STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities ex rel. Michael Howard, Complainant
v.
State of Connecticut, Dept. of Transportation, Respondent

CHRO No. 0940283

October 31, 2013

Memorandum of Decision

Procedural Background

On March 3, 2009, Michael Howard ("the complainant") filed an affidavit of illegal discriminatory practice, ("affidavit" or "complaint") with the Commission on Human Rights and Opportunities ("Commission" or "CHRO"). The affidavit, inter alia, stated that the State of Connecticut, Department of Transportation ("the respondent" or "DOT"), violated conn. gen. stat. sections 46a-60(a)(1) based on race and color (black) ; 46a-60(a)(4), and 46a-58(a), as based upon a violation of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 12101 et seq.[1] Additionally, the affidavit alleged certain conduct intended to reflect the factual basis of the complainant's claims.

After conducting a preliminary investigation into the allegations, supplemented with additional information collected from the parties, an investigator of the Commission found that there was reasonable cause to believe that an unfair practice was committed as alleged in the complaint. See

[1] 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, ... 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, ... mental disability ....; 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." ; and 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 ... color, race, ... or physical disability."

investigator's certification, dated December 20, 2010. After mandatory efforts to resolve the dispute by mediation failed, and in accordance with section 46a-84, the investigator certified the affidavit, on or about December 20, 2010, to the executive director of the Commission and the Attorney General. The Commission, thereafter, sent the affidavit to the Office of Public Hearings ("OPH") for a de novo hearing pursuant to section 46a-84.

On January 14, 2011, the Chief Human Rights Referee issued the required Notice of Contested Case Proceeding and Hearing Conference, assigned the case to Jon P. Fitzgerald as Presiding Human Rights Referee ("presiding referee").[2] On January 18, 2012, the case was reassigned to the undersigned presiding referee, Alvin R. Wilson, Jr. All statutory and procedural prerequisites having been satisfied, the complaint is properly before for this tribunal for hearing and decision.

The public hearing was held on April 4 and 5, 2013. Attorney Donald L. Williams, appeared on behalf of the complainant. Assistant Attorney General Josephine Graff, appeared on behalf of the respondent.[3] Thereafter, the parties filed post-hearing briefs, on or about May 31, 2013. Subsequently, no post-hearing reply briefs were filed and the record was closed.

Waiver of Claims

The complainant's post-hearing brief does not appear to address, in a substantive manner, either the reasonable accommodation claim or the retaliation clam. Pursuant to Regulation 46a-54-93a (closing arguments and briefs), "[t]he presiding officer may deem the failure to brief any claim to be

[2] Cases presided over by human rights referees ("referees") are contested cases as defined by the Connecticut Uniform Administrative Procedures Act ("UAPA"), section 4-16, et seq. various provisions of the Connecticut Fair Employment Practices Act ("CFEPA"), section 46a-51, et seq., and the respective regulations issued in accordance with those statutory sections. Although referees are appointed by the governor and confirmed by the general assembly, referees are granted the same powers that "hearing officers" and "presiding officers" appointed by an agency head are granted under the UAPA (see section 46a-57(b)), as well as powers granted by the CFEPA.

[3] After having determined that the interests of the state would not be adversely affected by having the complainant, or his attorney, present all of the case at public hearing, on or about May 31, 2012, the commission counsel assigned to this case deferred prosecution to complainant's counsel, pursuant to section 46a-84(d). The commission, subsequently, did not appear at the public hearing.

a waiver of said claim." It follows that where a complainant's post-hearing brief contains a cursory analysis, the referee may consider that effort a failure to brief the claim.

In this instance, the undersigned deems the retaliation claims waived. This decision will address the remaining claims in the affidavit -- sections 46a-60(a)(1) and 46a-58(a), as based upon a violation of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 12101 et seq.[4]

Findings of Fact

The following facts relevant to this decision are found from the evidence and testimony adduced at public hearing, the complaint, the answer and an assessment of the credibility of each witness:

1. The complainant, Michael Howard (African American), was hired by the respondent, the Connecticut Department of Transportation, as a Maintainer 2, effective January 30, 1989. Respondent Exhibit 1 (hereinafter referred to as "R-#"); Transcript p.7 (hereinafter referred to as "Tr. #"). (Additionally, the complainant's exhibits will be referred to as "C-#".)
2. While working for the respondent, the complainant was the subject to disciplinary action, including termination, on a number of occasions. R-2.
3. On August 30, 2005, the complainant signed a stipulated agreement that included a last chance agreement ("2005-LCA"). This stipulated agreement was "made in full and final settlement of the issues surrounding the complainant's second unsatisfactory service rating

[4] The respondent's argument, in its post-hearing brief, that the Office of Public Hearings ("OPH") lacks jurisdiction to hear a claim bought pursuant to section 46a-58 is incorrect. Subsection (a) of that statute states "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." Subsection (c) of section 46a-86 authorizes each human rights referee to award damages for a violation of section 46a-58. The language of section 46a-58, inter alia, transforms the substantive provisions, but not the remedy provisions, of federal law into its section for enforcement. See Trimachi v. Conn. Workers Comp. Comm., 2000 WL 872451 (Conn. Supr. Ct., June 14, 2000); see also CHRO ex rel. Barbara Dubois v. Maharam Fabric Corp., CHRO consolidated cases 0920414 and 1120319, ruling on motion to dismiss, dated July 9, 2013.

covering the period September 1, 2004 through August 31, 2005. R-28. Paragraph 1 of this agreement stated,

> In lieu of termination from state service, Michael Howard agrees to accept the terms and conditions set forth in this **Last Chance Agreement.** Mr. Howard acknowledges and understands that **ANY** further fact-findings that result in **ANY** disciplinary action beyond a counseling will result in his termination from State service. Mr. Howard also acknowledges and understands that his failure to comply with any terms and conditions of this agreement will also result in his termination from State service. (Emphasis in original.)

