STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNTIES
OFFICE OF PUBILC HEARINGS

CHRO ex rel. Stacy Maher,
Complainant

CHRO No. 0330303
Fed. No. 16aa300563

v.

New Britain Transportation Co.,
Respondent

April 17, 2006

FINAL DECISION

I.

PARTIES

The complainant is Stacy Maher, ("complainant"), of 227 Paddock Ave., Meriden, Connecticut. The complainant was represented by Attorney Andrew S. White, of 319 Whitney Ave., Bldg. #5, Hamden, Connecticut. The Commission on Human Rights and Opportunities ("commission') is located at 21 Grand Street, Hartford, Connecticut and was represented by Attorney Margaret Nurse-Goodison of the Office of Commission Counsel. The respondent is New Britain Transportation Company ("respondent") of 1748 North Broad Street, Meriden, Connecticut. The respondent was represented by Attorney Elizabeth K. Andrews, Tyler, Cooper and Alcorn, LLP of 205 Church Street, New Haven, Connecticut.

II.

SUMMARY OF COMPLAINT AND DECISION

By complaint dated December 27, 2002, the complainant alleges that the respondent illegally discriminated against her by reducing her hours of employment and

paying her a lesser rate of pay because of her sex (female) in violation of General Statutes § 46a-60 (a) (1) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and the Civil Rights Act of 1991. The complaint was amended August 5, 2004, and alleges failure to promote, an offer of promotion at a lesser rate of pay, reduction of her hours and constructive discharge because of her sex (female) in violation of General Statutes §§ 46a-58 (a), 46a-60 (a) (1), the Equal Pay Act of 1964, 29 U.S.C. 206 and Title VII.

For the reasons state herein, the complaint is DISMISSED.

III.

PROCEDURAL HISTORY

Upon the filing of the complaint, it was assigned to an investigator. After a preliminary investigation, the investigator found reasonable cause to believe that an unfair practice was committed as alleged in the complaint. On August 31, 2004, the complaint was certified to the executive director of commission and the attorney general of the State of Connecticut.

Upon certification of the complaint, the Honorable Donna Marie Wilkerson was assigned as presiding referee to hear the complaint. On September 21, 2004 a public hearing was scheduled to commence on May 23, 2005. On May 17, 2005, the complaint was reassigned to the undersigned as presiding referee in substitution of Referee Wilkerson. On May 19, 2005, the public hearing was continued and scheduled to commence on July 18, 2005. The public hearing was held over a three-day period,

concluding on July 20, 2005. Briefs and reply briefs were timely filed with reply briefs filed on January 17, 2006, at which time the record closed.

IV.

FINDINGS OF FACT

1. The respondent corporation has been a family run bus company since 1920. See Transcripts of Public Hearings ("T") at 213.
2. Peter Agostini has been the president of respondent since 1999, when he took over for his father. T at 216.
3. Lillian Agostini, Peter Agostini's mother, has been respondent's sole owner since 1999. T at 216
4. As owner, Lillian Agostini, is perceived by some as ranking above her son. T at 436.
5. Final word on company decisions rests with Peter Agostini and Lillian Agostini. T at 481.
6. In 1972, the respondent started its first school bus division in Southington, Connecticut. T at 214.
7. In 1987, the respondent added a second school bus division in Berlin, Connecticut. T at 214.
8. In 1995, the respondent acquired the Meriden school bus contract and opened a third division in Meriden. T at 214.

9. The respondent's main headquarters are located in Berlin, Connecticut. The Berlin facility houses the main office building, as well as the largest (possessing multiple bays) and only fully functional garage with a hydraulic lift. T at 218.

10. The respondent operates and maintains Connecticut Transit buses as well as school buses, and the transit buses are serviced exclusively in Berlin. T at 218.

11. A different skill set is required for maintaining transit buses. T at 251, 252.

12. The facility in Southington has only a one bay garage and some office space. T at 218.

13. In 1999, the respondent moved its Meriden division from Golden Street, which had a multi-bay garage, to the Berlin Turnpike, where it had only office space and a parking lot. T at 221.

14. After the Meriden move, Meriden's two full time mechanics were sent to Berlin. T at 390.

15. At the time the complainant terminated her employment in 2003, the Southington division was managed by Cheryl Kallberg (female); Berlin was managed by Dean Barnes (male), Meriden was managed by Nadine Walton (female) and a female was in charge of company wide maintenance. T at 220.

16. In 2001, the respondent's managerial and clerical staff was more than eighty percent female. T at 257.

17. Due to the nature of each division's facility, since at least 1999, all major mechanical work has been performed at the Berlin division. T at 221.

18. Only minor mechanical work is performed in the two other divisions, for example, replacing light bulbs, repairing short circuits, stop sign repairs, and other miscellaneous, general operational repairs. T at 221.

19. Each division historically had its own mechanics. A ”mechanic” is defined by respondent as a full time employee who does the full range of major rebuilding or mechanical work. T at 223, 224.

20. Alternately, a “defects person” or “mechanic’s helper” (hereinafter the latter) normally handles tasks such as repairing ripped seats, replacing some bulbs and changing and/or checking fluids such as oil and water. T at 224.

