State of Connecticut

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May 21, 2014

Felix Planas
9 Beechwood Court
Newington, CT 06111

James P. Tracy, Personnel Admin.
Joint Committee of Legislative Management
Legislative Office Building
Hartford, CT 06106

Kimberly Jacobsen, Esq.
CHRO
25 Sigourney St.,?'h fl.
Hartford, CT 06106

RE: CHRO ex rei. Felix Planas v. Joint Committee on Legislative Management. Legislative Office Fiscal Analysis. CHRO No. 1210127.

FINAL DECISION

Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent by certified mail, return receipt requested to the complainant and the respondent. The return post office receipt shall be proof of such service.

Very Truly Yours,

Kimberly D. Morris
Secretary II

cc.

Ellen E. Bromley, Presiding Human Rights Referee
Paulette Annan, Esq.
Antoria D. Howard, Esq.

Certified No. 7011 2000 0002 0985 5592 (F. Planas)
Certified No. 7011 2000 0002 0985 5608 (J. Tracy/Joint Committee of Legislative Management)

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and

Opportunities, ex rei.
Felix Planas, Complainant CHRO No. 121012%

v.

Joint Committee on Legislative
Management, Legislative Office of
Fiscal Analysis, Respondent May 21,2014

Procedural History

On October 17, 2011 Felix Planas (Complainant) filed an Affidavit of Illegal Discriminatory Practice and a complaint (collectively, the complaint) with the Commission on Human Rights and Opportunities (the Commission or CHRO). Complainant, who suffers from a physical disability (moderately severe, bilateral sensorineural hearing loss), charged his former employer, the Joint Committee on Legislative Management (JCLM) and its Legislative Office of Fiscal Analysis (OFA) with discrimination in violation of Connecticut's Fair Employment Practices Act (CFEPA) (Conn. Gen. Stats. § 46a-51 et seq.) (JCLM and OFA may be referred to, individually and/or collectively, as Respondent)[1]. Specifically, Complainant alleged that Respondent violated Conn. Gen. Stats. §§ 46a-60(a) (1); 46a-60(a) (4); 46a-71 and 46a-58(a)[2] when

[1]The Joint Committee on Legislative Management (the Joint Committee), a bi-camera, bi-partisan committee of the General Assembly comprised of elected leadership, is responsible for conducting the business and fiscal affairs of Connecticut's legislative branch. The Joint Committee's Office of Legislative Management provides administrative and operational support to the General Assembly, employing, pursuant to statute, an Executive Director, Directors of OFA, OLA, and such other personnel as it requires to staff its offices. Professional staff of OFA perform research, assist and advise the legislative committees of the General Assembly by (1) reviewing department and program operating budget requests; (2) analyzing and helping to establish priorities with regard to capital programs; (3) checking executive revenue estimates for accuracy; (4) recommending potential untapped sources of revenue; (5) assisting in legislative hearings and helping to schedule and prepare the agenda of such hearings; (6) assisting in the development of means by which budgeted programs can be periodically reviewed; (7) preparing short analyses of the costs and long-range projections of executive programs and proposed agency regulations; (8) keeping track of federal aid programs to make sure that Connecticut is taking full advantage of opportunities for assistance; (9) reviewing, on a continuous basis, departmental budgets and programs; (10) analyzing and preparing critiques of the Governor's proposed budget; (11) studying, in depth, selected executive programs during the interim; (12) performing such other services in the field of finance as may be requested by the Joint Committee (13) preparing (as required by the legislature) fiscal notes upon favorably reported bills which require expenditure of state or municipal funds or affect state or municipal revenue; (14) preparing at the end of each fiscal year a compilation of all fiscal notes on legislation and agency regulations taking effect in the next f1scal year, including the total costs, savings and revenue effects estimated in such notes; and (15) every second and fourth year after the effective date of each enacted bill, review the fiscal note of such bill to compare it to the fiscal note prepared at the time such bill was enacted. Conn. Gen. Stat.§§ 2-71c (c); 2-71c (e).

[2] Conn. Gen. Stat. § 46a-58 (a) states 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 immuntties, secured or protected by the Consfltution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness or physical disability. Accordingly, a proven violation of the federal Americans with Disabilities Act, 42 U.S.C. 12101 et seq. (the ADA) based on physical disability would also be a violation of Connecticut law.

it: 1) discriminated against him by failing to participate in an interactive process to accommodate his physical disability; 2) discriminated against him - evaluating, disciplining, and ultimately terminating his employment – because of his disability; and 3) terminated his employment in retaliation for requesting reasonable accommodations and rejecting a non-equivalent job offer.

Pursuant to Public Act 11-237, after processing the complaint through its early legal intervention program (Ell) the Commission referred the case to public hearing in accordance with Connecticut General Statute§ 46a-84(a) and the Regulations of Connecticut State Agencies§ 46a-54-77 (d)(2)(C) (the Regulations). On August 9, 2012 the undersigned Human Rights Referee was assigned to act as presiding referee in the matter and proper notices for public hearing were issued to all parties.

On August 28, 2012, Respondent filed an answer to the complaint, and special defenses against it denying all discrimination charges and claiming that it had legitimate non-discriminatory reasons for its employment actions.

The matter was heard at the Office of Public Hearings (OPH), 25 Sigourney Street, Hartford, Connecticut, on April 29, April 30, May 1, May 3, and May 29, 2013. The parties filed post hearing briefs as per scheduling orders and the record closed on September 18, 2013.

Preliminary Statement

For the reasons set forth hereinafter, it is determined that Complainant and the Commission have proven that Respondent failed to reasonably accommodate Complainant's disability in violation of state law. Judgment on that count is entered in favor of Complainant.

The discrimination and retaliation claims are dismissed.

Findings of Fact (FF)

The following facts are derived from the pleadings, the exhibits admitted into evidence and the testimony of witnesses at the public hearing. References to exhibits are identified by introducing party: Complainant ("C") or Respondent ("R") followed by the applicable number. Record exhibits are identified as such. References to the hearing transcript are identified by "Tr." followed by page number(s). Only those facts deemed necessary to an understanding of the issues raised at the public hearing and discussed in this decision are set forth herein.

1. OFA is the non-partisan office of the Connecticut state legislature that provides support to the legislature's Appropriations and Finance Committees. OFA staff members are responsible, inter alia, for reviewing budget requests, analyzing the fiscal impact of proposed legislation, projecting cost and revenue trends, and preparing reports on financial matters related to the appropriations and bonding processes. They are also tasked with providing information and performing research at the request of individual legislators. (Tr. 12).
2. Complainant has a dual undergraduate degree in Economics and Operations Research and a Master's of Business Administration in finance and management information systems. (Tr. 9-10).
3. Based on his qualifications – his education and his past experience in the private sector (C-36) – Respondent hired Complainant to work in OFA's Revenue Unit as an Associate Legislative Analyst on or about February 24, 1992. (Tr. 11). In this capacity Complainant's responsibilities included analyzing the impact that tax policies would have on state and local government, summarizing his findings in written communications known as fiscal notes, and performing computer simulations, or computer modeling. To perform the functions of his job satisfactorily, Complainant needed to be able to understand and respond to oral communication. (Tr. 12-14).
4. Complainant obtained an audiology evaluation in 1999 after a co-worker told him that she was having trouble hearing her. (Tr. 46-48).
5. Complainant was diagnosed as having a moderately severe, bilateral hearing loss that impacts his ability to communicate and frequently causes him to have difficulty understanding and responding to interactions involving speech. (Tr.45-46, 53, 56,58-59,61,63, 87,207, 228; C-5, C-7, C-10).
6. In correspondence dated February 10, 1999 Audiologist Diantha Moore, referred Complainant to the Hartford Hospital Hearing Center to be fitted for hearing aids. She described the extent of his hearing loss as "very handicapping" and observed that this made Complainant largely dependent on lip-reading in normal conversation. (C-5).
7. Although his hearing aids maximize Complainant's hearing ability, they do not restore it to normal. Sounds from muffled voices, words spoken by someone whose mouth is covered, and similar impediments to vocal clarity are not correctly transmitted through [his] hearing aids. If someone were speaking to, but not facing him, Complainant might not be aware of the person's attempt to communicate with him. Notwithstanding his use of hearing aids, there are frequent occasions when Complainant is effectively unable to understand speech. (Tr. 46, 54-55, 56, 58).
8. The deterioration of Complainant's hearing is progressive. (Tr. 91).
9. In 1999 Respondent promoted Complainant to the position of Principal Legislative Analyst (principal analyst), but did not provide him with a written description of the job. (Tr. 8; C-28).
10. Complainant's responsibilities in his position as a principal analyst evolved over time. (Tr. 27).
11. 1n 2002, adding to his [then] existing duties, Respondent assigned Complainant responsibility for analyzing Department of Information

Technology (DOIT) budget requests, an assignment that included written and oral communication. (Tr. 16-17).

