DOCKET NO.: UWY-CV21-6063279-S	:	SUPERIOR COURT
ANNE OLEAR	:	JUDICIAL DISTRICT OF WATERBURY
v.	:	AT WATERBURY
WATERBURY BOARD OF EDUCATION	:	MAY 15, 2024

SUPERIOR COURT
WATERBURY, J.D.
MAY 15 2024
CLERK'S OFFICE

MEMORANDUM OF DECISION
RE: MOTION FOR SUMMARY JUDGMENT

FACTS

Before the court is the Waterbury Board of Education's (defendant) motion for summary judgment in response to Anne Olear's (plaintiff) three count revised complaint.[1] Count one of the complaint alleges age discrimination pursuant to the Connecticut Fair Employment Practices Act (CFEPA), count two of the complaint alleges negligent misrepresentation, and count three of the complaint alleges fraudulent misrepresentation. Following the filing of the defendant's motion for summary judgment, the plaintiff withdrew count three of the complaint.[2] Therefore, this memorandum solely addresses counts one and two.

The complaint alleges the following facts, and additional facts will be addressed as necessary. The plaintiff was employed as a teacher by the defendant since 1974. The relevant employment decisions governing the present case took place when the plaintiff was sixty-seven years old. Prior to the plaintiff's retirement in February of 2020, the plaintiff was employed at the West Side Middle School (WSMS). The plaintiff retired with the intention of being rehired into the same position at WSMS and the plaintiff communicated her intention to the Principal, Peter McCasland of WSMS, who in turn informed the human resources (HR) representative Lisa

[1] Going forward in this memorandum, the revised complaint will be referred to as the complaint.
[2] See Docket Entry No. 130.00.

Dunn. Ms. Dunn indicated that plaintiff would need to have a break in service. Subsequently, the plaintiff retired and applied for the vacant teaching position. Mr. McCasland interviewed and recommended the plaintiff for the teaching position. On March 12, 2020, the defendant switched to remote learning due to COVID-19 concerns.

Subsequently, on April 27, 2020, the defendant posted a list of job openings at WSMS which included the teaching position that the plaintiff had retired from. Ultimately, the defendant hired a younger woman with less qualifications and experience than the plaintiff.

On November 24, 2021, the plaintiff commenced the present case against the defendant. On November 1, 2023, the defendant filed a motion for summary judgment. On January 2, 2024, the plaintiff filed an objection to the defendant's motion for summary judgment, and the defendant filed their reply on February 22, 2024. A remote hearing was held on April 29, 2024, at which time both parties were heard.

DISCUSSION

The defendant moves for summary judgment, asserting that there are no genuine issues of material fact in dispute. Specifically, the defendant argues that "the undisputed facts are such that no reasonable fact-finder could conclude that [d]efendant discriminated against [the] [p]laintiff on the basis of her age, or that it negligently or fraudulently made misrepresentations of fact to her." See Docket Entry No. 127.00, Def. MSJ. The defendant argues that the plaintiff was not rehired after retirement due to a variety of reasons: the COVID-19 pandemic caused the defendant to do "very, very little hiring" in 2020; the plaintiff attempted to negotiate a higher salary for her re-employment; the defendant was unsure whether the teaching position the plaintiff sought was going to be eliminated, rather than refilled; and lastly, the teaching position was subject to collective bargaining with the Waterbury Teachers Association (WTA), and as

such, first had to be offered to internal candidates, as a retiree the plaintiff was no longer considered an internal candidate.

In her objection, the plaintiff asserts that there are genuine issues of material fact and, thus, the defendant's motion for summary judgment should not be granted. The plaintiff alleges that the reason for the termination of her employment was pretextual, intended to mask unlawful age discrimination. Further, the plaintiff alleges that the defendant misrepresented that the plaintiff would be rehired after retirement, and that the plaintiff relied on the defendant's misrepresentations.

For the reasons set forth below, the motion for summary judgment is GRANTED in part and DENIED in part.

I. Legal Standard of Review

The standard for summary judgment in Connecticut is well established. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commission of Transportation*, 330 Conn. 400, 414-15, 195 A.3d 664 (2018).

