**State of Connecticut**
**Commission on Human Rights and Opportunities**
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August 2, 2018

CHRO ex rel. Grace Lohr v. Greenwich Board of Education CHRO No. 1220147 Fed No. 16a201200203.

**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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**STATE OF CONNECTICUT**
**COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES**
**OFFICE OF PUBLIC HEARINGS**

Commission on Human Rights and Opportunities ex rel. Grace Lohr, Complainant

CHRO No. 1220147

v.

Greenwich Board of Education, Respondent

August 2, 2018

**FINAL DECISION**

Complainant, Grace Lohr ("Lohr" or "Complainant), alleged that the respondent, the Greenwich Board of Education ("Board" or "Respondent"), discriminated against her by the hiring of five individuals who were younger than Lohr for various teaching positions in the Greenwich Public Schools. She alleged that she was as or more qualified than those younger individuals hired. Lohr further alleged that Respondent had an unwritten policy to hire only younger teachers. Ms. Lohr filed a complaint with the Commission on Human Rights and Opportunities (hereinafter "Commission" or "CHRO") on November 25, 2011, alleging violation of Conn. Gen. Stat. §46a-60(a)(1) and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634, as enforced by Conn. Gen. Stat. §46a-58(a) in connection with the above-mentioned allegations.

## I

## 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 Commission's exhibits are denoted as "CHRO" 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.

1. Lohr's date of birth is December 19, 1956. (TR-14).

2. Lohr earned her Bachelor's Degree with honors in 1978 from St. John's University in sociology and psychology, her Juris Doctorate in 1981 from St. John's Law School, and her Master's in Elementary Education in 2008 from the University of Bridgeport. (Ex. CHRO-2, Tr. 15-16).

3. Lohr practiced law in New York City, and worked for the Screen Actors Guild, a business affairs company, and an advertising agency. She also volunteered for Lawyers for the Arts, completed pro bono work for indigent actors, and defended animal organizations. (Tr. 16).

4. Lohr lived in Greenwich with her husband and two sons, Franklin and Philip. Franklin and Philip attended Greenwich Public Schools – first the Old Greenwich School for elementary, then the Eastern Middle School, and then to the high school. Ms. Lohr volunteered in her sons' elementary classrooms, serving as class parent, and running the "afters" program and field day. (Tr. 18, 69).

5. Lohr went back to school to pursue teaching because she wanted to stay close to home, and she had always loved teaching. (Tr.19).

6. In the fall of 2006, Lohr interviewed with Marjorie Klar ("Klar") to be approved to substitute teach. Klar handwrote on Lohr's interview form, "lawyer for 26 years, career change to elementary education". (Ex. CHRO-16, Tr. 44-46, 48).

7. Lohr completed the general online application for elementary classroom teaching positions in 2009 and continued to update and resubmit it as she gained experience. (Tr. 63-64).

8. Lohr did not attach all of her recommendation letters to the online application because it was not required, she did not have a scanner at home at the time, and the principals accepted them in person. No one ever rejected a recommendation letter when she offered it directly. (Tr. 66).

9. Many of the administrators with decision making authority were over 40. (See 650).

**COMPLAINANT'S TEACHING QUALIFICATIONS**

10. Lohr was employed by the Board of Education in several positions, as a substitute teacher, a CMT tutor, a special education aide, the first grade teacher for a short term leave replacement, a second grade teacher for summer school, a kindergarten teacher for summer school, a CMT teacher, an ESL teacher, and a title I professional aide. (Ex. CHRO-2, Tr. 44-45, 268-274).

11. Lohr began substitute teaching in the Greenwich Public Schools in the fall of 2006. (Tr. 44).

12. In December 2007, the principal of one of the elementary schools, the International School at Dundee ("ISD"), called and asked Lohr if she would consider coming on staff as a paraprofessional. (Tr-44-45).

13. Lohr worked as a paraprofessional special education aide at ISD from March 2008 through June 2010. (Tr. 49).

14. Lohr was hired as a long-term leave replacement for a first grade class at ISD in February 2010. Lohr covered Mariko Iwai's classroom during three separate trips Ms. Iwai took to Russia for the adoption of her child; the first two trips were two weeks each and the third trip was for six weeks. Iwai specifically requested Lohr as her leave replacement. Lohr worked with Iwai and her classroom beforehand to prepare the students, and was commended by Iwai and the parents afterwards for her seamless handling of the classroom during the teacher's absence. (Ex. CHRO-9, CHRO-10, CHRO-20, Tr. 33-35, 81).