12. Respondent further increased Complainant's job responsibilities in 2003, adding analysis of Department of Transportation (DOT) budget requests, and again in 2004, when it made him responsible for analyzing the budget requests of a third agency, the Department of Motor Vehicles (DMV). Respondent also assigned him responsibility for coordinating meetings on behalf of the Appropriations Committee's transportation subcommittee. Each new assignment required additional writing in the form of budget summaries. Notwithstanding his new assignments, Complainant remained responsible for performing tax policy analysis and computer modeling. His collective responsibilities required written communication: fiscal notes; fiscal impact statements; budget summaries; bill summaries; and making revisions and edits to two publications, Respondent's Tax expenditure Report, and its Tax and budget data book. (Tr. 27).
13. Respondent provided Complainant with a copy of its Fiscal Note Policy Manual (the Manual). The Manual contained instructions for complying with formatting requirements for the presentation of fiscal notes. It did not require analysts to employ a specific style in writing the notes. Respondent made revisions to the Manual from time to time. These were handed out at office meetings. (Tr. 20-22).
14. Respondent did not provide Complainant with formal training or specific instructions as how to write fiscal notes or any other document. (Tr. 21).
15. Complainant's responsibilities required oral communication: telephone calls, face-to-face discussions, small group meetings and chance encounters with, inter alia, chairs, members and staffs of the legislative subcommittees for which he bore substantive responsibility, and executive branch personnel - legislative liaisons, in-house counsel, fiscal officers and others -employed by the agencies for whose budgets he bore analytic responsibility. (Tr. 23-25, 287-294, 304-315, 320-328, 331-344).
16. 1n late 2002 or early 2003 Complainant requested an accommodation for his disability. Respondent granted his request, and installed infrared receiver equipment to improve his hearing capabilities in the meeting rooms in which he worked. (Tr. 77, 199, 590-591; C-10).
17. Pursuant to the Connecticut General Assembly's Employee Handbook (the Employee Handbook), the job performance of each of Respondent's employees is appraised annually by the employee's immediate supervisor. (C-4).
18. Respondent's performance appraisal tool is designed to evaluate whether employees are meeting the expectations of the job to which they are assigned, to determine training and development needs, and to identify employees who have demonstrated levels of achievement that justify pay increases and/or promotions. (C-4, Section 9.1).
19. Since 2000, pursuant to this appraisal tool, Respondent has evaluated the performance of its principal analysts in eight (8) broad categories:
    - work skills;

- job knowledge;
- initiative;
- problem solving and decision making;
- professional and ethical conduct;
- interpersonal relationships;
- communication skills; and
- customer service and interoffice collaboration.

Within each of the above-referenced broad categories employee performance is broken down into varying numbers of functionally related sub-categories. Employee performance in each sub-category is graded as: O (outstanding); E (exceeds expectations); M (fully meets expectations); N (needs improvement); or U (unsatisfactory). (C-3)[3].

20. Respondent's appraisal tool also includes "comments" sections to enable supervisors to move beyond the confines of the tools standardized grading requirements in order to discuss specific employee strengths and/or weaknesses to provide encouragement, advice, constructive criticism, set goals, etc., on an individualized basis.
21. Respondent graded Complainant annually on his skills and performance in each of sixty-six (66) distinct sub-categories it deemed relevant to the position of principal analyst. (C-3).
22. From 1992 through early 2003 Dan Schnobrich (Schnobrich) was Complainant's supervisor. On each of the ten (10) performance appraisals Schnobrich performed, he rated Complainant as having overall met or exceeded expectations. (Tr. 69-70; C-3). Although Schnobrich regularly noted Complainant's weaknesses in the area of written communication, those weaknesses did not stand in the way of his promotions, first to the position of associate economic analyst 1996, and then in 1999 to the principal economic analyst position. (Tr. 274).
23. From the fall of 2003 until his termination in 2011, Complainant was supervised by OFA Revenue Unit Section Chief Robert Wysock (Wysock). (Tr. 7-8, 39).
24. In each of the seven years (2003 to 2009) in which Wysock rated Complainant's job performance he judged him as "fully meeting" Respondent's expectations in each broad category and every one of the sixty six (66) related sub-categories pertaining to performance as a principal analyst. There was no enumerated skill or task with respect to which Wysock rated Complainant's work as "unsatisfactory" or "in need of improvement." (Tr. 83, 403-405; 730-634; C-3).
25. Wysock's narrative observations in the comments' sections of each yearly evaluation indicated that Complainant's was performing adequately. (C-3).
26. On or about December, 2009 or January, 2010, Alan Calandro (Calandro) became the director of OFA. (Tr. 668).

[3] Over the years, Respondent's performance evaluation tool evolved to the current format, the use of which began in 2000. (Tr. 66-67; C-3).

27. 1n May, 2010, an employee of the state senate's Democratic caucus sent Calandro an email seeking information related to a Republican proposal to sell state-owned Bradley Airport. Calandro forwarded the email to Complainant and several other OFA employees, asking whether any of them had "heard about the Bradley sale issue?" (R-15, attachment 6).
28. Complainant sought responsive information from staff at DOT by forwarding the email as he had received it from Calandro, thereby including information identifying its origin and author, and asked: 1) whether the agency had taken a position on the issue, and 2) if selling it would have an impact on federal funding. (R-15, attachment 6).
29. Calandro considered the act of forwarding an email "from a Democratic legislator to an executive branch agency during a Republican administration[4]" (Respondent's Post-Hearing Brief, PFF #27)[5] to be a breach of Respondent's confidentiality policy for which Complainant's employment could have been terminated. (R-7; Tr. 365-368). At the time, however, Respondent's confidentiality policy essentially called for employees to use discretion in their communications. It did not address or prohibit the forwarding of emails[6]. (Tr. 97; R-41). Complainant remained in his job.
30. The incident, however, was not without consequences. In a letter to Complainant dated June 8, 2010, Calandro characterized Complainant's action in having forwarded the email chain as "a serious breech" (sicf of office policy and "another example of how [Complainant had] failed to meet office expectations on various levels." In the letter he informed Complainant that his supervisor (Wysock) would be developing a performance improvement plan (PIP) to address his job deficiencies in the following areas:
    - understanding the proper role of OFA;
    - satisfactory written communication;
    - satisfactory oral communication;
    - independent analysis;
    - discretion in dealing with people; and
    - accurate and reliable analysis. (C-22).
31. Complainant's receipt of a draft of the June 8[1]h letter, was the first indication he had that Calandro believed he was failing to meet job expectations. (Tr. 101).
32. The purpose behind every PIP is to help the employee who is subject thereto develop the skills needed to ensure the employee's continued employment by Respondent. (Tr. 466).

'Connecticut's governor is the head of the state's executive branch agencies. In 2010, the Governor of Connecticut was Jodi Rell, a Republican.

'Respondent did not claim that any substantive information contained in the email was confidential. Legislative proposals to explore selling Bradley were not new or unusual. Various proposals and the overall issue had been well-covered in the press for years.

[6]Respondent implemented a written policy specifically related to the forwarding of emails the following September. fTr. 98, C-13).

Respondent's spelling error is noteworthy for its occurrence within the context of its proffers of (some similarly inconsequential) examples of Complainant's deficiencies in written communication to support its contention that Complainant was unable to perform the essential functions of his position. (R-15).

33. In the PIP, dated July 20, 2010, Respondent cited performance deficiencies in:
    - written communication;
    - oral communication and listening skills;
    - organization and time management; and
    - customer service and managing stress.

