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JOHN FEMIA *v.* CITY OF MERIDEN
(AC 45866)

Alvord, Elgo and Moll, Js.

Syllabus

The plaintiff, a full-time member of the defendant city's police department since 2008, sought to recover damages for the defendant's alleged violation of the Connecticut Fair Employment Practices Act (CFEPA) (§ 46a-51 et seq.). In 2012, the plaintiff, then a patrol officer, was promoted to the rank of detective and, thereafter, sought promotion to the rank of detective sergeant several times. In 2014, although the plaintiff received the second highest score on the promotional exam, the department's chief, C, did not promote any candidate at that time. In 2016, the plaintiff received the highest score on the exam, and, thereafter, C promoted another detective in the department. In 2018, the plaintiff received the highest score on the exam, and another detective in the department, W, received the second highest score. C promoted W to the rank of detective sergeant. At the time of this promotion, W was thirty-nine years old, and the plaintiff was forty-two years old. The plaintiff filed a complaint with the Commission on Human Rights and Opportunities, which issued a release of jurisdiction. Thereafter, the plaintiff commenced the present action against the defendant, alleging age discrimination in violation of a provision (§ 46a-60 (b) (1)) of CFEPA. The trial court granted the defendant's motion for summary judgment, in which the defendant argued, inter alia, that the plaintiff had not established a prima facie case of age discrimination because the evidence demonstrated that there was no significant difference in age between the plaintiff and W. From the judgment rendered for the defendant, the plaintiff appealed to this court. *Held* that the plaintiff could not prevail on his claim that the trial court improperly determined that he failed to establish a genuine issue of material fact with respect to his prima facie case of age discrimination: the three year age difference between the plaintiff and W, standing alone, was insufficient to establish the plaintiff's prima facie case, and the additional evidence submitted by the plaintiff, including his vague assertion that, to his knowledge, he was the only candidate for the position of detective sergeant while he was employed by the department who finished first on the promotional exam and was not promoted, and his argument that, between 2008 and his adverse employment action, the five employees that C promoted to detective sergeant were under the age of forty, a list of limited scope and without any evidence to show that there were eligible candidates during that period over the age of forty, did not establish a genuine issue of material fact as to his prima facie case of age discrimination; moreover, contrary to the plaintiff's assertion that an allegedly ageist comment made by one of his supervisors, approximately nine months after W's promotion to detective sergeant, constituted evidence giving rise to an inference of age discrimination, there was no evidence that C knew of the supervisor's comment or that C was influenced by that supervisor when he promoted W instead of the plaintiff, and, given that the comment was made nine months after the plaintiff was not selected for the promotion, there was no evidence that it was connected to the promotional determination; furthermore, contrary to the plaintiff's argument that the trial court improperly determined an issue of fact at the summary judgment stage by finding that C did not know the relative ages of the plaintiff and W when he did not select the plaintiff for the promotion, C had attested that he did not review any documents containing or revealing the ages, dates of birth, or relative ages of the plaintiff or W in connection with making his promotion decisions, he did not know any of their ages when he promoted them, and they all seemed to him to be approximately the same age, based on his personal on-the-job contact with them, and the plaintiff failed to offer any evidence that called C's testimony into question.

Argued October 24—officially released December 19, 2023

Procedural History

Action to recover damages for alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Eric R. Brown, for the appellant (plaintiff).

Stuart C. Johnson, with whom was *Emily Holland*, for the appellee (defendant).

Opinion

ALVORD, J. In this employment discrimination action, the plaintiff, John[1] Femia, appeals from the summary judgment rendered by the trial court in favor of his employer, the defendant, the city of Meriden. The plaintiff claims that the court improperly concluded that there was no genuine issue of material fact with respect to his allegation that he was not selected for a promotion in 2019 within the Meriden Police Department (department) on the basis of his age in violation of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq.[2] We affirm the judgment of the court.

The following facts, viewed in the light most favorable to the plaintiff as the nonmoving party, and procedural history are relevant to our resolution of this appeal. The plaintiff began working for the department in 2000, at which time he attended the Connecticut Police Officer Standards and Training (POST) Academy. After graduating from the academy in 2001, the plaintiff worked as a patrol officer within the department. In 2002, the plaintiff resigned from full-time employment with the department to pursue his legal education.[3] After graduating from law school and then working as an attorney, the plaintiff resumed full-time employment with the department as a patrol officer in 2008, until he was promoted to the rank of detective in 2012.