4. On May 16, 2008, Wanda Seldon, the assistant agency personnel administrator for the respondent, issued a letter of termination to the complainant that became effective June 2, 2008. The reason given for this action was his violation of his 2005-LCA. Specifically, "it was determined that on March 18, 2008, [Mr. Howard] was observed by [his] Transportation Maintenance Director [Jeffrey Wilson] picking up litter on I-395 ... without [his] safety vest or headgear on." R-30.
5. The complainant filed a CHRO complaint, dated June 10, 2008, claiming that he was terminated because of his race. Affidavit ¶ 3.
6. On August 29, 2008, the complainant signed a stipulated agreement ("2008-LCA") which, inter alia, stated in lieu of termination, he would receive a letter of warning and that –

> In consideration of this Agreement, Mr. Howard and the Union hereby withdraw any and all grievances, prohibited practices complaints, discrimination (CHRO and EEOC) complaints, lawsuits and any other legal or administrative actions filed on behalf of the Grievant. This agreement resolves all outstanding issues involving the Greivant and extinguishes any claims he may have. This includes but is not limited to OLR No. 06-14662.

It also stated that the 2005-LCA was incorporated into the 2008-LCA. In addition to the complainant, this agreement was executed by a representative of the complainant's union, a representative for the state office of labor relations, and by Seldon, on behalf of the respondent. R-31. Tr. 255 and 256.

7. The complainant worked in the respondent's Waterford garage from 2005 to 2009. He was terminated, effective February 2, 2009, for violating the 2008-LCA. See R- 36 and Tr. 48.
8. On November 17, 2008, the complainant and a crew from the Waterford garage were assigned to repair a flex beam. When a crew member, Kevin Rowley, a DOT maintainer 2,

arrived on the site, he told the complainant that more signs were needed to safely secure the work area. The complainant disagreed with Rowley's assessment. Rowley then called Brian Brouillard, the crew's supervisor, and told him that the work site was unsafe and required more signs but that the complainant would not get them. Tr. 198-202. Rowley asked Brouillard to come to the work site. Tr. 340.

9. Brouillard arrived at the worksite and determined that there were insufficient signs. He called the crew together and told them that they were not to work until the necessary signs had been secured and were in place. At first, Brouillard directed the complainant to return to the garage and obtain the necessary signs, but after the complainant made a remark, in front of the crew, that Brouillard perceived to be disrespectful, he nicely told the complainant to return to the garage and await further instructions. Tr. 108 and Tr. 343-344.
10. Before discipline is imposed, the collective bargaining agreement for maintainers (NP-2 maintenance labor contract) requires that a fact finding investigation be conducted. Tr. 315. Once a fact finding is complete the appropriate managers and human resources personnel review and provide recommendations for discipline. Seldon is responsible for reviewing the matter, including the recommendations, and issuing the final discipline to an employee. Tr. 249-254.
11. As a result of the November 17, 2008 events, the respondent subjected the complainant to an investigation into his actions ("a fact finding investigation") to determine if any discipline was appropriate. The fact finding meeting occurred on November 24, 2008 and was conducted by Cosmo Ignoto, the transportation maintenance manager responsible for, inter alia, the Waterford garage. R-34. On December 1, 2008, Ignoto recommended that the complainant be issued a written warning for his alleged failure to bring the appropriate signs to the work site. R-54. On December 1, 2008, Jeffrey Wilson, the transportation maintenance director, recommended that the complainant be terminated because he concluded that the complainant's actions resulted in a violation of the 2005-LCA and the 2008-LCA. Id. On December 16, 2008, Seldon approved the termination decision. Id.
12. On December 18, 2008, Wilson spotted a state owned 9-ton dump truck parked at Scott's Orchard, a privately held business. Wilson determined the truck was assigned to the complainant and saw him inside the store. After exiting the store, the complainant told

Wilson that he was seeking to obtain free pumpkins to attract deer, so that his daughter could observe them feeding at their home. Wilson told the complainant that was not an acceptable use of state time or equipment and that a fact finding investigation would be held to determine if discipline was warranted. Tr. 50 and 321. R-35. Affidavit ¶ 8.

13. On January 2, 2009, Ignoto conducted a fact finding meeting regarding the Scott's Orchard incident. On January 5, 2009, Ignoto issued his recommendation that the complainant receive a written warning for the incident. On January 6, 2009, Wilson recommended that the complainant be terminated because he was in violation of the 2005-LCA and the 2008-LCA. R-35. R-55.
14. By letter dated January 20, 2009, the respondent terminated the complainant's employment, effective February 2, 2009. Seldon signed the letter. The stated reason for the termination was respondent's conclusion that the complainant had violated the 2005-LCA and the 2008-LCA, based on the results of the fact finding investigations conducted into the November 2008 and December 2008 incidents. R-36.
15. After Brouillard became the complainant's supervisor at the Waterford garage, on or about 2006, the November 17, 2008 signage incident was the only time that Brouillard accused the complainant of any behavior that could have resulted in the need for a fact finding investigation and the potential for a determination that the complainant had violated his 2005-LCA or his 2008-LCA. R-2 and affidavit ¶¶ 6 and 7.
16. Brouillard attended dinners at the Jewett City French Club with persons affiliated with the local little league baseball. While attending these dinners, other state employees that are local residents may have been at the club. He also was present at a dinner at the local fire station, attended by over a hundred people. Tr. 352-353.
17. Wilson did not attend steak dinners with DOT employees. Nor was he disciplined or investigated by the respondent for inappropriate use of a state vehicle. Tr. 324-327.
18. After the complainant was terminated, his coworker and union steward, Isaiah Holloway told Brouillard that his treatment of the complainant could be perceived as discriminatory, but he did not think that Brouillard treated other African American employees in the same manner. Holloway refused to provide Brouillard with a letter stating that Holloway believed that Brouillard's treatment of the complainant was not discriminatory. Tr. 139-140.

19. On or about December 9, 1999, the respondent issued a memorandum regarding "Enforcement of Safety Practices and Policies." R-40. That memorandum stated, in relevant part --

> Employees are expected to properly wear the safety protective equipment which is provided by the Department under the appropriate circumstances.... Accordingly, effective immediately, all employees are herewith advised that the disciplinary enforcement of our safety policies and procedures will be conducted more rigidly. This means that the appropriate discipline will be applied to each violation, with a minimum of a written reprimand issued for less serious offenses and suspensions, demotions, and/or dismissals for the more serious safety violations ....