15. Eugene Matejek ("Matejek") taught third and fourth grade at ISD from 2001-2008. In the fall of 2008, he started at New Lebanon as the IB Coordinator and Interventionalist. In 2010, he became the Assistant Principal of New Lebanon. In the fall of 2013, he became the Assistant Principal at ISD. (Tr. 370).

16. Lohr also provided classroom coverage during the 2011-2012 school year at New Lebanon. Some of the coverage was scheduled and some was as needed. (Ex. CHRO-32, Tr. 97-99).

17. Lohr met or exceeded expectations in her evaluations 2009-2011, as a professional assistant with the Respondent. (Ex. CHRO 29a-c).

18. The process for beginning to fill known vacancies, included screening interviews, preliminary interviews, committee interviews, and then demonstrations. (Ex. CHRO-36, Tr.-59-60).

19. Lohr had a very good reference from her student teacher supervisor from ISD in Greenwich, where she taught 2 and 3 grade classes. (Ex. R-1).

**NORTH MIANUS**

20. Lohr had only one committee interview from her applications in June 2010, for a kindergarten classroom teaching position if enrollment numbers required, at North Mianus. Isadora Olshansky, a younger woman was hired. (Tr. 60, 520-521).

21. Lohr was observed for a lesson demonstration and then was interviewed by a committee. Principal Angela Schmidt was present for both the demonstration and interview, but did not participate because of her prior friendship with Lohr. Assistant Principal Jennifer Bencivengo ("Bencivengo"), and kindergarten teacher Karen Foster were present. A reading specialist, Jodie Rucci was also present but did not participate. One other teacher, Marcia Rutstein, was present for approximately 10 minutes of the demonstration and none of the interview. (Tr. 115-116).

22. The observers of the demonstration lesson had an evaluation form to rate and comment on the candidates. The interviewers were not consistent in which categories were rated or marked N/A for the various candidates. (Ex. CHRO-41, CHRO-42, CHRO-43, Tr. 136).

23. Lohr consistently received low marks from her interviewers, mostly 1's and 2's (below average or average) on a scale of 4.The only 3 she was given was for interest in the position/knowledge of Greenwich Public Schools. (Ex. CHRO-41).

24. Lohr was rated ones and twos for "experience." (Ex. CHRO-41).

25. For the criteria, "energy, initiative, sense of humor, insight", Lohr was rated a one out of four and Olshansky was rated a four out of four. (Ex. CHRO-41, CHRO-43).

26. Bencivengo called Lohr to inform her that she did not get the position. Lohr asked why, Bencivengo told her that in her demonstration she failed to interact with the students.

27. Comments on Lohr's evaluation sheets included: "Lesson was inappropriate for the age of the children," "Lecture with no opportunity for student response or interaction." Lohr was provided with information on classroom management but the evaluator, "saw little evidence of her applying/using what she had been told," and would "benefit from more instruction time." (Ex. CHRO-41).

28. Angela Schmidt was the principal, but because of her personal friendship with Lohr, Schmidt allowed the other members of the hiring committee take the lead. As Jennifer Bencivengo testified, Olshansky was chosen over the other candidate, Erin McEvily, and Lohr on the basis of her qualifications and performance. (Tr. 118-119).

29. In North Mianus when Lohr did not receive a position which she sought, she took the Title I professional assistant position at New Lebanon School. (Ex. CHRO-58).

**HAMILTON AVENUE**

30. Hamilton Avenue School had an opening for a short term leave replacement for first grade. Ultimately, Alexandria Nicole, who was younger than Lohr was hired for that position. (Ex. CHRO-2).

31. Flood who was involved in the hiring process testified that Nicole had been a first grade substitute teacher for another teacher on maternity leave at Riverside school. Flood testified she thought Nicole would be the best fit because it would be an easy transition from a long term, maternity substitute, first grade teacher whose position was ending, to a first grade teacher at Riverside side school the following school year. Further, Nicole was the better candidate (Tr. 477, 482).

32. Nicole had a recommendation from the Riverside school principal, which stated that Nicole was doing a great job. (Tr. 480).

33. In Hamilton Avenue School when Lohr did not receive a position which she sought, she was offered the position of a permanent building substitute by Cynthia Womack, which she turned down because of lack of medical benefits to continue as a professional assistant. (Ex. CHRO-44, Tr. 478).

