STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

September 19, 2014

CHRO No. 0920414 and 1120319 - Commission on Human Rights and Opportunities ex rel. Barbara Dubois, Complainant v. Maharam Fabric Corp., Respondent

Memorandum of Decision

Procedural Background

On May 28, 2009, Barbara Dubois ("the complainant" or "Dubois") filed an affidavit of illegal discriminatory practice ("2009 affidavit" or "2009 complaint") with the Commission on Human Rights and Opportunities ("commission" or "CHRO") asking that the commission investigate the complaint and secure for the complainant her rights and any remedy to which she is entitled. The affidavit, inter alia, alleged that Maharam Fabric Corporation ("the respondent" or "Maharam"), violated Conn. Gen. Stat. section 46a-58(a) (enforcing the substantive provisions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, et seq. ("ADEA")) and section 46a-60(a)(1) (age discrimination), when it terminated the complainant's employment.[1]

On March 4, 2011, the complainant filed a second affidavit of illegal discriminatory practice, ("2011 affidavit" or "2011 complaint") with the commission asking that the commission investigate the complaint and secure for the complainant her rights and any remedy to which she is entitled. The 2011 affidavit, inter alia, alleged that the respondent violated Conn. Gen. Stat. section 46a-58(a) (enforcing the substantive provisions of the ADEA), section 46a-60(a)(1)

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[1] Section 46a-58(a) – "It 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, gender identity or expression, sexual orientation, blindness or physical disability."

46a-60(a)(1) –"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 individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history or mental disability, intellectual disability, learning or physical disability, including, but not limited to, blindness[.]"

(age discrimination); and section 46a-60(a)(4) (retaliation based on a refusal to hire the complainant because she had filed the May 2009 affidavit).[2]

By letter dated March 15, 2012, the commission notified the parties that either the complainant or the complainant's attorney requested that the complaint be sent to the Office of Public Hearings ("OPH") for a de novo contested case proceeding, pursuant to the early legal intervention ("ELI") process established by section 8 of public act 11-237. The letter also stated that complainant or his attorney would be responsible for putting on the case before the presiding human rights referee assigned to the case, and that the commission counsel assigned to the case retained the discretion to participate in the hearing. [3]

On April 12, 2012, the OPH received the 2011 complaint from the commission. On April 26, 2012, the OPH received the 2009 complaint from the commission. On April 26, 2012, the required Notice of Contested Case Proceeding and Hearing Conference was issued for both complaints and the case was assigned to the undersigned as the presiding human rights referee ("presiding referee").

All statutory and procedural prerequisites having been satisfied, the complaint is properly before this tribunal for hearing and decision. The public hearing was held on September 30, 2013, and October 1, 2 and 3, 2013. Attorney David Cohen, appeared on behalf of the complainant. Attorney George Brenlla, appeared on behalf of the respondent. Thereafter, the parties filed post-hearing briefs, including proposed findings of fact, on or about January 9, 2013. Subsequently, on February 18, 2014, post-hearing reply briefs were filed and the record was closed.

For the following reasons, after a thorough consideration of the evidence presented and an assessment of the credibility of the witnesses, the undersigned concludes that there has been insufficient evidence adduced to establish that the respondent's decision to terminate the complainant, and, subsequently, to refuse to interview her for an open position, was motivated by either a discriminatory or retaliatory animus. Both complaints, therefore, are dismissed.

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[2] 46a-60(a)(4) – "It shall be a discriminatory practice in violation of this section: ... (4) For any person [or] employer ... to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84."

[3] In a second letter, also dated March 15, 2012, the commission, after determining that the state's interests would not be adversely affected, notified the parties that, pursuant to section 46a-84(d), it deferred prosecution of the entire case before the OPH to the complainant and her attorney. The commission did not participate in the contested case proceeding.

Finding of Facts[4]

The complainant was born on June 12, 1948. She began working for the respondent in 1985.

Maharam is a provider of textiles; architects and designers specify its products for commercial interiors and some residential use. Transcript p. 389 (hereinafter Tr. #). From 1985 until December 2008, the complainant's supervisor was Regional Sales Director Mark Goldberg. Tr. 24 and Tr. 237. On or about January 2009, Goldberg retired and was replaced by Regional Sales Director Pascal Manzari, who became the complainant's supervisor.

When she was terminated on March 19, 2009, Dubois was 60 years old, had worked for nearly 24 years as a sales representative (selling on commission, primarily to commercial customers), and her long-held sales territory included specifiers located in Fairfield and New Haven Counties in Connecticut, and Nassau, Suffolk, Albany, Rockland, and Westchester Counties in New York, as well as other counties in Eastern New York. (Northern and Eastern Connecticut was added to her territory in November 2008.) Company records reveal that Dubois was solely responsible for this territory prior to her termination. Respondent Exhibit-17 (hereinafter R-#).[5]

During her tenure, Maharam gave the complainant numerous awards acknowledging her success as a sales representative, including a Career Achievement Award in 2007, honoring

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[4] The complaints were sent to the Office of Public Hearings ("OPH") for a de novo hearing on the merits because the complainant or her attorney requested the transfer pursuant to the Commission on Human Rights and Opportunities' ("commission" or "CHRO") early legal intervention process (see PA-11-237). After the case was sent to OPH, the respondent filed a motion to dismiss the case because the complainant was the only employee of the respondent that worked in the state of Connecticut. In response, the complainant filed a request for a declaratory ruling regarding the scope of coverage of the term employer as defined by section 46a-51(10). On April 10, 2013, the commission ruled that in a case where an employer has only one employee in the state of Connecticut, as long as the employer employs two or more additional employees, inside or outside of the state of Connecticut, the employer is subject to the requirements of the CFEPA.

Since the complainant was the sole Maharam employee in Connecticut, the practical effect of this ruling was that other employees directly involved in the alleged relevant events are not amenable to subpoena pursuant to Connecticut law. This fact was acknowledged in the Complainant's post-hearing brief, p. 37 (hereinafter "C-brief p."). Where witnesses cannot be compelled to testify and discovery is limited to the production of documents and records in this administrative proceeding (unless the parties mutually agree to depositions, interrogatories, or affidavits), a party's ability to obtain evidence in this forum is hampered.

[5] The complainant's exhibits will be designated "C-#" and the complainant's post-hearing brief and reply brief will be "C-brief #" and C-reply brief #" respectively. The respondent's post-hearing brief and reply brief will be "R-brief #" and R-reply brief #" respectively.

Dubois for attaining the $40 million mark in cumulative sales. This notwithstanding, Goldberg, who supervised the complainant for over 20 years, was critical of her 2007 and 2008 sales efforts as reflected in her performance reviews, dated January 7, 2008 and July 22, 2008, respectively, as well as in his September 3, 2008 emails to her. R-10, R-11, R-14, and R-16. The complainant's February 3, 2009 performance review, by her new supervisor, Pascal Manzari, echoed Goldberg's concerns with the complainant's efforts in 2007 and 2008. He admonished her stating that she needed to increase her efforts or her performance would "continue to slip" and that was not acceptable. R-4.

In November 2008, at a time when the company's senior management recognized that its business outlook was dire due to a major downturn in the economy, as part of its 2007 plan to expand its residential business, Maharam hired Brin Reinhardt to be its New York City-based residential sales representative. At that time, Reinhardt was 37 years old. Reinhardt had been employed by Maharam as a sales coordinator (from June 2001 to July 2002) and a product development coordinator (from July 2002 to October 2003). C-8.

In March 2009, the respondent also employed three sales representatives who sold to commercial clients primarily in the boroughs that comprise New York City – Amy Pisansky, Linda Namias, and Danielle Zinn. As reflected in her performance reviews for 2007 and 2008, Dubois failed to meet her sales goals for two consecutive years. R-6, R-11, C-6 and C-33. In contrast, Namias, Pisansky, and Zinn each made or exceeded their respective sales goals in either 2007 or 2008. C-6 and C-33.