    After stating that Complainant needed to improve his performance in these areas in order to successfully carry out the duties and responsibilities of his position, Respondent warned that if, at the end of the performance plan period (a date that it did not identify), Complainant's performance did not meet "the expectations required to carry out the duties and responsibilities of an analyst" he could be subject to serious consequences, up to and including termination." (Tr. 369; C-23).
34. James Tamburro (Tamburro) had been Respondent's Training and Staff Development Coordinator[8] for over a decade at the time Respondent placed Complainant on the PIP. (Tr. 457-458).
35. Tamburro's main function was developing and facilitating training programs. (Tr. 458).
36. Based on suggestions from Wysock and Calandro, Tamburro specifically identified a semester long college course in writing, shorter courses in communication skills and several internal training programs that he judged appropriate to help Complainant develop the skills needed to ensure his continued employment. (Tr. 108-110,466-470, 679).
37. Throughout the semester in which he was enrolled in the writing course, Complainant was required to meet weekly with Wysock in order to share information with, and to keep him informed of his academic progress. Under the PIP, Wysock was responsible for providing Complainant with weekly feedback on the status of his efforts to improve his performance in written communication. (Tr. 111-112).
38. Complainant received an A minus (A-) in the English/writing course chosen by Respondent as appropriate to address the "common deficiencies" in his written communication (thereby making the Dean's List at Capital Community College for the fall 2010 semester). He successfully completed the various other courses and programs that Respondent had required him to take under the PIP. (Tr. 401-402, 431; C-14).
39. By 2010, Complainant's hearing aids were ten (10) years old. He sensed that his hearing was deteriorating. After a June 24, 2010 audiological evaluation confirmed this, he attempted to 'fill the gap' by taking advantage of technological improvements and purchasing 'top of the line' hearing aids. Although his new hearing aids supplemented his existing hearing, they did not make up for its loss. (C-15; Tr. 91-92).
40. Complainant formally notified Respondent of his deteriorating hearing and disability status in a letter dated September 30, 2010 to [then] OLM Executive Director D'Ann Mazzocca (Mazzocca). He sent copies of the letter to

[8] On or about December, 2012, Respondent promoted Tamburro to the position of Human Resources Administrator. (Tr. 458).

Calandro, Wysock, Tamburro and James Tracy (Tracy), Respondent's [then] Personnel Administrator.[9] (Tr. 121; C-15).

41. Tracy served as Respondent's Personnel Administrator from 1978 through 1212. In that capacity he had long been responsible for handling requests for accommodations. (Tr. 584).
42. On or about October 4, 2010, at a meeting with Tracy, Calandro and Wysock, Complainant requested that Respondent provide him with accommodations to assist him in overcoming communication barriers related to his disability. Complainant's request was consistent with Respondent's requirement that he improve his skills in areas of performance weakness - oral communication, listening skills and customer service- it had identified in the PIP. (Tr. 123-124, 207; C-23).
43. At Tracy's request, Complainant memorialized the substance of the October 4th meeting in an email to its participants dated October 12, 2010. In it he reiterated his request that Respondent accommodate his disability by: 1) replacing the handset on his telephone with one that would interface with his new hearing aids; 2) repairing the infrared emitters in the public hearing rooms in which he staffed meetings so that when speakers used their microphones he would be able to hear what they were saying; 3) either purchasing a speech to text converter or a recording device, or by assigning someone to accompany him to meetings to help him capture the exact questions to which he would later need to respond, as well as the names of those asking the questions(Complainant's request for limited clerical assistance); and 4) informing legislators and members of their staffs that his hearing was limited, and educating them that in order to ensure effective interactions with him it was imperative that they obtain his full attention. In the email Complainant explained that although the requests addressed needs necessitated by his current level of hearing, its further deterioration could lead to his needing additional accommodations in the future. (Tr. 125; Tr. 200; C-16).
44. Unless doing so is financially prohibitive, it is Respondent's policy to provide accommodations to employees with disabilities. (Tr. 632).
45. Respondent provided Complainant with the telephone handset he had requested. (Tr. 136, 204).
46. Tracy did not consider Complainant's request that Respondent repair the infrared emitters a request for an accommodation. Nevertheless, he relayed the request to Respondent's facility engineer who assigned a maintenance department employee to check the emitters. Tracy testified that although he had been assured that the equipment was working, he had not followed up with Complainant for verification. (Tr. 636).
47. Respondent did not repair the infrared equipment. (Tr. 141).
48. 1n an email from Calandro to Complainant, dated November 23, 2010, Respondent approved Complainant's request for limited clerical assistance. Respondent notified Complainant that this accommodation would be implemented during the upcoming General Assembly session, beginning in mid-February 2010 and that it would provide the requested support by

'Tracy is currently OLM's Executive Director.

assigning "someone from the administrative staff" to accompany Complainant to meetings. (C-17). Immediately before the first meeting at which Complainant was to have received the above-described support, this accommodation was rescinded. In lieu thereof, Complainant's supervisor accompanied him to subcommittee meetings held during the session, thereby effectively relieving Complainant of important job responsibilities. (Tr. 137-141).

49. Respondent rejected Complainant's request that it inform all legislators and staff of his hearing disability because it did not think the request was appropriate. (Tr. 601, 639).
50. On or about November 4, 2010, Respondent offered Complainant the opportunity of substituting his budget-analysis-related job duties for functions needed to manage OFA's new database (the database management position). Respondent considered the duties associated with both assignments functions of the position of principal analyst. (Tr. 383-385; R-14; C-55).
51. 1n an email to Calandro dated December 21, 2010, Complainant declined Respondent's database management offer, but thanked Calandro for having agreed to provide the clerical assistance that Complainant believed would enable him to effectively perform relevant functions of his job during the upcoming legislative session.[10] (R-14).
52. By return email dated December 23, 2010, Calandro acknowledged receipt of Complainant's message and stated that he would "be following up with [Complainant] soon . . ." (Tr. 135, C-19).
53. Calandro did not follow up with Complainant about either the database management position or the accommodations he had requested. (Tr. 142).
54. Complainant next heard from the OFA director on April 20, 2011 when Calandro, along with Wysock presented him with a letter informing him that he was failing to meet the expectations Respondent had articulated in the PIP and that unless his performance improved "significantly" during the following two months, he would be recommended for termination. Accompanying the letter were documents Complainant had worked on or authored which, according to Respondent, were illustrative of the continued performance deficiencies that rendered him unable to meet Respondent's expectations in the area of written communication. (C-24).
55. Between November 4, 2010, the date on which Respondent had offered him the database management position, and April 20, 2011, the date on which it notified him that he was two months away from termination, neither Wysock nor Calandro had met with Complainant to discuss the apparent disconnect between his successful completion of the courses chosen by Respondent's training and staff development coordinator as appropriate to address the performance deficiencies identified in the PIP, and Respondent's unchanged assessment of his job performance. (Tr. 151).
56. Despite having committed to closely monitor Complainant's work, and meet with him to discuss his progress in the two months following April 20, 2011, Respondent did not meet with him to discuss its denial of three of the four

[1o]Complainant's thanks was premature. Ultimately, Respondent did not provide this accommodation. (see 1[44 above).

accommodations he had requested the previous fall or the existence and/or potential efficacy of others until June 14, 2011, one week before its pre-termination performance improvement deadline. (R-54). On that day, at a meeting at which Respondent's attorney was present, Respondent went through the motions of interacting with Complainant about alternatives to his eight month old request that it notify legislators about his disability. (Tr. 206-215).

57. On July 27, 2011, Respondent terminated Complainant's employment for having failed to demonstrate significant improvement in his job performance. (Tr. 761; R-22).
58. After losing his job, Complainant made diligent efforts to find, and was successful in securing new employment. He began working at the Connecticut Department of Motor Vehicles (DMV) on May 2, 2012. (Tr. 162-166; C-43; C-51).

DISCUSSION

A. Jurisdiction

Respondent contests jurisdiction on two grounds, asserting: 1) that the doctrine of sovereign immunity bars Complainant's ADA claim; and 2) that OPH is not empowered to adjudicate federal claims.

