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

Commission on Human Rights and Opportunities ex rel. John Crebase	: CHRO No. 0330171 : Fed. No. 16aa300118
v.	
Procter & Gamble Pharmaceuticals, Inc.	: July 12, 2006

FINAL DECISION

Preliminary statement

On October 8, 2002, John Crebase ("complainant"), of North Haven, Connecticut, filed an affidavit of illegal discriminatory practice ("complaint") with the Commission on Human Rights and Opportunities ("commission"). In his complaint, he alleged that Procter & Gamble Pharmaceuticals, Inc. ("respondent"), of Cincinnati, Ohio, his former employer, illegally discriminated against him in violation of Title VII of the Civil Rights Act ("Title VII")[1], the Age Discrimination in Employment Act of 1967 ("ADEA")[2], the Americans with Disabilities Act ("ADA")[3], and General Statutes §§ 46a-58 (a) and 46a-60 (a) (1) when it terminated his employment on July 11, 2002 because of his sex

[1] 42 U.S.C. 2000e
[2] 29 U.S.C. 621-634
[3] 42 U.S.C. 12101

(male), age (over 40 years old) and mental disability (adjustment disorder with mixed anxiety and depressed mood). He also claimed that he was subjected to a hostile work environment because of his sex, age and mental disability. After preliminary investigation, the commission's investigator concluded that there was reasonable cause to believe that an unfair practice was committed as alleged in the complaint and, on January 16, 2005, certified the complaint to the commission's executive director. The respondent filed its post-certification answer on February 9, 2005 denying the allegations of discrimination. According to the respondent, the complainant was terminated for violating the respondent's policies by falsifying business records. The public hearing was held on February 1-3 and 7-9, 2006. After extensions of time requested by the respondent and the complainant, they filed briefs on May 24, 2006, at which time the record closed.

For the reasons set forth herein, it is found that the complainant established by a preponderance of the evidence that the violated §§ 46a-58 (a) and 46a-60 (a) (1) when it terminated his employment. Relief and damages are awarded as set forth herein.

Findings of fact

References to an exhibit are by party designation and number. The complainant's exhibits are denoted as "C" followed by the exhibit number, and the

respondent's exhibits are denoted as "R" followed by the exhibit number. The commission did not proffer any exhibits.

Based upon a review of the pleadings, exhibits and transcripts and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found ("FF"):

1. The respondent's business includes the sale of pharmaceuticals. Tr. 561-63.

2. The respondent employs more than twenty employees. Complaint & Answer ¶ 3.

3. The respondent hires representatives, also known as account representatives. These are entry-level positions that become career-level positions for most of the respondent's sales force. Account representatives are organized into teams of eight to twelve who report to an operations manager. The operations manager reports to a regional associate director who reports to the national director of sales. Tr. 723-24.

4. Account representatives generally function independently of their operations manager. They work from their own homes, and only infrequently meet with their manager and team members. Communication is usually via telephone, electronic mail and voicemail. Tr. 733-34

5. An account representative is assigned to a territory comprised of 250-300 physicians selected by the respondent whom they are to contact to promote the respondent's products. Approximately 125 of the physicians are high priority targets and receive the majority of the contacts. Tr. 582-83, 1265.

6. The account representatives promote the respondent's products primarily (1) by 'calling' on prescribers with offices in their assigned territories who prescribe either pharmaceuticals sold by the respondent or comparable pharmaceuticals sold by its competitors and (2) by leaving samples of the respondent's products with the prescribers at their offices (referred to as a 'sample and presentation call' or 'sampling') for distribution to patients. Tr. 391-93, 571-72, 577-78, 1261.

7. As defined by the respondent's business practice, a "call" consists of a face-to-face discussion between the account representative and someone capable of prescribing a medication ("prescriber") at which time a product presentation is made and prescribing information is left with the prescriber. The call can occur as a one-on-one meeting between the account representative and the prescriber, in a group setting, at a luncheon presentation or at a hospital display. Account representatives also call on physicians at hospitals while the physicians are making rounds, at dinner meetings and presentation meetings. Tr.

113-14, 248-49, 575-77, 740-41, 1199-1200, 1261; R-28, pp. 27-28, R-57. An account representative's discussions with non-prescribing office staff, while important, are not counted as calls. Tr. 428, 607-08, 615-17, 1290-91; R-28, p. 27.

8. Although most prescribers are physicians, a prescriber is anyone licensed by the federal or state government to prescribe the medication, such as physician assistants and nurse practitioners. Tr. 571; R-28, p. 27.

9. Sampling consists of identifying the prescriber's sample needs, validating the prescriber's sample eligibility status, leaving samples and preparing the appropriate documentation. R-57, p. PG02232.

10. Account representatives are expected to be in their territory a minimum of eight hours per day making calls, as measured from the time of their first call to the time of their last call, with the suggested time frame between 8:00 AM and 5:00 PM (Tr. 759-60; R-28, p. 23) and are expected to average eight to ten calls per day. Tr. 575.

11. The respondent ranks prescribers based on the number of prescriptions the prescriber writes for comparable pharmaceuticals, distributed by the respondent and/or its competitors, on a decile scale system from 1 to 10, with "1" being a low volume prescriber and "10" being a high volume prescriber. Tr. 591-92, 681, 1223-24.

12. High volume prescribers of pharmaceuticals manufactured by the respondent's competitors are called on with the intent of encouraging them to prescribe the respondent's products. Tr. 190, 1400.

13. Account representatives are encouraged to call more often on high volume prescribers than on low volume prescribers. Tr. 1223-24, 1316.

14. A call in which no sample is left is often referred to as a presentation-only call. Tr. 782

15. Pursuant to the respondent's policies and federal law, samples of pharmaceuticals may be left at an office only if there is a prescriber to sign a receipt for the product. Tr. 116, 565, 742, 1286.

16. Because samples must be signed for by a prescriber, samples provide the account representative with access to the prescriber to make a product presentation. Tr. 741-42.

17. According to the respondent's policies, an account representative should physically witness the prescriber signing for receipt of the samples. R-28, p. 25.

18. Account representatives are evaluated annually by their operations manager. The evaluations are issued after the fiscal year ends on June 30. Tr. 691.

19. Key components in performance evaluations include business performance and results in meeting specific call goals and objectives.

Account representatives are also assessed based on their selling skills and relationship building skills. Tr. 755-56.

20. The respondent's stated policy is to be honest with its employees about their performance. R-28, p.6.

21. The respondent hired the complainant as an account representative on October 19, 1987. Tr. 30-31.

22. The complainant is a male. Complaint & Answer ¶ 4.

23. From 1987 to his termination, the complainant held various positions with the respondent, was assigned to various territories and had several different supervisors. Between 1996 and July 2002, the complainant had seven supervisors and was reassigned to four different territories. Tr. 31-34, 39-43, 54-55.

24. During the applicable time frame, 2000 – 2002, the respondent provided its account representatives with laptop computers. Tr. 598-99.

25. The laptops allowed the account representatives to manage the business in their territory and communicate via e-mail with their regional director, manager and home office. The respondent can also transmit information from its home office to its account representatives via the laptop. Tr. 753-54.

26. On or about January 17, 2001, the complainant received his performance evaluation for the fiscal year July 1, 1999 to June 30, 2000. R-21.

27. In addition to the annual performance evaluation, the respondent also ranks its account representatives in comparison to one another on a scale of one to three, with one being high and three being low. Twenty to twenty-five percent of the account representatives receive a “1”, ten to twenty percent receive a “3”, and the balance receive a “2”. From 2000 – 2002, the respondent ranked the complainant’s performance as a “3”. Tr. 81, 88-89, 641.

28. The complainant objected to his low rank and sought an explanation from his operations manager, Cindy Palombo. Palombo was unable to provide an explanation because she had not been his supervisor for the entire 1999-2000 fiscal year. She referred him to his previous supervisors, to the respondent’s human resources department and, since at the time of his inquiry she was no longer to be his supervisor, to his new in-coming operations manager. Tr. 81-82, 98.

29. In July 2001, the respondent instituted a new piece of hardware known as a jornada. A jornada is a hand-held electronic device, approximately nine inches by four inches, that contains information about prescribers and allows account representatives to record their calls, enter notes

regarding the key aspects of a call ("call notes"), track their inventory of sample pharmaceuticals, and review previous call notes entered into the system by themselves and other account representatives assigned to that prescriber. It also allows prescribers to sign to acknowledge receipt of pharmaceutical samples. Tr. 83-84, 565, 599, 747-49, 753.

30. Account representatives were not required to obtain prescriber signatures for calls in which samples of pharmaceuticals were not left. Tr. 116-17.

31. Information recorded on the jornada can be downloaded into the account representative's laptop computer and then transmitted from the laptop computer to the respondent's central database. Tr. 115-16, 1294.

32. Beginning in July 2001, the respondent also instituted a new software computer system for the recording of data known as the Strategic Targeting and Analysis Tool system, also known as "STAT", for the laptop and STAT-to-go for the jornada. Tr. 1270; R-49, R-51.

33. From July 24, 2001 to July 27, 2001, the complainant received training in use of the jornada and STAT. R-2.

34. Account representatives could leave samples of pharmaceuticals with a prescriber only at the prescriber's address that was preset by the respondent in the jornada. Tr. 118-19.

35. Approximately two years after the jornada was introduced, the respondent discontinued it because of on-going mechanical problems. Tr. 1039-40, 1237.

36. The complainant believed that he could not change a prescriber's address through the jornada. Tr. 118, 192-93.

37. When the complainant entered a call on his jornada, the date and time of the call would default to the date and time he entered the call, which would not necessarily be the actual date and time he had made the call. Tr. 119-21.

38. The complainant's general policy was to record calls after the call was made. Tr. 528-29. However, with presentation-only calls he sometimes recorded them later when it was convenient, up to two days later. Tr. 408-09, 982.

39. In 2001 and 2002, the complainant promoted two of the respondent's products: Actonel (his primary product) and Tazorac (his secondary product). Actonel is prescribed for osteoporosis. Tazorac is prescribed for acne. Tr. 62, 757-58, 1260-61.

40. During the complainant's tenure as an account representative, prescriptions (sales) for Actonel in his assigned territory continued to improve. Tr. 58-59.

41. The respondent had parallel teams promoting Actonel, the “red team” and the “blue team.” The promotional territory of a red team account representative would encompass two or three blue team territories. Actonel was also promoted by representatives of a company called Adventis Pharmaceuticals. Adventis was a company independent from the respondent but with whom the respondent had a contract to co-market Actonel. Each blue team territory matched the territory of an Adventis representative. Tr. 59-61, 255-56, 751-52, 1267. While both red team members and blue team members promoted Actonel as their primary product, they promoted different secondary products. Tr. 750, 1267-68.

42. At a specific office location, a high decile prescriber would be called upon by two of the respondent’s account representatives and one Adventis representative. Often, only one representative would call on a low decile prescriber. Tr. 591, 752.