21. A mechanic’s helper might also do more significant jobs, depending upon the skill level of the individual helper. T at 275-277.

22. Mechanic’s helpers had many different skill levels. T at 276.

23. One of the primary distinctions between a mechanic and a mechanic’s helper is that a mechanic is a fulltime employee – 40+ hours per week, 52 weeks per year. T at 224; and C & R Ex 6.

24. Alternatively, a mechanics helper is generally a part time employee. T at 224.

25. All full time mechanics are currently in Berlin. T at 302.

26. The complainant worked for the respondent from approximately 1995 until June of 2003. T at 103.

27. Throughout the course of the complainant’s employment she was a part time employee working in the Meriden division. T at 126.

28. The complainant never complained to Peter Agostini about her rate of pay. T at 247.

29. During the course of the complainant's employment, the respondent valued her as an employee and believed that she was good at her job; she consistently received positive evaluations and regular raises. T at 226.

30. For the first year of her employment the complainant worked exclusively as a part time school bus driver. T at 39.

31. After the first year the complainant started doing yard work, which included taping seats and changing light bulbs. T at 40.

32. After an additional year the complainant progressed to more difficult mechanical work such as brake jobs. T at 40.

33. At that time the driving staff was approximately half women, half men. T at 127, 129.

34. The complainant does not claim that she was discriminated against when paid as a driver, and men and women were given the same pay increases. T at 130.

35. When the complainant first started working for the respondent, she drove a morning route, kindergarten route and afternoon route. T at 125; C & R Ex 6.

36. Shortly thereafter, the complainant requested to work from 6:00 a.m. to 2:00 p.m. only. T at 125; C & R Ex 1,

37. No one worked 6:00 a.m. to 2:00 p.m. at Meriden except the complainant. T at 398.

38. If there were days off from school, however, the complainant did not routinely work, nor did she usually work on Thursday mornings. T at 126.

39. The complainant cleaned houses for pay on Thursdays from 9 a.m. to 12 p.m. T at 405.

40. The complainant sometimes worked past 2:00 p.m., usually when it was convenient for her. T at 492.

41. Around 1998 the focus of the complainant's work shifted to yard work and mechanic's helper work, as opposed to driving. T at 130.

42. During this time period, the complainant also continued to drive school buses, yet she was always paid at a higher mechanic's helper rate of pay, regardless of whether she was driving a bus or performing yard work. T at 131.

43. Working until 2:00 pm allowed the complainant to be home when her children got off their school bus. T at 133.

44. The complainant did not work summers, weekends, and worked only occasionally (and when asked) during school vacations. T at 133-135.

45. The complainant felt like "one of the guys" with the men she worked with in Meriden, although there was a mechanic in Berlin who would "hoot and holler" when he saw her. T at 141, 142.

46. By 1999, the complainant was doing primarily part time mechanic's helper work, and the complainant testified that she characterized herself as a mechanic's helper, though she continued to drive her morning school bus run. T at 170.

47. The complainant drove a morning bus route throughout her career. T at 392.

48. In 1999, the complainant, believing herself to be underpaid, complained to Vice President Shirley Gralnick, who acknowledged the disparity and made an upward adjustment (almost ten percent) to the complainant's pay. T at 46, 197.

49. Despite the complainant's pay increase (to $12.00 per hour), by 1999 there was no longer a garage at the Meriden division, and so the type of mechanical work that could be performed was very limited. T at 136, 137.

50. Most of complainant's work at this time was defects work. T at 79

51. The complainant never received professional certification and did not know whether fellow workers had. T at 168.

52. According to the complainant, at no time during her employment with the respondent did she ever seek a full time mechanic's position, nor did she ever complain to anyone that she was being discriminated against because she was not offered the position. T 143, 274.

53. At all times during the complainant's employment the respondent had an anti-harassment and discrimination policy, with a complaint procedure in place, of which the complainant was aware. T at 159, 160 and C & R 6.

54. The complainant never complained to anyone at the respondent that she felt she was being discriminated against. T at 156.

55. The complainant did not ask respondent's management if fellow workers were making more money. T at 148.

56. The complainant's only basis for this belief was a fellow worker telling her "someone" was making more money. T at 147.

57. In 2001, the respondent was experiencing a shortage of employees, and at the same time, was "very, very busy." T at 229.

58. Management believed that the company could not operate successfully under the existing mechanics' schedule. T at 229.

59. Specifically, the respondent realized that in order to complete all mechanical work that needed to be done on the buses, and to have them in good working order and safe for operation during the next school year, it needed another full time mechanic to work during the summer. T at 229, 230.

60. Typically, only 40-50% of the respondent's fleet of 240 buses runs in the summertime. Consequently, this is when the majority of mechanical work is done to prepare for the upcoming year. T at 229.

61. The envisioned position would be eight hours per day, fifty-two weeks per year. T at 240.

62. A team of senior level management met to discuss the situation. T at 231, 232.

63. The team, which consisted of Lillian Agostini, Peter Agostini, Rich Spencer (CFO), Nadine Walton (Division Manager of Meriden), Cheryl Kallberg (Division Manager of Berlin), Dean Barnes (Division Manager of Southington), Debi Carroll (operations), and Linda Kidd, determined that the complainant was the best candidate for the job. T at 232.