Sovereign Immunity

Although Connecticut recognizes the validity of the doctrine of sovereign immunity and has authorized a claims commissioner to hear and determine most claims against the state, the state legislature has explicitly waived the state's immunity from claims for which an administrative hearing procedure [has been] established by law. Conn. Gen. Stat. § 4-142 (3).[11] CHRO is the state administrative agency established by the legislature to investigate and adjudicate allegations of discriminatory practices. OPH employs three human rights referees, gubernatorial appointees who function independently from the Commission and are responsible for scheduling and conducting all phases of the public hearing process in contested discrimination cases under its jurisdiction. The state has specifically waived its immunity, exempting administrative hearings in OPH from claims of sovereign immunity. (See Chapter 814c of the General Statutes, in particular Conn. Gen. Stat. § 46a-84, which governs the Commission's public hearing procedure; Conn. Gen. Stat.§ 46a-100 which, in setting forth the process for removing discrimination claims against state agencies to Superior Court, tacitly

[11]Conn. Gen. Stat. § 4-142. Claims Commissioner. Excepted claims. There shall be a Claims Commissioner who shall hear and determine all claims against the state except: (1) Claims for the periodic payment of disability, pension, retirement or other employment benefits; (2) claims upon which suit otherwise is authorized by law including suits to recover similar relief arising from the same set of facts; (3) claims for which an administrative hearing procedure otherwise is established by law; (4) requests by political subdivisions of the state for the payment of grants in lieu of taxes; and (5) claims for the refund of taxes.

acknowledges the waiver of sovereign immunity,[12] and, generally, the Uniform Administrative Procedure Act, Conn. Gen. Stat.§ 4-166 et seq.).

Subject Matter Jurisdiction

Under 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 . . . physical disability . . ." (Conn. Gen. Stat. § 46a-60 (a) (1)).

Similarly, the ADA prohibits a "covered entity" from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (42 U.S.C. § 12112(a)).

Additionally, under CFEPA it is also a discriminatory practice for any person "to subject . . . 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, sexual orientation, blindness or physical disability." (Conn. Gen. Stat.§ 46a-58(a)).

In this case, in addition to charging Respondent with disability discrimination under the specific provisions of Conn. Gen. Stat. § 46a-60 (a) (1), Complainant claims that Respondent committed a discriminatory practice under Conn. Gen. Stat. § 46a-58(a) by violating a specific "law of the United States," the ADA.

Respondent contends that OPH lacks statutory authority to adjudicate federal ADA claims.

While there may be a distinction between Respondent's contention and the fact that pursuant to Conn. Gen. Stat. § 46a-58 (a), as supported by case law,[13] OPH has jurisdiction over ADA claims that. properly pleaded, have become violations of state law (emphasis added), for present purposes it is clear that a complainant may seek redress

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[12]Conn. Gen. Stat. § 46a-100. Discriminatory Practice: Cause of action upon release from commission. Any person who has timely filed a complaint with the Commission on Human Rights and Opportunities in accordance with section 46a-82 and who has obtained a release from the commission in accordance with section 46a-83a or 46a-101, may also bring an action in the superior court for the judicial district in which the discriminatory practice is alleged to have occurred or in which the respondent transacts business, except any action involving a state agency or official may be brought in the superior court for the judicial district of Hartford.

[13]In *Trimachi v. Connecticut Workers Compensation Committee* (sic), 2000 WL 872451, *7 (Conn. Super), the Connecticut 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 ref. Adam Szydlo v. EDAC Technologies Corporation,* 2007 WL 4623072 (CHRO No. 0510368, November 19, 2007); *Commission on Human Rights & Opportunities ex ref. Dexter v. Connecticut Dept. of Correction,* 2005 WL 4828672 (CHRO No. 0320165, August 31, 2005). Thus, for example, this tribunal has jurisdiction to adjudicate an ADA claim provided it is raised under the aegis of (and thus converted into a claim under) § 46a-58 (a).

at CHRO for the deprivation of a federal right due to a discriminatory practice prohibited by Conn. Gen. Stat. § 46a-58(a).

Although Respondent correctly observes that Conn. Gen. Stat. § 46a-58 (a) does not explicitly reference employment discrimination, and that employment claims brought under state law are specifically governed by Conn. Gen. Stat. § 46a-60, it offer offers no supporting authority for its conclusion that discrimination claims arising within the context of employment relationships fall exclusively within the purview of the latter statutory section. (Respondent's Post-Hearing Brief, p. 18).

The substantive provisions of the ADA and CFEPA relevant to the complaint are virtually indistinguishable, and it is clear that OPH has jurisdiction to hear and decide the case on the merits. Accordingly, as a practical matter, both Respondent's jurisdictional objections and Complainant's decision to state his claim in duplicate are based on statutory provisions that allow more generous damage awards for proven violations of Conn. Gen. Stat§ 46a-58 (a) than those authorized for violations of Conn. Gen. Stat. § 46a-60. Under the former statute, a successful complainant may recover emotional distress and attorney fees;[14] under the latter, neither is available.[15]

Conceptually, the question is whether a violation of a federal employment law undergoes a specific conversion and remains "a discriminatory employment practice" under Connecticut law, or a broad general conversion, assuming a new identity as "discriminatory practice" under our laws.

In enacting Conn. Gen. Stat. § 46a-86 (b) our state legislature specifically addressed employment discrimination and limited available damage awards for proven violations. In enacting a statute the legislature is presumed to have acted with knowledge of existing statutes and with an intent to create one consistent body of law. *Zachs v. Groppo,* 207 Conn. 683, 696 (1988); *Doe v. Institute of Living, Inc.,* 175 Conn. 49, 62 (1978). The legislature authorized broader damages upon findings of discriminatory practices prohibited by Conn. Gen. Stat. § 46a-58. See Conn. Gen. Stat. § 46a-86 (c).

In this case Complainant sought an award for, but did not prove emotional distress damages. Accordingly, I need not opine as to their availability.

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[14] oamages available for violations of Conn. Gen. Stat. § 46a-58(a)
Conn. Gen. Stat. § 46a-86 (c) provides, in relevant part, that "[i] n addition to any other action taken under this section, upon a finding of a discriminatory practice prohibited by section 46a-58 . . . the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, the expense incurred by the complainant for obtaining alternate housing or space, storage of goods and effects, moving costs and other costs actually incurred by the complainant as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs.

[15] oamages available for violations of Conn. Gen. Stat. § 46a-60
Conn. Gen. Stat. § 46a-86 (b) provides that "In addition to any other action taken under this section, 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."

B. Discriminatory Employment Practices

The ADA prohibits a covered employer from discriminating against an otherwise qualified individual "because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a).

Under CFEPA it is a prohibited practice for an employer to discharge, or otherwise discriminate against an individual in compensation or any other term, condition or privilege of employment because of said individual's physical disability, except in the case of a bona fide occupationalqualification or need. Conn. Gen. Stat. §46a-60 (a)(1).

It is well established that Connecticut's anti-discrimination laws are coextensive with the federal law on this issue and therefore, this matter will be analyzed pursuant to both prevailing Connecticut and federal law. See *Pik-Kwik Stores, Inc. v. Commission on Human Rights* & *Opportunities,* 170 Conn. 327, 331 (1976).

In this case Complainant has made three distinct claims under the ADA and CFEPA, alleging that Respondent discriminated against him by:

1. failing to reasonably accommodate his disability;
2. evaluating, disciplining and ultimately terminating his employment because of his disability; and
3. retaliating against him for requesting accommodations on account of his disability.

1. Failure to Reasonably Accommodate

The ADA's definition of unlawful discrimination includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability. The ADA explicitly allows a cause of action for failure to provide reasonable accommodations. 42 U.S.C. §12112(b)(5)(A); see also *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 396 (2002).

Although not explicitly set forth in CFEPA, the duty to provide reasonable accommodations is also well established in Connecticut law. In *Curry v. Allen* S. *Goodman, Inc.,* 286 Conn 390, 404 (2008), the Connecticut Supreme Court determined that the broad intent underlying CFEPA, "to stamp out discrimination on the basis of physical disability" favored "construing 46a-60(a)(1) to require employers to make a reasonable accommodation for an employee's disability." */d.,* at 415.

Within the context of discrimination law, an accommodation is some type of assistance that will permit an otherwise qualified employee to perform the essential elements of his job despite his disability. 42 U.S.C. §12111(8). Examples of reasonable accommodations include, inter alia, "acquisition of devices to assist the performance of job duties ... and training materials or policies." 42 U.S.C. §12111 (9)(8).