34. The building substitute position would have given Lohr a full year of teaching experience. (Tr. 481).

**JULIAN CURTIS SCHOOL**

35. In 2011, at Julian Curtiss School, Lohr wanted to interview for a possible kindergarten teacher position if enrollment numbers required an additional section. Although Lohr lists this hiring as one of her claims for discrimination, there was never an opening. Principal, Patricia McGuire ("McGuire"), concluded that if there was an additional section, Courtney Harrison, the full time building substitute ("Harrison") age 29, would be promoted to fill the position and there was no need to consider others. (Ex. CHRO-44, Tr. 451).

36. Harrison was not interviewed or asked to complete a demonstration prior to being offered the position. No other candidates were considered. (Ex. CHRO-44, Tr. 143).

37. McGuire testified she felt harassed by Lohr over this position and that Lohr was stalking her. (Tr. 460)

38. Ms. McGuire testified that Ms. Harrison was not hired on contract until August 15, 2011. (Tr. 463).

39. Ms. McGuire emailed Ms. Lohr on June 17, 2011 stating, in relevant part, "My building substitute has been hired as a K teacher for 2011-2012." (Ex. CHRO-97, Ex. Tr. 463-464).

40. When asked about the June 17, 2011 email, Ms. McGuire testified that she would have to check the accuracy of her prior testimony that Ms. Harrison was not hired until August 2011. (Tr. 465).

**NEW LEBANON**

41. Gene Nyitray ("Nyitray") was the principal of New Lebanon from 2004 through 2011. Nyitray retired in June 2011 and Barbara Riccio became principal of New Lebanon on July 1, 2011. (Tr. 167, 630).

42. In early 2011 in New Lebanon, nine candidates were selected for consideration for two known positions and one possible position, all of whom were interviewed and gave demonstration lessons. (Ex. CHRO-45, Tr. 631).

43. There ended up being three classroom positions to fill for the 2011-2012 school year at New Lebanon – first, second, and fourth grades. (Ex. CHRO-45).

44. Both Nyitray and Assistant Matejek completed interview and demonstration forms for Ms. Moore. All four forms are dated April 13, 2011.The forms used included different criteria and format than the form used by North Mianus. (Ex. CHRO-46, Tr. 49).

45. After the selection process was completed Brooke Lieberman was hired as a grade one teacher for a section which was added around August 15 to cover additional enrollment; Joy Cavallaro-Stramaglia was hired as a grade four long-term substitute and Lisa Moore was hired as a grade two teacher. Lohr continued her employment as a Title I professional assistant at New Lebanon. (Tr. 658).

46. Matejek, who participated in the hiring process as assistant principal at the time and Gene Nyitray who participated in the hiring process as principal both credibly testified that Lohr's age was not a factor in the selection of hires at New Lebanon School and also that other candidates were outperformed and made a better impression than Lohr. (Tr. 393, 655,628-658).

47. Matjek's reviewing his observation report of Lohr testified that "it would be beneficial to the students learning if they engaged in the learning activities with more depth. He noted that planning less activities with more depth rather than many activities would be best. Further, he

observed that Lohr was too focused on student behavior during the lesson rather than on developing a more in-depth learning experiences. (Ex. R-1).

48. In Nyitrya's observation report he remarked that "It appeared that Grace was talking 'at' students rather than talking 'to' students during the lesson. He also stated that the lesson appeared "disjointed" and unclear as to, "which objectives were of most significance to the learners." Lastly, the students' responses, "did not reflect grasp of intended concepts." Id.

49. Nyitray and Matejek were at times inconsistent with the criteria considered N/A for Ms. Moore and Ms. Lohr. For example, both reviewers rated Ms. Moore a 4 out of 5 for "ability to work with others", but rated Ms. Lohr "N/A" for the same category. (Ex. CHRO-46, CHRO-56).

50. Each of the administrators from the four different schools testified credibly as to the non-age-related reasons for selecting a candidate other than Lohr and affirmed that age was not a factor in not hiring Lohr. They included Matejek, Jill Flood ("Flood"), Bencivengo, and by documentation from Cynthia Womack. (Tr. 393, 454-455, 482-483, 509, 520, 533).

51. Matejek and Flood, Bencivengo and Nyitray testified that the most of the applicants for elementary school positions were younger than forty (40). (Tr. 393, 482, 454, 521, 659).

52. There were five other candidates younger than Lohr who were also not hired for the open positions, some with better scores on their evaluation than Lohr. (Ex. R-6-10).