In 2007, Dubois achieved lower sales revenue and percentage of goal ($1.79 million in sales/$2.55 million goal = 70% of 2007 sales goal) than Zinn ($3 million sales/$1.93 million goal = 158%); Namias ($3 million/$2.27 million goal = 134%); and Pisansky ($1.9 million/$2.19 million goal = 87%). C-6.

Dubois' sales goal for 2008 ($1.89 million) was less than in 2007 ($2.55 million). C-6. In contrast, the 2008 sales goals for Namias (estimated $3.2 million), Pisansky (estimated $2.5 million), and Zinn ($3.2 million) increased over 2007.[6] (Pisansky's 2008 revenue surpassed her

[6] C-6 was generated by the complainant but did not contain either goal or sales information for Namias or Pisansky for 2008. For Namias and Pisansky, 2008 sales revenue information was calculated by identifying and aggregating the raw data contained in the scores of pages that comprise R-17, which delineates, inter alia, 2008 sales by territory by sales representative by account. Neither R-17 nor any other evidence introduced into the record, contained the sales goal information that was not provided by the complainant in C-6. In light of Namias' and Zinn's similar 2007 sales results, Zinn's 2008 sales goal as reported in C-6 was used to estimate Namias' 87% of goal.

2007 sales – totaling approximately $2.5 million; which equaled or exceeded her goal.[7]) C-6, C-33, and R-17.

In 2008, Dubois achieved lower sales revenue ($1.49 million = 79% of goal); than Zinn ($2.38 million = 74%); Namias ($2.79 million; estimated 87%) and Pisansky ($2.52 million = exceeded goal according to C-33). In 2008, Although Dubois' 2008 revenue was approximately $900,000 less than Zinn's 2008 revenue, the complainant achieved a slightly greater percentage of sales goal than Zinn -- 79% to 74%. C-6.

In early 2009, Maharam's senior management resolved to reduce costs in response to the dramatic impact that the economic downturn had on its revenues. In addition to layoffs, the respondent cut the pay of all non-commission based employees and reduced other non-essential expenditures. On March 19, 2009, during its third round of layoffs, Maharam terminated a number of employees, including the complainant, at various locations throughout the country. Prior to the layoffs, Maharam had approximately 320 employees; after, it had about 245. Tr. 400.

At that time, Bruce Madden was Maharam's Executive Vice President of Sales, and had been in the position since about 1998. He was 61 years old on March 19, 2009. Madden decided that the complainant and four other sales representatives positions would be eliminated as part of the company's reduction in force. Tr. 445. Madden selected these individuals because he believed the remaining sales force in each region impacted could effectively cover the sales territory. Tr. 444. The respondent did not hire anyone to replace any of these five sales representatives. After the reduction in force, the respondent retained 51 sales representatives; 23 of whom were 40 years of age or older. R-1.

The four other sales representatives whose positions were eliminated did not work in the same region as the complainant. (They were employed in California, Michigan, Georgia, and New Jersey, respectively.) According to company records, two of these representatives were 28 years of age when their positions were eliminated and the other two were 38. R-1.

In determining how to reduce costs in the northeast region, the pool of sales representatives that Madden could consider for elimination included Dubois, Pisansky, Namias, Amanda Officer (assigned to all the New England states except Connecticut), Reinhart, and Zinn. He decided to

[7] The estimated of $2.5 million was derived from R-17. See explanation in previous footnote. In another document created by the complainant, C-33, it states that to the best of the complainant's knowledge Pisansky made her 2008 goal but did not include any sales figures or the actual goals for any of the sales representatives listed – Namias, Zinn, Pisansky, Reinhardt, Patricia Moore, and Dubois. How the complainant reached her conclusions is not explained.

eliminate Dubois' position because he believed it made sense from a "geographic standpoint." Tr. 445. The complainant's sales performance record was not a factor in his decision. He retained Reinhardt because she was a specialist in the residential market that the company was attempting to grow.

Soon after the complainant was terminated on March 19, 2009, Maharam gave Reinhardt, who was 37 years-old at the time and had been hired approximately four months earlier to work exclusively in residential sales, responsibility for the following commercial sales territories that Dubois previously held[8] -- Fairfield and New Haven Counties in Connecticut, and Nassau, Suffolk, and Westchester Counties in New York. C-8, C-20, and C-22.[9] The balance of the complainant's territory - Eastern and Northern Connecticut and the area north of New York City to Albany – was transferred to Amanda Officer. The territory assigned to Reinhardt, in March

[8] The respondent offered only Madden's testimony regarding the reassignment of Dubois' territory to other sales representatives on or about the time of her termination, March 19, 2009. He stated that he was responsible for dividing the territories. Tr. 449-450. Madden also testified that the company should have been able to review and extract from its records the territory Reinhardt was assigned from March to November 2009, when she resigned. Tr. 499.

Lee Ann Ewing, the respondent's director of human resources was responsible for gathering this information, and testified that she obtained the assistance of Maharam's Director of Client Services to retrieve the data. Tr. 745. There is no evidence that she asked either Madden or Pascal Manzari, the regional manager responsible for the territory in March 2009, for any information, documents, records, etc., that may have been responsive to the complainant's discovery request.

Included in C-8 is Pascal Manzari's performance review of Reinhart, dated 7/30/2009. It states that Reinhardt's territory was "CT and Long Island." This is the only company document entered into the record which supports the conclusion that Reinhardt was not responsible for Westchester County, NY at the time of her review. When that change occurred, however, is not reflected in any other document entered into evidence.

[9] The affidavit of illegal discriminatory conduct ("affidavit" or "complaint") filed by the complainant with the CHRO on May 28, 2009 (CHRO no. 0920414) states "[r]ather than eliminating my position, Maharam simply delivered the bulk of my territory to a female sales representative nearly 30 years my junior who had joined the company only a few months previously and had no experience selling Maharam fabrics to the commercial customers in my region. My replacement was given my territory, except for the upstate Connecticut segment assigned to me four months previously and a segment of upstate NY near Albany. Roughly 80% of my sales were given to my younger replacement." Affidavit ¶ 20. Sometime before June 25, 2009, the respondent received the complaint from the CHRO, and had notice of the claims. C-55.

2009, accounted for approximately $1.2 million in sales revenue for Dubois in 2008 -- about 80% of the complainant's total 2008 sales and 62% of her 2008 sales goal.[10]

As reflected in one of her performance reviews, dated July 30, 2009 (C-8) and a Maharam Sales Organization document, dated May 2009 (C-20), Reinhardt also retained the residential sales responsibilities for which she was hired.

On April 28, 2008, an email from Pascal Manzari to Namias, Pisansky, Reinhardt, and Zinn announced changes to their respective sales territories, but did not specify the changes. C-12. Around this time, the complainant obtained some general information, from unidentified former clients and friends who remained employed by Maharam, that unspecified changes had been made to the assignments of the region's sales representatives. Tr. 269-275.

Reinhardt resigned effective October 2, 2009. C-8. The respondent's 2009 year-end sales records indicate that Zinn was given responsibility for Nassau and Suffolk Counties, NY; Pisansky was given Westchester County, NY; and Namias was given Fairfield and New Haven Counties, Connecticut. However, those records do not specify when those assignments became effective. Additionally, those records contain no information regarding Reinhardt's sales or territory assignments for 2009. R-17.

In November 2010, the complainant sent an email to Maharam to apply for a sales representative for the New England region – Connecticut, Rhode Island, Massachusetts, New Hampshire, Vermont, and Maine. C-32. Dubois sent a follow-up email to Lee Ann Ewing, Maharam's Director of Human Resources, to confirm that her first email had been received. Ewing acknowledged that her application had been received and the company would contact her if she was selected for an interview. C-32. The complainant made no additional efforts to obtain the position. Subsequently, the respondent did not offer the complainant an interview and she was not offered the job.

Ewing was aware that Dubois had filed an age discrimination complaint against the respondent in 2009. Ewing called Madden and told him that Dubois had applied for the New England sales representative position and that her application was to be given fair consideration. She spoke to Madden because as HR director, she had an obligation to assist the company avoid liability. Tr. 728-730. Ewing, however, was not responsible for managing any aspect of the sales operation. Tr. 746.

