

Commission on Human Rights and
Opportunities, *ex rel.*

John Cooper and
John C. Donahue,

Complainants

:
:

CHRO Nos. 9710685
9710637

v.

City of Hartford, Fire Department,
Respondent

:

August 14, 2000

FINAL DECISION

1. This matter originates from the filing of an Affidavit of Illegal Discriminatory Practice on May 23, 1997, by Mr. John C. Donahue (“Complainant”) against his employer the Hartford Fire Department (“Respondent”). Mr. Donahue alleged that he was not promoted, retaliated against, and discriminated against in the terms and conditions of his employment on the basis of his race (white) and sex (male) in violation of the Connecticut Fair Employment Practices Act (“CFEPA”); General Statutes §§ 46a-58(a), 46a-60(a)(1), and 46a-60(a)(4); and Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e, et seq. and the Civil Rights Act of 1991.
2. Mr. John Cooper (“Complainant”) also filed an Affidavit of Illegal Discriminatory Practice on May 27, 1997, the Respondent. Mr. Cooper alleged that he was not promoted and was discriminated against in the terms and conditions of his employment on the basis of his race (African-American) and sex (male) in violation of the

Connecticut Fair Employment Practices Act (“CFEPA”); General Statutes §§ 46a-58(a), 46a-60(a)(1), 46a-60(a)(4), and Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e, et seq. and the Civil Rights Act of 1991.

3. For the reasons set forth below, I hereby determine that the Complainants have failed to establish a prima facie case under both federal and state law. Therefore, judgment is entered for the Respondent and the complaints are hereby dismissed.

I. THE PARTIES:

The first Complainant is Mr. John C. Donahue. His address is 391 South Elm Street, Windsor Locks, Connecticut 06096.

The second Complainant is Mr. John Cooper. His address is 226 Martin Street, Hartford, Connecticut 06120.

The Connecticut Commission on Human Rights and Opportunities (hereinafter “the Commission”) is located at 21 Grand Street, 4th Floor, Hartford, Connecticut 06106. The Commission was represented at the Public Hearing by Attorney C. Joan Parker and Attorney Robert Zamlowksi, Assistant Commission Counsels II, and their office address is 21 Grand Street, 4th Floor, Hartford, Connecticut 06106.

The Respondent is the Hartford Fire Department, whose mailing address is 550 Main Street, Ground Floor, Hartford, Connecticut 06103. The Respondent was represented at Public Hearing by Karen K. Buffkin, Assistant Corporation Counsel, for the City of Hartford. Her office is located at The City of Hartford, Office of the Corporation Counsel, 550 Main Street, Hartford, Connecticut 06103.

II. PROCEDURAL HISTORY:

Mr. John C. Donahue, filed his complaint with the Commission on May 23, 1997, alleging that he was not promoted, retaliated against, and discriminated against in his

employment on the basis of his race (white) and sex (male) (Record-Exhibit 1). After conducting an investigation, the Complaint and the results of the investigation were certified to the Office of Public Hearings by the investigator on August 10, 1998 (Record-Exhibit 2). On September 2, 1998, the Honorable John F. Daly III was appointed as the hearing officer to preside over the processing of the complaint (Record-Exhibit 3).

The second Complainant, Mr. John Cooper, filed his complaint with the Commission on May 27, 1997, alleging that he was not promoted, was retaliated against, and was discriminated against in his employment by the Hartford Fire Department because of his race (white) and sex (male) (Record-Exhibit 7).

The Complainant, Mr. John Cooper, has filed two amendments to his complaint; one dated January 26, 1998, alleging that he was discriminated against on the basis that he is an African-American male (Record-Exhibit 13), and adding a claim of retaliation (Record-Exhibit 8). After conducting an investigation, the Complaint and the results of the investigation were certified to the Office of Public Hearings by the investigator on August 10, 1998 (Record-Exhibit 9). On September 3, 1998, the Honorable John F. Daly, III was appointed as the hearing officer to preside over the processing of the complaint (Record-Exhibit 10). Pursuant to Public Act 98-245, the matter was reassigned to Human Rights Referee Leonard E. Trojanowski on February 18, 1999 (Record-Exhibit 5).

Mr. John Cooper amended his complaint for a second time on April 20, 1999. In this amendment, he adopted each and every allegation of his original complaint of June 9, 1997. His amendment deleted his race as being African-American to allege simply "race". Mr. Cooper added the allegation that even though he is a black, African-American, the decision not to extend the 1994 fire lieutenant's eligible

register/"certification list" affected him the same as his white colleagues on the expired list. Complainant John Cooper also alleged that he suffered the same injury as his white colleagues (Record-Exhibit 13).

The Commission's motion to consolidate the Cooper and Donahue complaints before Human Rights Referee Leonard E. Trojanowski was granted on July 7, 1999 (Record-Exhibit 16).

The Public Hearing was held on seven days in January: the 18th, 19th, 20th, 21st, 26th, 27th, and 28th, 2000 (Tr. 1-1334). On January 18, at the Public Hearing, the Commission submitted a List of Record Exhibits to which the parties had no objection. Both the Commission and the Respondent filed their proposed findings of fact and post-hearing briefs on April 28, 2000. Both parties filed their reply briefs on June 5, 2000. Therefore, the record closed on June 5, 2000.

III. FINDINGS OF FACT:

These findings of fact are derived from the Complaints, the pleadings, the testimony of the witnesses at the Public Hearing, and the exhibits admitted into evidence. Only those facts deemed necessary to an understanding of the issues raised at the public hearing and discussed in this decision are set forth herein.

1. All procedural and jurisdictional prerequisites to the Public Hearing have been met. (Tr. 1-1334)
2. The Hartford Fire Department provides fire suppression and other fire related services to the City of Hartford. (Tr. 849, 850)
3. The Hartford Fire Department is currently budgeted for 400 employees, but rarely is at full strength. (Tr. 849)

4. Mr. Robert Dobson was appointed Fire Chief of the Hartford Fire Department by the Hartford City Manager in April of 1995. (Tr. 847)
5. Fire Chief Robert Dobson worked 28 years for the City of Philadelphia Fire Department and reached the rank of deputy chief before retiring and taking the fire chief position in Hartford. (Tr. 847, 848, 849)
6. Fire Chief Robert Dobson administers the Hartford Fire Department, which consists of approximately 400 members and which operates 24-hours a day, seven days a week. The Suppression Division is divided into District 1 and District 2. The two districts contain seventeen (17) fire companies. There are a Training Division, a Mechanical Division, and an Alarm and Signal Division. (Tr. 485, 849, 850)
7. There are seventeen (17) Captains and fifty-one (51) Lieutenants in the Suppression Division. (Tr. 851)
8. Ms. Patricia Washington has worked for the City of Hartford for many years. She is currently Director of Personnel for the City of Hartford and has held this position for approximately twelve years. (Tr. 7)
9. The City of Hartford's Charter, Chapter XVI, Section 6, provides that the Personnel Rules and Regulations adopted in accordance with the provisions of this Chapter shall have the force and effect of law. Among other things, they shall provide for the method of holding competitive examinations; the method of certifying eligible candidates for appointment; the establishment, maintenance, consolidation and cancellation of eligible lists. (R-Exhibit 10)

10. Promotions in a classified service, such as the Hartford Fire Department, are made according to merit and fitness, which is determined by conducting a competitive examination. (R-Exhibit 10)
11. The City of Hartford's Charter, Chapter XVI, Section 2(b), authorizes the Director of Personnel to maintain eligible lists based on competitive examinations for each position in a classified service. Whenever a vacancy is to be filled, the names of the three (3) persons standing highest on the eligible list applicable to the position in question are certified to the appointing officer. Except that in cases where there are fewer than three (3) persons on an eligible list, the Director of Personnel may certify the names of all persons on the list. No appointment can be made to any position in the classified service except from these lists. This process is known as the "Rule of Three". (R-Exhibit 10)
12. The "Rule of Three" requires that the Director of Personnel certify to the appointing authority two (2) more names than the number of vacancies. (Tr. 23, 24, 61; Comm.-Exhibit 44)
13. Chief Robert Dobson is the appointing officer for the Hartford Fire Department. (Tr. 65)
14. Following a competitive examination an eligible register, also called a "certification list", is compiled. An eligible register/"certification list" contains the names of the candidates who successfully completed the competitive examination, in the order of their test scores. (Tr. 15; Comm.-Exhibit 44)
15. Race, nationality and sex codes never appear on eligible registers/"certification lists". (Tr. 68, 70)

16. Under the City of Hartford's Charter, an eligible register/"certification list" remains in effect for a maximum of two (2) years, from the date on which it is established. Once an eligible register/"certification list" expires, no more promotions can be made from that register/"list". (Tr. 15, 784; Comm.-Exhibit 44)
17. As promotional vacancies occur within the Fire Department, the Director of Personnel, Patricia Washington, certifies to the department head, names from the eligible register/"certification list". Pursuant to the "Rule of Three," the Director of Personnel certifies to Chief Robert Dobson two names more than the number of vacancies. (Tr. 23, 24, 61; Comm.-Exhibit 44)
18. Then, Chief Robert Dobson makes appointments from the eligible register/"certification list," certified by the Director of Personnel. Pursuant to the "Rule of Three" he has the discretion to choose for promotion any of the candidates who appear on the eligible register/"certification list" for appointment to a position in the Hartford Fire Department. (Tr. 546,; Comm.-Exhibit 44)
19. The eligible register/"certification list" that is sent to the appointing authority, in this case Fire Chief Robert Dobson, by the Director of Personnel, Ms. Patricia Washington, does not contain the race or sex of the individuals who are on the eligible register/"certification list". (Tr. 69, 70, 855)
20. When an eligible register/"certification list" is set to expire, the staff of the Personnel Department notifies the appointing authority. (Tr. 66, 67)
21. If a department head would like to extend the eligible register/"certification list" (s)he must provide the Director of Personnel with a reason for the requesting an additional six month extension. (Tr. 67)

