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

CHRO, ex rel., Roderick A. Melvin,
Complainant

CHRO No. 0230320
Fed No. 16aa200641

v.

Yale University,
Respondent

July 19, 2006

AMENDED
FINAL DECISION

Preliminary Statement

The complainant is Roderick A. Melvin. He resides at 5 Byron Place, New Haven, CT 06515. He was represented by Attorney Karen L. DeMeola. Her office is located at 45 Elizabeth Street, Hartford, CT 06105. The commission was represented by Attorney David Kent, Assistant Commission Counsel II. The Commission on Human Rights and Opportunities (commission) is located at 21 Grand Street, Hartford, CT 06106. The respondent is Yale University. The respondent's mailing address is P.O. Box 208255, New Haven, CT 06437. The respondent was represented by Attorney Patrick M. Noonan of the law firm Donahue, Durham & Noonan, P.C., 741 Boston Post Road, Guilford, CT 06437.

For the reasons set forth hereafter, it is hereby determined that the complainant's case is DISMISSED.

The Procedural History

The complainant filed his complaint with the commission on January 18, 2002 alleging that he was warned, given a poor evaluation, denied a raise, not promoted, terminated, harassed, earned a different rate of pay, was retaliated against because he filed a complaint with the commission, discriminated against in the terms and conditions of his employment and that the respondent discriminated against him because of his perceived physical disability of job stress and related disorder all because of his race, African-American and his color, black in violation of General Statutes §§ 46a-58a, 46a-60 (a) (1), 46a-60 (a) (4), Title VII, Equal Pay Act of 1964 (EPA) and the Americans with Disabilities Act (ADA). He amended his complaint on August 19, 2004 adding that the respondent failed to give him proper training for his new job, supervisor of the copy and print production staff; that the respondent refused to consider him for a new position; and the respondent disciplined him discriminatorily because of his race, African-American and color, black. A reasonable cause finding was issued on January 20, 2005. The complaint was certified to public hearing on January 20, 2005 and a hearing conference was held on March 2, 2005. The respondent's answer was also filed on March 2, 2005. All of the prerequisites for the public hearing were complete. The public hearing was held on November 29 and 30, December 1 and 2, 2005.

Findings of Fact

The following findings of fact are based on the transcripts and the exhibits and will be referenced as “FF” in the legal analysis:

1. The complainant was promoted to supervisor I, a managerial and professional position in the medical school copy center in September of 1995. (C-4)
2. The complainant was supervised by George Guman who gave the complainant a negative performance appraisal dated March 18, 2002. (C-9, Tr. 567)
3. The medical school copy center was under great pressure to succeed financially, to introduce new technology and to provide better services for its customers. (Tr. 462, 705, 706, 707)
4. In May of 2000, the complainant’s position was upgraded from a supervisor I to a supervisor II, retroactively to April 1, 2000. The complainant received a $2,500.00 raise. (C-18)
5. In May of 2000 the medical school copy center was reorganized and Enrique Juncadella reported to John Paton, the head of the medical school copy center. (Tr. 460)
6. Enrique Juncadella became the complainant’s supervisor. He set various objectives for the complainant in the fall of 2000 that are articulated in a job description dated November 1, 2000. The job description contained an extremely detailed job description for the complainant consisting of two pages and thirteen sub-categories. (C-20)
7. In February of 2001, John Paton and Enrique Juncadella decided to reorganize the copy center. As part of this reorganization and because the complainant had

demonstrated that he was not able to take on all of the additional responsibilities that had been assigned to him in the fall of 2000, some duties were removed from the complainant. (Tr. 458-460, 468, 469)

8. As part of the reorganization of the medical school copy center, a new position, lead coordinator for delivery services, was created. (C-34)

9. In recognition of the complainant's additional efforts in the fall of 2000, John Paton authorized a $1,000.00 bonus for the complainant. (Tr. 469, C-35)

10. Although the complainant's new duties after the reorganization would have been more appropriately classified as a supervisor I, human resources red-circled the job and agreed to allow the complainant to remain as a supervisor II. (C-35)

11. The complainant's performance continued to be unsatisfactory. On December 12, 2000, the complainant received an oral warning for poor judgment. This was the auto parts store incident. Although the complainant knew that one of his employees, James Bryant, had an ongoing dispute with the complainant's brother-in-law, he still took James Bryant to an auto parts store both to pick up some of the respondent's parts and also to meet his brother-in-law to buy some parts for the complainant's own car. At the store, James Bryant and the complainant's brother-in-law argued and had a fistfight, resulting in James Bryant breaking the leg of the complainant's brother-in-law. The complainant was also reprimanded for conducting "…personal business while on company business in a Yale University vehicle at Advance Auto Parts with one of your staff members." (C-27)

12. In April of 2001, Enrique Juncadella issued a written warning to the complainant that detailed major areas in which the complainant's performance was unacceptable, under the leadership/supervisory skills heading were the following categories: leading by example, managing staff performance, staff development/cross-training, initiative/follow-up and administrative responsibilities-communications and utilizing current desktop software tools. (C-43)

13. The complainant received another warning of record dated April 27, 2001 from Sheila Sautter, who was the senior human resources representative of the school of medicine, for exhibiting poor supervisory judgment. The complainant who had just received the April 23, 2001 (C-43) warning expressed his disagreement with the warning at his own staff meeting. Sheila Sautter investigated this incident and in consultation with Katherine Matzkin, director of compensation, placement and staff relations, concluded that the complainant should receive a warning of record for poor judgment. (C-46)

14. At the warning of record meeting between Sheila Sautter and the complainant, Sautter also spoke to him about the need to improve his supervisory skills. She also took the opportunity to discuss with the complainant other job opportunities at the respondent. In addition, she recommended various training resources to him both at the respondent and outside resources. (C-46, Tr. 577, 578, 579, 580, 581, 582, 583, 584, 585)