"The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A

material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 191-92, 177 A.3d 1128 (2018).

"Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

"The burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is de minim[i]s. . . . Since the court, in deciding a motion for summary judgment, is not to resolve issues of fact, its determination is whether the circumstances giv[e] rise to an inference of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive." (Internal quotation marks omitted.) *Agosto* v. *Premier Maintenance, Inc.*, 185 Conn. App. 559, 570, 197 A.3d 938 (2018).

II. Count One: Age Discrimination in Violation of CFEPA

In count one of the complaint, the plaintiff alleges that the defendant discriminated against her on the basis of her age in violation of General Statutes § 46a-60 (b) (1), when she was not rehired following her retirement.

Section 46a-60 (b) (1) of the CFEPA states in relevant part: "For an employer . . . except in the case of a bona fide occupational qualification or need, to refuse to hire or employ . . . or to discharge from employment any individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability . . . [or] physical disability . . . ." See also,

Barbabosa v. *Board of Education*, 189 Conn. App. 427, 437, 207 A.3d 122 (2019) ("To establish a prima facie case of employment discrimination pursuant to § 46a-60 (b) (1) on the basis of either a disparate treatment disability discrimination claim or a reasonable accommodation claim, a plaintiff must establish a common essential element, namely, that he or she is qualified for the position.").

"The framework this court employs in assessing disparate treatment discrimination claims under Connecticut law was adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) . . . ." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015). This court will "look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both. . . . Under this analysis, the employee must first make a prima facie case of discrimination." (Citations omitted; internal quotation marks omitted.) Id.

The burden shifting framework established in *McDonnell* is as follows: "[i]n order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination." Id. Once the plaintiff establishes a prima facie case of disability discrimination, "[t]he employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citations omitted; internal quotation marks omitted.) Id., 74.

"[T]he Connecticut Supreme Court looks to federal precedent when interpreting and enforcing the CFEPA." (Internal quotation marks omitted.) *Weichman* v. *Chubb & Son*, 552 F. Supp. 2d 271, 282 (D. Conn. 2008). See also *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 689, 41 A.3d 1013 (2012) ("Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." [Internal quotation marks omitted.]); *Vasquez v. Claire's Accessories, Inc.*, 392 F. Supp. 2d 342, 349 (D. Conn. 2005) ("CFEPA claims are analyzed in the same manner as Title VII employment discrimination claims.").

"In order to establish a prima facie case of age discrimination, [plaintiff] must show (1) that she was within the protected age group, (2) that she was qualified for the position, (3) that she experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination." (Internal quotation marks omitted.) *Mendillo* v. *Prudential Ins. Co. of America*, 156 F. Supp. 3d 317, 338 (D. Conn. 2016). The plaintiff's burden at this stage is "de minimis." (Internal quotation marks omitted.) Id. In the present case, the parties do not dispute that the plaintiff falls within the protected age group, that the plaintiff was qualified for the vacant position, and that the plaintiff experienced adverse employment action when she was not rehired. The defendant does assert, however, that there is insufficient evidence to demonstrate that the decision not to rehire the plaintiff occurred under circumstances giving rise to an inference of discrimination. The Court disagrees.

The evidence that the defendant hired a "younger and less qualified" candidate when the plaintiff was interviewed for the position, was the preferred candidate for the position, and was not rehired is sufficient for the inference of discrimination.[3] "Generally, a plaintiff's replacement

[3]The plaintiff's deposition testimony refers to the teacher that replaced the plaintiff as being twenty years younger than the plaintiff. "[A]ge differences of [eighteen] and [twenty-five] years

by a significantly younger person is evidence of age discrimination." *Carlton* v. *Mystic Transportation Inc.*, 202 F.3d 129, 135 (2d Cir.), cert. denied, 530 U.S. 1261, 120 S. Ct. 2718, 147 L. Ed. 2d 983 (2000). While the defendant argues that the candidate who was offered the position is in the same protected class as the plaintiff, that is over forty years old, this is not the dispositive issue. *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 505, 832 A.2d 660 (2003) ("In an age discrimination case, the complainant need not establish that the person who ultimately was offered the position does not fall within the protected class.").