43. In the case of a prescriber with multiple offices, between the respondent’s red and blue teams and Adventis’ representatives, five to eight representatives could be calling on that prescriber to promote and leave samples of Actonel. Tr. 59-61.

44. The complainant did not leave samples of Actonel with prescribers if the office already had sufficient quantities on hand. Tr. 65.

45. While the red team, blue team and Adventis' representatives all promoted Actonel, there was also a competitive aspect to their relationship since an account representative needed to meet with a prescriber to record the office visit as a call or to leave sample pharmaceuticals and a prescriber who had recently seen a representative may not want to see another. Tr. 447-49. Also, the respondent's account representatives were ranked in comparison to one another's performance. Tr. 536-37; R-20.

46. Between January 2001 and July 11, 2002, the complainant was assigned to the respondent's New London territory as part of the Hartford blue team. Tr. 104-05.

47. From July 2001 until his termination in July 2002, the complainant's manager was Christopher Yapp. Tr. 1259, 1283. Yapp was the operations manager for the respondent's "Hartford blue team". Tr. 1258, 1267. Yapp was responsible for Connecticut, Rhode Island, Western Massachusetts and Vermont. Tr. 1259. He supervised fourteen account representatives. Tr. 1260. He reported to an associate director, Kathryn Anne Carman-Herbold, who reported to a national sales director. Tr. 1260.

48. In the fall of 2001, Yapp contacted the complainant to schedule a date to accompany him on his calls. The date selected was October 15,

2001. This was the first time that Yapp had accompanied the complainant on a call. Tr. 109-10; C-II-1-a. Field visits allow a manager to observe the account representative's interaction with prescribers. Tr. 1310-11.

49. Yapp found the complainant organized, able to effectively transition to material to answer pertinent questions, and effective in summarizing key data points. Yapp recommended that the complainant develop a better system for keeping track of doctors' office hours and offered to arrange further training for the complainant in the STAT software system if desired by the complainant. C-II-1-a.

50. On October 18, 2001, the complainant requested additional training in the STAT software system, particularly in the area of developing a better method for keeping track of doctors' office hours. Tr. 132-138, 463-64; C-II-1-b; R-33.

51. The complainant had raised the difficulty with using STAT software to extract doctors' hours at previous account representative training sessions. R-33.

52. On November 1, 2001, Yapp denied the complainant's request for additional individualized STAT training. Tr. 138; C-II-1-b; R-33. Instead, Yapp referred the complainant to the respondent's help line and to the team's technology trainer. Tr. 1275-77; C-II-1-b; R-33.

53. On November 6, 2001, the complainant wrote to William Sontag, the respondent's senior human resource director, regarding his performance evaluations. (Sontag's duties include recruiting interviewing, hiring and employee performance issues. Tr. 723.) The complainant complained to Sontag about inconsistencies between his evaluations and feedback from management. He complained about being set-up to fail, and that his evaluations did not reflect his work performance. He complained about the drop in his ranking to a "3" and that his previous supervisors were unable to explain why he was ranked so low in comparison to the other account representatives. He accused the respondent of having a hidden agenda. C-III-3.

54. The complainant contacted Sontag because Yapp had told the complainant that Yapp could not help him because he had not been the complainant's supervisor during the time period of the ranking. Tr. 166.

55. On November 30, 2001, the complainant, Sontag and Yapp had a conference call to discuss the complainant's past performance evaluations and the criticisms he had raised in his memorandum of November 6, 2001. Tr. 163-66.

56. Prior to this telephonic conference, the complainant and Sontag had never spoken to each other. Tr. 164.

57. During the telephonic conference, Sontag told the complainant that Sontag had determined that the complainant had three subjective evaluation factors that were below those of other account representatives: collaboration, initiative and solutions. C-III-4.

58. Sontag did not identify any deficiencies in objective evaluation factors. Tr. 165.

59. The subjective performance deficiencies identified by Sontag were inconsistent with areas identified as strengths in the complainant's performance appraisals. Tr. 179-80; C-III-4; R-20, R-21.

60. Sontag was frustrated with the complainant because of the complainant's concerns about his low rank. Tr. 1301.

61. On or about December 20, 2001, the complainant received his performance evaluation from Yapp for the fiscal year July 1, 2000 to June 30, 2001. R-20.

62. In addition to the annual performance evaluation, on December 21, 2001, the complainant also received a competency coaching tool. C-II-1-d.

63. Competency coaching tools are used in conjunction with the annual performance appraisal. Tr. 144. They list categories that the respondent believes are important for account representatives to master in order to

perform their jobs, and are used by the respondent to rank account representatives in relation to one another. Tr. 142; C-II-1d.

64. Yapp scored the complainant in the categories prior to e-mailing the competency coaching tool to, or discussing it with, the complainant. Tr. 145, 156.

65. The coaching tool ranked the complainant in the areas of pharmaceutical knowledge, selling and influence, business planning and strategy, and relationship manager. The complainant's cumulative average score was 3.48 out of 5.0, placing him in the 50th to 75th percentile. C-II-1-d.

66. On January 4, 2002, the complainant sent a memorandum to Sontag disputing Sontag's criticisms of the complainant's performance raised in the November 30, 2001 conference call. The complainant also accused the respondent of discrimination by driving out males and replacing them with females and younger people. Tr. 176-180; C-III-4.

67. The complainant never received a response from Sontag about the January 4, 2002 memorandum. Tr. 181.

68. Subsequent to his November 30, 2001 teleconference with Sontag and Yapp, the complainant began to suffer from anxiety, palpitations and diminished mental capacity. In response to these symptoms he consulted with Dr. Mark Kirschner, a clinical psychologist. Tr. 209-10.

69. On February 6, 2002, the complainant first consulted Dr. Kirschner for a diagnostic evaluation. C-III-13.

70. On February 14, 2002 and March 7, 2002, the complainant consulted with Dr. Kirschner for individual psychotherapy. C-III-13.

71. In early 2002, Yapp did an audit check of team's sampling and calling rates for the first half of fiscal year 2001-2002. Tr. 1301-02. He observed that there was a disparity between the complainant's sampling rate and that of some of the other blue team account representatives. Tr. 1302; R-29.

72. Yapp contacted Sontag in early March 2002 to discuss the sampling disparity. Tr. 776, 1302-03.

73. Sontag directed Yapp to forward the audit data to him. Tr. 1303.

74. In his review of the audit data, Sontag observed extended periods of time in November 2001, December 2001, January 2002, and February 2002 in which the complainant left few or no samples. Tr. 791-92, 799-800, 802, 1304; R-48, R-58.

75. Based on the complainant's low rate of sampling in comparison to the other members of his team and the pattern of consecutive days of presentation-only calls, Sontag decided to do an audit of the complainant's presentation-only calls that the complainant had recorded

on March 25-27, 2002 to verify whether the complainant had actually made the calls on the dates he had reported. Tr. 813, 816-18, 1307.

76. On April 5, 2002, the complainant first saw Dr. Hong for anxiety/depression. C-III-11.

77. On April 7, 2002, Sontag conducted the audit. Tr. 837.

78. Sontag did not contact all the offices recorded by the complainant. Tr. 813-14.

79. In his telephone calls to those physicians' offices that he did contact, Sontag asked only if the doctors were available on the day that the call had been recorded. Tr. 818-19.

80. Sontag was told by secretaries of several of the offices that the physician would not have been available to meet with an account representative on the date the complainant had recorded. The secretaries of other offices reported that the physician had been available. Tr. 822-26; R-3, R-7.

81. On April 9, 2002, Yapp and Sontag decided to meet with the complainant to discuss his job performance. Tr. 830-31, 969; R-12.

82. On April 10, 2002, Yapp went on his second field visit with the complainant. The field visit had been previously scheduled by Yapp and was unrelated to the results of his sampling audit or of Sontag's call audit. Tr. 837-38,1309-10.

83. One of the offices the complainant and Yapp visited was that of Dr. Smith. Upon arriving, they found that she had moved her office to another location and that the complainant was unaware of the new address. Tr. 187-88, 1312-13. Because Dr. Smith was a high decile prescriber of a competitor's osteoporosis product, several of the respondent's account representatives and Adventis' representatives were visiting her office trying to get her to change and prescribe Actonel. Tr. 187-192.

84. In making these field visits, the complainant used the addresses shown in the jornada. Tr. 192.

85. On this field visit, the complainant intentionally took Yapp to those offices where he was having difficulty meeting the physicians. Some Hartford-based physicians had only satellite offices in the complainant's territory and would not meet with him. Other physicians were in the satellite office only one day a week but not consistently the same day of the week. Tr. 183-84, 186, 1313; R-38.

86. The complainant told Yapp that some of the offices were satellite offices and difficult for the complainant to access physicians. Tr. 1313, 1388; R-38.

87. The complainant took Yapp to these locations because, since he could not contact these physicians, he wanted them removed from his call list so that they would not be included in his quota potential. Tr. 184.

88. Yapp's verbal feedback to the complainant that day regarding the field visit was that he found it odd that the complainant did not know that Dr. Smith had relocated her office. Tr. 206-07.

89. On April 11, 2002, Yapp contacted Sontag and Carman-Herbold regarding issues he had with the complainant's performance on the April 10, 2002 field visit. R-11, R-38.

90. Based on Yapp's comments about the field visit, as well as his own audit of March 25-27, 2002, Sontag decided to conduct another audit of the presentation-only calls the complainant had recorded on April 1, 2, 3 and 8, 2002. Tr. 846-47.

91. Sontag conducted the audit of these April calls between April 11 and April 15, 2002. Tr. 847; R-3, R-6, R-7.

92. On April 15, 2002, Yapp e-mailed Sontag the complainant's call notes for calls made by the complainant between March 25 – 27, 2002. R-13.

93. When calling the doctors' offices, Sontag did not speak with the doctors themselves; Tr. 1076, 1082, 1091, 1092, 1105, 1109; nor did he ask if the complainant had been there on the days in questions; Tr. 1106-07.

He called only to verify whether the physicians were in their offices on the days the calls were recorded. Tr. 807, 818-19, 1083, 1090, 1099.

94. Yapp and Sontag reported to Carman-Herbold the results of the two audits conducted by Sontag, the complainant's low sampling rate and that on Yapp's April field visit with the complainant the complainant had taken him to an office of a doctor who was no longer at that location. Tr. 646-47.

95. Carman-Herbold told Sontag to give the complainant an opportunity to respond to the audit results and sampling discrepancy. She told Sontag that he could discipline the complainant, inclusive of termination, if he found the complainant's explanation unsatisfactory. Tr. 647-48.

96. Yapp contacted the complainant and set the meeting for April 16, 2002. Yapp told the complainant that the meeting was to discuss his performance. Yapp told the complainant that Sontag would be attending the meeting. Tr. 1324-25.