Prima Facie Case

To prove a claim for failure to provide a reasonable accommodation under either the ADA or CFEPA, a complainant must show that: (1) he is disabled as defined by the applicable statute; (2) he is able to perform his essential job duties with or without a reasonable accommodation; (3) the respondent was aware of his disability, and (4) the respondent failed to reasonably accommodate his disability. *Conte v. Board of Education,* judicial district of New Haven at New Haven, Docket No. CV-02-0466475 (2003 WL 21219371, 4) (May 15, 2003).

In this case it is undisputed that Complainant is disabled, that Respondent was aware of his disability, and that Complainant requested accommodations. (C-16). Respondent denies that Complainant was qualified to perform the essential functions of his job, either with without an accommodation, and claims to have terminated his employment for reasons unrelated to his disability. (Respondent's Post-Hearing Brief, p. 23).

Essential Functions

Neither the ADA nor CFEPA define the term "essential functions." However, regulations promulgated by the EEOC indicate that "essential functions" encompass "the fundamental job duties to be performed in the employment position." 29 CFR 1630.2(n) (1). Evidence of whether a particular function is essential includes, but is not limited to: 1) the employer's judgment; 2) the written job description (prepared before advertising or interviewing applicants); 3) the amount of time spent on the job performing the function; 4) the consequences of not requiring the incumbent to perform the function; 5) the actual work experience of present or past incumbents in the job; and/or the current work experience of incumbents in similar jobs. 29 CFR 1630.2(n) (3). "To avoid unfounded reliance on uninformed assumptions, the identification of the essential functions of a particular job requires a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice." *Brokowski v. ValleyCentra/Schoo/District,* 63 F.3d 131,140 (2d Cir.1995).

No Written Job Description Exists

Respondent purported to introduce a written job description in a two page proffer entitled "Principal Legislative Analyst." (R-2). The document references Respondent's pay plan and is supportive of, and applicable to a broad class of professional positions "related to the missions and functions" of OLM. Its sole specific reference to OFA employees describes their responsibilities as "budget review and analysis and committee staffing functions."

In a section captioned "examples of duties" the 'job description' lists twenty-two (22) types of functions for which employees within the covered class might be responsible, but no example is specifically identified as essential to a particular position in any of the three agencies under OLM's jurisdiction. (R-2). Similarly, Respondent's website lists of fifteen (15) examples of "the kinds of things" OFA does, but neither enumerates specific functions associated with the principal analyst position, nor distinguishes between its essential and marginal functions. [16]

[16] http://www.cga.ct.gov/ofa/add-faqs.asp

Complainant testified that Respondent had never provided him with a job description for his position and that his responsibilities were ever evolving. (Tr. 25-27).

Employer's Judgment- Annual Performance Evaluations

Respondent requires supervisory personnel to conduct annual reviews to evaluate the job performance of its employees and to determine whether each is meeting Respondent's expectations for the position he or she holds. (C-4 at 64).

Annual reviews for employees in principal analyst positions evaluate performance in eight (8) broad categories. (FF-19). Within each is a "statement of standard," pursuant to which Respondent appraises employee performance in a number of functionally related sub-categories, awarding each a grade of: **O** (outstanding); E (exceeds expectations); M (fully meets expectations); N (needs improvement); or U (unsatisfactory).

Within the broad category of communications skills, for example, the performance of a principal analyst is broken down and graded with respect to how well he or she:

- Understands written and oral communications and asks appropriate questions;
- Communicates in writing in an accurate, clear, concise and well-organized manner;
- Communicates orally in an accurate, clear, concise and well-organized manner;
- Communicates impartially and objectively;
- Listens to and considers different viewpoints and opinions;
- Makes organized, credible, informative and effective presentations;
- Keeps supervisor, co-workers and legislators informed of progress, possible problems and relevant decisions, events or changes; and
- Uses communication tools like the telephone and email effectively and courteously.

In "comments" sections relevant to each performance category Respondent's evaluation tool provides room for supervisors to move beyond the confines its standardized grading structure to discuss specific employee strengths and/or weaknesses, provide encouragement, advice, constructive criticism, set goals, etc., in individualized contexts.

Robert Wysock (Wysockwas Complainant's supervisor from early 2003 until his termination in July, 2011.[1] In this capacity he appraised Complainant's performance for

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[17] Complainant worked for Respondent from 1992 to 2011. Over the course of his nineteen (19) year tenure he worked under four supervisors. At the public hearing both parties offered testimony and evidence pertaining to general, as well as specific aspects of Complainant's job performance throughout the course of his career. While it may be worth noting that in early 2003, precipitated by a calculation error he had made, Complainant had been placed on a PIP, or mentioning that over the years his appraisals had cited other mistakes or performance weaknesses, in reviewing the record I found evidence and testimony offered with respect to events that took place prior to Wysock becoming Complainant's supervisor to be of little relevance to the considerations that determined this decision. Nevertheless, I note too that (as per his annual appraisals) there had never been a year in which Complainant's performance had not met Respondent's overall expectations for the position he held.

seven (7) consecutive years. As per its evaluation tool, Wysock was required to rate Complainant's performance in each of sixty-six (66) distinct functional sub-categories Respondent deems relevant to the position of principal analyst. In each and every instance, he rated Complainant's performance, at the least, as "fully meeting expectations."[18] From 2003 through 2009, Wysock failed to identify any weakness in any aspect of Complainant's performance of an evaluated function that he considered significant enough to warrant a grade of "needs improvement" or "unsatisfactory." (C-3).

Wysock's narrative observations in Complainant's yearly evaluations also spoke to adequate performance. In comments that were remarkably consistent, sometimes identical from one year to the next, he praised Complainant's technological expertise and his solid understanding of the substantive subject areas within his purview. In comments that bespeak, though unknowingly, a relationship between hearing loss and communication, Wysock also noted Complainant's relative weakness in areas involving communication, including written communication and offered suggestions as to how Complainant might address these. One of these included instructing Complainant to wear his hearing aids at all times. (C-3).

In sum, neither the ratings nor comments sections of Complainant's annual evaluations, including descriptions of weaknesses, problems and mistakes referenced by Wysock over the years, indicated that Respondent viewed any aspect of Complainant's performance as significantly problematic, much less as deficient to an extent that could jeopardize his continued employment. (C-4 at 64; C-3).

An employee need not perform at a superior level; he need only show that he "possesses the basic skills necessary for their performance of [the] job." *Kowalczyk, Lynn v. City of New Britain,* 9810482 (Connecticut Comm'n on Human Rights and Opportunities, 2002) (quoting *de Ia Cruz v. New York City Human Resources Admin.,* 82 F. 3d, 16, 20 (2d Cir. 1996)).

Employer's Judgment- Performance Improvement Plan

In 2010, Respondent did not use its standard tool to appraise Complainant's performance. Believing Complainant had violated Respondent's confidentiality policy by forwarding politically sensitive email to an executive agency, OFA's new director (Calandro) deemed the violation an example of many ways in which he claimed Complainant had been failing to meet Respondent's performance expectations for some time. (FF-29). In a letter dated June 8, 2010, he notified Complainant that Wysock would be developing a PIP to address improvements that Respondent required him to make in: understanding the proper role of OFA; written and oral communication; accurate, reliable and independent analysis; and discretion in dealing with people. (C-2). On July 20, 2010, Respondent placed Complainant on a PIP and warned him therein that unless he were able to correct deficiencies in specifically enumerated functional

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[18]0ver the years, there had also been instances in which Wysock categorized Complainant"s performance as ""exceeding expectations."

areas and demonstrate significant improvement in overall performance he risked termination. (C-23).

Calandro had never directly supervised complainant. His testimony focused primarily on his dissatisfaction with Complainant's oral communication and listening skills: "[I]f you had a conversation with Felix, you never knew whether he knew what you were talking about or not[,]" but, Calandro said, he hadn't attributed these to Complainant's disability because Complainant had "never said anything related to the hearing problem." (Tr. 684).

Calandro believed Complainant's problems understanding oral communication were related to poor comprehension (Tr. 686) and that he lengthened the time it took to get work done because he misunderstood content, thereby causing "extra meetings and extra conversations and extra discussions." (Tr. 718). To illustrate this point Calandro described a meeting in which Complainant had responded to a topic under consideration by repeatedly insisting that "DOT [the Department of Transportation] can't do this," notwithstanding the fact that the actual subject of the discussion had been DOlT [the Department of Information Technology]. Because Complainant's unresponsive answers or misinterpretations persisted even when he wore his hearing aids for assistance, Calandro "didn't see the hearing being an issue in terms of communication." (Tr. 737).