15. In May 9, 2001, Enrique Juncadella gave the complainant his 2001 performance review. The appraisal form noted some positive elements in the complainant's

performance including his dedication and positive attitude. However, his key development needs were to " (1) engage in an aggressive program to learn copying and digital printing, as well as mailing skills; (2) pay more attention to administration and paperwork in your supervisory role; (3) …receive training to improve his supervisory skills." (C-49)

16. The complainant was given a final written warning on September 7, 2001, to address poor managerial judgment in two cases: one, where the complainant failed to keep the emissions sticker for one of the respondent's vehicles current and two, where he rented a car to attend a training session in Hartford and attempted to be reimbursed for the rental despite the fact the complainant was told by Enrique Juncadella to either take the blue Aerostar, one of the respondent's cars or his own vehicle. This was a violation of his supervisor's direct instructions. (C-56, Tr. 510, 640)

17. The complainant received a final written warning that addressed the complainant's performance from April 23, 2001 through September 10, 2001 when he went out on medical leave. The complainant was warned for not making sufficient effort to lead by example by increasing his technical skills, managing staff performance and discipline, follow-up – administrative duties, despite the passage of five months between April and September and the almost one year period of time that had passed since the complainant was first asked to increase his technical skills, C-68.

18. A memo from Enrique Juncadella, dated January 16, 2002 summarized a counseling session with the complainant on January 9, 2002 that once again

clarified the expectations that have been described over the course of the disciplinary measures undertaken against the complainant since April 23, 2001, including the leadership, technical skills and documentation, which had been addressed in previous sessions. (C-71)

19. Only in January 2002 did the complainant begin actively seeking training on the various medical school copy center machines. He kept a log of his training from January 10, 2002 through March 11, 2002. The total number of hours that are logged into the complainant's training log totals 167.45 hours. (C-70, Tr. 347)

20. The complainant had not become proficient on all of the machines in the fall of 2000, as he was required to do by Enrique Juncadella. (Tr. 245)

21. The complainant's training was interrupted with great frequency by his supervisory duties in the delivery area. (Tr. 134, 135, 430, 431, 432)

22. During 2001, there were two instances when Enrique Juncadella did not choose to impose discipline when the complainant had violated the respondent's rules. In March 2001, the complainant took the respondent's toolbox home with him, which was a violation of the respondent's rules. The complainant left the toolbox home for several days when it was needed at the respondent's work. In August 2001, the complainant refused to follow his supervisor's instructions regarding the organization of paper storage, a vital issue in the medical school copy center and he was not reprimanded for this rule violation either. (C-38, C-54, Tr. 483)

23. Enrique Juncadella informed John Paton in a memo dated March 4, 2002, that the complainant still had not acquired the technical and supervisory skills

necessary for his job. In this memo Enrique Juncadella recommended that the complainant's employment be terminated. (C-72)

24. In a letter from Katherine Matzkin, dated March 12, 2002, the respondent made the following offer to the complainant: a four month unpaid leave of absence where he could work with Fran Holloway, who worked in the respondent's office of equal opportunity, to identify the kinds of positions for which the complainant would be qualified. She also offered to underwrite the cost of university training programs that would be useful in securing an appropriate position at the respondent. She would permit the complainant to maintain his health insurance coverage at employee rates and also to amend his employment record to reflect resignation rather than discharge and would allow the complainant to collect unemployment insurance. In return, the respondent wanted the complainant to withdraw his complaint with the Commission and not to initiate any state or federal action or internal grievance. (C-74)

25. Sheila Sautter encouraged the complainant to consider other positions at the respondent many times beginning in April 2001. (Tr. 564, 582, 583, 584)

26. Sheila Sautter shared with Fran Holloway a listing of jobs for which the complainant was qualified. Fran Holloway then contacted the complainant about a driver's job in Pathology. However, the complainant was offended and refused to apply for this job. (Tr. 199, 594, 595)

27. Enrique Juncadella told the complainant to seek career counseling from the human resources department and confirmed this advice in an e-mail to the complainant dated September 11, 2001. (C-56, Tr. 137)

28. Despite all of the foregoing advice and suggestions the complainant never applied for any other position at the respondent. (Tr. 191)

29. Katherine Matzkin's standard practice for the settlement of complaints before the Commission was to require a release from the employee for the payment of amounts above and beyond what the respondent legally owed to the complainant. (Tr. 726)

30. The complainant was not interested in and he never applied for lead coordinator for delivery services position even though the position of lead coordinator for delivery service was open from April 2001 through October 2001. The position was to be posted internally within the medical school copy center and was to be filled from the existing staff. (Tr. 148, 149, 339, 471, 474, 151)

31. Enrique Juncadella's race is Hispanic. (Tr. 488)

32. Enrique Juncadella thought the complainant needed to develop skills relating to the printing business because his prior job experience had been working with the drivers. (C-43, Tr. 485, 486, 487)

33. The complainant never told John Paton that he was a victim of racial discrimination nor did John Paton observe any such discrimination against the complainant. (Tr. 560, 561)

34. The complainant never told Sheila Sautter that he was a victim of racial discrimination. (Tr. 599)

35. The complainant requested a one-month's medical leave from September 14, 2001 until October 15, 2001 because of a job stress headache and his hands were shaking. (C-60, Tr. 140, 141, 142)

36. The complainant requested a two-month extension of his medical leave from October 15, 2001 until December 10, 2001. (C-63, Tr. 146, 147)

37. The complainant filed his complaint with the commission on January 18, 2002. (CHRO-1, Tr. 162, 163)

38. The complainant's supervisors approved not only his original one-month medical leave but also a two-month extension. (Tr. 209, 210, 212, 213, 214, 215)