53. Between 2008 and 2016, Respondent hired teachers over the age of forty (40) 24.7% of the time. (Tr. 557).

54. Respondents did not challenge that Complainant was qualified for the positions for which she applied. (tr. 75).

55. Nyitray, was over 40 when he was hired, testified he hired at least 3 teachers who appeared to be over 40 based on their past experience. (Tr. 630, 655-656).

56. Nyitray also hired Lohr, for other positions in his school, and testified he had nothing at all against Lohr. (Tr. 658-659).

57. A uniform rating sheet for each of the positions for which Lohr was considered, was not used. The type of forms that are used were chosen by each school. (Tr. 525-526).

58. Testimony by several witnesses and Lohr illustrated that the method for keeping track of application materials after the interviews and who were the evaluators, was inconsistent and a bit sloppy. See (Tr. 458-465).

59. On March 21, 2013, the Respondent held a meeting of its Board of Education. In the monitoring report, the Respondent writes on page three, "The Human Resources Department has revised the hiring procedure for teachers and school administrators....School administrators submit their recommendations for hiring only after the hiring "packets" are completed – rather than submitting material in stages that, in the past, would result in misplaced information, losing track of applications, and loss of focus." (Ex. CHRO-70, Tr. 246).

60. On March 22, 2012, the Respondent meeting minutes also provided that "In a large school district with 70-100 vacancies a year to fill, it is essential that a consistent and comprehensive recruitment and hiring practice be followed across the school district. With fifteen schools, 54 administrators and a lack of consistent leadership at the Superintendent's and Human Resource's level over an extended period of time, gaps in the process have occurred that have created inconsistencies and incomplete practices. As noted in this report, those inconsistencies are being addressed this year through the development of standardized, district-wide procedures." Id.

61. Lohr interviewed for full time teaching positions in other adjacent districts, however, Lohr was not hired by any public school system as a certified full-time permanent teacher. Lohr applied for several positions in Stamford and Darien. (Tr. 274, 294-295, 308).

II

## LAW AND ANALYSIS

Complainant alleged that Respondent violated General Statutes 46a-60(a)(1)[1] of the Connecticut Fair Employment Act (CFPA). Our state's legislature intended the pertinent provisions of the Connecticut statute to mirror those of the federal antidiscrimination laws, Connecticut courts—along with this administrative tribunal—generally follow the analogous federal law when analyzing CFEPA claims. *Board of Education of the City of Norwalk v. Commission on Human Rights & Opportunities,* 266 Conn. 492, 505 n.18 (2003); *Craine v. Trinity College,* 259 Conn. 625, 636-37 (2002). Connecticut courts look to federal courts in interpreting the proof required under CFEPA, see *Levy v. Commission Human Rights & Opportunities*, 236 Conn. 96 (1996), "Claims under CFEPA are analyzed in the same manner as those under Title VII." *Kearney v. City of Bridgeport Police Dep't,* 573 F. Supp. 2d 562, 573 (D. Conn. 2008). "It is also noted the Connecticut Fair Employment Practices Act (CFEPA) became effective in 1947; General Statutes (Rev. to 1947) §§ 1360i to 1366i; and was amended in 1959 to add a prohibition against age discrimination in employment. Thus, our statutes predate, by many years, Title VII, which was enacted in 1964, and the ADEA, which was enacted in 1967. Moreover, Connecticut courts have observed that "CFEPA defines important rights designed to rid the workplace of discrimination ... As such, the act is composed of remedial statutes, which are to be construed liberally to effectuate their beneficent purposes." (Citations omitted; internal quotation marks omitted.). Our Supreme Court has also stated, "we have ... recognized that, under certain circumstances, federal law defines the beginning and not the end of our approach to

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[1] CONN. GEN. STAT. § 46a-60(a)(1) provides:
(a) It shall be a discriminatory practice in violation of this section:
(1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individuals race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including, but not limited to, blindness;

the subject. (Citations omitted; internal quotation marks omitted.) *State v. Commission on Human Rights & Opportunities,* 211 Conn. 464, 470, 559 A.2d 1120 (1989)." *Wagner v. Bd. of Trustees for Connecticut State Univ.,* No. HHDCV085023775S, 2012 WL 669544, at 11 (Conn. Super. Ct. Jan. 30, 2012)

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

"In a Title VII discrimination case 'where there is no direct or overt evidence of discriminatory conduct,' courts apply the three-part burden shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 . . . ." *Weinstock v. Columbia University,* 224 F.3d 33, 42 (2d Cir. 2000). According to the burden-shifting test from *McDonnell Douglas*, the plaintiff "first bears the minimal burden of setting out a prima facie discrimination case. *McPherson v. N.Y. City Dep't of Educ.*, 457 F.3d 211, 215 (2d Cir. 2006). See e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination.); *Craine v. Trinity College*, 259 Conn. 625, 637 (2002). "Unlike its federal counterpart, however, the Connecticut employment discrimination provisions contain no specific age limitation." *Commission on Human Rights and Opportunities ex rel. Adam Szydlo, Complainant v. EDAC Technologies Corporation, Respondent*, 2007 WL 4258347, at 7.

