

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

Commission on Human Rights : CHRO No. 0510366  
and Opportunities *ex rel.*  
Adam Szydlo, Complainant :  
  
v. :  
  
EDAC Technologies Corporation, : November 19, 2007  
Respondent

**MEMORANDUM OF DECISION**

**Procedural Background**

On or about March 22, 2005, Adam Szydlo (the complainant) filed an “Affidavit of Illegal Discriminatory Practice” (the complaint) with the commission on human rights and opportunities (commission), alleging that his former employer, EDAC Technologies Corporation (the respondent, or EDAC), terminated his employment because of his age, in violation of General Statutes § 46a-60 (a) (4) and, by virtue of § 46a-58 (a), the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.

The commission investigated the charges in the complaint, found reasonable cause to believe that a discriminatory practice had occurred, and attempted, without success, to conciliate the matter. On July 6, 2006, the commission investigator certified the complaint to public hearing in accordance with General Statutes § 46a-84 (a).

Due notice of the public hearing was issued to all parties and attorneys of record on July 7, 2006, in accordance with General Statutes § 46a-84 (b).

I conducted a public hearing on May 10, 11, 15, 16, 17, 22 and 24, 2007. Thereafter, the parties filed post-hearing briefs and the record closed on August 30, 2007.

### **Findings of Fact**

1. The respondent, a publicly traded corporation founded in 1946, designs, manufactures and services fixtures, tooling, molds, engine components and machine spindles for its industrial customers. (Exhibit C-56; testimony of Dominic Pagano, Transcript pp. 703-04)<sup>1</sup>

2. At all times pertinent to this case, the respondent encompassed four divisions: the spindle manufacturing division, the large machining division, the precision components division, and the recently purchased Apex Machine Tool Company (Apex). (Ex. C-56; Pagano, Tr. 704; Melluzzo, Tr. 745-49)

3. Employees in the precision components and large machining divisions work predominantly on critical parts for the aerospace industry. The precision components division manufactures and assembles small parts, ranging from one inch to forty inches in diameter; anything larger is handled by the large machining division. (Ex. C-56; Melluzzo, Tr. 745-46, 758)

4. The complainant was born on December 23, 1952. He emigrated from Poland to the United States in 1982 and, after working for several different employers, was hired by the respondent on December 6, 1986. (Szydlo, Tr. 13-17; Ex. C-7)

5. Based on the complainant's prior experience with computer numerical control (CNC) machines, the respondent assigned the complainant to its

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<sup>1</sup> References to the exhibits offered jointly by the complainant and the commission bear the prefix "C," followed by a number. The respondent's exhibits bear the prefix "R." Hereinafter, references to testimony consist of the witness's name, the abbreviation "Tr." and the transcript page number(s). The seven volumes of transcribed testimony are numbered consecutively.

precision components division. From 1988 until his termination, the complainant worked exclusively in the CNC milling machines department (the milling department, or, simply, the department) within the precision components division. (Szydlo, Tr. 18-19, 32 ; Ex. C-7)

6. The complainant developed experience on almost all of the department's milling machines. At first, the complainant operated small milling machines, and then progressed to the larger, more complicated four-axis and five-axis milling machines. The five-axis machine was the most difficult machine to operate and was used on the most complex and technically demanding jobs. (Szydlo, Tr. 16-24, 31-35, 250; Sartori, Tr. 182-84, 193-95; Blasiak, Tr. 325-26; Jurczewski, Tr. 812; Exs. C-7, C-10) According to his 2002 performance appraisal, the complainant "knows all the machines in the dept. and most jobs so he always works with no supervision . . . he is a perfect person to help save on time & cost."<sup>2</sup> (Ex. C-10)

7. Precision parts new to the milling department initially go through a testing, or "development," phase. Once the department has mastered the new part, subsequent work on that part is considered "production" work. Development work is more demanding than production work. (Szydlo, Tr. 46, 249; Groman, Tr. 604, 647-48) The complainant had been doing both development and production work since he joined the milling department. (Szydlo, Tr. 47-52, 249-50, 976)

8. Since the early 1990s, the complainant worked the second shift, from approximately 3:30 p.m. until midnight. He often worked additional hours after his regular shift and on weekends. (Szydlo, Tr. 19, 155-57; Blasiak, Tr. 322-24; Ex. C-7)

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<sup>2</sup> Although this particular appraisal is unsigned, the handwriting is the same as that in other appraisals prepared and signed by supervisor Jerry Groman. (C-10)

9. In 1998, the complainant was designated “team leader” for his shift, and given some supervisory authority over one other individual. (Szydlo, Tr. 28-30, Groman, Tr. 385-86; Ex. C-7) In 1999, he was designated “technical coordinator”—the person to whom other employees should bring questions when a supervisor was not available. As technical coordinator, the complainant served as “lead man” in the absence of his immediate supervisor, Dariusz “Derek” Jurczewski. (Szydlo, Tr. 36-41; Groman, Tr. 385-86; Jurczewski, Tr. 807; Ex. C-7, specifically the document “Rules to live by for the CNC department,” with which all employees were familiar)

10. Derek Jurczewski (d.o.b. 10/26/62) had been the supervisor (often referred to as lead man) of the milling department’s second shift since 1999. (Szydlo, Tr. 102-04; Jurczewski, Tr. 800; Ex. C-71) Jurczewski reported directly to Jerry Groman. Almost every day, the two discussed ongoing and upcoming projects for about an hour as the first shift drew to a close and the second shift began. (Jurczewski, Tr. 801-02; Groman, Tr. 621-22)

11. Jerry Groman (d.o.b. 7/6/66) began his employment with the respondent in 1991 as a CNC machine operator. He rose through the ranks in various positions, some with supervisory authority, until he became foreman of the milling department—both first and second shifts—in the spring of 2002. In addition to his supervisory responsibilities, Groman continued to work during the first shift. Despite his considerable technical experience, he had no formal management training. (Groman, Tr. 364-65, 378-87, 388-89; Sartori, Tr. 187, 195-96; Ex. C-71) Groman enjoyed eating lunch and fraternizing with other employees his age or younger. (Szydlo, Tr. 208-10)

12. Edward Ogrodnik (d.o.b. 10/1/62) and the complainant generally performed the most difficult jobs on the milling department’s second shift, and they were equally skilled in production work. Some, including Groman, perceived

Ogrodnik as more efficient than the complainant in development work.<sup>3</sup> (Groman, Tr. 462-63 647-53; Szydlo, Tr. 105; Ex. C-71) Groman considered Ogrodnik to be his “most valuable guy” (Groman, Tr. 463; see also Ex. C-55); Jurczewski likewise viewed Ogrodnik as his “number one” guy. (Jurczewski, Tr. 804)

13. In August 2004, the respondent hired Daniel Krajewski (d.o.b. 9/22/94) for the milling department’s second shift. (Ex. C-38; Groman, Tr. 421-22; Foley, Tr. 887; Ex. C-71) The complainant helped train him. (Szydlo, Tr. 40, 101) Both Jurczewski and Groman came to view as Krajewski as an employee with a lot of potential, especially in production work. (Jurczewski, Tr. 805-06; Groman, Tr. 474; Ex. C-55)

14. Both Groman and Jurczewski considered the complainant to be the second best operator in the night shift (after Ogrodnik), with Krajewski third, followed by Sengphat “Sam” Manivong (d.o.b. 9/11/60) and Johnny Khantikone (d.o.b. 4/12/65). (Groman, Tr. 472, 475; see also page19 of Ex. C-6, the transcript of the commission’s preliminary investigation, which Groman discusses at Tr. 666-67; Ex. C-71)