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[10] The complainant asserted that this transferred territory accounted for 85% or more of her sales and duties, but did not define what she meant by "sales" or "duties." Nor did the complainant provide any explanation of how she reached that conclusion. C-brief 14 and 17. Tr. 101.

Madden effectively told Zinn, the regional manager responsible for screening candidates for the New England sales representative position, for Madden's ultimate approval, that she should not interview Dubois. He did so because he believed that the complainant's 2007 and 2008 performance reviews reflected that she lacked the qualities necessary to be successful in the job. Tr. 484.

In January 2011, the respondent offered the position to and hired Kristin Thomas, who was 29 years old. Despite having worked for Maharam as a sales coordinator, she had no experience as a sales representative. In December 2010, Madden told Zinn that he believed that Thomas was the "far superior candidate," and that she "was an excellent, earnest person that anybody would find appealing as a sales person." Tr. 488-489.

Governing Law -- Discrimination and Retaliation Claims[11]

The analytical framework set forth in McDonnell Douglas v. Green governs the complainant's claims under section 46a-60(a)(1) and section 46a-60(a)(4). The first of the three McDonnell Douglas burden shifting steps requires the employee to make a prima facie case of a discriminatory employment practice or retaliation that raises a presumption the employer engaged in a prohibit act. The complainant's burden here is extremely low. See Baldassario v. Security Services of Connecticut, Inc., 2004 WL 1402417 (D.Conn 2004), *2. "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." Vollemans v. Town of Wallingford, 103 Conn. App. 188, 220 (2007) aff'd, 289 Conn. 57 (2008) (quoting Craine v. Trinity College, 259 Conn. 625, 638 (2002)).

Next, the burden shifts to the employer to rebut the presumption of discrimination or retaliation by introducing evidence of a legitimate, nondiscriminatory justification for the employment decision in question. The business rationale must be clear and specific. See Goldberg v. Sleepy's,LLC, 2013 WL 4441524 (D.Conn. 2013), *5. The respondent's burden is one of production and is not demanding. Id. See also Baldassario, 2004 WL 1402417 at *2. The employer merely needs to state a nondiscriminatory or non-retaliatory reason. "To rebut the plaintiff's prima facie case, the defendant does not have the burden of establishing that the basis was sound ... Simply stating a basis for the decision other than the plaintiff's [membership in the protected class is] enough." Wagner v. v. Bd. of Trustees for Conn. State Univ., 2012 WL 669544, *13 (Conn. Super. Ct. Jan. 30, 2012.) (quoting Craine v. Trinity College, 259 Conn. 625, 643 (2002)).

Once the respondent produces evidence of its legitimate business reason, the presumption of discrimination or retaliation, as the case may be, disappears and the burden shifts back to the

[11] The respondent's motion to dismiss the section 46a-58(a) claim, seeking to enforce the substantive provisions of the federal Age Discrimination in Employment Act ("ADEA"), was granted. See ruling dated July 3, 2013.

employee to proffer sufficient evidence to demonstrate that the reason stated by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory or retaliatory bias. Craine, 259 Conn. at 637; and, Taylor v. State of Connecticut Dep't of Correction, 2010 WL 3171317, *9 (Conn. Super. Ct. July 12, 2010). In order to establish a violation of section 46a-60(a)(1), the complainant bears the ultimate burden of proving that the protected trait – age in the case at bar -- was a motivating factor in the employer's adverse action. See Van Voorhis v. Hillsborough Cnty. Bd. of Cnty. Comm'rs, 512 F.3d 1296, 1300 (11th Cir. 2008). In order to establish a violation of 46a-60(a)(4), the complainant must prove that the respondent's action was "prompted by an impermissible motive." Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995); Newtown v. Shell Oil Co., 52 F.Supp.2d 366, 374 (1999).

In order for the complainant to prevail, the tribunal must conclude that the preponderance of the evidence presented supports a finding of actual discrimination or retaliation, "not merely speculation of discrimination." See Wagner, 2012 WL 669544 at *13 (quoting Craine, 259 Conn. at 643-44). "Proof of discriminatory motive is critical..., although that motive can be established by circumstantial as well as direct evidence." Zahorik v. Cornell University, 729 F.2d 85, 91-92 (2d Cir. 1984) (citations omitted). The same holds true in a retaliation case. See Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1038-39 (2d Cir. 1993).

Thus, under the three-step burden shifting approach, a showing that a proffered justification is pretextual may itself be equivalent to a finding that the employer intentionally discriminated or retaliated. If a complainant convinces the tribunal that it is more likely that the employer did not act for its proffered reasons and the employer's decision remains unexplained, the inferences from the evidence produced may be sufficient to prove the ultimate fact of discriminatory or retaliatory intent. See Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 18 (7th Cir. 1987) overruled by Coston v. Plitt Theatres, Inc., 860 F.2d 834 (7th Cir. 1988)(citations omitted).

Reduction in Force

Regarding the complainant's termination claim, the respondent asserts that because the complainant's position was eliminated as part of economic necessity and that she was not replaced after her position was eliminated as a part of the reduction in force, that Dubois cannot establish a violation of section 46a-60. Respondent's post-hearing brief, pp. 19 and 24-25 (hereinafter "R-brief, #).[12] The respondent's assertion is incorrect.[13]

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[12] "However, [the complainant] cannot establish that the elimination of her position as part of a Company-wide reduction-in-force occurred under circumstances giving rise to an inference of discrimination ... There is nothing in the record to suggest any inference of discrimination as [c]omplainant was one of fifty-two (52) individuals whose positions were eliminated as of March 19, 2009. The majority of the employees whose positions were eliminated were younger than forty. Further, four out of the five sales representatives whose positions were eliminated were younger than forty and treated the same as the [c]omplainant had been treated." Respondent's post-hearing brief, p. 19.

"McDonnell Douglas imposes no such requirement. Moreover, from the outset, the Supreme Court expressly noted that the McDonnell Douglas standard, though a useful yardstick, 'is not necessarily applicable in every respect to differing factual situations.' McDonnell Douglas, 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13.... The McDonnell Douglas analysis is neither 'rigid' nor 'mechanized' and that the primary focus is always whether an employer treats an employee less favorably than other employees for an impermissible reason." Montana v. First Fed. Sav. & Loan Ass'n of Rochester, 869 F.2d 100, 104 (2d Cir. 1989).

The Second Circuit, in discussing a company's decision to implement a reduction in force, has noted that while such business decisions, generally are outside a tribunal's purview, "sometimes the validity of a company's legitimate reduction masks, in an individual case, a discriminatory animus. Where an employee can show that reduction in force was a pretext for her discharge and she alleges facts which, if believed, would prove intentional discrimination against her because of her age," Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1221 (2d Cir. 1994), a violation of the section 46a-60 can be found. See also Baldassario, 2004 WL 1402417 at *2 (quoting Carlton, 202 F.3d at 136)("Even in the context of a legitimate reduction-in-force an employer may not discharge an employee because of his age. But [Plaintiff] must demonstrate, at least in his individual case, that the reduction-in-force and the allegation of poor performance are actually a pretext and that the real reason for his discharge was his age.")

"Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, [the evidence] must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." Gallo, 22 F.3d at 1224. In the absence of direct evidence of discriminatory animus on the part of the decision maker, in order to find a violation of 46a-60(a)(1), this tribunal must conclude that the complainant adduced sufficient evidence to prove that the respondent's proffered reason for discharging the complainant is false and that the employment action was motivated by a discriminatory reason – in this case, age. See Id. 1225. Montana, 869 F.2d at 106. The same standards apply to retaliation claims brought under section 46a-60(a)(4).