Claims of disparate treatment brought under CFEPA, like those under federal anti-discrimination statutes, can be analyzed as either "pretext" cases or "mixed motive" cases. *Levy v. Commission on Human Rights & Opportunities,* 236 Conn. 96, 105-06 (1996). The pretext model relies upon the burden shifting

analysis first established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and modified thereafter in cases such as *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000). In a mixed motive case, the tribunal applies the use of the mixed motive analysis established in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).

The Commission argues that "*McDonnell Douglas* model is the appropriate theory under which to analyze a CFEPA age discrimination claim. *O'Connor v. Town of Guilford,* No. CV166063111S, 2017 WL 6030940, at 5–6; *Wagner v. Bd. of Trustees for Connecticut State Univ.,* No. HHDCV085023775S, 2012 WL 669544, at 11. See also, *Vale v. City of New Haven,* 197 F. Supp. 3d 389, 398 (D. Conn. 2016). This tribunal has also concurred with the superior court in rejecting the ADEA's 'but-for' standard. *Commission on Human Rights and Opportunities ex rel. Barbara Dubois, Complainant v. Maharam Fabric Corp.,* Respondent, 2014 WL 5791594, at 9. Connecticut is the final arbiter of its own laws." (Citations omitted; internal quotation marks omitted.) *Vollemans v. Wallingford,* 103 Conn.App. 188, 199–200, 928 A.2d 568 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008). While "[w]e have often looked to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute ... [W]e have also 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). *Frederick v. Gladeview Health Care Ctr., Inc.,* No. CV116011350, 2014 WL 1876955, at 4." This tribunal agrees that McDonnell Douglas analysis should be utilized in the instant case.

**A**

**PRIMA FACIE CASE**

"In order to establish a prima facie case of age discrimination, the complainant must show that [s]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). "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.

Lohr is over 40 and is in a federally protected class. Connecticut General Statute §46a-60, does not require the Complainant to be of a particular age, only that she alleges age as the discriminatory factor. Lohr was selected to interview and present a demonstration for two open positons. Respondent did not challenge that she was minimally qualified for each position, therefore, she was minimally qualified for those positions. The issue here is causation. The candidates hired for the positions Complainant desired were all younger than Lohr; that fact will meet the de minimus burden of establishing causation for a prima facie case under General Statute §46a-60.

**B.**

**PRODUCTION OF LEGITIMATE BUSINESS REASON**

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. "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 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.

The Respondent argued that it did not hire Complainant due to her poor performances in interviews and demonstration. Further, compared to the individuals hired, evaluating all the necessary criteria, she was not the best candidate for the position. The Respondent's burden is only one of production not of persuasion. Complainant must show that her poor scores did not motivate the Respondent, but instead was merely a pretext for intentional age discrimination. Complainant disagrees with her evaluations of her experience and performance. Lohr did not present any witnesses that could corroborate her assessment of herself. Her allegations that she was more experienced and a better candidate are conclusory statements.

Lohr also alleged that the Respondent violated Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. 621-634, as enforced by Conn. Gen. Stat. §46a-58(a)[2]. It is significantly harder to make out a prima facie case under the ADEA. 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

[2] General Statute Section 46a-58(a) provides in relevant part that "[i]t shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability."

also, *Trojanowski v. Blakeslee Prestress, Inc.*, No. 3:08CV548WWE, 2009 WL 3340426, at 3 (D. Conn. Oct. 15, 2009).

