STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 17, 2014)

MARY L. BAGNALL	:	
	:	
v.	:	**C.A. No. PC-2005-6529**
	:	
STATE OF RHODE ISLAND COMMISSION FOR HUMAN RIGHTS and UPN28 TV, WLWC, PARAMOUNT PICTURES	:	

DECISION

VOGEL, J. Mary L. Bagnall (Bagnall or Appellant) appeals from a decision of the State of Rhode Island Commission for Human Rights (Commission) denying her discrimination claim against UPN28 TV, WLWC, Paramount Pictures (Employer). Bagnall filed a charge against Employer alleging that Employer discriminated against her with respect to termination from her employment because of her age in violation of G.L. 1956 § 28-5-7. Bagnall took a timely appeal to this Court from the Commission's decision. Jurisdiction is pursuant to G.L. 1956 § 45-53-5(c). For the reasons set forth herein, the Court affirms the decision of the Commission.

I

Facts and Travel

Bagnall worked for Employer as an Account Executive for approximately six months in 2000, from January through June. R. Ex. 1, Decision at 2, 6. Her role as an Account Executive was to sell television advertising for Employer's Channel 28. On June 30, 2000, her supervisor, Francis Perdisatt (Perdisatt), terminated her for performance issues. Id. at 6. On October 3, 2000, Bagnall filed a charge of discrimination with the Commission alleging that Employer had discriminated against her "with respect to terms and conditions of employment and termination

from employment because of her age" in violation of § 28-5-7. Id. at 1. After an investigation, on July 16, 2002, Preliminary Investigating Commissioner Richard Ferland ruled that there was probable cause to believe that Employer violated § 28-5-7. Id. Specifically, the Preliminary Investigating Commissioner found probable cause to believe that:

> "a. The complainant's date of birth is December 13, 1947;
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> "b. The complainant was employed by the respondent for approximately five (5) months and held the position of Account Executive at the time of her termination on or about June 29, 2000. The person who hired the complainant left the employment of the respondent before the complainant started;
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> "c. Within one month of the hire of the new local Sales Manager, Mr. Joe Charves, the complainant began to feel pressure and discontent from him. Mr. Chavres [sic] made derogatory comments about age, such as: 'She's attractive for an older lady';
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> "d. Five of the six Account Executives hired in this time period under the new General Sales Manager and the new local Sales Manager were thirty-one years old or younger. Most of them had relatively little experience. One of the Account Executives hired was forty years old. The complainant was fifty-two years old at this time;
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> "e. The respondent did not provide the complainant with adequate training, particularly when she was first hired. The complainant's work was scrutinized closely. The respondent did not acknowledge the complainant's accomplishments in sales for the respondent. By mid-May 2000, she was required to report daily on all of her activities for the day. None of the younger workers were subjected to this treatment;
>
> "f. A new Account Executive, who was twenty-three years old, was hired in June 2000. Within the week, the complainant was terminated, on or around June 29, 2000. The respondent's General Sales Manager, Francis Perdisatt, stated that the complainant was terminated because 'It just wasn't working'. The respondent terminated the complainant because of her age;
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> "g. The respondent discriminated against the complainant with respect to terms and conditions of employment, and termination because of her age;

> "h. The respondent's discriminatory actions have caused the complainant to suffer a loss of income and other work related benefits." R. Ex. 2, Compl. and Notice of Hr'g at 2-3.

Thereafter, on October 2, 2002, a Complaint and Notice of Hearing issued regarding Bagnall's claims. Id. at 1-2. The Complaint alleged that Employer terminated Bagnall because of her age, causing her to lose income and other work-related benefits. Id. at 2-3.

A

Commission Hearings and Findings

The Commission held hearings on the matters set forth in the above Complaint before Commissioner Randolph Lowman on February 23, February 24, February 25, February 26, February 27, March 16, and March 17, 2004. The Commission bifurcated the hearing to address initially the issue of liability, not damages. Bagnall presented testimony from Eric Cahow (Cahow), the Director of Marketing and Community Relations for Neighborhood Health Plan of Rhode Island; Jeannette Ware (Ware), another Account Executive; and Karen Galbo (Galbo), Employer's Public Affairs Director. Employer presented testimony from various persons who worked with Bagnall, including Marti Breden (Breden), the Operations Manager; Perdisatt, the General Sales Manager; Joseph Charves (Charves), the Local Sales Manager; and Mathieu Couture (Couture), Jaclyn Fiore (Fiore), and Kathryn Mitson (Mitson), all Account Executives.

At the first hearing, Bagnall testified that she was born in 1947 and began working in advertising sales in 1971 in San Francisco. Tr. 31-32, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶¶ 1-2. Her first jobs in advertising were for various magazines in San Francisco and New York City; around 1979, she took a job in London selling American-manufactured products. Tr. 32-38, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 2. She returned to selling magazine advertisements in the United States from 1982 through 1989. Tr. 38-42, Feb. 23, 2004; R. Ex. 1,

Findings of Fact ¶ 2. From 1990 through 1998, she owned a sales, marketing, and promotional company selling women's clip-on earrings. Tr. 45-46, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 2. In August 1998, she left her company and began selling radio advertising at Citadel Broadcasting Company (Citadel). Tr. 46-47, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 2.