39. The complainant was getting constant input from his supervisors that he was failing in his job. This input included two verbal warnings and three written warnings. (Tr. 199)

40. The complainant was aware he could apply for any of the jobs at the respondent by simply making an application. He was also aware there was a posting of available jobs on the respondent's website. (Tr. 199)

41. The complainant received input from John Paton, Enrique Juncadella, Sheila Sautter and Fran Holloway that he should seek career counseling. (Tr. 339)

42. The complainant returned form his medical leave on December 10, 2001. (C-68)

43. The complainant was terminated by Enrique Juncadella on March 12, 2002 after a year and a quarter of verbal and written warnings. (C-75)

44. Cheryl St. John worked in the billing office. Both she and the complainant reported to Enrique Juncadella. (Tr. 387, 388)

45. Cheryl St. John did not see Enrique Juncadella's discriminate against employees based on their race or color. (Tr. 395)

46. Lisa Ventura worked on a digital copy machine. Enrique Juncadella asked her to train the complainant. (Tr. 410)

47. Lisa Ventura did not see Enrique Juncadella discriminate against employees based on their race and color. (Tr. 416, 418, 422)

48. Laura Beattie worked on the machines the same time as the complainant. The complainant was her supervisor. (Tr. 427, 428, 430)

49. Although Laura Beattie thought Enrique Juncadella was a difficult supervisor, he did not discriminate against employees based on race or color. (Tr. 421)

50. Laura Beattie stated that people in the unit called Enrique Juncadella "little napoleon" because he was a difficult supervisor. (Tr. 421)

51. Stacy Ruwe, assigned John Paton the responsibility for the medical school copy center at the same time the complainant worked there. John Paton was Enrique Juncadella's boss. (Tr. 456, 457, 458, 459)

52. John Paton thought that the complainant was not successful because of his lack of technological and management skills. (Tr. 475)

53. John Paton thought cross training on various machines by the staff was a reasonable request because his staff was contracting, his revenues were declining and the unit needed employees to operate more than one machine. (Tr. 488, 489)

54. John Paton knew the respondent had computer training available for its employees at the learning center. (Tr. 494)

55. Sheila Sautter worked in human resources in 2001 and 2002, the same time the complainant worked in the medical school copy center. (Tr. 564, 569)

56. George Guman supervised the complainant before Enrique Juncadella. The complainant supervised delivery services for George Guman. George Guman

conducted a counseling session with the complainant that he memorialized in a memo to the complainant dated March 18, 1997 (C-8), discussing the complainant's negative performance "…your performance to date does not meet the minimal expectations necessary to fulfill the position of supervisor I and I would like to provide you the opportunity to make the necessary improvements, you should focus more on supervisory skills required…" Unlike a lead person, a supervisor calls for a range of administrative skills, including planning and organization, leadership, communication analysis and problem solving. The areas that need immediate attention and results are as follows:

> planning and organization skills
> prioritizing
> communication
> problem solving and analysis"

The memo ends with the following statement; "I'd like to meet with you weekly to review the progress you are making in those areas…I view these areas for improvement as critical to meeting the requirements for successfully carrying out the position of supervisor." (C-8, Tr. 664, 665, 666, 667, 668, 669, 670)

57. James Piscitelli was chosen for the position of lead coordinator of delivery services. (C-42, Tr. 157)

58. George Guman had a meeting with his supervisor, Carol Marshall, during which he received an oral warning. He looked at the respondent's job postings and found another job at the respondent. He took this job that had lower job classification and a lower salary. George Guman obtained this job on his own without any help from the respondent. (C-13, Tr. 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683)

59. The respondent's normal disciplinary process is an oral warning, a written warning and a termination. (Tr. 461, 586, 701)

60. The complainant was constantly being counseled by Enrique Juncadella and John Paton. (Tr. 79, 80, 135)

61. The complainant's position at the medical school copy center was never filled following his termination. (C-93, Tr. 600)

62. The medical school copy center was closed and all remaining employees were laid off in May of 2004. (Tr. 600)

Legal Analysis

A.

Failure to promote

The elements to prove a disparate treatment failure to promote case consist of the following: 1) membership in a protected class; 2) application and qualification for the job for which the respondent was seeking applicants; 3) despite his qualifications the complainant was not promoted and, 4) the employer continued to search for applicants or hired another applicant with equal qualifications. *McDonnell-Douglas v. Green,* 411 U.S. 792, 802-804 (1993), *St. Mary's Honor Court v. Hicks,* 509 U.S. 502, 506 (1993); *Reeves v. Sanderson Plumbing, Inc.,* 530 U.S. 140 (2000). Going through the elements of proof of a prima facie case for failure to promote, the first element of the complainant's case was that his race is, African-American, and his color is black. The second element of the prima facie case is application for the job. There are several cases in the second circuit court of appeals, which deal with this issue. In one case, a complainant who made a general request for promotion during her annual review failed

to establish that she applied for a specific position as required for a prima facie case under Title VII. *Brown v. Coach Stores, Inc.,* 163 F.3d 706, 707-10, (2d Cir. 1998). The court held that if generally requesting promotion in an annual review were sufficient, respondent would be unfairly burdened in their promotion efforts. In another case where the respondent expressly informed the complainant of a job opening and she did not indicate any interest, the court held that the complainant did not show that the failure to promote her was actually motivated, in whole or in part, by unlawful discrimination. *Hawkins v. 1115 Legal Service Care,* 163 F.3d 684, 694, 78 FEP 882 (2nd Cir. 1998).

