Commission on Human Rights and Opportunities ex rel. Michele Milton, Complainant	: Connecticut Commission on Human Rights and Opportunities
v.	: CHRO No. 0630188 : Fed. No. 16aa600110
Pulte Homes, Respondent	: December 3, 2009

FINAL DECISION

Preliminary statement

Michele Milton, the complainant, filed her affidavit of illegal discriminatory practice (affidavit) with the commission on human rights and opportunities (commission or CHRO) on October 5, 2005. In her affidavit, she alleged that the respondent, Pulte Homes, Inc., her former employer, violated General Statutes §§ 46a-58 (a) and 46a-60 (a) (1) and Title VII when she was harassed, received unequal pay and was subsequently terminated because of her age and sex.[1] The commission certified the

[1] In her affidavit, Ms. Milton also alleged that the respondent violated the federal Age Discrimination in Employment Act (ADEA). Because age is not an enumerated protected basis under § 46a-58, the commission does not have jurisdiction over this statute, and it was dismissed. See prehearing conference summary and order, paragraph 13. General Statutes § 1-2z provides in part: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." "[T]here are some forms of discrimination that are prohibited under § 46a-60, such as discrimination due to age or marital status, that are not within the purview of § 46a-58 (a) and that, therefore, § 46a-58 would be inapplicable." (Berdon, J., dissenting.) *Commission on Human Rights & Opportunities v. Truelove & Maclean, Inc.,* 238 Conn. 337, 357 (1996).

affidavit for public hearing on December 4, 2008, and the respondent filed its post-certification answer denying the allegations of discrimination on January 12, 2009. The affidavit was amended in March 2009. The public hearing was held on August 17, 18 and 19, 2009. Post-hearing briefs were due on October 2, 2009 at which time the record closed.

For the reasons set forth herein, it is found that the commission did not establish by a preponderance of the evidence that Ms. Milton was harassed or terminated because of her sex or her age. The commission, though, did establish by a preponderance of the evidence that Ms. Milton received less compensation than similarly situated non-basis sales managers because of her sex and/or age and relief is awarded as provided herein.

A violation of the federal Equal Pay Act (EPA) was alleged in an amendment to the affidavit and was briefed by the commission. However, after reviewing the commission's August 6, 2009 "Response to Respondent's motions in limine and motion to allow certain witnesses to testify telephonically" and after the discussion during the August 12, 2009 prehearing conference, the undersigned understood that the commission and Ms. Milton would proceed only on Title VII and §§ 46a-58 (a) and 46a-60 (a) (1). In the prehearing conference summary and order (paragraphs 12 and 14) as well as on the record (Transcript, at page 3: 11-15), the undersigned identified, without correction by the commission or Ms. Milton, that the statutes at issue were Title VII and §§ 46a-58 (a) and 46a-60 (a) (1). As the commission and Ms. Milton did not make any correction, these are the only statutes at issue, and the EPA statutory claim is deemed waived.

Findings of fact

Based upon a review of the pleadings, exhibits and transcripts and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found ("FF")[2]:

1. Ms. Milton was born in 1955. Tr. 9.
2. Between 1976 and July 2000, Ms. Milton worked in sales, management, and marketing for several retail companies. Tr. 10; CHRO 6.
3. Ms. Milton obtained her real estate license in August or September of 2000. Tr. 11.
4. After obtaining her real estate license, Ms. Milton worked for Prudential Connecticut Realty from October 2000 to July 2004. Tr. 11, 113-14; CHRO 6.
5. In July 2004, Ms. Milton left Prudential to work for William Raveis Real Estate. Tr. 11, 114-15; CHRO 6.
6. While at Raveis, Ms. Milton learned from Tim Pulte, nephew of the respondent's chief executive officer Bill Pulte, of an employment opportunity with the respondent as a real estate agent. Tr. 11-14. The respondent's real estate agents were known as "sales managers" and "sales associates". Tr.

[2] References to an exhibit are by party designation and number. The commission's exhibits are denoted as "CHRO" followed by the exhibit number, and the respondent's exhibits are denoted as "R" followed by the exhibit number. Those exhibits that were proffered by both the commission and the respondent may be referred to by either designation. References to the transcript are designated as "Tr." followed by the page number.

266. The terms “sales manager” and “sales associate” are interchangeable. Tr. 266.

7. The respondent is a real estate developer and builder of residential homes. The respondent builds “production homes”. Production homes differ from custom-built homes in that production homes offer the prospective buyer a choice among a limited number of home floor plans with a limited selection of options. Custom homes have more personalized home plan specifications with a greater selection of options available to the buyer. Tr. 117-19, 270-71.

8. During the relevant time period, the respondent was developing six sites in Connecticut: Carlson’s Ridge in New Milford; Farmside Village, later renamed Cheshire Crossing, in Cheshire; Oxbow Ridge in Canton; Oxford Greens in Oxford; Ponsett Ridge in Haddam; and The Woodlands of Newington in Newington. Tr. 263-64; CHRO 7, 11, 12, 14-25; R 4, 27, 28, 49.

9. In late September 2004, Ms. Milton applied for a sales position with the respondent and was interviewed by Mark Powers and Tess Bloom. Tr. 13-15. Mr. Powers was the respondent’s division president for Connecticut and was Ms. Bloom’s supervisor. Tr. 135, 261. Ms. Bloom was the respondent’s vice president of sales and marketing. Tr. 14-15.

10. Ms. Bloom recommended hiring Ms. Milton. Mr. Powers made the ultimate decision to hire Ms. Milton. Tr. 15-16, 265, 319.

11. Ms. Bloom telephoned Ms. Milton to offer her the position. Tr. 15. The respondent's initial salary offer was $40,000. Ms. Milton negotiated a salary of $45,000 with Ms. Bloom and accepted the position. Tr. 15-16, 25, 137. Ms. Milton began her employment with the respondent on November 1, 2004 as a sales manager at Oxford Greens. Tr. 15-16; CHRO 7, 8.
12. Pursuant to her employment agreement, Mr. Milton was to be paid an annual salary of $45,000 until the execution of her fifth purchase and sales agreement at which time her compensation would be 100% commission based. Tr. 138; CHRO 7.
13. Most of the other sales managers were paid under a similar system of salary converting to commission. Tr. 407-08; CHRO 14, 15, 17-25.
14. Ms. Bloom supervised the sales managers and was Ms. Milton's direct supervisor. Tr. 16
15. In Ms. Milton's discussions with Mr. Powers and Ms. Bloom, there was no mention of any monthly sales goals or quotas. Tr. 140.
16. Ms. Milton's employment agreement did not include any monthly sales goals or quotas. CHRO 7.
17. Ms. Milton's job description, though, does provide that sales managers would: "Attain established sales goals;" CHRO 3; and from her conversations with Ms. Bloom when she was hired, Ms. Milton knew and expected that at some point she would be given sales goals; Tr. 136-37.

18. Upon commencing employment, Ms. Milton attended the respondent's training program, consisting of one day per week at the respondent's corporate office in Cheshire and four days per week at the respondent's Oxford Greens site. Tr. 27, 29, 142-144, 272; R 10.
19. The training lasted approximately six weeks, until mid-December 2004. Tr. 28.
20. At the training, Ms. Milton received a copy of the respondent's employee handbook and its business practices policy handbook. Tr. 23, 142-43; R 1, 2, 3.
21. At the training, Ms. Milton also received a job description for her position. Tr. 20, 251; CHRO 3. Expectations of sales managers include selling homes, greeting customers, and being part of a sales team. Tr. 276-77.
22. The respondent maintains employment policies. These policies include prohibitions against age and sex discrimination and against harassment. The respondent's policies also include a complaint procedure to report harassment. Tr. 148-50, 262; R-1. Ms. Milton received a copy of the policies during her training. Tr. 148 – 49; R 3.
23. All new sales managers receive training regardless of their prior experience. The length of training period varied depending on the new employee's prior experience and the amount of time they needed to absorb the respondent's policies and procedures. Tr. 268-71, 321.