97. The purpose of Sontag and Yapp's meeting with the complainant was to discuss his performance and review with him his call reporting, call notes and sampling activities. They wanted to share all their audit results and concerns with him and hear his explanation for the apparent discrepancies. They also planned to ask the complainant questions about his daily work habits. Sontag wanted to hear the complainant's

side of the story and then determine what action to take next. Tr. 829-31, 850-51, 969, 1323-24; R-12.

98. Prior to the April 16, 2002 meeting, Sontag had not already determined that the complainant would be terminated. Tr. 831-32, 1126-27.

99. The meeting was to be held at the respondent's northern New Jersey office because it was convenient for the complainant and Yapp coming from Connecticut and for Sontag coming from Philadelphia. Tr. 1326 – 27.

100. On April 15, 2002, the complainant left Sontag a voicemail message requesting that Sontag bring the complainant's personnel file to the April 16, 2002 meeting. Tr. 378, 852-53.

101. On April 16, 2002, the complainant failed to appear at the meeting with Sontag and Yapp in New Jersey. The complainant left a voice mail message that morning that he was unable to attend because of a medical situation that arose the previous night, resulting in his taking medication making him drowsy and driving inadvisable. Tr. 269, 381-82, 1327-28; R-9, R-10.

102. On April 18, 2002, the complainant e-mailed Sontag to follow-up the April 16, 2002 voice mail. The complainant requested that at the rescheduled meeting he be provided with a copy of his personnel file. C-I-16.

103. On April 18, 2002, the complainant also e-mailed Yapp in follow-up to his voicemail and non-attendance at the April 16, 2002 meeting. He notified Yapp that he would be out on sick leave/short term disability. In addition, the complainant requested that, at the rescheduling of the meeting, he be provided with an advance copy of the agenda for the meeting, a copy of his personnel file, an explanation of how sales quotas were determined, and an explanation for the drop in his rank. R-9. The meeting would eventually be rescheduled to July 11, 2002 but none of the material or information he had requested would be discussed. R-66.

104. On April 22, 2002, the complainant met with Dr. Kirschner. Tr. 877-78.

105. On April 22, 2002, the complainant submitted to the respondent his application for disability benefits. C-III-11.

106. On April 23, 2002, the complainant saw Dr. Hong for a disability evaluation in connection with his disability application. Dr. Hong determined that the complainant's first day of total disability was April 23, 2002 and gave him a return to work date of May 1, 2002. He diagnosed the complainant with anxiety/depression. C-III-11.

107. On April 24, 2002, Sontag told the respondent's disability office that he wanted it to get proof that the complainant saw a doctor on April 15 or 16, 2002. C-IV-54.

108. On April 30, 2002, the complainant first consulted with Dr. Lederman, a psychiatrist, regarding his anxiety/depression. Tr. 333-34, 338; C-III-11; R-78.

109. Dr. Lederman initially diagnosed the complainant as having situational adjustment reaction with mixed emotions, anxiety and depressed mood. Tr. 341; C-III-11; Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR").

110. The complainant's anxiety and mood instability are chronic. R-78, p. 2.

111. Dr. Lederman recommended that the complainant take a leave of absence from work because the complainant could not function there and, if he continued working, would not get better because of the stress. Tr. 344.

112. On May 2, 2002, the complainant notified the respondent that his doctor would not cover April 16-23, 2002 as disability related and that his return to work date would be extended past May 1, 2002. C-IV-54.

113. On May 2, 2002, the respondent (Marie Zielinski) notified various personnel that the complainant had met the medical criteria for disability and would be returning to work on May 1, 2002. C-IV-54.

114. On May 6, 2002, the complainant notified the respondent that he was changing the first day of his disability-related absence from April 14, 2002 to April 23, 2002. C-IV-54.

115. On May 7, 2002, Dr. Lederman conducted a disability evaluation of the complainant in which he gave May 1, 2002 as the first day of the complainant's total disability and gave the complainant a full-time return to work date of August 15, 2002. He gave the complainant an axis I diagnosis of 309.28 (adjustment disorder with mixed anxiety and depressed mood). C-III-11; R-78; DSM-IV-TR.

116. On May 8, 2002, Zielinski e-mailed various personnel that the complainant's return to work date had been extended to August 15, 2002. C-IV-54.

117. On May 20, 2002, Sontag told Zielinski to closely monitor the complainant's case as he would most likely back fill the complainant's position. C-IV-54.

118. In connection with the complainant's disability application, the respondent referred the complainant to Dr. Nelken. Tr. 226-27. Dr. Nelken evaluated the complainant on May 29, 2002. He gave the complainant a primary axis I diagnosis of 296.3 (major depressive disorder, recurrent) and recommended weekly individual therapy and medication monitoring. Tr. 935; C-III-11; DSM-IV-TR.

119. On May 30, 2002, Sontag discontinued the complainant's salary supplement because of performance issues and the questionable nature of the complainant's disability case. C-IV-54.

120. On June 3, 2002, Zielinski e-mailed various personnel that she had received the complainant's disability assessments and that the complainant would be receiving an additional six weeks of short term disability. C-IV-54.

121. On June 4, 2002, the respondent notified the complainant that it was denying him disability benefit payments. C-IV-54.

122. On June 5, 2002, Zielinski e-mailed various personnel that the complainant's new return to work date would be July 1, 2002. C-IV-54.

123. By late June 2002, Lederman observed improvement in the complainant's condition sufficient to allow the complainant to return to work on July 1, 2002. Tr. 356-58, 367.

124. The complainant wanted to return to work. Tr. 231, 356-57.

125. On June 20, 2002, the complainant received a return to work release effective July 1, 2002 at four hours per day for two weeks, followed by six hours per day for two weeks, then beginning full time on August 1, 2002. C-IV-54.

126. On June 21, 2002, Dr. Lederman issued an outpatient treatment progress report. He affirmed his earlier diagnosis of 309.28 (adjustment disorder with mixed anxiety and depressed mood). He also noted that the complainant had been compliant and was progressing and

improving but needed more therapy sessions, and expected the complainant to return to normal functioning. R-79; DSM-IV-TR.

127. On June 25, 2002, Zielinski updated Sontag on the complainant's return to work schedule. C-IV-54.

128. On June 28, 2002, Zielinski clarified the complainant's return to work schedule with the complainant and Yapp. C-IV-54.

129. Effective July 1, 2002, the complainant was officially released to return to work but took a pre-planned family vacation rather than beginning work. Tr. 279-280, 1332.

130. By July 8, 2002, the respondent had decided to terminate the complainant. C-IV-54.

131. Yapp told the complainant to use July 10, 2002, his first actual working day, to update himself on promotional material, complete his expense reports and meet with Yapp on July 11, 2002. Tr. 1332. Yapp informed the complainant that the purpose of the meeting was to discuss and review material the complainant had missed while on his disability leave. Tr. 280-82, 1334.

132. Yapp and Sontag's actual purpose was to discuss with the complainant his job performance. Tr. 1338-39.

133. Although the complainant had requested a detailed agenda for the meeting, Yapp intentionally did not provide him with one. Tr. 1180, 1334.

134. On July 11, 2002, the complainant met Yapp in the lobby of the Marriott Courtyard hotel in Wallingford. They then went to a private conference room Yapp had reserved for the meeting. Tr. 281-82, 1333.

135. Yapp and the complainant began by discussing the expense reports the complainant still needed to submit and then discussed the materials for the new product that the respondent had begun marketing during the complainant's leave. The complainant had brought with him all, or at least most, of the material that Yapp had asked him to bring. Tr. 1337 - 38.

136. After arriving at the room, Yapp placed a telephone call ostensibly to his wife for her to pick up his laundry and said that he and the complainant were in a meeting. In fact, Yapp called Sontag who entered the room moments after the conclusion of the telephone call. Tr. 283, 1177-78, 1339-40.

137. The complainant had not been informed that Sontag would be at the meeting. Tr. 283.

138. Sontag was not in the conference room when the complainant and Yapp arrived because Yapp and Sontag were concerned about the

complainant's reaction to their questions about the audit results. Tr. 1338.

139. Sontag questioned the complainant about his call on Dr. Brown that the complainant had recorded as having occurred on a date when the doctor was on vacation. Tr. 287-88; R-66.

140. The complainant told Sontag that he did not remember the call as it had taken place months earlier but speculated he had seen another prescriber in Dr. Brown's office. Tr. 288-91.

141. Sontag did not ask the complainant any questions regarding any of the other physicians who were the subject of his audits. Tr. 287, 292; R-66.[4]

142. At that meeting, Sontag terminated the complainant's employment. Tr. 292. At the time of his termination, the complainant was over 40 years of age (Complaint & Answer ¶ 4) and his base pay was $80,000.00 (Tr. 298).

143. After terminating the complainant's employment, Sontag and Yapp accompanied the complainant to his home to retrieve company-owned material. Tr. 1344.

[4] Pages 2-4 of R-66 are Sontag's handwritten notes made during the meeting. R-1 is Sontag's file memorandum of the meeting that he prepared later. R-1, though, includes discussions about topics that were not recorded in R-66. I find R-66, buttressed by my credibility assessments of Sontag, Yapp and the complainant, to be a more credible and accurate recitation of what did and did not occur at the meeting.

144. While following the complainant to his home, Sontag called the local police to meet them at the complainant's residence. Tr. 1006-07, 1334.

145. After retrieving the material from the complainant's home, Sontag and Yapp then accompanied the complainant to a rented self-storage facility where the complainant stored his pharmaceutical samples to change the lock on the storage unit and transfer the rental from the complainant to Yapp. Tr. 1345.

146. At the time of complainant's termination, twelve out of fourteen account representatives were female. Tr. 1421.

147. The respondent hired a younger female to replace the complainant. Complaint & Answer ¶ 14; Tr. 58, 1419.

148. Following his termination, the complainant incurred out-of-pocket medical expenses that would have been paid by his medical insurance with the respondent had he remained employed. Tr. 301. He incurred costs of $280.00 for his physical examination (Tr. 305); $1,500.00 for screenings for an aortic aneurysm and echocardiogram (Tr. 305); and health insurance premiums of $150.00 per month (Tr. 303).

149. The complainant received $10,000.00 in unemployment compensation benefits from the State of Connecticut (Tr. 476), $700.00 from his antiques business in 2003 (R-64) and $1,290.00 from his antiques business in 2004 (R-65).

150. During his treatment, the complainant was prescribed Paxil, Buspar, Nortriptylene, Remeron and Rispridal to treat his anxiety, mood changes and depression. He initially received weekly psychotherapy sessions and currently receives monthly sessions. Tr. 340, 346-349, 360-61. The complainant's treatment is likely to continue indefinitely. Tr. 363.

151. The complainant suffered from a continuation of depression and the situational adjustment reaction caused by his work environment triggered that underlying and still continuing condition. Tr. 344, 351.

