State of Connecticut
Commission on Human Rights and Opportunities
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October 3, 2019

CHRO ex rel. Cynthia Leonard v. City of Waterbury CHRO No. 1630341 Fed No. 16a201600747.

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, complainant and respondent's attorney.

Very Truly yours,

Kimberly D. Morris
Secretary II

cc.

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Michele C. Mount, Presiding Human Rights Referee

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNTIES
OFFICE OF PUBLIC HEARINGS

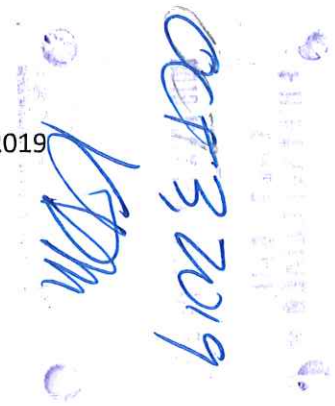
CHRO ex rel. Cynthia Leonard,
Complainant

v.

City of Waterbury,
Respondent

CHRO No. 1630341

October 3, 2019



FINAL DECISION

I.

SUMMARY

Cynthia Leonard (hereinafter "Leonard" or "Complainant'), filed a discriminate claim against by the City of Waterbury Board of Education ("Respondent") when she was not interviewed for, or promoted to, a Human Resources Assistant position by the Respondent because of her physical disability, hearing impaired. Leonard filed a complaint with the Commission on Human Rights and Opportunities (hereinafter "Commission" or "CHRO"). The complaint was filed on January 12, 2016, alleging violations of General Statute §46a-60(a)(1) and §46a-60(a)(4) the Americans with Disabilities Act, 42 U.S.C. §121-1 et seq., and Title VII of the Civil Rights Act of 1964, .42 U.S.C, § 2000e-2, as enforced by General Statute §46a-58(a).

At the time of her application, Complainant had worked in the Respondent's Education Personnel Department, BOE grants, for three years and five months, held an undergraduate degree in Business Administration, possessed a Human Resources Certificate, and was enrolled in a Master's Degree program with an anticipated degree conferral date in approximately 6 months. Complainant was already performing the job for which she applied. Her direct supervisor and the Director of the Department both believed she was qualified for the position and the likely candidate; however, Leonard did not get the job and was never interviewed.

II.

FACTS

A. Stipulated Facts

In advance of the public hearing in the above-captioned matters the Commission and the Respondent stipulated to the following facts:

1. In March 2012, the Complainant was hired by the Respondent In the position titled "Secretary 11."
2. Following her hire, the Complainant was assigned to the Education Personnel Department.
3. The Complainant's immediate supervisor In the Education Personnel Department Was James Murray, then acting in the position titled "Human. Resources Assistant Grant Funded Personnel."
4. James Murray retired from employment with the Respondent in September of 2015.
5. On or about August 6, 2015, the position for Human Resources Assistant Grant Funded Personnel was posted on the Respondent's electronic application portal, Applitrack.
6. On or about August 14, 2015, the Human Resources Assistant-Grant Funded Personnel posting was revised and reposted In Applitrack.
7. On November 30, 2015, the Complainant was transferred to another Secretary II position in Special Education.

B. Findings of Fact

8. All jurisdictional requirements have been met. Based upon evidence and testimony adduced at public hearing, the complaint, answer and other pleadings, and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found.

9. Within the City of Waterbury, the Education and Personnel Department acts as the Human Resources (HR) department for the Board of Education (BOE)[1], the office is located on the third floor of a building, which housed various city offices. (Tr. 10-11).

10. There is a separate HR department for civil service employees that are not employed by the BOE. That office is located on the second floor of the same building. (Tr. 10-11).

11. The City of Waterbury BOE is a distinct legal entity from the City. (Tr. 158).

12. The BOE HR Dept. is further divided between civil service BOE employees and Grant funded BOE employees and the two office do not overlap. (Tr. 150-152).

13. The BOE HR Dept.'s office had approximately 15 people on the third floor during the time period covered in the complaint. Within the BOE HR Dept., there was a smaller, two-person department for all grant-funded employees of the BOE, which covered approximately 2,000 employees. (Tr. 11-12, 85).

14. Complainant was one of the two grant-funded employees that made up the BOE HR Grants Department. Complainant's supervisor James Murray (Murray) was the other member of the BOE HR Grants Dept. (Tr. 10-11, 13, 399).

15. Murray was employed as a HR Assistant (HRA) but did the functions of a HR Generalist. (Tr. 10-11, 13, 399)

16. Complainant was employed as a Secretary II; however, she performed the functions of an HRA as well as a Secretary II. (Tr. 13-14, 309-310).

17. As a Secretary II in the BOE HR Dept. in 2015, Complainant's annual salary was twenty-five thousand-two-hundred forty-three and 40 cents ($25,243.40). The HRA position would have paid forty-five thousand ($45,000). (Tr. 80; Ex. CHRO-27).

[1] The Education and Personnel Department is referred as the "BOE HR Dept.," in this ruling. (Tr. 161).

18. Complainant worked directly with Murray. She was stationed directly outside his office and performed many of the same tasks as he did. The only duty she did not perform that Murray did was disciplinary. The two worked directly together for approximately three and a half years. (Tr. 13-14).

19. When Murray was out of the office, Complainant covered for him and performed his duties. No one ever expressed disapproval that she covered for him. No one else covered for Murray in his absence. (Tr. 15, 400).

20. Dr. Shuana Tucker (Tucker) was hired by the Respondent as the Talent and Professional Development Director in 2012. Within six months of her hire, due to a vacancy, Tucker was appointed interim Director of HR for the BOE HR Dept. Tucker was appointed to that interim position by Paul Guidone (Guidone), COO and CFO of the school district. (Tr. 27-28; 253-254).

21. For the entirety of Complainant's tenure, Tucker supervised Murray, and her. Tucker was familiar with Complainant and her work because she oversaw the whole department. (Tr. 28, 199, 214, 256).

22. Tucker's opinion was that Complainant did very good work and had no complaints about her work. (Tr. 256).

23. Murray told Tucker that he was very pleased with Complainant's work. Complainant completed training and added skills and was successful in her efforts. (Tr. 257-258).

24. Scott Morgan (Morgan) was hired in July 2011, by the City as a temporary HR generalist civil service. He was promoted to HR Generalist civil service in November 2011. In or around late 2014, Morgan was promoted to Senior HR Generalist civil service. In March 2016, Morgan was promoted to Director of HR for the City civil service. (Tr. 155-156, 200).

25. For approximately six months in 2014, Morgan received a stipend to help in the BOE HR Department due to vacancies. Morgan's duties in the BOE HR Dept. were not delineated in writing. Morgan did not receive a stipend in 2015. (Tr. 161-162).

26. Neither Complainant, Tucker nor Murray reported to Morgan. Tucker reported to the Superintendent and Guidone. (Tr. 199-200, 254).

HEARING LOSS

27. In 1992, Complainant was in a car accident that resulted in damage to her eardrum. At the time, she was diagnosed with a ruptured eardrum. Since that injury, she has experienced a hearing impairment. (Tr. 15-16, 127-128).

28. Due to her hearing loss, Complainant tends to speak loudly. (Tr. 16).

29. Complainant's hearing was tested by an audiologist and she was diagnosed with a 20 percent hearing loss. (Tr. 128).

30. Complainant also must speak loudly on the phone and can use only one ear. (Tr. 16, 403).

31. It was apparent that Complainant had difficulty hearing during her testimony. (See Tr. 17, 28, 91, 118, 119, 120, 145).

32. Complainant disclosed her hearing impairment to her co-workers, including, Murray, Tucker, Michelle Costanzo (Costanzo), Jaclyn Planas (Planas), and Kathy Kris. Complainant made the disclosures when questioned about being loud. She advised them that since she did not hear well, she tended to speak louder. (Tr. 17, 24).

33. When Complainant began her job, her desk was located at the end of the long hallway. She did not have a cubical and her desk was visible from the front entrance to the office. (Tr. 18-19, 268).

34. People came to Tucker with concerns because Complainant was loud when she was on the telephone. (Tr. 268).

35. Tucker and Complainant spoke about the concerns over the volume of her voice; Complainant disclosed to Tucker that she has a hearing impairment. (Tr. 268).

36. Tucker and Murray moved Leonard to a workstation behind a wall at the end, of the long hallway; Complainant knew that she was moved in the hope that the wall would stop her voice from carrying. (Tr. 20).