24. In addition to Ms. Milton, Tad Serrao and Ronda Margolis were also sales managers at the Oxford Greens site. Tr. 29. Ms. Margolis is a female. Tr. 152.
25. Both Mr. Serrao and Ms. Margolis are older than the complainant. Tr. 152, 443, 471.
26. Mr. Serrao and Ms. Margolis had been at the Oxford Greens site for approximately one year prior to Ms. Milton's hire. Tr. 31, 444-45, 470.
27. At Oxford Greens, both Ms. Margolis and Mr. Serrao received an initial salary that would be replaced with a commission-based system when home sites were available for sale to the public. Mr. Serrao received a higher salary for a longer period of time than did Ms. Margolis. Tr. 80; CHRO 14, 15.
28. At Oxford Greens, the respondent offered five styles of housing floor models. The respondent limited the number of each style that could be built. Tr. 49-51.
29. The respondent restricted the number of home site available for sale at any one time. Lots were released in phases as groups of 30 with specifications on price, lot premiums, basement conditions and house locations. Tr. 50. One group would be released for sale when the lots in the previous phase had been sold. Tr. 49-51, 173-74, 455-56. Any sales manager could sell any released lot. Tr. 479. Lots could not be sold until they were released. Tr. 50, 478. The policy of lot release applied to all sales managers. Tr. 457.

30. The respondent's policy of releasing lots in phases for sale applied to Ms. Milton, Mr. Serrao and Ms. Margolis equally and had nothing to do with age or sex. Tr. 173-74.

31. The respondent's pricing policies also applied to Ms. Milton, Mr. Serrao and Ms. Margolis equally and had nothing to do with age or sex. Tr. 183.

32. As of February 2005, Ms. Milton had not complained to Mr. Powers about Mr. Serrao or about any other employee at Oxford Greens. Tr. 276; R 15.

33. In an email to Mr. Powers in February 2005, Ms. Milton expressed appreciation for the support she had received at Oxford Greens from the staff, and specifically cited the support she had received from Mr. Serrao. R 15. Mr. Serrao and Ms. Margolis assisted the complainant in getting acclimated at Oxford Greens. They answered the complainant's questions and explained issues to the complainant's customers if Ms. Milton did not have the answer. Tr. 152-54, 157, 448, 474-75.

34. In February 2005, the respondent set sales goals at Oxford Greens of 5 sales per month per sales manager. Tr. 54 – 57, 160-61; R 16.

35. The sales goals set by the respondent applied to Ms. Milton, Mr. Serrao and Ms. Margolis equally and had nothing to do with their age or sex. Tr. 160-61, 163; R 16.

36. The respondent did not indicate that there would be any disciplinary action taken against sales persons who failed to meet the sales goal. Tr. 55.

37. In February 2005, Ms. Milton complained to Ms. Bloom about the distribution of customers to the sales managers. Ms. Milton felt that she was not getting a fair share. Tr. 36-41.

38. Ms. Bloom did not inform Mr. Powers of Ms. Milton's issues about customer distribution. Tr. 282

39. In late March 2005, Suzie Nolan formally replaced Ms. Bloom as Ms. Milton's supervisor. Tr. 16, 274. Ms. Nolan had been hired by Mr. Powers in August 2004 as a division sales and marketing manager. She became general sales and marketing manager for the division, providing marketing and advertising support. Tr. 381-82. In December 2004 or January 2005, she had already assumed Ms. Bloom's duties of managing the sales managers. Tr. 382-83.

40. When Ms. Nolan replaced Ms. Bloom as Ms. Milton's supervisor, Ms. Milton complained to Ms. Nolan about the distribution of customers. In response to Ms. Milton's concerns, in April 2005, the respondent introduced the "up system", which established a fairer system of customer distribution by rotating walk-in clients among the sales managers. Ms. Milton thanked Ms. Nolan and Mr. Powers for their assistance in getting the new system established. Tr. 36 – 41, 174-78, 281-83, 392-96, 417, 478; CHRO 10; R 18.

41. Ms. Milton took a deposit on an unreleased lot, violating the respondent's policies. Tr. 285, 398. Ms. Milton told Ms. Nolan that she had taken the deposit a week or two prior to her termination. Tr. 422-23, 436; Affidavit, ¶ 7.

42. Mr. and Mrs. Downey were clients of Ms. Milton. The working relationship broke down, with Ms. Milton not wanting to work with them and with them requesting to work with a different sales manager. Tr. 450-51, 476.

43. Mr. and Mrs. Dipaolo-Trapani were clients of Ms. Milton and had purchased a home in Oxford Greens. Subsequent to their purchase, Mr. and Mrs. Trapani had complaints. Ms. Milton told Mr. Trapani to write a letter to corporate headquarters if they were unhappy. Tr. 287-88, 290, 329; R 19. Ms. Milton herself should have been able to address their concerns. Tr. 288-89.

44. The respondent's vice president of construction was Steve Dicks. Tr. 419. Mr. Dicks complained to Mr. Powers and Ms. Nolan about Ms. Milton. Mr. Dicks complained that he spent too much time providing information to Ms. Milton's clients that Ms. Milton should have provided and that other sales managers did provide to their clients. Tr. 291, 329-32. Mr. Dicks also complained that Ms. Milton's customers were trying to modify their homes so as to make them custom homes, rather than production homes, which made it impossible to complete the homes in a timely manner. Tr. 429-30. Mr. Dicks also complained that Ms. Milton was offering customers sales options that were not provided by the respondent. Tr. 457-58, 483.

45. The respondent's vice president of customer relations was Ray Demers. Tr. 419. Mr. Demers complained that Ms. Milton consistently told customers things that were not true. Tr. 292, 329-32.

46. Ms. Nolan recommended to Mr. Powers that Ms. Milton's employment be terminated because her failure to follow procedures was disruptive to the worksite. Tr. 295-96.

47. Based on the recommendation of Ms. Nolan and the complaints by Mr. Dicks and Mr. Demers, Mr. Powers decided to terminate Ms. Milton's employment. Tr. 296, 319. Mr. Powers was the ultimate decision maker in deciding to terminate Ms. Milton Tr. 135-36, 267.

48. On July 1, 2006, Ms. Nolan, with Mr. Serrao present, notified Ms. Milton that she was being discharged from Oxford Greens. Tr. 64.

49. Ms. Nolan told Ms. Milton that she was being discharged because she was not achieving her sales goals, because she was not blending well with the team, because of her attitude, and because she was undermining the core of the team spirit. Tr. 402, 404.

50. After notifying her of her discharge from Oxford Greens, Ms. Nolan offer the complainant a position at another of the respondent's developments, Ponsett Ridge. The complainant did not accept the reassignment. Tr. 188-89.

51. Ms. Milton was 49 years old when hired by Mr. Powers and 49 years old when discharged by Mr. Powers. Tr. 135.

52. While employed with the respondent, Ms. Milton never complained of age or sex discrimination. Tr. 150.

53. At various times during the relevant time period, the respondent employed a total of fifteen people who at some times during their employment served as sales managers. Twelve of the sales managers were female: Ms. Milton, Kathleen Alemany, Gretchen Goodmaster, Adrienne Jarrell, Christina Mallozzi, Ronda Margolis, Ka Mei Ong, Marcia Roberts, Barbara Ross, Keri Smith, Sanam Solati and Annette Thor. Three of the managers were male: Michael DeCilla, David Fitzgibbons and Tad Serrao. The salaries of the female managers ranged from $32,500 to $50,000. The salaries of the male sales managers ranged from $50,000 to $60,000. CHRO 7, 11, 12, 14-25; R 4, 27, 28, 49.

54. At Ponsett Ridge, Mr. DeCilla and Mr. Fitzgibbons received salaries of $55,000 and $50,000, respectively, while Ms. Smith and Ms. Jarrell received salaries of $40,000 and $43,000, respectively. The female sales managers at Ponsett Ridge received only a 1% commission on sales regardless of the number of sales while Mr. Fitzgibbon's commission was increased from 1% to 2% if he sold four or more homes per month. CHRO 17, 18, 19, 25.

55. Mr. DeCilla, Mr. Fitzgibbons and Ms. Solati had experience selling production homes prior to being hired by the respondent as sales managers. Tr. 307, 309-10, 336.

56. The job description for sales managers does not mention production home sales experience as being a required, or even a desired, requisite for the position. CHRO 3

57. Subsequent to terminating Ms. Milton's employment, the respondent hired Christina Mallozzi, a college recruit. After completing her training, Ms. Mallozzi was assigned to Oxford Greens and paid a salary of $40,000. Tr. 481-82, 484; CHRO 21. According to her employment application, Ms. Mallozzi had no prior experience selling real estate. CHRO 21. She is younger than the complainant. CHRO 37.