15. Pratt & Whitney was and continues to be the main client of the precision components division. (Pagano, Tr. 702, 709; Melluzzo, Tr. 785) Its production, like that of the aerospace industry in general, decreased significantly after the terrorist attacks of September 11, 2001. Consequently, the respondent suffered a serious downturn in business; its precision components division experienced the worst impact, with sales decreasing by almost fifty percent in 2002. (Pagano, Tr. 698, 709; Melluzzo, Tr. 750-52; Ex. C-56)

16. In response to the decline in business, the respondent consolidated its physical space and reduced its workforce in 2002. (Pagano, Tr. 698-705)

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<sup>3</sup> Groman testified, however, that he had no documents to support his opinion of Ogrodnik’s efficiency on development jobs. (Groman, Tr. 554, 590-91)

17. Although the respondent experienced an overall turnaround in sales in 2003 and 2004, its business with aerospace customers continued to decline, although less precipitously than in 2002. (Exs. C-57, C-58)

18. In 2004, the respondent hired several new employees for the milling department: Krajewski (see FF #13) and Johnny Khantikone (39) for the second shift, and William Coleman (age 36) and Andrzej Czyzewski (39) for the first shift. (Groman, Tr. 420-22, 427-28, 451-52; Foley, Tr. 887; Exs. C-38, C-71, C-73)

The complainant helped train Krajewski. (Szydlo, Tr. 40, 101) Jurczewski perceived Krajewski as a “sharp guy” and a good worker “[f]rom a production point of view.” (Jurczewski, Tr. 805-06) Groman similarly saw Krajewski as an employee with a wealth of potential, one who would be “up to par potentially in a matter of time.” (Groman, Tr. 474; Ex. C-55)

19. In December 2004, the respondent’s general manager, Luciano Melluzzo, determined that the current and projected workload in the precision components division could no longer justify the size of the division’s current workforce. He informed Lester Karolak, manager of the precision components division, and Jerry Groman that a reduction in the division’s workforce was necessary, and directed them to implement the layoffs in the milling department, subject to three criteria: preservation of both the first and second shifts, retention of “core competency” employees, and reallocation of employees where possible. After delegating this responsibility, Melluzzo had no further involvement in the layoffs. (Melluzzo, Tr. 744, 751-62, 785, 790; Karolak, Tr. 671, 688)

20. Karolak prepared a list of employees to be terminated, relying primarily on a 2004 “efficiency report”—a compilation of computer data that, inter alia, identified the time each employee spent on set-up and production of specific jobs, and compared that figure with the approximate time each task should

require. (Karolak, Tr. 671-75, 694-95; Groman, Tr. 540; Melluzzo, Tr. 757; Exs. C-21, C-22, R-2)<sup>4</sup>

21. Of the second shift operators, Ogrodnik scored lowest on the efficiency report, with an efficiency rating of 53%. The complainant also had a relatively low score, 65%. (Ex. C-21, the 2004 composite ratings; Groman, Tr. 552)

22. On or about December 27, 2004, Karolak gave the layoff list to Groman for his review and approval. Ogrodnik's name was on the list at that time, but the complainant's was not. (Groman, Tr. 454, 585; Ex. C-55)<sup>5</sup>

23. Although Groman did not review the efficiency report in detail, he strongly believed that it was flawed and the ratings unrepresentative of the employees' work. In particular, he believed the rating for Ogrodnik—whom he considered to be the best and most self-sufficient worker in the division—did not accurately reflect Ogrodnik's skills or the difficulty of his particular assignments.<sup>6</sup> (Groman, Tr. 462-63, 554; Foley, Tr. 899-900; Ex. C-55)

24. Groman abandoned any reliance on the efficiency report and, with no discussion with anyone else, modified the layoff list, replacing Ogrodnik's name

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<sup>4</sup> Melluzzo, like others, testified that the efficiency report was the primary factor in preparation of the list. At one point in his testimony, Melluzzo stated that the report "got us 90 percent of the way there." (Melluzzo, Tr. 782, 796; Karolak, Tr. 694-95; Foley, Tr. 886) Even Groman conceded that the efficiency report was to be the primary criterion. (Groman, Tr. 542-44, discussing his prior testimony at the commission's December 2005 preliminary investigative hearing)

<sup>5</sup> Groman testified emphatically that the complainant's name was not on the list (Groman, Tr. 454, 585) and reiterated that fact in a memorandum he prepared for Foley after the complainant had filed his complaint. (Ex. C-55) He also noted that Sam Manivong was not listed. (Groman, Tr. 585) Karolak, the author of the list, initially testified that the complainant's name was on the list, but ultimately conceded that he did not recall its composition (Karolak, Tr. 671-72, 676), just as he was unable to recall many other events or conversations while testifying. Neither the original list nor the modified list (discussed below) is in evidence.

<sup>6</sup> Groman conceded, under oath, that because the efficiency report was inaccurate with regard to Ogrodnik, it would also be inaccurate with regard to the other employees under scrutiny for possible termination. (Groman, Tr. 462-63, 553) He also acknowledged that he knew of no documents demonstrating or comparing employees' self-sufficiency. (Groman, Tr. 589, 609)

with that of the complainant. (Groman, Tr. 420, 455, 561, 585-91) He also removed John Arcelaschi (a day shift operator who was related to Groman) from the list and replaced him with Greg Aube, who worked in the assembly department at that time. (Groman, Tr. 466, 523-33; Jurczewski, Tr. 814-15; Ex. C-55; Szydlo, Tr. 99)

25. Jurczewski, who was in the best position to evaluate the second shift operators, was on vacation at the time of the layoffs and thus had no input into Groman's decision. (Jurczewski, Tr. 802-03, 807; Groman, Tr. 457-59, 668-69; Szydlo, Tr. 281)

26. At the time of the layoffs, Ogrodnik was forty-two years old and the complainant fifty-two; the complainant was the oldest on the second shift by six years. Arcelaschi was forty and Aube forty-six. (Ex. C-73)

27. On or about December 28, 2004, Groman returned the list to Karolak with the modifications. (Groman, Tr. 651-63) Without any discussion with Groman, Karolak forwarded the list to Carol Foley, head of the human resources department, for preparation of termination notices. (Groman, Tr. 533, 559, 561-62; Foley, Tr. 883, 885) On December 30, 2004 the respondent began the layoffs. (Exs. C-70, C-71) Foley disposed of the list after preparing the termination notices. (Foley, Tr. 885-86)

28. Although the respondent typically required a supervisor to confer with Foley prior to discharging an employee, Groman did not follow this protocol. (Foley, Tr. 890-91)

29. The complainant was on vacation at that time and was not scheduled to return to work until January 3, 2005. On the morning of January 3, he received a telephone call at home from another employee, informing him of his impending termination. (Szydlo, Tr. 108-09, 111)



30. Later that day, the complainant went to work earlier than usual to speak with Karolak about the layoff. He chose Karolak, rather than Groman, because of the ease of communication with Polish-speaking Karolak. Karolak told the complainant that his salary—relatively high due to his length of service—was not the reason for his selection, but he offered no other explanation. They discussed the complainant’s qualifications and Karolak told the complainant to speak with Groman. (Szydlo, Tr. 114-19; Karolak, Tr. 682, 686)

31. After speaking with Karolak, the complainant went to Groman’s office and asked why he was being terminated. When Groman answered that he made too much money, the complainant explained that Karolak had said that money was not an issue. Groman telephoned Karolak and they spoke for several minutes. (Szydlo, Tr. 119-22; Groman, Tr. 563; Karolak, Tr. 682) When the call ended, Groman told the complainant that he could stay and that Sengphet “Sam” Manivong would be terminated instead. (Szydlo, Tr. 126-27, 130; Groman Tr. 563)<sup>7</sup> The complainant thanked him, went home to change into his work clothes, and reported for his shift. (Szydlo, Tr. 128-30)