37. There were two desks behind the wall. Complainant's new desk was next to Costanzo's desk. There was little to no privacy or personal space. Complainant and Costanzo could be heard from the front of the office where the public appeared. (Tr.21, 271, 398, 404).

38. Complaint's hearing impairment was generally known within the HR BOE Dept. Complainant had told Tucker that she had no problem with her coworkers knowing, and Tucker encouraged Complainant that if she was ever questioned about the volume of her voice to respond that she cannot hear clearly and that is why she speaks loudly. (Tr. 21, 271).

39. Complainant's workstation was moved a second time when she and Costanzo were moved into an office. Tucker told Complainant that she was being moved into an office due to the volume of her voice, especially since the job involved confidential information. (Tr. 23, 269, 398, 401).

40. Costanzo observed Complainant speaking loudly from the beginning. Costanzo testified that Leonard spoke loudly on the telephone because Leonard could not hear well. (TR 400, 403).

41. In the Respondent's original Answer to the Complainant's CHRO complaint, which Morgan verified under oath was true and accurate to the best of his knowledge, the Respondent denied that he was aware Complainant had performed all of Jim Murray's job duties. (Tr. 204-204)

42. In the Respondent's original Answer to the Complainant's CHRO complaint, which Morgan verified under oath was true and accurate to the best of his knowledge, the Respondent

denied that "it was aware of Complainant's hearing impairment from a 1992 accident or any resulting injuries or disabilities." (Tr. 204-205, 210; Ex. CHRO 1).

43. Morgan testified that he remembers having conversations about the volume of Complainant's voice. (Tr. 211).

44. Tucker creditably testified in 2014, that Morgan approached her and asked if there was something wrong with Complainant because she was very loud. Tucker told him that Complainant has a hearing impairment. Morgan responded, "oh, okay." Tucker testified that she is "very confident" in her memory that she told Morgan that Complainant has a hearing impairment. When asked for a percentage of confidence, Tucker testified, "100 percent." (Tr. 270, 271, 369-370).

45. From 2012-2014, Morgan visited the BOE HR Dept. two to three times per week and interacted with Complainant. In 2014 Morgan received a stipend for helping out in the BOE HR office. He worked at times in the same office as Complainant. The two interacted day-to-day. (Tr. 188, 335-336).

46. Morgan instituted an "open door policy" because he disapproved that many employees in the BOE HR Department worked with their office doors closed. Morgan believed closed doors were not welcoming. Morgan testified that open doors are his "idea of a professional workplace." Having the doors open would mean Complainant's voice could be heard again. (Tr. 193).

47. In 2014, Complainant sought reclassification from a Secretary II to an HRA position with the support and assistance of Murray and Tucker. (Tr. 25-28).

48. To prove that Complainant was in fact performing most of the duties listed on Murray's HRA job description, Complainant had Murray and Tucker sign a copy of Murray's job description. (Tr. 26, 312; Ex. CHRO-26).

49. Tucker testified that Complainant completed the job duties in Murray's job description. (Tr. 312).

50. Tucker testified that she believed Complainant possessed the educational requirements to be qualified for the reclassification, (Tr. 311-312).

51. Complainant's union representative Cory Garfman (Garfman), submitted the request for reclassification to the Respondent's financial officer at the time, Guidone. In an email to Guidone, Garfman wrote, "Additionally, it is perhaps also important to note that when closely examining the job duties and responsibilities of the current human resource administrator, Jim Murray, Cynthia Leonard performs 11 out of 12 of the bullet points associated with his job. Lastly, Jim has indicated that because she is such an asset to his office, ultimately he would overwhelmingly approve if Cynthia were to assume his position when he finally retires." (Tr. 27, 32-33; Exs. CHRO-17, CHRO-17A),

52. Complainant was present when Garfman spoke to Murray about Complainant and heard Murray state that he would overwhelmingly approve her assuming his position when he retires. (Tr. 33).

53. Over the following months, Guidone relayed that he was working on the reclassification. In the summer of 2015, Complainant had not yet received a decision on the reclassification request. (Tr. 33-34).

54. In or around November or December 2014, Murray formally informed Complainant of his plans to retire in or around September 2015. At that time, Murray told Leonard that he was going to start showing her the ropes of the duties she did not already perform in the department. (Tr. 34-35).

55. Murray started bringing Complainant to meetings with employees to address personnel issues. (Tr. 36).

56. Murray told Tucker that he encouraged Complainant to apply for his position because he felt that she was more than qualified and that he trained her to do the job. (Tr. 259).

57. Tucker testified that Complainant was more than qualified to apply for the position. She based her opinion on her understanding of the training Complainant received from Murray, her own observations, and the fact that Complainant was doing the job already. (Tr. 263-264, 310),

58. Tucker instructed Complainant to post the vacancy for Murray's position. Complainant reviewed the job posting from Murray's files. Three versions of the job descriptions were reviewed by Tucker and Murray. Once a final description was approved by both, Complainant sent it to Guidone for approval. Finally, she sent it to Nancy Vaughn for external posting. (Tr. 37-40, 89, 128-129; CHRO-4).

59. The job posting required, "three years of professional human resource experience. A bachelor's degree in human resources or business administration or other related area preferred." (Tr. 63; CHRO-4).

60. Complainant possessed the specific degree and years' experience required in the first posting and applied for the HRA using Applitrack (Tr. 42, 64; Ex, CHRO-27).

61. At the time of her application, Complainant had worked directly with Murray in the BOE HR Dept. for three years and five months. (Tr. 44; Ex. CHRO-27).

62. Complainant had the required degrees, certificates, and experience required for the position of BOE HRA Grants. (Tr. 44-46, 54; Exs. CHRO-27, CHRO-29).

63. Morgan admitted that Complainant probably did many of the same job duties as Murray, the current BOE HRA Grants. (Tr. 220-221).

64. Complainant was working towards her master's degree at the time of her application. She earned her Master's in Education in 2016. (Tr. 44-45; CHRO-27).

65. Complainant had existing relationships with the district, principals, and other staff that the BOE HRA-Grants worked with, and noted that on her application. She also noted that she had the precise experience and qualifications required by the position and had filled in for Murray for weeks at a time. (Tr. 48; Ex. CHRO-27).

66. Complainant had passed the civil service exam for "Human Resources Assistant" in October 2014. She was ranked 7th on a list that would remain in effect for two years. Passing the exam and being put on the list means that the individual is qualified for the position. (Tr. 48, 110-111, 370, 414; Ex. CHRO-16)..

67. Complainant had previous managerial job experience in her earlier career. (Tr. 93-94).

68. On or about August 14, 2015, someone in the BOE HR Dept. told Morgan that the posting for Murray's position was going to close, Morgan was surprised to learn that it was up and asked what was posted. (Tr. 170- 173, 202-203).

69. Morgan felt he had "a vested interest" to make sure the job was filled "correctly." (Tr. 202).

70. At 9:31am on August 14, 2015, at Morgan's direction, CJ Gomes accessed Applitrack and pulled down the BOE HRA-Grants job posting so that Morgan could revise it. (Tr. 58, 216-217, 329; CHRO-5; Exhibit A).

71. The revised job posting changed the education and experience requirements to "Graduation from an accredited college or university with a bachelor's degree," and "Four years of professional human resource experience." (TR 63; CHRO-6).

72. Under "Minimum Training and Experience Required" in the new position provided that a master's degree in Human Resources, Public or Business Administration or a related field may substitute for one (1) year of the general experience described above." (Ex. CHRO-6).

73. When calculating years of experience, the Respondent may — in some circumstances — consider partially completed programs when the applicant is currently enrolled. The time

credited would depend on how far into the program the applicant was at the time of application. (Tr. 308, 317).

74. In the revised posting, Morgan removed the specificity of the undergraduate degree in the applicant's education. When questioned, during his testimony why he believed a relevant degree would not be preferable, Morgan evaded the question. (Tr. 234 -235, 235).

75. Tucker testified that having educational background and skills within business or in HR would be helpful, and that she was aware that Complainant had a degree in business administration. In Tucker's professional experience, she testified that there is no reason why it would be preferable to remove the specificity in the field of bachelor's degree. (Tr. 296-297).

76. Complainant asked Tucker about the revised posting. Tucker told Leonard she didn't need to apply again and that the applications received for the first posting would be considered. (Tr. 67).

77. Complainant reapplied despite knowing it was not necessary. She included two additional letters of recommendation from a third school principal and the Respondent's physical education supervisor. (Tr. 67; Ex. CHRO-30).