Analysis

I

Section 46a-60 (a) (1)

Ms. Milton alleged that the respondent violated § 46a-60 (a) (1) when she was harassed, received unequal pay and was subsequently discharged because of her age and sex. Section 46a-60 provides in relevant part: "(a) It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or

privileges of employment because of the individual's race, color, religious creed, age, sex . . . ."

A

Terms and conditions of employment (harassment)

1

"Subdivisions (1) and (8) of § 46a-60 (a) prohibit an employer or its agents from discharging, discriminating against or harassing an employee on the basis of sex." *Brittell v. Dept of Correction*, 247 Conn. 148, 164 (1998). In this case, Ms. Milton alleged the respondent violated § 46a-60 (a) (1) when she was "harassed on the basis of my sex by male coworkers and the respondent knew of this and did not stop it from happening to me. Tad Serrao had been stealing my customers since my hire and I complained to my supervisors Mark Powers and Suzie Nolan and they did nothing to stop this harassment." Affidavit, ¶ 11. The commission asserted that the harassment was also due to Ms. Milton's age. Commission's post-hearing brief, 20.

However, "not all allegations of harassment are actionable. . . . The abuse must be severe and pervasive; the incidents must be persistent, not isolated." (Citatione omitted; internal quotation marks omitted.) *Massey v. Connecticut Mental Health Center*, 1998 WL 470590, 4 (Conn Super., July 31, 1998. The "workplace [must be] 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." (Internal quotation marks omitted.) *Brittell v. Dept of Correction*,

supra, 247 Conn. 166-167 (1998). "If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment." (Internal quotation marks omitted.) *Ledan v. Danbury*, Superior Court, judicial district of Waterbury at Waterbury, Docket No. UWY-CV-04-4001302 (July 18, 2006) (2006 WL 2349017, 3).

To prove an actionable harassment, or hostile work environment, claim, Ms. Milton must establish that (1) she belongs to a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based upon her protected class; "(4) the harassment affected a term, condition or privilege of employment (i.e., that the harassment was sufficiently pervasive or severe to create an abusive work environment); and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action." *Britell v. Dept of Correction*, Superior Court, judicial district of New Haven at New Haven, Docket No. 93-0351853s (September 9, 1997) (1997 WL 583840, 13), aff'd, sub nom. *Brittell v. Dept of Correction*, 247 Conn. 148 (1998).

To satisfy the fourth prima facie element or requirement, the "harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. . . . [T]he standard of pervasiveness or severity has both objective and subjective implications. The conduct at issue must create an objectively hostile or abusive work environment, one that a reasonable person, in the plaintiff's situation, would find to be hostile or abusive." *Britell v. Dept. of*

Correction, supra, 1997 WL 583840, 14. "Whether a reasonable person would find a given work environment to be hostile depends on the totality of the circumstances; [c]onsiderations include: (1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (4) whether the conduct unreasonably interferes with the employee's work performance." (Internal quotation marks omitted.) *Galligan v. Milford Public Schools*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. AAN-CV-04-0085584-s (January 27, 2006) (2006 WL 337144, 7). "Similarly, if a victim does not subjectively view the environment to be abusive, the conduct cannot be found to have altered the conditions of the victim's employment." *Britell v. Dept. of Correction*, supra, 1997 WL 583840, 14.

The fifth element of the prima facie case "is where proof of the agency relationship . . . is needed. The plaintiff must show that a specific basis exists for imputing the conduct that created the hostile work environment to the employer. . . . [I]t is apparent that the fifth element has two parts, the employer's actual or constructive knowledge of the harassment and the employer's inaction or lack of adequate action after learning of it. . . . A somewhat more refined statement of essentially the same criterion is that the plaintiff must prove that the defendant either provided no reasonable avenue for complaint or that the defendant knew of the harassment but did little or nothing about it." (Citations omitted.) *Britell v. Dept. of Correction*, supra, 1997 WL 583840, 15.

In this case, four general types of harassment are identified: (1) the respondent's unresponsiveness to Ms. Milton's requests for a more equitable distribution of customers; (2) Mr. Serrao's instructions to support staff to remove Ms. Milton's business cards from promotional brochures; (3) Mr. Serrao's telling Ms. Milton that for her first six months of employment she should not to speak to any customers; and (4) Ms. Milton's inability to gain access to the respondent's "saleslogix" tracking system until April 2005. Commission's post-hearing brief, 20 – 21; Complainant's post-hearing brief, 13, 30; R 22. The commission, though, failed to establish by a preponderance of the evidence that (a) these actions were taken against Ms. Milton because of her sex or age, (b) that some of these actions even occurred, and/or (c) that the actions were reported to the respondent pursuant to its anti-harassment policy.

With respect to the first type of alleged harassment, in February or March 2005, Ms. Milton complained to her then-supervisor Ms. Bloom about the unfair distribution of customers. She also accused Mr. Serrao of taking walk-in customers who were potentially her clients. Ms. Bloom took no action and shortly thereafter left the respondent's employment. Tr. 36-41, 174-76. There is no evidence that Ms. Bloom, a female who was approximately only 18 months younger than Ms. Milton; CHRO 43; ignored Ms. Milton's concerns because of Ms. Milton's sex or age. Also, given the competitive nature of working on commission, disputes over customers arose even between Mr. Serrao and Ms. Margolis. Tr. 155, 453, 476-77.

The evidence also contradicts the complainant's assertion that Mr. Powers and Ms. Nolan took no action to prevent Mr. Serrao from "stealing" her customers. Affidavit, ¶ 11. When Ms. Nolan became Ms. Milton's supervisor, Ms. Milton again raised the issue of customer distribution. Ms. Nolan, Mr. Powers and Ms. Milton then met and discussed the problem. Tr. 41. Subsequently, the respondent instituted the "up system" that provided for a fairer rotation of customers among Ms. Milton, Mr. Serrao and Ms. Margolis. CHRO 10. In May 2005, Ms. Milton emailed Mr. Powers to thank him for setting up the new system, to inform him that the system seemed to be working, and to express her appreciation of Ms. Nolan as an advocate. R 18; FF 40.. In her May 2005 email to Mr. Powers, the complainant did not make any complaint about Mr. Serrao's non-compliance with the new distribution system. Tr. 177-79.

Ms. Milton next identified actions taken by Mr. Serrao as harassing, specifically, his remark to her early in her employment that for her first six months of employment she should not to speak to any customers; Tr. 41; and his and Ms. Margolis' instructions to support staff to remove Ms. Milton's business cards from promotional brochures; Tr. 43-45. As Ms. Milton found the remark ridiculous and ignored it; Tr. 42; the remark did not interfere with her job performance. Also, both Mr. Serrao and Ms. Margolis testified that the only time they would have removed Ms. Milton's business cards from promotional material and replace it with their own would have been if one of them was going to give the brochure to one of his or her own customers. Tr. 453-54, 477. The appropriate witness to have persuasively established Ms. Milton's account of the

incident would have been one of the support staff who Ms. Milton alleged she observed removing her business cards; however, no member of the support staff was called to testify. Even if these two isolated incidents occurred as alleged, they do not rise to the level of discriminatory intimidation, ridicule, and insult that would be sufficiently frequent, severe or pervasive to alter the conditions of Ms. Milton's employment and create an abusive working environment.

Importantly, Ms. Milton did not report either the brochure incident or Mr. Serrao's alleged remark to the respondent. Tr. 43-45; FF 32. The respondent had an anti-harassment policy and a complaint reporting procedure that was contained in its employee handbook that Ms. Milton had received and read. R 1, § 7.1; R 3; FF 22, 52. In the absence of actual or constructive knowledge of harassing conduct by a co-worker, the respondent is not liable.

In addition, these claims of harassment by Mr. Serrao are contradicted by the complainant's own email to Mr. Powers in February 2005 where Ms. Milton reported, in part, that the "team here has been so supportive-especially Tad [Serrao] to get me up & running with contracts, etc.". R 15. Further, Mr. Serrao and Ms. Margolis assisted the complainant in getting acclimated at Oxford Greens. They answered the complainant's questions and explained issues to the complainant's customers if Ms. Milton did not have the answer. Tr. 152-54, 157, 448, 474-75; FF 33.