The department's General Order Promotions–01 (general order) guides its promotional process. Pursuant to the general order, the promotional process is designed to address "[1] Validity: Proof through statistical data that a given component of the selection process is job related either by predicting a candidate's job performance or by detecting important aspects of the work behavior related to the position; [2] Utility: Proof of the usefulness that a given component of the selection process can be used as a predictor of job success; [and 3] Adverse Impact: Proof that a given component is not discriminatory towards a member of a particular protected class, age, race or ethnic background, as measured by the '80% rule.' " (Emphasis omitted.) Meriden Police Department, General Order Promotions–01 (effective June 24, 2016) p. 5. The components of the promotional process include: "[1] A written examination; [2] An oral examination; [and 3] The awarding of points as determined by the candidates Seniority" (collectively, the exam). Id., p. 3. A candidate becomes eligible for a promotion by obtaining a passing grade on the exam and being placed on the promotional list. See id. The general order also contains a section entitled "Development and Use of Promotional Eligibility Lists," which states that the defendant determines the criteria and procedures for creating and using a promotional eligibility list. Id., p. 5. These procedures include, in part,

"[t]he method for selecting [candidate] names from the lists." Id.

The plaintiff first sought promotion to the rank of detective sergeant in 2014. Although the plaintiff received the second highest score on the exam, the department's chief, Jeffry Cossette, did not promote any candidate at that time.[4] In 2016, the plaintiff again completed the exam for possible promotion to the rank of detective sergeant. The plaintiff received the highest score on the exam. Thereafter, Cossette promoted Detective Shane Phillips.[5] In 2018, the plaintiff took the exam for possible promotion to the rank of detective sergeant. The plaintiff received the highest score on the exam, and Detective John Wagner received the second highest score. Cossette promoted Wagner to the rank of detective sergeant. At the time of this promotion, Wagner was thirty-nine years old, and the plaintiff was forty-two years old.[6]

The plaintiff filed a complaint with the Commission on Human Rights and Opportunities, which issued a release of jurisdiction on May 4, 2020. Thereafter, on June 24, 2020, the plaintiff commenced the present action against the defendant. The operative complaint, amended February 11, 2021, alleged one count of age discrimination in violation of General Statutes § 46a-60 (b) (1). The defendant answered the complaint and asserted a special defense alleging that the plaintiff failed to mitigate his damages.

On January 31, 2022, the defendant filed a motion for summary judgment as to the operative complaint, accompanied by a supporting memorandum of law and appended exhibits. Therein, the defendant argued that the plaintiff had not established a prima facie case of age discrimination because "[t]he evidence demonstrates that there is no significant difference in age between the plaintiff and the individual who was promoted instead of him. The plaintiff cannot make out a prima facie case of age discrimination without showing that there was a significant difference in age between himself and the individual who was promoted." Alternatively, the defendant argued that, even if the plaintiff could establish a prima facie case of age discrimination, there was no evidence that the defendant's proffered legitimate reason for promoting Wagner instead of the plaintiff was pretextual.

The defendant appended the following exhibits: the general order; the 2018–2019 detective sergeant promotional eligibility list; the plaintiff's 2016–2018 performance evaluations; Wagner's 2016–2018 performance evaluations; excerpts from the plaintiff's deposition transcript; excerpts from Phillips' deposition transcript; a copy of the defendant's responses to the plaintiff's first set of interrogatories and requests for production; and Cossette's signed affidavit. In his affidavit, Cossette averred that he promoted Wagner instead of the plaintiff

because the plaintiff's "social skills, communication skills, and command presence were lacking as compared to . . . Wagner . . . ." Cossette also attested that Wagner had obtained the respect of his fellow officers, whereas the plaintiff had not to the same extent, and Wagner was "better suited" for leadership positions. Cossette averred that, at the time of his promotional decision, he did not know the ages of the plaintiff or Wagner, nor did he know that the plaintiff was older than Wagner.