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[13] Furthermore, the respondent, noting that Madden is older than the complainant, also asserts that, "[a] well-recognized inference against discrimination exists where the person who participated in the allegedly adverse decision is also a member of the same protected class." R-brief 19-20 (citing McHenry v. One Beacon Ins. Co., 2005 WL 2077275, at *7 (EDNY Aug. 29, 2005), citing Marlow v. Office of Ct. Admin. of N.Y., 820 F.Supp. 753, 757 (SDNY 1993). However, this tribunal recognizes that both the Supreme Court and the Second Circuit have unequivocally stated that "the non-plaintiff actors' ages in an ADEA case is not determinative; the question is whether the plaintiff suffered an adverse employment act 'because of his age.'" Mattera v JPMorgan Chase Corp., 740 F.Supp.2d 561, 573, fn.9 (citing O'Connor v Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996). That standard is equally applicable to claims made under section 46a-60(a)(1).

"It is permissible for the trier of fact to infer the ultimate fact of discrimination [or retaliation] from the falsity of the employer's explanation ... The factfinder's disbelief of the reason put forward by the [employer] (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 [or retaliation]... That is not to say that such a showing by the complainant will always be adequate to sustain a ... finding of liability. Certainly there will be instances [in which], although the [complainant] has established a prima facie case and set forth evidence to reject the [employer's] explanation, no rational fact finder could conclude that the action was discriminatory." Wagner, 2012 WL 669544 at *17-18 (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-48 (2000)).

It would be improper for this tribunal to attached undue significance to a respondent's claim that it merely exercised a good faith business judgment in terminating all employees selected for the reduction-in-force, if the complainant introduces evidence to call such claim in to question. Montana, 869 F.2d at 106. It would also be improper for a tribunal to substitute its judgment for that of a business and to determine that the employer should have selected another employee for termination. Id.

"But where, as here, the [complainant] claims not that her employer used poor business judgment in discharging her but that her employer used the structural reorganization as a cover for discriminatory action, a [tribunal], to ensure that the business decision was not discriminatory, is not forbidden to look behind the employer's claim that it merely exercised a business decision in good faith.... *See also* Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir.) (courts must refrain from second-guessing decision making process, but must allow employees to show that employer acted in an illegitimate or arbitrary manner), *cert. denied,* 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985). To hold otherwise would effectively insulate an employer from the constraints of ... antidiscrimination law during any structural reorganization or reduction in force." Montana, 869 F.2d at 106.

"But For" or "Motivating Factor" Standard

The respondent also asserts that the "but for" test applies to age and retaliation claims brought pursuant section 46a-60(a)(1) and 46a-60(a)(4). The respondent is incorrect.

The respondent bases its argument on the decisions of the U.S. Supreme Court in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) (ADEA plaintiffs must prove "but for" causation because the ADEA requires a plaintiff to show an adverse action "because of" her age.") and Univ. of Texas Southwestern Med. v. Nassar, 133 S.Ct. 2517 (2013) (Title VII retaliation provision prohibits discrimination "because of" protected activity and, therefore, requires a plaintiff to show "but for" causation). The respondent also relies on two Second Circuit decisions – Timbie v. Eli Lilly, 429 Fed. Appx. 20 (2d Cir. 2011) and Rubinow v. Ingelheim, 496 Fed. Appx. 117 (2d Cir. 2012).

The final piece of the respondent's argument, that purportedly solidifies its position, is the frequently cited proposition that "when an overlap between state and federal law is deliberate, federal precedent is particularly persuasive.... In drafting and modifying the CFEPA ... our legislature modeled that act on its federal counterpart, Title VII of the Civil Rights Act of 1964 ... and it has sought to keep our state law consistent with federal law in this area." Respondent's Post-Hearing Reply Brief, p.3 (hereinafter R-reply brief #), citing Chouhan v. Univ. of Conn. Health Ctr., et al., 2013 WL 6335273 (Conn. Super. Ct. Nov. 5, 2013). While the assertion regarding the persuasiveness of federal precedent offers sound advice, the Connecticut legislature did not model the CFEPA on Title VII.

In 1947, the Connecticut legislature passed An Act Concerning Fair Employment Practice, Connecticut Public Act No. 171. This law provided, in part, that "[i]t shall be an unfair employment practice (a) for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the race, color, religious creed, national origin or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against him in compensation or in terms, conditions or privileges of employment; ... (d) for any person, employer, labor organization, or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any unfair employment practice or because he has filed a complaint or testified or assisted in any proceeding under section 6[14] .... The act became effective on May 14, 1947.[15]

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[14] Section 6 of P.A. 47-171 set forth the complaint filing, investigation, mediation, and hearing procedures.

[15] Also included in the definition of an unfair employment practice, was the conduct enumerated in the following subdivisions of section 5 of P.A. 47-171 -- (b) for any employment agency, except in the case of a bona fide occupational qualification or need, to fail or refuse to classify properly or refer for employment, or otherwise to discriminate against, any individual because of his race, color, religious creed, national origin or ancestry; (c) for a labor organization, because of the race, color, religious creed, national origin or ancestry of any individual to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless such action is based upon a bona fide occupational qualification; and (e) for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts herein declared to be unfair employment practice or to attempt to do so.

Age was added as one of the protected classes in 1959. See section 3 of Public Act 59-145. That same year, the legislature adopted damages in addition to the limited cease and desist penalties found in section 6 of PA 47-171. Public Act 59-334, modified then Conn. Gen. Stat. section 31-127, adding to the the authority to require a "respondent to take such affirmative action, including, but not limited to, hiring or reinstatement of employees, with or without back pay, or restoration to membership in any respondent labor organization, as in the judgment of the tribunal will effectuate the purposes of this

Although considering federal employment discrimination precedent persuasive, Connecticut courts have "recognized ... that under certain circumstances, federal law defines 'the beginning and not the end of our approach to the subject." State v. CHRO, 211 Conn. 464, 470 (1989), quoting Evening Sentinel v. National Organization for Women, 168 Conn. 26, 34–35 n. 5, (1975). See also, Levy v. CHRO, 236 Conn. 96, 103 (1996) (In deciding whether section 46a-60 had been violated, the court stated that "[a]lthough this case is based solely on Connecticut law, we review federal precedent concerning employment discrimination for guidance in enforcing our own anti-discrimination statutes.") See also Vollemans v. Town of Wallingford, 103 Conn. App. 188, 199-200 (2007) aff'd, 289 Conn. 57 (2008) (In clarifying the nature of the filing period of section 46a-82(e), the court stated, "[w]hile often a source of great assistance and persuasive force, ... it is axiomatic that decisions of the United States Supreme Court are not binding on Connecticut courts tasked with interpreting our General Statutes. Rather, Connecticut is the final arbiter of its own laws.")(citations and internal quotations omitted).

There is no sound argument that the "but for" causation standard announced in either Nassar or Gross controls this tribunal's consideration of complaints alleging violations of section 46a-60. See Dwyer v. Waterfront Enterprises, Inc., 2013 WL 2947907, *7 (Conn. Super. Ct. May 24, 2013) and Hasemann v. United Parcel Serv. of America, 2013 WL 696424, *12-13 (D. Conn. Feb 26, 2013). See Wagner, 2012 WL 669544 at *11-12.

Prima Facie Case – Position Elimination Claim

Regarding the claim that the respondent selected the complainant's position for elimination because of her age, the complainant satisfies the de minimus prima facie case requirement. She is a member of a protected class based on her age of 60 and was Maharam's oldest sales representative in the United States when her position was eliminated; she had been a successful commercial market sales representative for the majority of her near 24 years with the respondent; she was terminated; and a substantial amount of her territory was transferred to a 37 year old residential sales representative, with no experience selling to Maharam's commercial clients and who had been hired, only a few month prior to Dubois' termination.[16]

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chapter." This is the precursor to today's section 46a-86, and it has been modified on numerous occasions since 1959.

The federal Age Discrimination in Employment Act ("ADEA") was passed in 1967. Its substantive provisions are essentially identical to the prohibitions that already existed in Connecticut law that was passed two decades prior. See, for example, section 62 of the ADEA.

[16] "In applying the analytical framework enunciated in McDonnell Douglas Corp., ... '[e]vidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to

Prima Facie Case – Refusal to Hire Claim

Regarding her claim that Maharam declined to hire her to be the company's New England sales representative because of her age, the complainant satisfies the de minimus prima facie case requirement. She was 62 years old in November 2010; was qualified based on her prior experience with the respondent; she was not given an interview, and a substantially younger person was hired for the job in January 2011.