22. The Director of Personnel, based on the input from the department head/appointing authority then makes a written request to the Personnel Board recommending that the eligible register/"certification list" be extended for an additional period of time. (Tr. 67)
23. If the department head does not want the eligible register/"certification list" to be extended, then (s)he must notify the Director of Personnel. In that instance, the Director of Personnel does not make a request to extend the register/"list" to the Personnel Board, the eligible register/"certification list" will expire on its expiration date.
24. The Hartford Personnel Board decides whether the eligible register/"certification list" will be extended in accordance with the Personnel Rules and Regulations. (Tr. 28, 29; Comm.-Exhibit 44)
25. Ms. Patricia Washington testified that when the Personnel Board considers whether to extend an eligible register/"certification list", the Personnel Board does not have copies of the specific eligible register/"certification list" during its deliberations. (Tr. 29)
26. On August 3, 1994, an eligible register/"certification list" was established by the Personnel Department of the City of Hartford for the position of fire lieutenant. Of the 188 individuals who applied for and took the test, 70 passed the examination. The names of the successful candidates were placed on the eligible register/"certification list" in order of their test scores. (Comm.-Exhibit1)
27. Also on August 3, 1994, the names of the 32 individuals standing highest on the eligible register/"certification list" were certified to Fire Chief Robert Dobson by the Personnel Director Patricia Washington. (Comm.-Exhibit 1)

28. On August 7, 1994, 31, candidates were promoted to the position of fire lieutenant by Fire Chief Robert Dobson. (Comm.-Exhibit 1)
29. On May 7, 1996, Ms. Patricia Washington, Director of the Personnel Department, sent a memorandum to the Personnel Board indicating that she concurred with Chief Robert Dobson's request to extend the 1994 fire lieutenants eligible register/"certification list". (Tr. 699; Comm.-Exhibit 6)
30. The three (3) candidates who were next in line on the 1994 fire lieutenants eligible register/"certification list", Mr. Sanchez, Mr. Carter and Mr. Dahlman all requested that the eligible register be extended for a period of one (1) year. (Comm.-Exhibit 6)
31. The request by Ms. Patricia Washington for the 1994 fire lieutenant eligible register/"certification list" to be extended was considered by the Hartford Personnel Board at its meeting of June 18, 1996. (Tr. 699; Comm.-Exhibit 6)
32. At this meeting, Hartford Personnel Board Chairman, Francisco DeJesus requested a breakdown of the number of Hartford residents and minorities on the 1994-fire lieutenant's eligible register/"certification list". Ms. Patricia Washington indicated to the chairman there were 39 fire department employees who remained on the register/"list". Of this number, ten (10) were Hartford residents and nine (9) were minorities. Ms. Patricia Washington did not tell the members of the Personnel Board how the remaining candidates ranked on the register/"list". (Comm.-Exhibit 5)
33. Personnel Board member Ms. Annika Warren made a motion to extend the 1994 fire lieutenant's eligible register/"certification list" for six (6) months. Mr. DeJesus seconded the motion and the Personnel Board voted to extend the 1994

fire lieutenant's eligible register/"certification list" for six (6) months. The six (6) month extension meant the register/"list" now expired on February 3, 1997.

(Comm.-Exhibit 5)

34. The 1994-fire lieutenant's eligible register/"certification list" contains numeric codes indicating the race and sex of the individuals eligible for promotion to the position of fire lieutenant. The codes follow:

<u>Code #</u>	<u>Description of Code #</u>
1	white male
2	white female
3	black male
4	black female
5	Hispanic male
6	Hispanic female

(Comm.-Exhibit 1; Comm.-Exhibit 2)

35. The breakdown of the 37 candidates who remained on the 1994 fire lieutenant's eligible register/"certification list" by race and sex follows:

30	white male
1	white female
2	black male
4	Hispanic male

(Comm.-Exhibit 1; Comm.-Exhibit 2)

36. In December of 1996, a number of individuals who remained on the 1994 fire lieutenant's eligible register/"certification list" wrote a letter to Fire Chief Robert Dobson requesting that the register/"list" be extended for a second six months or until August 3, 1997.

37. On January 27, 1997, the Personnel Board of the City of Hartford held a special meeting to consider whether to extend the 1994-fire lieutenant's eligible register/"certification list". At this meeting there were a number of individuals who addressed the Personnel Board in support of extending the register/"list" for

an additional six months until August 3, 1997. The Hartford Personnel Board took no action because there was no request for an extension from either Personnel Director Ms. Patricia Washington or Fire Chief Robert Dobson. (Comm.-Exhibit 9)

38. At the January 27, 1997, meeting Ms. Washington was asked by Hartford Personnel Board Chairman, Mr. Larry Reynolds, to explain why Fire Chief Robert Dobson had not requested that the 1994 fire lieutenant's eligible register/"certification list" be extended for a second six months. Ms. Patricia Washington responded that the fire chief indicated to her that he did not favor an extension because he did not intend to make any appointments to the position of fire lieutenant in the near future. (Tr. 414, 519-522, 675, & 682; R-Exhibit 34)

39. In January, February, March or April, of 1997 there were no vacancies in the Hartford Fire Department for the position of fire lieutenant. (Tr. 505, 506)

40. On May 4, 1997, Fire Chief Robert Dobson promoted three fire lieutenants to the position of Fire Captain. (Tr. 89; Comm.-Exhibit 27)

41. These promotions to the position of Fire Captain on May 4, 1997, created three vacancies in the position of fire lieutenant. (Tr. 164, 268, 269)

42. There is no requirement that the Hartford Fire Department fill vacancies as soon as they occur. (Tr. 157, 785)

43. Ms. Patricia Washington testified individuals who are unlikely to be reached for promotion if the eligible register/"certification list" is extended are often opposed to its extension. On the other hand, those individuals who are likely to be reached for promotion are generally in favor of extending the eligible register/"certification list". Because of this fact, it is her policy not to take either

side; but, instead to seek guidance from the department head who knows the needs of his or her department. (Tr. 660, 661, 753)

44. On September 5, 1996, four individuals from the 1994 fire lieutenant's eligible register/"certification list" were certified to the Hartford Fire Department for consideration for two promotional vacancies. The candidates were ranked 32 through 35. The Complainant, John Cooper, was ranked number 35. The candidates ranked 32 and 33; Frank Carter, Jr. and Miguel Sanchez, were appointed on September 22, 1996. The Complainant, John Cooper, was not selected for promotion. Mr. Cooper acknowledged that he did not expect to be promoted at this time. (Tr. 192, 2204, 205, 286-288; Comm.-Exhibit 1)

45. On September 30, 1998, an eligible register/"certification list", for the position of fire lieutenant, was established by the Personnel Department. (R-Exhibit 18). Of the 137 individuals who applied, 31 passed the promotional examination. The Complainant John Cooper does not appear on the eligible register; and thus, is not currently eligible for promotion. The Complainant John Donahue was ranked 19 on this eligible register/"certification list".

46. On September 30, 1998, the names of the 17 individuals ranked highest on the fire lieutenant eligible register were certified to Fire Chief Robert Dobson for consideration for promotion. On October 18, 1998, the Hartford Fire Chief promoted 13 of the 17 individuals certified to him by the Director of Personnel. The Fire Chief promoted candidates ranked 1, 2, 3, 5, 6, 7, 8, 11, 12, 13, 14, 16 and 17. Of those promoted Harry Dahlman, Larry Pac, Thomas DiScipio, Paul Hanson, Tom Cirullo, Timothy Walsh, Thomas Pettigrew, Mark Horan and

Theodore Borfsky were also listed on the 1994 fire lieutenant eligible register. (R-Exhibit 18).

47. Mr. John C. Donahue, who is white, was promoted to the position of fire lieutenant effective April 23, 2000. (Joint Stipulation of Facts dated April 19, 2000.)

48. When there is a vacancy in any given group, individuals can be transferred from another house to fill the vacancy. When the vacancy is long term, it can be filled by either a detail or a transfer. (Tr. 390)

49. Transfers are also made to balance individual houses with regard to the strengths and weaknesses of the individual firefighters assigned to a particular house. Individuals are transferred to complement the skill sets of the employees that are currently in a particular house. (Tr. 395)

50. Fire Chief Robert Dobson testified that he made involuntary transfers of firefighters for the “good of the Fire Department” and that rubric included the following motives:

- To even out shifts
- To let a firefighter know about the fire chief’s displeasure with his/her actions
- To breakup groups, which might negatively influence young firefighters
- To break up antagonisms.

(Tr. 878, 879, 880)

51. Hartford firefighters are trained in modern fire-fighting techniques; this allows them to be interchangeable on any fire apparatus. They can be assigned to an Engine, Ladder, Truck, or Tactical unit at any time.

52. When firefighters are detailed to other houses, they are paid overtime. It is a firefighter's job to know the area of the city where detailed. (Tr. 396, 406-407, 529-531, 886-887)
53. John Cooper was transferred from Engine 5 to Engine 8. Mr. Cooper's duties at Engine 8 were exactly the same as they were at Engine 5; and there was no change in salary, benefits, or rank. Prior to being transferred to Engine 5, John Cooper served at Ladder 3. John Cooper had been involuntarily transferred many times prior to his transfer to Engine 8. Two of these involuntary transfers have occurred under Chief Dobson out of six or seven times he has been involuntarily transferred. (Tr. 228, 230, 231, 232, 236, 237, 254, 255, 256, 257, 265)
54. John Cooper was terminated from the City of Hartford. As a result of the Settlement Agreement of November 20, 1995, with the City of Hartford and the Hartford Firefighters Union, he returned to work and served a three month suspension. (Tr. 258, 259, 260, 262; Comm.-Exhibit 11)
55. Fire Chief Robert Dobson never discussed the racial and ethnic makeup of the individuals on the 1994 fire lieutenant's eligible register/"certification list" after the first six month extension of the register/"list" with Patricia Washington at any time. (Tr. 854)
56. Fire Chief Robert Dobson never discussed the racial and ethnic makeup of the remaining candidates on the 1994 fire lieutenants eligible register/"certification list" with any member of the Hartford Personnel Board. (Tr. 855)
57. During his tenure with the Hartford Fire Department, Fire Chief Robert Dobson's policy was to extend all eligible register/"certification lists" for six

- months rather than a year. The only exception to this rule was one register/"list" he extended for a year. (Tr. 852, 853, 856, 858)
58. Another reason Fire Chief Robert Dobson was only extending the eligible registers/"certification lists" for six months was because the Hartford Fire Department had a large number of people – 150 or more – that were eligible to take the new lieutenant's examination after the 1994 register/"list" expired. (Tr. 858)
59. The final reason Fire Chief Robert Dobson gave for only extending registers/"lists" for six months was that the Hartford Fire Department had gone for a considerable amount of time without a labor contract and the department morale was a serious problem. The Chief felt that the morale would improve when all of the potential candidates were preparing and studying for the fire lieutenant's exam. (Tr. 858, 859, 860)
60. Fire Chief Robert Dobson testified that the firefighters on the old eligible registers/"certification lists" had an equal opportunity, as other members of the fire department, to take the new fire lieutenant's exam. (Tr. 859)
61. In response to allegations that Fire Chief Robert Dobson knew that there were going to be promotions to fire captain and retirements in the near future, he testified that, although at the time the 1994 fire lieutenant's eligible register expired, there were no vacancies in the fire lieutenant position in the suppression division. He knew vacancies would occur in the future, he just did not know when. In any case, Chief Robert Dobson had made up his mind that he was not going to promote any more people from the 1994 lieutenant register/"list". (Tr. 860)