As Ms. Milton observed, Mr. Serrao and Ms. Margolis had a business relationship for over thirty years and had hired all of the staff at Oxford Greens. R-22. That the two

of them did not want a third sales manager on site; Tr. 481:12-17; R-22; is not surprising as it meant dividing potential customers and commissions between three people rather than two. As the complainant acknowledged, any actions taken by Mr. Serrao that interfered with her ability to get new customers was not motivated by her age or sex but were taken for his own financial benefit. Tr. 182.

The commission also cited as harassment the complainant's inability to access saleslogix, the respondent's tracking system that allowed sales managers to track customers, enter information, and receive leads from the internet. Although the system was available to other sales managers at the time Ms. Milton was hired in November 2004, she did not have access to the system until April 2005. Tr. 45-47. However, Ms. Margolis, a female sales manager who was older than the complainant, did have access to the system; thus undermining the complainant's claim that her age and/or sex were the motivating factors behind her lack of access.

The complainant also had complaints about the respondent's business practices that she believed hindered her ability to sell homes. However, the sales goals set by the respondent applied to Ms. Milton, Mr. Serrao and Ms. Margolis equally and had nothing to do with their age or sex. Tr. 160-61, 163; R 16; FF 35. Although sales goals were not included in the complainant's employment offer; CHRO 7; the job description for the position of sales manager states as a duty and responsibility: ""Attain established sales goals." CHRO 3. Also, from her conversations with Ms. Bloom at the time she was hired, the complainant knew and expected that at some time she would be given sales

goals. Tr. 136-37. Likewise, the respondent's policy of releasing lots in phases for sale applied to Ms. Milton, Mr. Serrao and Ms. Margolis equally and had nothing to do with age or sex. Tr. 173-74; FF 30. Similarly, the respondent's pricing policies also applied to Ms. Milton, Mr. Serrao and Ms. Margolis equally and had nothing to do with age or sex. Tr. 183; FF 31.

3

For these reasons, it is found that the commission did not establish by a preponderance of the evidence that Ms. Milton was harassed because of her sex or her age.

B

Compensation

1

The complainant alleged that the respondent violated § 46a-60 (a) (1) by discriminating against her in her compensation. Ms. Milton alleged that she was earning less than similarly situated male sales managers because of her sex. Affidavit, ¶ 10. In a disparate treatment case, the inquiry is whether Ms. Milton was subjected to different treatment because of her protected status. *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 104 (1996). There are two analytical methods used in allocating the burdens of proof: the mixed-motive paradigm and the pretext paradigm. The pretext paradigm will be used in this decision as both the commission and the respondent utilized this analysis in their post-hearing briefs.

The pretext paradigm requires that the commission first establish a prima facie case; that is, the commission must show that Ms. Milton is in a protected class, was qualified for the position, incurred an adverse employment action, and the adverse action occurred under circumstances giving rise to an inference of discrimination. *Jacobs v. General Electric Co.*, 275 Conn. 395, 400 (2005). "The establishment of a prima facie case creates a rebuttable presumption of discriminatory intent . . . . The burden of establishing a prima facie case is a burden of production, not a burden of proof, and therefore involves no credibility assessment by the fact finder. . . . The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor." (Citations omitted.) *Craine v. Trinity College*, 259 Conn. 625, 638 (2002).

Once the commission establishes a prima facie case, "the employer then must produce legitimate nondiscriminatory reasons for its adverse employment action . . . . This burden is one of production, not persuasion; it can involve no credibility assessment." (Internal quotation marks omitted.) *Jacobs v. General Electric Company*, supra, 275 Conn. 400.

After the commission has established a prima facie case and the respondent "has produced evidence of a legitimate, nondiscriminatory reason for the employment action, [t]he plaintiff retains the burden of persuasion. [The plaintiff] now must have the opportunity to demonstrate that the [defendant's] proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden

of persuading the court that [the plaintiff] has been the victim of intentional discrimination. [The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Internal quotation marks omitted.) Id., 401 The "factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, [n]o additional proof of discrimination is required." (Internal quotation marks omitted.) *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 706 (2006).

However, "there must be not only sufficient evidence that the employer's reasons are false (pretextual) but also sufficient evidence that the employer's reasons were a pretext for intentional discrimination. Stated another way, there must be sufficient evidence on the record that the . . . protected trait or traits played a role in the decision-making process and actually motivated the employer's decision." (Internal quotations omitted.) *Board of Education v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 507 (2003).

2

In this case, the commission established a prima facie case of unequal compensation: Ms. Milton was a female; she met the minimum qualifications for the

position of sales manager having successfully sold homes while employed by the respondent and by having had successful real estate sales experience prior to becoming employed by the respondent; her salary was less than the salaries of male sales managers; and the salaries of other female sales managers were also consistently lower than the salaries of the male managers.

The respondent articulated a legitimate business reason for the salary discrepancies: salaries of sales managers were negotiated with applicants on a case-by-case basis with consideration given to such factors as the applicant's negotiation skill; the applicant's experience; and the development site where the applicant, if hired, would be assigned to work. Tr. 302-03. Further, prior experience in selling production homes was particularly valued and justified compensating Mr. DeCilla and Mr. Fitzgibbons at a salary higher than paid to Ms. Milton. Tr. 307-10, 409.

The commission established by a preponderance of the evidence that the respondent's business reason lacked credibility and was a pretext for discrimination. Although differences among the developments could account for differences in salary, it does not account for salary differences at the same development. Two of the respondent's development sites had, at one time or another, both male and female sales representatives: Oxford Greens and Ponsett Ridge. At Oxford Greens, both Ms. Margolis and Mr. Serrao received an initial salary that would be replaced with a commission-based system when home sites were available for sale to the public. Mr. Serrao, though, received a higher salary for a longer period of time than did Ms.

Margolis. He received a salary of $60,000 from November 25, 2003 to June 30, 2004, the expected date when home sites would be available for sale. Ms. Margolis, on the other hand, received a salary of only $50,000 beginning October 15, 2003 which was further reduced to $25,000 effective January 31, 2004 until the home sites were available for sale. Tr. 80; CHRO 14, 15; FF 27.

Similarly at Ponsett Ridge, Mr. DeCilla and Mr. Fitzgibbons received salaries of $55,000 and $50,000, respectively, while Ms. Smith and Ms. Jarrell received salaries of $40,000 and $43,000, respectively. Further, while the female sales managers at Ponsett Ridge received only a 1% commission on sales regardless of the number of sales, Mr. Fitzgibbon's commission was increased from 1% to 2% if he sold four or more homes per month. CHRO 17, 18, 19, 25; FF 54

Although the respondent argued that Mr. DeCilla and Mr. Fitzgibbons warranted a higher salary because of their experience in selling production homes, the commission persuasively demonstrated that this argument also lacked credibility as Ms. Solati, who also had production home experience, received a salary of only $45,000. Tr. 336; CHRO 22; FF 55. Ms. Solati's salary was less than that of Mr. DeCilla and Mr. Fitzgibbons and equal to that of Ms. Milton, who had no experience selling production homes. In addition, the "qualifications" section of the job description for sales managers does not mention production home sales experience as being a required, or even a desired, requisite for the position. CHRO 3; FF 56.

In addition to the persuasive evidence of unequal pay based on sex, there is also persuasive evidence of unequal pay based on age; i.e., younger employees received better compensation plans that did older employees. For example, Ms. Ong and Ms. Goodmaster were hired as community sales managers in May 2005 and received the same salary. The respondent, though, paid Ms. Ong, who is younger than Ms. Goodmaster, a salary for a longer period of time than it paid Ms. Goodmaster. CHRO 23, 24, 37. Similarly, Ms. Smith, who was hired as a sales manager trainee, received the same compensation as Ms. Goodmaster, who had been hired as a sales manager. CHRO 24, 25. Like Ms. Ong, Ms. Smith is also younger than Ms. Goodmaster. CHRO 37.

3

For the reasons set forth, the commission established by a preponderance of the evidence that because of her sex and/or age Ms. Milton received less compensation than similarly situated non-basis sales managers.