Another failure to promote claim failed where the complainant knew that she was under consideration for the position but failed to actually apply for the position. *Cardozo v. Healthfirst, Inc.,* 1999 WL 782, 546 at *4 (S.D.N.Y. September 29, 1999). In another case the court held that the mere expression of a general interest in promotion to management was insufficient to establish a prima facie case that the complainant had applied for the specific position. *Victory v. Hewlett Packard Co.,* 34 F. Supp. 2d 809, 818-19, 78 FEP 1718 (E.D.N.Y. 1999).

In a federal district court case in Massachusetts, the court held that where the respondent did not require a formal application, the complainant need not prove that an application was submitted. *Eldred v. Consolidated Freightways Corp., 898* F. Supp. 928, 933, 71 FEP 33 (D. Mass. 1995). There is a Connecticut case on point where the complainant had “expressed an interest (in the position) on numerous occasions.” She could establish a prima facie case even though she failed to file a written application for the position. *Department of Public Health v. Commission on Human Rights and Opportunities,* 2001 WL 418046 at *4 (Conn. Super. Ct. Apr. 6, 2001). In the present

case, the complainant testified that he mentioned in a meeting with John Paton and Enrique Juncadella that if they gave him the lead coordinator position, their troubles would be over. The fact pattern in Department of Public Health where the complainant had expressed an interest in the position “on numerous occasions," is different from the fact pattern in this case. In addition, the respondent denies that this conversation ever took place. It is clear from the evidence that the respondent had an elaborate job application process, which included the on-line posting of jobs and a system of written job applications. The complainant admitted that he was aware that he could apply for any of the jobs simply by making an application. He also knew that there was also an on-line posting of jobs on the respondent’s website (FF# 40). The complainant’s failure to complete a job application for the lead coordinator position pursuant to established procedures would normally serve as a bar in establishing a prima facie case. However, the failure to apply is sometimes excused where the respondent has no formal application process or where the complainant is unaware of the job opportunity. Fran Holloway offered a lower level delivery job but the complainant was offended and did not apply for the job (FF# 26). The complainant admitted on cross-examination that he had never applied for any position at the respondent the entire time he was there (FF# 28). He also never applied for the lead coordinator position (FF# 30). By his own admission he was constantly being counseled by Enrique Juncadella and John Paton (FF# 60).

I will assume for purposes of the prima facie case analysis and the Connecticut precedent on this issue that the complainant’s one expression of interest in the position will serve as a job application. As far as qualification for the job I will assume, for the

sake of argument that the complainant qualified for the position, which satisfies the second element of his prima facie case. The third element is that despite his qualifications the complainant was not promoted. It is true that the complainant was not promoted to the lead coordinator position. The fourth element of proof is that the respondent hired another applicant with equal qualifications. The respondent hired James Piscitelli, a white male, for this position during October of 2001 (FF# 57). The complainant alleges that James Piscitelli did not have the same or similar supervisory skills as the complainant. For purposes of this analysis, I will assume that James Piscitelli had equal qualifications for the position. Therefore, I will assume for the sake of argument that the complainant has proved his prima facie case in his failure to promote claim.

The respondent's non-discriminatory business reason for its decision was that the complainant was in the process of a fourteen month progressive disciplinary period for poor performance that eventually lead to the termination of the complainant by the respondent. During this process, the respondent was consistent in saying that although he had certain strengths the complainant was lacking in supervisory skills, technical skills and initiative.

On the issue of his training on the printing machines, although he argued that Enrique Juncadella interrupted him with great frequency, he admitted on cross-examination that the real interruption to training schedule was his supervisory duties in the delivery area (FF# 21). This testimony is consistent with one of his own witnesses Laura Beattie as well as the testimony of John Paton and Sheila Sautter (FF# 21). The complainant failed to provide any evidence of James Piscitelli's work history and his

skills and abilities in order to make a comparison to the complainant's supervisory skills, which the respondent has documented in great detail. Although the complainant has made a lot of conclusory allegations and statements, he has done nothing to refute the respondent's non-discriminatory reason, which is very well documented, that he was a poor performer over a long period of time. In addition the complainant admitted under cross-examination he never applied for the lead coordinator position, (FF# 30). He also failed to demonstrate that his treatment in the promotion to the lead coordinator position was a pretext for discrimination because of his race, African-American and color, black. Therefore, his failure to promote claim is dismissed.

B.

Retaliation

The law is clear that a complainant claiming retaliation must prove: 1) that he was engaged in protected activity; 2) that the respondent knew of the protected activity; 3) that he suffered an adverse employment action, and 4) that a casual connection exists between the complainant's protected activity and the adverse employment action. *Weixel v. Board of Education of NY,* 287 F.3d 138 (2d Cir. 2002), *Quinn v. Green Tree Credit Corp.,* 159 F.3d 759, 769 (2nd Cir. 1998).

For the purposes of his prima facie case, the first element is participation in protected activity. The complainant filed his complaint with the commission on January 18, 2002. For the second element, the respondent was sent a copy of his complaint by registered mail. Therefore, the respondent was aware of his complaint with the commission. The third element is that he suffered an adverse employment action. The

forth element is a casual connection between the adverse employment action and the complainant's protected activity.