20. Respondent's employee handbook, dated June 1999, section regarding "Use of State Time, Vehicles, Equipment, and Supplies," states in relevant part, "Do not do personal errands or park the vehicle in inappropriate places." R-41. This section of the handbook refers a reader to the respondent's personnel memorandum 96-2, regarding "Employee Responsibilities Regarding Usage of State Time, Equipment, supplies and Materials." Tr. 373. The March 8, 2010 version of this memorandum, R-38, contained no substantive revisions to the June 14, 1996 version. Tr. 367-369. The respondent also issued a policy, on or about March 25, 1999, titled "Policy on Employee Use of Department Resources for Personal Reasons is Prohibited." It stated relevant part that, "[i]t is the policy of the Department that no employee shall use State time, equipment, or materials for other than State business purposes, including but not limited to computers; telephones; and State vehicles." R-39.

21. Between December 10, 2008 and December 16, 2008, the complainant gave Cosmo Ignoto, transportation maintenance manager, a one-page letter from Dr. Joseph A. Amatruda, dated December 10, 2008 (C-2 and R-46) that stated, in relevant part –

> Mr. Howard has been seen by me ... on June 16, 2008 and December 10, 2008. Mr. Howard has experienced acute stress related to what he describes as a hostile work environment in the Waterford Garage. Consequently, Mr. Howard has experienced an increased level of anxiety which has impacted his family life and general sense of well being. (sic) In this regard, I am supportive of his request to be transferred to the Wells Street facility in Groton, which he believes would significantly improve his ability to perform his work duties and reduce the level of stress and anxiety which has been apparent in our meetings.

22. On or about December 16, 2008, Catherine A. Brown, principal human resource specialist, with the respondent, sent a reply letter to Amatruda, seeking information regarding his

diagnosis of the complainant in order to determine if Mr. Howard had any physical or mental limitation that would preclude him from performing any of his job functions. The letter stated that Amatruda's conclusions were "of great concern to the Department due to the type of work Mr. Howard performs." The letter requested a reply as soon as possible. R-47.

23. Amatruda sent a reply letter to Brown, dated January 9, 2009. He indicated in his response that he "defer[s] to your department to make a determination that addresses your concerns, and the employee's wish to continue working within the DOT." Amatruda directed Brown to contact the complainant's primary care physician for "potential medication side-effects and/or underlying medical conditions ..." and any impacts that may have on his ability to perform his job duties. R-48.
24. During the complainant's nearly two decade tenure with the respondent, at unspecified times and frequency, he and unidentified coworkers engaged in "name-calling" (i.e., the use of course language) to liven up the work atmosphere. The terms "moolie" and "hymie" were among the terms used. On one occasion, Brouillard was present when the term "moolie" was uttered. Tr. 57-59.
25. Brouillard treated some employees more favorably than others when it came to (1) assigning equipment and (2) subjecting them to fact finding investigations and potential discipline for damage to state property. His conduct upset the majority of the workers that reported to him. Tr. 109-119.

Discussion and Conclusions

The presiding referee has reviewed the pleadings and the evidence offered at the hearing, and has weighed the credibility of each witness to determine whether sufficient evidence has been adduced to satisfy the burden of establishing a violation of any of the claims alleged in the complaint. For the following reasons, I find that the complainant has not satisfied his burden with respect to any of his claims. Accordingly, his complaint is dismissed.[5]

[5] For any respective claim made, "[t]he presiding [referee] may, on his or her own or by motion of a party, dismiss a complaint ... if the complainant or the commission: ... fails to sustain his or her burden after presentation of the evidence." Regulation 46a-54-88(d).

Section 46a-60(a)(1) claim and Section 46a-58(a) claim based on Title VII violation –

The applicable test for a disparate treatment claim, brought under either section 46a-60(a)(1) or section 46a-58(a) -- based on the substantive provisions of Title VII -- is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1983) and its progeny. "Under this analysis, the employee must first make a prima facie case of discrimination. The employer must then rebut that case by stating a legitimate, nondiscriminatory justification for the employment decision in question. Once the employer has done so, the employee must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." Craine v. Trinity College, 259 Conn. 625, 637 (citing McDonnell Douglas Corp., at 802-804). The complainant must prove by a preponderance of the evidence that reason offered by the respondent is pretextual. Levy v. CHRO, 236 Conn. 96, 108 (1996). "This methodology is intended to provide guidance to fact finders who are faced with the difficult task of determining intent in complicated discrimination cases. It must not, however, cloud the fact that it is the [complainant's] ultimate burden to prove that the [respondent] intentionally discriminated against [him] ...." Id. (citations omitted).

Therefore, when a plaintiff alleges disparate treatment, liability depends on evidence that the alleged protected trait actually played a role in the employer's decision making process and had a determinative influence on the outcome. Reeves v Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000). "The principal inquiry in a disparate treatment case is whether the plaintiff was subjected to different treatment because of his or her protected status." Levy, 236 Conn. at 104. The complainant "must produce sufficient evidence to remove the [fact finder's] function from the realm of speculation." Craine, 259 Conn. at 636 (citation omitted).

To satisfy his obligation to establish a prima facie case on the race, color and disability claims (violations of sections 46a-60(a)(1) and 46a-58(a)), the complainant must show that: (1) he belongs to a protected class; (2) he was qualified for the position held; (3) he was discharged; and (4) the discharge occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class. This burden is minimal and is not the level of proof required to establish a violation of the law. Id. at 638 (citation omitted). "The burden of establishing a prima facie case is

a burden of production, not of proof, and therefore involves no credibility assessment by the fact finder." Craine at 638 (citing Reeves at 142).