Once the plaintiff establishes a prima facie case of discrimination as the plaintiff has done in the present case, "[t]he employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 74. The courts "have characterized the evidence necessary to satisfy this initial burden as minimal . . . ." (Internal quotation marks omitted.) *Zimmerman* v. *Associates First Capital Corp.*, 251 F.3d 376, 381 (2d Cir. 2001).

The burden now shifts to the defendant to put forth a legitimate nondiscriminatory reason for not rehiring the plaintiff. The defendant provides an evidentiary basis to support their argument. The affidavit of Senior HR Generalist, Ms. Dunn supports the proposition that a hiring freeze went into effect. Ms. Dunn attested to the fact that there was " very, very little [hiring]"

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and age differences of [thirteen] and [twenty six] years supported inferences of discrimination." *Kelly* v. *Signet Star Re, LLC,* 971 F. Supp. 2d 237, 246-47 (D. Conn. 2013).

during the first few months of the pandemic. Def. Motion SJ, Docket Entry No. 128.00, Exhibit B, pg. 202. Further, Ms. Dunn in her deposition testimony confirmed that the vacant position the plaintiff was seeking to be rehired into was subject to collective bargaining. Def. Motion SJ, Docket Entry No. 128.00, Exhibit B, pg. 169-70. Ms. Dunn explained that if a teaching vacancy occurs during the school year, then the vacant position must be posted externally for the rest of that school year. Def. Motion SJ, Docket Entry No. 128.00, Exhibit B, pg. 26. For the following school year, the vacant position first must be posted internally to current WTA members and the defendant argues that the plaintiff was no longer a "current WTA" member, given that the plaintiff had retired when the vacant position was filled. Def. Motion SJ, Docket Entry No. 128.00, Exhibit B, pg. 106. The candidate who filled the position was a current WTA teacher.

Since the defendant has presented legitimate nondiscriminatory reasons for their decision not to rehire the plaintiff, the burden shifts back to the plaintiff to demonstrate that the proffered reasons are pretext for unlawful discrimination. This court finds that the plaintiff has met her burden.

The standard applicable to discussing the plaintiff's burden is important. "Under CFEPA, this Court applies the motivating-factor test," not but-for causation. *Percoco* v. *Lowe's Home Centers, LLC,* 208 F. Supp. 3d 437, 448 (D. Conn. 2016). Thus, the "[p]laintiff is not required to show that age was the sole factor in the employer's decision" nor does the plaintiff need to disprove the reason offered by the employer. *Hagelthorn* v. *Kennecott Corp.,* 710 F.2d 76, 82 (2d Cir. 1983). See also *Zebedeo* v. *Martin E. Segal Co., Inc.,* 582 F. Supp. 1394, 1415 (D. Conn. 1984) ("It has been held that impermissible age considerations do not have to have been, the 'sole factor,' but must have been, more likely than not, a 'causative' or 'determinative' factor . . . a 'factor that made a difference' . . . ." [Citation omitted; internal quotation marks omitted.]).

In the present case, there are a few instances where the plaintiff produces evidence to cast some doubt on the defendant's proffered reasons as to why the plaintiff was not rehired. For example, the plaintiff provides evidence demonstrating that fifteen employees were hired by the defendant between February 2020 and June 2020 – the exact time frame that the plaintiff retired, reapplied, and was interviewed for the position in question. This timeline is also when the defendant claims there was not much hiring going on due to the pandemic. The defendant does not address this issue and, therefore, there is clearly a dispute of material fact regarding whether the pandemic was a genuine reason as to why the plaintiff was not rehired.

Next, the plaintiff argues that the policy stating internal WTA teachers are first offered the opportunity to apply for positions before external candidates, such as the plaintiff is an "undocumented policy." Although there is deposition testimony and affidavits about this procedure, Ms. Dunn admits that this is an unofficial policy. While the defendant is correct that the plaintiff has not submitted any evidence other than her own testimony to contravene the accuracy of this unwritten policy, the plaintiff does point out that this unwritten policy may not be applied equally to all retirees.