78. Complainant asked both Tucker and Murray what happened with the posting. Tucker told Complainant that Morgan got involved with it. Murray told Complainant that Morgan took the first posting down because Morgan did not want Complainant to replace Murray. Murray was not happy. (Tr. 67-68).

79. Complainant testified that she did not directly ask Morgan why he changed the posting because she had heard from co-workers that she was not going to get the position because Morgan thought she was loud and unprofessional. Murray also told her that Morgan thought she was loud and unprofessional. (Tr. 133-135).

80. Revisions to job descriptions in the BOE HR Dept. are routinely submitted to the personnel committee of the BOE for approval, this did not happen in this instance. (Tr. 60, 300).

81. In Tucker's professional opinion, the substance of Morgan's revisions to the BOE HRA-Grants posting were significant and would normally have been brought to the personnel committee for approval. (Tr 302).

82. Morgan did not seek authorization from anyone before pulling the posting down. He did not know BOE procedures. He did not submit the revised posting to the Board, or the personnel committee within the Board, for approval. (Tr. 201-202, 204, 360-363; Ex. CHRO-23, Ex. CHRO-24).

83. Morgan did not request approval from or even inform Tucker he was removing the posting for the position in her department. Tucker learned that Morgan had the posting removed from a third party, after the fact. (Tr. 260, 262).

84. It was the normal practice for postings coming from the BOE HR Department to go through Tucker. In Tucker's experience and opinion, Murray, part of the civil service office, did not have authority to take down a posting from the BOE HR Dept. (Tr. 261-262).

85. Morgan had never removed a job posting and revised it until the BOE-HR posting. He never has since. The August 2015, BOE HRA-Grants position was the only time Morgan has ever pulled a posting down. (Tr. 59-60, 201)..

86. Morgan had never been involved in hiring a grant funded BOE employee. He had never sat on an interview panel for a grant-funded position. (Tr. 61, 231-232).

87. Tucker was out of the office on intermittent FMLA in August because she was caring for her ailing father out of state, who passed away over the Labor Day weekend in 2015. Tucker was often out of the office from Wednesday or Thursday through Monday during those months. Morgan filled in for Tucker while she was out, including during the interviews on September 4, 2015. (Tr. 273, 306; Ex. CHRO 14).

88. Morgan admitted that the person who accessed Applitrack (The Respondent's job listing site) to pull down the posting would have been able to view the applications already filed in response to the first posting. He also testified, in not very convincing manner, that he could not recall who pulled the posting down for him. (Tr. 423).

89. In August 2015, Morgan had access to the Applitrack system through CJ Gomes, and could get information within it. (Tr. 169).

90. Morgan knew Complainant had approximately three and a half years of experience in the BOE HR Department.

91. Morgan testified that he removed the first posting because a job analysis should have been performed. (Tr. 170-172).

92. Morgan testified that he could not have done it all in one day because it would have taken "a little while to rewrite the job spec." (Tr. 217).

93. Morgan had the posting taken down, and had it reposted all in one day. (Tr. 58, 216-217, 329; Ex. CHRO-5, Exhibit A).

94. Morgan testified that he personally revised the HRA- BOE Grants job posting so that it tracked the civil service HR Generalist position. (TR 179, 203-204).

95. Morgan did not do a new job analysis because he concluded that the BOE HRA Grants position was equivalent to a civil service HR Generalist. He relied on a previous job analysis for civil service HR Generalist to revise the posting. (Tr. 218-219).

96. Murray's salary was $65,000 per year. Morgan believed the BOE HRA-Grants posting sounded more like a lower level civil service HRA, whose pay would be in the range of $35,000 to $45,000. (Tr. 175-176).

97. Morgan testified that the reason he revised the posting was to equalize pay and experience requirements for the HRA Grants job that were similar to a civil service HR Generalist. Because

Murray was paid $65,000, Morgan testified that he wanted to keep like jobs with similar pay and similar requirements. (Tr. 223-224).

98. The salary listed on the Respondent's approved requisition form (number 2015401) to fill Murray's vacancy was $45,000. Both the first and revised postings for the BOE Grants HRA position listed the salary range as $45,000 to $65,000. Morgan did not change the salary range when he revised the posting. (Tr. 80- 81, 236; Ex. CHRO-4, Ex. CHRO-6).

99. Morgan testified that the BOE HRA-Grants position had to be revised to change the minimum years' experience from three to four so that the HRA grant position would be equivalent to the HR Generalist civil service position. (Tr. 334).

100. Morgan testified that he did not believe there was an initial level HR position in the grant side in 2015. (Tr. 220).

101. Morgan reviewed all the applications and concluded that Complainant did not meet the new minimum qualifications for an interview. He wrote "NQ Experience" next to her name on an applicant list. (Tr. 181-182).

102. Morgan did not consult anyone, including Complainant before concluding that her past managerial experience did not count as relevant experience. (Tr. 340).

103. Complainant was not granted an interview for the BOE HRA-Grants position. She received a letter dated September 1, 2015 notifying her that she did not meet the required qualifications for the position. (Tr. 68-69, 292; CHRO-18).

104. Morgan and Murray interviewed six candidates, including Planas and Phalen. (Exs. CHRO-14).

105. Phalen's Bachelor's Degree is in Education, she did not possess a bachelor's degree in HR or Business Administration.. (Tr.299, Ex. CHRO-8).

106. Planas did not possess a bachelor's degree in HR or Business Administration. Planas' bachelor's degree was in psychology with a minor in criminal justice. (Tr. 300, Ex. CHRO 9).

107. Planas and Phalen were both hired as HRAs in the BOE HR Dept. (Ex. CHRO-1).

108. Complainant had passed the HRA civil service exam and was on the list for a two-year period from 2014 through 2016, therefore she was qualified for a position that paid in the range of $40,000 to $53,000. (Tr. 372; Ex. CHRO-16).

109. Morgan sent Phalen a letter dated November 6, 2015 notifying her of her selection for employment in the position of HRA Grants in the Education Department. The letter referenced requisition number 2015401 and stated Phalen's starting compensation would be $24.73 per hour. Approval was not obtained by the Board to hire Phalen until November 18, 2015. (Tr. 81-82, 230-231, 364-365; Ex. CHRO-21, Ex.CHRO-25).

110. The approved requisition form listed two positions with a salary of $45,000. Morgan did not sign the requisition form for the posting because he was not the appropriate person as he was in civil service side. The form was signed by Tucker, Guidone, Dr. Oellette (Superintendent), and Geary (Mayor's Chief of staff). (Tr. 214-215; CHRO-21).

111. Morgan was not involved in the salary level decision for the new hire(s) because the position was in the BOE HR Department and again did not involve him as he was a civil service Senior HR Generalist. (Tr. 215).

112. Morgan testified that Complainant was deemed not qualified because the updated posting was changed to require four years of experience. (Tr. 227).

113. Morgan conceded that Leonard met the minimum qualifications on the first posting. (Tr. 341).

114. Morgan testified that Leonard would have been qualified and interviewed if he had not changed the posting to require four years instead of three. (Tr. 325).

115. Morgan testified that the significance of the difference between three and four years' experience would depend on the individual. An assessment would be needed on a case-by-

case basis to determine if the one-year difference was significant, however he did not provide Complainant with that opportunity. (Tr. 327).

116. Morgan knew Complainant held a certificate in HR. (Tr. 389).

117. Tucker did not believe increasing the years' experience from three to four would make a huge difference for the BOE HRA-Grants position. Knowing that Leonard had approximately three and a half years' experience in the grants department, Tucker did not think that six months' less experience would have made enough of difference to disqualify Complainant. (Tr. 282, 284-285).

118. Complainant testified about the irregularities in the hiring process, describing them as: there were two different job descriptions, no approval sought from the Board or anyone for the second job description, there were two hires to replace one-person, there were missing documents from her application, and the identity and quantity of interviewers. (Tr. 118-122).

119. In his testimony on October 17, 2018 Morgan denied knowledge of the identities and qualifications of the applicants to the first posting when he revised the job description. (Tr. 328-329).

120. Morgan admitted in his testimony on October 16, 2018 that he was aware of Complainant's efforts to seek reclassification at the time, and then denied the same in his testimony on October 17, 2018. (Tr. 237, 319).

121. Murray took time off before his official retirement date in September 2015. Complainant covered for Murray when he was absent and handled all business for the BOE HR Grants Department. No one expressed disapproval of Complainant covering for Murray; Tucker had no concerns regarding Complainant's ability to cover the position for longer stretches of time. (Tr. 258, 381).