62. Fire Chief Robert Dobson called Ms. Patricia Washington after the expiration of the 1994 fire lieutenant's eligible register/"certification list" in February of 1997. He told her that he wanted some tests conducted for the fire lieutenant's position and deputy fire chief position. (Tr. 863)
63. Fire Chief Robert Dobson transferred Mr. John Cooper from Engine 5 to Engine 8 for three reasons. One, the wishes of the members of Engine 5. Two, Mr. John Cooper was not cooperative during an inspection. Three, the chief wanted Mr. Cooper to work under a strong officer, Lieutenant Carmine Zitani who was his supervisor at Engine 8. (Tr. 867, 868)
64. Fire Chief Robert Dobson had lunch at Hal's restaurant with Mr. John Cooper in 1996 because of Mr. John Cooper's conduct in allegedly pulling a knife on his supervisor, Lieutenant Carmine Zitani, causing an uproar at the Phoenix Club. This caused complaints from another fire department member (Mr. Steve Harris). The fire chief wanted to tell Mr. John Cooper that if he wanted to advance in the Hartford Fire Department he would have to stop the problematic behavior. (Tr. 869, 870, 871)
65. Fire Chief Robert Dobson testified that he never promised, guaranteed, or made other assurances to Mr. John Cooper that he would promote him to fire lieutenant. At the end of the luncheon meeting the Chief thought that Mr. John Cooper had a "short fuse" and what had happened with the alleged knife pulling incident might happen again. Therefore, he did not select Mr. John Cooper for promotion to fire lieutenant because he thought problems would continue. (Tr. 872, 873)

66. Chief Dobson testified that he did not think that transferring firefighters from one house to another is a detriment to the fire department's overall efficiency because all firefighters are trained in the same modern fire fighting techniques. There are no ladder men or engine men like there were in the past. (Tr. 886, 887)
67. Ms. Patricia Washington testified that the preparation and scoring of the fire lieutenant's exam, as with other exams in the classified services, is done by outside consultants. (Tr. 8, 9, 10, 11)
68. After taking the written test, successful candidates are sent to an "oral panel" which interviews the candidates. The final step, for a limited percentage of candidates, is an interview with Fire Chief Robert Dobson. (Tr. 12, 13)
69. In order to be placed on an eligible register/"certification list", candidates must pass both the written and "oral" examination. (Tr. 14)
70. All eligible registers/"certification lists" are compiled and maintained in the Hartford Personnel Department. (Tr. 47)
71. Mr. John C. Donahue has worked for the Hartford Fire Department for 29 years, 12 as a driver/deputy chief's aide. (Tr. 72)
72. Mr. John C. Donahue took the test for promotion to the position of fire lieutenant in October of 1993, along with the other candidates. He was ranked 37 on the eligible register/"certification list" generated by that exam. (Tr. 74, 75)
73. Mr. John C. Donahue admitted that there were no vacancies for fire lieutenant when the 1994 eligible register/"certification list" expired on February 3, 1997. (Tr. 83)
74. Mr. John C. Donahue testified that he thought Fire Chief Robert Dobson had advance knowledge that there would be vacancies for the job of fire lieutenant

- because a fire captain's test was coming up and there were upcoming retirements that he was probably aware of because of the requirement that retiring firefighters notify the Fire Department prior to retiring. (Tr. 81, 82, 83)
75. Mr. John C. Donahue testified that when the Hartford Personnel Board voted on whether to extend the 1994 fire lieutenant eligible register/"certification list" for the second six month period, there were no vacancies in the position of fire lieutenant in the Hartford Fire Department. (Tr. 87)
76. Mr. John C. Donahue testified as to why Fire Chief Dobson did not extend the 1994 register/"list" for a second six months as follows:
- "I just felt that there was no good reason for them not to extend the list. The only reason that I could come up with is the fact we're all whites with the exception of one, possibly two, firefighters on the 1994 register/"list"..." (Tr. 88)
77. Mr. John C. Donahue considers himself a fairly good employee with no sick leave problems or record problems. (Tr. 89)
78. Mr. John C. Donahue testified his understanding of the past procedure for filling vacancies was to fill any vacancies at "the same time as they opened up". (Tr. 90)
79. Mr. John C. Donahue testified he thought that morale of the Fire Department suffers when positions are left vacant. (Tr. 91)
80. Mr. John C. Donahue testified that he was certain he would have been promoted to fire lieutenant if the 1994 fire lieutenant's eligible register/"certification list" was extended for a second six months. (Tr. 93)
81. Mr. John C. Donahue testified that he thought, under the Fire Department's rules and regulations, an extension of the register/"list" "was more or less automatic." He never anticipated that the 1994 fire lieutenant's eligible

- register/“certification list” would not be extended for a second six months. (Tr. 99)
82. Mr. John C. Donahue testified under cross-examination that in addition to Mr. John Cooper another African-American, Fredrick Twiner, three (3) male Hispanics and a female were on the expired 1994 fire lieutenant’s register/“list”. (Tr. 156)
83. Mr. John C. Donahue testified, under cross-examination, that he is not aware of any written policy or procedure, which compels the Hartford Fire Department to fill immediately any vacancies which occur in the department. (Tr. 157)
84. Mr. John C. Donahue testified on cross-examination that he had no information or evidence that any test, including the 1993 fire lieutenant’s exam, had ever been “fixed”. (Tr. 171)
85. Mr. John C. Donahue testified, on cross-examination, that he had no information or proof that Fire Chief Robert Dobson had any knowledge of the race, sex, or ethnicity of candidates on the 1994 fire lieutenant’s eligible register/“certification list”. (Tr. 176)
86. Mr. John C. Donahue testified that he was involuntarily transferred only once in his career with the Hartford Fire Department, sometime in 1977 or 1978, which was before Fire Chief Dobson’s appointment in April of 1995. This transfer took place because his car sprayed the Assistant Fire Chief Thomas with slush. (Tr. 120, 121, 172)
87. Mr. John C. Donahue testified under cross-examination that not one of the following told him that they did not extend the list because there were no black,

- African-American, candidates they desired to promote left on the list -- Fire Chief Dobson, Ms. Warren, Mr. DeJesus, Ms. Borges nor Ms. Washington (Tr. 175)
88. Mr. John C. Donahue testified, under cross-examination, that he had no information that Fire Chief Robert Dobson had any knowledge as to the race or ethnicity of any candidates on the 1994 fire lieutenant's eligible register/"certification list". (Tr. 176)
89. Mr. John C. Donahue testified that, according to his understanding, under the "Rule of Three" two extra names are added to the list of candidates the fire chief interviews and the Chief has the ability to pick any candidate on the register/"certification list". (Tr. 181)
90. Mr. John Cooper has worked for the Hartford Fire Department for 19-1/2 years. (Tr. 191)
91. Mr. John Cooper took the 1993 exam for fire lieutenant and was ranked 35th on the 1994 fire lieutenant's eligible register/"certification list". (Tr. 193, 205, 206; Comm.-Exhibit 1)
92. Mr. John Cooper testified that when he interviewed with Fire Chief Robert Dobson for the fire lieutenant's position, the Chief told him the following:
- "... you're not going to be hired right now. Maybe in the near future you could, you will be."
- (Tr. 207)
93. Chief Robert Dobson notified Mr. John Cooper that he wanted to have lunch with him at Hal's Restaurant on July 9, 1996 to get to know him better. (Tr. 208, 209, 210, 211)
94. Mr. John Cooper testified that his conversation with Fire Chief Robert Dobson at Hal's Restaurant consisted of the following:

“We had a very lively spirited conversation, he asked me about if I’m a team player which I told him I was. He told me you’re going to be a damn good lieutenant and he told me where I was going to be placed, who was going to be working for me and what group I was going to be on, the whole works, I mean it was just like a kid in a candy store ...”

“Keep your ear to the ground because you’re going to hear me coming...”

“He told me you’re going over to Ladder 3, I think it might have been Group 2. He said I don’t want you to let them white boys get away with nothing.”

(Tr. 211, 212)

95. Mr. John Cooper testified that he ran into Mr. Greg Thomas, a Hartford firefighter, at Hal’s and they talked about his conversation with the fire chief.

(Tr. 213, 214)

96. Mr. John Cooper testified that he is an African-American and his claim to be white in the original complaint he filed with the Commission was a mistake. (Tr.

215, 216, 218)

97. Mr. John Cooper testified that the Hartford Fire Department’s decision not to promote him was based on his race. (Tr. 219)

98. Mr. John Cooper testified he was aware that the “Rule of Three” allowed the fire chief to interview two (2) more candidates than there were existing vacancies.