There is no dispute the complainant has met the first three prongs of his prima facie case of race or color discrimination – he is an African-American, is black, is qualified, and was terminated. Regarding the question of whether the record contains evidence that satisfies the fourth prong, the complainant's post-hearing brief does not reference the analytical framework that has developed in the wake of the McDonnell Douglas decision and its extensive progeny. Nor does it analyze the evidence presented in a manner consistent with that framework. This tribunal, therefore, must glean what evidence adduced may be relied upon to satisfy the last prong -- that his termination occurred under circumstances that give rise to an inference of discrimination based on his race or color.

The complainant testified that (1) sometime prior to 1998 (over a decade before the salient events alleged in the affidavit), his supervisor and foreman engaged in favoritism and nepotism, respectively, Tr. 27-32, (2) unspecified coworkers at the Waterford garage used the terms "klan," "grand poobah" and "grand wizard" to described their supervisors, managers, and directors that allegedly attended segregated dinners,[6] Tr. 15-16, (3) he complained about the use of such terms to the respondent's affirmative action department sometime between 2003 and 2008,[7] Tr. 95, and (4)

[6] The affidavit of discriminatory conduct filed in this matter does not contain any allegations of the use of these terms by any employee of the respondent. Additionally, two witnesses called by the complainant, Isaiah Holloway and Nancy Skorenki, who worked in the Waterford facility with the complainant, neither were questioned about nor provided any testimony to corroborate the use of such language in the Waterford garage or the convening of such dinners. Additionally, respondent called two witnesses - Patrick Perkins and Kevin Rowley - who were the complainant's coworkers during his the entire tenure at Waterford. Perkins was asked no questions by either counsel about the use of the terms klan, grand poohbah or wizard, nor was he asked about the alleged exclusionary dinners. Rowley testified that he never heard such terms used and was not questioned about the dinners. Tr. 205.

[7] However, the complainant did not submit any additional evidence to confirm that he logged such a complaint. Additionally, on cross-examination, when first asked if he complained to respondent's affirmative action department or anyone at the DOT about these remarks, he said he had, Tr. 95, but then when directly asked again twice, his reply did not indicate that he had done so. (Tr. 96-97 and 98-99.)

another supervisor allegedly witnessed and countenanced the use of the word "moolie," -- that the complainant testified was equivalent to the word "nigger."[8] Tr. 57-59.

Additionally, Isaiah Holloway, complainant's co-worker and union steward, testified that the complainant and his supervisor, Brouillard, had an adversarial and negative relationship and that Brouillard "had it out for" the complainant. Tr. 133-134. Holloway also testified that, in his opinion, "[i]f Mr. Howard was lighter skinned with blue eyes and blond hair, we would not be here today [at the public hearing]." Tr. 114. Lastly, Nancy Skorenki, complainant's co-worker, testified that the complainant, Holloway, and three others told her that Brouillard did not want her working in his garage and under his supervision Tr. 127-128. Skorenki also testified credibly that Brouillard handled the assignment of equipment and the reporting of accidents resulting in damage to department property and equipment in an unfair manner. Tr. 110-115.

Given the minimal burden necessary to succeed at this stage of the review, I conclude that this evidence, collectively, is sufficient to establish the fourth prong of the test. The complainant has satisfied his burden of production regarding his prima facie case under the McDonnell Douglas framework. By satisfying this burden, the complainant "is then aided by a presumption of discrimination unless the [respondent] proffers a legitimate, nondiscriminatory reason for the adverse employment action, in which event, the presumption evaporates ...." Berube v. Great Atlantic & Pacific Tea Co., Inc., 2010 WL 3021522 (D. Conn 2010) (quoting McPherson v. New York City Dept. of Education, 457 F.3d 211, 215 (2d Cir. 2006). The burden, therefore, now shifts to the respondent to offer evidence of a legitimate, nondiscriminatory business reason for terminating the complainant's employment.

---

[8] The complainant testified that on at least one occasion Brouillard "turned beet red" when he witnessed an employee using the term to refer to the complainant. Tr. 59. "Moolie" is said to have originated from the word "moulinyan," which means eggplant in an Italian dialect. The affidavit of illegal discriminatory conduct filed in this matter does not contain an allegation of the use of this, or any other, racially derogatory term by any employee of the respondent. Neither Holloway, Skorenki, nor Perkins were asked if they had witnessed any employee of the respondent use the word moolie. (See supra footnote 6.) Rowley testified he never heard anyone at the Waterford garage utter the word. Tr. 205.

Respondent's Legitimate Non-Discriminatory Reason for Terminating the Complainant's Employment

After the complainant has established a prima facie case of discrimination, the respondent has the burden of producing "'through the introduction of admissible evidence', reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 and n.8 (1981)). To satisfy this burden, "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at 257.

The Respondent offered evidence that its legitimate non-discriminatory reason for complainant's termination was that he had violated his 2008-LCA.[9] The respondent established that it reached this conclusion after conducting investigations consistent with its practices and procedures to determine whether the complainant had (1) failed to provide adequate signage for a work site and/or (2) violated the respondent's policy prohibiting the improper use of a state vehicle and state time.

I conclude that respondent satisfied its burden. The complainant must now provide evidence that the respondent's reason was a pretext and that his race, color, or alleged disability actually played a role in the employer's decision to terminate him. Reeves v Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000).

Evidence of Pretext and Discriminatory Animus

For the following reasons, I find that the complainant has failed to produce evidence sufficient to support a conclusion that the reasons offered by the respondent for his discharge were not worthy of credence. Furthermore, I conclude that the evidence proffered by the complainant, when carefully reviewed, is insufficient to find that any individual responsible for respondent's decision to

[9] "A last chance agreement is a stipulation that the Department enters into with the employee in their Bargaining Unit to resolve an outstanding issue. Typically , ... it means there's a recognition that this is the last chance that the person is going to get, and if they violate a policy, or procedure, ... they would be terminated." Tr. 376-377 (Testimony of Vicki Arprin, respondent's agency human resources administrator.)

terminate the complainant because he violated his 2005-LCA and 2008-LCA possessed a discriminatory animus based on race, color, or disability.