122. When Murray retired, his position had not yet been filled. (Tr. 69).

123. In the original Answer in the instant case, Morgan verified under oath, that the Respondent denied the allegation in paragraph 17, additionally stating "Complainant did not meet the new job specifications. Respondent denies Complainant performed all job duties required after Jim Murray's retirement." (Tr. 209; CHRO-1).

124. Morgan knew that Complainant performed Murray's job duties after his retirement when he signed the verification under oath on February 26, 2016, (Tr. 354).

125. Complainant performed Murray's role as the sole member of the BOE HR Grants Department from the date of Murray's retirement in September 2015, until Phalen started in mid November 2015. (Tr. 274).

126. On February 17, 2017, the Respondent filed another Answer to Complainant's certified CHRO complaint with the Office of Public Hearings, (OPH Answer in Record).

127. The February 17, 2017 Answer was verified by Robert Brenker, who started as the Director of BOE HR Department in or around January 2016. Scott Morgan was still employed as the Director of HR civil service at the time. (Tr. 155, 200; OPH Answer in Record).

128. In the second answer the Respondent changed its response to the allegation in paragraph 17 of the Complaint, denying the allegations and only stating, "Complainant did not meet the *new* job specifications." (emphasis added) (TR 208-209).

129. After Murray retired Complainant filed a grievance through her union representative, Garfman, because she was performing both the positions of BOE HRA-Grants and Secretary II Grants. Complainant had never filed a grievance before. (Tr. 70-71; CHRO-19).

130. Superintendent Oellette confirmed receipt of the grievance in an email to Garfman, notifying him and Complainant that Morgan and Gary Miller would meet with him on Oeltette's behalf. Miller was acting COO of the BOE at the time. The email was copied to Morgan. (Tr. 345, 348; CHRO-19).

131. Complainant's grievance was resolved in a meeting with Morgan and Tucker, without Garfman's knowledge or presence. Leonard did not know at the time that she had the right to union representation at the meeting. (Tr. 71-73, 342-348).

132. When asked whether he met with Complainant without her union representative, Morgan testified that he thought Complainant was a union representative. Morgan could provide no explanation for why he would think that. He did not recall Complainant ever telling him that she was a union representative or any instances where she was involved in grievances. (Tr. 346-347, 351-352).

133. Morgan admitted he sometimes gets pushback in grievances meetings with union representation when the claimant is represented in the grievance meeting. Morgan testified that they do not typically meet without a union representative. He then conceded that it does happen and did happen with Complainant. (Tr. 356).

134. In settlement of the grievance, Leonard was paid a $300 per week stipend to perform the BOE HRA-Grants position until the successful candidate could begin work. That lasted close to three months. (Tr. 69-71; CHRO-19).

135. Complainant was only paid prospectively because contractually she was required to file the grievance within 10 days of when she knew or should have known that there was a violation. She was not paid for work she had performed previously.

136. Tucker had no issue paying Leonard the stipend because she was working out of class and should be compensated for the work she was doing. (Tr. 281).

137. Garfman emailed Morgan after learning about the grievance meeting, stating, "While we are pleased a settlement was reached concerning this issue, the last message I received from the Superintendent was that a Step 1 grievance would soon take place where I would be included. In going forward pursuant to Article 8 of the contract, I am therefore requesting that I be

present and included at any and all future Step 1 meetings, as well as any and all subsequent steps of the grievance process for grievances which are submitted by the union." (Tr. 72-73; CHRO-19).

138. Planas started as an HRA in late September 2015. Although she was hired as an HRA in the BOE HR Department, she was assigned to work with substitutes through civil service. Planas did not take over the HRA grants job duties that Leonard and Murray performed. (Tr. 74).

139. Planas's previous experience involved working in civil service on a data entry system, and prior to that in the BOE HR Dept working on civil service certifications. She had never performed the grants duties that Murray and Complainant performed. (Tr. 84-86).

140. Approval was not granted to hire Planas until November 5, 2015, when the Board voted and approved her hiring retroactively effective to September 28, 2015. (Tr. 364; CHRO-24).

141. Morgan agreed to pay Complainant a stipend to perform the job of BOE HRA-Grants after he determined that she was not minimally qualified for the same job. (Tr. 358).

142. Morgan did not have any concerns about Complainant performing the position in the interim. (Tr. 368-369).

143. Complainant was asked to show her replacement Phalen the "ropes". Morgan was not surprised to learn that Complainant was asked to show Phalen the ropes because anyone coming into a new position would need training. (Tr. 75, 359).

144. Phelan does not have a hearing impairment. (Tr. 75).

REASSIGNMENT

145. Complainant received a letter dated November 20, 2015 reassigning her to a Secretary II position in the Special Education Department. Her reassignment was effective November 30, 2015. (Tr. 76; CHRO-20).

146. As a Secretary II in the Special Education Department, Leonard would have no further opportunity to further her career aspirations in human resources. (Tr. 76, 314).

147. The Respondent contemplated staffing changes as part of a reorganization plan that was discussed and revised numerous times. The plan had always included the excessing of the BOE Grants department Secretary II (Complainant). Morgan was aware for some time that the plan was to eliminate Complainant's position and transfer her. (Tr. 383-386; R-7).

148. Morgan believed that the BOE HR Dept. should be staffed with more HR professionals than administrative staff, which ultimately did not happen. (Tr. 190-191).

149. The main purpose of the reorganization was to improve the functioning of the office and elevate the experience and skills of the individuals therein. (Tr. 390).

150. The Secretary II that was not excessed in the new staffing model did not hold an HR Certificate. (Tr. 389).

151. When Leonard started in the Special Education Department, she was assigned to coordinate busing for special education students. Later she was assigned to coordinate all homebound tutoring. She no longer had any HR duties. (Tr. 139).

152. Morgan testified that he offered to mentor Complaint, however as a Secretary II in Special Education, she had no opportunity to advance in the HR function as she was not accruing the 6 months of HR experience that was required. (Tr. 388, 393-394).

153. Complainant testified that she felt her career path was off track and her educations choices were a waste of money. (Tr. 139)

154. In March of 2016, the Respondent posted a vacancy for "Human Resources Assistant — Education". The posting stated only three years of professional human resource experience was required, not the previously required 4 years in the revised posting. (Tr. 77-78; Ex. CHRO-1).

155. The "Human Resources Assistant Education" posting was a civil service tested position. (Tr. 110; Ex. CHRO-31).

156. Because the Respondent changed the title of the position from "Human Resources Assistant" to "Human Resources Assistant — Education", it was not required to use the existing, active civil service list. Complainant would have been eligible for any "Human Resources Assistant" position through October 2016, as vacancies arose and the Respondent worked through the ranked list. (Tr. 110-111, 416; Ex. CHRO 16).

157. Morgan was aware that Leonard was on the existing HRA civil service list. (Tr. 370).

158. Complainant did not apply for the March 2016, HRA-Education position because she had already filed a CHRO complaint against the Respondent in January 2016, regarding the same position. She did not think she would be selected after what had transpired in August 2015. She also no longer wanted to work with Morgan or Robert Brenker because she experienced a lot of tension since she filed this complaint. (Tr. 110, 123).

159. Complainant was embarrassed that she was not selected for an interview and all her co-workers knew she did not get the job she was already performing. She felt embarrassed that, to her knowledge, every other time someone was in the same situation in the department, they were selected to replace their supervisor, but she was not deemed qualified. (Tr. 142-143).

160. Complainant felt unwelcome, singled out because of her disability and unrecognized for her hard work and adequacy. (Tr. 143).

161. Costanzo observed Complainant to be visibly upset after she learned she would not be interviewed. (Tr. 406).

162. Leonard's new boss in Special Education, Sue Clemente, had not known that Leonard was a Secretary II, and had always assumed she was an HRA. That fact became a joke in Special Education office. (Tr. 142).

III.

Law

The American with Disabilities Act ("ADA") prohibits a covered employer from discriminating against an otherwise qualified individual "because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). Under the Connecticut Fair Employment Practices Act (CFEPA) it is a prohibited practice for an employer to discharge, or otherwise discriminate against an individual in compensation or any other term, condition or privilege of employment because of the individual's physical disability, General Statute §46a-60 (a)(1).