(Tr. 220)

99. Mr. John Cooper testified he thought he would have been promoted to fire lieutenant if the 1994 fire lieutenant’s eligible register/“certification list” had been extended for a second six months because there were three fire lieutenant vacancies after the register/“list” expired. (Tr. 221, 222, 225, 226)

100. Mr. John Cooper testified that after he filed his complaint with the Commission on Human Rights and Opportunities, he was involuntarily transferred from Engine 5 to Engine 8. (Tr. 227, 228)
101. Under cross-examination, Mr. John Cooper testified that during his 19-1/2 year career with the Hartford Fire Department, he had been transferred nine (9) times: seven (7) times under previous fire chiefs; and, two (2) times under Fire Chief Robert Dobson. (Tr. 256, 257)
102. Under cross-examination, Mr. John Cooper testified that he had been suspended for 90 days by Chief Dobson for allegedly pulling a knife on Lieutenant Carmine Zitani, his supervisor at Ladder 3 Engine 5. He was also arrested by the Hartford Police Department for this incident. (Tr. 258, 259, 260, 261, 262)
103. Mr. John Cooper testified, under cross-examination, that the alleged knife pulling incident occurred after the 1994 eligible register/“certification list” was extended for the first time. (Tr. 262, 263)
104. Mr. John Cooper testified under cross-examination that his duties at Engine 8 were the same as his duties had been at Engine 5. (Tr. 265)
105. Mr. John Cooper testified, under cross-examination, that although his complaint with the Commission on Human Rights and Opportunities alleged that the 1994 fire lieutenant’s eligible register/“certification list” was not extended for a second time because there were no candidates left on the list, that Fire Chief Robert Dobson wanted to promote. (Tr. 273, 274, 275)
106. Under cross-examination, Mr. John Cooper testified that at least five (5) of the candidates for promotion on the 1994 fire lieutenant eligible register/“certification

- list”, who wrote to Chief Robert Dobson requesting the register/“list” be extended for a second six (6) months, were now fire lieutenants, having been promoted by Chief Dobson in the interim. They are Mr. Thomas DiScipio, Mr. Paul Hansen, Mr. Pac, Mr. Harry Dahlman (all white, males), and Mr. Jose Almedina (Hispanic, male). (Tr. 280, 281)
107. Mr. John Cooper, under cross-examination, denied that his meeting at Hal’s with the Chief was to get him to “clean up his act”. (Tr. 283)
108. Mr. John Cooper testified, under cross-examination, that he never checked with the Hartford Personnel Department, the Personnel Director, or the Chief’s office to see whether any of these sources anticipated any vacancies for the position of fire lieutenant after the 1994 fire lieutenant’s eligible register/certification expired. (Tr. 294)
109. Under the Charter and Ordinances of the City of Hartford, only the Director of Personnel can request the extension of an eligible register/certification list. (Tr. 660)
110. When some members of the Personnel Board asked Ms. Bea Sullivan, the analyst at the Personnel Department responsible for the Hartford Fire Department, for the ethnic and racial breakdown of the 1994 fire lieutenant’s eligible register/certification list, Ms. Patricia Washington directed her not to provide this information to the Personnel Board or anyone else. (Tr. 670)
111. Ms. Patricia Washington testified that she has no way of knowing when someone in the Hartford Fire Department is retiring unless they send her a request in writing. (Tr. 773)

112. Requests for promotions in the Hartford Fire Department need approval from both the City Manager's office as well as the City Budget Office. (Tr. 775)
113. The federal Equal Employment Opportunity Commission requires the Hartford Personnel Department to report to the Commission the sex, race and ethnicity of all employees, including firefighters, who work for the City of Hartford. (Tr. 782)
114. Fire Chief Robert Dobson testified that one reason he involuntarily transferred Mr. John Cooper was because his supervisor, Lieutenant Carmine Zitani, told the Chief that he had had enough of Mr. John Cooper and he needed a break. (Tr. 878, 879)
115. Fire Chief Robert Dobson testified that he did not necessarily transfer firefighters who disagreed with him, because a lot of people in the Hartford Fire Department disagreed with the things he did as fire chief. (Tr. 880)
116. Fire Chief Robert Dobson testified that he follows the affirmative action policies of the Equal Employment Opportunities Commission and the City of Hartford. (Tr. 901, 902)
117. Fire Chief Robert Dobson testified that he said hello to firefighter Mr. Greg Thomas at Hal's Restaurant but did not otherwise speak to him. (Tr. 956, 957)
118. Chief Robert Dobson testified he would not pass over a qualified white male firefighter to promote a qualified black firefighter. (Tr. 959)
119. Fire Chief Robert Dobson never told Ms. Patricia Washington, the Personnel Director, that he was looking to promote only minority candidates on the 1994 fire lieutenants eligible register/"certification list". (Tr. 1090)

120. Fire Chief Robert Dobson's understanding of his ability to promote applicants, under the "Rule of Three" and the applicable ordinances of the City of Hartford, is that he is not restricted in his selection of candidates to pick from the top of the eligible register/"certification list". (Tr. 1093, 1094)
121. Fire Chief Robert Dobson has hired 75 new firefighters and promoted about 65 firefighters during his tenure with the Hartford Fire Department. (Tr. 1114, 1115)
122. Fire Chief Robert Dobson testified that he has promoted many white firefighters who were also active in the Hartford Firefighters Union Local 760, during his tenure with the Hartford Fire Department, including the following:
- Mr. Thomas DiScipio, Mr. Ted Borowski, Mr. Michael Dempsey, Mr. Frank Costello (twice), Mr. Thomas Cirullo, and Mr. Scott Cunningham.
- (Tr. 1109, 1110, 1111, 1112)
123. Mr. Gregory L. Thomas is a black African-American firefighter who has worked for the Hartford Fire Department for 15-years. (Tr. 1183)
124. Mr. Gregory L. Thomas was Mr. John Cooper's best friend. They had a routine of how they spent their days off together. They would lunch at Hal's Restaurant, then they would go up to Springfield, and then return to Hartford later in the day. (Tr. 1183, 1187, 1188)
125. Mr. Gregory L. Thomas testified that he went to Hal's Restaurant with Mr. John Cooper for his luncheon meeting with Chief Robert Dobson. Mr. John Cooper told him the purpose of the meeting was to find out who Mr. John Cooper was, because he and the Chief had never met. (Tr. 1185, 1188, 1190)
126. Mr. Gregory L. Thomas testified that, after the meeting with Fire Chief Robert Dobson, Mr. John Cooper said the Chief was going to make him a fire lieutenant

on Ladder 3, Company 2, Engine 2, and that the Chief wanted him to straighten out the white guys in the company. (Tr. 1186, 1187)

127. Under cross-examination, Mr. Gregory L. Thomas testified that at their luncheon meeting John Cooper told him that Chief Robert Dobson had also talked to Mr. John Cooper about the incident where he allegedly pulled a knife on his supervisor, Lieutenant Carmine Zitani, as well as “other incidents” Mr. John Cooper had been involved with as a Hartford firefighter. (Tr. 1188, 1189, 1190, 1191, 1192)

128. Mr. Gregory L. Thomas testified, under cross-examination, that he knew Mr. John Cooper had been suspended by Fire Chief Robert Dobson for ninety (90) days for allegedly pulling a knife on his supervisor, Lieutenant Carmine Zitani. (Tr. 1192, 1193)

129. Fire Chief Robert Dobson promoted 31 candidates to the position of fire lieutenant before the 1994-fire lieutenant’s eligible register/“certification list” expired on February 3, 1997. Of this total, the breakdown by race, sex and ethnicity, using the codes supplied by the Personnel Department to the EEOC follows:

24	white males
1	white female
3	black African/American males
3	Hispanic males

(Comm.-Exhibit 1)

IV. ANALYSIS:

Connecticut Fair Employment Practices Act and Title VII:

Both Complainants allege violations of General Statutes §§ 46a-58(a), 46a-60(a)(1) and 46aa-60(a)(4), the Connecticut Fair Employment Practices Act (“CFEPA”) as

well as violations of Title VII of the Civil Rights Act of 1994, as amended, 42 U.S.C. § 2000e, *et seq.* The first Complainant, Mr. John C. Donahue, argues that, because Fire Chief Robert Dobson did not request a second extension of the 1994 fire lieutenant's eligible register/"certification list", he was discriminated against on the basis of his race - white and sex - male. Mr. John C. Donahue also alleges that he was retaliated against by being involuntarily transferred to a different firehouse, because he filed his complaint with the CHRO.

The second Complainant, Mr. John Cooper, whose race is African-American and whose sex is male, has argued that because Fire Chief Robert Dobson did not request a second extension of the 1994 fire lieutenant's eligible register/"certification list", he was discriminated against on the basis of his race, African-American, and sex, male. Mr. John Cooper, also alleges that Chief Robert Dobson retaliated against him for filing his complaint with the Commission by involuntarily transferring him to a different firehouse. In addition, Mr. John Cooper also added an amendment to his complaint alleging, although he is an African-American male, he was injured in the same way as his white colleagues who were among the remaining candidates on the expired 1994 fire lieutenant's eligible register/"certification list".

The Connecticut Supreme Court has stated that the Connecticut Legislature intended to make the Connecticut Fair Employment Practices Act coextensive with Federal Law. *State of Connecticut v. Commission on Human Rights and Opportunities*, 211 Conn. 464, 469, 470 (1989) *Levy v. Commission on Human Rights and Opportunities*, 236 Conn. 96, 1015-106 (1996). The Connecticut Supreme Court has also made clear that the court looks to federal law for guidance in interpreting

CFEPA. State of Connecticut, *supra*, 469. Therefore, I will address both the Title VII and CFEPA claims simultaneously.

Absent direct evidence of discrimination, a claim of disparate treatment under Title VII is analyzed pursuant to the burden shifting framework - first established by the United States Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 802-804 (1973).

“Initially, the complaining plaintiff has the burden ”of demonstrating a prima facie case of racial discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Once a prima facie case has been made, the employer must present some legitimate, non-discriminatory reason for its decision. *Id.* Should the employer succeed in this showing, the complaining plaintiff must demonstrate that the employer “intentionally discriminated against him” on the basis of race. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, ----, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993) (quoting *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 n. 6, 101 S.Ct. 1089, 1093-94 n. 6, 67L.Ed.2d 207 (1981)). The plaintiff may satisfy this burden by showing intentional discrimination by the employer, or by discrediting the employer’s proffered reason for its decision in conjunction with sufficient facts establishing the elements of the prima facie case. *Id.*”

“To establish a prima facie case of discrimination under Title VII, a complaining plaintiff may make the following four-part showing: (1) that she belongs to a protected class; (2) that she was qualified and applied for a job for which the employer was seeking candidates; (3) that the employer denied her the position despite her qualifications; and (4) that after this denial, the employer continued to solicit applicants for the position who had comparable qualifications to the plaintiff. *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. at 1824. These four elements will not apply identically to all factual scenarios, and therefore represent only a flexible guideline for how a plaintiff may chose to establish a prima facie case. *Id.* At 802 n. 13, 93 S.Ct. at 1824 n. 13; *Burdine*, 450 U.S. at 253-54 n. 6, 101 S.Ct. at 1094 n. 6. The ultimate burden of demonstrating intentional discrimination rests at all times with the complaining plaintiff, though. *Hicks*, 509 U.S. at ----, 113 S.Ct. at 2749; *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093.”

Lloyd v. WABC-TV, 879 F. Supp 394, 400, 401 (S.D.N.Y. 1995)

Because the allegations of the Complainants are different, I will analyze their claims separately. I will start first with the claims of Mr. John C. Donahue and then discuss the claims of Mr. John Cooper.

