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| **DOCKET NO. FST CV 22-6056206 S** | | **: SUPERIOR COURT** |
| **FITZSIMMONS, BARRY** | STAMFORD-NORWALK JUDICIAL DISTRICT | **: JUDICIAL DISTRICT OF** |
| **V.** | 2025 MAR 19 P 2:52 | **STAMFORD/NORWALK** |
| **CINE MED INC.** | | **: MARCH 19, 2025** |

## MEMORANDUM OF DECISION

Defendants Cine-Med, Inc. ("Cine-Med"), Kevin McGovern ("McGovern") and Mary Panagrosso ("Panagrosso") have moved for summary judgment to dismiss all counts in the amended complaint of Barry Fitzsimmons ("Fitzsimmons").[1] For the reasons stated below, the motion is granted in part and denied in part.

### The Standards for Deciding a Motion for Summary Judgment

"The standards . . . [for] review of a . . . motion for summary judgment are 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

[1] In his Amended Complaint, Fitzsimmons alleged violations of the Connecticut Fair Employment Practices Act ("CFEPA"), the Age Discrimination in Employment Act ("ADEA") and Title VII: Count One (violations of ADEA as to Cine-Med); Count Two (retaliation under ADEA as to Cine-Med); Count Three (violations of Title VII as to Cine-Med); Count Four (retaliation under Title VII as to Cine-Med); Count Five (violations of CFEPA as to Cine-Med for age discrimination); Count Six (violations of CFEPA as to Cine-Med for gender discrimination); Count Seven (aiding and abetting under CFEPA age discrimination as to McGovern); Count Eight (aiding and abetting under CFEPA age discrimination as to Panograsso); Count Nine (aiding and abetting under CFEPA gender discrimination as to McGovern); Count Ten (aiding and abetting under CFEPA gender discrimination as to Panograsso); Count Eleven (retaliation under CFEPA age discrimination as to Cine-Med); Count Twelve (retaliation under CFEPA age discrimination as to McGovern); Count Thirteen (retaliation under CFEPA age discrimination as to Panograsso); Count Fourteen (retaliation under CFEPA gender discrimination as to Cine-Med); Count Fifteen (retaliation under CFEPA gender discrimination as to McGovern); and Count Sixteen (retaliation under CFEPA gender discrimination as to Panograsso).

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. . . . 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. . . ." *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 115-16 (2012), quoting *H.O.R.S.E. of Connecticut, Inc. v. Washington*, 258 Conn. 553, 558-60 (2001). (Citations omitted).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent...." *Zielinski v. Kotsoris*, 279 Conn. 312, 318 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the

opponent to establish that there is a genuine issue of material fact: "it is then 'incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.'" *Iacurci v. Sax*, 313 Conn. 786, 799 (2014), quoting *Connell v. Colwell*, 214 Conn. 242, 251 (1990). The non-moving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of "showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such] issue of material fact." *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573 (2016).

"It is fundamental that, when ruling on such a motion, a trial court is limited to determining whether a material factual issue exists; it may not then proceed to try that issue on the summary judgment record, if the issue does exist. ... When deciding a summary judgment motion, a trial court may not resolve credibility questions raised by affidavits or deposition testimony submitted by the parties." *Doe v. Town of West Hartford*, 328 Conn. 172, 196-97 (2018).

**Plaintiff Exhausted His Administrative Remedies.**

Plaintiff commenced a proceeding before the Commission on Human Rights and Opportunities ("CHRO") asserting claims for age and gender discrimination in connection with the termination of his employment. Cine-Med and McGovern were respondents. Panagrosso argued the Court lacks jurisdiction over the claims against her for retaliation and aiding and abetting because, although she was mentioned in the administrative complaint,

plaintiff did not name her as respondent. McGovern and Cine-Med argued that plaintiff failed to exhaust administrative remedies on his retaliation claim.

"The Superior Court lacks subject matter jurisdiction in a matter if an adequate administrative remedy exists, and it has not been exhausted." *Malasky v. Metal Products Corp.*, 44 Conn.App. 446, 452 (1997). In *Malasky*, 44 Conn.App. at 455, the Appellate Court held that there is an exception to the exhaustion of administrative remedies against employees who were not respondents but were named in the complaint that specifically described ways that the employee was alleged to have harmed a former employee, so they were on notice of the discrimination claims, which were subject to investigation by the agency, so the purposes of exhaustion of remedies were satisfied.