The adverse employment actions, which the complainant alleges to be retaliatory, include the following: the written warning dated April 23, 2001, by his manager, Enrique Juncadella, which discussed performance issues including his leadership/supervisory skills, managing staff performance, initiative, administrative responsibilities, communication and the use of technology. The complainant communicated to his staff that he had received a written warning during a staff meeting, on April 24, 2001. Sheila Sautter, of human resources, conducted an investigation of the complainant's conduct, which resulted in a warning of record dated April 27, 2001. In 2001 he testified that he told the respondent he was contacting a lawyer to defend his rights. The complainant alleges that the respondent was aware that he was engaging in this protected activity by virtue of Sheila Sautter's investigation concerning the complainant's comments during the staff meeting. He argues that Enrique Juncadella and John Paton were also aware of the complainant's protected activity in 2001 when he filed his complaint with the commission on January 18, 2002. The complainant was terminated less than two months after filing his complaint. The complainant argued that the respondent engaged in a pattern of harassment and discrimination against the complainant from September 2000 through his termination. He argued that beginning in 2001 and continuing through his termination the complainant was vocal about the harassment and the discriminatory treatment, however, his concerns were ignored. He argued that the harassment continued despite or because of his continual engagement in protected activity including after his complaint was filed with the Commission. He

argued that immediately after the April 2001, warning of record, the complainant was prevented from succeeding at his job. He argued that the written warning of April 23, 2001 required the complainant to devise a training plan which he did and the plan was rejected three times. He argued that Enrique Juncadella continuously engaged in harassing behavior including the removal of the complainant from his training sessions with other employees and sabotaging the complainant's attempts at training and going to seminars. The complainant argues that the two termination letters from the respondent, both dated March 12, 2002, one from Ms. Katherine Matzkin, director of university placement and staff relations and the other from his supervisor, Enrique Juncadella, were evidence of retaliation. Katherine Matkin's letter offered certain benefits in return for the withdrawal of his complaint before the Commission and for him not to initiate any other action at the state or federal level or file any internal grievance.

The respondent, on the other hand, claimed that the complainant never complained that he was a victim of racial discrimination by Enrique Juncadella to John Paton, Enrique Juncadella's boss nor to anyone else in the human relations department. The complainant never introduced any written documents to support his claims of racial discrimination. The complainant argued that he complained to Enrique Juncadella, John Paton and the human relations department verbally about discriminatory treatment. The testimony of John Paton and Sheila Sautter was to the effect that they never received any communication from the complainant that he was a victim of discrimination (FF# 33, 34). John Paton also stated that he never saw the complainant being discriminated against while he observed him (FF# 34). The complainant's witnesses Cheryl Flynn St. John, Lisa Ventura and Laura Beattie, all

testified that they did not like Enrique Juncadella as a supervisor, who they called “little napoleon” (FF# 50) however they never saw Enrique Juncadella, who is a Hispanic, discriminate against the complainant based on his race and color (FF# 45, 47, 49). George Guman’s testimony did not address any instances of racial discrimination that he observed. Thus, the complainant’s own witnesses did not corroborate his allegations and testimony.

The essence of the complainant’s retaliation claim is that he was given two written warnings and that the respondent denied him the right to go on medical leave and that he received two termination letters from the respondent one of which offered benefits if he withdrew his action before the commission and in the federal courts and any labor grievances he had pending. The complainant also alleged, in his brief, that the respondent gave him a poor performance appraisal and several written and verbal warnings and terminated him in retaliation for having previously filed a complaint with the commission and harassed him because of his race, African-American and color, black, in violation of General Statutes § 46a-60 (a) (4) and Title VII. The plaintiff’s termination is an adverse employment action and can serve as the third element of his prima facie case. The complainant has difficulty with the fourth element of his prima facie case. However, for the sake of argument I am going to assume that the complainant proved a causal connection exits between the protected activity and the adverse action. Therefore, the complainant, for the sake of argument, has proven his prima facie case of retaliation.

The burden then shifts to the respondent to articulate its legitimate, non-discriminatory, business reasons for its actions. The respondent had problems with the

complainant's performance including his lack of supervisory skills, his lack of technical skills and his lack of initiative. All of the written warnings that the complainant received were very detailed and fact specific including how the respondent expected the complainant to improve his performance (FF# 12, 13, 16, 17). The period of time from his first written warning to his termination was fourteen months. Most of these specific criticisms were not explained or even addressed by the complainant in his brief. The complainant focused on other issues such as his statement that he was going to seek legal counsel. For example, the two written warnings and indeed the termination documents listed a multitude of very specific reasons to support the two warnings as well as the termination. The adverse employment actions, which the complainant alleges to be retaliatory, unfair disciplinary actions including a poor performance appraisal, inequitable job scrutiny and a hostile work environment, do not rise to the level of an "adverse employment action" as that term has been interpreted by the courts. *Burlington Industries Inc. v. Ellerth,* 524 U.S. 742 (1998). However, the complainant's termination is an adverse employment action.

Once a prima facie case is established and the employer asserts legitimate non-discriminatory reasons for the adverse treatment, the complainant must prove that the employer acted with a false motive or pretext. The complainant did not prove pretext for retaliation. He also did not rebut the performance issues.

The complainant has argued on page 17 of his brief that he was terminated less than two months after filing his complaint. Most courts hold that temporal proximity of the adverse action and the protected activity alone is not enough and is not sufficient to create a triable issue of the fact as to pretext. In *Stevens v. St. Louis University Medical*

Center, 97 F.3d 717 (8th Cir. 1997), the court held that the complainant's discharge less than three months after she filed her claim of discrimination with the equal employment opportunity commission was sufficient to establish a prima facie case but it was not enough to show pretext in the absence of other probative evidence that her dismissal was based on unlawful discrimination. The United States Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000) held "that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation" and that "a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 135.

In addition, the complainant's credibility was undermined by the inconsistencies in his own testimony and the failure of his own witnesses to support his testimony on this issue. Therefore, the complainant's claim of retaliation is dismissed.

C.

Hostile work environment claim based on race, color and national origin

The Second Circuit Court of Appeals has made the following statement: "A hostile work environment exists '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment.' *Harris v. Forklift Systems, Inc.,* 570 U.S. 17 (1993) (citations and internal quotation marks omitted). Conduct that is 'merely offensive' and 'not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview." *Torres v. Pisano,* 116 F.3d 625 (2d Cir. 1997)

The complainant alleged that the respondent had subjected him to a hostile work environment because of his race and national origin, African-American and his color, black. The complainant did not provide me with any evidence of his place of origin. 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) *Brittell v. Department of Correction,* supra, 247 Conn. 166-67 (1998).