1. Mr. John C. Donahue:

A. Burden of Proof – Whites as a Protected Class:

Before I proceed with the analysis of Mr. John C. Donahue’s claims, I must first deal with an issue raised by the Respondent, City of Hartford, in its brief. The City argues because Mr. John C. Donahue’s race and color is white, he should be held to a higher standard of proof than other protected classes under Title VII. The United States District Court in Connecticut has addressed this issue as follows:

“The Court declines to place any such extra burden on the plaintiff in the initial stages of his case. As the United States Supreme Court recently reiterated, “ ‘[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.’ “ *Oncale v. Sundowner*, 523U.S. 75, ----, 118 S.Ct. 998, 1001, 140 L.Ed.2d 201 (1998) (quoting *Castaneda v. Partida*, 430 U.S. 482, 499, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977)).”

Cuniffe v. Sikorsky Aircraft Corporation, 9 F. Supp. 2d 125, 130 (D. Conn. 1998).

Although the New York District Courts are split on this issue, at least one Southern District of New York Court, citing *Cuniffe* has made the following statement:

“The leading Supreme Court Cases on reverse discrimination cut against defendant’s argument for different legal standards. *McDonald v. Santa Fe Trail Transp. Co.*, 247 U.S. 273, 279, 96 S.Ct. 2574, 49L.Ed.2d 493 (1976), establishes that Title VII “proscribe[s] racial discrimination ... against whites on the same terms as racial discrimination against nonwhites.”

Cully v. Milliman & Robertson, Inc., 20 F. Supp. 2d 636, 640 (S.D.N.Y. 1998).

Based on this precedent, Mr. John C. Donahue's burden of proof as a white male is the same as any other protected class making a claim under Title VII.

B. The Sex Discrimination Claim:

Because Mr. John C. Donahue did not present any evidence that he was discriminated against because of his sex (male) and he did not brief this issue, he effectively abandoned the issue. Therefore, he failed to establish a prima facie case on this issue, under state or federal law, and this claim is hereby dismissed.

C. The Retaliation Claim:

A claim of retaliatory discharge is analyzed under the following standard:

“We analyze a claim of retaliatory discharge under the familiar three-part burden shifting analysis first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See also *St. Mary's Honor Center v. Hicks*, 5509 U.S. 502, ---, 113 S.Ct. 2742, 2746-47, 125 :/Ed/2d 407 (1993). In order to make out a prima facie case of retaliation, a plaintiff must show by a preponderance of the evidence i) participation in a protected activity known to the defendant; ii) an employment action disadvantaging the plaintiff; and iii) a causal connection between the protected activity and the adverse employment action. See *Kotcher*, 957 F.2d at 64 (citing *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir.1991)).”

Tomka v. Seiler Corporation, 66 F.3d 1295 (2nd Cir.1995)

Curran v. All Waste Systems, Inc., 2000 WL639999, (2nd Cir.2000).

The only evidence Mr. John C. Donahue introduced to support his claim of retaliation by the Hartford Fire Department was that he was involuntarily transferred only once in his career, back in 1977 or 1978, because he splashed slush, while driving his vehicle, on Assistant Fire Chief Thomas. He did not testify as to the name of the fire chief who transferred him.

Mr. John C. Donahue must establish three elements under state and federal law:

- (1) he participated in a protected activity known to the Respondent;
- (2) an employment action disadvantaging the Complainant; and,

- (3) causal connection between the protected activity and the adverse employment action.

The term ‘protected activity’ refers to action taken to protest or oppose statutorily prohibited discrimination *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2nd Cir.2000). Opposition includes activities such as: making complaints to management, writing letters to customers, protesting against discrimination by industry or society in general. *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2nd Cir.1990). Clearly, Mr. John C. Donahue failed to establish any of the elements of a prima facie case for retaliation. Being transferred for splashing an assistant fire chief with slush did not encompass participation in a protected activity known to the Respondent.

Also, Mr. Donahue could not meet the second element of the test because there was no materially adverse change in the terms and conditions of employment – he was not terminated or demoted or given a decrease in wages or benefits, a title change or any change in his job responsibilities. *Curren v. All Waste Systems, Inc.*, 2000 WL 639999 (2nd Cir.2000); *Richardson v. New York State Dept. of Correctional Service*, 180 F.3d 426, 446 (2nd Cir.1999).

The law is clear that a transfer in positions can constitute an adverse change only if it is accompanied by a decrease in salary or benefits or even status. *Garber v. New York City Police Department*, 159 F.3d 1346, 1998 WL 514222, (2d Cir.1998).

He also failed to establish the third element because there was no causal connection between a protected activity and the adverse employment action. Mr. Donahue did not engage in a legally protected activity to begin with and thus, there was no “materially adverse change” in the terms and conditions of his employment and, therefore, no causal connection between the two. In addition, his claim is too

remote in time because unless there is proof of a continuing violation, claims must be brought within 180 days of the date of the violation. Mr. John C. Donahue has failed to establish a prima facie case of retaliation and this claim should be dismissed.

D. The Race Discrimination Claim – Prima Facie Case:

Mr. John C. Donahue's race discrimination claim alleges that he was not promoted to fire lieutenant because he was a white firefighter. He argued that Fire Chief Robert Dobson, whose race is African-American, did not promote him because he wanted to promote minority firefighters to the position of fire lieutenant. Since he did not present any direct evidence of discrimination, Mr. John C. Donahue is making a claim of disparate treatment under Title VII and Connecticut Fair Employment Practices Act. Therefore, his claim must be analyzed pursuant to the burden-shifting framework established by the United States Supreme Court in *McDonnell-Douglas v. Green*, 411 U.S. 792, 802-804 (1973).

According to the United States Supreme Court, Mr. John C. Donahue has the burden of establishing a prima facie case of racial discrimination by showing that:

- 1.) He belongs to a protected class;
- 2.) He was qualified for, and also applied for, a job for which his employer was seeking candidates;
- 3.) His employer denied him the position despite his qualifications; and,
- 4.) After denying him the position, his employer continued to solicit applicants for the position who had comparable qualifications to his own.

The ultimate burden of demonstrating intentional discrimination rests at all times with the Complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

When the Complainant alleges disparate treatment “liability depends on whether the protected trait (under Title VII race) ... actually motivated the employer’s decision” *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). That is the (Complainant’s race) must have “actually played a role in [the employer’s decisionmaking] process and had a determinative influence on the outcome.” *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2105 (2000).

The Complainant has established the first element of his prima facie case by showing that he is a member of a protected class, because his race is white.

The Complainant also established the second element of his prima facie case by demonstrating that he was qualified for the position of fire lieutenant by passing the written examination given by the outside consultant in 1993. He was then placed on the 1994 fire lieutenant’s eligible register/“certification list”. The Hartford Fire Department was looking for candidates for the position of fire lieutenant until the expiration of the 1994-fire lieutenant’s eligible register/ “certification list.”

The third element the Complainant must prove is that the Hartford Fire Department denied him the promotion to fire lieutenant despite his qualifications for the position.

The fourth element of proof of a prima facie case is that the Hartford Fire Department continued to solicit applicants for the position who had comparable qualifications to the Complainant.

I will analyze the third and fourth elements of proof together because, in this case, they cannot be analyzed separately. Before I begin my analysis, I will note that the United States Supreme Court and a number of courts in the Second Circuit Court of

Appeals have held that the *McDonnell Douglas* elements constitute only a “flexible guideline” and no element is “essential”. “See *McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13; *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir.1988); *Meiri v. Dacon*, 759 F.2d 989, 996 (2c Cir.), cert. denied, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978)).” *Lloyd*, supra, 401.

It is necessary, at this point in my analysis, to start at the beginning. The Personnel Director for the City of Hartford, Ms. Patricia Washington, had previously contracted with an outside consultant to prepare and give a written examination for the position of fire lieutenant. The written examination was conducted in 1993. The firefighters who passed the examination were placed on the 1994 fire lieutenant” eligible register/“certification list”, which is the subject of this complaint.

The City of Hartford Charter, Chapter XVI, Section 2(b), and the Personnel Rules and Regulations adopted pursuant thereto have the force and effect of law. Chapter XVI, Section 6, authorizes the Director of Personnel to maintain lists of eligible candidates based on competitive examinations ranked in the order of their test scores for each position in a classified service, such as the fire department. Whenever a vacancy is to be filled, the Director of Personnel is to certify to the appointing officer, in this case, Fire Chief Robert Dobson, the names of the three (3) persons standing highest on the eligible list applicable to the position in question (fire lieutenant). This is known as the “Rule of Three.” No appointments

to any positions in the classified service can be made except from these registers/"lists."

As Fire Chief Robert Dobson promotes firefighters to the position of fire lieutenant, the Director of Personnel, Ms. Patricia Washington, certifies to him more names from the eligible register/"certification list." Pursuant to the "Rule of Three", the Director of Personnel certifies to Fire Chief Robert Dobson two more names, if they are available, than the number of vacancies.

The eligible register/"certification list" that is sent to the appointing authority, Fire Chief Robert Dobson, by Ms. Patricia Washington, the Director of Personnel, does not contain any information on the race, sex or ethnicity of any candidate on the register/"list." The Hartford Personnel Department is mandated by the United States Equal Employment Opportunity Commission to compile reports, which provide a breakdown of the City of Hartford's workforce, by race, sex and ethnicity. Ms. Patricia Washington testified that her policy was that she never provided such information on individual candidates listed on eligible registers/"certification lists" either to the Hartford Personnel Board or to Fire Chief Robert Dobson, or to anyone else. She also directed members of her department never to provide such information to either the Hartford Personnel Board or to Fire Chief Robert Dobson, or to anyone else.

The appointing authority receives from the Director of Personnel, a list of candidates' names for a position. Fire Chief Robert Dobson has the discretion/authority based on the "Rule of Three" to select or choose any of the candidates whose names are on the register/"certification list". Thus, although seniority and the highest test score are both used in compiling the eligible

register/“certification list,” they are not the determining factor which would compel Fire Chief Robert Dobson to select candidates who have either the highest seniority or the highest test score. Fire Chief Robert Dobson has the ability to promote the candidates he thinks would be best for the Hartford Fire Department.