Wysock said that that he agreed with Calandro's description of Complainant's performance deficiencies and that he supported his boss' decision to implement the PIP. He testified that his own concerns in areas pertaining to "written communication, oral communication, independent analysis, discretion in dealing with people and accurate reliable analysis" dated back to 2003 when he had first begun supervising Complainant. However, given his lengthy history of having evaluated Complainant's performance as meeting or exceeding expectations, I did not find Wysock's testimony credible. (Tr. 369-370, 405, 726-734; C-3).

On November 4, 2010, without having evaluated the status of Complainant's progress under the PIP, Calandro offered him new job responsibilities. These involved creating and maintaining an independent database for OFA (the database management position). According to Calandro, this was "absolutely the most important priority" [of the office] and accepting the new responsibilities would be a "win-win" for Complainant who would remain a principal analyst, but would no longer have to deal with some of the performance issues set forth in the PIP. He might also have superior opportunities for management or advancement. (Tr. 703-706). In its post-hearing brief, Respondent argued that if Complainant had accepted the database management position, which would have allowed him to remain a principal analyst, he "most likely" would have remained in its employ. (Respondent's Post Hearing Brief, p. 45).

It is undisputed that Respondent considered communication to be an essential function of Complainant's assignment, but it is clear that within the context of OFA's mission and

responsibilities, Respondent was able to address evolving office objectives by altering employee functions to accommodate the skills and experience of individual employees.

Request for Accommodations

Although Respondent had long been aware of Complainant's disability, in placing him on the PIP, Respondent had not drawn a connection between his hearing loss and any of the areas in which it claimed his performance was deficient.

Complainant, on the other hand, understood the relationship. In addition to depending on his hearing aids, over the years he had also attempted to compensate for his disability by notifying and reminding staff that he was hard of hearing, asking co-workers to repeat themselves, and sending emails to confirm the substance of some oral communications. Essentially, to the extent that he was able to recognize he needed to, he self-accommodated. (Tr. 46, 53-55, 56, 58-59, 65, 69, 87, 207, 228).

Accordingly, in a letter dated September 30, 2010, Complainant "formally" notified Respondent of his on-going and permanent hearing loss, enclosing a copy of a recent audiological evaluation as further documentation. (C-15). The following week he requested that Respondent provide him with four accommodations that he believed would alleviate communication problems attributable to his disability: 1) a telephone handset that would interface with his hearing aids; 2) repairs to infrared emitters in legislative hearing rooms; 3) mechanical or clerical assistance at meetings to record the exact questions he was being asked, as well as the names of those asking the questions; and 4) informing legislators and employees of the legislature about the limitations of his hearing, and educating them on how to optimize effective interactions with him. (C-16).

Determining Reasonable Accommodations- The Interactive Process

Under both federal and state law, once a qualified employee with a disability makes a request for an accommodation, his employer must engage in an informal, interactive process with him to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3) (1995). The interactive process functions as a mechanism for, inter alia, assessing the purpose of the subject position, analyzing its functions to distinguish between those that are essential and those that are non-essential to job performance and, ultimately determining whether, which and to what extent accommodations that will remove the identified limitations are available and effective. See *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,* 29 C.F.R. § 1630, App. (2011).

Although there is no precise test for what constitutes a reasonable accommodation, any plausible accommodation that does not result in an undue hardship in the particular circumstances of the employer's workplace would be considered reasonable. An employer is not required to provide an accommodation if it would impose an "undue hardship." 29 C.F.R. § 1630.2(p). "Undue hardship" is defined as requiring significant difficulties or expense. *Powell v. Nat'/ Bd. Of Med. Exam'rs,* 364 F.3d 79, 88 (2d Cir. Conn. 2004).

Respondent did not consider any of Complainant's requests unreasonable. (Tr. 638, C-25). However, it granted only one, providing him with the telephone equipment he had requested.

The interactive process is not an end in itself, but a means to an end. In cases where appropriate accommodations are obvious, a step-by-step process will not be necessary. However, in instances where the employer's knowledge about the subject disability and/or the manner in which that disability may affect job performance is inadequate to the task of suggesting, or responding to, a request for accommodations, antidiscrimination law mandates that the parties enter into an interactive process. "The need for bilateral discussion arises because each party holds information the other does not have or cannot easily obtain . . . ." *Loulseged v. Akzo Nobel Inc.,* 178 F.3d 731, 736 (5th Cir. 1999).

It is evident from the record that Respondent was unaware that both CFEPA and the ADA required it to respond to Complainant's request for [un-granted] accommodations by participating in a meaningful dialogue with him, and it failed to do so.

Tracy remembered having had several full day ADA trainings in 1990 (twenty years prior to Complainant's accommodation request) and said that although he had had numerous conversations with "counsel with regards to exactly how best to accommodate," since then, he had never received specific additional training. (Tr. 593, 631). Although he recalled knowing that employers were required "to try to accommodate someone with a disability as much as we can[,]" Tracy was unaware of the necessity of entering into an interactive process. (Tr. 639).

Calandro explained that Tracy was responsible for seeing "whether or not accommodations needed to be made" and, if so, implementing them (Tr. 697-698), and that he [Calandro] was responsible for "following up on" related requests, but had never had any formal ADA training. Calandro said that he was generally familiar with the Connecticut General Assembly Employee Handbook's section on the legislature's non-discrimination policies and that "what came to mind" was that "it's about non-discrimination in employment" . . . in terms . . . "related to hiring and [that] it is the typical approach, the standard, modern-day approach, which is we do not discriminate based on race, sex religion, etcetera." He "imagined, but didn't know whether disability was a part of the policy," and "didn't recall whether there was a section about accommodations for individuals with disabilities." (Tr. 734-735).

Initially, Respondent had agreed to provide Complainant with mechanical or clerical/secretarial assistance at meetings so that speakers' identities, questions or concerns could be adequately documented and after the meetings Complainant would be able to respond to their substance appropriately. However, when it came time to implement the accommodation, Respondent reneged. Without discussion. Instead of accommodating Complainant so that he could perform essential job functions, Wysock accompanied Complainant to subcommittee meetings and assumed many of his

affiliated responsibilities. (Tr. 139-40).

Respondent is correct in noting that an employer is not obligated to provide an employee the accommodation he requests or prefers, and only need provide some reasonable accommodation. *Ezikovich v. Commission on Human Rights and Opportunities,* 57 Conn. App. 767, 775 (Conn. App. 2000). In this instance, however, unless one views substituting Wysock and allowing him to perform the functions of Complainant's position as an admission that Respondent did not consider those as essential to that position, having Wysock accompany Complainant cannot be considered a reasonable accommodation. To the extent that Respondent considered understanding and responding to oral communication to be essential functions of Complainant's job, its failure to grant the requested accommodation, or a substantively similar one, precludes it from successfully arguing that even with accommodations Complainant would have been unable to perform these functions.

Respondent also rejected Complainant's request that it inform all legislators and staff of his hearing disability. (Tr. 639). Tracy testified that he had rejected this request because he never considered it "reasonable or appropriate." Calandro said that he was comfortable with and understood Tracy's "position on it as not being appropriate," but that he "did not pay a lot of attention to [the issue of propriety] because this was something that was not handled by me." (Tr. 740- 741).[19]

Although ignorance of the law may explain Respondent's failure to enter into the interactive process, it does not exempt or excuse it from the consequences of not having done so.

Hearing loss is a common disability. As many of its symptoms are generally known, I will take judicial notice of the fact that people suffering from hearing loss frequently experience significant difficulty communicating with others. Speech involves many different sounds in a rapid flow. Even loud speech is often difficult for a person with hearing loss to follow. Because louder low-pitched sounds may drown out softer high-pitched ones, people who are hard of hearing may hear only parts of words. It is not uncommon for people experiencing hearing loss to become irritable (and blame others for mumbling), tired or even depressed from the ongoing requirement of exercising disproportionate energy, adjusting hearing aids, reading lips and body language, focusing closely on context, etc., in order to maximize comprehension. All, or any combination of these, may impact the appearance of intelligence.[20]

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[19]Respondent's failure to grant this request is particularly troubling given the fact that in enacting (or making actionable) legislation protecting disabled employees from adverse employment consequences based on their disabilities. the legislature required employers (not exempting itself) to provide reasonable accommodations without reference to any inconvenience incurred by the employer in so doing, provided that the requested accommodations created no undue hardship or expense.