Specifically, there is no evidence that Wilson, possessed a discriminatory motive when he requested an investigation to determine if the complainant should be disciplined for violating DOT policies after Wilson, by happenstance, witnessed (1) on March 18, 2008, the complainant working without required safety gear along the highway and (2) on December 18, 2008, a DOT truck parked in front of a retail establishment and subsequently determined there was no legitimate work reason for it to be at that location.[10] Further there was no evidence that Wilson possessed a discriminatory motive when he recommended that the complainant be terminated following fact findings meetings held on November 24, 2008 and January 2, 2009, respectively. See R-54 and R-55. Lastly, there is no evidence that Wilson exhibited any discriminatory animus during his nearly three decade tenure at the DOT.[11]

To the extent that the complainant is arguing that he was discriminated against in terms and conditions of employment following accusations by Wilson that he violated the respondent's policy regarding the improper use of a state property and time on December 18, 2008, both the complainant and Isaiah Holloway, the complainant's coworker and union steward, testified that certain activities (e.g., personal hygiene breaks, beverage breaks) are not considered violations of the policy. But they both also testified that other types of personal errands are permitted by the respondent – using state time and vehicles -- if they are of short duration. Tr. 51-53 and 136-137.

---

[10] Although, the complainant argues that, along with Wilson, his supervisor Brouillard was "directly responsible for [his] termination" for the March 2008 incident (see complainant's post-hearing brief at p.3), there is no evidence that Brouillard had any role in that decision. Furthermore, Brouillard's only involvement in the December 18 incident was responding to Wilson's inquiry about who was assigned to the truck Wilson saw parked at the store, before he saw the complainant through the store window and signaled him to come outside. See R-35.

[11] Seldon testified that during the approximately 20 years that she worked with Wilson, that while they "don't always see things eye-to-eye ...," she found him to be fair and has never received a complaint that he has discriminated against a person because of race. Tr. 278.

However, these assertions are in direct conflict with Respondent's personnel memorandum 96-2, and its employee handbook, dated June 1999. See R38 and R-41. The handbook's "Use of State Time, Vehicles, Equipment, and Supplies," states, in relevant part, "Do not do personal errands or park the vehicle in inappropriate places." Id. Although, the testimony suggests that unidentified employees, including managers and supervisors, violate the policy, the evidence does not support the conclusion that Wilson permits some employees to avoid discipline, while punishing others. Such evidence could be the basis of an inference that Wilson may harbor a discriminatory motive in the instant case; however, none was offered.[12]

To establish that Wilson possessed the requisite motive, the complainant testified that Wilson attended "steak nights" – events that purportedly occurred periodically over 2 decades and to which allegedly only Caucasian employees, supervisors, and managers were invited.[13] Tr. 13. Wilson testified that he never attended such events. Tr. 325-326. The complainant presented no reliable evidence to refute Wilson's testimony.

Next, the complainant implied that Wilson's participation in fact finding investigations about the complainant – as an eyewitness in two instances and in his role as a maintenance director in others

---

[12] To the extent that the complainant is attempting to assert that Wilson discriminated against him in terms and conditions of employment in connection with the discipline he was issued after being spotted without his safety gear on in March 2008, in violation of the respondent's personnel memorandum no. 99-3, regarding the enforcement of safety practices and policies, the same reasoning applies. See R-40.

[13] Managers and supervisors allegedly treated the employees who attended these segregated dinners more favorably while at work. Tr. 13. The complainant's testimony -- based upon statements allegedly made to him by unidentified coworkers – was, in essence, that these dinners took place with some unspecified regularity, were attended by crew leaders, foremen, managers, and co-workers. He specifically identified Dan Turisi, Roland Gauthier Sr., Brian Brouillard, Lester Davis, Jeff Wilson, Jim Wilson, Gordon Coates, Roland Gauthier Jr., Bob Candolis, Rich Kustoliac, Kevin Darling, Tom Howard, Mike Grenada, Jerry Sullivan. Tr. 17, 92 -94. He testified that African-Americans were never invited, Tr. 13, and that "[o]ne individual was told the he could come but he had to come through the back door." Tr. 15. Although evidence was presented that, during 2002, the complainant filed a complaint with the respondent's affirmative action office alleging that his supervisor in the Groton garage, Willis Clark, treated him unfairly because of the color of his skin, Tr. 285-292, no complaints were filed regarding the allegedly discriminatory dinners. Tr. 94. There are no allegations of this nature in the complainant's affidavit of illegal discriminatory conduct.

– established that Wilson had a discriminatory bias. The facts do not support this conclusion. Wilson's job responsibilities require that he review and make recommendations in all fact findings investigation regarding employees working in the DOT district that he manages. Tr. 303.

Wilson's role as a witness during the investigations into the March 2008 and December 2008 incidents likely influenced the respondent's decision that discipline was warranted. Additionally, his recommendation that the complainant actions in November 2008 and December 2008 warranted termination under the terms of his 2005-LCA and 2008 LCA undoubtedly were given great weight by the respondent. However, in the existing disciplinary structure, Wilson was not the final decision maker. Tr. 304. Senior managers in the respondent's human resource department review each recommendation and make the final determination regarding the appropriate level of disciplinary action. Tr. 304-305. There was no evidence offered that Seldon possessed a discriminatory motive when she approved the recommendation for termination in January 2009.

Next, this tribunal closely scrutinized the complainant's evidence regarding his supervisor, Brian Brouillard. Similar to Wilson, Brouillard's role as a witness, during the disciplinary investigation of the complainant's alleged failure to secure and utilize the appropriate signage, likely carried significant weight with those involved in the respondent's decision making process to discharge the complainant.[14] However, under the process utilized by the respondent to discipline employees in complainant's bargaining unit, Brouillard was not ultimately responsible for the decision to discharge the complainant.

The complainant testified to a work environment where coworkers would engage in a "name-calling thing" to liven up the atmosphere.[15] Tr. 57. It was in this context that he revealed that, on one

[14] It is noteworthy, that while the arbitrator who denied the complainant's grievance, on July 31, 2012, concluded that the improper signage incident did not provide a sufficient basis for DOT to discipline the complainant, he determined that the complainant's violation of the respondent's policy regarding the use of state property and time was enough to support the February 2009 termination decision. See Comp. exh 1, pp. 17-24.