The harassment alleged by the complainant included the failed training sessions that the complainant attributes to his supervisor, Enrique Juncadella. He alleged that his reduction in his duties by the respondent was harassment. The complainant also alleges that all of his written and verbal warnings he received from the respondent were harassment. The complainant also alleged that his termination was harassment.

The respondent proved its reason for terminating the complainant that he was a poor performer. The respondent gave the complainant fourteen months to improve his performance. His performance failed to improve and he was terminated. The documentary evidence and the testimony of all of the witnesses supported the respondent's reason. The complainant's pay was not reduced but remained the same. The complainant has presented a number of conclusory allegations. The conduct of the

respondent was professional and respectful and it did not create an abusive working environment. The conduct of the respondent was never hostile or abusive. The respondent's conduct did not intimidate, ridicule or insult the complainant because of his race and national origin, African-American and his color, black.

The evidence proved that the complainant's termination was due to his long-term (14 months) poor performance.

While, the complainant argues that the written and verbal warnings were elements of harassment, he failed to provide proof of harassment by the respondent connected to these personal actions. The complainant has failed to provide any proof of any harassing conduct by his supervisor Enrique Juncadella.

The complainant failed to prove that the conduct by the respondent was sufficiently severe or pervasive so as to have altered the conditions of his working environment. Therefore, his claims are dismissed.

D.

Termination

The issue is whether or not the complainant has met his burden of proof that he was terminated because of discrimination. In order to carry his burden of proof, the complainant must establish a prima facie case. *Crim v. CHRO,* 1999 Super. LEXIS 2460 (CT Sup. CT. 1999). He must produce evidence that: 1) he is a member of a protected class; 2) he was qualified; 3) he suffered an adverse action; and 4) the adverse action took place under circumstances giving rise to an inference of discrimination. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000).

In going through the first element of the complainant's prima facie case it is clear that his race is African-American and his color is black. I will assume, for the purposes of this analysis, he proved the second element, that he was qualified for the position. He was terminated by the respondent on March 12, 2002 (FF# 23, 24). The fourth element of his case is that the adverse employment action took place under circumstances giving rise to an inference of discrimination.

The respondent proffered the following non-discriminatory business reasons for terminating the complainant. These included concerns about the complainant's supervisory skills and his planning and organizational skills, the same deficiencies later noted by Enrique Juncadella (FF# 12, 15, 17, 18, 23) and John Paton (FF# 52). In 1999, Enrique Juncadella replaced George Guman as Manager of the copy center (FF# 5, 6). With this new job description the complainant's new duties were more appropriately classified as a supervisor I but human resources agreed to allow the complainant to remain a supervisor II (FF# 10). Even with his reduced duties the complainant was unable to achieve satisfactory performance. The complainant was counseled and disciplined multiple times for failing to perform adequately and for failing to meet expectations. In December of 2000, the complainant received an oral warning for poor judgment for the fistfight between James Bryant and the complainant's brother-in-law. James Bryant broke the leg of the complainant's brother-in-law (FF# 11).

In April of 2001 Enrique Juncadella issued a written warning to the complainant about his performance. The warning including the following areas where the complainant's performance was unacceptable:

- leading by example

- developing technical skills
- managing staff performance
- staff development/cross training
- initiative/follow-up
- administrative responsibilities
- communications and utilizing current desktop software tools

This document was an extremely detailed two-page written warning where the respondent detailed the complainant's need for improvement (FF# 12). In April of 2001, four days after the April 23, 2001 written warning, he received another warning for poor supervisory judgment by disagreeing with the warning at his own staff meeting (FF# 13). Sheila Sautter, human resources representative, investigated this incident in consultation with Katherine Matzkin, director of compensation, placement and staff relations. Sheila Sautter concluded the complainant should receive a warning for poor judgment for mentioning that he disagreed with the written warning he had received at his own staff meeting (FF# 13). Sheila Sautter met with the complainant and spoke to him about the need to improve his supervisory skills. Sheila Sautter also discussed with the complainant other job opportunities. In addition, Sheila Sautter recommended various training resources for him at the respondent and also outside resources (FF# 14). In May of 2001, just one month after receiving these two written warnings Enrique Juncadella gave the complainant his performance review (FF# 15). The appraisal noted some positive elements in the complainant's performance, including his deduction and his positive attitude. However, consistent with the warnings from the prior month, the appraisal also noted some key areas in which the complainant needed to improve

including his dedication and supervisory skills. In the employee's version of his performance appraisal, dated May 10, 2001 the complainant listed the following key development needs "learning to operate all photo copy machines and take more computer classes."

The complainant was next disciplined on September 7, 2001; a final written warning was issued for poor managerial judgment and performance. He had failed to keep the emission stickers for one of the vehicles current and he rented a car to attend a seminar in Hartford after being told by his supervisor he was not authorized to rent a car. The next discipline the complainant received was a final written warning, dated December 21, 2001 (FF# 10). The complainant had not made sufficient efforts to lead by example or to increase his technical skills. The follow-up on administrative duties states, "you also have difficulty performing any administrative tasks that require the use of any of the Microsoft Office suite of applications." A few weeks later the complainant was counseled on January 9, 2002 concerning the " clarification about expectations of your performance." In January 2002, fourteen months after being asked to bring his skills up to speed, the complainant began actively seeking to train on the various copy center machines. The complainant kept a record of the training dates running from January 10, 2002 through March 11, 2002 (FF# 19). The complainant admitted under cross-examination that he had been given the assignment in the fall of 2000 to master these machines and also that he could not master all of the machines, despite all of his training (FF# 20).

