field personnel to sales being done via conference call in house. This proved to be highly successful. Thirty outside sales employees were let go and inside sales people implemented the news sales model. (Tr. Tr. 3268-3272).

47. Early in his employment, he expanded the market to European countries. He also expanded the market to patent law firms; such change was typical at Nerac. Eitelman stated that working for Nerac, you had to accept change because it was kind of an exciting dynamic environment to work in. Complainant was a supporter of and participant in these ongoing changes throughout his employment as Nerac. (Tr. 3267-75, 3307-16).

48. Eitelman was outspoken and not shy about expressing his opinions. Both positive and negative comments have been attributed to him. (See Tr. 3362-3370, 3406).

49. Complainant, in 2006, which was his last full year of employment at Nerac, Complainant earned the most he ever had earned. (Tr. 3316).

50. Complainant reported to Don Brough, ("Brough") who was the Sales Manager, in 2007, Brough reported to Blackwell. Id.

51. Blackwell worked on site one or two days a week and remotely on the others. (Tr.1715).

52. Blackwell solicited Complainant's input on how to implement the new Nerac. (Tr. 3325 -3326).

53. Bouley stated that, Complainant was an "outstanding transactional salesman," there was "nobody better at transactional sales" during the time of his employment with Nerac. (Tr. 2300).

54. Complainant testified that he had his highest paid year in 2006. He stated that in 2007 he was trending to earn more than in 2006. (Tr. 3296-97, 3316).

55. At the end of 2006, Complainant's base salary was increased from $90,000 to $95,000. His commission on sales continued to be 6%, with an enhancement if a certain monthly sales level was reached. (Tr. 3116-18).

56. Blackwell was hired to help shepherd in the New Nerac. He sought out Complainant because he was aware of his reputation and success. (Tr. 2039-2041, 3311).

57. Blackwell made significant changes at Nerac, such as deciding to eliminate the call center, which he viewed as "an expense we could no longer justify" and led to "the higher level salespeople [being] very reliant on the call center to generate opportunities for them." (Tr. 1923, 1929).

58. In the new business model, Blackwell determined that Nerac "needed our salespeople to have a more — deeper, more impactful relationship with customers" and the call center was not consistent with that approach. (Tr. 1924)

59. In 2005, Blackwell terminated Simpson and replaced him with the older Brough, and then replacing Brough with the similar-in-age John DeMeo, who himself was terminated within two years for lack of sales performance. (Tr. 1953. D.O.B. Stip.).

60. On May 10, 2007, there was an offsite, lunchtime, sales meeting with inside and outsides sales people at Angelina's restaurant. This lunch was set up and paid for by Nerac. The purpose of this lunch was to provide an opportunity for the sales to people vent frustrations at work and discuss both positive and negative issues regarding work. (Tr. 3228-3230, 4417).

61. Beth Kilmer, (Kilmer) told Complaint that sales were poor and management was allowing her to conduct a luncheon meeting for sales staff. No managers were to be present and it was

intended as very frank discussion of why sales were plummeting and what could be done about it. At the meeting, about 12-14 people were present. Id.

62. There was testimony that the atmosphere at the restaurant was crowded and noisy. Id.

63. Sloman, Quinn and Kilmer were sitting next to or near the Complainant. Id.

64. Quinn testified that Eitelman was having trouble hearing and kept nudging him asking, "What did they say?" (Tr. 3231-3232).

65. Eitelman, Kilmer, and Quinn drove back together from the meeting to the office. Kilmer did not mention to Quinn anything that Eitelman said at the meeting. (Tr. 3262-63).

66. Kilmer could not remember much about the restaurant meeting, including where she sat or what specifically Eitelman allegedly said. (Tr. 4417-4418).

67. Kilmer worked in a sales role from Chehalis, Washington and only came into the Tolland office twice a year. (Tr. 4411-4412).

68. Blackwell testified that after the meeting Kilmer reported to him that Complainant made derogatory and inappropriate comments at lunch. Blackwell could not recall what was said and did not speak to Complainant after hearing about the alleged remarks. (Tr. 2056-2057).

69. On May 11, 2007, Complainant went to a company-wide meeting; Kilmer was speaking to the group about how the sales people were not with the program. (Tr. 1815-18).17

70. After the meeting, Petrie told Complainant that Blackwell needed to speak with him. Petrie brought Complainant to her office at Blackwell's request. Ruest was present and Blackwell was on speakerphone. Blackwell stated that Complainant was terminated because of comments that he allegedly made at the luncheon meeting and there was no further discussion. Blackwell told Petrie (as reported to him by Beth Kilmer) that Complainant said something Blackwell thought was inappropriate. Petrie could not recall what it was that Complainant purportedly said. (Tr. 1815-1817).