It is well established that Connecticut's anti-discrimination laws are coextensive with the federal law on this issue and therefore, this matter will be analyzed pursuant to both prevailing Connecticut and federal law. See *Pik-Kwik Stores, Inc. v. Commission on Human Rights & Opportunities*, 170 Conn. 327, 331 (1976). "Although we are not bound by federal interpretation of Title VII provisions, '[wle have often looked to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute.' Nevertheless, we have also recognized that, under certain circumstances, federal law defines 'the beginning and not the end of our approach to the subject'," *State v. Commission on Human Rights & Opportunities.* 211 Conn. 464, 470, 559 A.2d 1120 (1989), quoting *Department of Health Services v. Commission on Human Rights and Opportunities*, 198 Conn. 479, 489 (1986) and *Evening Sentinel v. National Organization for Women*, 168 Conn. 26, 34-35 n. 5 (1975).

"Consequently, on occasion, we have interpreted our statutes even more broadly than their federal counterparts, to provide greater protections to our citizens, especially in the area of civil rights." *Comm'n on Human Rights & Opportunities v. Savin Rock Condo. Ass'n Inc.*273 Conn. 373*fn 11(2005). Complainant has filed the instant claim under the ADA and CFEPA, alleging that Respondent discriminated against her by not promoting her to a Human Resources Assistant because of her physical disability.

Our Supreme Court has stated that "[t]he legislative history of the [fair employment practices] act indicates that the statute was intended to provide strong protections for those with disabilities; *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390, 410–11, 944 A.2d 925 (2008); and that a thorough review of the legislative history reveals a consistent intent to increase protections for individuals with disabilities. *Id.*, at 412. Because the intent of the legislature [was] to stamp out discrimination on the basis of physical disability and a wide range of other disabilities (mental disability, learning disability and [intellectual disability]), we must not interpret the statute in a way that would thwart this purpose." *Id.* (internal quotation marks omitted); *Thomson v. State Dep't of Soc. Servs.*, No. HHDCV146050384, 2016 WL 551368, at 3 (Conn. Super. Ct. Jan. 19, 2016).

A. Prima Facie Case

To state a prima facie case of ADA discrimination, a plaintiff must show: (1) that he is an individual with a disability within the meaning of the statute; (2) that his employer is subject to the ADA and had notice of the disability; (3) that he was otherwise qualified to perform the essential functions of his position, with or without reasonable accommodation; and (4) that he was fired or suffered adverse employment action because of the disability. (Internal citations omitted), *Miller v. Taco Bell Corp.*, 204 F. Supp. 2d 456, 458 (E.D.N.Y. 2002). However, in Connecticut the appellate court determined that, "because the question of whether the plaintiff was qualified for his position is not relevant to the question of whether he was discriminated against by the defendant, we conclude that it is not an element of his

prima facie case. To establish his prima facie case of discrimination in this case, the plaintiff had to present evidence that: (1) he belonged to a protected class; (2) he was subject to an adverse employment action; and (3) the adverse action took place under circumstances permitting an inference of discrimination." *Tomick v. United Parcel Serv., Inc.*, 157 Conn. App. 312, 333, 115 A.3d 1143, 1157 (2015), aff'd, 324 Conn. 470, 153 A.3d 615 (2016). Consequently, because the Connecticut standard is less onerous the analysis will focus primarily on the ADA standard.

The level of evidence required to show a prima face case is de minimis, "The burden of establishing a prima facie case is not onerous." *Texas Dept, of Communitv Affairs v, Burdine,* 450 U.S. at 253; see also *Ann Howards Apricot Restaurant v. CHRO* 237 Conn. 209, 225 (1996); *Greenwav v. Buffalo Hilton Hotel,* 143 F.3d 47, 52 (2d Cir. 1998). "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 [employee's] favor." (Citation omitted.) *Craine v, Trinity College,* 259 Conn. at 638.

"In the disability context, a prima facie case for disparate treatment [under both statutes] is established [under the McDonnell Douglas-Burdine model] if the plaintiff shows: (1) he suffers from a disability or handicap, as defined by [General Statutes § 46a-51]; (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation; and that (3) [the defendant] took an adverse employment action against him because of, in whole or in part, his protected disability." *Curry v. Allen S. Goodman,* Inc., 286 Conn 390, 404 (2008).

Complainant was passed over for the position of Human Resources assistant, a job she was already performing. Instead she was transferred to Special Education as a Secretary II, a potion that prevented her from acquiring six more months of Human Resources experience in the Waterbury school system, which at the time was necessary under the new requirements of HRA BOE Grants. The experience

requirement of four years in HR was lowered back to three years after the two new hires in BOE-Grants and Complainant was transferred out of the office, with no explanation as to why.

"In the present case the plaintiff's hearing condition is a physical impairment. Under the ADA, impairment includes any physiological disorder or condition that affects the body systems, including the special sense organs. 29 C.F.R. § 1630.2(h)(1); see *Taco Bell, 204* F.Supp.2d at 459. The plaintiff's hearing deficiency is a physiological disorder which affects a special sense organ (the ear) and is therefore considered an impairment under the ADA. (Internal quotations marks omitted) *Godfrey v. New York City Transit Auth.,* No. 02-CV-2101, 2006 WL 2505223, at *4 (E.D.N.Y. Aug. 28, 2006), vacated and remanded, 258 F. App'x 353 (2d Cir. 2007).

"[H]earing is considered a 'major life activity' under the ADA. The EEOC regulations define 'major life activity' to include functions such as caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2." (Internal citation omitted) *Godfrey v. New York City Transit Auth.,* No. 02-CV-2101, 2006 WL 2505223, at *4 (E.D.N.Y. Aug. 28, 2006), vacated and remanded, 258 F. App'x 353 (2d Cir. 2007).

Moreover, "an ADA plaintiff properly alleges disability where it can be shown that an employer regarded the plaintiff as having a disability. Determination of whether a plaintiff is regarded as having a disability turns not upon whether plaintiff actually suffers from a disability, but upon the employer's intent." *Miller v. Taco Bell Corp.,* 204 F. Supp. 2d 456, 460 (E.D.N.Y. 2002).

Due to Complaint's hearing loss, she had challenges speaking on the telephone, she often spoke in a very loud voice, which was sometimes disruptive, and it was common knowledge that she had a hearing impairment by her co-workers. Her desk was relocated to the back of the office and behind a wall to then into an office to help reduce disruption to office from the volume of Complainant's voice, while speaking

on the phone. Further, she had a documented medical diagnosis of her hearing loss. She is clearly and individual with a disability satisfying prong 1 of the Prima facie case.

Moreover, it was common knowledge that Complainant had hearing loss as accommodations such as moving her desk and putting her in office with only one other colleague were provided. Morgan specifically asked Tucker why Complainant spoke so loudly, and she informed him of the Complainant's hearing loss. Prong two is also met; The Respondent employer, being a public-school system, is subject to the ADA and had notice of her disability.

Complainant performed all essential tasks of her job in addition to her supervisor's (Murray) job. She often covered for him when he was away and when he retired, Complainant took over all of his job duties, as well as her own. She was paid more money to perform the tasks of her supervisor after he retired, which acknowledges that she is capable of performing above and beyond her job duties. Complainant was regarded as a good worker by her colleagues and Tucker. She easily meets the third prong of a prima facie case, performing essential requirements of her position.

Moreover, Complainant, was not interviewed and passed over for a position that she was already performing. She was then transferred to the Special Education Department as a Secretary II, which was not a Human Resources position even though she a certificate in HR, almost completed her masters in HR and was already on civil list after passing the civil service exam. Failing to even interview the Complainant, disregarding previous management experience and transferring her to position with no HR advancement possibilities illustrate adverse action. The circumstances detailed below, show a contrived and tortured explanation of why she was deprived of the opportunity to be interviewed. Complainant has met all the necessary prongs; thus, she meets the requirements for prima facie showing of adverse employment action.

B. McDonnell Douglas – Burdine Model

The United States Supreme Court has set forth three theories of discrimination, each of which requires a different prima facie case and corresponding burden of proof. These theories are: (1) the disparate treatment theory; see *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252–56, 101 S.Ct. 1089, 1093–95, 67 L.Ed.2d 207 (1981); McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); (2) the disparate impact theory; see *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989);8 International *Brotherhood of Teamsters v. United States,* 431 U.S. 324, 357–62, 97 S.Ct. 1843, 1865–68, 52 L.Ed.2d 396 (1977); and (3) the direct evidence theory. See *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 *Miko v. Comm'n on Human Rights & Opportunities,* 220 Conn. 192, 202–03, 596 A.2d 396, 402 (1991). Although there was testimony that Morgan did not like the volume of the Complainant's voice and did not want her to have the BOE grants HRA position, the weight of that evidence is not reliable enough to be direct evidence. It does however add to the evidence indicating a discriminatory animus.