There were also times when Enrique Juncadella could have imposed discipline and he did not. For example, the complainant took a toolbox home for several days in

March 2001, which was against policy (FF# 22). Again in August 2001, the complainant failed to follow his supervisor's instructions regarding the organization of paper storage, a vital issue in the copy center (FF# 22).

In a memo dated March 4, 2002, Enrique Juncadella informed John Paton that the complainant still had not acquired the technical and supervisory skills that were necessary for him to succeed in his job. In this memo, Enrique Juncadella recommended that the complainant's employment be terminated (FF# 23). The respondent made certain offers to the complainant, which he rejected (FF# 30). Sheila Sautter created a list of jobs and she met with Fran Holloway, the complainant's friend who passed this job along to the complainant (FF# 26). The evidence shows the total progressive disciplinary actions the complainant received from the respondent included the following:

- one oral warning
- an unsatisfactory performance review
- two written warnings
- two final warnings

When he was terminated on March 12, 2002, there can be no claim that the complainant was not adequately informed of the need to improve his performance. Nor did the complainant rebut the respondent's non-discriminatory business reasons for terminating him.

The complainant did not complain that he was being discriminated against in any of the respondent's documents evaluating his work. The complainant never complained

to the respondent during his employment about being harassed or treated poorly due to his race African-American and color, black.

In the present case, since the complainant could not show that his job performance was satisfactory, he could not establish a prima facie case of race and color discrimination. Even if I assume for the purposes of argument that he produced some minimal evidence of this, he failed to rebut the respondent's legitimate, non-discriminatory for firing him, that his work was unsatisfactory over a long period of time, fourteen-months (FF# 17). The law requires him to produce evidence that the respondent's reason was false and/or a pretext for discrimination and he did not satisfy this burden. *Reeves,* supra and *Crim,* supra.

This is especially true in light of the documentary evidence that the respondent submitted in this case. The complainant failed to submit any evidence showing that the respondent's documents and other evidence were false. He also did not submit any evidence showing that the real reasons were discriminatory.

In fact, the complainant testified that he thought everything was fine until he received a written warning and that the progressive discipline that he received from the respondent was a surprise to him including the warning he could be fired if his performance did not improve. The complainant admitted he was getting constant input form his supervisors that he was failing in his job, including two verbal warnings and three written warnings. There is simply no evidence of an abusive working environment. Some of the respondent's witnesses testified that they personally liked the complainant, but his poor supervision of his employees, his lack of computer/technological skills and his lack of initiative did not improve. Even though the

respondent gave him a fourteen-month period to improve. The complainant admitted that he had not mastered all of the machines even on the date when he was terminated (FF# 20). He also admitted that his training was interrupted by his supervisory duties in the print shop and delivery area (FF# 21).

The complainant admitted that he received a status report on his performance and a final warning, dated December 21, 2001 from Enrique Juncadella. This warning notes that the complainant returned from his medical leave of absence on December 10, 2001 and states the following areas of performance expectations: 1) technical skills; the complainant has not made sufficient efforts to operate the printing and mailing equipment; 2) managing staff performance; 3) administrative follow-up; he has difficulty filling out forms for requisition from the catalogue, or cash reimbursement. The report stated, "You also have difficulty performing any administrative tasks that require the use of any of the Microsoft Office suite of applications." (emphasis supplied). It had been nearly fourteen or fifteen months since the complainant had first been given the responsibility for learning the machines and Microsoft software, (FF# 17).

The complainant argued on pages 25 through 26 in his brief that George Guman, a white male, was treated more favorably than the complainant. George Guman testified that when he received a verbal warning from Carol Marshall, his supervisor, he saw the handwriting on the wall and said, "I am going to protect myself and get another job." George Guman testified that the postings were available to anyone who wanted to access them. He found a job for an entry-level accountant that was four labor grades below his old job. He interviewed for the job, which they offered to him, and he

accepted the job offer even though it paid $22,000.00 less than he was making (FF# 58).

Finally, the complainant sometimes testified that he was surprised by the progressive disciplinary process he underwent at the respondent. George Guman testified that he had a counseling session with the complainant on March 18, 1997, while he was still the complainant's supervisor, which he memorialized in a memo to the complainant (FF# 2). This memo includes the entire issues that George Guman addressed with the complainant and they are the same performance problems that Enrique Juncadella, John Paton and the human relations department continued to address with the complainant later on in his career (C-8, FF# 2). This document graphically illustrates that the complainant was not caught unaware of the issues raised by the progressive discipline. The same job performance concerns expressed by Enrique Juncadella were also expressed by George Guman. Therefore, the progressive discipline applied by the respondent was consistent throughout the entire process.

Therefore, the complainant's termination claims are dismissed.

E.

Failure to accommodate disability

The complainant claims that he was discriminated against based on his perceived disabilities of headaches and anxiety. State case law requires him to show that he was disabled within the meaning of the Connecticut statutes and not just perceived to be disabled. General Statutes § 46a-51 (15); *Lusk v. Christ Hospital,* 10 AD Cas. (BNA) 534 (N.D. Ill. 2000). The complainant must produce some evidence that

he informed the respondent of his protected class status, that he requested a reasonable accommodation for it; that his request was denied improperly or that the respondent refused to engage in an adequate interactive discussion about it; and that an accommodation existed which would allow him to perform the essential functions of his job. *Taylor v. Phoenixville School District,* 784 F.3d 296 (3d Cir. 1999). The complainant bears the legal burden of showing this, yet he failed to do so. *Adriani v. CHRO,* 220 Conn. 307 (1999). The complainant returned to full time work on December 10, 2002 after his medical leave and the extended leave both of which were granted by the respondent (FF# 38). His original medical leave is dated September 17, 2001 (FF# 35) and the extension is dated October 12, 2001 (FF# 36) both signed by Sheila Sautter on behalf of personnel. The complainant alleged that Enrique Juncadella told him he could not go on medical leave and that his job would not be there when he returned. These allegations are controverted by a signed and completed application for leave of absence for one month to Enrique Juncadella from the complainant, dated September 17, 2001 and the application for a two month leave of absence from the complainant to Enrique Juncadella, dated October 12, 2001 both signed by Sheila Sautter. Although the complainant makes conclusory allegations, there is no documentary evidence or testimony to support his failure to accommodate claim. In addition, the complainant admitted under cross-examination that his supervisors approved the one-month medical leave and also two-month extension (FF# 38). His testimony completely undermines his assertion the respondent told him he could not go on medical leave.