64. The team tried to keep the pay package fair, and considered skill level, certification and qualifications. T at 234, 235, 241.

65. The complainant had never requested from the respondent full time employment. T at 81, 143.

66. She testified only that she asked why full time employment had not been offered. T at 698.

67. The complainant was the only woman, and the first choice to fill the position, over and above all other qualified males. T at 647, 648.

68. The three senior members of the management team – Lillian Agostini, Peter Agostini and Rich Spencer - engaged in an extensive analysis to determine what the appropriate and fair "offer package" would look like. T at 232-33.

69. In doing so, they looked at the complainant's current rate of pay, the rate of pay for an entry level position, rates of pay for other employees working in the position, what other companies were paying for the same type of work, the location that the complainant would be working in, and the complainant's skill level, including whether or not she held any certifications. T at 241, 689.

70. The overall intent of the analysis was to make an offer that was fair, not only to the employee being offered the position, but also to employees already performing the job. T at 235.

71. After performing this analysis, the respondent offered the complainant the full time mechanic's position with full benefits, including full health insurance coverage, short term disability insurance, life insurance, and vacation and personal days, effective immediately. T at 239, 241.

72. Benefits were a substantial amount when computed per hour, but the complainant did not need them. T at 318.

73. Professional certifications (which the complainant has not claimed to possess) are important in weighing qualifications. T at 241.

74. Some of respondent's mechanics go on to get professional certifications and raises. T at 369.

75. The complainant was not offered a pay raise as part of the offer package because she was already making $12.35 per hour, which was more than the

prevailing starting wage for full time mechanics with comparable experience and skill. T at 242; 673.

76. Peter Agostini offered the complainant the full time position in June of 2001. T at 239 to 241.

77. When Peter Agostini offered the complainant the position, he explained what the hours would be, and that there would not be a pay increase because the complainant was currently at a level of pay above the entry level position. T at 239 to 241.

78. Peter Agostini did, however, offer the complainant the full benefits package, as described above. T at 239 to 241.

79. The complainant asked Peter Agostini, “Why is there no pay increase?” He explained that is was because it would not be fair to bring her in at a pay rate that was higher than other entry level mechanics who possessed the same skills and experience. T at 239 to 241.

80. The complainant should have been aware that consistent with others who had accepted the position of mechanic, had she accepted the position, she would have been eligible for a pay raise three months later in September of 2001 (standard 90 day review raise). T at 667.

81. The complainant declined the offer. T at 239, 240.

82. The complainant did not request an increase or make a counter proposal with a different rate of pay. T at 243.

83. The complainant knew that Peter Agostini’s mother, Lillian, was sole owner of the company and hence the real boss. T at 62.

84. In rejecting the offer, the complainant explained to Peter Agostini at least in part that she wanted to be able to spend time, especially in the summer and during the school holidays, with her three children. Tat 240.

85. The complainant did not need the offered benefits and wanted to spend time with her family. T at 321.

86. In the fall of 2001, the complainant returned to the respondent, working part time. She continued to drive and perform defects work. She also continued to receive pay raises, and by the end of the 2002 school year, she was making $12.70 an hour for all the time worked (including bus driving). C & R Ex 3.

87. In June of 2002, the respondent determined that it could not operate efficiently and successfully without a full time mechanical staff in all three divisions. T at 411.

88. The primary need was for full time – 52 weeks per year – mechanics. T at 411.

89. The respondent determined that it needed to do a company wide reorganization of mechanical hours in order to accomplish this, and actually get all of the necessary mechanical work done. T at 411.

90. One of the primary reasons for the hour reorganization for mechanical personnel was that there was no mechanical coverage from 2:00 p.m. to 4:00/4:30 p.m. in Meriden, when the respondent had all of its buses on the road bringing children home from school. T at 410, 411.

91. More specifically, the respondent's contractor, the Meriden Board of Education was "getting a little antsy" because if there was a breakdown, the children were necessarily stranded on the bus because the respondent would be forced to call

in a mechanic from either Southington or Berlin to get the vehicle serviced. T at 410.

92. The respondent determined that the new hours for all mechanical personnel would be 8:00 a.m. to 4:30 p.m. T at 411.

93. The respondent realized the need for a full time Meriden mechanic and offered the position to the complainant. Again, the complainant was the respondent's first choice for the job, and the first person asked. The full time position required the complainant to be available to work 8:30 a.m. to 4:30 p.m., Monday through Friday, including summers and vacations. T at 493.

94. In making the second offer in 2002, the respondent management team again went through the same analysis that it performed in 2001 to ensure that the offer made to the complainant was fair. T at 673, 674.

95. The complainant was again offered the full time position (this time by her manager, Nadine Walton) with full benefits, but no pay raise. T at 673, 674.