When the 1994 fire lieutenant’s eligible register/ “list” was set to expire, the Hartford Personnel Director notified Fire Chief Robert Dobson. He asked her to ask the Hartford Personnel Board to extend the register/ “list” for six months. The Hartford Personnel Board voted to accept Ms. Patricia Washington’s recommendation that the register/ “list” be extended for six months. The six-month extension meant the register/ “list” would expire on February 3, 1997. When the initial six months extension of the register/ “list” was due to expire, Ms. Patricia Washington again contacted Fire Chief Robert Dobson and asked whether he wished to have the register/ “list” extended for a second six month period. Fire Chief Robert Dobson told Ms. Patricia Washington that he did not want the 1994 fire lieutenants eligible register/ “certification list” extended for a second six months. On January 27, 1997 the Hartford Personnel Director, Ms. Patricia Washington, attended a Personnel Board meeting. A number of people spoke, some supporting the extension of the register/ “list”, some opposing it. The Chairman of the Personnel Board asked Ms. Washington to explain why Fire Chief Robert Dobson had not requested that the 1994 fire lieutenants eligible register/ “certification list” be extended for a second six months. Ms. Patricia Washington told Mr. Lary Reynolds that Fire Chief Dobson did not intend to make any appointments from this “list.” Since there was no request from the Director of Personnel, Ms. Patricia Washington, to extend the register/ “list” the Personnel

Board moved onto other business. Since the Personnel Board did not vote to extend the register/ "list" for a second six months, it expired after the end of the first 6-month extension time period, or on February 3, 1997.

All parties agree that, at the time that the 1994 fire lieutenant's eligible register/"certification list" expired and for three-month period thereafter, there were no vacancies for the position of fire lieutenant. That is during January, February, March and April of 1997 there were no vacancies for fire lieutenant in the Hartford Fire Department. Then on May 4, 1997, Fire Chief Robert Dobson promoted three-fire lieutenants to the position of fire captain. These promotions to the position of fire captain created three vacancies in the position of fire lieutenant.

Fire Chief Robert Dobson testified that he had a policy, when he was appointed fire chief, of extending eligible registers/"certification lists" for only a six month period of time. During his entire tenure at the Hartford Fire Department he only made one exception to this rule. Fire Chief Robert Dobson had other reasons why he did not want to extend the 1994 fire lieutenant's eligible register/"certification list." These reasons included the fact that a particularly large number of firefighters were eligible to take the new lieutenant's examination – one hundred fifty (150) or more. Fire Chief Robert Dobson also thought the Hartford Fire Department had a morale problem; because the department had gone for several years without a collective bargaining agreement. The Fire chief thought morale would be improved if all of the potential candidates were busy studying for, taking the exam, and interviewing for the position of fire lieutenant. In response to the arguments of the Complainants, as well as other candidates who were not promoted from the 1994 fire lieutenants eligible register/"certification list" which expired, Fire Chief Robert

Dobson testified that the firefighters who were not promoted from the expired registers/"certification lists" had an equal opportunity, as did any other members of the Hartford Fire Department, to take the new examination.

Fire Chief Robert Dobson called Ms. Patricia Washington in February of 1977 and requested that she start the ball rolling for conducting two tests for the positions of fire lieutenant and deputy fire chief. The chief testified that he had previously decided he was not going to promote any more firefighters off the 1994 fire lieutenant's eligible register/"certification list".

Fire Chief Robert Dobson was consistent in his testimony, even under the pressure of cross-examination, that his policy was not to discriminate against the firefighters under his command because of their race, sex or ethnicity. The chief said he was aware of the City of Hartford's affirmative action policy and he tried to implement this policy to the best of his ability.

He stated, on numerous occasions, that he did not discriminate against white firefighters in general and, in particular, the white firefighters who remained unpromoted on the 1994 eligible register/"certification list". All parties agree that racial composition of the Hartford Fire Department is overwhelmingly white by race.

Although there were allegations of "test fixing" Mr. John C. Donahue admitted, under cross-examination, that he had no evidence of "test fixing" either in the 1993 exam for fire lieutenant or any other examination during his tenure with the Hartford Fire Department. Mr. John Cooper made the same admission.

The heart of the argument John C. Donahue made about the 1994 fire lieutenant eligible register/"certification list" is that the only reason he could think of for Fire

Chief Robert Dobson's failure to request Ms. Patricia Washington to extend the register/"certification list" for the second six-months was because the Chief was prejudiced against white firefighters. However, he was unable to substantiate through his testimony any statements of bias against whites by Fire Chief Robert Dobson.

There were thirty-seven (37) candidates who remained on the 1994 fire lieutenant's register/"certification list". The breakdown by race, sex, and ethnicity using the EEOC codes follows:

30	white males
1	white female
2	black African-American males
4	Hispanic males.

Therefore, the expiration of the 1994 register/"certification list" affected all protected classes equally, not just white firefighters as the Complainants have argued.

Mr. John C. Donahue also contended that Fire Chief Robert Dobson knew that there were going to be vacancies occurring in the position of fire lieutenant. And even if there were no vacancies when the 1994 register/"certification list" expired, the fire chief's promotion of three fire lieutenants to fire captains, three months later, was proof that the chief was discriminating against Mr. John C. Donahue and other white firefighters because he was aware that there would be vacancies and he would be making the promotions to fire captain. He continued to maintain that the fire chief had to fill vacant positions in the fire department immediately. However, he could not point to any city charter provision or to a provision of personnel rules and regulations to support his position. Although under cross-examination, he

testified that he was aware of the Fire chief's wide latitude to promote firefighters under the "Rule of Three", he still insisted that if the 1994 fire lieutenant's Eligible Register/"Certification List" had been extended for a second six-months that the fire chief would have, without doubt, promoted him.

Finally, there is a piece of documentary evidence that, in my judgment, speaks very loudly as to whether Fire Chief Robert Dobson discriminated against John C. Donahue because he is a white firefighter in failing to extend the 1994 fire lieutenant eligible register/"certification list". This document is the key documentary evidence in this case. It is the 1994 fire lieutenant eligible register/"certification list" which is the subject of this dispute. Prior to the expiration of this register/ "certification list", Fire Chief Robert Dobson promoted thirty-one (31) candidates to the position of fire lieutenant. Using the EEOC codes provided by the Hartford Personnel Department. I calculate that the breakdown of Fire Chief Robert Dobson's promotions to the position of fire lieutenant follows:

24	white males
1	white female
3	black males
3	Hispanic males

To my mind, these promotions provide a perfect snapshot of Fire Chief Robert Dobson's promotional policy. This policy is nondiscriminatory and closely mirrors the racial, sexually and ethnic makeup of the Hartford Fire Department. This is reinforced by the fact that these promotions relate to the position of fire lieutenant, which is at issue in this case. In addition, Fire Chief Robert Dobson testified that during his tenure he promoted John C. Donahue to fire lieutenant and many other white males including Mr. Thomas DiSicipo, Mr. Ted Borowski, Mr. Michael

Dempsey, Mr. Frank Costello (twice), Mr. Thomas Cirullo, and Mr. Scott Cunningham from a later register/"certification list".

Since Mr. John C. Donahue is unable to show that he applied for a position and was rejected, and since the 1994 fire lieutenant's eligible register had expired, Fire Chief Dobson could not make any promotions to the position of fire lieutenant. In addition, the Hartford Fire Department did not solicit any applicants for the position of fire lieutenant nor did the Hartford Fire Department seek to fill the fire lieutenant's position or place anyone in the position of fire lieutenant because there were no vacancies for the position of fire lieutenant at the time the 1994 register/"list" expired. Therefore, Mr. John C. Donahue was unable to prove the third and fourth elements of a prima facie case.

Mr. John C. Donahue was also unable to prove that the Fire Chief Robert Dobson's actions, with respect to the extension of the 1994 register/"certification list", was motivated by his discriminatory animus against whites or that his race played a role in Fire Chief Robert Dobson's decision-making process and had a determinative influence on the outcome or that the Hartford Fire Departments proffered non-discriminatory explanation for its decisions were a "pretext for discrimination". *Reeves*, supra, 2106.

The United States Supreme Court has recently discussed the issue of when a Complainant's prima facie case, combined with sufficient burden for the fact to find the employer's proffered non-discriminatory explanation is false, may permit the trier of fact to conclude that the employer unlawfully discriminated in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). However, the court

also points out that there are other cases where the Complainant's showing will not always be adequate and discusses this issue in the following language:

“This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. (Emphasis supplied.)

Reeves, supra, 2108.

As the trier of fact, it is my job to judge the credibility of the witnesses. After watching the witnesses testify at the public hearing and paying careful attention to their demeanor as well as by a thorough reading and rereading of the transcript, I found the testimony of the main witnesses for the Hartford Fire Department and the Hartford Personnel Department, Fire Chief Robert Dobson and Personnel Director Ms. Patricia Washington to be consistent and credible.

The testimony of Mr. John C. Donahue, and the other witnesses called to support his case, reflects numerous contradictions, inconsistencies and implausibilities as it relates to the issue of whether he was intentionally discriminated against because he was a white firefighter. This was especially true under the pressure of cross-examination when the witnesses often contradicted their earlier statements on direct examination. For example, some witnesses testified that the Hartford Fire Department engaged in “text-fixing”. However, on cross-examination, all of the Complainant's witnesses admitted that they were not personally aware of any incidents of “test-fixing.” More specifically, they were not alleging that the 1993

fire lieutenant's examination, which had been conducted by an outside consultant, was "fixed".

Then, there is the "failure to promote" issue. While both Complainants alleged their claims involve classic failure to promote cases, during the presentation of their evidence both Complainants eventually admitted that their real claims against Fire Chief Robert Dobson were that he failed to extend the 1994 fire lieutenant's eligible register/"certification list" for a second six months. It is clear to me that there are significant differences between the fact patterns of a classic failure to promote case and the failure to extend the 1994 fire lieutenant's register/"certification list". The most significant difference is that the Charter and Ordinance of the City of Hartford have established detailed procedures for how tests and promotions are conducted by the uniformed services. The Complainants were unable to demonstrate that the Hartford Fire Department, the Hartford Personnel Department, or the Personnel Board failed to follow these procedures. Both of the Complainants also admitted that the "Rule of Three" allows Fire Chief Robert Dobson the ability to select any candidate from among the eligible register/"certification list" without giving precedent to either seniority or the highest test scores which are the deciding factors in many other promotional systems.

The problem shifting from a classic "failure to promote" case to a "failure to extend the register/"certification list" presents for the Complainants is that they now must prove, not only that Fire Chief Robert Dobson intentionally discriminated against them because of their race (one is African-American and the other is white) in not extending the 1994 register/"certification list", but that he also intentionally discriminated against them because he did not promote them. The Hartford Fire

Department argued, and I agree with the Respondent's argument, that once the 1994 fire lieutenant eligible register/"certification list" expired in February 3, 1997, Fire Chief Robert Dobson was powerless to promote any firefighters from that register/"certification list"

The Complainants took the contradictory position that although the fire chief had the discretion given him by the Hartford City Charter and Ordinances to pick anyone on the register/"certification list" that he should have picked them.