71. Blackwell was 42 years old when he terminated Complainant. (D.O.B. Stip.).

72. After Eitelman's termination, Nerac retained additional, new in-house sales representatives such as Karl Fazina (DOB 12/13/1973), Chris Waszczak (DPB 7/26/1981), Steve Harz (DOB 1/25/63) and Angela colon (DOB 12/13/1978). (Tr. 3300, 3356-3357).

II

LAW AND ANALYSIS

Complainant claims that Respondent violated General Statute §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. Comm'n 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, "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) (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

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 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 was over 40 and alleged age discrimination based on being older therefore, the first prong of the prima facie case, that Compliant be a member of a protected class, is met. The second prong, which is he is qualified for the employment position, is also fulfilled as it was admitted he consistently had the highest number of sales per period. Complainant was also lauded by his employer as one of the top

sales people at Nerac. The third prong that Complainant suffered an adverse employment action is met based on his 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 was that he did not say what he was accused of saying and in fact could not hear most of what was being discussed at the lunch meeting. Complainant also cited the general culture of the company, statistics relating to a reduction in workforce (RIF) (which occurred almost a year after complainant was terminated) and alleged hostile remarks made by Petrie to another employee. However, while there are multiple categories of circumstantial evidence, there is no direct evidence presented, therefore we will look at the circumstances surrounding the termination.

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. In the instant case there is no other evidence that rises to the level of discriminatory animus.

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 terminate the complainant is not probative of discriminatory animus, nor is there a demonstrated causal connection. Moreover, the Complainant cannot point to any employee who was not hired or terminated because of the remark. The evidence lacked a demonstrated 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. Finally, Petrie allegedly made the comment three or four years before Complainant's termination in 2007, the alleged remarks are too remote in time to the employment decision and are too weak to raise a reasonable inference of discrimination.

2. 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, of 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. Comm'n 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...." (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's argument 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, he argue that disproportionate number of employees over fifty shows a discriminatory intent because Respondent 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. He 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 by Respondent and his termination.

3. Insubordination

"An employer does not violate Title VII when it takes adverse employment action against an employee to preserve a workplace environment that is governed by rules, subject to a chain of command, free of commotion, and conducive to the work of the enterprise." *Matima v. Celli*, 228 F.3d 68, 79 (2d Cir. 2000). Employee insubordination and other conduct that is disruptive to the workplace are legitimate, nondiscriminatory reasons for terminating an employee. *Tebbenhoff v. Elec. Data Sys. Corp.,* 244 Fed.Appx. 382, 384 (2d Cir. 2007). While complainant insists, he never made any disparaging or inappropriate remarks at the lunch meeting, even if true that would not change the fact that Blackwell said he based his termination decision on such remarks, which is not probative of discriminatory animus.

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). Respondent went through a several year period of downsizing in the implementation of their new corporate model.

The Complainant further argued that the corporate culture is youth orientated, therefore discriminatory, because the company sponsored a professional bicycling team and Bouley would practice with them occasionally and go on bike trips with younger employees. Corporations have been sponsoring everything from NASCAR teams to Golf teams, and promoting company teams such as softball and basketball since before the 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. 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.

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 different managers and, were terminated for different reasons. Employees like Ms. Bulloch and Ms. Santry, although they did not testify themselves, were both well under 40 years old. Curt Betters, who filed a claim of age discrimination claim, which was dismissed by the CHRO finding there was no reasonable cause to believe that discrimination had occurred. The Complainant mentions several others, noting their age, their replacement's age, his disagreement regarding their performance and why they were terminated as indication that the company preferred younger employees. However, several of those who testified such as Piers and Rogers could credibly substantiate that supposition. They do not meet the qualifications to be a comparator, nor do they show a discriminatory basis, as they are mainly conclusory allegations with no proof. Further, there were many of credible examples and testimony by employees who were over 40 stating that were happy and successful with Nerac and had been there for many years.

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 his insubordination. 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 alleged comments did not motivate the Respondent, but instead was merely a pretext for intentional age discrimination. Even If the Respondent were misled about the comments and they were untrue, their legitimate business reason would be a bad business decision or an allegation of wrongful termination. It does not illuminate a discriminatory intent.

"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.

Nevertheless, assuming 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. 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.

In Complainant's case, he had been with the company for least 12 years and there were no evidence presented that he was a poor or underperforming employee. The Respondent's articulated business reason for Complainant's termination was that he made disparaging inappropriate remarks at a lunchtime meeting designed to promote a healthy discussion of Nearc's sales climate. The respondent did not produce a witness that could remember what comments Complainant allegedly made or produce documents that contained the remarks. However, that is an indication of poor documentation, not discrimination. Terminating a top employee over hearsay, without first speaking with the employee, can

reasonably be said to be a very poor business decision. Nevertheless, it is a legitimate business reason albeit a feeble one.

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 complaint failed to demonstrate a nexus between his termination and discrimination. Again, arguendo that he met the de minimus burden of proving a prima facie case, he did not meet his 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
Presiding Human Rights Referee

cc.

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