96. Once again, the complainant rejected the offer, allegedly because she was not offered a pay raise. T at 675.

97. There is a policy that full time employment is for fifty two weeks a year. T at 494.

98. The complainant told respondent's management that she could not get full time day care for her children. T at 591.

99. Some mechanics received raises when they threatened to quit. T at 554.

100. On being offered full time, some mechanics rejected management's initial offer and negotiated an increase. T at 371, 539.

101. The complainant said she did not need the benefits and wanted the pay raise instead. T at 417.

102. When the complainant refused the full time position in 2002, she asked her manager, Nadine Walton, whether she could return in the fall and work 6:00 a.m. to 2:00 p.m. T at 429, 430.

103. Nadine Walton informed the complainant that she could not, as that shift no longer existed. T at 430.

104. Complainant's mechanical work was done initially by two part time drivers. T at 427.

105. Within a few months Mike Hazlett was hired as the full time Meriden mechanic at an initial rate of pay less than had been offered to the complainant. C&R Ex 2, 3.

106. At that point, the complainant asked Nadine Walton is she could return in the fall as a driver, to which Walton responded "absolutely." T at 429.

107. The complainant did in fact return to work with the respondent in the fall of 2002. T at 429.

108. The complainant requested that she be assigned to drive only morning bus routes. T at 429, 430, 433.

109. Had the complainant wanted more hours, for example afternoon hours, kindergarten runs and/or charter bus work, those hours were readily available to her. T at 431.

110. The complainant understood that the respondent's policy was that only drivers who drove morning and afternoon runs were eligible to drive kindergarten. Any driver was eligible to sign up for charter work. T at 431, 432.

111. The complainant however, chose not to take this work. T at 431, 432.

112. The complainant drove a morning school bus route for the entire 2002-2003 school year. T at 433.

113. In June 2003, the complainant accepted her pink slip, as was the custom for the majority of the respondent's school bus drivers. T at 435.

114. In the fall of 2003, the complainant chose not to return to work at all. T at 435.

115. The complainant did not consider working for another bus company because she believed "the way that employees were treated was the same at other companies." T at 121.

116. The complainant stated that she believed there was a general disrespect for part time mechanics helpers at other companies, similar to that at the respondent, that cut across gender, age and racial lines. T at 121, 122.

117. The complainant submitted a letter in the form of an apparent counter offer after rejecting the respondent's full time offer, that addressed her need to not work in the summer and contained a request for scaled back (from full time) non summer hours. The letter did not mention a counter proposal in the rate of pay. T at 157 and R Ex 7.

118. On at least one occasion an employee of respondent was offered a full time position, which he rejected because of the proposed rate of pay, but a compromise was reached after the employee specifically asked for a higher rate. T at 371

119. The respondent does not allow for pay increases in exchange for forgoing benefits. T at 379.

120. Throughout the complainant's employment with the respondent, there were periodic instances when the complainant was paid both less and more than male mechanic's helpers, and the pay rates for the mechanic's helpers relative to each other were in constant flux, while evidencing no discernible pattern of actionable animus. C&R Ex 2, 3.

121. Offers for the position of full time mechanic were sometimes made to drivers, sometimes made to mechanic's helpers, sometimes made to workers already in Berlin for positions in Berlin, sometimes included an immediate raise and sometimes not, and were sometimes at a rate of pay higher than that made to the complainant, and were sometimes at a rate of pay less than that made to the complainant (even though some such offers were subsequent thereto), also evidencing no discernable pattern of actionable animus. C&R Ex 2, 3.

122. Some of respondent's mechanics had prior experience at Pratt and Whitney. T at 312, 364, 365 and 556.

123. Some of respondent's mechanics had professional certifications. T at 369.

124. Some of respondent's Berlin mechanics were required to work on transit buses. T at 218.

125. Some of respondent's mechanics went full time directly from positions as lower paid part time drivers. T at 308, 309.

126. Steve Hazlett, whom the complainant cites as her closest comparable, was promoted to lead mechanic, with foreman duties, and stationed in Berlin. T at 337, 338.

127. Several of the complainant's co-workers negotiated for higher pay. T at 570.

128. Sometimes the respondent would accede to wage demands, sometimes not, depending on budget constraints. T at 574.

129. The availability of full time positions depended on respondent's needs at a given time. T at 609.

130. Location played a role in what a mechanic was worth and they were worth more when situated in Berlin. T at 659, 662.

131. In determining whom to promote, there was a preference to keep mechanics in the same location. T at 663.

132. On one occasion, familial nepotism (an aunt awarding an unjustifiable increase to her nephew) played a role in setting rate of pay. T at 676.

133. It was common to award a pay raise to a mechanic ninety days after going full time and complainant would have been eligible for such an increase. T at 666, 667.

V.
Analysis

A.
The complainant's claims under Title VII and CFEPA

The respondent alleges that the complainant has failed to establish the requisite prima facie case under her Title VII and CFEPA claims, in that she has failed to establish that she suffered an adverse employment action, and in that her allegations do not give rise to an inference of discrimination. Connecticut courts often look to federal employment discrimination law for guidance in enforcing Connecticut's anti-discrimination statutes, and hence federal case law may be considered in an analysis of

complainant's state claims as well as those arising under Title VII. *Thames Talent, Ltd. V. Commission on Human Rights and Opportunities,* 265 Conn. 127, 139 (2003).