32. The following day, when the complainant reported for work, Groman told him they needed to go to the human resources office. When the complainant asked if he was being terminated, Groman replied in the affirmative. When they left the building, the complainant asked if he was being terminated because he was “too old,” to which Groman replied, “Yes. I keep the younger people.” (Szydlo, Tr. 132-33, 947-48)

33. After this exchange with Groman, the complainant went to see Foley to complete the requisite paperwork; he then went to say goodbye to Jurczewski and some co-workers. He did not mention Groman’s comment to any of them,

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<sup>7</sup> Although Groman admitted under oath that he said the complainant could remain and that Manivong would be fired, he argued that he said it only because he felt cornered, wanted to avoid an argument, and just wanted to buy some time before resolving the matter. He claims that his intention was to allow the complainant to remain only for one day while he had a chance to confer with management. (Groman, Tr. 640-43) As discussed in detail below, I find this rationale to be unconvincing.

and assumed that Jurczewski knew what Groman had said. (Szydlo, Tr. 140-41, 956-61) The last person he spoke with was Karolak, who told him not to discuss his termination with other employees. (Szydlo, Tr. 959) The complainant did discuss these events, along with Groman's comments, with his wife and with his friend and former co-worker, Tom Blasiak. (Szydlo, Tr. 1016-18; Blasiak, Tr. 349-50)

34. Sam Manivong was also terminated on January 3, 2005. (Groman, Tr. 588; Exs. C-71, C-73) He was forty-four years old, the second oldest employee on the second shift in the milling department. (Exs. C-53, C-73)

35. In addition to the complainant, Manivong and Aube, the respondent terminated six others in the milling department (first and second shifts), including Zygmunt Kurylo, the only other milling department employee, beside the complainant, who was over fifty years old. (Exs. C-70, C-73; Groman, Tr. 630-31; Szydlo, Tr. 94-96)

36. Following the layoffs, only Arcelaschi (age 40), Andrzej Czyzewski (38), Thomas Lemelin (46), and Mariusz Wilczak (28), along with supervisor Groman (38), remained on the first shift. Krajewski (30) and Ogrodnik (42—ten years younger than the complainant), along with lead man Jurczewski (44), remained on the second shift. (Exs. C-44, C-55, C-70, C-71; C-73; Szydlo, Tr. 99-100; Groman, Tr. 453)

37. Johnny Khantikone (age 39), another second shift operator initially designated for layoff, was transferred to the Apex division because he had experience with a computer program known as MasterCam, essential to the work in that division. The complainant had no MasterCam experience or training. Khantikone did not perform successfully in Apex and the respondent terminated him less than two months after the transfer. (Ex. C-35; Marcil, Tr. 828-830; Szydlo, Tr. 287; Foley, Tr. 853)

38. While employed by the respondent, the complainant worked a forty-hour shift each week, and often worked overtime after his shift (on average, approximately fifteen hours per week) and on Saturdays; he occasionally worked on Sundays as well. At the time of his termination, the complainant's regular pay was \$21.60 per hour.<sup>8</sup> (Szydlo, Tr. 134-35, 142-48, 156)

39. Almost every year, the complainant received annual merit raises of three percent. (Szydlo, Tr. 74; Ex. C-7)

40. While working for the respondent, the complainant earned \$66,992.88 in 2003 and \$75,229.78 in 2004. (Exs. C-12, C-13)

41. The respondent also paid the complainant \$182.88 for his one day of work prior to termination (January 3, 2005), along with severance pay in the amount of \$1,719.20, the equivalent of two weeks' regular pay. The complainant also received reimbursement in the amount of \$171.92 for one paid holiday. (Szydlo, Tr. 152; Exs. C-12, C-13)

42. Following his termination, the complainant suffered from low self-esteem and took medication to relax and to relieve anxiety. He did not begin searching for a new job for several months and even considered returning to Poland. (Szydlo, Tr. 160, 971, 1009-10, 1014-15)

43. Following his termination, the complainant received state unemployment compensation benefits in the amount of \$7392. (Ex. C-13; Szydlo, Tr. 151-53)

44. When he began his job search, the complainant looked for jobs in the Hartford Courant, in a local Polish-language newspaper, and on the Internet, and he enlisted the assistance of an employment agency. Because of family and childcare demands, he limited his search to night shift positions. He applied

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<sup>8</sup> The complainant also testified that he earned \$21.60 per hour, "plus 15 percent nightshift." (Szydlo, Tr. 142-43) Nothing in the testimony, the supporting exhibits, or the post-hearing briefs explains what he meant by this, but he apparently earned this same premium in his subsequent position. (Id., 156)

to five or six companies in the aerospace field, had three or four interviews, and in late May 2005 obtained a position with A-1 Machining Company (A-1). His salary was \$19 per hour for a forty-hour workweek, and he was allowed to work up to twenty overtime hours at time-and-a-half. (Szydlo, Tr. 149-60, 971-75, 985-87; Ex. C-13)

45. For the remainder of 2005, the complainant earned \$48,981.22 working for A-1. (Ex. C-13)

46. In February 2006, the complainant was hired by Volvo Aircraft (Volvo) in Newington. He began his new position at \$20 per hour for a forty-hour workweek and, after approximately two months, received an increase to his present salary of \$21 per hour, with overtime at time-and-a-half. (Szydlo, Tr. 162-64; Ex. C-13)

47. In 2006, the complainant earned \$10,098.81 at A-1 and \$62,223.71 at Volvo, for a total of \$72,322.52. (Ex. C-13)

48. For the two-week period ending February 3, 2007, the complainant earned \$2982.53 at Volvo. (Ex. C-13)

## **Discussion and Analysis**

### *Age Discrimination in Employment Act*

The goals of the Age Discrimination In Employment Act (ADEA) are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621 (b). The ADEA makes it unlawful, inter alia, for an employer to discharge any individual because of such individual's age. 29 U.S.C. § 623 (a) (1). The ADEA extends protection to employees who are at least forty years old. 29 U.S.C. § 631 (a); *Montana v. First Federal Savings &*

*Loan Association of Rochester*, 869 F.2d 100, 103 (2<sup>nd</sup> Cir. 1989). When analyzing claims under the ADEA, courts generally rely upon the legal framework established for claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. See, e.g., *Rose v. New York City Board of Education*, 257 F.3d 156, 161 (2<sup>nd</sup> Cir. 2001); *McInnis v. Town of Weston*, 375 F.Sup.2d 70, 80 (D.Conn. 2005).

### Connecticut Fair Employment Practices Act

According to the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq. (CFEPA), it is a discriminatory practice “[f]or 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, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including, but not limited to, blindness . . .” General Statutes § 46a-60(a)(1). Because the legislature intended the pertinent provisions of the Connecticut statute to mirror those of the federal antidiscrimination laws, Connecticut courts—along with this administrative tribunal—generally follow the analogous federal law when analyzing CFEPA claims. *Board of Education of the City of Norwalk v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 505 n.18 (2003); *Craine v. Trinity College*, 259 Conn. 625, 636-37 (2002). Thus, cases involving age discrimination under the ADEA provide guidance for age discrimination cases under CFEPA. *Williams v. Hartford Public Schools*, 2007 WL 2080554, \*4 (Conn. Super.); *Delgado v. Achieve Global f/k/a Learning International, Inc.*, 2000 WL 1861853, \* 5-6 (Conn. Super.); see also *McInnis v. Town of Weston*, supra, 375 F.Sup.2d 85. Unlike its federal counterpart,

however, the Connecticut employment discrimination provisions contain no specific age limitation.