Analysis

I

Section 46a-60 (a) (1)

A

Termination

The complainant alleged that the respondent violated § 46a-60 (a) (1) when it terminated his employment because of his sex, age and/or mental disability. Section 46a-60 (a) states in part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupation qualification or need, to refuse to hire or employ or to bar or to

discharge from employment any individual . . . because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability . . . ." "'Mental disability' refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders.'" General Statutes § 46a-51 (20).

"The framework for the burden of production of evidence and the burden of persuasion in an employment discrimination case is well established. . . . First, the complainant must establish a prima facie case of discrimination. . . . In order to establish a prima facie case, the complainant must prove that: (1) he is in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination." (Citation omitted; internal quotation marks omitted.) *Jacobs v. General Electric Company*, 275 Conn. 395, 400 (2005). "The establishment of a prima facie case creates a rebuttable presumption of discriminatory intent . . . . The burden of establishing a prima facie case is a burden of production, not a burden of proof, and therefore involves no credibility assessment by the fact finder. The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor." (Internal citations omitted.) *Craine v. Trinity College*, 259 Conn. 625, 638 (2002).

"Once the complainant establishes a prima facie case, the employer then must produce legitimate nondiscriminatory reasons for its adverse employment action . . . . This burden is one of production, not persuasion; it can involve no credibility assessment.

"After the plaintiff has established a prima facie case, and the defendant has produced evidence of a legitimate, nondiscriminatory reason for the employment action, the plaintiff retains the burden of persuasion. The plaintiff now must have the opportunity to demonstrate that the defendant's proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional discrimination. The plaintiff may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Jacobs v. General Electric Company*, supra, 275 Conn. 400-01. "[T]here must be not only sufficient evidence that the employer's reasons are false (pretextual) but also sufficient evidence that the employer's reasons were a pretext for intentional discrimination. Stated another way, there must be sufficient evidence on the record that the . . . protected trait or traits played a role in the decision-making process and actually motivated the employer's decision." (Citation omitted; internal quotations omitted.) *Board of Education of the City*

of Norwalk v. Commission on Human Rights and Opportunities, 266 Conn. 492, 507 (2003).[5]

In this case, the complainant established a prima facie case. First, he is a member of one or more protected classes. He is a male and was over the age of 40 at the time of his termination (FF 22, 142). In addition, he had been diagnosed with anxiety and/or depression by three doctors (including two psychiatrists) who had examined him (FF 106, 109, 115, 118, 151; Ex. C-III-11). Because anxiety and depression are included in the American Psychiatric Association's "Diagnostic and Statistical Manuel of Mental Disorders Fourth Edition Text Revision DSM-IV-TR", the complainant has a "mental disability" as defined by § 46a-51 (20). *Conte v. New Haven Board of*

[5] It should be noted that employment discrimination cases "fall into two basic categories: 'single issue motivation' and 'dual issue motivation' cases. In single motivation cases, the single issue is whether an impermissible reason motivated the adverse action, which courts analyze under the framework first set forth in *McDonnell Douglas* . . . . In dual issue motivation cases, the determination involves both the issue of whether the plaintiff has proved that an impermissible reason motivated the adverse action and the additional issue of whether the defendant has proved that it would have taken the same action for a permissible reason, which is analyzed under the framework set forth in *Price Waterhouse* . . . . "(Citations omitted; internal quotation marks omitted.) *Wood v. Sempra Energy Trading Corporation*, 2005 WL 3416126, 5, n. 6 (D. Conn.). Although the complainant's brief mentioned the Price Waterhouse method of analysis, as both the complainant and the respondent analyzed this case under the McDonnell Douglas framework that will also be the method utilized in this decision. It should also be noted that "the Second Circuit has held that the ultimate issue in an employment discrimination case is whether the plaintiff has met her burden of proving that the adverse employment decision was motivated at least in part by an impermissible reason, i.e., a discriminatory reason, regardless of whether the case is presented as one of single or dual motive." (Citations omitted; internal quotation marks omitted.) Id.

Education, 2003 Conn. Super. LEXIS 1454, 10 and 13-14.[6] The complainant's condition is chronic (FF 110, 151) and his treatment is likely to continue indefinitely (FF 150). Further, the complainant's e-mails to the respondent, as well as his application for leave with supporting medical documentation, clearly put the respondent on notice that, at the time of his termination, the complainant had a record and history of one or more mental disorders (FF 101-03, C-III-11, C-IV-54). Second, the complainant was qualified for his position as is evident by his nearly fifteen years of employment with the respondent and his favorable performance appraisals and competency coaching tool (C-III-1-d, R-20, R-21). Third, he incurred an adverse employment action when the respondent terminated his employment (FF 142). Finally, the temporal proximity between the complainant's return from disability leave and his termination (FF 134, 142), Sontag's actions during the complainant's leave (FF 107, 117, 119) and also his subsequent replacement by a younger female (FF 146) create circumstances giving rise to an inference of discrimination. (See also Complaint and Answer ¶¶ 8 and 9.[7]) Thus, the complainant established his prima facie case.

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[6] The respondent's medical expert disputed that the complainant had a mental disability. However, unlike the three doctors who diagnosed the complainant's mental disorders, the respondent's expert had never examined the complainant (Tr. 881). Also, much of his testimony dealt with what he perceived to be flaws in the note taking of the doctors who had examined the complainant (Tr. 871, 876, 886-87).

[7] "Answering paragraph 8, Respondent admits only so much as alleges that in 1996 and subsequently some older male employees were replaced by younger females." "Answering paragraph 9, Respondent admits only so much as alleges that at some times and in some locations, some managers were discharged by or retired with encouragement from the Respondent."

The respondent articulated a nondiscriminatory business reason for its decision to terminate the complainant – he had violated known company policies by falsifying business records when he reported calls on doctors that he did not make (Tr. 1001, 1014).

In its brief, the respondent argued in part that the complainant cannot show its business reason was a pretext for discrimination because he did not identify any similarly situated women, similarly situated younger employees or similarly situated non-disabled employees who committed similar violations but received different disciplinary action. While similarly situated employees are often used as circumstantial evidence in establishing discriminatory motivation, they are not the only credible form of circumstantial evidence. In this case, by a preponderance of the evidence, the complainant provided substantial credible evidence that the respondent's articulated reason is unworthy of credence and is a pretext for discriminatory motivation, and that his protected traits played a role in the decision-making process and motivated the respondent's decision to terminate his employment. This evidence falls into five, somewhat overlapping, categories: (1) Sontag and Yapp's conduct at the termination meeting; (2) Sontag's conduct during the complainant's leave; (3) the two field visits by Yapp, Yapp's audit of the complainant's sampling rate, and the call audits conducted by Sontag; (4) the complainant's personnel appraisals, competency coaching tool and low ranking; and (5) the respondent's attitude toward the methods other account representatives used in recording calls. In addition, the complainant provided a credible

explanation, lacking fraudulent intent, of how inaccuracies in his call recording could have occurred.

The July 11, 2002 termination meeting

On July 11, 2002, Sontag, Yapp and the complainant participated in a meeting that resulted in the complainant's termination. The behavior of Sontag and Yapp at this meeting is in stark and disturbing contrast with their behavior on April 16, 2002 at a meeting called to discuss with the complainant the same concerns as would be addressed in July.

In preparation for the April meeting, Yapp told the complainant that Sontag would also be attending and both Yapp and Sontag were together awaiting the arrival of the complainant (FF 96; Tr. 1327). For the July meeting, Yapp intentionally did not tell the complainant that Sontag would be there because they were afraid of the complainant's potential behavior (FF 137, 138; Tr. 1338-40; 1410). Instead, Sontag waited in his car in the parking lot until Yapp called him from the meeting (FF 136; Tr. 1121). Even in the telephone call Yapp did not indicate to the complainant that Sontag would be attending. Instead, Yapp pretended that he was talking to his wife about picking up laundry from the cleaners, which served as the cue to Sontag to enter the meeting room (FF 136).

For the April meeting, the complainant was told that it would be to discuss personnel issues (FF 96). For the July meeting, the complainant was told that its

purpose was to update him on material he had missed during his leave, even though Yapp and Sontag knew that they would be discussing personnel issues (FF 131, 132).

Although their agenda (R-66, p.1) was the same for both meetings and the complainant had been told in April that the meeting was to discuss personnel issues, Sontag and Yapp were now suddenly afraid of the complainant's reaction to such a discussion. They felt they had to "tread lightly," get the complainant "settled and comfortable" before bringing Sontag into the room (Tr. 1338) and do what seemed "safe and reasonable." (Tr. 1339.) Yet, the only information to justify this subterfuge that Yapp and Sontag had about the complainant's temperament in July that they did not have in April was their knowledge that the complainant had been out on a disability-related leave.

Sontag and Yapp's stated purpose for the July meeting was to obtain from the complainant his explanation for the apparent discrepancies between his recording of presentation calls and the results of Sontag's audits (Tr. 647-48, 850-51, 1335). However, they did not provide him with an agenda of the meeting or any advance notice of the topics of discussion (Tr. 1119) because they claim to have wanted an unrehearsed response from him about incidents that had happened three to four months prior to the meeting (Tr. 1180, 1408). They also testified, though, that they would have given him additional time to respond to the questions if he had so requested (Tr. 1180-81). There is an inconsistency that indicates pretext between words claiming preparation time would have been allowed after the meeting had commenced and

actions (or, rather, inactions) in not allowing preparation prior to its commencement. They also did not even ask a fifteen-year employee returning from a two-month leave how he was feeling (Tr. 1122); instead, they ignored his statement that if the meeting continued he was going to start feeling dizzy and ill and need to leave (Tr. 1416).

Sontag had been told by the regional associate director to “make sure that you give [the complainant an] opportunity to respond. If he can give you a good answer, let’s make sure we hear it.” (Tr. 647-48.) However, the meeting was conducted in such a way as to ensure that the complainant would not be in a position to provide answers. He was intentionally not given an agenda of the meeting (FF 133). He was intentionally misled that the subject of the meeting would be updating him on material he had missed during his leave but was not told that the meeting would be specifically about the audits or even about personnel issues in general (FF 131, 132). He was expected to recollect the details of calls he had made months earlier; and he was actually asked about only one call, on Dr. Brown, from the calls that Sontag had audited (FF 139, 141).

Another indication of pretext for discriminatory motivation at the July meeting is how the complainant’s termination differed from a typical employee separation procedure. Typically, the respondent gives a former employee a list of its property to be returned and arranges to meet the employee in a public place. Even if the collection of property is to occur the same day as the termination, the respondent will give the former employee an hour or two to collect the material and arrive at the public location (Tr. 1005-06). The process differed, however, with the complainant. After notifying him that

he was terminated, Sontag and Yapp followed him to his home to retrieve items that they wanted (Tr. 1005, 1012-13). Then, on the way to his house, they called the local police department asking that a police officer be present at the complainant's home (Tr. 1007-07) "to assure [their] security and safety as well as his" (Tr. 1007) simply because as he left the meeting the complainant had asked them how fast they could drive (Tr. 1006).