Mr. John C. Donahue presented no direct evidence of any statements by Fire Chief Robert Dobson or Personnel Director, Ms. Patricia Washington, evidencing his claim that they were biased against him or other white firefighters. The only witness that testified at all concerning derogatory statements by Fire Chief Robert Dobson was Mr. John Cooper. He testified that the chief told him to keep the white boys in line. I did not find Mr. Cooper's testimony to be credible because Fire Chief Robert Dobson had fired Mr. John Cooper for allegedly pulling a knife on Lieutenant Zitari. Finally, there was absolutely no corroborated evidence to support Mr. John Cooper's testimony by way of the testimony of other witnesses or any written documentation in the record. Mr. John Cooper's testimony is totally unsupported by any other evidence in the record.

Mr. John C. Donahue tried to argue that the Personnel Board acted discriminatorily because some members asked, in a meeting where the 1994 register/"certification list" was being considered for extension, for the racial breakdown of the firefighters on the list and whether or not they were residents of the City of Hartford. I did not find this argument persuasive because the Personnel Board's role is to either extend or not extend the registers/"lists". The appointing

authority in this case was Fire Chief Robert Dobson. Mr. Donahue presented no evidence to demonstrate that the Board's comments had any effect on Fire Chief Dobson's promotional decisions or his decision not to ask for an extension of the 1994 register/"certification list".

In addition, Mr. John C. Donahue also argued that because the Hartford Personnel Department classified City employees according to the EEOC codes that the Personnel Department in conjunction with Fire Chief Robert Dobson were conspiring to manipulate the eligible registers/"certification lists" by using this data in an improper manner. However, Mr. John C. Donahue presented no evidence to support this argument.

I was more persuaded by the Hartford Fire Department's argument that the Personnel Department is required by the Federal EEOC law to maintain the numerical breakdown of City employees by race, sex and ethnicity. I was also persuaded by the testimony of Hartford Personnel Director, Ms. Patricia Washington, that she had ordered Personnel Department employees not to give this EEOC information to anyone; not the Personnel Board, Fire Chief Robert Dobson, or anyone else.

Mr. John C. Donahue also implied in his argument that Fire Chief Robert Dobson should have promoted candidates for fire lieutenant off of the 1994 eligible register/"certification list" according to the strict numerical ranking of the test scores. He continued to advance this argument even when he and other witnesses called on his behalf, admitted on cross-examination, that the "Rule of Three" permitted Fire Chief Robert Dobson to select any candidate from the 1994 eligible register/"certification list" regardless of their test score.

Mr. John C. Donahue, in his claim of disparate treatment under Title VII and Connecticut Fair Employment Practices Act, did not present any convincing circumstantial evidence that Fire Chief Robert Dobson's alleged discriminatory animus against white firefighters motivated the fire chief's decisions about whether to extend the 1994 fire lieutenant's eligible register/"certification list" for a second six months or his decisions to promote individual firefighters to fire lieutenant from the 1994 register/"certification list". In *Reeves*, the United States Supreme Court held that when, as here, Mr. John C. Donahue alleges disparate treatment under Title VII

“ liability depends on whether the protected trait ... actually motivated the employer's decision.”

Reeves, supra, 2105.

Mr. John C. Donahue failed to establish that he was treated differently by Fire Chief Robert Dobson because of his status as a white firefighter. On the other hand, the testimony from Fire Chief Robert Dobson and Ms. Patricia Washington was clear, even under the pressure of cross-examination, that they did not discriminate against white firefighters or any other group of firefighters in the Hartford Fire Department. Fire Chief Robert Dobson also testified that he followed the Federal Equal Opportunity Employment guidelines to the best of his ability.

D.1. The 1994 Register/"Certification List":

The most persuasive piece of evidence for me, as the trier of fact, was the pattern of promotions by Fire Chief Robert Dobson from the 1994 fire lieutenant eligible register/"certification list", which is the subject of the present action. For me this piece of documentary evidence is a perfect snapshot of how Fire Chief Robert Dobson promoted Hartford firefighters to the position of fire lieutenant.

The 1994 fire lieutenant's register/"certification list" is extremely relevant and material to the issues in this case because Fire Chief Robert Dobson was the appointing authority for this register/"certification list".

All of the parties agreed that the overwhelming majority of Hartford firefighters were white by race. When the 1994-fire lieutenant's eligible register/"certification list" expired on February 3, 1997, Fire Chief Robert Dobson had promoted 31 firefighters to the position of fire lieutenant. Using the EEOC Codes supplied by the Hartford Personnel Department I calculate the following breakdown of the promotions made by Fire Chief Robert Dobson before the 1994 register/"certification list" expired:

24	white males
1	white female
3	black males
3	Hispanic males

It is clear that Fire Chief Robert Dobson's patterns of promotion are non-discriminatory. If anything, he promoted more white firefighters to the position of fire lieutenant than any other race or nationality. Furthermore, Mr. John C. Donahue failed to present any statistical evidence to support his claim of disparate treatment.

For all of the foregoing reasons, the Complainant, Mr. John C. Donahue, has failed to establish a prima facie case, under state or federal law, of his claims of failure to extend the 1994 register/"certification list" for a second six month period or his claim of failure to promote him because of discrimination based on his race (white) is hereby dismissed.

2. Mr. John Cooper:

A. Motion To Dismiss:

There is also a preliminary issue I must deal with before I can proceed with an analysis of Mr. John Cooper's claims. The Respondent, City of Hartford, argues John Cooper's latest amended complaint should be dismissed because it fails to state a cause of action pursuant to General Statutes § 46a-60(a)(1) or Title VII of the Civil Rights Acts of 1964 and 1991. In support of this argument, the Respondent notes when Mr. John Cooper filed his complaint with the Commission on May 27, 1997, he alleged that he had been denied promotion and subject to unlawful discrimination on the basis of race (white) and sex (male). On January 26, 1998, he amended his complaint to allege that his protected class was not white, but African-American and he added a claim of retaliation for filing his complaint with the Commission by being involuntarily transferred to another engine company within the Hartford Fire Department.

On April 19, 1999, the Complainant filed a second amendment to his complaint adopting each and every allegation of his original and January 26, 1998 amendments. This second amendment now alleged that Mr. John Cooper had been denied a promotion and discriminated against on the basis of race, not his own race African-American. This amendment also alleged Fire Chief Robert Dobson's decision not to request an extension of the 1994 fire lieutenant's eligible register/"certification list" was motivated by the fact that the remaining candidates on the register/"certification list" were white and he suffered the same injury as the other remaining candidates on the register/"certification list" who were white. The Respondent is requesting that I dismiss this part of Mr. John Cooper's complaint. In support of this proposition, the Respondent cites a Fourth Circuit Court of Appeals case *Childress v. City of Richmond, Va.*, 134 F.3d 1205, 1209 (4th Cir.

1998), cert. denied, 524 U.S. 927 (1998) where a group of white police officers complained of a hostile work environment and retaliation where disparaging remarks were made by a police lieutenant to minority police officers and women police officers.

I deny the Respondent's request for the following reasons:

1. a motion to dismiss was never filed prior to the start of the public hearing;
2. a motion for a directed verdict was never filed by the Respondent during the public hearing;
3. The public hearing is over and the time to file a motion to dismiss or a motion for a directed verdict has passed.

Therefore, the motion to dismiss is denied and I will treat this allegation as another allegation that Mr. John Cooper has to prove.

B. The Sex Discrimination Claim:

Because Mr. John Cooper did not present any evidence that he was discriminated against because of his sex (male) and did not brief the issue, he effectively abandoned this issue and therefore this claim, under state or federal law, is hereby dismissed.

C. The Retaliation Claim:

A claim of retaliation is analyzed under the following standard:

“We analyze a claim of retaliatory discharge under the familiar three-part burden shifting analysis first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See also *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, ----, 113 S.Ct. 2742, 2746-47, 125 L.Ed.2d 407 (1993). In order to make out a prima facie case of retaliation, a plaintiff must show by a preponderance of the evidence i) participation in a protected activity known to the defendant; ii) an employment action disadvantaging the plaintiff; and iii) a causal connection between the protected activity and the adverse employment action. See *Kotcher*, 957 F.2d at 64 (citing *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir.1991)).” *Tomka v. Seiler Corporation*, 66F.3d 1295 (2nd Cir. 1995).

Curran v. All Waste Systems, Inc., 2000 WL 639999 *3, 213 F.3d 625 (2nd Cir.2000).

Mr. John Cooper testified that he was involuntarily transferred by the fire chief from Engine 5 to Engine 8, in retaliation for filing his complaint with the Commission. Fire Chief Robert Dobson also testified that he involuntarily transferred Mr. John Cooper from Engine 5 to Engine 8. The fire chief is allowed to transfer firefighters for the “good of the Fire Department.”

The good of the fire department has included, during Fire Chief Robert Dobson’s tenure, evening out shifts or to break up antagonisms. Fire Chief Robert Dobson testified that he transferred Mr. John Cooper for the following reasons: some members of Engine 5 requested the transfer; Mr. John Cooper had been uncooperative during an inspection; and, because the fire chief wanted him to work under a strong officer, Lieutenant Carmine Zitani.

Applying the retaliatory discharge standard to the facts of this case, Mr. John Cooper did not participate in a protected activity to protest or oppose statutory discrimination. *Cruz*, supra, 566. The second element Mr. John Cooper must prove is an employment action disadvantaging the Complainant. The Respondent argues that since he was performing the same duties at Engine 8 as at Engine 5, his wages were the same, his benefits were the same, and his title was the same that this cannot be considered “a materially adverse change.” An adverse action is a “materially adverse change” in the terms and conditions of employment. *Curran v. All Waste Systems, Inc.*, 2000 WL 639999, 213 f.3d 625 (2d Cir.2000); *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426, 446 (2d Cir.1999).

“A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation.”

Curran, supra, at *3.

“Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of ‘adverse.’”

Richardson, supra, at 446.

“An adverse action is not every action that the employee dislikes or disagrees with. (Emphasis supplied.) Rather a reasonable person must view the decision as adverse.”

Leson v. ARI of Connecticut, Inc., 51 F.Supp.2d 135, 142 (D.Conn.1999).

Here, the Complainant claims the adverse action was that he was involuntarily transferred.

“The law is clear that a transfer in positions can constitute an adverse change if it is accompanied by a decrease in salary or benefits or even status.”