No actionable ADEA claim pursuant to § 46a-58(a)

General Statutes § 46a-58 (a) provides in relevant part that “[i]t 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.”<sup>9</sup> In *Trimachi v. Connecticut Workers Compensation Committee* (sic), 2000 WL 872451, \*7 (Conn. Super), the Superior Court reiterated the legal tenet long espoused in commission administrative decisions that General Statutes § 46a-58(a) expressly converts a violation of federal antidiscrimination laws into a violation of Connecticut antidiscrimination laws. See, e.g., *Commission on Human Rights & Opportunities ex rel. Dexter v. Connecticut Dept. of Correction*, 2005 WL 4828672 (CHRO No. 0320165, August 31, 2005); *Commission on Human Rights & Opportunities ex rel. Scarfo v. Hamilton Sundstrand Corp.*, 2000 WL 35457586 (CHRO No. 9610577, September 27, 2000). Thus, for example, this tribunal has jurisdiction to adjudicate a Title VII claim provided it is raised under the aegis of § 46a-58 (a).

Because § 46a-58 (a) does not include age in its enumeration of protected classes, the commission lacks jurisdiction over the ADEA claim. *Poeta-Tisi v. Griffin Hospital*, 2006 WL 1494078, \*8 (Conn. Super.); *Commission on Human Rights & Opportunities ex rel. Ramseur v. Colonial Chimney and Masonry, Inc.*, 2005 WL 4828677 (CHRO No. 0440130, November 28, 2005). See also *Commission on Human Rights & Opportunities ex rel. Crebase v. Procter & Gamble Pharmaceuticals, Inc.*, 2006 WL 4844064 (CHRO No. 0330171, July

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<sup>9</sup> Notably absent from this list are otherwise protected classifications such as age, sexual orientation, learning disability and mental disability.

12, 2006) (federal action predicated upon age and mental disability cannot be adjudicated through § 46a-58 (a) because age and mental disability are not included as protected classes under that statute); *Commission on Human Rights & Opportunities ex rel. Kennedy v. Eastern Connecticut State University*, 2004 WL 5380913 (CHRO No. 0140203, December 27, 2004) (same re learning disability). I have no jurisdiction over—and I therefore dismiss—the complainant’s ADEA claim.

*Disparate treatment analysis—mixed motive*

Claims of disparate treatment brought under CFEPA, like those under federal anti-discrimination statutes, can be analyzed as either “pretext” cases or “mixed motive” cases. *Rose v. New York City*, supra, 257 F.3d 161; *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 105-06 (1996); *Denault v. Connecticut General Life Insurance Company*, 1999 WL 549454, \*4 (Conn. Super.). The pretext model relies upon the familiar burden shifting framework first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and refined thereafter in cases such as *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In a mixed motive case, the tribunal applies the paradigm established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The facts of this case warrant use of the mixed motive analysis.

As the nomenclature “mixed motive” implies, an employer may have more than one reason for its action—that is, it may be motivated by both legitimate and illegitimate reasons. To succeed in a mixed motive case, the employee must first establish by a preponderance of the evidence that his membership in a protected class<sup>10</sup> was a motivating or substantial factor in the employment

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<sup>10</sup> If this were an actionable ADEA case, the complainant would be protected because he is over forty years old. He is certainly protected by CFEPA, where there is no age

decision. If the employee successfully establishes that an impermissible criterion was a substantial or motivating factor (but not necessarily the sole or even principal factor), the burden shifts to the employer to prove that it would have made the same decision absent the complainant's protected class status. *Price Waterhouse v. Hopkins*, supra, 490 U.S. 247, 258 (Title VII action); *Raskin v. The Wyatt Company*, 125 F.3d 55, 60 (2<sup>nd</sup> Cir. 1997) (ADEA action); *Levy v. Commission*, supra, 236 Conn. 106 (CFEPA action re alleged disability discrimination).

The employee's burden in a mixed motive case is heavier than the de minimis showing needed for a prima facie case under the inference-based *McDonnell Douglas* approach. *Raskin v. Wyatt Co.*, supra, 125 F.3d 60. Although the mixed motive approach has often been referred to with the misleading label of "direct evidence" analysis, direct evidence (in the literal sense) of discrimination, such as "I fired him because he was too old," will be rare. *Ostrowski v. Atlantic Mutual Insurance Companies*, 968 F.2d 171, 181 (2<sup>nd</sup> Cir. 1992); see also *Henry v. Jones*, 2007 WL 3230407, \*6 (7<sup>th</sup> Cir. 2007) (improbable that an employer would admit, "You're too old to work here").

The United States Supreme Court has recently confirmed that the complainant may satisfy his burden with either direct or circumstantial evidence that his age was a motivating or substantial factor in the respondent's decision. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-101 (2003); see also *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1186 (2<sup>nd</sup> Cir.), cert. denied, 508 U.S. 826 (1992); *Department of Transportation v. Commission on Human Rights & Opportunities*, 272 Conn. 457, 467-68 n.15 (2005); *Levy v. Commission*, supra, 236 Conn. 104 n.16. Thus, an employee only needs to adduce evidence "that may be viewed as directly reflecting the alleged discriminatory attitude." (Emphasis in original; citations and internal quotation marks omitted.) *Raskin v.*

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threshold to qualify for protected status, so long as his age is a basis for his termination.



*Wyatt Co.*, supra, 125 F.3d, 60-61; *Shah v. James P. Purcell Associates, Inc.*, 2007 WL 1630311, \*4 (D.Conn.).

Both the Second Circuit Court of Appeals and the federal District Court of Connecticut emphasize that “to warrant a mixed-motive burden shift, the [complainant] must be able to produce [whether by direct or circumstantial evidence, or both] a ‘smoking gun’ or at least a ‘thick cloud of smoke’ to support his allegations of discriminatory treatment.” *Raskin v. Wyatt Co.*, supra, 125 F.3d 60-61; *Ostrowski v. Atlantic Mutual*, supra, 968 F.2d 181; *Shah v. James P. Purcell*, supra, 2007 WL 1630311, \*4. As in *Ostrowski*, the smoke may arise from “policy documents or statements of a person involved in the decisionmaking process that reflect a discriminatory . . . animus of the type complained of in the suit.” *Ostrowski v. Atlantic Mutual*, supra, 182; see also *Denault v. Connecticut General Life Insurance Co.*, 1999 WL 549454, \*5 (Conn. Super.).

I need not belabor either the fine distinctions between direct and circumstantial evidence in theory, or the sufficiency of any circumstantial evidence before me in fact, because the complainant points to Groman’s statement as direct, inculpatory evidence that the complainant’s age was a significant factor behind the determination to lay off the complainant rather than another employee. My analysis must, at least initially, focus on this alleged statement, as the complainant’s success depends entirely upon the verbal exchange the complainant had with Groman on the day of his termination.

The complainant testified convincingly that, as he and Groman were outside of Groman’s building about to walk to the human resources office on the morning of his termination, he asked if he was being terminated because of his age. Groman, according to the complainant, succinctly replied, “Yes. I keep the younger people.” Groman, in turn, vehemently denies making this comment. No witnesses corroborated either version.

As the Second Circuit has stated in an ADEA case, “Since the [employer] will rarely admit to having said or done what is alleged, and since third-party witnesses are by no means always available, the issue frequently becomes one of assessing the credibility of the parties.” *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 57 (2<sup>nd</sup> Cir. 1998). Resolution of this dispute, therefore, depends on an assessment of the credibility of the complainant and Groman and, to a significant extent, dictates the outcome of this case, for if one believes the complainant’s testimony, the respondent may not only be enshrouded in a thick cloud of smoke, but may be caught holding the gun itself.

The credibility of witnesses is a matter within the province of the administrative agency. *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 347 n. 16 (2000); *Elf v. Department of Public Health*, 66 Conn. App. 410, 422 (2001). The hearing officer has the prerogative to assess the credibility of witnesses and believe or disbelieve any evidence presented. *Levy v. Commission on Human Rights & Opportunities*, 35 Conn. App. 474, 489, aff'd, 236 Conn. 96 (1996).