[15] Of the name calling, he testified, "I didn't think nothing of it, you know? We all had names going around. One of the guys was called – he was Jewish and they used the name Hymie. Later I found

occasion, Brouillard witnessed an unidentified employee call the complainant "moolie" and turn "beet red in the face laughing." Tr. 58-59. The complainant testified that there was a time when he did not understand the term to be racially offensive. Tr. 57-59. While the complainant stated that a co-worker, subsequently, told him that "moolie" was racially derogatory, Tr. 58, there was no evidence offered that he communicated to Brouillard, the respondent's affirmative action office, or any other manager, any concerns about his coworkers' using offensive terms and that his concerns were ignored.

The complainant testified that he and unnamed coworkers discussed that Brouillard, and other employees of the respondent organized and attended numerous dinners, throughout his 20 year tenure, from which black employees were excluded. Tr. 91-92. No witnesses were called by the complainant to corroborate this testimony. When asked about this on direct examination, Brouillard admitted that as the little league chapter vice president, he attended dinners at the Jewett City French Club, with colleagues from the little league, and that local residents who were also state employees may have been at the club on those occasions. He also testified that he, along with more than 100 individuals attended a dinner, possibly a fundraiser, at the Jewett City firehouse. Tr. 352-353.[16] On cross-examination, Brouillard was asked no questions about these dinners. I conclude that there is insufficient evidence to establish that any discriminatory dinners where convened or attended by Brouillard.

---

out what moolie was." The complainant did not specify who used either of these derogatory terms. There was no evidence offered that Brouillard, or any other supervisor or manager, used such terms.

[16] The exact testimony was–

Q – Have you ever attended a steak dinner with employees from the Department of Transportation?
A – Yes.
Q – How many times have you done that?
A – One time with the Fire Department, and there were a few steak dinners at the Jewitt City French Club I was associated with. I was the Vice-President of the Jewett City Little League, and it was my associates with the Little League that went to the French Club for steak dinners, and there may have been a few State employees there that lived there that were local residents.
Q – How many people were at the steak dinner that you went to with the Fire Department?
A – One hundred and twenty, one hundred and fifty, maybe.
Q – And those were not all DOT employees?
A – Correct.

Next, the complainant testified that Brouillard subjected him to an excessive and unfair degree of disciplinary actions, after becoming his supervisor at Waterford.[17] The complainant's work history is devoid of any disciplinary action from July 2005 through December 2007. R-2. In January and February 2008, the complainant received oral counseling on a total of four occasions. Id. Such counseling did not subject the complainant to termination under the terms of the 2005-LCA. It was not until, March 18, 2008, when Wilson witnessed the complainant working without the required safety gear, that he was subjected to disciplinary action. There is no evidence that Brouillard was involved in this episode. Subsequently, the complainant was terminated effective June 2, 2008, but under the terms of his 2008-LCA, he was reinstated.

The evidence reveals that after Brouillard began to supervise the complainant at the Waterford garage, only once did he take action that subjected the complainant to possible discipline, including termination. This was in November 2008, after the complainant's alleged failure to secure the proper signage and his alleged use of a disrespectful tone. The evidence does not support a conclusion that Brouillard disciplined the complainant either excessively or in a discriminatory manner.

Isaiah Holloway, testified that Brouillard and the complainant had an adversarial and antagonist relationship and that Brouillard "had it out for Michael.... did not get along with Michael whatsoever...."[18] Tr. 133-134. Holloway also believed, and expressed to Brouillard after the

---

[17] The complainant testified he worked at the Waterford garage from 2005 to 2009. Tr. 46-48. Broulliard testified that he arrived at Waterford "2005, 2006. Somewhere in there." Tr. 340. After a thorough review of the record, neither party nor any of the other witnesses offered additional evidence to accurately define these dates.

[18] The undersigned could not find support for the characterization, contained in the complainant's post-hearing brief, p. 8., that "Holloway testified that he and virtually the entire Waterford garage were aware of Brouillard's hatred for the complainant, and personally informed Brouillard that his actions and conduct toward the complainant were border racism. [Tr. 133]." Notably, although the complainant testified that the majority of his co-workers commonly used the terms "klan", "grand poobah", or "grand wizard" to refer to supervisors and upper management, Tr. 97-98, and used other racially derogatory language, neither Holloway nor the complainant's other witness and coworker, Nancy Skorenki, were asked whether they observed this behavior. Also, neither was asked if they (1) had witnessed any managers using or countenancing of the use of any discriminatory language or (2) had knowledge of employees discussing or attending dinners – "Italian or Steak

complainant was discharged, that Brouillard's actions toward the complainant could be perceived to be discriminatory. Tr. 139. Holloway also testified that when he was approached by Brouillard to provide a letter indicating that Brouillard did not discriminate against the complainant, he declined to do so. Tr. 140. However, Holloway also testified that while he perceived Brouillard to nitpick the complainant, he did not act that way toward Holloway or other black employees. Tr. 139-140. This testimony lacks details of specific actions taken by Brouillard from which to infer either disparate treatment or a discriminatory animus based on race, color, or disability.

Of note, on cross-examination, Brouillard was asked about only one matter – a complaint filed by an employee that he supervised, David Deckler, alleging that Brouillard threatened him. When asked whether Deckler's complaint alleged that Brouillard called him a "Hymie Jew," Brouillard replied no. Tr. 358 and 359. The complainant did not offer Deckler's complaint, or any other evidence, related to the respondent's investigation of that incident.[19] There is no proof that Deckler made such a claim, or that Brouillard ever made the statement. Furthermore, when counsel for the complainant asked Seldon whether she was aware of such a complaint and fact finding investigation, her response was "no". Tr. 298.

This tribunal also considered Nancy Skorenki's testimony about Brouillard; he was her supervisor as well.[20] She was the complainant's coworker in Waterford from March 2008 until he was discharged

---

Nights" -- with other coworkers and managers, including Brouillard, from which minority employee were excluded.