The complainant has failed to put forth any credible direct or strong circumstantial evidence to establish that any of respondent's actions were motivated by discriminatory intent, and it is therefore inappropriate to evaluate this case through an analysis as set forth in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). Such an analysis, often termed a "mixed motive" analysis, would actually shift the burden of persuasion to the respondent (employer) upon a showing of sufficient evidence to establish a prima facie case.

Lacking such evidence, a complainant is still afforded an opportunity to establish a discrimination claim indirectly by inference. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983). The framework for the burden of production of evidence and the burden of persuasion in an inferential employment discrimination case is well established. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and subsequent decisions have established an allocation of the burden of production and an order of presentation of proof discrimination cases.

First, the complainant must establish a prima case of discrimination. In order to establish a prima facie case, the complainant must prove that: 1) she is in the protected class; 2) she was qualified for the position; 3) she suffered an adverse employment action; and 4) that the adverse action occurred under circumstances giving rise to an inference of discrimination. Once the complainant establishes a prima facie case, the employer then must produce a legitimate, non-discriminatory reason for its adverse

employment action. This burden is one of production, not persuasion; it can involve no credibility assessment.

After the complainant has established a prima facie case, and the respondent has produced evidence of a legitimate, non-discriminatory reason for the alleged adverse employment action, the complainant retains the ultimate burden of persuading the court that the complainant has been the victim of intentional discrimination. The complainant may succeed in this either directly by persuading the court that a discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's proffered explanation is not credible or is mere pretext to conceal a discriminatory animus. Employment discrimination therefore can be proven with evidence that the respondent was motivated by discriminatory animus, or indirectly, by proving that the reason given by the employer was pretextual. *Jacobs v. General Electric Co.,* 275 Conn. 395, 400-01, 880 A.2d 151 (2005). Courts have described the complainant's prima facie burden as "minimal" and "de minimis"; *Woodman v. WWOR-TV, Inc.,* 411 F.3d 68, 76 (2nd Cir. 2005); *Craine v. Trinity College,* 259 Conn. 625, 638 (2002). That, however, is not to say that the burden is non-existent. See *Curry v. Goodman, S*uperior Court, judicial district of Hartford, Docket No. CV 020817767 (November 18, 2004, Stengel, J.) (granting motion for summary judgment where plaintiff claimed discrimination based on disability but failed to show that he was qualified for position).

The Second Circuit Court of Appeals has defined "an adverse employment action as a materially adverse change in the terms and conditions of employment…To be materially adverse, a change in working conditions must be more disruptive than a mere

inconvenience or an alteration of job responsibilities…Examples of such a change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices…unique to a particular situation." (Citations omitted; internal quotation marks omitted.) *Sanders v. New York City Human Resources Administration,* 361 F.3d 749, 755. (2nd Cir. 2004).

If some or all of the complainant's allegations are deemed to constitute an adverse employment action, the evidence still must be sufficient to create an inference that the qualifying employment decisions were made based upon the impermissible criteria. *Byrd v. Roadway Express,* 687 F.2d 85 (5th Cir. 1982). This, the complainant has attempted to do by establishing that at least some of the alleged adverse employment actions were not encountered by similarly situated males. Some courts are requiring claimants to establish that the employees to whom a claimant may wish to compare himself or herself to, be nearly identical in all or almost all respects. C. Geoffrey Weirich, Employment Discrimination Law, (3d Ed.), 2002 Cumulative Supplement, Chapter 2, P.18. Alleged comparables must have been "similarly situated in all relevant respects" and must have engaged in conduct of "comparable seriousness." *Williams v. St. Luke'-Shawnee Mission Health Sys., Inc.*, 276 F.3d 1057, 1060 (8th Cir. 2002).

The alleged adverse employment actions claimed under Title VII and CFEPA will be broken down and analyzed under several separate criteria. Each will then be addressed in the context of the findings of fact heretofore set forth, and in the context of

the comprehensive personnel and wage statistics for the complainant and her male comparables, as more particularly set forth in C & R Ex 2, 3.

1.

Unequal pay for comparable work

There is no claim that the complainant's pay as a part time bus driver was not equal to that of other drivers, male or female. During the complainant's years as a mechanic's helper, discrepancies appeared vis-à-vis the hourly rate of pay paid at any given time relative to male mechanic's helpers and the complainant (who was the only female mechanic's helper). Discrepancies also developed between the offers made to the complainant and her male comparables when they were offered a full time position as a mechanic, both in terms of the original proposed rate of pay, and whether the rate constituted an increase over the current rate of pay. The complainant was the only female to be offered the subject position. The following conclusions best characterize and explain these discrepancies:

a) There was a broad range of experience and abilities among the mechanics helpers.
b) Beginning in 1998 the complainant's hourly rate was paid for all her time, despite the fact that she continued to maintain her morning bus run (normally lower paid) while being employed as a mechanics helper, therefore receiving an enhanced drivers rate of pay rendering direct comparisons problematical.