The fact finder assesses credibility “not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude . . . . [The fact finder has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom . . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record.” *Shelton v. Statewide Grievance Committee*, 277 Conn. 99, 111 (2006); *Hutton v. Commissioner of Correction*, 102 Conn. App. 845, 853 (2007).

This tribunal is not bound by or required to credit the testimony of Groman over that of Szydlo, or vice versa. The record reveals that the two hold widely disparate views on what was said on both January 2 and January 3, and, based

on my firsthand observation of the witnesses, and my knowledge of other pertinent circumstances, I am entitled to believe or disbelieve either witness, and draw appropriate inferences.

The complainant related a detailed account of the two conversations. His clear memory in general and his specific recall of minutiae (e.g., the handshakes as he said goodbye, Groman's advice that the complainant should do a better job keeping his machines clean, the precise locale where Groman made his discriminatory comment) make him more believable than others (such as Groman, Karolak and Jurczewski) plagued with memory lapses during their testimony. His recollection of Groman's offer to terminate Sam Manivong, for example, is believable simply because it is too bizarre to be fabricated. His consistently straightforward, cooperative and positive demeanor (albeit hampered at times by language barriers) indeed shows him to be a credible witness.

The respondent offers several reasons why the complainant should not be believed, notably his failure to challenge the termination along with his failure to tell Foley, Jurczewski, Karolak, and his co-workers about Groman's comment. Certainly such inaction on the complainant's part gives pause to this tribunal. It is, after all, logical to expect a suddenly terminated employee to protest his layoff and to share his thoughts and descriptions of the event with those close to him. He explained that he said nothing to his superiors because he assumed they knew; his shock and surprise may have contributed to his reticence. He did, however, tell his wife and his friend Tom Blasiak, a former EDAC employee. Any problems with his veracity are insignificant when compared to Groman's.

Unlike the complainant, Groman demonstrated a faulty (or selective) memory for details. His testimony was marked by the inability to recall pertinent events and conversations, such as his failure to recall why, when, and at whose

request he prepared a critical memorandum describing the incidents leading up to the complainant's termination. (See, e.g., Groman, Tr. 459 ff., 534-37.)

Groman was an evasive and uncooperative witness, as exemplified by the following colloquies:

Q: And did you have a conversation with [the complainant] as to why he wasn't going to be working that day?

A: No.

Q: No. He did not ask you that day why he was being laid off?

A: No.

\* \* \*

Q: And at the fact finding hearing, page 53 of the transcript [i.e., Ex. C-5], you were asked by the fact finder if you could read paragraph number 10 [of the complaint], do you recall that?

A: I don't recall that, no.

Q: Okay. And you read paragraph number 10, which is before you now, [the complainant says] on or about January 4<sup>th</sup>, 2005 I went to Mr. Groman's office, do you see that?

A: Yep.

Q: Okay.

[Here, the referee shows page 53 to the witness.]

Q: When I asked you if you had a conversation with Mr. Szydlo on January 4<sup>th</sup> and you said no, that wasn't correct, was it?

A: It entailed yes.

Q: What?

A: Well, he asked me, [am I] getting laid off, I said yes, that's not a conversation.

Q: That's not a conversation?

A: All I said was yes.

Q: Okay. Your definition of conversation isn't somebody asks you a question and you respond, is that not your definition?

\* \* \*

Q: So it's not – you didn't have a conversation?

A: No.

(Tr. 570-573)

Q: And so between 2002 and 2004 how many employees did you lay off that were over 40 in your department?

A: You've got the papers.

(Tr. 411)

Q: Was Adam working on the same five axis machine [as Krajewski]?

A: Two people can't work on the same machine.

Q: Okay.

A: He was working on an identical machine that was right next to him.

(Tr. 433)

Internal inconsistencies in his testimony, as well as inconsistencies between his testimony and that of others, also damage his credibility. He emphasized that while he was to rely on a list generated by the results of the efficiency report, he deemed the underlying report to be flawed in order to justify his abandonment of the list. In the meantime, others, including his superiors Melluzzo and Karolak, emphasized the importance of the list, noting it was the primary factor—a measurable, objective one—in determining the layoffs. Even at the time of the public hearing, Melluzzo believed the efficiency report led to the layoffs.

Although Groman eschewed the list in order to save Ogrodnik, he did not hesitate to claim that the complainant had a low efficiency rating for the past year and that Krajewski had scored well in only four months on the job. He relied upon the objective list when it suited him; otherwise, he readily admitted his decision was almost entirely subjective, with no reference to the efficiency

report or, for that matter, the personnel files and performance evaluations of the various employees.

In their first of two conversations, Groman initially told the complainant he was being terminated to save the company money. Once Karolak corrected Groman's impression, Groman offered no other reason for the layoff. He claimed he did not tell the complainant the allegedly "true" reason—performance problems—in order to spare the complainant's feelings and avoid confrontation. Likewise, Groman testified that his offer to terminate Manivong instead was made simply to appease the complainant and end the conversation. (See FF #31, n.7.) Such empathy rings false in light of Groman's demeanor on the stand—he does not present himself as someone who would be intimidated by a subordinate employee.

The complainant and the commission also urge that I disbelieve Groman as a sanction for his—and, in general, for the respondent's—lack of cooperation in and hindrance of the discovery process. While I am certainly authorized to draw adverse inferences against the uncooperative parties, I need not rely on such artificial, punitive constructs here, as ample reasons warrant acceptance of the complainant's version over Groman's.

On balance, I find the complainant to be a more credible witness than Groman, specifically regarding the conversations between the two on January 3 and January 4, 2005. I believe that Groman did respond to the complainant with words to the effect of "Yes. I keep the younger people."

Acceptance of Groman's statement as a proven fact does not, by itself, satisfy the complainant's initial burden of persuasion. To determine whether a comment is sufficiently probative of discriminatory intent, I must consider several factors, including, but not necessarily limited to: (1) the actual content of the remark (in this case, the direct statement revealing a discriminatory animus toward older employees); (2) the role of the speaker, Groman, in the decision-making process; (3) the timing of the remark in relation to the termination; and

(4) the context in which the remark was made—that is, whether it was related to the decision-making process. *Koestner v. Derby Cellular Products*, 2007 WL 2935486, \*3 (D.Conn.) In other words, “[t]he more a remark evinces a discriminatory state of mind, and the closer the remark’s relation to the allegedly discriminatory behavior, the more probative that remark will be . . . ,” whereas, “[t]he more remote and oblique the remarks are in relation to the employer’s adverse action, the less they prove that the action was motivated by discrimination. . . .” *Id.*, quoting *Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d 111, 115-16 (2<sup>nd</sup> Cir. 2007).

Discriminatory remarks, when uttered by a decision maker can establish a prima facie case under a mixed motive analysis; *Denault v. Connecticut General*, supra, 1999 WL 549454, \*5 n.1; whereas remarks by someone other than the decision maker may have little probative value. *Tomassi v. Insignia Financial Group*, supra, 478 F.3d 115. The respondent claims that the decision makers were Karolak and Melluzzo, not Groman. The factual record belies this assertion.

Melluzzo met with Karolak and Groman, and charged them with implementing the layoffs; he never saw the subsequent lists and had no further involvement in the process. Karolak prepared the initial list, basing his choices on the efficiency report—the primary tool endorsed by Melluzzo. After Groman received the list from Karolak, he made unilateral changes and returned the list to Karolak. Karolak, without any apparent questions, then gave the revised list to human resources director Foley, who processed the termination paperwork.

At times, Groman disclaimed any decision making authority, describing himself merely as the individual preparing a document for his supervisors’ approval. At other times, however, he asserted that he was indeed the decision maker (see, e.g., Groman, Tr. 577-86), his determinations at most subject only to tacit, pro forma approval. Such equivocation undermines his credibility in general, although this particular issue is easily resolved.

Karolak himself testified that he did not need to approve the changes:

Q: Did you have to approve the layoff of Adam?

A: No.