[20]Following are several examples of miscommunications, arguably related to hearing loss. that occurred during the course of Complainant's testimony:

- Complainant's attorney asked: "and this performance plan, was it something in writing?" Complainant answered: "it included writing." Understanding that Complainant had not heard the question correctly, Attorney Annon revised her wording and asked again: 'Was the performance improvement plan that you were put on, was this done in writing?'" (Tr. 72);

Clearly one consequence of Respondent's having failed to engage in a process that would have increased its general understanding of the nature and effects of hearing loss, was its continued insistence that the deficiencies in Complainant's performance were unrelated to his disability. Because the process is a means to an end, the end cannot be determined without both parties engaging in a meaningful dialogue. Claiming poor performance in response to a request for accommodations begs the questions that the interactive process was designed to answer. Without having engaged in a dialogue to explore the relationship between hearing and communication within the context of an essential functions analysis with respect to Respondent's expectations for employees holding various principal analyst positions, Respondent cannot effectively defend against Complainant's charge that it failed to accommodate his disability.

Until at least May 2009 (the date of his last performance evaluation), Respondent considered Complainant qualified for, and able to perform, without accommodations, the functions of the positions he held at OFA. (Tr. 23-26, 480-488; C-3).

Respondent could have, but did not claim that in 2010, under the leadership of its new director [Calandro], OFA had implemented stricter performance standards, such that Complainant's previous performance would have been rendered as "not meeting expectations." Nor did Respondent claim that Complainant's overall performance had diminished. Nevertheless, when it placed him on the PIP in July of 2010, Respondent cited Complainant for deficiencies in, among other things, oral and written communication (areas that it may have considered functionally essential to his position), and required him to correct these or face termination.

I will accept arguendo that sometime after 2009 Complainant had become unable to satisfy Respondent's expectations in performing the functions of the principal analyst job that he had held without accommodation for many years. Additionally, I have determined that Respondent evidenced no discriminatory animus against

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- With respect to Complainant's FMLA leave Respondent"s attorney asked: "Okay so, you never asked for any leave in February? You asked for leave in June?" Complainant answered, "I took leave June 11, 2010."" Respondent"s attorney: "and that"s when you asked for it?" Complainant responded: ""No. The law allows me to take the leave." (Tr. 197);
- At a later point in the proceeding Respondent's attorney asked: 'Why don't you just read me the fourth sentence?" Complainant answered: "Also discussed was the ADA items." Respondent"s attorney: ""No, the fourth sentence." Complainant: "Fourth?" Respondent's attorney: "Beginning with the impression." Complainant: ""I heard first." Respondent"s attorney: "Fourth. I'm sorry. The fourth." (Tr. 218);
- Respondent"s attorney: "Isn't it fair to say that, since 1992, your supervisors have made consistent note of your deficiencies in written communication skills, yes or no?"" Complainant: "No on the fairness." Respondent's attorney: "I didn't ask if you thought it was fair. I asked if, since 1992 - -" Referee Bromley: "She asked is it fair to say, is it correct to say?"" Complainant: "Okay."" Respondent"s attorney: Let me rephrase it. Is it correct to say that. since 1992, your supervisors have consistently made note of your deficiencies in written work product, written performance?" (Tr. 253).

Complainant,[21] and that terminating Complainant's employment was not a pretext for illegal discrimination.[22] Respondent is, nevertheless, liable for failure to reasonably accommodate Complainant's disability.

After declining to provide Complainant with three of the four accommodations that Complainant believed would alleviate performance problems attributable to his disability, Respondent failed to work with Complainant, in an interactive process to identify the precise limitations resulting from his hearing loss and explore the potential availability of other reasonable accommodations that might enable him to overcome those limitations. Ultimately Respondent terminated Complainant's employment due to his failure to improve his performance, with or without accommodation, in areas cited in the PIP, claiming that his inability to do so was unrelated to his disability.

"Liability for failure to provide a reasonable accommodation ensues only when the employer is responsible for a breakdown in that process." *Thompson v. City of New York,* No. 03 Civ. 4182, 2006 WL 2457694, at *4 (S.D.N.Y. Aug. 10, 2006) *report and recommendation adopted,* No. 03 Civ. 4182, 2006 WL 6357978 (S.D.N.Y. Aug. 10, 2006) *affd sub nom. Thompson v. New York City Dept. of Prob.,* 348 Fed.Appx. 643 (2d Cir. 2009).

Holding
Complainant has demonstrated that Respondent failed to engage in the interactive process, and that Respondent discriminated against him, denying him reasonable accommodations on the basis of his disability in violation of both federal and state law.

2. Disability Discrimination

Complainant alleges that Respondent discriminated against him under the ADA and CFEPA by evaluating, disciplining and ultimately terminating his employment based on his disability rather than upon legitimate performance criteria. (Joint Brief of the ComplainanUCommission, p. 38).

Prima Facie Case
"In the disability context, a prima facie case for disparate treatment [under both statutes] is established [under the *McDonnell Douglas-Burdine* model] if the plaintiff shows: (1) he suffers from a disability or handicap, as defined by [General Statutes§ 46a-51]; (2) he was nevertheless able to perform the essential functions of his job, either with or

[21] Failure to accommodate claims are necessarily "because of a disability." Accommodations are only deemed reasonable (and thus, required) if they are needed because of the disability. No proof of a particularized discriminatory animus is necessary. Thus, an employer who fails to reasonably accommodate a known disability violates the statute, no matter what its intent. unless it can prove hardship. See *Carroll v. Xerox Cotp.,* 294 F.3d 231. 237-38 (1" Cir. 2002) (citing *Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 264 (1'[1] Cir. 1999).

[22] A complainant in a reasonable accommodation case is not required to show that an employer"s reason for its adverse employment action was a pretext for discrimination. The complainant need only demonstrate that reasonable accommodation would have enabled performance of essential job functions. *McMillan v. City of New York.* 711 F.3d 120, 127 (2d Cir. 2013).

without reasonable accommodation; and that (3) [the defendant] took an adverse employment action against him because of, in whole or in part, his protected disability." *Curry v. Allan S. Goodman, Inc.,* supra, 286 Conn. 426.

Complainant has stated a prima facie case of discrimination.

Once a plaintiff has established a prima facie case of discrimination, a presumption of discrimination is created, but the defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. Once the defendant offers a legitimate, nondiscriminatory reason, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the proffered reason is pretextual." *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. 108. 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 explanation is unworthy of credence." See *McDonnell Douglass,* 411 U.S. at 804-805. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Wright v. West,* 505 U.S. 277, 296 (1992).

The first element of Complainant's discrimination claim is undisputed. He is disabled. As a result of Respondent's failure to accommodate his disability I will assume, arguendo, that he has also proven that he was able to perform the essential functions of his position. However, Respondent's liability on the failure to accommodate claim neither obviates its negative assessment of Complainant's overall job performance, nor relieves Complainant of the burden of having to prove the claim's third element: that Respondent's adverse employment actions against him were because of his disability.

Respondent rebutted Complainant's prima facie case by articulating a legitimate business reason – performance problems – for the adverse employment actions it took against him and the burden of demonstrating that Respondent's stated reason was pretextual, a cover-up to hide its true discriminatory motive.

Complainant argues that the main complaints Respondent had about Complainant's job performance were directly related to his disability. (Joint Brief of the Complainant/Commission, p. 46; Tr. 655-657; R-6; R-9). Although Complainant cites to testimony and evidence that demonstrate Respondent's ignorance about the effects that Complainant's disability may have had on his performance (testimony and evidence which led me to find Respondent liable for failure to accommodate) neither that testimony and evidence, nor any other in this case, despite Complainant's arguments to the contrary, established Respondent's discriminatory motive or that it acted with discriminatory animus. Complainant failed to prove that Respondent's articulated legitimate reasons for: placing him on the PIP, evaluating his performance thereunder and, ultimately, terminating his employment - his overall history of mediocre job performance, his specific weaknesses in communication (this Complainant also acknowledged) and his occasional, but embarrassing public mistakes - were false or a

pretext for disability discrimination, or that he had been treated differently and/or less favorably than Respondent's non-disabled employees.