On June 3, 2022, the plaintiff filed a memorandum of law in opposition to the defendant's motion for summary judgment, in which he argued that he had established a prima facie case of age discrimination. In support of his opposition, the plaintiff maintained that (1) all persons promoted to the detective sergeant position in the department after 2008 were under the age of forty, (2) a senior member of the department command staff made an ageist comment to him,[7] (3) a reasonable jury could conclude that Cossette knew of the plaintiff's age when he did not select the plaintiff for the promotion because Cossette had access to the plaintiff's personnel file, which contained his age, and (4) a reasonable jury could find that the defendant's proffered nondiscriminatory reasons for not promoting the plaintiff were a pretext for discrimination.

The plaintiff submitted the following exhibits in support of his opposition: the plaintiff's deposition transcript; the defendant's responses to the plaintiff's second set of interrogatories and requests for production; a copy of the plaintiff's driver's license and resume; the general order; the plaintiff's 2018 performance evaluation; the department's 2018 detective sergeant examination results; the 2018 promotional eligibility list; the defendant's responses to the plaintiff's first set of interrogatories and requests for production; Cossette's deposition transcript; deposition transcripts from two supervisors; and the plaintiff's affidavit. In his affidavit, the plaintiff averred that, in addition to his regular patrol and detective duties, he also had the following duties and responsibilities: "[1] POST certified Search and Seizure instructor; [2] POST certified Criminal Law Instructor; [3] POST certified Search Warrant Preparation Instructor; [4] Gang training of staff at the Venture Academy and Wilcox Tech High School; [5] Presenter to the Meriden Council of Neighborhoods on gangs; [6] Instructor at the [department's] Citizen's Police Academy; [7] Intelligence Liaison Officer to the Connecticut Intelligence Center (CTIC) since 2014 and [he] received a statewide award for leadership in this role; [8] Gang Intelligence Officer from 2015 through approximately 2018; [and 9] Liaison to the Connecticut FBI Joint Terrorism Task Force Executive Board from 2015 to present." Additionally, the plaintiff averred that, "[t]o my knowledge, following my return to the [department] in September, 2008, I was the only candidate who placed

first on the [promotional] eligibility list for promotion to the position of Detective Sergeant who was not promoted to the position of Detective Sergeant." The court, *Abrams*, *J.*, held oral argument on the motion for summary judgment on August 5, 2022.

On September 14, 2022, the court issued a memorandum of decision, wherein it determined "that the plaintiff failed to raise a genuine issue of material fact on the issue of whether his adverse employment action occurred under circumstances giving rise to a claim of age discrimination. Having failed to make such a showing, the plaintiff has not set forth a prima facie case to support his age discrimination cause of action." First, with respect to the age difference between the plaintiff and Wagner, the court stated that "It is undisputed that at the time of the 2019 adverse employment action that is the subject of this case, the plaintiff was forty-two years old and Wagner . . . was thirty-nine. As stated by the [United States Court of Appeals for the Sixth Circuit]: '[t]he overwhelming body of cases in most circuits has held that age differences of less than ten years are not significant enough to make out the fourth part of the age discrimination prima facie case.' . . . Therefore, standing alone, the three year age gap between the plaintiff and Wagner is insufficient to establish the plaintiff's prima facie case. Nevertheless, '[i]n cases where the age difference between the plaintiff and the individual treated more favorably is less than ten years, the plaintiff still may present a triable claim if [he] directs the court to evidence that [his] employer considered [his] age to be significant.' " (Citation omitted; footnote omitted.)

Second, regarding the comment made by a senior member of the department's command staff to the plaintiff, the court stated that, "the plaintiff points to a comment made by a supervisory employee of the defendant (not Chief Cossette) regarding the plaintiff's gray hair that the plaintiff found to be ageist. . . . In his affidavit filed in conjunction with the defendant's summary judgment motion, Chief Cossette attests that he was not aware of the plaintiff's age when he decided not to promote him. Moreover, there is no indication in the numerous exhibits offered by the plaintiff with his memorandum in opposition to the motion for summary judgment that Chief Cossette knew about the . . . comment made by the supervisory employee. Based on the foregoing, this one remark cannot serve as sufficient support for the fourth element of the plaintiff's prima facie case." (Footnote omitted.)