Q: Did you approve or have to approve the layoff of Sam?

A: No.

(Tr. 683) Even if Karolak did have to ‘authorize’ Groman’s choices, he implicitly did so when he received the list and, without any discussion, passed it on to Foley for processing.

Groman exercised unfettered discretion when he arbitrarily deviated from the proposed layoff list. No formal approval occurred before the layoffs were initiated. For all intents and purposes, Groman, with his unquestioned and “enormous influence in the decision-making process,” was the de facto decision maker. See *Rose v. New York City*, supra, 257 F.3d 162. Accordingly, his comments to the complainant were likewise the comments of the decision maker.

As a general rule, isolated and disconnected discriminatory remarks, even if made by a decision maker, are by themselves insufficient to raise an inference of discrimination. *Danzer v. Norden Systems*, supra, 151 F.3d 56; *Hayes v. Compass Group USA, Inc.*, 2004 WL 2471640, p. \*7 (D.Conn.). Either Groman’s comment must be accompanied by additional evidence of discrimination, or the complainant must demonstrate a nexus between the remarks and the adverse employment action that he suffered. *Koestner v. Derby Cellular*, supra, 2007 WL 2935486, \*2-3; *Schreiber v. Worldco, LLC*, 324 F.Sup.2d 512, 518 (S.D.N.Y.2004). Here, Groman’s comment is underscored, among other ways, by his choices for layoff—the two oldest employees on the second shift (Manivong and the complainant) and the only two in either shift over fifty years old (Kurylo and the complainant).



More important to this issue are the timing and the context of the discriminatory comment, which firmly establish the requisite nexus. Groman's comment occurred at the time of, and fully in the context of, the complainant's termination. Indeed, Groman made the comment in direct response to the complainant's query, as he and the complainant stood outside the building about to go to human resources for the discharge paperwork.

In sum, Groman was the de facto decision maker, his opinion holding full sway over Karolak, who accepted Groman's changes unquestioningly. Groman's comment constitutes direct, persuasive evidence that the complainant's age was in fact a motivating or substantial factor in deciding whether the complainant would remain or would fall victim to the workforce reduction. The complainant has satisfied his prima facie burden for a mixed motive case.<sup>11</sup>

Once the complainant has established his prima facie case, the respondent may avoid liability only by proving that it would have made the same decision even if it had not considered the impermissible factor. The respondent's burden is one of persuasion by a preponderance of the evidence, not merely one of production. *Rose v. New York City*, supra, 257 F.3d 161; *Raskin v. Wyatt Co.*, supra, 125 F.3d 60; *Levy v. Commission*, supra, 236 Conn. 106. Furthermore, the respondent may not prevail merely by demonstrating a legitimate reason for its decision; it must also demonstrate that it was motivated by such reason at the time the decision was made. *Levy v. Commission*, supra, 105.

The respondent offered evidence in support of both its decision to conduct a reduction in its workforce and its choice of those employees, particularly the complainant, who would be terminated. I find the evidence unpersuasive and must conclude that the respondent did not satisfy its burden.

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<sup>11</sup> The direct evidence that supports the complainant's mixed motive analysis would also significantly support his claim under the McDonnell Douglas approach.

The respondent first attempted to justify its actions by pointing to a significant downturn in business after the September 11, 2001 terrorist attacks on New York and Washington, D.C. Economic difficulties, it explained, necessitated a reduction in its work force (reduction in force, or, simply, RIF). Case law indeed recognizes that a restructuring or reduction in force “often is a legitimate reason for dismissing an employee.” (Emphasis added.) *Tarshis v. Riese Organization*, 211 F.3d 30 (2<sup>nd</sup> Cir. 2000); see also *Tutko v. James River Paper Co., Inc.*, 199 F.3d 1323 (2<sup>nd</sup> Cir. 1999); *Commission on Human Rights & Opportunities ex rel. Alexsavich v. United Technologies Corp.*, 2000 WL 35457594 (CHRO Nos. 9330373 / 9330374, October 4, 2000).

Case law has firmly established that “[i]t is not the function of a fact-finder to second-guess business decisions or to question a corporation’s means to achieve a legitimate business goal.” *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2<sup>nd</sup> Cir. 1988); *Commission ex rel. Alexsavich v. United Technologies*, supra, 2000 WL 35457594. The complainant, nonetheless, need not challenge the RIF itself to succeed, because “even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons.” *Fanning v. Gold Systems, Inc.*, 2007 WL 795098, \*4 n.3 (D.Conn.) (quoting *Maresco v. Evans Chemetics*, 964 F.2d 106, 111 (2<sup>nd</sup> Cir. 1992)); see also *Danzer v. Norden Systems*, 151 F.3d 50, 55 (2<sup>nd</sup> Cir. 1998) (decision should focus on whether the selection of employees to be terminated in a downsizing was influenced by an impermissible ground); *Gallo v. Prudential Residential Service*, 22 F.3d 1219, 1216 (2<sup>nd</sup> Cir. 1994) (while company is entitled to reduce its workforce and reorganize its operation to maximize efficiencies, it may not discharge an employee for a discriminatory reason); *Commission ex rel. Alexsavich v. United Technologies*, supra. Failure to examine the motives behind an employer’s specific choices for layoff “would effectively insulate an employer from the constraints of . . . antidiscrimination law during any structural reorganization or reduction in force.” *Montana v. First Federal*, supra, 869 F.2d 106.

Accordingly, I need not determine whether the RIF itself was a legitimate reason for the respondent's actions, and instead shift my attention to the more specific issue of whether the respondent, in the course of implementing its RIF, has met its burden of proving that it would have chosen the complainant even if it had not considered his age.

The respondent's decision to downsize the milling department led to the creation of a list of potential layoffs, ostensibly based on the 2004 efficiency report. Although the efficiency report ranked Ogradnik lowest among those on the second shift, making him, at least by the respondent's reasoning, the logical and obvious first choice for termination, Groman chose to terminate the complainant instead. The respondent's witnesses point varyingly to the efficiency report itself and to the complainant's alleged mediocre performance to justify the complainant's layoff. Problems abound with each of these arguments.

The respondent first emphasizes that the efficiency report was the primary (or, to use Melluzzo's term, "majority") criterion for establishing the layoff list. The efficiency report was a relatively new evaluative tool, and had not been used in prior RIFs. Use of the report was intended, for the most part, to make the RIF an objective process. Flawed or not, the 2004 report does rate the complainant second lowest among the milling department night shift operators, a fact upon which the respondent relies in its attempted justification for the complainant's termination.

Nonetheless, the respondent cannot rely on the efficiency report because Groman, the decision maker, perceived the report as significantly flawed. (The report's inaccuracy appears borne out, for example, by abundant testimony that Ogradnik was in all likelihood the best worker on the second shift, notwithstanding his 53% rating, lowest on the shift.) More important, as Groman himself recognized, if it was inaccurate for one, it was likely inaccurate for all. Groman ultimately ignored the report, consciously rejecting the objective

methodology of his superiors.<sup>12</sup> Yet the respondent still contends that the report justified its selections, citing the complainant's low efficiency rating, yet ignoring the fact that the complainant, no matter what his score, was not even placed on the original, report-based list.