Although in some cases an employer's failure to provide reasonable accommodations might serve as evidence that it acted adversely against a disabled employee because of the individual's disability, in this case, as set forth more fully hereinbefore, Respondent's failure to accommodate Complainant's disability was based on ignorance, not malice.

The claim is dismissed.

3. Retaliation

The ADA prohibits employers from retaliating against individuals who oppose discriminatory activities or who make charges, testify, assist, or participate in any manner in an investigation, proceeding or hearing under the ADA. 42 U.S.C. § 12203.

Similarly, under Connecticut law an employer may not "discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or . . . filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84[23] (Conn. Gen. Stat. § 46a (a)(4)).

Prima Facie Case

To establish a prima facie case of retaliation, a plaintiff must show: (1) that he participated in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action against him; and (4) a causal connection between the protected activity and the adverse employment action." *Ayantola v. Board of Trustees of Technical Colleges,* 116 Conn. App. 531, 536, 976 A.2d 784 (2009).

Complainant admits that there is no direct evidence of retaliatory animus that might establish a causal connection between his request for accommodations and his termination. He cites *Bollick v. Area Group Holdings, Ltd.,* 278 F. Supp.2d 278 (D. Conn. 2005), however, for the proposition that in the absence of direct evidence, "proximity in time between the employee's protected activity and the adverse employment action can provide strong evidence of causation" and offers the following chronology as evidence of the requisite connection:

- Complainant's request for accommodations in October, 2010;
- Respondent's offer of alternate employment - the database management position in November, 2010;
- Complainant's rejection of Respondent's offer in December, 2010; and
- March, 2011, the date on which Respondent set in motion the administrative process that led to Complainant's termination on July 11, 2011.

Courts, though, have determined that if "timing is the only basis for a claim of retaliation, and the gradual adverse job actions began well before the plaintiff had ever engaged in

any protected activity, an inference of retaliation does not arise." *Slattery v. Swiss Reinsurance America Corp.,* 248 F.3d 87, 95 (2d Cir. 2001).

Accordingly, given the fact that Respondent had placed him on the PIP several months prior to his having requested accommodations, Complainant cannot prove causation with reference to the timing of the request.

Having found insufficient evidence to support Complainant's retaliation claim, I decline to address Respondent's argument that a request for accommodations is not a protected activity under CFEPA.

The claim is dismissed.

C. Damages / Orders

CFEPA's remedial goals are furthered by vesting in the referee broad discretion to award remedies specifically tailored to the particular discriminatory practices at issue. See *Commission on Human Rights and Opportunities v. Truelove and Maclean, Inc. et a/.*, 238 Conn. 337, 350-351 (1996). Consistent with federal law, the goal of the courts is to make the Complainant whole and put him in the position he would have been in absent the discriminatory conduct. See *Landgraf v.* US/ *Film Prods.,* 511 U.S. 244, 254 (1994)

Pursuant to Conn. Gen. Stat. § 46a-86 (a), when a respondent is found to have engaged in a discriminatory practice, the presiding referee shall issue "an order requiring the respondent to cease and desist from the discriminatory practice and further requiring the respondent to take such affirmative action as in the judgment of the [referee] will effectuate the purpose of" the state's antidiscrimination law. Further affirmative action may include orders requiring the hiring or reinstatement of employees, with or without back pay, provided that deductions are made for interim earnings, unemployment compensation and amounts which the complainant could have earned with reasonable diligence. Conn. Gen. Stat. § 46a-86 (b). The Connecticut Supreme Court has held that both pre- and post-judgment interest are permissible components of back pay awards under Conn. Gen. Stat. § 46a-86 (b). *Thames Talent Ltd.* V. *Comm'n on Human Rights and Opportunities,* 265 Conn. 127, 143-145.

Reinstatement and/or Front Pay

Complainant has requested reinstatement or instatement to an equivalent position and seniority as a principal analyst.

Respondent is hereby ordered to hire Complainant for the next principal analyst or equivalent position that becomes available, and to reinstate any pension benefits that Complainant lost upon his termination, as if said termination had not occurred. Per annum, Respondent shall pay Complainant the salary, including wage increases and longevity payments to which he would have been entitled had he remained employed by Respondent, plus an amount representing the benefits to which he would have been

entitled had he remained employed as a principal analyst, less the amount of his yearly salary and benefits. Respondent shall be responsible for making said payments until it re-hires Complainant, or until November 1, 2018, or until Complainant is offered a principal analyst position and declines, whichever occurs first.

If Complainant is unable to perform the essential functions of his job with or without reasonable accommodations, he may be eligible for medical separation or he may be involuntarily terminated for non-performance.

Back Pay

Complainant is awarded back pay for the period commencing on September 1, 2011 (the date on which he was removed from Respondent's payroll).

Had Complainant remained employed by Respondent between September 1, 2011 and November 1, 2013, his compensation, including a 3% wage increase that went into effect on July 1, 2013, and longevity payments to which his tenure entitled him, would have been $270,714.75. Deducting the $19,950.00 he received in unemployment compensation benefits, and the $72,806.65 he earned since he began working at the Connecticut Department of Motor Vehicles (DMV) on May 2, 2012 his back pay award for this period is $177,958.11. (Joint Brief of the Complainant/Commission, p. 59).

Complainant's back pay award from November 1, 2013 through the date of this decision shall be calculated by subtracting his actual compensation from DMV from the salary to which he would have been entitled had he remained employed by Respondent during this period.

Unemployment Compensation

Complainant received a total of $19,950.00 in unemployment compensation benefits; $9,120.00 in 2011, and $10,830.00 in 2012. (C-38; C-39). Respondent is ordered to pay $19,950.00 to the Commission which the Commission shall then transfer to the appropriate agency.

Interest

Complainant is entitled to an award of pre- and post-judgment interest on his back pay which Respondent is ordered to pay from the date of Complainant's termination through the date of his reinstatement, or until November 1, 2018, or until Complainant is offered a principal analyst position and declines, whichever occurs first, at the rate of four (4%) percent per year, compounded annually.

Medical expenses

Complainant is awarded, and Respondent shall pay him $17,508.60 as reimbursement for the cost he incurred in replacing the medical insurance coverage he lost when Respondent terminated his employment.

Emotional Reaction

Complainant testified that he felt shame in having to tell his child, parents, friends and relatives about his termination and that he suffered feelings of loss. He stated that beginning with his having been placed on the PIP, and particularly during his last six months at work when he had the feeling that the decision to terminate his employment had already been made, he had panic attacks, nervousness and stress that required him to crank up the volume on his hearing aids in order to communicate. During this period his doctor treated him for anxiety and depression with prescription drugs. However, he had suffered similarly in the past and drug therapy was not new. After his termination, talk therapy was added to his regimen. (Tr. 182-191).

To the extent that an award for emotional distress damages is available in this forum, the criteria to be considered in awarding same are: "[1] the subjective internal emotional reaction of the complainant to the discriminatory experience which he has undergone . . . [2] whether the discrimination occurred in front of other people; [3] the degree of offensiveness of the discrimination and [4] the impact on the complainant." (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights and Opportunities ex ref. Donna Harrison vs. John Greco,* CHRO Case No. 7930433, Memorandum of final decision, p. 15, June 3, 1985; *Peoples v. Belinsky,* supra, 1988 WL 492460, 6.

In failing to participate in the interactive process and denying Complainant accommodations, Respondent exhibited no discriminatory animus and did not go out of its way to disparage, humiliate or otherwise cause emotional distress to Complainant. Respondent's behavior was more ignorant than intentionally offensive.

The situation does not warrant an award of emotional distress damages.

No Retaliation

Pursuant to Conn. Gen. Stat. 46a-60 (a) (4) Respondent shall not engage in or allow any of its employees to engage in any conduct against Complainant or any other person who testified or assisted in these proceedings.

Cease and Desist

Respondent shall cease and desist from all acts of discrimination prohibited under federal and state law and shall provide a nondiscriminatory work environment pursuant to federal and state law.

It is so ordered this 21th day of May 2014.

Ellen E. Bromley,
Presiding Human Rights Referee

cc.
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