Sontag and Yapp's inconsistent treatment of the complainant between the April and July meetings is evidence of the unjustifiable, stereotypical fears about a person with a mental disorder that state anti-discrimination laws were enacted to prevent, and also provides evidence of pretext as they were not interested in the complainant's explanation for the audit results.

Sontag's conduct during the complainant's leave and the decision to terminate the complainant

Sontag testified that his role in a disability claim is simply to facilitate an employee's contact with the respondent's appropriate health care personnel. Tr. 953. The respondent also claimed that no decision to terminate the complainant had been made prior to the July meeting (Tr. 1396-97) when, it claimed, the complainant admitted to falsifying business records (Tr. 1000, 1014). Clearly, however, Sontag's involvement in the complainant's disability application process was adversarial rather than merely

facilitative and the decision to terminate the complainant had been made prior to the July meeting with him.

Organized by date, Exhibit C-IV-54 is a case communication log regarding the complainant. The log consists of summaries of communications including those to and from the complainant; to and from Barb Konerman, employed in the respondent's home office dealing with work related injuries and accidents (Tr. 1128); to and from Rhonda Robertson, a case manager in the respondent's disability office (Tr. 1128); to and from Marie Zielinski; and to various "contacts" who included Sontag and Yapp (Tr. 1129). According to this exhibit, Sontag told Robertson on April 24, 2002, that he wanted proof that the complainant had seen a doctor on April 15 or 16, 2002. On May 20, 2002, Sontag told Zielinski that he wanted a close monitoring of the complainant's case as he "will most likely back fill position." Although the respondent had concluded on May 2, 2002 that the complainant's "case met the medical criteria for disability" [and three physicians had found the complainant to be suffering from mental disorders (C-III-11)], nevertheless, on May 30, 2002, the complainant's salary supplemental pay was discontinued at Sontag's request because Sontag found the complainant's disability case to be questionable. C-IV-54. These are not the disinterested actions of a neutral facilitator.

Also, there is evidence that the decision to terminate the complainant's employment was made during his disability leave. According to Exhibit C-IV-54, on July 8, 2002 (prior to the July 11 meeting at which the respondent claimed it terminated the

complainant because he admitted to falsifying records), Konerman told Zielinski that the complainant had been terminated (FF 130). This entry indicates that the respondent's claim that the complainant was terminated for admitting to falsifying business records is pretextual because the decision to terminate him had been made even before he was asked to explain the discrepancy between his call records and Sontag's audits.

Also, even if the complainant had erred in entering the one call he was questioned about at the July meeting, termination is not the sole disciplinary action available to the respondent. According to the respondent's policies, employees who violate its policies "will be subject to appropriate discipline, up to and including termination." R-30, p. 2.[8] Sontag had been told by the regional associate director to "make sure that you give [the complainant an] opportunity to respond. If he can give you a good answer, let's make sure we hear it. But if he doesn't, then you have my permission to do what you need to do, and if that includes termination, you can do that." Tr. 647-48. Thus, there is room for discretion. Had the complainant been given a full and fair opportunity to explain that he did not change the jornada's default entry date when he recorded his calls, the possibility exists under the respondent's written polices

[8] Also according to Exhibit R-30, p. 2, the respondent's Worldwide Business Conduct Manual, the respondent "is requiring all employees to sign and return an acknowledgement form (enclosed at the end of this Conduct Manual). Your signature confirms that you have received these policies and that you will read and comply with them." No such acknowledgment form signed by the complainant was introduced into evidence.

and the directive given by the associate regional director that a different form of discipline could have been utilized.

Yapp's field visits with the complainant,
Yapp's audit of the complainant's sampling, and
Sontag's audits of the complainant's presentation-only calls

Yapp became the complainant's supervising operations manager in July 2001 (FF 47). He supervised fourteen account representatives, including the complainant (FF 47; Tr. 1260). He prepared their performance reviews that included objective quantitative standards he could obtain directly from his own computer such as prescriptions generated, calls made and samples left (Tr. 1268-70, 1294-95). Yapp testified that it was very important to him to keep close tabs on his account representatives because he had his own call goals and each account representative's calls rolled into his own goal (Tr. 1295). He also testified that he routinely did audit checks of the sampling rates of his representatives (Tr. 1301-02). Being in the field with his representatives to observe their capabilities was his primary responsibility and he spent an average of 3-4 days per week in the field with his representatives making calls on physicians (Tr. 1264).

Yapp went on two field visits with the complainant, one in October 2001 and the second in April 2002. Yapp's different responses to these two visits are noteworthy. In his memorandum to the complainant summarizing the October field visit, Yapp noted

that although the complainant needed to develop patient profiles, draw the physician into conversation, and increase his understanding of the STAT system, overall the calls on the physicians went well. Yapp wrote to the complainant that Yapp was "particularly pleased with your organization today. Specifically, you showed your ability to maintain an orderly sales binder where all key reprints and sales aids are at your immediate disposal. Your organizational skills allowed you to effectively transition to needed material to answer pertinent questions, summarize the situation . . . and keep the physicians interest. As we discussed, this skill is vital per adult learning principles. . . . You displayed effectiveness in summarizing key data points . . . . In most calls, you transitioned into a Tazorac discussion effectively. You were able to probe for areas of interest, ask 'what are you currently using', and handle questions appropriately." (C-II-1-a.)

As is evident from Yapp's subsequent memorandum, the April field visit, though, did not go as well (R-38). What is particularly noticeable about this memorandum, though, is that while it is written <u>to</u> the complainant it repeatedly refers to him in the third person, by his first name, unlike Yapp's October memorandum to the complainant in which Yapp appropriately used the second person pronoun "you" when referring to the complainant. Also peculiarly different between the two memorandums, the April memorandum was never sent to the complainant. Rather, it was sent as an attachment to an e-mail to Sontag for his review and comment (Tr. 838-39; R-11). Finally, although by the time of the April field visit Yapp had completed his sample audit and Sontag had

completed one of his presentation-only audits, Yapp did not discuss with the complainant even the general issues of sampling or call recording (R-38).

It is also worth noting that while the April memorandum chastised the complainant for being unaware that Dr. Smith had moved her office several months earlier, Yapp was unable to offer an explanation why neither the red team account representative nor the Adventis representative who called on Smith did not record her address change on their jornadas for downloading to the respondent's central data base and subsequent transfer to the complainant's jornada (Tr. 1431). Smith was a decile ten prescriber, a very important potential customer (Tr. 821-22), called on by multiple representatives (Tr. 187-191). As a decile ten prescriber, she should have been visited at least every other week by a red team account representative or an Adventis representative who were also responsible for updating her address (Tr. 1224-25, 1285, 1426, 1430-31).

When Yapp conducted his audit of the complainant's sampling rate, he observed that the complainant was leaving samples at only 12% of the calls he made while his peers were, on average, leaving samples at 36% of the physicians they called on (R-29). However, Yapp compared the complainant's sample rate only to six of the fourteen account representatives he supervised (R-29). He also did not know the sample rate of the complainant's predecessor in the New London territory (Tr. 1352) nor did he compare the complainant's sample rate with that of the red team account representative or the Adventis representative whose territories included the complainant's (R-29).

Despite supervising only fourteen representatives (twelve of whom were female, FF 47, 146) and spending three to four days per week in the field with them, Yapp went on only two field visits with the complainant in the nine month period between July 2001 and April 2002 when the complainant commenced his leave (FF 48, 82). Despite routinely conducting audits of his representatives' sampling rates, it was not until the spring of 2002 that he noticed the complainant's sampling rate. When it became evident from his audit of the complainant's sampling and his April field visit with the complainant that the complainant needed attention and guidance, instead of conferencing with the complainant, Yapp went to Sontag.

When Yapp noticed that the complainant's sampling rate was lower than some of his other account representatives, he notified Sontag. Sontag conducted audits of presentation-only calls that the complainant recorded between March 25 – 27, 2002 and April 3 – 10, 2002 by telephoning the doctors' offices. Although the ostensible purpose of the audits was to determine whether the complainant was physically in the offices on those dates making face-to-face presentations with a prescriber (Tr. 1308), that was not the question Sontag asked when he spoke with the receptionists (Tr. 1106-07). Rather, he asked if the doctor was in on the date that the complainant had recorded the call (Tr. 819, 1083, 1099, 1106). He did not ask if the complainant had been in that day and might have spoken with a prescribing authority other than the doctor recorded, such as another doctor, a nurse practitioner or physician's assistant (Tr. 1106-07) nor did he

speak with any of the doctors themselves when he called the offices to determine when and where they may have met with the complainant (Tr. 820, 1078, 1109).

"The determination of whether an investigation is reasonable will necessarily depend on all the facts and circumstances of the particular case." *Brittell v. Department of Correction*, 247 Conn. 148, 172, n. 36 (1998). In this case, the investigations conducted by Yapp and Sontag were seriously flawed because they were not designed to obtain the information that that the respondent purportedly sought to obtain. Yapp used a restrictive subset of his account representatives with whom to compare the complainant (FF 71). Sontag never mentioned the complainant in his calls to the doctors' offices (FF 79, 93). Sontag's investigation did not really determine whether the complainant lied about seeing the doctors or, as the complainant testified, he simply recorded calls when it was convenient (which would have appeared as the jornada's default date and not necessarily the actual call date). While investigations do not have to be perfect, a flawed investigation, particularly when cumulated with other evidence, can be an indication of discriminatory motivation. *United Technologies/Pratt and Whitney v. Commission on Human Rights and Opportunities*, 72 Conn. App. 212, 234 (2002), cert. denied, 262 Conn. 920.

Personnel appraisals and ranking

Although the complainant's termination did not occur until 2002, the respondent's discriminatory animus toward the complainant extended two years prior to the complainant's termination as evidenced by the discrepancies between his low percentile ranking, his 2000 and 2001 personnel appraisals (R-20, R-21) and his 2001 competency coaching tool (C-II-1-d).

For two years prior to his termination, the complainant had received a ranking of "3", placing him in the lowest ten to twenty percent of the respondent's account representatives (FF 27). In a telephone conversation with the complainant in November 2001, Sontag explained that the low ranking was the result of the complainant's deficiencies in the subjective areas of collaboration, initiative and solutions (Tr. 176-77; C-III-4). [It is noteworthy that when the complainant asked for an explanation for this low rank from his operations manager in 2000, Palombo, and his operations manager in 2001, Yapp, neither was able to give him an explanation (Tr. 81-82, 166). Sontag, however, was able to identify deficiencies even though he had never spoken with the complainant prior to this telephone conversation (Tr. 164).] While there is nothing unlawful about the respondent's use of subjective criteria in its decision making and while it is not the role of this tribunal to second guess the respondent's business judgment, "[a] subjective evaluation, besides being clear and specific, must also be

honest" and the complainant is "entitled to challenge the credibility of the decision's rationale." *Byrnie v. Town of Cromwell, Board of Education*, 243 F. 3d 93, 105 (2001).