"The Courts have established the framework to support a claim of disparate treatment as set forth by the United Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, (1973)." *Board of Education of the City of Norwalk v. CHRO* 266 Conn. 492, 504 (2003), citing *Craine v. Trinity College,* 259 Conn. 625, 636-37 (2002). 'Under this analysis, the employee must first make out a prima facie case of discrimination. The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias. *McDonnell Doualas v. Green,* 411 U.S. at 802-804," *Craine v. Trinity College,* 259 Conn. at 637.

Often, a plaintiff cannot prove directly the reasons that motivated an employment decision. Nevertheless, a plaintiff may establish a prima facie case of discrimination through inference by presenting facts [that are] sufficient to remove the most likely bona fide reasons for an employment action...." From a showing that an employment decision was not made for legitimate reasons, a fact finder may infer that the decision was made for illegitimate reasons. It is in these instances that the McDonnell Douglas–Burdine model of analysis must be employed."[*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973)]

Under the McDonnell Douglas–Burdine model, the burden of persuasion remains with the plaintiff. *Miko v. Commission on Human Rights & Opportunities*, 220 Conn. 192, (1991). Once the plaintiff establishes a prima facie case, however, the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating (not proving) some legitimate, nondiscriminatory reason for the plaintiff's rejection. *Texas Dept. of Community Affairs v. Burdine*, supra, at 254, 101 S.Ct. at 1094; *Miko v. Commission on Human Rights & Opportunities,* supra, at 204, 596 A.2d 396.

"Therefore, [t]he defendant need not persuade the court that it was actually motivated by the proffered reasons.... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. *Texas Dept. of Community Affairs v. Burdine,* supra, at 254–55, 101 S.Ct. at 1094; see *Miko v. Commission on Human Rights & Opportunities,* supra, at 204, 596 A.2d 396. Once the defendant offers a legitimate, nondiscriminatory reason, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the proffered reason is pretextual. *Texas Dept. of Community Affairs v. Burdine, supra,* at 255–56, 101 S.Ct. at 1094–95; *Miko v. Commission on Human Rights & Opportunities*, supra, at 204, 596 A.2d 396. The McDonnell Douglas–Burdine analysis keeps the doors of the courts open for persons who are unable initially to establish a discriminatory motive." *Levy v. Comm'n on Human Rights & Opportunities*, 236 Conn. 96, 102, 671 A.2d 349, 354 (1996). (Internal quotation marks omitted) "The factfinder's disbelief of the reasons put forward by the defendant

(particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and ... upon such rejection, [n]o additional proof of discrimination is required.... (Citation omitted; internal quotation marks omitted.) *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)." *Jackson v. Water Pollution Control Auth. of City of Bridgeport,"* 278 Conn. 692, 706, 900 A.2d 498, 508 (2006).

Our Supreme Court has stated that:

> "[t]he legislative history of the [fair employment practices] act indicates that the statute was intended to provide strong protections for those with disabilities; *Curry v. Allan S. Goodman, Inc.,* 286 Conn. 390, 410–11, 944 A.2d 925 (2008); and that a thorough review of the legislative history reveals a consistent intent to increase protections for individuals with disabilities. *Id.*, at 412. Because the intent of the legislature [was] to stamp out discrimination on the basis of physical disability and a wide range of other disabilities (mental disability, learning disability and [intellectual disability]), we must not interpret the statute in a way that would thwart this purpose."

Id. (internal quotation marks omitted); *Thomson v. State Dep't of Soc. Servs.,* No. HDCV146050384, 2016 WL 551368, at 3 (Conn. Super. Ct. Jan. 19, 2016).

C. Proffered Legitimate Reason

The Respondent through Morgan claimed that the Complainant was not interviewed because she did not meet the minimum requirements. Complainant, however, did not meet the requirements because Morgan changed them without any credible reason. Morgan claimed he did not know of the Complainant's hearing disability; however, the evidence and conflicting testimony, (some of which are Morgan's own inconsistencies) makes that claim not credible. Tucker testified that in 2014, Morgan complained to her that the Complainant was too loud and unprofessional. Tucker informed him that it was due to a hearing impairment. Further, Morgan would visit the grants office a few days a week and

worked with Complainant. He knew where complainant was seated and why. There was other credible testimony that runs counter to his claim. Additionally, Morgan produced no corroborating evidence for much of his testimony. The justification for Morgan's action where based mainly on what "he thought" not on what was customary or even had precedent.

1. Complaint's experience

To sum up from the findings of fact, Complainant met all the requirements of the first posting and was on track to exceed what was required by the second posting by having only a few months to go before completing her master's degree in Human resources and had a germane bachelor's degree. Further, in the second posting a master's degree in Human Resources, Public or Business Administration or a related field may substitute for one (1) year of the general experience. Complainant was approximately six months short of the 4 years of HR experience as required by the second positing and six months away form completing her master's degree. She met the three years' experience required in the first posting. Complainant had also passed the civil service exam for "Human Resources Assistant" in October 2014. She was ranked 7th on a list that would remain in effect for two years. This is persuasive evidence that she was qualified for the BOE Grants HRA position. Additionally, Complainant had a certificate in Human Recourses and had been performing the job duties of an HRA during most of her tenure as the assistant Murray. Neither of her replacements had HR certificates nor did they have a germane undergraduate degree. Not only had she performed all the functions of an HRA when filling for Murray she was the interim BOE grants HRA for three months after Murray left and before the replacement was hired.

2. Irregularities in the Posting and change to the requirements.

Complainant and others testified about the irregularities in the hiring process. In sum they are as follows: two different job descriptions, the new requirement of four years' experience was changed back to the original three years, no approval was sought from the Board for the second job description, two

hires were made to replace one-person, there were missing documents from Complainant's application, and the identity and quantity of interviewers.

In 2015, Morgan was called upon to assist the staff in the BOE Personnel department after the departure of a few key employees. Morgan who had never interfered with BOE Grants hiring in the past, prior to Complainant's application for the HRA position interfered in the instant posting. At all relevant times Complainant was qualified for an HRA position that paid $45,000 on the civil service side and would have been interviewed for the HRA position in Grants but-for the funding source of the BOE HRA-Grants position.

There was no credible reason to increase the required years of experience from three to four. Tucker testified that she did not believe the additional year was significant. Morgan also admitted that the significance of the difference between three and half years and four years' experience would depend on the individual. Morgan was not a member of the BOE HR Department. He unilaterally pulled down a BOE HR Department posting without the approval of the Director of the BOE HR Department, without Tucker's consent or approval and the BOE's Personnel Committee, and arbitrarily revised it. He testified that he revised it because in his judgment, his more than forty (40) years of human resources experience told him that new qualifications were needed. It is more than coincidental that the revised posting removed the qualification of a bachelor's degree in human resources or business administration and now required only a bachelor's degree in any field matched, which accommodated the new hires and changed the experience to 4 years, out of Complainant's reach. These facts add to the suspicion that Respondent's reasoning is a pretext, and that he tailored the description to exclude complainant and include the eventual hires.

Morgan testified that he was concerned that this job had not gone through an appropriate job analysis because it was the same job description was used when Murray was hired and had not been analyzed to ensure that there was equity for the position across the City. However, a job analysis was never

performed. The respondent stated that one of the reasons the "required experience" was changed to four years, was that it made the HR BOE-Grants position consistent to the civil service side. However, the complainant had already passed the civil service exam. Moreover, a future posting for HRA BOE GRANTS position reverted to require only three years' experience. It gives the appearance that the requirements were changed just to prevent interviewing the Complainant.

Morgan was aware for some time before Murray's retirement that the plan was to eliminate Complainant's position and transfer her. Morgan was personally tasked with the reorganization and was involved in the staffing changes. Although the stated purpose of the reorganization was to improve the functioning of the office and elevate the experience and skills of the individuals therein, Morgan chose to keep a Secretary II in the Department that did not hold a Certificate in HR, hire HRA's without previously required relevant bachelor's degrees and transferred Complainant, who had a certificate and was few months short of a master's degree, out. The respondent did not provide any additional evidence that a revised posting was needed or wanted. Leonard earned her master's degree the following spring in 2016. The revised posting stated that a master's degree could be substituted for one year of experience. The complainant was 6 months away from having a master's degree (which would substitute for one year of experience) and the required 4 years HR experience. Further, the respondent failed to consider the Complainant's earlier HR experience with another employer, which would have given her the required 4 years HR experience.