In *Resnick v. United Public Service Employees*, 2013 WL 6038364 *2-7 (Conn.Super. 2013) (Domnarski, J.), the Court recognized that there is an exception to exhaustion for claims of retaliation or aiding and abetting that are sufficiently detailed and "reasonably related" to the underlying discrimination claim presented to the administrative agency. Accord, *Robinson v. Purple Hearts Home Care, LLC*, 2019 WL 4668059 *5-7 (Conn.Super. 2019) (Gordon, J.).

In *Schofield v. Rafley, Inc.*, 222 Conn.App. 448, 456-57 (2023), the Appellate Court explained the reason for the "reasonably related" exception to exhaustion:

"The reasonably related doctrine invoked by the plaintiff is an exception to the exhaustion requirement. ... When applicable, it excuses a party's failure to exhaust its administrative remedies. As the United States Court of Appeals for the Second Circuit has observed, '[e]xhaustion is an essential element of [the employment discrimination] statutory scheme. ... The reasonably related doctrine is a limited, judge-made exception to that requirement ....'... (holding that reasonably related doctrine operates as 'exception to the exhaustion requirement'). The reasonably related exception is rooted in the recognition that 'in certain circumstances it may be unfair, inefficient, or contrary to the purposes of the statute to require a party to separately re-exhaust new violations that are 'reasonably related' to the initial claim.' ... ('it would be burdensome and wasteful to require a plaintiff to file a new [employment discrimination complaint] instead of simply permitting [the plaintiff] to assert that related claim in ongoing proceedings'). In Connecticut, the reasonably related exception operates to excuse a party's failure to obtain a release of jurisdiction from the commission. ... Put differently, it salvages an employment discrimination claim that was not presented to the commission in accordance with General Statutes §§ 46a-82, 46a-100 and 46a-101." (Citations and footnotes omitted).

Here, the claims against Panagrosso for discrimination, retaliation and aiding and abetting were reasonably related to the specific discrimination claims plaintiff made to the CHRO against Cine-Med and McGovern so the exception to administrative exhaustion applied to preserve jurisdiction over those claims. The same is true for the retaliation claims against Cine-Med and McGovern; they were on notice of specific discrimination claims that would encompass facts underlying the retaliation claims subject to investigation to satisfy the purposes of exhaustion of administrative remedies. See *Resnick*, 2013 WL 6038364 *6-7. See generally *Schofield*, 222 Conn.App. at 456-57.

**Cine-Med Does Not Have Sufficient Number of Employees for Title VII or the ADEA to Apply.**

Counts One and Two are brought pursuant to the ADEA , 29 U.S.C. § 621 et seq. Under "definitions", "an 'employer' means a person...who has twenty or more employees..." 29 U.S.C. § 630 (b). Counts Three and Four are brought pursuant to Title VII , 42 U.S.C. § 2000e. Under "definitions", "[t]he term 'employer' means a person...who has fifteen or more employees..." 42 U.S.C. § 2000e(b) . According to the evidence submitted by Cine-Med, when plaintiff's employment terminated Cine-Med employed approximately twelve employees, which is below the minimum employee limits of both federal statutes.

Plaintiff presented a list of employees with seventeen names listed, with some names crossed out, but without an affidavit or other admissible evidence to authenticate whether this was a list of employees of Cine-Med at the time of the events alleged to violate the ADEA and Title VII. Plaintiff also pointed to evidence that Cine-Med from time to time employed contractors, but again without any evidence that would create an issue of fact as to whether the contractors could be considered "employees" at the time of the alleged discrimination for purposes of satisfying the numerical condition for application of the federal discrimination statutes. See generally *Tremalio v. Demand Shoes, LLC*, 2013 WL 5445258 *11 (D.Conn. 2013) (Bryant, J.) (test for determining whether a contractor is a *de facto* employee). Although plaintiff characterized the testimony as to the number of employees as not "definitive", the testimony was clear and consistent that Cine-Med employed fewer than fifteen employees, thus shifting the burden to plaintiff to submit

contrary evidence that would create an issue of fact. See *Iacurci v. Sax*, 313 Conn. at 799. The counts alleging violation of the ADEA and Title VII are dismissed.