Moreover, the plaintiff produced evidence of an email dated May 6, 2020, from Ms. Dunn which contradicts Ms. Dunn's affidavit about the unwritten policy. In the email, Ms. Dunn inquired about the plaintiff to the superintendent, this was after the plaintiff had been interviewed, but while the hiring freeze was still in effect. Specifically, Ms. Dunn asked the superintendent whether the plaintiff could be rehired and importantly, the email sought clarification on whether such rehire would be for "this school year or next." This is in direct contradiction to the testimony and affidavit of Ms. Dunn that asserted that the procedure for current school year vacancies was that they could be offered to external candidates, but the

vacancies for the following school year had to be offered to internal candidates first. When the email was sent, it was the current school year, and the plaintiff had already retired making her an external candidate. The fact that Ms. Dunn was inquiring into whether the approval of the plaintiff was for the current school year or the following school year sheds some serious doubt on the legitimacy of the unwritten policy.

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party" (Internal quotation marks omitted.) *Devito* v. *Griffin Hospital*, Superior Court, judicial district of New Haven, Docket No. CV-22-6120129-S (January 19, 2024, *Wilson, J.*). Further, "[t]he United States Supreme Court specifically has held that evidence establishing the falsity of the legitimate, nondiscriminatory reasons advanced by the employer may be, in and of itself, enough to support the trier of fact's ultimate finding of intentional discrimination." (Internal quotation marks omitted.) Id. See *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ("The factfinder's disbelief of the reasons put forward by the defendant [particularly if disbelief is accompanied by a suspicion of mendacity] may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." [Emphasis in original; internal quotation marks omitted.]). "Thus, in the present case, [the plaintiff is] not required to establish both that the plaintiff's proffered reasons were false and that discrimination was the real reason for the termination of his employment." *Hartford Police Dept.* v. *Commission on Human Rights & Opportunities*, 347 Conn. 241, 276-77, 297 A.3d 167 (2023).

Lastly, the fact that the plaintiff's salary negotiation is inextricably related to her age is relevant. At sixty-seven years old and with forty years of experience working for the defendant,

the plaintiff "maxed out" her salary range as a teacher, she achieved step twelve. This meant that the salary the plaintiff retired at was significantly higher than the salary that was potentially to be offered to her upon rehire. While this may not be direct evidence of discrimination, it is certainly circumstantial evidence that a fact finder, in the present case, a jury could use to analyze whether the defendants' proffered reasons for their employment decisions were false or not. In order to prevail on plaintiff's age claim, she is required to show that the reason proffered by defendants was "not the only reasons, and that age made a difference." *Nordquist* v. *Uddeholm Corp.,* 615 F. Supp. 1191, 1199 (D. Conn. 1985). See *Geller* v. *Markham,* 635 F.2d 1027, 1035 (2d Cir. 1980), cert. denied, 451 U.S. 945, 101 S. Ct. 2028, 68 L. Ed. 2d 332 (1981) ("Where an employer acts out of mixed motives in discharging or refusing to hire an employee, the plaintiff must show that age was a causative or determinative factor, one that made a difference in deciding whether the plaintiff should be employed."); *Reed* v. *Signode Corp.*, 652 F. Supp. 129, 135 (D. Conn. 1986) ("Plaintiff need not show that age was the sole factor in the employer's decision nor does he need to disprove the reason offered by the employer." [Internal quotation marks omitted.]). See also *Meiri* v. *Dacon,* 759 F.2d 989, 997 (2d Cir.), cert. denied, 474 U.S. 829, 106 S. Ct. 91, 88 L. Ed. 2d 74 (1985) ("After the employer articulates legitimate, non-discriminatory reasons for the employee's discharge, the employee must be afforded an opportunity to prove the existence of factual issues demonstrating that the stated reasons were merely a pretext for discrimination."). In the present case, on March 8, 2022, a deposition of Ms. Dunn was conducted where she was asked whether "the step [six] maximum . . . involved[d] exclusively Ms. Olear or was that a broader conversation with rehiring retired teachers?" Def. Motion SJ, Docket Entry No. 128.00, Exhibit B, pg. 236. Ms. Dunn responded stating the following, "[i]t was adamant that any rehired retiree would only be allowed to be rehired up to a step [six] . . . And anybody since then has

only been offered up to a step [six]." Def. Motion SJ, Docket Entry No. 128.00, Exhibit B, pg. 236.