Third, the court addressed the plaintiff's argument that, because Cossette had access to the plaintiff's personnel files, which contained his age, a reasonable jury could conclude that Cossette knew the plaintiff's age at the time the plaintiff was not selected for the promotion. The court determined that "Cossette has attested that

he 'did not review any documents containing or revealing the ages, dates of birth, or relative ages of [the plaintiff or] . . . Wagner in connection with making [his] promotion decisions, and [he] did not know any of their ages when [he] promoted them' and they 'all seemed . . . to be approximately the same age, based on [his] personal on-the-job contact with them.' The plaintiff has failed to offer any evidence that calls this testimony into question. Therefore, the plaintiff has failed to raise a genuine issue of material fact regarding whether [Chief Cossette] was aware of his age at the time he was denied the promotion and whether his age played any part in Chief Cossette's deliberative process." Accordingly, the court rendered summary judgment in favor of the defendant. This appeal followed.

Before turning to the plaintiff's claims on appeal, we set forth the relevant standard of review. "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. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . 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. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [or to deny a] motion for summary judgment is plenary." (Footnote omitted; internal quotation marks omitted.) *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 539–40, 285 A.3d 1128 (2022).

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 qualifica-

tion 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 . . . ."[8] 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."[9] (Citations omitted; internal quotation marks omitted.) *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 220, 928 A.2d 586 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008).

"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. . . ." (Internal quotation marks omitted.) *Wallace* v. *Caring Solutions, LLC*, 213 Conn. App. 605, 616, 278 A.3d 586 (2022).

Finally, "our legislature modeled [CFEPA] on its federal counterpart, Title VII . . . and it has sought to

keep our state law consistent with federal law in this area. . . . Accordingly, in matters involving the interpretation of the scope of our antidiscrimination statutes, our courts consistently have looked to federal precedent for guidance." (Citation omitted; internal quotation marks omitted.) *Eagen* v. *Commission on Human Rights & Opportunities*, 135 Conn. App. 563, 579–80, 42 A.3d 478 (2012). "[O]ur Supreme Court has held that in defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII of the Civil Rights Act of 1964, the federal statutory counterpart to § 46a-60." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 156 Conn. App. 239, 250, 113 A.3d 463 (2015), aff'd, 322 Conn. 154, 140 A.3d 190 (2016).

The plaintiff claims on appeal that the trial court improperly determined that he failed to establish a genuine issue of material fact with respect to a prima facie case of age discrimination. The parties agree that the plaintiff has satisfied the first three prongs of the *McDonnell Douglas-Burdine* framework. The issue, therefore, is whether the plaintiff raises a genuine issue of material fact "that the adverse action occurred under circumstances giving rise to an inference of discrimination." *Vollemans* v. *Wallingford*, supra, 103 Conn. App. 220.

In considering this claim we necessarily begin by reviewing the United States Supreme Court's holding in *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), which addressed "whether a plaintiff alleging that he was discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA) . . . 29 U.S.C. § 621 et seq., must show that he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the [*McDonnell Douglas-Burdine* framework]." (Emphasis omitted.) Id., 309. The court determined that an inference of age discrimination "cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination . . . ." Id., 313. The prima facie case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . ."[10] (Emphasis omitted; internal quotation marks omitted.) Id., 312. *O'Connor* did not address what constitutes a significant age difference for the purpose of establishing an inference of age discrimination.

We turn to the decisions of the federal circuit courts of appeals that have addressed whether a significant age