*In Stone v. Bd. of Educ. of Saranac Cent. Sch. Dist.,* 153 F. App'x 44, 45–46 (2d Cir. 2005), Stone lost on Motion for Summary Judgment. Stone was an unsuccessful applicant for the position of full-time elementary school teacher failed to offer sufficient evidence to permit reasonable fact finder to conclude the board of education's valid age-neutral explanations for its hiring decision, namely, that applicant interviewed poorly and did not demonstrate sufficient familiarity with newer teaching methods, were false or that age discrimination was an animating force behind decision not to hire 50-year-old applicant. "Once plaintiff made out a prima facie case of age discrimination under the ADEA and defendant proffered valid age-neutral explanations for its hiring decision -namely, that plaintiff interviewed poorly and did not demonstrate sufficient familiarity with newer teaching methods-plaintiff was required to show that defendant's stated reasons were merely a pretext for age discrimination. *See, e.g., James,* 233 F.3d at 154; *Gallo v. Prudential Residential Servs.,* 22 F.3d 1219, 1224-25 (2d Cir.1994)." *Id.*

The appellate court held, "we agree with the District Court's conclusion that plaintiff failed to present sufficient evidence from which a reasonable factfinder could conclude both (1) that defendant's stated reason for selecting other qualified candidates is false and (2) that age discrimination was an animating force behind defendant's decision not to hire plaintiff. *See Gallo,* 22 F.3d at 1225 (quoting *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 516-17, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Even if plaintiff could establish that defendant somehow inaccurately assessed her public speaking and teaching skills or improperly selected other candidates on the basis of their previous ties to Morrisonville Elementary School, such allegations would not support a cause of action under the ADEA. Moreover, in reaching our conclusion we are mindful of the need to respect the employer's unfettered discretion to choose among qualified candidates," *Byrnie,* 243 F.3d at 103 (quoting *Fischbach v. D.C. Dep't of Corr.,* 86 F.3d 1180, 1183 (D.C.Cir.1996)), and will not act as a super personnel department that second guesses employers' business

judgments, *id.* (quoting *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir.1999)) (internal quotation marks omitted)." *Stone v. Bd. of Educ. of Saranac Cent. Sch. Dist.*, 153 F. App'x 44, 45–46 (2d Cir. 2005). In the instant action it is unlikely that the Complainant would have made it past the summary judgment stage if in federal court under the ADEA. Arguendo should could prove that Respondent violated the ADEA, it would be unenforceable under General Statute §46a-58 as age is not listed as a protected class.[3] Nevertheless, this the Complainant satisfied the de minimus burden of stating a prima facie case under General Statute 46a-60; nonetheless, Respondent here has satisfied its burden of producing a legitimate, nondiscriminatory reasons, which was supported by its evaluation sheets of the Complainant and the credibly testimony during the hearing. The Complainant now bears the burden of proving that the Respondent's reasons are a pretext for discrimination.

A similar situation was discussed in *Poeta-Tisi v. Griffin Hosp.*, No. CV05-4003197S, 2006 WL 1494078, at 4 (Conn. Super. Ct. May 17, 2006). The plaintiff alleged that the person ultimately hired for each position was younger, as in Lohr's cased. It was further argued in *Poeta-Tisi* that an inference of discrimination must be drawn from that allegation because "it is apparent that she is well-qualified," again, it is the same argument Lohr puts forth. The plaintiff in *Poeta-Tisi* failed to submit any evidence in support of those allegations and arguments. Without such evidence, the court held, that there can be no inference of discrimination, the same reasoning applies here. Further, in *Poeta-Tisi over* eighteen percent of the hospital's workforce was age fifty or older which the court found significant. Id. Lohr argued that there was an unwritten rule that Greenwich never hired older teachers. However, the Respondent, Greenwich Board of Education, demonstrated that it hired elementary school teachers over the age of

[3] Although age discrimination is within the purview of § 46a-60, it is not included within the protections of § 46a-58. "[T]here are some forms of discrimination that are prohibited under § 46a-60, such as discrimination due to age or marital status, that are not within the purview of § 46a-58(a) and that, therefore, § 46a-58 would be inapplicable." *Commission on Human Rights & Opportunities v. Truelove & Maclean, Inc.*, 238 Conn. 337, 357, 680 A.2d 1261 (1996). *Poeta-Tisi v. Griffin Hosp.*, No. CV05-4003197S, 2006 WL 1494078, at *8 (Conn. Super. Ct. May 17, 2006)

forty (40), 24.7% of the time between 2008 and 2016. Moreover, there was testimony by Respondent that in general there were more applicants under the age of 40 than over 40 applying for the elementary school positions.