The respondent also provided testimony in an attempt to show that the complainant's termination was predicated upon his declining work performance. Inadequate performance may be a legitimate basis for termination, and performance can be measured objectively. The respondent, however, adduced no documents of deficiencies in the complainant's performance, and no documents analyzing or comparing its employees' self-sufficiency—a trait Groman deemed important—or any other aspect of their work. In fact, the respondent's attempts to denigrate the complainant's performance run counter to the complainant's performance evaluations. See *Benichak v. Sikorsky Aircraft Corp.*, 2003 WL 23648092, \*6 (D.Conn.) Having ignored employees' personnel files and annual evaluations (as well the efficiency reports), Groman again eschewed any formal justification for his decision and relied solely on his personal knowledge of, or preference for, the milling department employees.<sup>13</sup>

The respondent has attempted to reduce this case to a simple matter of retaining Ogradnik, even at the expense of another employee. (See opening remarks of the respondent's attorney, Tr. 8-10; Groman, Tr. 631.) Groman and Jurczewski both considered Ogradnik to be the most qualified second-shift operator, followed, in order, by the complainant, Krajewski, Manivong, and Khantikone. (See FF #14.) That Groman's primary mission was the retention of Ogradnik is, therefore, unsurprising. Yet the respondent still offered no

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<sup>12</sup> Even at the time of the hearing, Melluzzo still had the incorrect impression that Groman had relied upon the efficiency report. (Melluzzo, Tr. 757)

<sup>13</sup> Curiously, and detrimental to the respondent's defense, the respondent never demonstrated how the complainant's termination was consistent with Melluzzo's goal of retaining "core competency" workers; in fact, the concept is never even defined, much less discussed.

convincing evidence why it instead chose the complainant rather than, say, Krajewski, Manivong (whose selection was an afterthought), or even someone in the day shift.<sup>14</sup>

Krajewski, a new employee hired only four or five months before the layoffs, was well-liked, exuberant, and hard-working, and only thirty years old. The respondent claims that Krajewski was not laid off because he had a higher efficiency rating than the complainant, but Groman not only ignored the efficiency report for the purpose of saving Ogradnik, but, as noted above, indicated that if the report were deficient for one, it was deficient for all. Any reliance on the report, therefore, would be disingenuous. Furthermore, at the time of the layoffs, while both Groman and Jurczewski were please with Krajewski's work ethic, they considered the complainant to be a better operator. By saving Krajewski, rather than the complainant, Groman arbitrarily chose to ignore this commonplace perception.

Manivong, on the other hand, was the second oldest operator on the second shift, six years younger than the complainant. Like the complainant, he was not on the original layoff list prepared by Karolak. Although Manivong scored slightly higher than the complainant on the 2004 efficiency report, Groman and Jurczewski both considered the complainant a better operator. Given Groman's goal of terminating another employee in order to save Ogradnik, and given his rejection of the efficiency report, Manivong alone, rather than the complainant, would appear to have been the more logical choice from the start.

Groman's January 3, 2005 offer to terminate Manivong instead of the complainant stands out as one of the more puzzling occurrences in the layoff process, and underscores not only Groman's unfettered decision making

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<sup>14</sup> The respondent has offered no evidence that its choices could not cross into different shifts or departments. When Groman decided he wanted to protect Arcelaschi, his relative, from termination, he replaced him on the list with Greg Aube from the assembly department.

powers but also the caprice with which he wielded those powers. Even more egregious was Groman's ultimate decision to terminate both employees in lieu of Ogrodnik, a decision that, on this record, was totally unjustified and unnecessary.

Moreover, even if Groman's retention of Arcelaschi (his relative) at the expense of Aube (see FFs #24 and #26) were not by age discrimination, it certainly underscores the fact that Groman had no hesitation about making unilateral changes that suited him, without regard for the opinions of others. Moreover, this substitution involved someone outside the milling department, leaving one wondering not only what authority allowed Groman to do this, but also what else he might have done to avoid terminating Ogrodnik or the complainant. The unusual handling of the Aube situation also weakens Groman's credibility and sheds further doubt on the overall layoff process.

Groman's choices were further compromised by his failure to follow the normal protocol. See, e.g., *Choate v. Transport Logistics*, 234 F.Supp.2d 125, 132 (D.Conn. 2002). In this RIF situation, he should have discussed the layoffs with the head of human resources, Carol Foley. Even Foley could not explain why this requisite step did not occur.

Finally, subjective evaluations are, by themselves, potentially suspect, because they may mask illegal discrimination. *Knight v. Nassau County Civil Service Commission*, 649 F.2d 157, 161 (2<sup>nd</sup> Cir.), cert. denied, 454 U.S. 818 (1981). Nothing in the federal or Connecticut anti-discrimination laws, however, proscribes the use of subjective criteria, as many desirable traits and skills cannot be measured quantitatively. See, e.g., *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 104 (2<sup>nd</sup> Cir. 2001); *Robertson v. Sikorsky Aircraft Corporation*, 2000 WL 33381019, \*3-4 (D.Conn.). Courts, in fact, may show particular deference to subjective evaluations for supervisory or professional positions or positions requiring public interaction; *Robertson v. Sikorsky*, supra, \*3-4; but those are not the types of positions at issue here.

Even assuming that subjective evaluation is valid in this instance, such subjectivity must be “honest.” *Byrnie v. Town of Cromwell*, supra, 105. That is, “while the business judgment rule protects the sincere employer against second-guessing of the reasonableness of its judgments, it does not protect the employer against attacks on its credibility.” (Citations omitted; emphasis added.) *Id.* Groman’s questionable credibility casts a strong shadow over the legitimacy of the respondent’s defense, just as it did over his denial of key portions of his conversations with the complainant.

While the record contains some plausible, nondiscriminatory reasons that might have motivated the respondent to choose the complainant, rather than others, for its layoff, the respondent has not conclusively demonstrated that it would have terminated him if his age had not been a factor. Unconvincing, inconsistent and sometimes unbelievable testimony leaves me in a quagmire of weak and conflicting arguments that ultimately lead me to the conclusion that the respondent failed to satisfy its burden of proof under the mixed motive analysis.

### Damages

When the presiding referee determines that unlawful discrimination has occurred, he is authorized to award relief (see General Statutes §46a-86), the goal of which is to restore the employee to the status he would have enjoyed but for his unlawful termination. *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 144 (2<sup>nd</sup> Cir. 1993), cert. denied, 510 U.S. 1164 (1994); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 166 (2<sup>nd</sup> Cir. 1998); *Worthington v. City of New Haven*, 1999 WL 958627 \*14 (D.Conn. 1999).

General Statutes § 46a-86 (b) specifically authorizes an award of back pay for lost wages. Back pay awards may include commissions, merit increases, and fringe benefits, so long as the complainant can prove, rather than merely speculate, that he would have earned these absent the discriminatory act. *Equal Employment Opportunity Commission v. Joint Apprenticeship Committee*

of the Joint Industry Board of the Electrical Industry, 186 F.3d 110, 124 (2<sup>nd</sup> Cir. 1999); *Saulpaugh v. Monroe Community Hospital*, supra, 4 F.3d 145. Back pay awards run from the date of termination to the date of judgment; *Kirsch v. Fleet Street*, supra, 148 F.3d 167; but may be tolled earlier if the complainant assumes a new position with equal or higher salary, or under other circumstances such as retirement or cessation of job-seeking. *Id.*, 168; *Nordquist v. Uddeholm Corp.*, 615 F.Sup. 1191, 1203-04 (D.Conn. 1985)

Because the EDAC position historically included varying accrual of overtime hours, it is difficult to project what the complainant might have earned in subsequent years had he not been terminated. (I note, for example, that the complainant's earned income in 2001 was more than \$20,000 higher than his 2002 income, weakening any argument that the complainant's income rose consistently each year.) Furthermore, the complainant's post-hearing brief contains calculations that are unclear and, in some instances, internally inconsistent. Therefore, I will use his 2004 salary, \$75,229.78 (see FF #40), as the basis for my calculations.

I will not project the three percent annual increments (see FF #39) into the calculations because they were merit-based and thus not guaranteed. See *Commission on Human Rights & Opportunities ex rel. Malizia v. Thames Talent, Ltd.*, 2000 WL 35457573 (CHRO No. 9820039, June 30, 2000), appeal dismissed sub nom. *Thames Talent v. Commission on Human Rights & Opportunities*, 2001 WL 1132654 (Conn. Super.), aff'd, 265 Conn. 127 (2003). Moreover, the complainant did not include these salary increases in the calculations set forth in his post-hearing brief.