difference exists under *O'Connor*. In general, federal circuits require a plaintiff to present additional evidence supporting a prima facie case of age discrimination when the difference in age between the plaintiff and the other employee involved in the plaintiff's employment action is less than ten years. See *Frappied* v. *Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1058 (10th Cir. 2020) (age difference of ten or more years is sufficiently substantial to support inference of age discrimination whereas age difference of less than ten years is not); *Del Valle-Santana* v. *Servicios Legales de Puerto Rico, Inc.*, 804 F.3d 127, 131 (1st Cir. 2015) (three year age difference, absent additional evidence sufficient to support inference of discrimination, is "too insignificant to support a prima facie case of age discrimination" (internal quotation marks omitted)), cert. denied, 579 U.S. 933, 136 S. Ct. 2518, 195 L. Ed. 2d 849 (2016); *France* v. *Johnson*, 795 F.3d 1170, 1174 (9th Cir. 2015) (eight year age difference sufficient to establish prima facie case when additional evidence supports plaintiff's age discrimination claim); *Girten* v. *McRentals, Inc.*, 337 F.3d 979, 981 (8th Cir. 2003) (nine year age difference "may not be significant enough to demonstrate age discrimination"); *Bennington* v. *Caterpillar, Inc.*, 275 F.3d 654, 659 (7th Cir. 2001) (five year age difference "is not substantial enough (in and of itself) to set forth a prima facie age discrimination case" (emphasis omitted)), cert. denied, 537 U.S. 819, 123 S. Ct. 96, 154 L. Ed. 2d 27 (2002). For example, in *Nembhard* v. *Memorial Sloan Kettering Cancer Center*, Docket No. 96-7406, 1996 WL 680756 (2d Cir. November 22, 1996) (decision without published opinion, 104 F.3d 353), the United States Court of Appeals for the Second Circuit determined that the plaintiff could establish a prima facie case of age related discrimination because the plaintiff submitted evidence supporting an inference that her employer repeatedly discriminated against her. The court concluded that, although "the fact that [the plaintiff] was replaced by someone only a year younger, alone, does not necessarily support the inference that [the defendant] terminated her due to her age, when her termination is bathed in the light of [her supervisor's] comments, a reasonable jury could infer that her termination was due to her age." Id., *4.[11]

In this case, the court determined that "standing alone, the three year age gap between the plaintiff and Wagner is insufficient to establish the plaintiff's prima facie case" but that "the plaintiff still may present a triable claim if [he] directs the court to evidence that [his] employer considered [his] age to be significant." (Internal quotation marks omitted.) The court then reviewed the plaintiff's argument "that he was over forty years old at the time he was denied the promotion, whereas Wagner was under forty, and that there was a supposed pattern and practice of the defendant promoting individuals under the age of forty." In rejecting

this argument, the court stated: "The fact that an individual over forty years old was allegedly passed over for promotion by someone under forty years old is even less probative in a cause of action brought under CFEPA because '[t]he ADEA covers the class of employees who . . . are over the age of forty [whereas] [t]he CFEPA makes it unlawful for employers to refuse to hire or discharge from employment any person on the basis of age' without explicit reference to an age limitation." We agree with the court.

The evidence submitted by the plaintiff in response to the defendant's motion for summary judgment does not establish a genuine issue of material fact as to whether the circumstances surrounding him not being selected for the promotion give rise to an inference of discrimination. Instead, the plaintiff merely made a vague assertion that "to his knowledge he was the only candidate for the position of detective sergeant while he was employed by the [department] who finished first on the promotional exam and was not promoted." Such an assertion cannot assist the plaintiff in establishing his prima facie case. See *Walker* v. *Dept. of Children & Families*, 146 Conn. App. 863, 871, 80 A.3d 94 (2013) ("a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment" (internal quotation marks omitted)), cert. denied, 311 Conn. 917, 85 A.3d 653 (2014). The plaintiff also argued that, between 2008 and his adverse employment action, the five employees Cossette promoted to detective sergeant were under the age of forty. We are not persuaded that a list of such a limited scope purporting to evidence the department's alleged discriminatory employment practices—without any evidence to show that there were eligible candidates during that period over the age of forty—establishes a genuine issue of material fact as to his prima facie case of age discrimination.[12] See, e.g., *Haskell* v. *Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984) ("[t]he courts have consistently rejected similar statistical samples as too small to be meaningful").

The court then turned to the comment made by one of the plaintiff's supervisors approximately nine months after he was not promoted to detective sergeant. In rejecting this comment as evidence giving rise to an inference of age discrimination, the court stated that "there is no indication in the numerous exhibits offered by the plaintiff with his memorandum in opposition to the motion for summary judgment that [Cossette] knew about the . . . comment made by the supervisory employee." Our review of the record shows that there was no evidence that Cossette knew of the supervisory employee's comment or that Cossette was influenced by that employee when he promoted Wagner instead of the plaintiff. See *Agosto* v. *Premier Maintenance, Inc.*, 185 Conn. App. 559, 582–83, 197 A.3d 938 (2018) ("[r]emarks made by someone other than the person

who made the decision adversely affecting the plaintiff may have little tendency to show that the decision-maker was motivated by the discriminatory sentiment expressed in the remark" (internal quotation marks omitted)). Moreover, the comment was made nine months *after* the plaintiff was not selected for the promotion and there was no evidence that it was connected to the promotional determination. Thus, we agree with the court that this comment does not support an inference of age discrimination.