c) The complainant's 6 a.m. to 2 p.m. shift was unique to her and she was not routinely available to work Thursday mornings, 2 p.m. to 4:30 p.m., school holidays or summers.

d) The complainant worked in the Meriden facility, which had no lift or garage subsequent to 1999 and where repairs were to school buses only, and of more limited complexity.

e) The respondent tried to keep wages for its non-union mechanics helpers fair, and considered each worker's qualifications relative to certifications, experience, longevity, location and other customary non-discriminatory intangibles.

f) Some mechanic's helpers negotiated for increases, some with the threat of quitting or working elsewhere. The complainant requested a raise (based upon her then perception of being underpaid) only once, taking her complaint to a female vice president. Management agreed and awarded the complainant a wage increase of approximately ten percent.

g) On one occasion a male mechanic's helper received a disproportionately high increase as a result of non-actionable familial nepotism, the increase being approved by a vice president who was his aunt.

h) At no time did the complainant actively pursue a position with a competing bus company, and actually testified that she believed mechanic's helpers were treated poorly at the other companies as well and that this treatment cut across race and gender lines.

i) The discrepancies evidence no pattern from which one could infer a discriminatory animus. There are numerous examples of occasions on which the

complainant was being paid a higher hourly rate than male mechanics helpers, such as W. Sharp, Mike Hazlett and S. Bruznik On some occasions she was paid more than even full time mechanics, such as M. Kidder, and on some occasions more than full time mechanics were paid even after she ceased working for the respondent, such as M. Kidder, W. Maldonado, J. Peterson and S. Bruznik. C&R Ex 2, 3.

j) The complainant did not make a pay related counter offer to the respondent's initial offer, either in 2001 or 2002, despite the fact that the one time she had complained about her rate of pay the respondent offered an increase of approximately ten percent.

k) Most of the males who were offered a full time mechanic position were to be employed in Berlin, where the major school bus repairs were done and where the more complex transit buses were maintained.

l) Some of the males who were offered a full time mechanic position were being promoted directly from having served as part time drivers, a position which paid less than part time mechanic's helpers. thereby offering an explanation for an initial increase.

m) Some of the males who were offered a full time mechanic's position had been previously employed at concerns such as Pratt & Whitney; and at least one had professional certifications.

n) The respondent's full time offers to the complainant were set by a management committee which considered such things as experience, certifications, location,

the company's finances at that time, what competitors were paying and what others in the company were making.

o) On at least one occasion a male employee rejected the respondent's first offer but made a counter offer and a compromise was reached.

p) Late in her employment, and presumably after the full time offer of 2002 the complainant submitted what appears to be a written counter offer that addressed hours to be worked during the week (still excluding summers) but not her proposed rate of pay.

q) The respondent's offer of benefits was worth several dollars an hour, and although the complainant stated the benefits were of no use to her, the respondent as a matter of policy could not award an increase in lieu of full time benefits.

r) There were male employees who were offered full time mechanic positions (both before and after the complainant) who either received no hourly pay increase, such as S. Bruzik, R. Henne, and Mike. Hazlet, or who were offered a rate of pay less than the complainant had been making (at the time of the offer or even prior thereto) as a part time mechanics helper, such as S. Bruzik, Mike Hazlett, M. Kidder, W. Maldonado and J. Peterson. C&R Ex 2, 3.

s) While the complainant's self selected alleged comparable (Steve Hazlett) did receive a pay increase at the time he accepted a full time mechanic's position, that was in 1997 and he was being promoted from being a driver. While Hazlett was making more as a full time mechanic in 2001 and 2002 than the amount offered at that time to the complainant, he was in actuality a lead mechanic

(foreman), situated in Berlin and had already had a few years experience as a full time mechanic.

t) The complainant, had she accepted the respondent's offer in either 2001 or 2002, would have been eligible for an increase in pay after a 90-day review, as had been the case with male mechanics who had become full time.

The complainant was able to identify selective instances from the group of apparently ten male co-workers she selected as her comparables, where her rate or offer of pay was less than that of a male peer at a given time, but she was unable to identify any pattern that that would allow a finder of fact to reasonably conclude that she had suffered an adverse employment action, or that any such action (at least as perceived by her) could be inferred to have resulted from a discriminatory animus.

It is found therefore, that the complainant has not succeeded in establishing a prima facie case relative to unequal pay. Were the finding otherwise, the respondent has nonetheless provided ample evidence of non-actionable legitimate business reasons (free of any persuasive evidence of pretext) to explain differences and inconsistencies, claimed under CFEPA and Title VII.

2.