F.

Disability

Claims of disability discrimination under the ADA must be analyzed under the *McDonnell-Douglas* burden shifting analysis. *Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 52 (2d Cir. 1998). The complainant, in order to establish a prima facie case, must provide evidence which shows that: 1) he is a qualified individual with a disability; 2) he is otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation: and 3) he suffered an adverse employment action because of his disability. *Wernick v. Fed. Reserve Bank,* 91 F.3d 379, 383 (2d Cir. 1966).

The complainant alleged that his anxiety and headaches were work related. He included two letters from his doctor, who recommended that he take off from work, once for four days and once for ten days, but no other documentation from any medical professionals or anyone else to support his disability claims were provided. He argued that during September of 2001 when he requested that he be allowed to go on medical leave that he was told he could not take medical leave and that his job would not be there when he returned. The complainant had returned to full duty work on December 10, 2001 (FF# 42). With respect to his "perceived as" disabled claim in order to establish a prima facie case, the complainant must show that the respondent perceived him to be disabled within the merits of the ADA and General Statutes § 46a-60. This means that the complainant must demonstrate that his employer viewed him as having an impairment that substantially limited a major life activity. *Coldwell v. Suffolk County,* 158, F.2d 635, 646 (2d Cir. 1998).

There is no evidence that the complainant's injuries rose to the level of limiting a major life activity and the complainant never notified the respondent of his specific disabilities or requested reasonable accommodations. Therefore, the complainant's claims under General Statute § 46a-60 and the ADA are hereby dismissed.

G.

Equal Pay Act

To make out a prima facie case under the Equal Pay Act, the complainant must prove that the two jobs in the comparison require equal skill, effort and responsibility and are performed under similar working conditions. This is the standard set forth by the United States Supreme Court decision in *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974).

Courts continue to focus on overall job content in order to determine whether the jobs are substantially equal. A federal district court in the Second Circuit Court of Appeals has ruled that a female assistant professor of criminal justice at a college established a prima facie case by comparing herself to other professors throughout the Social and Biological Sciences Division of the college because the complainant accurately captured the equality of skill, effort and responsibilities of professors in different departments (emphasis supplied). *McEleney v. Marist College,* 239 F.3d 476, 480-481 (2d Cir. 2001).

Although the complainant has made an EPA claim, he has not provided any evidence of the persons he thinks are part of the comparison, or what he thinks are the specifics of the job or jobs he considers comparable, or indeed the salaries he thinks are comparable. I am dismissing the complainant's claim for failure to prove a prima

facie case under the EPA because he has not provided any evidence to support his claim or evidence that the jobs in question require equal skill, effort and responsibility and are performed under similar working conditions.

CONCLUSION

The complainant alleged that he respondent violated General Statutes §§ 46a-60 (a) (1); 46a-60 (a) (4), Title VII of the Civil Rights Act of 1964, as amended and the Americans with Disabilities Act, 42 U.S.C. 12101, et. seq. and the Equal Pay Act of 1964, U.S.C. 206 and discriminated against him by failing to promote him, denying him a raise, warning him and treating him differently than other employees with alleged performance issues and by ultimately terminating his employment. The complainant further claims that he was harassed, discriminated against and terminated because he is an African-American, black male who was perceived to be disabled. The complainant also claims that he was harassed and discriminated against because of his sex, in the terms and conditions of his employment. The complainant also claims he was terminated in retaliation for vocalizing his complaints to management and for filing a complaint with the commission and it discriminated against him in the rate of his pay because of his sex, male and in the terms and conditions of his employment.

ORDER

1. The complainant's failure to promote claims that he was denied promotion because of his race and national origin, African-American and his color, black pursuant to General Statutes § 46a-60 (a) (1) and Title VII of the Civil Rights Act of 1964 as amended, is hereby dismissed.

2. The complainant's claims that he was retaliated against for filing a complaint with the Commission, because of his race and national origin, African-American and his color, black, pursuant to General Statutes §46a-60 (a) (4) and Title VII of the Civil Rights Act of 1964, as amended, are hereby dismissed.
3. The complainant's claims that he was harassed and discriminated against, because of his sex, male, in the terms and conditions of his employment, pursuant to General Statutes § 46a-60 (a) (1) and Title VII of the Civil Rights Act of 1964, as amended, are hereby dismissed.
4. The complainant's claims that he was terminated because of his race and national origin, African-American and his color, black, pursuant to General Statutes § 46a-60 (a) (1) and Title VII of the Civil Rights Act of 1964, as amended, are hereby dismissed.
5. The complainant's claims that the respondent perceived him to be disabled, pursuant to the Americans with Disabilities Act, 42 U.S.C. 12101, et. seq., are hereby dismissed.
6. The complainant's claims that the respondent discriminated against him, because of his sex, in his rate of pay, pursuant to the Equal Pay Act of 1964, U.S.C. 206 is hereby dismissed.

It is so ordered this 19th day of July 2006.

_____

Leonard E. Trojanowski,
Presiding Human Rights Referee

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