[19] Although the complainant testified generally that it was well known, for a real long time, how district 2 managers treat minorities, Tr. 96, he failed to produce evidence of any complaints made by any DOT employee, alleging that Brouillard had engaged in illegal discriminatory conduct.

[20] The complainant's post-hearing brief, at page 9, claimed that Skorenki testified that Brouillard "has a problem with minorities," and cited Tr. 110. The undersigned could not locate such a statement anywhere in her testimony. She was asked on direct examination by counsel for the complainant if she had "an opinion as to whether or not ..., in 2008, were acts of discrimination or unfairness ... exhibited by ... Brouillard." Tr.116. She did not answer that question, but instead digressed to an explanation of how she has seen improper signage patterns at various locations around the state, despite the fact that the respondent provides books designating the proper patterns for each work site. She did not testify, however, that Brouillard has witnesses crews that he supervised using improper sign patterns and failed to hold the responsible employee accountable. Tr. 116-118.

in February 2009. Her testimony essentially was that (1) five coworkers (including the complainant, Holloway, Mark Moore, and two unspecified employees) told her that Brouillard was biased against her and did not want her working in Waterford, Tr. 127-128; (2) he "favored certain individuals," Tr. 109, 110, 112, and 115; (3) it seemed her coworkers in the garage were upset all the time with Brouillard, Tr. 109-110; (4) Brouillard's decision to assign a "Bobcat" (a piece of heavy equipment) to an employee upset a number of his direct reports; the majority of whom were white males with more seniority than the favored employee, Tr. 110-111 and 118-119; and (5) Brouillard subjected her to discipline, but not one of her male co-workers, although both damaged state property while on the job, Tr. 112. While this evidence demonstrates that Brouillard treated his employees unfairly, it does not establish a discriminatory animus based on race, color or disability.

Although the complainant asserted Brouillard subjected him to a hostile working environment for many years, I conclude that the evidence, in sum, is insufficient to find that Wilson, Brouillard, or any other individual involved with or arguably responsible for the respondent's decision to terminate the complainant in February 2009 possessed a discriminatory animus based on race, color, or disability.

Reasonable Accommodation Claims

Next, this tribunal turns to the complainant's reasonable accommodation based disability discrimination claims[21] brought under section 46a-60(a)(1) and the Americans with Disabilities Act

---

[21] Pursuant to Regulation 46a-54-93a (Closing arguments and briefs), "[t]he presiding officer may deem the failure to brief any claim to be a waiver of said claim." It follows that where a complainant's post-hearing brief contains a cursory analysis, the referee may consider that effort a failure to brief.

Notwithstanding the failure of the complainant to brief the reasonable accommodation claims, the undersigned has elected to address them. In doing so, the undersigned does not consider whether the record contains evidence sufficient to establish that complainant has satisfied his obligation to prove his prima facie case. It is assumed, arguendo, that this burden has been met. It should be noted, however, that complainant's allegation is that his supervisor's treatment of him caused his disability. One of the complainant's physicians, Dr. Ciotola, concluded that the disability was situational and recommended a job transfer as an accommodation. If the condition is situational, it

("ADA"), as enforced through section 46a-58(a).[22] Both the CFEPA and the ADA provided that no employer shall discriminate against a qualified individual with a disability because of the disability. Section 46a-60(a)(1) and 42 U.S.C. § 12112(a). "The term discriminate includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.... 42 U.S.C. sec. 12112(b)(5)(A)." Ezikovich v CHRO, 57 Conn.App. 767 (2000) at 774 (Internal quotation marks omitted).

On a reasonable accommodation claim, the complainant must produce enough evidence to allow the fact finder to find that (1) the employer is a covered entity, (2) he is disabled within the meaning of the applicable statute, (3) he was able to perform the essential functions of the job with or without a reasonable accommodation, and (4) the employer, despite knowing of the complainant's disability, did not reasonably accommodate it. See Festa v Board of Educ. of Town of East Haven, 145 Conn. App. 103, 114 (quoting Curry v. Allan S., Goodman, Inc., 286 Conn. 390, 416-417 (2008) (citations omitted); Ezikovich v CHRO, 57 Conn.App. 767, 774 (2000) (quoting at Lyons v. Legal Aid Society, 68 F.3d 1512, 1515 (2d Cir.1995)); and CHRO ex rel. Saksena v. Conn. Dept. of Rev. Services, CHRO No. 9940089, Memorandum of Decision (August 9, 2001). "If the employee has made such a prima facie showing, the burden shifts to the employer to show that such an accommodation would impose an undue hardship on its business." Festa, 145 Conn.App. at 114 (quoting Curry, 286 Conn. at 417).

Evidence of disability discrimination includes the failure of an employer to provide a reasonable accommodation to an employee. Curry, 286 Conn. at 416-417. The CFEPA requires an employer to engage in an informal, interactive process with the qualified individual with a disability who has requested an accommodation. Festa, 145 Conn. App. at 114-115 (See also Curry, 286 Conn. at 416-417. The purpose of the interactive process is to determine whether a reasonable accommodation

---

raises questions as to whether it is a qualifying disability under Connecticut law. Additionally, there was no evidence proffered that the alleged disabling conditions interfered with the complainant's ability to perform the essential functions of his job.

[22] Although these are state law claims, the Connecticut Supreme Court has stated that "[w]e review federal precedent concerning employment discrimination for guidance in enforcing our own antidiscrimination statutes. See Perodeau v. Hartford, 259 Conn. 729, 738 (2002); Levy v. CHRO, supra, 236 Conn. at 103. (citations omitted)." Curry, 286 Conn. at 415.

exists that will permit the employee to perform the essential functions of his job. The employer and the employee must engage in good faith efforts "to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." See Curry, 286 Conn. at 416 (quoting 29 C.F.R. § 1630.2(o)(3)).

In this case, the complainant alleged that the respondent discriminated against him on the basis of his disability – stress and hypertension – by failing to assign him a new supervisor.[23] Affidavit ¶ 5. He claims to have requested a transfer in September 2008. Id. The complainant argues that his request, in turn, obligated the respondent to provide the accommodation requested. Although not raised in his affidavit, the complainant argues, in his post-hearing brief, that the respondent did not engage in good faith, informal, interactive efforts in response to his second request for an accommodation on or about November 28, 2008.