Failure to promote

The complainant also alleges that she was not offered a promotion to the position of full time mechanic as quickly as her male peers. While this is in some cases an accurate observation, when viewed in the context of the conclusions reached below (in

conjunction with those set forth in the previous section and applicable to this claim as well), the reasonableness of an inference that this resulted from an impermissible animus on the part of the respondent is again not sufficiently credible.

a) The full time mechanic position was a 52-week a year position, and there was no evidence that the complainant was willing to work routinely over school holidays (she had three school age children during the time periods under review), or during the summer.

b) The complainant never applied for or requested a full time mechanic's position, and only asked why one had not (at the time) been offered her.

c) The respondent had created a 6 a.m. to 2 p.m. position for the complainant that allowed her to drive mornings at the higher mechanic's helper rate, and that was unique in the company.

d) After being challenged by the complainant as to why the full time position had never been offered to her, the respondent offered it to her twice and she turned it down twice, at least in part because the position required the complainant to be away from her family during school vacations and over the summer, and she was unwilling to do so.

e) The complainant spent her entire career with the respondent in Meriden, where there was no garage after 1999. The respondent preferred to promote from the same location as the location where the full time position existed, and most of the full time mechanic positions (all of them today) were in Berlin.

As with the unequal pay claim, there is no reasonable basis to form an inference that the respondent resisted offering a full time mechanic's position to the complainant because of her gender. The respondent is a company where over three quarters of the management and clerical staff were female and the sole owner was a female. The evidence logically leads one to conclude that the respondent believed that the complainant had no interest in working full time 52 weeks a year and was happy with the 6 a.m. to 2 p.m. (and often 3 p.m. or 4 p.m. at the complainant's option) time slot that had been created for her. It was not until the complainant questioned why she had not been approached about full time employment in 2001 that the respondent could reasonably have concluded otherwise, at which point a position was offered to her twice.

3.

Reduction in hours and constructive discharge

The complainant also claims that after refusing the respondent's second offer of full time employment her duties and hours were reduced to driving a school bus for the morning run at the reduced (from mechanic's helper) driver's rate. This too, would certainly constitute an adverse employment action, and could be actionable if motivated by an improper animus. However, the evidentiary conclusions heretofore set forth, in conjunction with those that follow, lead to a different result.

a) In the year 2002 the Meriden school board made it clear to the respondent that it expected a mechanic to be on duty in Meriden until 4-4:30pm every school day, because of the number of children on the road in buses during the late

afternoon. It was determined that a full time mechanic was needed in Meriden who would work 8am to 4-4:30pm and the complainant's position was eliminated.

b) The complainant's part time mechanic's duties were performed briefly by two part time drivers and a full time mechanic was hired for Meriden in February of 2003, at a rate of pay initially less than had been offered to the complainant.

c) The complainant chose at her option to drive mornings only. The midday kindergarten run (and some special runs) were available only to drivers who drove both morning and afternoon runs. The complainant chose not to drive afternoons, hence the midday runs were not available to her.

d) The complainant could have chosen to drive greatly in excess of ten hours per week and chose not to.

There is no question that the complainant's hybrid 6 a.m. to 2 p.m. position had been eliminated in 2002, but the elimination is shown to have been reasonably tied to the demands of the Meriden division's client, the Meriden Board of Education. What remained available to the complainant was a position of full time mechanic (which she turned down twice) or part time driver. The latter was offered to her and she chose her own hours. There is no reasonable basis to infer that these actions were motivated by an impermissible animus, and additionally the respondent has offered a legitimate business reason for its actions. There can be no constructive discharge where the complainant has selected the very conditions she then perceives as intolerable, and the standard for a complainant is a demanding one. *Martin v. Citibank, N.A.,* 762 F2d 212,, 221 (2nd Cir. 1985). The work environment must be intolerable, justifying resignation and

beyond ordinary discrimination. Penn. State Police v. Suders, 124 S. Ct. 2342, 2343, 2345 (2004). Yet the complainant was doing what she had always done (driving the morning shift) and declined the opportunity to do more.

B.

The complainant's claims under the Equal Pay Act

In her amended complaint the complainant alleges that the respondent violated the Equal Pay Act, 29 U.S.C. § 206 (d), by alleging that the respondent promoted her male peers to full time mechanic positions with raises and benefits, while offering her only benefits. Not stated, but reasonably inferred, is the complainant's belief that the Equal Pay Act was also violated by paying her a lesser hourly rate as a mechanic's helper.

To establish a prima facie case under the Equal Pay Act , a complainant has the burden of proving that (1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the job; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances." *Noel v. Medtronic Electromedics, Inc.,* 973 F.Supp. 1206, 1210 (D. Colo. 1997); *Tidwell v. Fort Howard Corp.,* 989 F.2d 406, 409 (10th Cir. 1993).

Jobs must be substantially equal in terms of skill, effort, responsibility, and working conditions. *Nulf v. International Paper Co.,* 656 F.2d 553, 560 (10th Cir. 1981); see also *Gunther v. County of Washington,* 623 F.2d 1303 (9th Cir. 1979), aff'd, 452 U.S. 161, 101 S. Ct. 2242 (1981).

More precisely, the Equal Pay Act governs "wages paid", which wages are wages paid "within any establishment", for "equal work" on jobs requiring "equal skill, effort and responsibility" under "similar working conditions". 29 U.S.C. § 206 (d) (1).

The Equal pay Act's reach is more limited than Title VII and does not prohibit discrimination in certain compensation related areas, such as allegedly discriminatory transfers and promotions. *Schnellbaecher v. Baskin Clothing Co.,* 887 F.2d 124, 130 (7th Cir. 1989). The refusal to allow female employees the opportunity to earn equal pay by performing the same job as males has been found to present a question under Title VII, but not the Equal Pay Act. *Waters, Turner, Wood & Smith Ins. Agency Inc.,* 874 F.2d 797, 800-801 (11th Cir. 1989).