3. The New Hires

Morgan testified that because Murray's salary was $65,000, he thought the duties and requirements of the BOE HRA-Grants position should be increased to match a civil service HR Generalist, whose salary he claimed at the time ranged from $50,000 to $65,000. Morgan's claim that the BOE HRA-Grants position was really an HR Generalist position is not logical. Morgan was not involved in determining the salary

level for the new BOE HRA-Grants employees because he was in civil service. Yet, Morgan throughout his testimony stated it was very important that employees being paid similar salaries should have similar requirements and duties. This testimony is questionable given that he knew the successful candidates would be paid only Forty-five thousand, ($45,000) (Phelan and Planas were in fact paid $45,000 each). That fact would prove the opposite of Morgan's claims and tend to show that the BOE Grants HRA was not equivalent to HR generalist in the civil service side.

Complainant was performing for three and half years alongside Murray, alone when Murray was out of the office, and alone once Murray retired. Tucker, Director of the Department, had full faith in her ability to perform the job. Tucker and Morgan paid her a stipend to perform the job after Murray retired for close to three months after Morgan disqualified her from consideration for the job. Planas was hired in September, she had no prior experience performing the BOE HRA-Grants duties and did not in fact perform any of them after she was hired. Her hiring did not enhance the HR presence in the BOE HR department as Morgan testified was part of the reason to reorganizing the department. Both hires and the transfer of Complainant would have the opposite effect.

The facts and the credibitly of the testimony tends to prove that the revision to the original job posting was arbitrarily and discriminatorily motivated. Any one of the irregularities might be explained away, however the number of inconsistencies with past practice, the very targeted job posting revisions that made the Complainant unqualified and the two hires qualified, at very least, gives the air of a discriminatory motive against the Complainant. Coupled with evidence that several other people testified they were aware of Morgan's dislike of Complainant's loud voice it is very probable that the Complainant was discriminated against due to her impairment.

Morgan, admittedly was aware when he made the revisions that Complainant possessed close to three and a half years' experience in Waterbury alone, and assumed she would likely apply for the

position. While Morgan claimed that he did not know who had already applied when he revised the posting, he admitted that he had access to the application system through CJ Gomes who took the posting down at his request and created access to the other applications.

Tucker had done an efficiency study for human resources and had worked with a consultant and talked with Murray and Morgan about the changes that were needed in the education department. They acknowledged that there was some overlap between what BOE Grants did, and what the Civil Service HR did. Tucker testified that the work needed to be more aligned. However, that does not translate into removing a position and adding six months to the experience, which disqualified plaintiff, and retracting the need to have a bachelor's in a specific major, which made the new hires qualified for the HRA BOE grants. Complainant had already proven that she could be an HRA on the civil service side by passing the exam and being on the list of qualified candidates.

The Respondent argues that "the public hearing record is devoid of evidence to characterize Mr. Morgan's actions as 'manipulating the process' to discriminate against the Complainant. The evidence in the record supports a finding that Mr. Morgan was following the process as he "thought" it existed, and he did not know that the Complainant had applied for the position at the time that he made the revisions to the Initial Job Specification." However, what Morgan "thought" was not actually the process. Moreover, he did not have authority to have someone take down the posting and revise it according to what he "thought." Morgan did not know the process at all. Morgan appears to interpret the request of the school board, mayor's office and superintendent to help in the BOE grants department as being autonomous to do as he judged fit. Arguendo, he did have autonomy, it did not give him leave to act with discriminatory animus.

4. Union Grievance

In 2014, Leonard sought reclassification from a Secretary II to an HRA position with the support and assistance of Murray and Tucker. Complainant performed and the job duties of an HRA and Tucker believed that Leonard possessed the educational requirements to be qualified for the reclassification. Through her union representative Cory Garfman, Complainant made the request for reclassification to Guidone, the financial officer. Over the following months, Guidone relayed that he was working on the reclassification. In the summer of 2015, Complaint had not yet received a decision on the reclassification request. After Murray retired Complaint filed a grievance through her union representative, Garfman, because she was performing both the positions of BOE HRA-Grants and Secretary II -Grants. Leonard had never filed a grievance before. Complainant's grievance was resolved in a meeting with Morgan and Tucker, without Grafman's knowledge or presence, another fact which demonstrates that Morgan doesn't always follow the rules. Complainant did not know at the time that she had the right to union representation at the meeting. Morgan decided to settle the grievance by only paying Leonard 10 days of back pay because contractually she was required to file the grievance within 10 days of when she knew or should have known that there was a violation. He also agreed to pay her prospectively. He made that decision without the input of her union representative who was the one who submitted the grievance.

Garfman emailed Morgan after learning about the grievance meeting, stating, "While we are pleased a settlement was reached concerning this issue, the last message I received from the Superintendent was that a Step 1 grievance would soon take place where I would be included. In going forward pursuant to Article 8 of the contract, I am therefore requesting that I be present and include at any and all future Step 1 meetings, as well as any and all subsequent steps of the grievance process for grievances which are submitted by the union." Morgan's failure to have a union representative present for Complainant's request for reclassification, illustrates a past instance where Complainant was unfairly treated.

IV.

Conclusion

The Complainant successfully made out her prima facia case. The Respondent proffered a legitimate reason for changing the posting; however, the Complainant then met its burden of persuasion to show that the proffered reason was a pretext for discrimination. The record is replete with evidence that makes it highly probable that Morgan knew Complainant had a disability, applied for the HRA position, her educational and professional qualifications, when he revised the posting. The record supports the conclusion that Morgan's failure to interview and hire the Complainant was motivated by discriminatory animus. Complainant was credible in her testimony as where the witnesses that supported her claim. Moreover, Complainant provided corroborating evidence and witness testimony. Morgan's testimony was less credible, and he provided almost no additional evidence that he was justified in his revision of the job posting. There was also testimony that Morgan did not like the Complainant's loud voice and thought it was unprofessional. Therefore, Complainant met its burden of proving the Respondent's proffered legitimate reason was a pretext and the Respondent acted with a discriminatory animus; therefore violated both the ADA and General Statute §46a-60 (a)(1).

VI.

Damages

General Statutes § 46a-86(b) provides in pertinent part that "upon a finding of a discriminatory employment practice, the presiding officer may order the hiring or reinstatement of employees, with or without back pay ... and, provided further, interim earnings, including unemployment compensation and welfare assistance or amounts which could have been earned with reasonable diligence on the part of the person to whom back pay is awarded shall be deducted from the amount of back pay to which such person is otherwise entitled." *CHRO ex rel. Kathy Treacy, Complainant v. VITAS Innovative Hospice Care, Respondent,* 2017 WL 6048986, at *25. "Upon a finding that a respondent has engaged in a discriminatory employment practice, the presiding officer may order the reinstatement of the complainant, back pay,

front pay, the monetary value of lost fringe benefits, prejudgment interest and post-judgement interest. General Statutes §§ 37-3a, 46a-86(b); *State of Connecticut v. Commission on Human Rights and Opportunities*, 211 Conn. 464, 481 (1989); *Silhouette Optical Limited v. Commission on Human Rights and Opportunities,* judicial district of Hartford, Docket No. CV 92520590 (January 27, 1994) (10 Conn. L. Rptr. No. 19, 599, 601-04); *Commission on Human Rights and Opportunities ex rel. Roberta A. Dacey v. Borough of Naugatuck,* CHRO No. 8330054, 15-16 (August 10, 1999). Awards of back pay and front pay must be reduced by the amount the complainant earned, or could have earned, with reasonable diligence. § 46a-86(b); Silhouette Optical Limited, supra, 10 Conn. L. Rptr. 601-03." *Commission on Human Rights & Opportunities, ex rel., Downes v. zUniversity.com, Inc.,* 2003 WL 25592787 * 2 (CHRO No. 0120366) (September 12, 2003). Id.

An award of back pay is intended to make the complainant whole by restoring him to the position he would have been in but for the unlawful discrimination," *Albemarle v. Moody,* 422 U.S. 405, 418 (1975). Further, "where prohibited discrimination is involved, the Presiding Officer [has] not merely the power but the duty to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Wroblewski v. Lexington Gardens,* 188 Conn. 44, 66-67 (1982).