C

Termination of employment

1

Ms. Milton further alleged that the respondent violated § 46a-60 (a) (1) when it terminated her employment because of her age and/or sex. Similar to the claim of unequal pay, a claim of discriminatory termination involves a burden-shifting analysis. The commission must first establish a prima facie case that the complainant is in a

protected class, was qualified for the position, incurred an adverse employment action, and the adverse action occurred under circumstances giving rise to an inference of discrimination. Thereafter, the respondent must articulate a legitimate reason for the adverse action. Then the commission must establish by a preponderance of the evidence that the complainant has been the victim of intentional discrimination. *Jacobs v. General Electric Company*, supra, 275 Conn. 400-01; *Board of Education v. Commission on Human Rights & Opportunities*, supra, 266 Conn. 507).

2

The commission established a prima facie case that Ms. Milton's termination was discriminatory: (1) Ms. Milton was a member of a protected class by virtue of her sex and age; (2) Ms. Milton met the minimum qualifications for her position, having successfully sold homes while employed by the respondent and by having had successful real estate sales experience prior to becoming employed by the respondent; (3) Ms. Milton incurred an adverse personnel action when her employment was terminated; and (4) the termination occurred under an inference of discrimination, as the respondent hired a younger female, Christina Mallozzi, to work at Oxford Greens shortly after Ms. Milton's termination from that site. CHRO 40; FF 1, 4, 5, 48, 57. In addition, the respondent had also discharged a number of women over the age of 40 and replaced them with younger women. Tr. 72, 74, 81-82.

In response, the respondent successfully met its burden of articulating business reasons for Ms. Milton's termination that, if true, would constitute legitimate, non-

discriminatory reasons for her discharge. According to the respondent, Ms. Milton repeatedly missed her sales goals; exhibited a negative attitude; and was eroding team confidence by telling dissatisfied customers to complain to higher management, by being unable to work with customers, by not fully explaining options to customers, and by accepting a deposit on an unreleased property lot. Tr. 396-97, 402, 480-81, 483.

After the respondent has articulated a legitimate, nondiscriminatory reason for the adverse employment action, the commission retains the burden of persuasion to demonstrate that the respondent's proffered reason was not the true reason for the termination and that Ms. Milton has been the victim of intentional discrimination. In support of its claim that the respondent's conduct was discriminatory, the commission cited to other sales managers who had missed their sales goals and weekly staff meetings without being terminated, the difficulty Ms. Milton had in making sales, the replacement of older employees with younger employees, that Ms. Milton was not placed on a performance improvement plan prior to termination, and the hiring of Christina Mallozzi.

As evidence that the respondent's explanation was a pretext for discrimination, the commission noted that the complainant's employment agreement had no provision relating to sales goals. Although, in February 2005, the respondent set monthly sales goals of five sales contracts each for Ms. Milton, Mr. Serrao and Ms. Margolis; Tr. 162; R 16; the respondent never informed the complainant that failure to meet her sales goal would result in her termination. Tr. 55. Indeed, less than three weeks prior to

discharging Ms. Milton, Mr. Powers sent her an email inquiring about whether she would be able to meet her sales goal for June. Yet, Mr. Powers did not inform the complainant that her failure to meet the goal would result in her termination. R 20.

The commission identified the apparent disparate treatment of sales managers as evidence of discriminatory animus. Even though Mr. Serrao and Ms. Margolis also did not consistently meet their monthly sales goals; CHRO 40; only the complainant was discharged. Similarly, although Mr. Serrao, Ms. Margolis and Ms. Milton would occasionally miss the weekly sales meetings; Tr. 465; only Ms. Milton was discharged.

The commission next cited to Ms. Milton's difficulty in making sales as evidence that the respondent's reasons for her termination was pretextual. In particular, they claim that Ms. Milton's sales ability was hampered by Mr. Serrao's aggressive sales techniques, by the lack of a system to fairly distribute potential customers and by Ms. Milton's exclusion from the respondent's saleslogix system.

As further evidence of discriminatory animus, Ms. Milton testified that within the few months surrounding her own discharge, the respondent also terminated the employment of several other employees who were over forty years of age, and hired women under the age of thirty to replace them. Tr. 72, 74-75, 80-83.

The different disciplinary action taken by the respondent against Ms. Milton and Mr. DeCilla was also identified as demonstrating pretext. Prior to his termination, Mr. DeCilla was placed on a performance improvement plan and, when he was unsuccessful at Ponsett Ridge, reassigned to Oxbow Ridge. Tr. 71, 189-90. The

complainant, however, was not offered a performance improvement plan. Tr. 71. Also, despite provisions in the respondent's employee handbook regarding apprising employees of their performance on a systematic and regular basis; R 1, § 3.5; the complainant never received an individual performance evaluation; Tr. 70.

The commission identified the respondent's hiring of Christina Mallozzi as additional evidence demonstrating pretext. Within a week after it discharged Ms. Milton, the respondent hired Ms. Mallozzi, a woman younger than the complainant, to replace Ms. Milton at Oxford Greens. Tr. 71-72. The respondent maintained that Ms. Mallozzi was not hired to replace the complainant, would have been hired even if the complainant had not been discharged, was assigned to Oxford Greens temporarily for training and was needed as an assistant at Oxford Greens because the home sites were selling so well. Tr. 301-02, 405-07.

3

Despite the commission's arguments that the respondent's explanation for discharging the complainant was a pretext for discrimination, there is insufficient evidence rebutting the respondent's primary concerns regarding Ms. Milton's interaction with customers, the complaints about Ms. Milton by other employees and Ms. Milton's acceptance of a deposit check for an unreleased building lot.

With respect to the commission's evidence suggesting pretext, although Mr. Serrao and Ms. Margolis also missed staff meetings and did not always meet their sales goals, there is no evidence that they had other performance issues as had Ms. Milton.

Tr. 300. Additionally, militating against a finding that the complainant was discriminated against because of her sex and age is the fact that Ms. Margolis is also a female and is older than the complainant.

The issue of the complainant's difficulties in making sales was addressed in the earlier section on alleged harassment. To summarize that evidence, the respondent's policies regarding pricing, inventory release and sales goals applied equally to Mr. Serrao and Ms. Margolis just as they did to the complainant. FF 30, 31, 35. The complainant's email to Mr. Powers complimenting Mr. Serrao in February 2005; R 15; and Ms. Nolan in May 2005; R 18; also negates her claim that their actions had a discriminatory animus.

With respect to Ms. Milton's observation that numerous sales managers over the age of forty had been replaced with employees younger than thirty, she acknowledged that she did not know the circumstances of their separation from the respondent. Tr. 232-36. There was uncontested evidence that the employees whose discharge had been identified by Ms. Milton as indicative of discrimination had actually been discharged for job abandonment; Tr. 273-74; declining performance and refusal to accept a performance improvement plan; Tr. 314; and ethics issues; Tr. 316. Other employees identified by the complainant had voluntary resigned. Tr. 315-16. Further, the respondent had also terminated male sales managers as well as female sales managers. Tr. 314-15.

While Mr. DeCilla, unlike the complainant, was offered a performance improvement plan prior to his discharge, Barbara Ross was also offered such a plan. Tr. 314. That Ms. Ross is a female and is older than Ms. Milton; CHRO 43; again indicates that sex and age were not factors in the respondent's decision not to offer a performance improvement plan to the complainant. Like Mr. DeCilla, the complainant was also offered reassignment to another of the respondent's developments, Ponsett Ridge. Unlike Mr. DeCilla, though, the complainant did not accept the reassignment. Tr. 188-89; FF 50.

In addition, although Ms. Milton did not receive an individual performance evaluation during her employment with the respondent, the respondent's polices provide that an "employee may be discharged at any time with or without cause and with or without advance notice at the Company's sole discretion." R 1, § 3.7. Further, there is insufficient evidence as to how often any sales manager received individual performance evaluations.

Several witnesses testified that Ms. Milton did not have a positive working relationship with her customers or with other employees. After meeting on-site with prospective buyers Mr. and Mrs. Downey, Ms. Milton returned to the office declaring that she could not and would not continue working with them and they, in turn, requested a different sales manager. Tr. 166-67, 450-51; FF 42. Despite the reassignment of Mr. and Mrs. Downey from Ms. Milton to Mr. Serrao, though, the respondent paid Ms. Milton a commission for the Downey sale. Tr. 167.