Prima Facie Case – Retaliation Claim

Regarding the retaliation claim, the complainant satisfies the de minimus prima facie case requirement. In May 2009, Dubois filed an employment discrimination complaint against Maharam with the CHRO; in November 2010, she applied for the position of sales representative for the New England region, was not interviewed and was not hired; and in January 2011, a substantially younger person was hired for the position.

Respondent's Legitimate Business Reason -- Section 46a-60(a)(1) -- Termination Claim

The evidence presented by Maharam – the testimony of Stephen Maharam, Madden, and Ewing – describing the downturn in the economy in late 2008–early 2009, the deleterious impacts to its business, and the resulting need to reduce costs, satisfies the respondent's burden of production regarding its legitimate business reason for eliminating the complainant's position as a part of its reduction in force.[17] More precisely, Madden selected the complainant's position for elimination (along with four other sales representatives) because he believed that the remaining sales force in each respective region could adequately cover the territory, and that it made sense to him from a "geographic standpoint." Tr. 445. Therefore, the presumption of discrimination in connection with elimination of Dubois' position, established by the complainant satisfying the minimal burden regarding her prima facie case dissolves. The burden shifts to the complainant to adduce evidence from which this tribunal can infer that the respondent's decision to eliminate her position was motivated by impermissible age discrimination in violation of section 46a-60(a)(1).

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create a rebuttable presumption of discriminatory intent and to require the employer to articulate reasons for its decision.'" Vollemans v. Town of Wallingford, 103 Conn. App. 188, 221 (2007) aff'd, 289 Conn. 57 (2008) (quoting *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir.1988)). See also Mattera v. JPMorgan Chase Corp., 740 F.Supp.2d 561, 571-573 (S.D.N.Y. Sept. 30, 2010).

[17] The complainant concedes this point. C-brief p.10.

Legitimate Business Reason – Section 46a-60(a)(1) – Refusal to Interview Discrimination Claim

The evidence proffered by the respondent (the uncontested and critical performance reviews for 2007 and 2008 and Madden's testimony that he had reviewed and relied on these evaluations when he instructed Zinn not interview the complainant) satisfies the respondent's burden of production regarding its legitimate business reason for refusing to consider the complainant for the position of New England Region sales representative in December 2010. Therefore, the presumption of discriminatory refusal to rehire, flowing from the complainant's proof of her prima facie case, dissolves; the complainant can no longer rest on her prima facie case and must instead raise sufficient evidence from which this tribunal could conclude by a preponderance of the evidence that her age was a motivating factor in the respondent's decision to eliminate her position. See Mattera , 740 F. Supp. 2d at 574.

Legitimate Business Reason – Section 46a-60(a)(4) - Refusal to Interview Retaliation Claim

The same evidence proffered by the respondent to rebut the complainant's prima facie case of discriminatory refusal to hire, also rebuts the prima facie case of retaliation. The burden shifts to the complainant to point to evidence in the record from with this tribunal can infer that the respondent's actions were motivated by a retaliatory animus.

Evidence of Discriminatory Termination

The respondent's proffered reason for the elimination of dozens of positions was the drastic drop in business that it experienced in late 2008. The complainant does not dispute this. Instead, the complainant frames the issue to be "why [she] was selected for inclusion in the reduction and her duties given to a younger, far less qualified replacement instead of the reverse." C-brief 11. The complainant states, "Maharam's assertion that it justifiably terminated [her] as part of a position elimination during a reduction in force ... is not only wholly unsubstantiated but patently false..." and that Madden's decision "was illogical and pretextual on many levels." C-brief 10 and C-reply brief 5.

More precisely, however, the issue is whether the preponderance of the evidence adduced during the hearing establishes either that Madden's proffered reasons are false, making an inference of discrimination possible, or that the complainant's age was a motivating factor in Madden's decision to eliminate her position.

To satisfy this burden, the complainant offers the following for consideration -- (1) In March 2009, Dubois, at 60 years of age, was the oldest sales representative employed by Maharam; (2) Madden admitted that his decision to eliminate Dubois' position had nothing to do with her performance; (3) Her sales results in 2005 and 2006 exceeded her sales goals. As of 2007, the

complainant surpassed $40 million in career sales and Maharam recognized her success; (4) Although she failed to meet her sales goals in 2007 and 2008, her productivity in January 2009 surpassed her goal for that month; (5) Neither Dubois nor her New York region colleagues met their respective sales goal in February 2009. (6) On March 19, 2009, when the complainant was terminated, she had met (or was close to meeting) her March goal; (7) Reinhardt, 37 years old, was hired in November 2008 to lead the respondent's New York area residential sales effort. After the March 19, 2009 reduction in force, Reinhardt was retained, although she had no experience working for Maharam as a commercial sales representative; and was given responsibility for a substantial portion of the complainant's sales territory. C-brief 11-12, 14; (8) Maharam offered no "neutral" explanation for its decision. C brief 12; (9) Dubois would have been delighted to add residential sales to her portfolio and believed she was qualified to do so. C-brief 13; (10) Madden did not consider retaining the complainant and releasing Reinhardt. C-brief 13; (11) Madden's testimony describing how Dubois' territory was divided among numerous sales representatives was contradicted by other evidence. C-brief 13; (12) It was "highly illogical" for Madden to give Reinhardt part of Dubois territory because Reinhardt did not have a car and lived in Brooklyn. C-brief 13; (13) The Respondent failed to produce records in discovery that clarified exactly how and to whom Dubois' territory was assigned upon her termination. C-brief p.11; (14) The absence of any meaningful documentary support to explain how Dubois' territory was divided is surprising. C-brief 14; (15) Madden's testimony did not clarify exactly how and to whom Dubois' territory was assigned upon her termination. C-brief 11; (16) Reinhardt resigned from the position in November 2009 because she did not like the demands of commercial sales; and (17) The only rationale Madden offered for combining sales roles was "the largest sales territories could absorb the smaller sales territories," but provided no facts to support the theory. C-reply brief 5.

Analysis – Section 46a-60(a)(1) Termination Claim

To support a finding of pretext, the complainant argues that the respondent did not produce records that established, with certainty, what part of the complainant's territory was assigned to Reinhardt. Based on the evidence presented, this tribunal found that Maharam gave Reinhardt, as of March 19, 2009, responsibility for Fairfield and New Haven Counties, Connecticut; and Westchester, Nassau and Suffolk Counties, New York. The issue remaining is whether there is sufficient additional evidence to support a conclusion that the reason proffered by the respondent is a pretext for discrimination.

Although sufficient to satisfy the complainant's burden to establish an inference of discrimination at the prima facie stage, the mere fact that a substantial portion of the complainant's territory was transferred to Reinhardt, a younger sales representative, "cannot standing alone establish pretext." Mattera, 740 F. Supp. 2d at 574. Reviewing the record, no evidence was introduced to support the conclusion that Madden's decision that Reinhardt was

qualified to sell to Maharam's commercial clients, as well as to its residential clients, was unreasonable. "Only when an employer's business decision is so implausible as to call into question its genuineness should this [tribunal] ... find that it is pretextual." Dent v. U.S. Tennis Association, 2011 WL 308417, at *8 (E.D.N.Y Jan. 27, 2011) (citing Fleming v. MaxMara USA, Inc., 371 Fed. App'x 115, 118, 2010 WL 1170247, at *2 (2d Cir. Mar. 25, 2010)(citing Dister, 859 F.2d at 1116).