The EEOC has defined the term "establishment" as a "distance physical place of business" and not necessarily an entire "enterprise". 29 C.F.R. § 1620.9. While the definition has been the subject of considerable litigation it has been held that uniform job descriptions may be irrelevant where the job responsibilities of managers at some locations were more significant than those at others. *Gerbush v. Hunt Real Estate Corp.,* 79 F.Supp.2d 260, 263 (W.D.N.Y. 1999).

Also much litigated has been the question of job "equality". It has been held that female bus drivers cannot compare themselves to males who drive longer routes and received premium pay as a result. *Kindred v. Northome/Indus. Sch. Dist. No. 363*, 154 F.3d 801 (8th Cir. 1998), cert. denied, 119 S. Ct. 881 (1999). A "unique position" also presents a problem for a claimant, and it has been held that a female employee who held a unique position for which there was no similarly situated position in the

establishment could not meet her burden of proof. *Rinkel v. Associated Pipeline Contractors, Inc.* 17 FEP 224, 226 (D. Alaska 1978).

If the complainant has proven that she is being paid less than male employees for the same work, the burden shifts to the respondent to show that any pay differences are justified under any one of the four exceptions discussed in *Holt:*

1. a seniority system,
2. a merit system,
3. a system that measures quality or quantity of production
4. where pay differentials are based on any factor other than sex.

Ryduchowski v. Port Authority of New York and New Jersey, 203 F.3d 135, 142 (2nd Cir. 2000). Once the respondent proves that the wage disparity is justified by one of the four affirmative defenses of the EPA, complainant may counter by producing evidence that the reasons respondent seeks to advance are actually a pretext for gender discrimination. Id.

The conclusions set forth in the discrimination claims under CFEPA and Title VII can be incorporated by reference in this section of the decision. There was no testimony offered from any of the ten male workers who were allegedly performing comparable mechanic's helper duties or who were offered full time mechanic positions. We do not know first hand and in any detail the duties they performed and the circumstances under which they performed them. Neither party offered such testimony, but the burden to establish a prima facie case was on the complainant. Conversely, there was a plethora of evidence that no two mechanics helpers possessed the same skill or experience and the services they preformed were shaped to some extent by the division

in which they worked. Those offered full time positions were sometimes being promoted from lower paying driver status, some were slated for the main facility in Berlin (or Southington which also had a garage), and all brought different levels of experience to the job. The evidence made clear that the complainant's mechanic's helper duties, from 1999 forward, were performed at the Meriden facility, in the town where the complainant lived and where her children went to school. As previously stated it had no garage and transit buses could not be serviced there. The complainant worked her special hours, which encompassed her hybrid driver/mechanic's helper duties (with enhanced driver pay) and enjoyed extended school vacations. The complainant did not produce sufficient evidence to establish identifiable pay disparity or requisite comparability, and indeed her position may have been unique, as was the case in *Rinkel*. Even were it otherwise, the respondent has offered credible reasons to justify inequalities which reasons are unrelated to gender.

Additionally, there is no basis to conclude that the affirmative defenses set forth in the EPA were meant to be construed strictly in light of Commission regulations, and it is found they may be raised as a matter of law to comply with the burden shifting mechanism of the EPA. *Ryduchowski v. Port Authority of New York and New Jersey,* 203 F.3d 135 (2nd Cir. 2000)

VI.

CONCLUSION

Upon a review of the evidence it would appear that the complainant was a conscientious and valued employee who made a serious effort to balance the competing needs of family and professional advancement. It could be argued that the

respondent could have been more proactive in trying to find an appropriate place for the complainant in its restructured environment. It could be argued that it lost a good worker it did not really need to lose. As the respondent's counsel stated in its brief, however, although a business decision may not be good or wise, it is still not actionable unless it is discriminatory. *Graefenhain v. Pabst Brewing Co*. 827 F. 2d 20 (7th Cir. 1987). Conversely, the complainant could have been far less passive, and even defeatist, in speaking out in her own behalf by expressing her interests in advancement, her willingness to adapt, and by making timely counter proposals to offers she may have considered inadequate. This story led to an unhappy ending for both parties, but it is not reasonably possible to conclude that the results were dictated by the complainant's gender. The complainant testified as to her belief that mechanic's helpers were undervalued, male and female, at the respondent's facilities and those of its competitors. This may be true, but does not constitute a claim for which this tribunal is authorized to award relief. The complainant has failed to establish a prima facie case under CFEPA, Title VII or the EPA. Additionally, the respondent has proffered non-pretextual legitimate business reasons for its employment actions, adverse or otherwise.

VII.

ORDER

The complaint is dismissed.

It is so ordered this 17th day of April 2006.

J. Allen Kerr, Jr.
Presiding Human Rights Referee

cc.
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Peter Agostine
Margaret Nurse-Goodison, Esq.
Andrew White, Esq.
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