Addressing customer complaints is a basic aspect of the job of a sales manager. Tr. 172, 288-89; R 19. According to the respondent, Ms. Milton, though, dealt with the concerns of customers by telling them to write to senior management. Tr. 287-88, 396-97, 480-81, 483. In an email exchange between the complainant and Mr. Powers regarding a written complaint Mr. DiPaolo-Trapani had sent to the respondent's corporate headquarters, Mr. Powers clearly and emphatically stated that it was part of the complainant's job to resolve this type of an issue without "defer[ring] things to people up the chain of command." In response, Ms. Milton acknowledged that the "customer had made minor complaints to me" prior to his correspondence with the respondent's corporate office. The complainant, however, did not indicate what, if any, specific efforts she had made to resolve the complaints prior to Mr. Trapani sending his correspondence. Also, despite being told by Mr. Powers to deal with such issues herself, she argued with him in the email: "As I mentioned before – I truly feel sometimes customers need to vent their issues & merely by acknowledging them in return by a letter & explanation from the 'top' so to speak – carries a bit more weight than our explanation in person to them." R 19; FF 43.

Although the Downeys and the DiPaolo-Trapanis were the only customers specifically identified by the respondent as clientele with whom the complainant had issues, as the complainant only had twelve sales; CHRO 40; these unsatisfied clients represent sixteen percent of her clientele. Further, there is no evidence that either Mr. Serrao or Ms. Margolis had a similar number of unsatisfied clients.

According to the respondent, Ms. Milton's interaction with her customers also caused problems for the vice president of construction, Steve Dicks, and the vice president of customer service, Ray Demers. Mr. Dicks complained to Mr. Powers and Ms. Nolan about Ms. Milton. According to Mr. Powers and Ms. Nolan, Mr. Dicks complained that he spent too much time providing information to Ms. Milton's customers that Ms. Milton should have provided, information that other sales managers did provide to their customers. Tr. 291, 329-32. Mr. Dicks also complained that Ms. Milton's customers were trying to modify their homes so as to make them custom homes, rather than production homes, making it difficult to complete the homes in a timely manner. Tr. 429-30. He also complained that Ms. Milton was offering customers sales options that were not provided by the respondent. Tr. 457-58; FF 44. Similarly, Mr. Demers complained that Ms. Milton consistently told customers things that were not true. Tr. 292, 329-32; FF 45.

In addition, Ms. Milton violated the respondent's policies by improperly accepting a deposit check on an unreleased building lot. FF 41. The respondent does not permit the taking of deposits on unreleased lots in order to avoid gaps between houses, to protect the integrity of the housing community, because it does not know when the house would be built and because prices could change. In addition, taking a deposit on an unreleased lot erodes team confidence and gives buyers the wrong expectations. Tr. 286, 399-400; Affidavit, ¶ 7 ("I had customer deposit checks, if only he would release the inventory.")

Finally, it is worth noting that Mr. Powers was the sole decision maker in the decisions both to hire the and to discharge the complainant. FF 10, 47. Also, shortly after her termination, Ms. Milton completed and sent to the respondent a written exit interview questionnaire. CHRO 52. In the questionnaire, she did not accuse the respondent of age or sex discrimination. Tr. 192.

4

For the reasons set forth, respondent met its minimal burden of articulating non-discriminating reasons for discharging the complainant. The commission did not offer persuasive evidence that the respondent's articulated concerns regarding the complainant's interaction with customers, complaints by other employees about the complainant and the complainant's acceptance of a deposit check for an unreleased building lot were pretext for discrimination, and the commission did not establish by a preponderance of the evidence that the respondent terminated Ms. Milton's employment because of her sex and/or age.

II

Section 46a-58 (a)

Ms. Milton also alleged that the respondent violated § 46a-58 (a). Section 46a-58 (a) states: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex,

blindness or physical disability." Ms. Milton alleged that the specific law of the United States that the respondent violated is Title VII, which provides in relevant part: "It shall be an unlawful employment practice for an employer – (1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment; because of such individual's race, color, religion, sex . . . ." 42 U.S.C. § 2000e-2 (a) (1). According to Ms. Milton, the respondent discriminated against her in the terms, conditions and privileges of her employment; discriminated against her in her compensation; and discharged her because of her sex.

A

Terms, conditions, or privileges of employment (harassment)

1

The complainant alleged that the respondent deprived her of rights under Title VII by discriminating against her in the terms, conditions or privileges of her employment by harassing her because of her sex. To establish a Title VII claim of discriminatory harassment or hostile work environment, the commission must establish that the workplace was "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." (Citations omitted; internal quotation marks omitted.) *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). In *Harris*, the U.S. Supreme Court outlined a two part test for proving a hostile work environment. The first

part of the test asks whether the conduct in question was objectively hostile or, in other words, whether the employer's actions created "an environment that a reasonable person would find hostile or abusive . . . ." Id.

Determining whether the work environment was objectively hostile is accomplished by examining the totality of the circumstances. *Williams v. County of Westchester*, 171 F.3d 98, 100 (2d Cir. 1999). A nonexclusive list of the factors that may be considered includes "the frequency and severity of the discriminatory conduct, whether such conduct is physically threatening or humiliating, and whether the conduct unreasonably interferes with the plaintiff's work performance." Id. No single factor is required or dispositive. *Schiano v. Quality Payroll Systems, Inc.*, 445 F.3d 597, 605 (2d Cir. 2006). However, in *Faragher v. Boca Raton,* 524 U.S. 775, 788 (1998), the court reiterated that Title VII is not a "general civility code" and that the above factors are to filter out "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes and occasional teasing." (Internal quotation marks omitted.) Id. Conduct, in order to be actionable, "must be extreme to amount to a change in the terms and conditions of employment . . . ." Id

If the commission can make a showing that the environment was objectively hostile, it must then establish the second part of the *Harris* test: whether the complainant subjectively perceived the work environment as abusive. *Harris v. Forklift Systems, Inc.*, supra 510 U.S. 21-22. "Conduct that is 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. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." (Internal quotation marks omitted.) *Usherenko v. Bertucci's Corp*., United States District Court, Docket No. 3:05-cv-756 (JCH) (D. Conn. December 21, 2006) (2006 WL 3791389, 7). Further, the commission must also demonstrate that the harassing conduct occurred because of the complainant's protected class. Id., 6

In addition, liability for a co-worker's harassment can attach to the employer "only when the employer has either provided no reasonable avenue for complaint or knew of the harassment, but did nothing about it." (Internal quotation marks omitted.) *Murray v. New York University College of Dentistry,* 57 F.3d 243, 249 (2d Cir .1995).

2

In this case, the commission has not established by a preponderance of the evidence that Ms. Milton was harassed because of her sex in violation of Title VII. As detailed in the earlier discussion that concluded that the conduct did not constitute harassment under § 46a-60, and incorporated herein, the conduct alleged by Ms. Milton was not objectively hostile or abusive because the conduct was not sufficiently severe, pervasive or frequent to unreasonably interfere with her work performance. There is also no persuasive evidence that the incidents alleged by the complainant occurred because of her sex, and she did not utilize the respondent's anti-harassment procedure to report the incidents.

B

Compensation

1

Ms. Milton further alleged that the respondent deprived her of rights under Title VII by discriminating against her in her compensation because of her sex by paying her less than it paid its male sales managers. As with any Title VII case, the commission may present evidence of salary discrimination under the disparate treatment burden-shifting paradigm set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, the commission must establish a prima facie case by showing the Ms. Milton was a member of a protected class, was qualified for the job in question, was paid less than men for the same work, and that the respondent's adverse employment decision occurred under circumstances that raise an inference of discrimination. Evidence of discriminatory animus is required in a Title VII case. Thereafter, the respondent must articulate a legitimate, non-discriminatory reason for the wage disparity. After the respondent articulates its reason, the presumption of discrimination disappears and the commission must show that the complainant's sex at least partly motivated the wage disparity. *Fayson v. Kaleida Health, Inc.*, United States District Court, Docket No. 00-CV-0860E(SR) (W.D.N.Y., Sept. 18, 2002) (2002 WL 31194559, 6).