Lohr offers raw data of the ages of candidates hired by the Respondent since 1961. However, statistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its [adverse employment] decision.... This is because a[n] [employer's] overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer.... Without an indication of a connection between the statistics, the practices of the employer, and the employee's case, statistics alone are likely to be inadequate to show that the employer's decision ... was impermissibly based on [a protected trait]." (Citations omitted; internal quotation marks omitted.) *Bd. of Educ. of City of Norwalk v. Commission on Human Rights & Opportunities,* 266 Conn. 492, 516, 832 A.2d 660, 674 (2003).

Lohr also argues that Respondent's interview procedure and evaluation forms were inconsistent, and that Respondent's filing and preserving applications and evaluations of past interviewees was sloppy. "While we do not second-guess an employer's hiring standards, the reasons for its employment decision, including its alleged reliance on such standards, are subject to scrutiny under Title VII, and [d]epartures from procedural regularity, for example, can raise a question as to the good faith of the process where the departure may reasonably affect the decision." (Internal quotation marks omitted.) *Stern v. Trustees of Columbia University,* 131 F.3d 305, 313 (2d Cir.1997). Additionally, we have stated that, [i]n order for the procedural irregularity to be probative of the presence of actual discrimination, the [complainant] must also be able to show that the irregularity had a tangible effect on the [decision]. *Craine v. Trinity College,* supra, 259 Conn. at 642, n. 11, 791 A.2d 518." (Internal quotation marks omitted). *Bd. of Educ. of City of Norwalk v. Comm'n on Human Rights & Opportunities,* 266 Conn. 492, 513, 832 A.2d 660, 672–73 (2003). There was no evidence presented of any tangible effects. Moreover, the fact that some

positions weren't advertised, or evaluations of prior interviews were lost, effected all those who applied for positons equally.

Klar testified, that "Principals don't hire people they recommend hires." Recommendation from the administrator comes to her for her review and for the review of the director of human resources and the packet goes to the superintendent who is the ultimate hiring authority for the district. No evidence was presented of any claim of discrimination by the ultimate hiring authority or Ms. Klar or the director of human resources, nor was any evidence presented that the Complainant brought her claims of discrimination to the attention of anyone prior to filing her complaint. In addition, Respondent has a policy against discrimination of any kind, including specifically age discrimination.

Respondent argues that "Lohr believes that the use on some of the hiring materials of words such as 'professional appearance', 'vitality', and 'energy and energetic' 'indicate a younger person.' Certainly, as Lohr herself admits with regard to 'professional appearance,' such words can also describe a candidate over the age of 40, including Lohr herself. Testimony by the administrators confirms that such words are not limited to 'younger persons.'" This Tribunal agrees. All the qualities such as vitality and performance in this instance are not dog whistle terms for age discrimination. Good teachers are energetic, and vital. Professional appearance is more apropos of cleanliness, how a person dresses, sloppy or tidy, distracting or sensible, and situation appropriate, as opposed to old verses young.

At least one of the interviewers, Nyitray for example, was older than complainant when he interviewed her. An older decision maker is a "well-recognized inference against discrimination ... where the person who participated in the allegedly adverse decision is also a member of the same protected class. (internal citiation omitted), Consequently if a decision maker is in same protected class as plaintiff, claims of discrimination become less plausible." (Internal quotation marks and citation omitted). *Hasemann v. United Parcel Serv. of Am., Inc.*, No. 3:11-CV-554 VLB, 2013 WL 696424, at *8 (D. Conn. Feb. 26, 2013); Browne v. CNN Am., Inc., No. 98 Civ. 1768, 1999 WL 1084236, at *4 (S.D.N.Y. Dec. 1, 1999) ("The fact that

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

Complainant makes several arguments that she was as qualified or more qualified for the positions for which she was not hired, North Mianus, Julian Curtis, New Lebanon and Hamilton Ave. Again more experience is not synonymous with the "best candidate. " Moreover, Respondent credibly testified that there was never an opening at Julian Curtis because it was decided to promote a permanent building substitute, McGuire, who was already teaching and no one else was considered or interviewed. Therefore, there was never a position for which, Lohr could interview at Julian Curtis.

As to the other positions, complainant must show that in all material respects, she was similarly situated to the other applicants, but was treated differently on the basis of her age. See *Baroudjian v. Connecticut Human Rights Comm'n,* No. CV08 401 85 28, 2009 WL 3086388, at *7 (Conn. Super. Ct. Aug. 25, 2009). "There is nothing unlawful about an employer's basing its hiring decision on subjective criteria, such as the impression an individual makes during an interview. At the same time, we have also cautioned that an employer may not use wholly subjective and unarticulated standards to judge employee performance for purposes of promotion. This because [a]ny defendant can respond to a [discrimination charge] with a claim of some subjective preference or prerogative and, if such assertions are accepted, prevail in virtually every case. Accordingly, an employer's explanation of its reasons must be clear and specific in order to afford the employee a full and fair opportunity to demonstrate pretext. Where an employer's explanation, offered in clear and specific terms, is reasonably attributable to an

honest even though partially subjective evaluation of ... qualifications, no inference of discrimination can be drawn." (Internal citations and quotation marks omitted), *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 104–05 (2d Cir. 2001).