"We note, additionally, that [t]he [fact finder's] disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, [n]o additional proof of discrimination is required. . . . [T]o defeat summary judgment [however] . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination." (Citations omitted; internal quotation marks omitted.) *Stubbs* v. *ICare Management., LLC*, 198 Conn. App. 511, 522, 233 A.3d 1170 (2020).

The burden of proof to survive a motion for summary judgment in an employment discrimination case is minimal. Taken together, the plaintiff has offered sufficient evidence upon which a jury could reasonably find that defendant's proffered explanations are pretext for discrimination. A reasonable trier of fact could conclude, from the admissible evidence provided, that the defendant's decision not to rehire the plaintiff was motivated, at least in part, by discriminatory intent and, therefore, the defendant's Motion for Summary Judgment as to count one is DENIED.

III. Count Two: Negligent Misrepresentation

Count two of the revised complaint claims that the defendant negligently misrepresented to the plaintiff that she was eligible for post-retirement reemployment after a short break in service, and that the plaintiff relied on such misrepresentations. Further, the plaintiff alleges that

the defendant knew or should have known that the plaintiff would rely on such misrepresentations.

Under Connecticut law, "an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." *Nazami* v. *Patrons Mutual Ins. Co.*, 280 Conn. 619, 626, 910 A.2d 209 (2006).

In their motion for summary judgment the defendant argues that there is no evidence that the defendant or its agents made any misrepresentations to the plaintiff. In support of this argument the defendant relies on the plaintiff's own lack of evidence. The defendant points out that the plaintiff has not alleged or provided evidence that the defendant made an unconditional representation that it would rehire her. "Instead, Plaintiff alleges that she applied for the position at issue, that she was recommended for the position, and that she engaged in salary discussions with the Defendant's agents." Def. Motion SJ, Docket Entry No. 128.00, pg. 14.

Indeed, the evidentiary basis for the plaintiff's claim of negligent misrepresentation appears to be the plaintiff's own affidavit which contains a statement that "[o]n January 29, 2020, Ms. Dunn replied that she had no problem with me returning so long as I retired with a short break in service and was rehired on Mr. McCasland's recommendation." P's Response to Motion SJ, Docket Entry No. 131.00, Exhibit A, pg. 2. First, Our Supreme Court has noted that a party's "conclusory statements, in [an] affidavit and elsewhere . . . [does] not constitute evidence sufficient to establish the existence of disputed material facts." (Internal quotation marks omitted.) *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 583, 687 A.2d 111 (1996). In other words, a "self-serving" affidavit containing conclusory statements cannot be used to defeat

a motion for summary judgment. Second, the basis for which the plaintiff claims that Ms. Dunn and/or Mr. McCasland made misrepresentations appears to solely be the emails exchanged. The court has read these emails and does not construe anything in the emails to amount to a promise or statement guaranteeing that the plaintiff would be rehired.

The emails exchanged do not constitute negligent misrepresentation because they did not guarantee employment. See *Petitte* v. *DSL.net, Inc.*, 102 Conn. App. 363, 373, 925 A.2d 457 (2007).

Since the plaintiff has failed to present any evidence that a misrepresentation of fact was made by the defendant, the court need not address the factors necessary to prove negligent misrepresentation.

Therefore, the court concludes that the defendant's Motion for Summary Judgment as to count two, negligent misrepresentation be GRANTED.

IV. CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is DENIED as to count one and GRANTED as to count two.

SO ORDERED

A JDNO was sent on May 15, 2024 notifying all counsel of record of the availability of this Memorandum of Decision in the electronic file and sent by electronic Means to RJD.

By the Clerk,
Matthew P. Stevens TAC
5/15/2024

PARKINSON, J.
Juris #442329