It has been well established that the Tribunal has the authority to award compensation for emotional distress for violations of §46a-58(a). *CHRO v. Bd. of Educ. of Town of Cheshire,* 270 Conn. 665, 688—90 (2004). The remedies provided in General Statute §46a-86(c) apply to General Statute §46a-58(a) Id. In addition, "General Statutes 46a-58(a) has expressly converted a violation of federal antidiscrimination laws into a violation of Connecticut antidiscrimination laws." *Trimachi v. Connecticut Workers Compensation Committee,* 2000 WL. The issue of awarding emotional distress damages in employment claims arising from Title VII violations [a breach of federal law] has been fully analyzed in prior decisions and rulings," See

Commission on Human Rights & Opportunities ex ret John Crebase v. Proctor and Gamble Pharmaceuticals, Inc. CHRO No. 0330171, pp. 69-71 (July 12, 2006). Emotional distress damages pursuant to § 46a-86 (c) may be awarded for violations of § 46a-58 (a) as was ordered in Crebase, supra. Subsequently, this tribunal continued to decide, in the affirmative, the issue of awarding emotional distress damages for violations of Title VII employment claims that are covered under General Statute §46a-58 (a). As a result, emotional distress damages have been awarded for violations of Title VII as enforced through General Statute § 46a-58 (a) in *Commission on Human Rights & Opportunities ex rel. Randall L. Saex v. Wireless Retail, Inc.,* CHRO No. 0410175F July 26, 2006; *Commission on Human Rights & Opportunities ex rel. Rosa DiMicco v. Neil Roberts, Inc.,* CHRO No. 0420438, September 12, 2006; *Commission on Human Rights & Opportunities ex rel. Correa v. La Casona Restaurant,* CHRO No. 0710004, April 28, 2008; *Commission on Human Rights & Opportunities ex rel. Jane Doe v. Claywell Electronics,* CHRO No. 0510199, December 9, 2008; and *Commission on Human Rights & Opportunities ex rel. Jennifer Swindell v. Lighthouse Inn,* CHRO 0840137, January 29* 2009. *Commission on Human Rights and Opportunities ex rel. Samuel Braffith,* CHRO NO. 0540183 November 13, 2009." *Commission on Human Rights and Opportunities ex rel. Collazo v. 3M Cuno. Inc.* CHRO Nos. 0940298 & 1040407, 2015 WL 4153808, at *6 (Jan. 29, 2015).

"Criteria to be considered in awarding emotional distress damages include: (1) the subjective internal emotional reaction of the complainant to the discriminatory experience, (2) whether the discrimination occurred in front of other people, (3) the degree of offensiveness of the discrimination, and (4) the impact on the complainant." *CHRO ex rel. Phan v. Hartford Police Dept.* 2015 WL 1530312, 18; CHRO ex rel. *Mohammed v. Economic Opportunity Now. Inc.,* 2014 WL 7777667, 3; CHRO ex rel. *Crispin v. SY Management,* 2011 WL 2196507;. *Callazo,* 2015 WL 4153808. "[Glarden variety emotional distress claims generally merit $30,000 to $125,000 awards." *Patino v. Birken Mfg. co.,* 304 Conn. 679, (2012) (quoting *Olsen v, Nassau,* 615 F. Supp. 2d 35, 46 (E.D. N,Y. 2009)). For an emotional distress claim that is garden variety, the evidence is limited to Complainant's testimony. *Patino,* 304 Conn at 707 (citing *Olsen,* 625 F.

Supp2d at 46). In Patino, a garden variety emotional distress award of $94,500 was found to be reasonable based on the plaintiff's testimony of his experience, which included having trouble sleeping and feeling devastated, overwhelmed, angry, sad, and humiliated.

Back Pay

Complainant's backpay award is calculated as follows: If Leonard had been promoted to the BOE HRA-Grants position in September 2015, her salary would have been $45,008 or $24.73 per hour with a 35-hour week. Complainant's pay as a Secretary II was $25,243.40 or $13.87 per hour with a 35-hour week. The difference in pay was $10.86 per hour. Planas and Phalen were both granted salary increases effective June 31, 2016, raising their salaries to $50,000 or $27.47 per hour. It is logical to infer that, had Complainant been promoted, she too would have received the salary increase.

9/28/15 - 3/31/16

$24.73 per hour - $13.87 per hour = $10.86 loss per hour

$10.86 per hour x 35 hours per week = $380.10 per week loss,

$380.10 x 26.6 weeks = **$10,110.66 total loss for 9/28/15 - 3/31/16**

3/31/16 - 12/31/16

$27.47 per hour $13.87 per hour = $13.60 per hour loss

$13.60 per hour x 35 hours per week = $476 per week loss

$476 per week x 39.4 weeks = $18,754.40 total loss for **3/31/16 - 12/31/16 = $18,754.40**

1/1/17 – 12/31/17

$27.47per hour - $13.87 per hour = $13.60 per hour loss

$13.60 per hour x 35 hours per week = $476 per week loss $476 per week x 52 weeks =

$24,752 total loss

1/1/18 – 12/31/18

$27.47 per hour $13.87 per hour = $13.60 per hour loss

$13.60 per hour x 35 hours per week = $476 per week loss

$476 per week x 52 weeks = **$24,752 total loss**

1/1/31 – 10/1/31 (38 weeks)

$27.47 per hour - $13.87 per hour = $13.60 per hour loss

$13.60 per hour x 35 hours per week = $476 per hour week loss per week

x 38 weeks = $15,232 total loss

TOTAL BACK WAGES: $118,353.06

Emotional Distress Damages

Emotional damages will be awarded if the complainant has met the necessary elements of an emotional distress claim. "Criteria to be considered in awarding emotional distress damages include: (1) the subjective internal emotional reaction of the complainant to the discriminatory experience, (2) whether the discrimination occurred in front of other people, (3) the degree of offensiveness of the discrimination, and (4) the impact on the complainant. *Harrison v. Greco*, supra, CHRO Case No. 7930433, pp. 7-8; *CHRO ex rel. Lynne Thomas v. Samuel Mills*, CHRO Case No. 9510408, p. 7 (August 5,

1998)" *Commission on Human Rights and Opportunities ex rel. Douglas Peoples v. Estate of Eva Belinsky*, 1988 WL 492460 *5 (Conn. Super.)

The test for emotional distress damages involves a subjective and objective analysis. The subjective component is measured by the complainant's feelings and reaction to the discriminatory act. Complainant testified she was embarrassed about being discriminated against because of her disability, felt unwelcome, unrecognized for her work, and had feelings of inadequacy. She experienced anxiety worrying about providing for her family and her derailed career path.

Objectively the emotional distress, feelings of inadequacy, embarrassment, and anxiety is the reasonable expectation under the situation where it would appear that she was targeted, with discriminatory animus such that she wasn't even given an interview for a job that she was already performing. Not only was she performing the job, but doing it well, as supported by testimony of Tucker and Murray.

The discrimination was very public, there had been expectations by many co-workers that she would get the job, as she had been performing HRA duties since she was there and was the acting HRA BOE – Grants after Murray left. Morgan told other people that she was loud and unprofessional because of the volume of her voice and there was testimony that other co-workers knew of his opinion. Complainant felt her efforts to advance her education such as getting an HR certificate and master's degree would be useless if she remained in the Waterbury school district. Further she was away that it would be useless to apply for other HRA positions if Morgan oversaw hiring. The award for emotional distress is **$35,000.**

Pre- judgment and Post-judgment Interest

The Complainant also seeks an award of pre-judgment and post-judgment interest at a rate of ten percent compounded per annum. Pre-judgment and post-judgment interest compensate the prevailing party when the prevailing party is deprived or does not have the use of the money between the order of payment and the actual payment by the losing party. *Commission on Human Rights and Opportunities ex rel. Taranto v. Big Enough, Inc.*, CHRO No. 0420316 (June 30, 2006) 2006 WL 47534476. The victimized person should not be deprived of the true value of the money. *Thames Talent v. Commission,* supra 265 Conn. 144-45. Therefore, as part of the award the respondent shall pay pre-judgment and post-judgment at the rate of 5% compounded per annum.

VII.

ORDER

1. Respondent shall cease and desist from the practice complained of with regard to Complainant and with regard to all employees who may or will in the future become similarly situated.
2. Respondent shall not engage in or allow any of its employees to engage in any conduct in violation of Conn. Gen. Stat, S 46a-60(a)(4), and shall continue to post the Commission's posters concerning equal employment in conspicuous locations visible to all employees and applicants for employment.
3. The Respondent shall not retaliate against the Complainant or any witness who participated in the public hearing.
4. The Respondent shall pay to the complainant **$118,353.06** for back pay.
5. The Respondent shall pay **5%** pre-judgment and post-judgment.
6. The Respondent pay emotional distress damages in the amount of **$35,000.**

It is so ordered 3rd day of October 2019.

Michele C. Mount

Presiding Human Rights referee

cc.

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