Here, the complainant successfully met his burden of challenging the respondent's credibility. Although the respondent ranked the complainant in the lowest ten to twenty percentile, the objective and subjective factors identified in his performance appraisals and coaching tool actually placed the complainant in the upper fifty percentile and identify as strengths those areas Sontag had identified as weaknesses. According to the performance appraisal dated November 30, 2000 (for the fiscal year July 1, 1999 to June 30, 2000), the complainant "delivered above expectation on his A-D[9] Prilosec targets at 92% (vs Team at 85%). During [October, November, December] John was on paternity leave for 6 weeks which is the reason for not meeting his call objectives for this time period." While falling slightly below the team average in April, May and June 2000, the complainant "met expectations for [July August and September] '99 and [January, February, March] '00 call objectives . . . ." He attained 98% of his call objectives for July, August, September 1999 and "accomplished all objectives from his previous personal development plan." (Tr. 95-108; R-21, p. 1.)

Similarly, the complainant's objective performance for the 2000 – 2001 fiscal year also ranked him in the upper 50 percent of his team's average. He "delivered 87.9% of his Actonel [total prescription] Objective vs. 85% for the team, earning the number 5

[9] In July 2001, the respondent would adopt a decile system of ranking prescribers. At this time, it ranked prescribers on a letter system from A-D.

place on our team of 14 account managers. The organization established a market share goal of '7' this year. In this regard, John achieved a market share of 5.4% vs. the team share of 5.1% and earned the number 6 place on the team. " Despite being on disability leave for a month and assuming a new territory on January 1, 2001, the complainant achieved 79% of his Actonel call objectives in the first quarter, 116% the second quarter, 107.4% the third quarter and 98% the fourth quarter. He "exceeded his reach objectives on A-D physicians by 104%" He "delivered 36.9% of calls against A physicians, 27.5% against B physicians and 14.7% against C physicians. In this regard, the team maintained an average of 29.9%, 18% and 11.8% respectively." (Tr. 95-108; R-20, p. 1.)

In addition to scoring among the upper 50% of his peers in objective measures, the complainant also received favorable assessments from his supervisors in his subjective skills, belying Sontag's alleged concerns about his collaboration, initiative and solutions skills. For example, the 1999-2000 appraisal notes that the complainant "took personal responsibility for growth in a newly assigned territory this year. He shared and reapplied previous pharmaceutical knowledge and experience to get up to speed quickly. . . . . Working closely with his counterparts, John identified key customers and their needs. He helped in meeting these needs by effectively coordinated CBD [consumer business development] efforts with counterparts. Some examples including developing local thought leaders, (Dr. M. Ables and Dr. J. Rosenblatt) and customizing patient education materials to specifically meet customer's

needs. These activities developed relationships to facilitate early physician trials for Actonel. John also helped in meeting internal customers' needs by helping to train the Team on how to set up and execute GSEs. He and Sandy Polom executed two GSE Workshops during Team meetings. The workshops enabled newer, inexperienced team members [to] provide GSEs to their customers." (Tr. 95-108; R-21, p. 1.)

Likewise, he continued engaging in collaboration, initiative and solutions activities in 2000 – 2001. "Of particular note, John led 3 group-selling events this year, collaborating effectively with Alliance counterparts, targeting a total of 53 physicians with 42% of attendees being A physicians. These programs produced a 327% increase in [total prescriptions]. John also took the lead to develop productive relationships with Connecticut's most influential Medical Group, ProHealth. This initiative involved John traveling outside his territory to develop relationships with the Medical Director and C.E.O. This work led to piloting "For Her Health" program within ProHealth from which key learnings will be shared nationally. Additionally, John identified and leveraged a key local advocate within the New Britain medical community: Dr. Rosenblatt. John worked with the appropriate resources to train Dr. Rosenblatt as a speaker/local advocate and leveraged Rosenblatt to influence his key physicians through peer-to-peer programs. John also identified an opportunity to develop and utilize Dr. Ables as a local advocate. . . . . John delivered objectives from his last Personal Development plan. He collaborated effectively with a teammate to design and deliver Macrobid training for the team. This work met the intention to boost capacity by sharing industry knowledge and

expertise with his peers. John also took the initiative to take 'The 7 Habits of Highly Effective People' course to further enhance his skill set, which also met the requirements of his personal development plan." (R-20, p. 1.) While Sontag, who had never met or worked with the complainant prior to telling him what he was doing wrong, had concerns about the complainant's subjective skills, the performance appraisals prepared by his managers detail repeated specific incidents of collaboration, initiative and solutions activities that challenge the respondent's credibility to fairly assess the complainant's performance.

In addition to the specific examples identified in the performance appraisals, the complainant also received, in December 2001, a coaching competency tool that ranked his competency skills on a comparative percentile scale in the areas of pharmaceutical knowledge, selling and influencing, business planning and strategy, and relationship management. The complainant's overall average was a 3.48 out of 5.0, placing him in the 50th to 75th percentile. Within these general categories, it is worth noting that the complainant scored a 4.0 (75th percentile) in the area of counterpart relationship, "effectively interacts with co-promotion counterparts, can represent his/her own interests and yet be fair to others; seen as a team player and is cooperative, makes collaboration happen." He received a 3.0 (50th percentile) in problem solving, "uses logic and data to solve difficult problems with effective solutions, probes all sources for answers, can see hidden problems, is excellent at honest analysis, looks beyond the obvious." He also received a 4.0 (75th percentile) in decision quality, "makes good decisions based upon a

mixture of analysis, experience and judgement to ensure greatest target impact." (C-II-1-d.) The complainant's overall ranking in the 50-75th percentile clearly challenges the respondent's credibility that the complainant ranked in the lowest ten to twenty percentile of its account representatives.[10]

The complainant's performance appraisals and competency coaching tool do identify areas for improvement. Nevertheless, they also identify objective accomplishments; specific collaboration, initiative and solutions activities; and positive subjective skill sets that clearly challenge the respondent's credibility and willingness to assess the complainant's job performance in a non-discriminatory manner.

The respondent's treatment of other employees

The respondent argued that the complainant did not produce evidence of similarly situated employees who had committed similar offenses yet were disciplined differently. According to the respondent, the account representatives identified by the complainant as having apparently recorded calls at times other than when the call was made "may technically have been inaccurate." (Respondent's brief, p. 27, n. 12.) The respondent also claimed "there is no allegation that Gatta -or any other representative- ever admitted to recording calls on non-prescribers, as Complainant did." (Respondent's

[10] Even the respondent's regional associate director described the complainant as a "middle of the road performer."

brief, p. 27.) While it is not a finding that the complainant ever made such an admission, the lack of evidence that the respondent, aware of these technical inaccuracies, ever even investigated with whom and when these account representatives actually met supports the complainant's claim of pretext for discriminatory motivation.

More relevant to the finding of pretext for discriminatory motivation, the evidence in the record establishes that the recording of calls is not the rigid process Sontag and Yapp applied to the complainant, but instead a more flexible system, a flexibility afforded to non-basis employees but not to the complainant. For example, other account representatives apparently used the jornada's default date/time of entry rather than record the actual date and time of the call, yet they remained employed by the respondent (Tr. 125-130, 503-06, 522-23; C-IV-61, R-58). If other account representatives met with a group of doctors outside of the office, at a dinner meeting, for example, they would record the call as having occurred at each doctor's primary office address rather than the actual location of the meeting (Tr. 1254-55). Also, according to the respondent's associate regional director, recording calls at the end of the day rather than at the conclusion of the call did occur (Tr. 668). Further, the respondent was unable to account for why the red team account representatives or the Adventis representatives who also called on Dr. Smith did not report her change of address (Tr. 190-91, 1431). The respondent's rush to judgment that the complainant falsified

business records contrasts sharply with its 'technically inaccurate' view toward the record keeping of its non-basis employees.

Complainant's explanations for the call recording discrepancies

It is evident from the circumstances of the July 11th meeting and Sontag's conduct during the complainant's leave that the respondent had no interest in obtaining from the complainant his explanations for the apparent discrepancies Sontag found in his call audits. The respondent's failure to listen to the complainant's reasonable explanations is yet another indication of its discriminatory motivation in terminating the complainant. Had it been willing to give the complainant time to review his notes for calls occurring three to four months prior to the meeting and been willing to listen to him, the respondent would have heard explanations addressing its concerns. Because the complainant did not change the jornada's default entry time (Tr. 120) the calls would appear at the time he recorded them rather than the time he was actually at the prescribers' offices. He also often would meet with his doctors while they made their rounds at local hospitals (Tr. 48, 248). The complainant also provided detailed explanations for the specific doctors Sontag had contacted in his audits (Tr. 1444-60). While his method of recording calls may have been technically inaccurate, the complainant provided reasonable explanations demonstrating a lack of fraudulent intent for the discrepancies.

These explanations, along with Sontag's failure to speak with the doctors themselves and his failure to inquire of the doctors' receptionists if and when the complainant had been in the offices, should have been considered by the respondent in its determination of appropriate discipline - had it not been predisposed for discriminatory reasons to terminate him anyway.

B

Hostile work environment

Although not addressed in his brief, at the prehearing conference the complainant reported that he would, in addition to his termination claim, also be proceeding on his claim that the respondent had subjected him to a hostile work environment because of his sex, age and mental disability. (See Prehearing conference summary and order, ¶ 6, November 2, 2006.) In order to prove a hostile work environment claim, the complainant must establish that because of his protected basis he was subjected to a workplace "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ." The workplace "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. . . . [W]hether an environment is sufficiently hostile or abusive [is determined] by looking at all the

circumstances." (Citations omitted; internal quotation marks omitted.) *Brittell v. Department of Correction*, supra, 247 Conn. 166-67.

In this case, the complainant worked primarily out of his own home, set his own schedule as to which doctors he would call upon and when, and rarely came into contact with his supervisor or other account representatives (**FF** ; Complaint & Answer, ¶ 2). There is also no evidence that on either of the complainant's field visits with Yapp, on his November 2001 telephone conversation with Yapp and Sontag or at the July termination meeting did Yapp or Sontag intimidate, ridicule or insult the complainant because of his age, sex or mental disability. Therefore, he did not prove this claim by a preponderance of the evidence.