Finally, the plaintiff argues that because Cossette had access to the department's personnel files, and the data contained therein included employee ages, a genuine issue of material fact exists as to whether Cossette knew the ages of the plaintiff and Wagner at the time he promoted Wagner instead of the plaintiff. The plaintiff argues that the court improperly determined an issue of fact at the summary judgment stage by finding that Cossette did not know the relative ages of the plaintiff or Wagner when he did not select the plaintiff for the promotion. We disagree.

In rejecting the plaintiff's argument, the court stated that, "[i]n the present case, [Cossette] has attested that he 'did not review any documents containing or revealing the ages, dates of birth, or relative ages of [the plaintiff or] . . . Wagner in connection with making [his] promotion decisions, and [he] did not know any of their ages when [he] promoted them' and they 'all seemed . . . to be approximately the same age, based on [his] personal on-the-job contact with them.' The plaintiff has failed to offer any evidence that calls this testimony into question. Therefore, the plaintiff has failed to raise a genuine issue of material fact regarding whether the defendant's chief decision maker was aware of his age at the time he was denied the promotion and whether his age played any part in [Cossette's] deliberative process."

As our summary judgment jurisprudence makes clear, "[i]t is not enough for the moving party merely to assert the absence of any disputed factual issue; the moving party is required to bring forward . . . evidentiary facts, or substantial evidence outside the pleadings to show the absence of any material dispute. . . . The party opposing summary judgment must present a factual predicate for his argument to raise a genuine issue of fact." (Internal quotation marks omitted.) *Vollemans* v. *Wallingford*, supra, 103 Conn. App. 193. In an age discrimination claim, a plaintiff establishes a prima facie case by presenting "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . ." (Emphasis omitted; internal quotation marks omitted.) *O'Connor* v. *Consolidated Coin Caterers Corp.*, supra, 517 U.S. 312. Such evidence must demonstrate "a logical connection between each element of the prima facie case and

the illegal discrimination for which it establishes a legally mandatory, rebuttable presumption. . . . This logical connection can be drawn only if the employer acted with knowledge that the replaced worker was significantly older than her successor." (Citation omitted; internal quotation marks omitted.) *Woodman* v. *WWOR-TV, Inc.*, 411 F.3d 69, 80–81 (2d Cir. 2005).

The evidence submitted by the parties, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals no genuine issue of material fact that Cossette was not aware of the age difference between the two candidates for promotion. Cossette averred that, "[w]hen I promoted . . . Wagner to the rank of detective sergeant, I did not know whether [the plaintiff] was older or younger than . . . Wagner." Cossette further attested that he "did not review any documents containing or revealing the ages, dates of birth, or relative ages of [the plaintiff] . . . or Wagner in connection with making my promotion decisions, and I did not know any of their ages when I promoted [Wagner]."[13] Thus, we conclude that the trial court did not improperly determine an issue of fact at the summary judgment stage.[14]

For the foregoing reasons, the plaintiff did not submit evidence at the summary judgment stage to support his claim that the decision not to promote him gives rise to an inference of age discrimination. Accordingly, we conclude that the trial court correctly rendered summary judgment because the plaintiff failed to establish the existence of a genuine issue of material fact as to his prima facie case of age discrimination.[15]

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The plaintiff's first name had been spelled inconsistently throughout the pleadings. The trial court utilized "the spelling 'John' because that is what the plaintiff used in his initial complaint and writ of summons." We do the same.

[2] The plaintiff briefs his claims as follows: (1) the court improperly determined that the defendant did not discriminate against him on the basis of his age in violation of CFEPA; (2) the court improperly decided an issue of fact at the summary judgment stage; and (3) the court improperly determined that no significant age difference existed between the plaintiff and the younger candidate who received the detective sergeant promotion. Because his claims are intertwined, we address them together.

[3] The plaintiff remained employed by the department as a reserve officer.

[4] Each promotional eligibility list generated by the department contains an expiration date. When the plaintiff completed the exam for promotion to detective sergeant in 2014, the corresponding promotional eligibility list expired on October 9, 2015. Thus, to be considered subsequently for the position of detective sergeant, the plaintiff had to complete the exam again.