The complainant alleged that, in September 2008, he requested to be transferred to the Groton garage and that he cited medical reasons for the transfer. See Affidavit ¶ 5. While the testimony reveals that complainant's union representative, Tom White, had discussions with some of respondent's managers, in September 2008, focused on identifying alternative work locations for the complainant, Tr. 101-102 (the complainant), Tr. 272-273 (Seldon), and Tr. 312 (Wilson), there was no evidence that, during this period, either the complainant or White disclosed to the respondent an alleged disability or requested an accommodation.

In contrast, there was evidence indicating that, on an unspecified date, the complainant notified the respondent of his alleged disability -- a letter from Dr. Joseph A. Amatruda, dated December 10,

---

[23] The complainant alleged that working for his supervisor caused his stress and that resulted in his hypertension. In this regard, "[a]n employer is not required to provide a position free of stress or criticism to an employee suffering from depression; such accommodation is not reasonable.... Nor is an employer required to provide the complainant with a different supervisor or to eliminate contact between the employee and the supervisor who was the trigger and stressor to her depression. ...Although the Second Circuit does not establish a per se rule that the replacement of a supervisor may never be a reasonable accommodation, there is a strong presumption that it is unreasonable, a presumption which the employee may rebut." CHRO ex rel. Saksena v. Conn. Dept. of Rev. Services, CHRO No. 9940089, memorandum of decision, August 9, 2001 (citations and internal quotations omitted). See also Kennedy v Dresser-Rand Co., 193 F.3d 120 (2nd Cir.1999) and Wernick v. Federal Reserve Bank, 91 F.3d 384 (2nd Cir.1996).

2008, addressed to Cosmo Ignoto, Manager, Transportation Maintenance. C-2.[24] Ignoto testified that after he received the Amatruda letter, he forwarded it to the respondent's human resources department.[25]

The respondent entered into evidence a letter addressed to Amatruda, dated December 16, 2008 (R-47), that Vicki Arpin, respondent's human resources administrator, testified was drafted by Catherine A. Brown, a principal human resources specialist for the respondent, in reply to Amatruda's letter. The complainant was listed as a "cc:" recipient on Brown's letter. Arpin testified that she had seen the letter, Tr. 377, although when this occurred is unclear. R-47 is unsigned; however, it appears that it was sent to Amatruda because R-48 is purportedly his response – a letter dated January 9, 2009. It, too, is unsigned.[26] (Seldon testified that she, too, recalled seeing R-48, but when this occurred was not specified. Tr. 277.)

This tribunal finds that this evidence, while imprecise, is sufficient to establish that, on or about December 16, 2008, the respondent initiated the good faith efforts required to identify the limitations resulting from the alleged disability and the reasonable accommodations necessary to

---

[24] Contrary to the Complainant's assertion in his post-hearing brief, p. 4, there is no evidence that he notified any of his supervisors, including Brouillard, or any other representative of the respondent of any alleged disability, prior to November 28, 2008 – the date of the letter from Dr. Ciotola. See footnote 25, infra.

[25] C-3 was a letter dated November 28, 2008, from Rober T. Ciotola, M.D. This letter, in substance, was identical to C-2. It contained Ignoto's name and title as the addressee, but did not include any other address information. This letter stated, in relevant part, Mr. Howard has had severe hypertension and acute situational stress. The stress is related to his current job situation in Waterford Garage.... I recommend [he] be transferred Groton, Wells Street facility...." Id. While the complainant testified that he hand delivered both letters, Tr. 76, Ignoto did not recall receiving the Ciotola letter – C-3. Tr. 176. The respondent offered no evidence that it had written to Dr. Ciotola to follow up on his letter.

[26] Curiously, it also includes the notation "draft" handwritten on the top right corner of its first page. Amatruda writes that his "assessment that Mr. Howard is experiencing 'acute stress' resulting from his employment situation was based on Mr. Howard's presentation on June 16, 2008 and December 10, 2008, and his perception that that he was returning to a hostile work environment, fails to address in any substantive manner the extent of his diagnosis or the basis of his conclusion that the requested transfer would enhance the complainant's ability to perform his job duties.

overcome those limitations. The respondent's reaction – sending a letter to Amatruda seeking clarification of the complainant's condition and what limitations, if any, were required -- was reasonable under the circumstances. Amatruda's letter was one page and provided no details from which the respondent could begin to craft an appropriate accommodation.

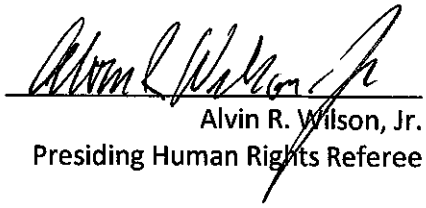
The good faith efforts commenced after the November 2008 fact finding meeting and Wilson's recommendation, on December 1, 2008, that the complainant be terminated. This effort commenced prior to (1) December 16, 2008, when Seldon approved his recommendation (R-54); (2) the January 2, 2009 fact finding meeting; and (3) Wilson's January 6, 2009 recommendation (the second one in just over a month) that the complainant be terminated (R-55). Although Brown received a reply from Amatruda, on or after January 9, 2009, it would have been received on or about the time that the decision to terminate the complainant was essentially a fait accompli.

Although it is not clear when the respondent actual made the final decision that the complainant was to be terminated, the official notification was issued on or about January 20, 2009. That decision was unrelated to any alleged disability discrimination. The legitimate termination is a material intervening factor that suspended any duty of the respondent to engage further in the interactive process. If this tribunal had determined that the respondent wrongfully terminated the complainant, and ordered his reinstatement, then respondent's obligation to engage in an informal, interactive process would resume at that point.

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 complaint be, and hereby is, dismissed in its entirety.

It is so ordered this 31st day of October 2013.



Alvin R. Wilson, Jr.
Presiding Human Rights Referee