Garber v. New York City Police Department, 159 F.3d 1346, 1998 WL 514222, (2d Cir.1998).

Mr. John Cooper admitted his duties and his title were the same at both engines, as were his pay and benefits. Therefore, John Cooper has failed to establish the third element of proof of a prima facie case of retaliation.

I find the fire chief’s reasons for transferring Mr. John Cooper to be more persuasive than the testimony presented by the Complainant. Thus, I find that he was transferred, not in retaliation for filing his complaint with the Commission, but instead to accommodate the request of some members of Engine 5 for non-cooperative behavior during an inspection and so that he could work under a strong officer, Lieutenant Carmine Zitani. I also note that in this weighing of credibility,

Mr. John Cooper has been involuntarily transferred nine (9) times in his 19-1/2 year career with the Hartford Fire Department; seven (7) times under the prior fire chief; and, twice under Fire Chief Robert Dobson.

Therefore, the Complainant, John Cooper, has failed to prove the fourth element of a prima facie case: a causal connection, the protected activity, and the adverse employment action.

For the reasons set forth above, the Complainant, John Cooper, has failed to establish a prima facie case of retaliation under state and federal law and his claim is dismissed.

D. The Race Discrimination Claim – Prima Facie Case:

D.1. Suffered the Same Injury as White Firefighters:

Mr. John Cooper claims that he suffered the same injury as the white firefighters on the 1994 register/"certification list". The claims of Mr. John Cooper would seem to be polar opposites to his white colleagues because he is claiming that Fire Chief Robert Dobson did not promote him because he is a black, African-American. While Mr. John Cooper may have advocated the position that he suffered the same injury as the white firefighters on the 1994 register/"certification list", he presented no evidence to support this particular claim of discrimination. Proof of this claim, even in the best of circumstances, would have been extraordinarily difficult. In any case, the position that he ended up advocating was that Fire Chief Robert Dobson did not promote him because he was a black African-American.

Therefore, he did not establish a prima facie case under state or federal law on this issue and his claim is hereby dismissed.

D.2. The Race Claim:

Mr. John Cooper also alleges that he was not promoted in violation of Title VII and Connecticut Fair Employment Practices Act. Because most of the claims of racial discrimination are identical, I adopt the analysis of Mr. John C. Donahue's claim of racial discrimination. To establish a prima facie case of discrimination under Title VII, Mr. Cooper must establish the following:

1. that he belongs to a protected class;
2. that he was qualified and he applied for a job for which the employer was seeking candidates;
3. that his employer denied him the position despite his qualifications; and
4. that after him the position his employer continued to solicit applicants for the position who had comparable qualifications to his own.

“The ultimate burden of demonstrating intentional discrimination rests at all times with the Complainant.” *St. Mary Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L.Ed2d 207 (1981). *Lloyd*, supra, 400, 401.

When the Complainant alleges disparate treatment

“liability depends on whether the protected trait (under Title VII race) ... actually motivated the employer's decision”

Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed2d 338 (1993).

That is the (Complainant's race) must have

“actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.”

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2105 (2000).

It is clear that Mr. John Cooper meets the first prong of the test because he is a black, African-American and, thus, is a member of a protected class. He also meets the second prong of the test because the Hartford Fire Department was

looking to promote firefighters to the position of fire lieutenant. He was qualified for this promotion because he took and passed the written examination given by an outside consultant in 1993. He was ranked 35th by test score.

As with Mr. John C. Donahue, I will analyze the third and fourth elements of establishing a prima facie case together because of particular facts of his claim. I am confident in doing this because the United States District Court for the Southern District of New York has discussed this issue as follows:

“ ... the *McDonnell Douglas* elements constitute only a flexible guideline and no element is ‘essential.’ ”

Lloyd, supra, 401.

The same comments are applicable about Mr. John Cooper’s claim of a classic failure to promote as was applicable to Mr. John C. Donahue’s argument. At the end of his case he admitted that Fire Chief Robert Dobson’s failure to extend the 1994 fire lieutenants eligible register/"certification list" for a second six months was the discriminatory act, with the fire chief’s failure to promote him to fire lieutenant. While there are similarities between the claims of Mr. John Cooper and Mr. John C. Donahue, there are differences. Mr. John C. Donahue argued that he was not promoted because Fire Chief Robert Dobson discriminated against him because he is a white firefighter. Mr. John Cooper has argued that he was not promoted because Fire Chief Robert Dobson discriminated against him because he is a black, African-American firefighter.

Under the United States Supreme Court precedent in *Reeves*, Mr. John Cooper must demonstrate, to establish a prima facie case of disparate treatment, that Fire Chief Robert Dobson’s decision not to promote him was motivated by the Chief’s discriminatory animus against black, African-Americans. In addition, he must

also demonstrate both that his race actually played a role in Fire Chief Robert Dobson's decision-making process and that it had a determinative influence on the outcome of the fire chief's decision.

“ ... the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.’ *Burdine*, 450 U.S. at 253, 101 S.Ct. 1089.”

Reeves, supra, 2105.

Under cross-examination, he admitted that when the 1994 register/"certification list" expired on February 3, 1997, there were no vacancies for the position of fire lieutenant. In addition, there would be no vacancies until June of 1997, when Fire Chief Robert Dobson promoted three (3) fire lieutenants to fire captain.

Mr. John Cooper also admitted, under cross-examination, that under the "Rule of Three" Fire Chief Robert Dobson had the authority to promote whomever he wanted to the position of fire lieutenant.

Finally, he also testified, under cross-examination, that he had been suspended by Fire Chief Robert Dobson for a period of ninety (90) days for allegedly pulling a knife on his supervisor at Ladder 3, Engine 5, Lieutenant Carmine Zitani.

Mr. John Cooper testified that the alleged knife-pulling incident occurred prior to the time when the 1994 register/"certification list" was extended for the first time.

Under cross-examination Mr. John Cooper also denied that the meeting at Hal's Restaurant was to get him to "clean-up his act."

Under cross-examination he further admitted that Fire Chief Robert Dobson had promoted white firefighters, black African-American firefighters, Hispanic firefighters, as well as women firefighters. He further testified that he never

asked anyone at the Hartford Personnel Department, the Personnel Director Ms. Patricia Washington, or anyone at Fire Chief Robert Dobson's office whether there were any potential future vacancies for fire lieutenant after the 1994 register/"certification list" expired.

D.3. The 1994 Register/"Certification List"

The most persuasive piece of evidence was the pattern of promotions by Fire Chief Robert Dobson from the 1994-fire lieutenant eligible register/"certification list". This documentary evidence is a perfect snapshot of Fire Chief Robert Dobson's pattern of promotions to the position of fire lieutenant. The 1994 eligible register/"certification list" is relevant because it is the 1994 register/"list" which is the subject of this complaint. The evidence of Fire Chief Robert Dobson's pattern of promotions to fire lieutenant is just as relevant to Mr. John Cooper's claim as it was to Mr. John C. Donahue's claim.

Using the EEOC Codes supplied by the Hartford Personnel Department I calculate the following breakdown of the promotions made by Fire Chief Robert Dobson before the 1994 register/"certification list" expired:

24	white males
1	white female
3	black males
3	Hispanic males

It is clear that Fire Chief Robert Dobson's patterns of promotion are non-discriminatory. Although he promoted more white firefighters to the position of fire lieutenant than any other race or nationality, he promoted significant numbers of black African-American firefighters and Hispanic firefighters.

Clearly, based on the record Fire Chief Robert Dobson promoted all of the races and sexes that made up the personnel of the Hartford Fire Department and he did

not exclude any group whether, white males and female, black African-American males, or Hispanic males. Furthermore, Mr. John Cooper failed to present any statistical evidence to support his claim of desperate treatment.

As I stated at the beginning of this section, in order to establish a prima facie case of disparate treatment under *Reeves* Mr. John Cooper needed to demonstrate that Fire Chief Robert Dobson intentionally discriminated against him, because he is a black African-American, by demonstrating that the fire chief's animus against black African-American firefighters:

1. motivated the fire chief's decision;
2. played a role in his decisionmaking process; and,
3. had a determinative influence on the outcome of his decision not to extend the 1994 fire lieutenant's eligible register/"certification list" for a second six months.

The fire chief testified that he did not promote Mr. John Cooper to the position of fire lieutenant because, in his judgment, he did not believe Mr. Cooper's disciplinary problems were over. Therefore, he was not, in the chief's judgment, a good candidate for fire lieutenant.

I found Fire Chief Robert Dobson's testimony to be more credible than Mr. John Cooper and his witnesses, especially under the pressure of cross-examination.

Mr. John Cooper failed to establish that Fire Chief Robert Dobson failed to extend the fire lieutenant's 1994 eligible register/"certification list" for a second six months or failed to promote him to fire lieutenant because of his race, black African-American.

For all of the foregoing reasons, the Complainant, Mr. John Cooper failed to establish a *prima facie* case under state or federal law and his claim of racial discrimination is dismissed.

Based on all of the above, the Complainants Mr. John C. Donahue and Mr. John Cooper have failed to establish *prima facie* cases of racial discrimination, retaliation, and gender discrimination under state and federal law. Therefore, judgment must enter for the Respondent, Hartford Fire Department, and their complaints are hereby dismissed.

V. CONCLUSIONS OF LAW:

As to Complainant John C. Donahue:

1. The Complainant did not establish a *prima facie* case of gender discrimination, under state or federal law.
2. The Complainant did not establish a *prima facie* case of racial discrimination, under state or federal law.
3. The Complainant did not establish a *prima facie* case of retaliation under state or federal law.

As to Complainant John Cooper:

4. The Complainant did not establish a *prima facie* case of gender discrimination, under state or federal law.
5. The Complainant did not establish a *prima facie* case of racial discrimination, under state or federal law.
6. The Complainant did not establish a *prima facie* case of retaliation, under state or federal law.

VI. ORDER:

In light of the foregoing, in accordance with the provisions of General Statutes § 46a-86, it is hereby ordered that the Complaints be, and hereby are, DISMISSED.

Dated at Hartford, Connecticut, this 14th day of August, 2000.

Hon. Leonard E. Trojanowski
Presiding Human Rights Referee

c: John Cooper
John C. Donahue
Patricia C. Washington, Director of Personnel, City of Hartford
Attorney Karen K. Buffkin
Attorney C. Joan Parker, Assistant Commission Counsel II
Attorney Robert Zamlowski, Assistant Commission Counsel II
Attorney Raymond Pech, Deputy Commission Counsel