**There are Material Issues of Fact To Be Tried.**

**1. Age Discrimination**

In *Femia v. City of Meriden*, 223 Conn.App. 1, 11-13 (2023), the Appellate Court reviewed the standards for proving age discrimination:

> "Having set forth the applicable standard of review, we now turn to the general principles governing a claim of age related employment discrimination. Section 46a-60 (b) provides in relevant part: 'It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's ... age ....' Accordingly, when reviewing a plaintiff's claim of employment discrimination, 'this court employs the burden-shifting analysis set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) [and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (collectively, the *McDonnell Douglas-Burdine* framework)]. Under this analysis, the employee must first make a prima facie case of discrimination. The 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. ... That test is a flexible one. ... To establish a prima facie case of discrimination, the complainant must demonstrate that (1) he is in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances

giving rise to an inference of discrimination. ... The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor....

'Under the *McDonnell Douglas-Burdine* model, the burden of persuasion remains with the plaintiff. ... Once the plaintiff establishes a prima facie case, however, the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating (not proving) some legitimate, nondiscriminatory reason for the plaintiff's rejection. ... Because the plaintiff's initial prima facie case does not require proof of discriminatory intent, the McDonnell Douglas-Burdine model does not shift the burden of persuasion to the defendant. Therefore, [t]he 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. ...'" (Citations and footnotes omitted).

There are facts in the record from which a reasonable jury could find that plaintiff could establish a prima facie case of age discrimination and that the non-discriminatory reasons proffered by Cine-Med were pretextual.[2] Defendants have not met their burden of showing that there are no genuine material issues of fact concerning age discrimination and they are entitled to judgment as a matter of law.

**2. Gender Discrimination**

The burden shifting *McDonnell-Douglas* formula also applies to claims of gender discrimination.[3] See *Luth v. OEM Controls, Inc.*, 203 Conn.App. 673,

[2] The "same actor" inference does not preclude a finding of discriminatory intent by McGovern and Cine-Med here. See *Martinez v. Premier Maintenance, Inc.*, 185 Conn.App. 425, 452 (2018) ("same-actor inference is permissive, not mandatory").

[3] Section 46-60 (b) (1) provides "It shall be a discriminatory practice in violation of this section:

680 (2021). There are facts in the record from which a reasonable jury could find that plaintiff could establish a prima facie case of gender discrimination and that the non-discriminatory reasons proffered by Cine-Med were pretextual. Defendants have not met their burden of showing that there are no genuine material issues of fact concerning age discrimination and they are entitled to judgment as a matter of law.

**3. Retaliation**

The burden shifting McDonnell-Douglas formula also applies to claims of retaliation.[4] See *Luth v. OEM Controls, Inc.*, 203 Conn.App. at 690. There are facts in the record from which a reasonable jury could find that plaintiff could establish a prima facie case of retaliation and that the non-discriminatory reasons proffered by Cine-Med were pretextual. Defendants have not met their burden of showing that there are no genuine material issues of fact concerning age discrimination and they are entitled to judgment as a matter of law.

**4. Aiding and Abetting**

Section 46a-60 (b) (5) provides: "It shall be a discriminatory practice in violation of this [section for] any person, whether an employer or an

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(1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, ... to 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 ... sex...."

[4] Section 46-60 (b) (4) provides: " (b) It shall be a discriminatory practice in violation of this section: ... (4) For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice...."

employee or not, to aid, abet, incite, compel or coerce the doing of any act declared to be a discriminatory employment practice or to attempt to do so."

Perpetrators of discrimination may be found to have aided and abetted a corporate employer's discrimination even when the employee was the perpetrator of the employer's discrimination. See *Belanger v. Z Incorporated*, 2024 WL 1879658 *6 (Conn.Super. 2024) (Shah, J.) (and cases cited therein). In *Thomas v. Eder Bros, Inc.*, 2023 WL 5542851 *4 (Conn.Super. 2023) (Welch, J.), Judge Welch determined a sole perpetrator could not be held to have aided and abetted his own discrimination where the complaint against the corporate employer had failed. Here, both McGovern and Panagrosso are alleged to have been involved in the discrimination by Cine-Med. Compare, *Kanios v. UST, Inc.*, 2005 WL 3579161 *8 (D.Conn. 2005) (Squatrito, J.) ("more than one person is allegedly involved in the termination and discriminatory practices of [the corporate defendant]").

There are facts in the record from which a reasonable jury could find that plaintiff could establish a prima facie case of aiding and abetting discriminatory conduct by defendants and that the non-discriminatory reasons proffered by Cine-Med were pretextual. Defendants have not met their burden of showing that there are no genuine material issues of fact concerning aiding and abetting and they are entitled to judgment as a matter of law.

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Krumeich, J.T.R.

Decision enters in accordance with the foregoing. All counsel and self-represented parties of record notified. JDNO notice sent. 3/19/2025

Amina Seyal (Assistant Clerk)