[5] In its memorandum of decision, the court stated that, "[a]lthough the plaintiff's opposition memorandum also references the defendant's 2017 decision to promote [Phillips] instead of the plaintiff as additional evidence of age discrimination, this purported adverse employment action is not alleged, only alluded to, in the plaintiff's operative complaint nor was it appealed to [the Commission on Human Rights and Opportunities] or the [Equal Employment Opportunity Commission] within the requisite time period. . . . Accordingly, the court will only consider [John] Wagner's 2019 promotion and not the 2017 elevation of Phillips in adjudicating this motion for summary judgment." (Citation omitted.) The plaintiff does not challenge

the trial court's treatment of this issue.

[6] When making a promotional determination, Cossette also employs what is known as the "rule of three." Under this rule, which has been used by the department since the 1980s, the department's chief receives the names of the top three candidates on the promotional eligibility list. The top three candidates are those who received the highest overall scores on the promotional exam. Cossette testified that, after receiving the list, it is his practice to review each candidate's leadership abilities and communication skills. At oral argument before this court, the plaintiff's attorney stated that the plaintiff does not challenge the department's use of this rule.

[7] The plaintiff had testified to an incident that occurred on August 24, 2020, nine months after he was not selected for the promotion, wherein a senior member of the department's command staff commented, "[s]eems you have more gray hair today" as the plaintiff entered a room.

[8] Although § 46a-60 has been amended since the events at issue in this appeal; see, e.g., Public Acts 2022, No. 22-82, § 10; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 46a-60.

[9] In the context of summary judgment, "regardless of [*McDonnell Douglas-Burdine*'s] burden-shifting framework, it is axiomatic that a defendant seeking summary judgment bears the burden to show the absence of a genuine fact issue for trial. . . . Accordingly, the burden [is] placed on [the defendant] to show the absence of a genuine fact issue . . . ." (Citations omitted.) *Peterson* v. *Connecticut Light & Power Co.*, Docket No. 3:10-cv-02032 (JAM), 2014 WL 2615363, *2 (D. Conn. June 12, 2014).

[10] The plaintiff argues that the trial court incorrectly applied *O'Connor* to his claim of age discrimination by finding that there was no significant age difference between himself and Wagner. The plaintiff maintains that he "developed and presented" the necessary additional evidence that *O'Connor* requires to create an issue of fact as to whether the plaintiff's adverse employment action was motivated by age. We disagree that the court misapplied *O'Connor*.

[11] In *Nembhard*, the plaintiff's "claim of age discrimination centered around the following events: (1) in September, 1991, [her supervisor] cancelled [the plaintiff's] application for computer training, explaining that younger staff would be trained; (2) in July, August, and September 1992, [her supervisor] made reference to an 'old, black fly' she was trying to get rid of; (3) in August, 1992, [her supervisor] told [the plaintiff] that only older people tended to accumulate sick time; (4) In July, 1992, after [the plaintiff] informed [her supervisor] of her willingness to train on a computer, [her supervisor] told her that the younger staff would train on computers." *Nembhard* v. *Memorial Sloan Kettering Cancer Center*, supra, 1996 WL 680756, *2.

[12] The record reveals that Cossette promoted several officers over the age of forty to various other positions within the department. In fact, Cossette promoted two persons over the age of forty to the rank of detective sergeant, the first promotion in 2007 (age 49), and the second promotion in 2021 (age 41).

[13] The plaintiff's contention that Cossette's access to employee personnel files for purposes of reviewing an employee's performance evaluation shows that Cossette scrutinizes the ages of employees when making his promotional determinations is speculative at best.

[14] The plaintiff also argues that he offered "extensive evidence" questioning Cossette's "self-serving denial of knowledge of relative ages [of the plaintiff and Wagner]." Viewing the evidence proffered in the light most favorable to the plaintiff, we conclude that the plaintiff has not presented evidence demonstrating a genuine issue of material fact as to Cossette's lack of knowledge of the plaintiff's age.

[15] The defendant raises, as an alternative ground for affirmance, that, even if this court were to determine that the plaintiff established a prima facie case of age discrimination, the defendant offered a legitimate, nondiscriminatory justification for why the plaintiff was not selected for the promotion. Because we affirm the court's decision, we need not address the issue nor the plaintiff's arguments thereto.