2

The same facts that established Ms. Milton's unequal pay claim under § 46a-60 also establish by a preponderance of the evidence a discriminatory compensation

scheme under a Title VII analytical standard. As set forth in the earlier detailed analysis of the § 46a-60 unequal pay claim, and incorporated herein, the commission established a prima facie case, the respondent articulated a non-discriminatory business reason for the pay differential, and the commission established by a preponderance of the evidence that the respondent's articulated reason was a pretext for discrimination.

The persuasive evidence previously discussed that established that the respondent's unequal compensation system was motivated by the sex of its sales managers can be summarized as follows: The complainant was not the only female who was paid less than male sales managers; no female sales manager was paid more than a male sales manager. FF 53. Even within the same development, the respondent paid its male sales managers more than it paid its female sales managers. FF 27, 54. Male sales managers also received higher commissions than did female sales managers. FF 54. Further, contrary to the respondent's contention, the evidence persuasively establishes that experience did not factor into its compensation decisions. One example is Ms. Solati who had experience in the sale of production homes yet received a lower salary than male sales managers who had production home sales experience. FF 53, 55. Another example is Christina Mallozzi who was recruited out of college. Although she had no prior experience in selling real estate, once she completed she received nearly the same salary as the complainant, who had several years of real estate sales experience prior to being hired by the respondent. FF 57.

The male sales managers are similarly situated to Ms. Milton and the other female sales managers so as to be used as comparators. Despite being hired for different development sites, all sales managers received the same training, were subject to the same policies and procedures, had the same job description, and were supervised by Ms. Bloom and then by her successor Ms. Nolan, both of whom reported to Mr. Powers. Tr. 268-71, 321; CHRO 3; R 1, 2, 10; FF 13, 14, 23.

Although age is not a protected basis under § 46a-58 (a), the persuasive evidence of age discrimination provides additional credence to the argument that wage disparities were the result of a discriminatory animus and not the result of non-discriminatory factors. Ms. Ong and Ms. Goodmaster were hired as community sales managers in May 2005 and received the same salary. Ms. Ong, though, who is younger than Ms. Goodmaster, received a salary for a longer period of time than did Ms. Goodmaster for no apparent reason than age. CHRO 23, 24, 37. Similarly, Ms. Smith, who was hired as a sales manager trainee, received the same compensation as Ms. Goodmaster, who had been hired as a sales manager. CHRO 24, 25. Strikingly, like Ms. Ong, Ms. Smith is also younger than Ms. Goodmaster. CHRO 37.

3

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

C

Discharge

1

Finally, the complainant alleged that the respondent deprived her of rights under Title VII by discharging her because of her sex. "A Title VII plaintiff can prove her case by direct proof or circumstantial evidence of discrimination. . . . . Where, as here, a Title VII case relies on circumstantial evidence of discrimination, the court follows the burden-shifting analysis first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 . . . . The plaintiff bears the initial burden of establishing a prima facie case of discrimination. She may make out a prima facie case by showing that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she experienced an adverse employment action; and (4) the adverse action occurred under circumstances that give rise to an inference of discriminatory intent." *Wood v. Sempra Energy Trading Corp*., United States District Court, Docket No. 3:03 cv 986 (JCH) (D. Conn. December 12, 2005) (2005 WL 3416126, 5.).

With respect to the second prima facie element, to "show 'qualification' sufficient to shift the burden of providing some explanation for discharge to the employer, the plaintiff need not show perfect performance or even average performance. Instead, the plaintiff need only make the minimal showing that he possesses the basic skills necessary for the performance of [the] job." (Internal quotation marks omitted.) *Baker v. Dept. of Correction*, United States District Court, Docket No. 3:03 cv 1894 (JCH) (D.

Conn. March 8, 2006) (2006 WL 581205, 5.). With respect to the fourth prima facie element, "the mere fact that a plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the prima facie stage of the Title VII analysis." *Zimmermann v. associates First Capital Corp.*, 251 F.3d 376, 381 (2d Cir. 2001). The commission's burden in establishing a prima facie case of discrimination is de minimis. *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 401 (2d Cir. 1998).

"Once a plaintiff has established a prima facie case, a rebuttable presumption of discrimination arises, and the burden shifts to the defendant to offer a legitimate, non-discriminatory 'business rationale' for its actions." *Wood v. Sempra Energy Trading Corp.*, supra, 2005 WL 3416126, 5. The respondent's "burden is one of production, not persuasion; it can involve no credibility assessment." (Internal quotation marks omitted.) *Reeves v. Sanderson Plumbing Productions, Inc.*, 530 U.S. 133, 142 (2000). The burden is satisfied if the proffered evidence "taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." (Internal quotation marks omitted.) *Schnabel v. Abramson*, 232 F.3d 83, 88 (2d Cir. 2000).

"If a defendant offers a legitimate, non-discriminatory reason for its actions, the burden shifts back to the plaintiff to fulfill her ultimate burden of proving that the defendant intentionally discriminated against her in the employment action. . . . In order to satisfy this burden, the plaintiff may attempt to prove that the legitimate, non-discriminatory reason offered by the defendant was not the employer's true reason, but was a pretext for discrimination. . . . Ultimately, a finder of fact may consider the

strength of the prima facie case, the probative value that the defendant's reason is pretextual, and any other evidence presented in the case when determining if the plaintiff has sustained her burden." (Citations omitted.) *Wood v. Sempra Energy Trading Corp.*, supra, 2005 WL 3416126, 5. "The ultimate question is whether the employer intentionally discriminated . . . . In other words, it is not enough to . . . disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Reeves v. Sanderson Plumbing Productions, Inc.*, supra, 530 U.S. 146-47.

Further, the commission need not show that sex was the only factor motivating an adverse employment action in order to make a showing of employment discrimination. 42 U.S.C. § 2000e-2(m); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). "We have consistently held that a plaintiff in an employment discrimination case need not prove that discrimination was the sole motivating factor, the primary motivating factor, or the real motivating factor in the adverse employment action; she need only prove that discrimination was a motivating factor." *Olsen v New York*, United States Court of Appeals, Docket No. 07-3317-cv (2d Cir. March 17, 2009), 315 Fed. Appx. 361, 363 (2009 WL 690236, 1.).

When, as in this case, the evidentiary basis for a disparate treatment claim is that co-workers were treated differently, the commission must show that the co-workers to whom the complainant is compared were similarly situated in all material respects to the complainant. What constitutes "all material respects" varies from case to base but

the determination must be based on (1) whether the complainant and those she "maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness. . . . In other words, there should be an objectively identifiable basis for comparability. . . . Hence, the standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical." (Citation omitted.) *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000).

2

In this case, the commission has not established by a preponderance of the evidence that the respondent discharged Ms. Milton because of her sex. As set forth in the earlier detailed discussion, and incorporated herein, that concluded that the commission did not establish a discriminatory termination under § 46a-60, there is not persuasive evidence that the respondent's concerns regarding Ms. Milton's interaction with customers, the complaints about Ms. Milton by other employees and Ms. Milton's acceptance of a deposit check for an unreleased building lot were false or were a pretext for intentional discrimination. FF 41-45. Further, as previously discussed, the evidence did not support the commission's contention that other employees had been discharged for discriminatory reasons. Tr. 232-36, 273-74, 314-16. The evidence also did not support a finding that there were other sales managers about whom the respondent had the same concerns as it had about the complainant regarding

interaction with customers, complaints by other employees and acceptance of a deposit for an unreleased lot .

Additionally, although the respondent may have treated male sales managers different from the complainant by not discharging them for missing sales goals and sales meetings or by offering them a performance improvement plan prior to discharge, it also treated other female sales managers, such as Ms. Margolis and Ms. Ross, different from the complainant, thus militating against a finding that it discriminated against the complainant because of her sex. Ms. Margolis, who like the complainant also missed sales goals and staff meetings; Tr. 300; was not discharged. Ms. Ross, unlike the complainant, was offered a performance improvement plan prior to her discharge; Tr. 314.

Further, it is worth noting that Mr. Powers was the sole decision maker in the both the decision to hire the complainant and then, only eight months later, in the decision to discharge the complainant. FF 10, 47. When "the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [the respondent] an invidious motivation . . . ." (Internal quotation marks omitted.) *Mastrolillo v. Norwalk Community College*, United States Court of Appeals, Docket No. 08-2217-cv (2d Cir. November 5, 2009) (2009 WL 36519645, 1). It is especially difficult to find invidious motivation "when the firing has occurred only a short time after the hiring." *Grady v. Affiliated Central, Inc.*, 130 F.3d 553, 560 (2d Cir. 1997), cert. denied, 525 US 936 (1998).