In 2005, the complainant earned the following:

182.88	[earnings for one day of work at EDAC, 1/3/05]
1719.20	[two weeks severance pay]
171.92	[reimbursement for one unused vacation day]
7392.00	[unemployment compensation]
<u>48981.22</u>	<u>[earnings at A-1]</u>
58447.22	[TOTAL 2005 EARNINGS]



If the complainant were entitled to back pay for 2005 in the amount of \$75,229.78, that figure must be offset by \$58,447.22, for a balance of \$16,782.56.

The complainant has provided insufficient evidence to support a precise award for 2006. I am aware of neither the exact date he changed jobs from A-1 to Volvo, nor the exact date his Volvo hourly wage went from \$20 to \$21. Thus, I cannot make the appropriate comparisons with the EDAC salary for any specific portion of that calendar year and will instead look at 2006 in its entirety. With the complainant's total earnings of \$72,332.52 (see FF #47) compared with the \$75,229.78 he would have earned at EDAC (without the merit increment), the complainant is entitled to back pay for 2006 in the amount of \$2907.26.

The complainant submitted even less evidence to support its damage claim beyond 2006. His earnings statement for the two-week period ending February 3, 2007 indicates that he earned \$2982.53: \$1680 in regular pay, \$913.50 in overtime pay, and \$389.03 for "miscellaneous." (See FF #48 and Ex. C-13.) The record contains no explanation of this third category, but it is obviously not a one-time occurrence, as the earnings statement itself indicates a higher figure (\$1117.47) as "year-to-date" miscellaneous payments. Absent any evidence or argument to the contrary, I will assume the complainant's bi-weekly payment to be representative of his 2007 earnings at Volvo.

With a consistent bi-weekly salary of \$2982.53, extrapolation of the complainant's earnings for 2007 up until the date of this decision would yield a total of \$68,598.19, assuming no salary increases. Using the aforementioned figures, the complainant would have earned \$66,549.19 at EDAC for the same forty-six week period, likewise assuming no salary increases. It is evident that

by 2007 the complainant's salary had exceeded what he would have earned with EDAC.<sup>15</sup> Accordingly, I award no back pay for 2007.

The complainant seeks an award of front pay. Although General Statutes § 46a-86 does not explicitly provide for front pay awards, the courts and this tribunal have recognized that front pay may be appropriate when reinstatement is not an available remedy and the employee is still unemployed or undercompensated compared to what he would have earned but for his termination. *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1182 (2<sup>nd</sup> Cir. 1996); *Worthington v. City of New Haven*, supra, 1999 WL 958627 \*15; *State of Connecticut v. Commission on Human Rights and Opportunities*, 211 Conn. 464, 478 (1989). Here, no front pay is warranted, as the scant evidence shows that by 2007 the complainant appeared to be earning more than if he had remained at EDAC. For the same reasons militating against back pay for 2007, I decline to award front pay.

Awarding pre-judgment interest is within the discretion of the court and of this tribunal and should be awarded to restore the complainant to the economic position he would have been in but for his discharge. *Gierlinger v. Gleason*, 160 F.3d 858, 873 (2<sup>nd</sup> Cir. 1998); *Worthington v. City of New Haven*, supra, 1999 WL 958627 \*17. In fact, according to the Second Circuit, it is "ordinarily an abuse of discretion not to include pre-judgment interest on a back pay award." *Saulpaugh v. Monroe Community Hospital*, supra, 4 F.3d 145.

This tribunal, like state and federal courts, has the discretion to choose a prejudgment interest calculation designed to make the complainant whole. *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, Docket No. CV92-520590S, Superior Court, judicial district of Hartford/New Britain at Hartford, p. 21 (January 27, 1994, 10 Conn. L. Rptr. 599). An

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<sup>15</sup> Viewing this change from a full year's perspective, if the complainant's biweekly earnings in 2007 were projected for the entire fifty-two weeks, instead of forty-six, they would yield \$77,545.78, a higher annual earning than the complainant would have received from EDAC (\$75,229.78), assuming no salary increases in either position.

appropriate rate of interest, used in other decisions of the commission, is ten percent. See General Statutes § 37-3a; *Commission ex rel. Malizia v. Thames Talent*, supra, 2000 WL 35457573 (awarding prejudgment interest at the rate of ten percent); *Silhouette Optical v. Commission*, supra, 5, 11 (affirming an award of prejudgment interest at the rate of ten percent). Furthermore, the interest should be compounded, with interest accruing in one year bearing annual interest thereafter. *Saulpaugh v. Monroe Community Hospital*, supra, 4 F.3d 145; *Worthington v. City of New Haven*, supra, 1999 WL 958627, \*17; *Silhouette Optical v. Commission*, supra, 21-22.

The complainant has a duty to make reasonable efforts to mitigate his damages by seeking alternative employment after his discharge. *Reed v. A.W. Lawrence & Co.*, supra, 95 F.3d 1182; see General Statutes § 46a-86 (b). "The goal of mitigation is to prevent the [complainant] from remaining idle and doing nothing." *Raimondo v. Amax, Inc.* 843 F.Sup. 806, 809 (D.Conn. 1994). The respondent, however, bears the burden of proving that the complainant failed to make reasonable efforts to mitigate by establishing (1) that suitable employment existed, and (2) that the complainant did not make reasonable efforts to obtain such employment. *Dailey v. Societe Generale*, 108 F.3d 451, 456 (2<sup>nd</sup> Cir. 1997). The respondent also argues that the complainant's relative inaction between his termination and his new employment almost five months later militates against any damage award for that time.

Remaining at home for several months after an unexpected end to more than twenty years of employment is not surprising. As the complainant credibly testified, the trauma of his discharge sufficiently depressed him so that he was not ready to face the vicissitudes of job-hunting for several months; he should not be penalized for his inaction. See *Maturo v. National Graphics, Inc.*, 722 F.Sup. 916, 926 (D.Conn. 1989); *Commission ex rel. Malizia v. Thames Talent*, supra, 2000 WL 35457573. When he finally began seeking new employment, he focused only on positions consonant with his particular skills, background and experience—a permissible limitation under applicable case law. See, e.g.,

*Cendant Corporation v. Commissioner, Department of Labor*, 2004 WL 574880, \*14 (Conn. Super). Under the circumstances of this case, I find that the complainant did use reasonable diligence to mitigate his damages.

### **Final decision and order**

1. The respondent shall pay to the complainant back pay in the amount of \$19,689.82, in accordance with the conclusions and calculations above.
2. Pursuant to General Statutes § 37-3a, the respondent shall pay to the complainant pre-judgment interest on the damages award at the rate of ten percent, compounded annually, from the date of his termination to the date of this decision.
3. Pursuant to General Statutes § 37-3a, the respondent shall pay post-judgment interest on the damages award (or any balance thereof) at the rate of ten percent, compounded annually, from the date of this decision until the award is paid in full.
4. Pursuant to General Statutes § 46a-86 (b), the respondent shall pay to the commission \$7392, which represents the amount of unemployment compensation paid to the complainant. The commission shall then transfer said amount to the appropriate state agency.
5. The respondent shall cease and desist from all acts of discrimination prohibited by state or federal law, and shall provide a nondiscriminatory work environment pursuant to state and federal law.
6. The respondent shall post in prominent and accessible locations, visible to all employees and applicants for employment, such notices regarding statutory antidiscrimination provisions as the commission shall provide. The respondent shall post the notices within three working days of their receipt.

7. Should prospective employers seek references concerning the complainant, the respondent shall provide only the dates of his employment, the last position held, and the rate 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 providing such information, unless it is required by law to provide such information.

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Date

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David S. Knishkowsky  
Human Rights Referee