While Respondent may have utilized different forms, or observed the Complainant for different lengths of time, the evaluators all made a written record of what they observed and any effects from using different forms applied to all candidates. There were categories for rating on both forms and separate areas for writing comments on all the forms. This allowed for ratings in substantially similar, if not exact categories, as well as areas for subjective impressions. When impressions, criticisms and feedback overlap consistently in areas of performance and interviews, it is reasonable to infer that those impressions are highly credible. If a dozen people, at different times, make similar observations, those observations are more credible than a conclusory statement by the Complainant that she was better qualified for the positions. Principals, administrators and teachers all had similar feedback regarding Lohr's interview and demonstration. Respondent's constructive criticism of Lohr's performance was consistent. Additionally, Lohr's conclusory allegation that Respondent had a secret policy of hiring younger teachers is unsupported by the evidence. This conspiracy would have to include at least 8 interviewers, including several principals, teachers, human resources personnel and the superintendent, many over the age of 40. There is absolutely no evidence of this proposition; moreover, this scenario highly unlikely.

In the hiring process at Hamilton, school principal, Flood, testified that Nicole, whom had been hired, had been a first grade substitute teacher for another teacher on maternity leave at Riverside school. Flood testified she thought Nicole would be an easy transition from a substitute first grade teacher whose position was ending to a permanent first grade teacher at Riverside side school the next school year. Further, Flood testified that Nicole had good recommendations and was the better candidate. In Hamilton Avenue School when Lohr did not receive a position which she sought, she was offered the position of a permanent building substitute, which she turned down because of lack of medical benefits and chose to

continue as a professional assistant. The building substitute position would have given Lohr a full year of teaching experience at various levels, similar to the experience of Nicole. While it is understandable that someone would down a position due to the lack of medical benefits, having the experience of being a permanent substitute as Nicole had made her a logical choice to be hired by Hamilton due to that exact experience.

For the North Mianus position, Lohr received low marks from her interviewers, mostly 1's and 2's (below average or average) on a scale of 4. The only 3 she was given was for interest in the position/knowledge of Greenwich Public Schools. For the criteria, "energy, initiative, sense of humor, insight," Lohr was rated a one out of four and the reviewers gave Olshansky, who was hired, a four out of four. In New Lebanon, Matjek's observation report of Lohr's demonstration lesson stated that "it would be beneficial to the students learning if they engaged in the learning activities with more depth." He noted that planning less activities with more depth would be better. Further, he observed that Lohr was too focused on student behavior during the lesson rather than on developing more in-depth learning experiences. Lastly, Lohr was told she could benefit from more teaching experience in educational situations. While Lohr may have been accomplished in other areas and had experience in education, none was for a permanent tenure track classroom teacher.

With regard to the ratings and comments on the evaluation forms, the tribunal will defer to the opinions of the interviewers who have vast experience in judging the characteristics and qualities necessary for teaching young students. A reserved or quiet manner, such as the Complainant demonstrated while testifying, may serve someone well in a professional, or legal environment, however those qualities may not be ideal or suitable for teaching young children.

Complainant interviewed in other public school districts such as Stamford and Darien for a several tenure track classroom teacher position; Lohr was not offered any position in either of those districts. The Respondent articulated a legitimate business reason that was not rebutted successfully. Respondent

proffered the reason that Complainant was not hired based on her poor performance in the demonstration and interviews and be benefitted by more teaching experience. 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.

**III.**

**CONCLUSION**

The age discrimination claim fails because the plaintiff did not meet her burden of presenting evidence that was sufficient to rebut the legitimate, nondiscriminatory reason that the Respondent gave for its decision to terminate the Complainant, therefore the Respondent has not violated General Statute §46a-60.

It is so ordered this 2nd of August 2018.

Michele C. Mount,
Presiding Human Rights Referee

cc.

Grace Lohr – via email only
Jody Walker-Smith, Esq. – via email only
William Kupinse, Esq. – via email only