Finally, in her the written exit interview questionnaire Ms. Milton did not accuse the respondent of discharging her because of her age or sex. Tr. 192; CHRO 52.

III

Damages and other relief

A

Statutes and case law

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

The presiding human rights referee is also authorized to award relief including: (1) prospective monetary relief (front pay); *Silhouette Optical Limited v. Commission on Human Rights and Opportunities*, 10 Conn. L. Rptr. No. 19, 603 (February 28, 1994); (2) prejudgment and postjudgment compounded interest on the award of front and back pay; Id., 604; (3) ordering the respondent to pay to the commission the amount of unemployment compensation paid to a complainant, which the commission shall then transfer to the appropriate state agency; General Statutes § 46a-86 (b); and (4), for a

violation of § 46a-58 (a), awards for emotional distress; *Commission on Human Rights & Opportunities ex rel. Peoples v. Belinsky*, Superior Court, judicial district of Stamford-Norwalk at Norwalk, Docket No. CVN-08806-1209, (November 8, 1988) (1988 WL 492460, 5.).

B

Unequal compensation

As previously discussed, the commission established by a preponderance of the evidence that the respondent discriminated against the complainant in her compensation. Ms. Milton's employment agreement with the respondent provided that, effective November 1, 2004, she would receive a salary of $45,000 until her fifth sales agreement was executed, after which she would be placed on a commission-only basis. CHRO 7. Her gross bi-weekly pay was $1,730.77. R 13. Ms. Milton completed her fifth purchase and sales agreement in February 2005. CHRO 40. For purposes of computation, the fifth sales date will be assumed to have been effective with her March 4, 2005 salary paycheck. R 12. At $1,730.77 biweekly, Ms. Milton was paid $15,576.93 for the nine bi-weekly pay periods from November 1, 2004 to March 4, 2005.

Having found Ms. Milton to have been denied equal compensation, the appropriate comparator is Mr. Serrao, the only male sales manager at Oxford Greens. Mr. Serrao's annual salary had been $60,000; CHRO 14; or $2,307.69 bi-weekly.

Had Ms. Milton been paid $2,307.69 bi-weekly between November 1, 2004 and

March 4, 2005, she would have earned $20,769.21. As she instead received only $15,576.93, her damages are the difference, $5,192.28.[3]

C

Prejudgment interest

Ms. Milton is also awarded prejudgment interest at the rate of 10% per annum, compounded annually, on the salary discrepancy calculated as follows (salary is deemed accrued on March 4, 2005; interest is deemed accrued on and as of ("a/o") March 4th of each succeeding year):

Prejudgment interest on salary differential of 5,192.28

a/o 3/4/06	$5,192.28 x 10% =	$519.23
a/o 3/4/07	$5,192.28 + $519.23=$5,711.51	
	$5,711.51 x 10% =	$571.15
a/o 3/4/08	$5,711.51 + 571.15 = $6,282.66.	
	$6,282.66 x 10% =	$628.27
a/o 3/4/09	$6,282.66 + 628.27 = $6,910.93.	
	$6,910.93 x 10% =	$691.09

[3] Although Ms. Milton's employment agreement specified that her salary would cease after the execution of her fifth sales agreement, the respondent erroneously continued to pay her salary for a period of time thereafter. Tr. 138-39; CHRO 41. The award of back pay is limited to the time when the respondent was contractually obligated to pay Ms. Milton a salary.

a/o 3/4/10: n/a – decision issued prior to accrual date

Total award of prejudgment interest: $2,409.74

D

Reinstatement, front pay
and reimbursement of unemployment compensation

Because the commission did not establish by a preponderance of the evidence that the respondent terminated the complainant's employment because of her sex and/or age, there is no award for reinstatement or front pay and no order that the respondent reimburse the state for unemployment compensation paid to the complainant.

E

Emotional distress

Emotional distress damages are not available for a § 46a-58 (a) claim arising from § 46a-60. *Commission on Human Rights & Opportunities v. Truelove & Maclean, Inc.*, 238 Conn. 337, 346 (1996). However, in this case, Ms. Milton's § 46a-58 (a) claim is not in conjunction with her § 46a-60 claim but rather arises from the respondent's unlawful practices under Title VII. Emotional distress damages have been awarded in this forum for § 46a-58 (a) claims arising from a violation of federal law. *Commission on Human Rights & Opportunities ex rel. John Crebase v. Proctor & Gamble Pharmaceuticals, Inc.*, CHRO Docket No. 0330171 (Final decision, July 12, 2006).

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

In this case, however, emotional distress damages are not awarded because the complainant's testimony as to the emotional distress she suffered was limited to the emotional impact of her termination; Tr. 108-12; for which no liability has been found. There was no specific testimony as to the emotional impact of the unequal compensation, for which liability has been found.

F

Postjudgment interest

Ms. Milton is awarded postjudgment interest at 10% per annum compounded annually on her damage award of $5,192.28.

Conclusions of law

1. With respect to Ms. Milton's § 46a-60 (a) (1) claim of harassment, the commission did not establish by a preponderance of the evidence that the complainant was harassed because of her sex or age.
2. With respect to Ms. Milton's § 46a-60 (a) (1) claim of unequal compensation, the commission established a prima facie case, the respondent articulated a non-discriminatory reason for the compensation, and the commission met its burden of persuasion of establishing by a preponderance of the evidence that the respondent's articulated reason was actually a pretext for intentional discrimination.
3. With respect to Ms. Milton's § 46a-60 (a) (1) claim of discriminatory termination, the commission did not establish by a preponderance of the evidence that the respondent's articulated reasons for discharging the complainant were pretext for age and/or sex discrimination.
4. With respect to Ms. Milton's § 46a-58 (a) claim of harassment, the commission did not establish by a preponderance of the evidence that the respondent violated a term, condition or privilege of employment secured and or protected by the laws of the United States, specifically Title VII, on the basis of Ms. Milton's sex.

5. With respect to Ms. Milton's § 46a-58 (a) claim of unequal compensation, the commission established by a preponderance of the evidence that the respondent's articulated reasons for the disparity in salaries were actually pretext for intentional discrimination and resulted in the deprivation of rights secured and or protected by the laws of the United States, specifically Title VII, on the basis of Ms. Milton's sex.
6. With respect to Ms. Milton's § 46a-58 (a) claim of discriminatory discharge, the commission did not establish by a preponderance of the evidence that the respondent's articulated reasons for discharging the complainant were pretext for sex discrimination in violation of Title VII.

Order

1. The respondent shall pay the complainant the sum of $5,192.28 in compensation for the discriminatory disparity in salary.
2. The respondent shall pay the complainant the sum of $2,409.74 in prejudgment interest.
3. The respondent shall pay the complainant postjudgment interest at 10% per annum compounded annually on the award of $5,192.28.
4. Pursuant to General Statutes § 46a-60 (a) (4), the respondent shall not engage in or allow any of its employees to engage in any conduct against the complainant or any other person who testified or assisted in these proceedings.

5. Should prospective employers contact the respondent seeking references concerning the complainant, the respondent shall provide only the dates of said employment, the last position held and rate(s) of pay. In the event additional information is requested in connection with any inquiry regarding the complainant, the respondent shall require written authorization from the complainant before such information is provided, unless required by law to provide such information.
6. The respondent shall cease and desist from all acts of discrimination prohibited under federal and state law and the respondent shall provide a nondiscriminatory work environment pursuant to federal and state law.
7. The respondent shall provide the commission with the name, age, sex and compensation of sales managers hired from December 4, 2009 to December 3, 2011 for its Connecticut building sites.
8. Pursuant to General Statutes § 46a-54 (13), the respondent shall post in conspicuous locations in its Connecticut offices visible to all employees and applicants for employment notices regarding statutory provisions as the commission shall provide. The respondent shall post such notices within five (5) days of its receipt of such notices from the commission.

_____
Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Ms. Michele Milton
David Kent, Esq.
Rebecca Brenia, Esq.
John F. Birmingham, Jr. Esq.