Instead, to support a finding of pretext, the complainant argues additionally that Madden "contradicted himself" as to the dispute over Reinhardt's territories and this "fatally undermines Maharam's purported non-discriminatory position elimination." C-brief 16. The complainant asks the referee to conclude that Madden possessed a discriminatory animus because, first, his testimony about the disposition of Dubois' territory allegedly was untruthful ("Maharam offered false testimony ...." C-brief 16); and second, based on this alleged untruthful testimony, the legitimate nondiscriminatory reason provided by Madden is false. C-brief 17. The complainant cites CHRO ex rel. Szydlo v. Edac Tech. Corp, No. 0510366, 2007 WL 4258347 (CT. Civ. Rts. Nov. 19, 2007) for the proposition that "[e]mployer defenses lacking credibility support an affirmative finding of age discrimination in favor of the complainant." C-brief 16.[18]

On direct examination, Madden was asked, "When you selected Ms. Dubois for layoff, how was her territory, or clients, or customers, divided?" Madden replied, "Amongst the existing sales people, Long Island went to Danielle Zinn, who was a sales person in New York City. I think the one or two accounts in Queens went to Linda Namias, who was a sales person in New York City. Westchester and one account in Connecticut, Starwood, went to Amy Pisanski who was a sales person in New York City. Western Connecticut – or maybe I have my geography wrong, southern Connecticut – went to Amanda Officer was a sales person working out of the Boston office. And Brin Reinhardt, who was covering Greenwich from a residential side, picked up the remaining contract customers." Tr. 449-450. Madden testified that he decided how the complainant's territory was to be divided. Tr. 450.

On cross examination, Madden stated he was not aware that the complainant had sought documentation from the company regarding the division of Dubois' territory, and that he did not have such information. Tr. 497-498. Additionally, Madden replied yes when asked if Reinhardt was assigned Fairfield and New Haven Counties, Connecticut. When asked if he had proof that Pisansky, as Madden claimed, was assigned Westchester County, rather than Reinhardt, as a company document, dated May 2009 (C-20) stated, Madden said he had no proof. Tr. 501-502. Madden believed that such information may be retrievable – "maybe a report of commissions earned could be run." Tr. 501-502. Although he admitted to

[18] In Szydlo, an assessment of witness credibility was required to determine whether or not a supervisor replied "Yes. I keep the younger people," after the complainant asked if he was being terminated because he was "too old." Unlike in the instant case, that resolution of that issue was directly probative of discriminatory animus. No comparable allegations are made in this case.

orchestrating the realignment, Madden could not provide any greater clarity around the territory that was assigned to Reinhardt in 2009. Tr. 503.

To the extent that this testimony supports the conclusion that Madden contradicted himself, it does not support a conclusion that the legitimate business reason offered by Madden is false or that Madden possessed a discriminatory animus when he decided to eliminate the complainant's position.

Next, to support a finding of pretext, the complainant relies on the respondent's proposed finding of fact 50, to assert that the only rationale Madden offered in his testimony for combining sales roles was that "the largest sales territories could absorb the smaller sales territories," but provided no facts to support the theory. C-reply brief 5-6. The testimony offered by Madden on cross examination was:

> Q: I take it from your comments you offered Barbara Dubois no opportunity to expand her territory into New York residential? A: No. Q: But that was another way of combining two positions, was it not? A: We would have been putting a small market into a big market, taking a person who was a specialist in a market that we invested heavily into develop, and moving that person out of the company. So when you put the puzzle together, it doesn't fit. Tr. 505.

The complainant is correct that no objective criteria was offered by Madden to explain what he meant by "putting a small market into a big market." Madden testified, however, that he selected five sale representatives for the reduction in force, after he determined what made sense geographically, so that Maharam could adequately service its customers.[19]

Recognizing that the respondent admitted that residential sales was a small part of the company's business that they had recently invested in and were seeking to grow, the complainant attempted to compare Dubois' and Reinhardt's respective sales goals (while acknowledging that such a task is complicated given the record) in order to establish that Madden's rational of putting smaller markets into larger markets supports a finding of pretext. This comparison, to the extent that is may be relied upon, does not undermine Madden's stated reason for retaining Reinhardt or make his decision to do so patently implausible.

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[19] "The big picture was to reduce the size of the sales force and do so in a manner that allowed us to cover those territories as best we could from other territories. So while we had acknowledged that the coverage wouldn't be as focused as it was, at least there would be coverage on the very best accounts ... [W]e looked at the market and said which markets can we cover from other markets? Which markets can be absorbed in other markets.... It just fell into place from a geographical standpoint." Tr. 445.

The same testimony by Madden also offered a rationale for retaining Reinhardt. His substantive reason was that Reinhardt was a specialist in the residential market, and had recently been recruited to do that job. The evidence reveals that Reinhardt remained responsible for residential sales after March 19, 2009. C-8 and C-20.

None of the other reasons offered by the complainant to establish pretext (enumerated above) are sufficient to prove that Madden's explanation was based on a discriminatory motive. The law does not require that employment decisions "be rational, wise, or well-considered only that [they] be nondiscriminatory. And the record here does not support the [complainant's] contention that her termination was the result, in whole or in part, of [age-based] animus." See Powell v. Syracuse University, 580 F.2d 1150, 1156-1157 (2d Cir. 1978).

Complainant's evidence of discriminatory refusal to interview and retaliation

To establish by a preponderance of the evidence that Madden's reason (the complainant's 2007 and 2008 performance reviews) is a pretext and that he was discriminating against the her based on age and/or retaliating against her because she filed a discrimination complaint with the commission, the complainant proffered the following to satisfy its burden –

(1) Her decades of success as a sales representative prior to 2007 and 2008. C-brief 28; (2) Madden did not take into account her positive sales results in January and March of 2009. C-brief 28; (3) Madden was ignorant of impact to the complainant's sales results of lost business with Starwood account. C-brief 29; (4) Madden's statement that she had bad years when company had good years is not accurate. C-brief 29; (5) Madden did not address why Dubois' 79% performance was so problematic that she should not be hired, although Zinn was promoted when her performance was 74%. C-brief 29-30; (6) Madden's use of the words "inherent persona" and "rigor" were "code words" that indicated that Madden stereotyped "a class of older workers," and that this established that his reasons actually were a pretext for discriminatory refusal to hire and retaliation. C-brief 35-36; (7) The respondent was obligated to establish that its hiring process was undertaken in a neutral fashion and that was the best-qualified candidate was selected for the position; (8) The respondent's fatally undermined its duty of establishing a neutral, nondiscriminatory hiring process when it failed to make its regional manager responsible for interviewing candidates, who was not amenable to subpoena, available for the public hearing. C-brief 39; (9) The respondent's hiring process contained material procedural irregularities. C-brief 38 and 41 and C-reply brief 18; (10) Madden was "biased" when he told Zinn not to interview Dubois. C-brief 40; (11) The respondent sought to have the case dismissed (arguing that CFEPA did not apply because Dubois was Maharam's only employee who worked in Connecticut) and had not trained any of its employees in the

requirement of the CFEPA. C-brief p. 40; (12) Maharam was sued at least twice since 2000 for age discrimination and retaliation and at best was oblivious to its obligation to administer a fair and unbiased application process. C-brief 41; (13) The respondent did not produce "an iota of evidence suggesting that the explanations for it exclusion of [complainant] were not a pretext for retaliatory animus and age discrimination." C-brief 42; (14) The respondent was required to provide Dubois an interview because that was the only way it could obtain the information necessary to decide if she should be rehired. C-reply brief 18; (15) Madden's belief that the complainant had not displayed sufficient interest in the job is contradicted by other evidence; (16) Ewing's response to the complainant's December 2, 2010 email "misled" her. C-reply brief 20; (17) The complainant was unfairly subjected to the a requirement that she had to express interest in the position beyond merely sending an email, but that the respondent failed to show that other candidates needed to do the same. C-brief 43-44; and (18) As of December 2010, 88 of 92 sales representatives were younger than 40 and that the respondent failed to provide a meaningful explanation for this result.

Analysis – section 46a-60(a)(1) Refusal to Hire Claim and section 46a-60(a)(4) Retaliation Claim

The complainant notes that, "[d]epartures from procedural regularity, such as failure to collect all available evidence, can raise a question as to the good faith of the process where the departure my reasonable effect the decision." Collins v. Connecticut Job Corps., 684 F.Supp.2d 232, 252 (2010) (citing Zahorik v. Cornell Univ., 729 F.2d at 93). The complainant argues that the evidence reveals that respondent did not adhere to its procedures when considering and interviewing candidates and that the "clear deviations from neutral hiring standard[s], demonstrate that Madden acted based on a stereotype of the [c]omplainant as lacking the 'inherent persona' and 'rigor' of Thomas." C-reply brief 22.