II

Section 46a-58 (a)

A

ADEA and ADA

The complainant also alleged that the respondent violated § 46a-58 (a) when it terminated his employment because of his sex, age and mental disability. Section 46a-58 (a) states: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this

state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability." The complainant alleged that the specific laws of the United States that the respondent violated are Title VII, when it terminated his employment on account of his sex, the ADEA, when it terminated his employment on account of his age, and the ADA, when it terminated his employment on account of his mental disability. However, because age and mental disability are not enumerated as protected bases under § 46a-58 (a), the commission does not have jurisdiction to adjudicate the ADEA- and ADA-based claims.[11]

B

Title VII

Because the complainant's Title VII claim is based on allegations that the respondent terminated him on the basis of his sex and sex is enumerated in § 46a-58 (a) as a protected basis, the merits of this allegation must be addressed. Title VII provides in relevant part: "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex,

[11] General Statutes § 1-2z states: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

or national origin . . . .” 42 U.S.C. § 2000e-2 (a) (1). “A Title VII plaintiff can prove her case by direct proof or circumstantial evidence of discrimination. . . . . Where, as here, a Title VII case relies on circumstantial evidence of discrimination, the court follows the burden-shifting analysis first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 . . . . The plaintiff bears the initial burden of establishing a prima facie case of discrimination. She may make out a prima facie case by showing that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she experienced an adverse employment action; and (4) the adverse action occurred under circumstances that give rise to an inference of discriminatory intent. Once a plaintiff has established a prima facie case, a rebuttal presumption of discrimination arises, and the burden shifts to the defendant to offer a legitimate, non-discriminatory ‘business rationale’ for its actions. If a defendant offers a legitimate, non-discriminatory reason for its actions, the burden shifts back to the plaintiff to fulfill her ultimate burden of proving that the defendant intentionally discriminated against her in the employment action. In order to satisfy this burden, the plaintiff may attempt to prove that the legitimate, non-discriminatory reason offered by the defendant was not the employer’s true reason, but was a pretext for discrimination. Ultimately, a finder of fact may consider the strength of the prima facie case, the probative value that the defendant’s reason is pretextual, and any other evidence presented in the case when determining if the plaintiff has sustained

her burden." (Citations omitted.) *Wood v. Sempra Energy Trading Corporation*, 2005 WL 3416126, 5 (D. Conn.)[12]

As previously discussed, in this case the complainant established a prima facie case. First, he is a male (FF 22). Second, he was qualified for his position as is evident by his nearly fifteen years of employment with the respondent, his favorable performance appraisals, and his scores on his competency coaching tool (C-II-1-d, R-20, R-21).[13] Third, he incurred an adverse employment action when the respondent terminated his employment (FF 142). Finally, his subsequent replacement by a female (FF 147) creates circumstances giving rise to an inference of discrimination sufficient for a prima facie case.

The respondent articulated a nondiscriminatory business reason for its decision to terminate the complainant – he had violated known company policies by falsifying business records when he reported calls on doctors that he did not make (Tr. 1001, 1014).

For the reasons previously discussed in detail and incorporated herein by reference, the complainant established by a preponderance of the evidence that the

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[12] As previously discussed, supra, n. 5, because the complainant and the respondent utilized the *McDonnell Douglas* analysis in their briefs, that analysis will also be utilized in this decision.

[13] "To show 'qualification' sufficient to shift the burden of providing some explanation for discharge to the employer, the plaintiff need not show perfect performance or even average performance. Instead, the plaintiff need only make the minimal showing that he possesses the basic skills necessary for the performance of the job." (Citations omitted; internal quotation marks omitted.) *Baker v. State of Connecticut, Department of Correction*, 2006 WL 581205, 5 (D. Conn.)

respondent's explanation was a pretext for discrimination. To summarize: There are significant differences in Sontag and Yapp's planning and execution of the April and July meetings. With respect to the meeting on July 11, 2002, Sontag and Yapp intentionally misled the complainant as to who would be attending and what the meeting would be about. By not providing him with this information prior to the meeting, they ensured that he would not be able to give responsive answers to questions about incidents that had happened months prior to the meeting. They engaged in elaborate theatrics both in orchestrating Sontag's entrance into the meeting and in calling the police to meet them at the complainant's home. They departed from the respondent's typical separation procedure.

Further, the respondent did not observe its stated policy of being honest with employees about their performance (FF 20). For the two years prior to the complainant's termination, the respondent had ranked him lower than his peers for reasons that were wholly inconsistent with the objective and subjective assessments given to the complainant by his managers on his performance appraisals and competency coaching tool. Yapp did not bring his concerns about the complainant's sampling rate to the attention of the complainant prior to contacting Sontag. He did not compare the complainant's sampling rate to his entire team, nor to the red team account representative for that territory, nor to the complainant's predecessor in that territory. He wrote a memorandum purportedly to the complainant about the April field visit that was never actually sent to the complainant and referred to him in the third person. In his call

audits, Sontag did not speak with the doctors the complainant recorded as having called on, nor did he even ask the receptionists if the complainant had recently been in the offices. These are not the actions of supervisors being honest with their employees.

The respondent's conduct constitutes an unlawful employment practice under Title VII and, therefore, a violation of § 46a-58 (a).

III

Damages and other relief

A

Statutes and case law

General Statutes § 46a-86 (b) provides in part in part that "upon a finding of a discriminatory employment practice, the presiding officer may order the hiring or reinstatement of employees, with or without back pay . . . and, provided further, interim earnings, including unemployment compensation and welfare assistance or amounts which could have been earned with reasonable diligence on the part of the person to whom back pay is awarded shall be deducted from the amount of back pay to which such person is otherwise entitled."

In addition, General Statutes § 46a-86 (c) provides additional remedies for a violation of § 46a-58 (a). These remedies include awards for emotional distress. *Commission on Human Rights and Opportunities ex rel. Peoples v. Belinsky*, 1988 WL

492460, 5 (Conn. Super.) The award for emotional distress damages must be limited to compensatory, rather than punitive, amounts. *Chestnut Realty, Inc. v. Commission on Human Rights and Opportunities*, 201 Conn. 350, 366 (1986). “That such compensatory damages may be incapable of precise mathematical computation and necessarily uncertain does not, however, prevent them from being awarded. That damages may be difficult to assess is, in itself, insufficient reason for refusing to award them once the right to damages has been established.” *Griffin v. Nationwide Moving & Storage Co.*, 187 Conn. 405, 420 (1982); *Commission on Human Rights and Opportunities ex rel. Thomas v. Mills*, CHRO Case No. 9510408, p. 8 (August 5, 1998); *Commission on Human Rights and Opportunities ex rel Cohen v. Menillo*, CHRO Case No. 9420047, pp. 12-13 (June 21, 1995).

In addition to back pay, reinstatement and emotional distress awards, the presiding officer is also authorized to award relief including (1) prospective monetary relief (front pay) *Silhouette Optical Limited v. Commission on Human Rights and Opportunities*, 10 Conn. L. Rptr. No. 19, 603 (February 28, 1994); (2) prejudgment and postjudgment compounded interest on the award of front and back pay; Id., 604; and (3) ordering the respondent to pay to the commission the amount of unemployment compensation paid to the complainant, which the commission shall then transfer to the appropriate state agency. General Statutes § 46a-86 (b). “Furthermore, a nonbreaching party who attempts to mitigate his losses may recover his expenditures toward that goal

from the breaching party." *Keefe v. Norwalk Cove Marina, Inc.*, 57 Conn. App. 601, 610 (2000).

The deduction for amounts that the complainant could have earned through reasonable diligence is often referred to as the duty to mitigate damages. The complainant "has a duty to make reasonable efforts to mitigate damages. What constitutes a reasonable effort under the circumstances of a particular case is a question for the trier. Furthermore, we have concluded that the breaching party bears the burden of proving that the nonbreaching party has failed to mitigate damages." (Citations omitted; internal quotation marks omitted.) *Ann Howard's Apricots Restaurant, Inc. v. Commission on Human Rights and Opportunities*, 237 Conn. 209, 229 (1996). "[T]here still remains a duty [on the complainant] to avoid increasing the employer's damages. . . . . In general, there should be an effort to find comparable work. Of course, what reduction should be made from a back pay award for a failure to mitigate is for the hearing officer to decide." (Citations omitted.) *Connecticut Department of Correction v. Connecticut Commission on Human Rights and Opportunities*, 2000 Conn. Super. LEXIS 2887, 23.

The respondent can meet its burden of demonstrating that the complainant failed to satisfy his duty to mitigate "by establishing (1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it. . . . [The respondent is also] released from the duty to establish the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such employment."

(Citation omitted; internal quotation marks omitted.) *Broadnax v. City of New Haven*, 415 F.3d 265, 268 (2d Cir. 2005). In other words, a complainant may not be rewarded for his inertia with a bloated award. “Reason, not to mention equitable considerations, militates against such an award. What this court will do, as it should do, is measure damages as though [the complainant] had acted reasonably.” (Citation omitted; internal quotation marks omitted.) *Grande v. Behling*, 1997 Conn. Super. LEXIS 1087, 12.

B

Back pay

At the time of the hearing, the complainant was not employed, and had not been employed by a pharmaceutical company since his termination. While employed with the respondent, his base pay was $80,000.00 per year (FF 142). In support of an award of full back pay, the complainant testified that he sent out hundreds of resumes to pharmaceutical companies (Tr. 293-94), utilized the internet (Tr. 294) as well as recruiters in his job searches (Tr. 295), and had interviews for positions with pharmaceutical companies, though no job offers were extended (Tr. 477-79). He continued looking for pharmaceutical work during the time when he was a partner in a plastic injection molding company (Tr. 482-83). Also, his psychiatrist testified that at the time of his termination the complainant had wanted to return to work (Tr. 356-57).

However, the evidence is also that the complainant at times removed himself from the job market. The complainant testified that there were periods of time that he was not looking for a job because he was doing construction jobs with a friend of his (who was going to assist the complainant with his own real estate rehabilitation plans) (Tr. 482). Also, according to his treating psychiatrist, the complainant went through a phase of "finding himself" and reevaluating his career direction because he felt he could no longer work in a corporate environment (R-78). It appears that for the first two years of his unemployment the complainant remained in the job market. Thereafter, it appears he removed himself from the job market, in part to purchase, restore and sell houses (earning $80,000.00, and thereby mitigating his damages, for the approximately one year he worked on that project; Tr. 312-14) and in part to assist his wife with her real estate business (Tr. 314, 480-81). Therefore, the complainant is awarded back pay for the first two years of his unemployment: July 11, 2002 – July 10, 2003 and July 11, 2003 – July 10, 2004. For the year July 11, 2002 to July 10, 2003, the complainant's base pay is determined to be $80,000.00. Deducting the $10,000.00 he received in unemployment compensation and the $700.00 he received from his own antique business (FF 149), his back pay award for this period is $69,300.00. For the period July 11, 2003 to July 10, 2004, the complainant's base pay is again found to be $80,000.00. Deducting the $1,290.00 he received from his antique business (FF 149), his back pay award for this period is $78,710.00.