The complainant also cites various university tenure cases for the proposition that procedural irregularities can evidence pretext.[20] C-brief 41-42. In those cases there were formal and comprehensive rules established for academic departments, tenure committees, deans, and university presidents to adhere to when vetting candidates for tenure. The procedures, in such

[20]Also in support of this argument, the complainant cites Norville v. Staten Island, in which the court stated that for the purpose of establishing the de minimus prima facie case it was sufficient to show that the employer deviated from its standard practice of promoting the most senior union member of two equally qualified candidates, but then upheld the trial court's grant of judgment as a matter of law in favor of the defendant on the age and race claims. 196 F.3d 89 (2d Cir. 1999).

cases, are generally quite formal and recognize the gravity of the decisions to award an academic a life-time appointment.

Clearly, the laws protecting against discrimination in employment decisions require procedural fairness. In the instant case, because there exists no comparable formal review process, the tribunal is required to determine whether, in this less structured setting, material procedural irregularities occurred; and, if so, whether those irregularities support an inference of discriminatory or retaliatory animus.

The complainant states that, "Maharam has offered no cases applying the motivating factor standard ... in support of its position, and it also has cited no authority for an employer's refusal to consider an applicant who is protected from retaliation for an interview on the same basis as all other candidates." C-reply brief 22. The complainant appears to be arguing that laws protecting against retaliation require an employer to provide favorable treatment to any person who has alleged discriminatory conduct by the employer, and precludes an employer from utilizing reliable information it possesses to determine which candidates should be interviewed.

The complainant also argues that once Ewing told Madden that Dubois had applied and had filed an age discrimination case against Maharam, that "his duty was to ensure that the [c]omplainant receive the same consideration, without bias, as any other applicant." The complainant equates Madden's instruction to Zinn not to grant her an interview to be the "quintessential badge of retaliation and discrimination forbidden under anti-discrimination laws." C-brief 27.

The law certainly prohibits an employer from acting in a discriminatory or retaliatory manner, including making illegal "efforts by the employer to single the [c]omplainant out for disadvantage treatment ...." C-reply brief 22. The law, however, does not call for an employer to ignore reliable facts when considering a candidate for employment. More precisely, the law requires this tribunal to determine whether or not there is sufficient evidence to support a conclusion that the reasons offered by the respondent are false and a pretext, so that an inference of discrimination or retaliation can be made, or whether there is other sufficient evidence of discriminatory or retaliatory animus.

As evidence of procedural misconduct, the complainant offers Madden's statement that he reviewed "full documentation" regarding the complainant's performance history, and states it is nonsensical and "meritless." C-brief 28 and C-reply brief 18. In connection with this argument, the complainant also asserts that Madden was ignorant about the impact of the loss of the complainant's largest account in 2007; that purportedly accounted for 30-50% of her sales. C-brief 29. The complainant argues that "Madden did not review the [c]omplainant's

sales performance in deciding to exclude her; he relied on his memory of [c]omplainant's 2007 and 2008 sales performance from previous reviews he had not seen for two or three years among hundreds of reviews during the interim." C-reply brief 22. The complainant's argument is that Madden could only acquire "all the evidence" needed to evaluate her qualifications for the job if he requested and reviewed her personnel file and if the complainant, who had worked for the respondent for over 20 years, received an interview. C-reply brief 18.

A review of Madden's testimony reveals, however, that when he spoke of "full documentation," he was referring to the complainant's sales performance reviews for 2007 and 2008; he believed that was sufficient information for him not to extend Dubois an interview. Specifically, on direct examination, after stating that he reviews the performance reviews of all of the 65-70 sales representatives, Madden was shown the complainant's performance review for 2008. Tr. 454. R-4. Madden replied "yes," when asked "did you review it when it was given to her?" Tr. 454. Then Madden replied, "Yes, at the time sure," when asked, "And you read the entire review?" Tr. 454-455. Then Madden was shown the review written by Goldberg, her direct supervisor, dated July 2008; he testified he had seen it before, and that he was aware of the review. Tr. 455. R-10. He was then shown the complainant's 2007 review, also done by Goldberg. Madden replied "yes," when asked, "Did you review this document on or about ... January of 2008?" Tr. 455. R-11. Madden was then shown the complainants' July 17, 2007 performance review, also done by Goldberg, and replied "Yes, I did," when asked, "Did you see this document on or about [and review] it on or about July 15, 2007?" Tr. 455-456. R-16. Madden was then shown Dubois' sales representative performance summary, dated February 2009, that noted that the complainant achieved 79.5% of goal for the first two-months of 2009. R-3. Tr. 456-457. Then Madden was shown, the complainant's 2007 performance summary and noted that she achieved 70.1% of sales goal for the year. Tr. 457. Madden responded "yes" when asked whether he was "intimately familiar with these documents." Tr. 457.

On cross examination, Madden admitted that in 37 years with the company he never requested any employees' personnel file, including the complainant's. Tr. 487-488. He stated that he had the records he needed to form his opinion about the complainant -- her sales summary, history of sales performance, and the reviews done by her regional directors – and that he was aware of the complainant's substantial career sales accomplishments and awards. Tr. 487-488.

Although the complainant asserts that it was not possible for Madden to recall her performance results from 2007 and 2008 because he had read hundreds of reviews since 2007, there is no evidence to discredit Madden's statement that he possessed the information regarding the

complainant's performance in 2007 and 2008, and that he relied on the evaluation of her performance by her regional directors to refuse her an interview.

Next, the complainant asserts that Madden's testimony revealed that he was ignorant of the circumstances of the loss of Starwood business on her sales results in 2007 and, therefore, he had not considered all of the evidence when refusing to grant her an interview. On cross examination, when asked if he was familiar with Starwood's corporate decision to move business away from the respondent, Madden testified that he knew that Maharam was no longer doing as much business with Starwood as it had been, but that he was unaware of any decision by Starwood to no longer consider Maharam. Tr. 846-487. Madden, on the other hand, was familiar with the complainant's performance reviews.

In this regard, the complainant is correct when she states that her direct supervisors acknowledged the impact the loss of Starwood business had on her sales. The January 7, 2008 review by Mark Goldberg, the complainant's long-term supervisor stated, "With a new sales goal reflecting the decrease in Starwood business[,] it should be a much better year for you to reach and exceed your sales goals in 2008....We knew going into the year that we would see much less Starwood business in 2007, so you should have concentrated your efforts with your other major clients." R-11. The February 3, 2009 review by her new supervisor, Pascal Manzari, stated "I was shocked to read about the low number of sales calls you had been making/week and the fact that many of your meaningful accounts have slipped in sales for two or three years in a row...not just Starwood." R-4. Assuming arguendo that Madden was not aware of the specific reasons for the loss of the Starwood business, that fact does not support a inference of discriminatory or retaliatory animus, where the evidence reveals he relied on the complainant's performance reviews.

To further support its argument of respondent's procedural irregularity, the complainant appears to assert that all candidates who submit an application showing the minimum qualifications for the job must be interviewed. No legal authority has been provided to support that position. Once again, the law requires that an employer not discriminate against an applicant based upon an individual's protected status. If the evidence (direct or circumstantial) adduced leads to the conclusion that either age or retaliation was a factor in denying the complainant an interview, then a violation of section 46a-60(a)(1) or 46a-60(a)(4) will be found.

Also, in support of the argument that the respondent violated its procedures, the complainant asserts that Maharam waived the standard application form for Thomas "but proffered no legitimate reason as to why she received pretextual treatment." C-reply brief 22 (citing Tr. 704: 11 and Tr. 719: 7-9) and C-brief 39. That assertion is incorrect.

Ewing offered the following testimony directly addressing this point on cross examination when asked why there was no standard Maharam employment application completed in connection with Thomas' candidacy --

> "Q: Now going back to the information that has been provided by the company with respect to Kristin Thomas' application, all that we have is ... her resume. A: Yes, that's what I had. Q: We have no Maharam application. A: She had worked for us two months prior so I didn't -- ... Danielle [Zinn] asked me, do I need an application from Kristin and I told her no... She was an active – a regular active fulltime employee in October [2010], so I didn't see the point in making her – I mean, our application form takes 20 minutes to fill out. I saw no point in wasting 20 minutes, so I had an application for her already in her file from when she first worked for us... [S]he had just left us in October and then was re-interviewing in December, so I just didn't see the need." Tr. 716.

Next, to support the claim that the respondent engaged in procedural irregularities, the complainant argues that the respondent offered an interview to a candidate, Clifford, who neither met the objective standards for consideration and who, apparently, did not submit a resume. C-reply brief 22 (Citing C-29). The evidence in the record is not dispositive on the issue of whether Clifford was interviewed. Ewing offered the following testimony on cross examination --

> "Q: And looking at Exhibit No. 30, since you didn't attend the interviews of the two candidate we know were interviewed, [Clifford and Baethge], do you have anything to add about the substance of the interviews given to those candidates by Danielle Zinn?[21] A: No, I do not. Q: Or in fact why either of them were given an interview? A: No, I do not. Q: You have no information for us. A: No. Q: And there's no written information telling

[21] Danielle Zinn, the regional director who conducted the interviews that occurred, did not testify at the public hearing; she was not amenable to subpoena. Madden was also questioned about Clifford's employment application form. "Q: Do you know who completed the employment application form? A: No, I don't.... In the normal course of things it would have been Danielle Zinn, but I have no way of knowing. Q: [F]or this candidate no resume has been received. Do you have any information that can clarify why that would be the case?... A: I can't for this candidate. I can tell you why it might happen ... I have no idea why this candidate. Q: Okay. But in this employment application form, it looks like the first three pages are filled in and fourth is not. Does that indicate to you that this candidate was given an interview? A: It would indicate it, but I couldn't tell you if it happened.... Q: Do you know of any practice by Maharam to send out this application form long distance and ask them to fill it in and send it back in? A: No, no. I think I would be more likely that she came in and interviewed with Danielle, knew her, might have been recommended by somebody, you know, could have been anything, could have been a friend of a friend." Tr. 474-476.

> us why they were given – granted interviews? A: No. Q: Now ... Clifford's interview form ... is not accompanied by a resume at all is that correct? A: No, it is not. Yes, that's correct. Q: So, even though this candidate submitted no resume, she was granted an interview? A: Well, I don't know if she was granted an interview. She filled out an application." Tr. 710-711.

The complainant argues that Madden's use of the terms "rigor" and "inherent persona" are evidence that he harbored a discriminatory animus based on age. C-brief 35-36. This tribunal does not find that the brief exchange on cross examination, seeking Madden's concession that the complainant's credentials surpassed Thomas', supports that conclusion. Madden's testimony implies that when he used the word "rigor," that he was describing the complainant's work performance as reported in her 2007 and 2008 performance reviews. He stated, "I questioned Barbara's rigor based on her reviews from her directors." Tr. 490. Additionally, when Madden testified that the qualities of a successful sales representative including one's "inherent persona," this appears to equate to one's personality, not one's age.

The complainant also states that Ewing's reply to Dubois' December 2, 2010 follow-up email to confirm that her November 30, 2010 email to Maharam's HR address had been received "misled" her. C-reply brief 20. The complainant's email stated, "Is hr@maharam.com a valid email for applying for a position? I'm just confirming you received my email. Thanks." Ewing's response was, "Yes, that is a valid email address and I did receive your resume. I have forwarded your resume and will let you know if they want to schedule an interview." C-32. This response not misleading.

The complainant also argues that Ewing had an affirmative obligation to provide information to her because they had known each other for a decade. For example, the complainant asserts that Ewing should have told her that Zinn had been promoted to regional manager. C-reply brief 20. There is no proof that, except for the December 2, 2010 email, the complainant asked Ewing for any other information or that Ewing provided additional information to any other candidate for the New England Regional sales representative position. The evidence presented does not support a finding that Ewing engaged in procedural irregularities sufficient to infer she acted with discriminatory or retaliatory animus.

Also, as evidence that the respondent acted with discriminatory intent, the complainant argues that Maharam "conceded that the [c]omplainant's performance was perfectly satisfactory and had nothing to do with her termination of employment in 2009." C-reply brief 21 (citing FF-14, i.e., Tr. 461:2-18). That assertion is incorrect. On cross examination Madden was asked, "Why

didn't you hire Ms. Dubois if you knew she applied for the position?" Madden replied, "In the end analysis Barbara, being one of the unfortunate people part of the reduction in force, had nothing to do with her performance. In terms of considering her for a new job, it had very much to do with her past performance." Tr. 461.

Next, the complainant argues that Madden subjected her to a double standard when he denied Dubois an interview but promoted Zinn to regional sales manager although her 2008 sales performance (74% of goal) was less than Dubois' (79%). C-brief 29-30 and 37. C-8. The evidence reveals, however, that Zinn's 2008 sales exceeded Dubois by $900,000. C-8. It is entirely reasonable for Madden to have considered Zinn a more successful sales representative, which was likely only one factor in his decision to promote Zinn. The fact that Dubois's achieved a slightly higher percentage of goal in 2008 does not prove that Dubois was subjected to a double standard or support an inference of discrimination.

The complainant also raised the following issues for consideration.

1. Madden's statement that she had bad years when company had good years is not accurate.

To the extent that Madden's testimony is not accurate, it does not support an inference of pretext. The fact that the complainant's supervisors were critical of her performance in 2007 and 2008 is not in dispute, and there is no evidence offered by the complainant to refute the reviews or from which to conclude that her supervisors' appraisals were motivated by discriminatory animus.

2. The respondent's failure to make available for the public hearing its regional manager responsible for interviewing candidates, and who was not amenable to subpoena, fatally undermined its duty of establishing a neutral, nondiscriminatory hiring process.

This tribunal cannot make a finding of fact because, under existing law, the election of this forum deprived the complainant of the ability to compel certain witnesses to appear.

3. Madden's belief that the complainant had not displayed sufficient interest in the job is contradicted by other evidence.

The complainant offered evidence that she submitted a brief follow-up email to Ewing to ensure that her prior email had been received. To the extent that this follow-up email is evidence of the complainant's sufficient interest, that fact that Madden's was not aware of it does not establish that he had a discriminatory motive when he decided she should not be interviewed.

4. As of December 2010, 88 of 92 sales representatives were younger than 40 and that the respondent failed to provide a meaningful explanation for this result.

The complainant proffered no evidence that indicated that this result was based on discriminatory conduct by the respondent, therefore, this evidence cannot support an inference of discrimination.

The Connecticut Supreme Court has recognized that "[s]tatistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rational for its [adverse employment] decision.... This is because a[n] [employer's] overall employment statistics will, at least in 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]." Perez-Dickson v. City of Bridgeport, 304 Conn. 483, 517-518 (citing Board of Education of City of Norwalk v. CHRO, 266 Conn. 492, 516 (2003). Without information regarding the number of applicants by age and who applied for the positions, the statistical information offered by the complainant is incomplete and not probative of pretext. See EEOC v. Comcast of Georgia, Inc., 560 F.Supp.2d 1300, 1312 (N.D. Georgia 2008).

Regarding the balance of the complainant's arguments enumerated above, the undersigned concludes that they are insufficient to support a finding the respondent's legitimate business reason is a pretext or that the respondent acted with discriminatory or retaliatory animus when it refused to extend an interview to the complainant.

Final Decision and Order

In light of the foregoing, I find in favor of the Respondent. It is hereby ordered, in accordance with the provisions of subdivision (4) of subsection (d) of section 46a-54-88a of the Regulations of Connecticut State Agencies, that the complaints be, and hereby are, dismissed in their entirety.

It is so ordered this 19th day of September 2014.

Alvin R. Wilson, Jr.
Presiding Human Rights Referee