Thus, the complainant's total back pay award is $148,010.00

C

Prejudgment interest

The complainant is also awarded prejudgment interest at the rate of 10% per annum, compounded annually, in the amount of $39,467.00 on his back pay award calculated as follows (salary is deemed accrued on July 10th of each year; interest is deemed accrued on and as of ("a/o") July 10th of each succeeding year):

<u>Prejudgment interest on July 11, 2002 – July 10, 2003 salary loss - $69,300.00</u>

a/o 7/10/04	$69,300 x 10% =	$6,930.00
a/o 7/10/05	$69,300 + $6,930=$76,230	
	$76,230 x 10% =	$7,623.00
a/o 7/10/06	$76,230+$7,623=$83,853.	
	$83,853 x 10% =	$8,385.00
a/o 7/10/07: n/a – decision issued July 12, 2006		
	subtotal:	$22,938.00

Prejudgment interest on July 11, 2003 – July 10, 2004 salary loss - $78,710.00

a/o 7/10/05	$78,710 x 10% =	$7,871.00
a/o 7/10/06	$78,710 + $7,871 =$86,581.00	
	$86,581 x 10% =	$8,658.00
a/o 7/10/07: n/a – decision issued July 12, 2006		
	subtotal:	$ 16,529.00

Total prejudgment interest $39,467.00

D

Medical expenses

The complainant also incurred medical expenses that would have been paid by medical insurance available through the respondent had he remained employed. The complainant is awarded $280.00 for his physical examination (Tr. 305); $1,500.00 for screenings for an aortic aneurysm and echocardiogram (Tr. 305); and $3,600.00 for health insurance premiums (at $150.00 per month; Tr. 303; for the 24 months he was actively seeking employment in the pharmaceutical industry) for a total award of $5,380.00 (FF 148).

E

Reinstatement and front pay

The respondent is also ordered to hire the complainant for the next account representative position that becomes available within Connecticut. The respondent shall pay the complainant the sum of $80,000.00 per annum plus all benefits provided to its account representatives until it hires the complainant, or he reaches the age of 65 or he is offered such a position and declines, whichever occurs first.

F

Emotional distress

Emotional distress damages are not available for a § 46a-58 (a) claim arising from § 46a-60. *Commission on Human Rights and Opportunities v. Truelove & Maclean, Inc.*, 238 Conn. 337, 346 (1996). However, in this case, the complainant's § 46a-58 (a) claim is not in conjunction with his § 46a-60 claim but rather arises from the respondent's unlawful practices under Title VII. For several reasons, it is apparent that emotional distress damages are available for a violation of § 46a-58 (a) arising from an unlawful employment practice under Title VII. First, General Statutes § 1-2z provides that: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and

considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or workable results, extratextual evidence of the meaning of the statute shall not be considered." Section 46a-58 (a) plainly and unambiguously makes a "deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States" a "discriminatory practice in violation of this section . . . ." In this case, the respondent deprived the complainant of his rights under Title VII to a work environment free of sex discrimination. Nor would it be an unworkable result for a violation of federal laws to be a violation of this section; rather, such a result would be consistent with the historic remedial purposes of this chapter.

Second, in *Trimachi v Connecticut Workers Compensation Committee*, the court determined that "General Statutes 46a-58 (a) has expressly converted a violation of federal antidiscrimination laws into a violation of Connecticut antidiscrimination laws." 2000 Conn. Super. LEXIS 1548, 21.

Third, the Connecticut Supreme Court concluded that, under § 46a-58 (a), the commission could prosecute violations of General Statutes §§ 10-15c and 10-4b. The court further determined that the remedies available under General Statutes §46a-86 (c) apply to violations of § 46a-58 (a). *Commission on Human Rights and Opportunities v Board of Education of the Town of Cheshire*, supra, 270 Conn. 665. The court's rationale in finding that violations of state education statutes are within the purview of

§ 46a-58 (a) is equally applicable in finding that violations of federal discrimination law are also within the purview of § 46a-58 (a).

Therefore, the respondent's deprivation of the complainant's rights under Title VII to a work environment free of sex discrimination constitutes a violation of § 46a-58 (a) and enables the complainant and commission to seek the remedies available to them under § 46a-86 (c).

The criteria to be considered for awarding an emotional distress award are: (1) most importantly, "the subjective internal emotional reaction of the complainant to the discriminatory experience which he has undergone . . . [2] whether the discrimination occurred in front of other people; [3] the degree of offensiveness of the discrimination and [4] the impact on the complainant." (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights and Opportunities ex rel. Harrison vs. Greco*, CHRO case no. 7930433, Memorandum of final decision, p. 15, June 3, 1985; *Peoples v. Belinsky*, supra, 1988 WL 492460, 6.

First, the complainant' experienced a strong subjective internal reaction to the experience. The complainant was stressed by the drop to a low rank (Tr. 162), felt that the respondent was not playing by its own rules in assessing his performance (Tr. 180) and was suspicious that the respondent was trying to get rid of him (Tr. 342). Following the telephone conference in November 2001 with Sontag and Yapp, the complainant "started freaking out." Tr. 180. He began experiencing anxiety, rapid heart beat, diminished mental capacity, depression, lethargy, difficulty in sleeping, lack of

motivation and inability to keep up with his work (Tr. 209-11, 215, 337-39). He felt confused, betrayed and anxious because he had previously always felt motivated to excel and his strong identification with the respondent had been a source of pride and strength for him. (Tr. 342-43). He would need to go on disability leave because he could not function at work and would not have gotten better had he remained working because of the stress (Tr. 344).

Second, although the complainant's termination likely became known to his peers, there is no evidence that his rank, performance appraisals, and competency coaching tool or the results of Yapp and Sontag's audits ever became public knowledge.

Third, the respondent's conduct toward the complainant was highly offensive. It is evident by the discrepancy between his low rank and his personnel appraisals and competency coaching tool that the discriminatory experience spanned two years, culminating in his discriminatory termination. Further, the reaction of Sontag and Yapp to their fear and discomfort with the complainant following his disability leave was clearly out of proportion to their interaction with him prior to his leave. Although they had no safety concerns about meeting the complainant in an above-board meeting in April, after his disability leave, they lied to him about who would be at the July meeting and the agenda for that meeting. Yapp pretended he was telephoning his wife when in actuality he was clueing Sontag to enter the meeting. They then contacted the police to meet them at the complainant's home.

Finally, although the complainant has been functional enough for the work environment since July 2002 (Tr. 362), the impact on him of the discriminatory experience continues even four years after his termination. The discriminatory experience “triggered something that was more underlying that was - - this was continuing and still there.” (Tr. 351.) Both before and since his termination he has been on a series of anti-depressant medications (FF 150; Tr. 340, 348, 359-62) and consulting a psychiatrist (FF 150; Tr. 349, 363) because of the discriminatory experience. Although his symptoms had been receding prior to his termination, the discriminatory termination resulted in a return of anxiety (Tr. 358-59), stress, loss of confidence, concern about how he would support his family and what he would do next (Tr. 351). His need for medication and therapy is likely to continue indefinitely (FF 150; Tr. 362-63).

For these reasons, the complainant is awarded $15,000.00 in emotional distress damages.

G

Postjudgment interest

The complainant is awarded damages of $148,010.00 in back pay, $5,380.00 in reimbursement for medical expenses and $15,000.00 in emotional distress damages for

a total of $168,390.00. The complainant is awarded postjudgment interest at 10% per annum compounded annually on this total.

H

Other claims

During his employment with the respondent, the complainant also participated in a profit sharing plan (Tr. 298), used a company provided automobile (Tr. 299-300), received an expense account (Tr. 299) and incurred other out of pocket medical expenses not previously mentioned (Tr. 304). As is evident by the brevity that even the complainant's brief (pp. 12-13) addressed these issues, the record lacks specificity as to the actual value of these benefits and amount of these costs. Therefore, no award is made for these claims given their speculative nature.

The complainant is also not awarded his investment in a plastic injection molding company. His testimony that the investment "was probably close to twenty thousand dollars" (Tr. 308) is too vague to support an award for costs incurred in an attempt to mitigate his damages.

I

Reimbursement of unemployment compensation

The complainant testified to receiving "close to $10,000.00" in unemployment compensation benefits (Tr. 476). The commission is ordered to obtain verification of the amount actually paid to the complainant and to so notify the respondent. The respondent shall then pay to the commission the actual amount paid to the complainant and the commission shall then transfer such amount to the appropriate agency.

Conclusions of law

1. With respect to the complainant's § 46a-60 (a) (1) termination claim, he established a prima facie case, the respondent articulated a non-discriminatory reason for his termination, and the complainant met his burden of persuasion by establishing by a preponderance of the evidence that the respondent's articulated reason was actually a pretext for intentional discrimination.
2. With respect to the complainant's § 46a-58 (a) claim, the complainant established a prima facie case, the respondent articulated a non-discriminatory reason for its termination of the complainant, and the complainant met his burden of persuasion by establishing by a

preponderance of the evidence that his termination was the result of deprivation of rights secured and or protected by the laws of the United States, specifically Title VII, on the basis of his sex.

3. The complainant did not establish his claim of a hostile work environment by a preponderance of the evidence.

Order

1. The respondent shall pay the complainant $148,010.00 in back pay.
2. The respondent shall pay the complainant $39,467.00 in prejudgment interest on the award of back pay.
3. The respondent shall pay the complainant $5,380.00 in reimbursement for his out of pocket medical expenses.
4. The respondent shall pay to the complainant $15,000.00 in emotional distress damages.
5. The respondent shall pay postjudgment interest to the complainant at 10% per annum compounded annually on $168,390.00 (representing the total of the award for back pay, medical expenses, mitigation expenses and emotional distress).
6. The respondent shall reinstate the complainant to the next account representative position that becomes available within Connecticut. Effective with

the date of this order, the respondent shall pay the complainant the sum of $80,000.00 per annum plus all benefits provided to its account representatives until it hires the complainant, or he reaches the age of 65 or he is offered such a position and declines, whichever occurs first.

7. The commission shall obtain verification of the amount actually paid to the complainant in unemployment compensation benefits and notify the respondent of that amount. The respondent shall then pay to the commission the actual amount paid to the complainant and the commission shall then transfer such amount to the appropriate agency.
8. Pursuant to General Statutes § 46a-60 (a) (4), the respondent shall not engage in or allow any of its employees to engage in any conduct against the complainant or any other person who testified or assisted in these proceedings.
9. Should prospective employers seeking references concerning the complainant ever contact it, the respondent shall provide only the dates of said employment, the last position held and rate(s) of pay. In the event additional information is requested in connection with any inquiry regarding the complainant, the respondent shall require written authorization from the complainant before such information is provided, unless required by law to provide such information.
10. The respondent shall cease and desist from all acts of discrimination prohibited under federal and state law and shall provide a nondiscriminatory work environment pursuant to federal and state law.

11. For a period from August 1, 2006 to July 30, 2008, the respondent shall provide the commission with the name, age, sex and known disability of every applicant for employment for account representative in Connecticut; the name, age, sex and known disability of every person it hires for such position; and the name, age, sex and disability of Connecticut-based account representative who, voluntarily or involuntarily, leaves its employment.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

c:
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