Near the end of 1999, Employer's General Sales Manager, Corey Lewis (Lewis), approached Bagnall as a result of a referral by Cahow, one of her clients at Citadel. Tr. 49, Feb. 23, 2004; Tr. 14, Feb. 25, 2004; R. Ex. 1, Findings of Fact ¶ 3. After several interviews, Lewis offered Bagnall an Account Executive position on November 24, 1999. Tr. 56, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 4; Complainant's Ex. 4, Nov. 29, 1999. Her offer letter stated that Bagnall would receive a two- to three-week training period after which she would be given a list of current clients; her draw would be calculated based on commissions of $25,000 per year; and she would have a three-month grace period in which her commissions did not need to equal her draw.[1] Tr. 65-66, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 4; Complainant's Ex. 4. Bagnall accepted the offer in mid-December 1999. Tr. 60, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 4. Later that month, after Bagnall had provided her two weeks' notice to Citadel, Lewis informed her that he would be leaving Employer for another job, and thus when she started at Employer she would not have a manager or an account list. Tr. 67-68, Feb. 23, 2004; Tr. 34-35, Feb. 24, 2004; R. Ex. 1, Findings of Fact ¶ 5. Bagnall testified that she did not believe Lewis' departure from the station had anything to do with her age. Tr. 35, Feb. 24, 2004.

Bagnall began working for Employer on January 3, 2000 as an Account Executive. Tr. 68, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 6. During her first month of work, Employer did

[1] A "draw" is similar to a base salary; it consists of a minimum amount that an Account Executive would receive per year, with any commissions exceeding the value of the draw to be paid as additional income.

not have a General Sales Manager and, thus, Bagnall received minimal supervision and training. Tr. 71-80, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 8. She eventually received at least sixteen hours of computer training in the Employer's Providence and Boston offices, some of which occurred after business hours. Tr. 42-46, 111, Feb. 24, 2004; R. Ex. 1, Findings of Fact ¶ 23. Breden, Employer's Operations Manager, testified that he gave Bagnall more training on computer programs than he gave other Account Executives because she did not understand the system and was, in his opinion, difficult to train. Tr. 30-31, 34, Feb. 25, 2004. He estimated that he gave her roughly forty hours of training. Id. at 30.

Partly because of the circumstances of her hire and the resulting lack of initial training, John Satterfield (Satterfield), the General Manager in Boston, Massachusetts, agreed to increase Bagnall's draw to $30,000 per year at the end of her first month. Tr. 117, Feb. 23, 2004. At the end of her first month, Satterfield gave Bagnall an account list. Id. at 79-80; R. Ex. 1, Findings of Fact ¶ 9; Complainant's Ex. 6. Bagnall testified that the list was not as lucrative as it first appeared; some accounts were owed "free time" from Employer because of poor audience ratings for their previously-aired advertisements; and others had posted substantial business in 1999 for product launches that would not be repeated in 2000. Tr. 81-82, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 9.

Perdisatt began working as General Sales Manager with Employer in late-January 2000. Tr. 79, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 10. He was fifty-one when he began working for Employer. Tr. 42, Feb. 25, 2004; R. Ex. 1, Findings of Fact ¶ 10. He was hired to increase Employer's share of business in the Providence market and to coordinate Employer's local and national business efforts. Tr. 43, Feb. 25, 2004; R. Ex. 1, Findings of Fact ¶ 11. In his first two weeks with Employer, Perdisatt met with Bagnall a "couple" of times for short training sessions

about television advertising. Tr. 88, Feb. 23, 2004; Tr. 86-87, Feb. 25, 2004. Perdisatt testified that new business "was of maximum importance to every account executive at the station" because Channel 28 was so new in the state. Tr. 47, Feb. 25, 2004. He also testified that during sales meetings he made clear to his Account Executives that new business was "a top priority." Id. at 52.

Charves began working as Local Sales Manager with Employer in mid-February 2000. Tr. 87, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 10. He was twenty-eight when he began working for Employer. Tr. 4, Feb. 26, 2004; R. Ex. 1, Findings of Fact ¶ 10. Charves was hired to manage the local sales team and to increase Employer's revenue and market share. Tr. 7, Feb. 26, 2004. Charves testified that when he started working for Employer his primary goal for the sales department was to "build new agency business." Tr. 8, Feb. 26, 2004. Perdisatt asked Bagnall to report directly to Charves after he joined the company. Tr. 89-90, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 12.

Bagnall testified that Charves made several age-based comments in her presence. Tr. 100-07, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 13. First, Bagnall testified that the prime time programming at the station skewed towards a younger audience, and Charves made statements that were dismissive of advertising during programming that was addressed towards an older audience. Tr. 100-02, Feb. 23, 2004. In particular, Bagnall testified that Charves said to "forget about" advertisers targeting older audiences because "[t]hey only want old people." Id. at 102. In addition, Bagnall testified that following a meeting with a representative of an advertisement agency, Charves noted that the representative was "really attractive for an older lady." Id. at 104. Charves also stated once that it would be "cool" if his sales staff was the same age as the young audience for prime-time programming on Channel 28. Id. at 105, R. Ex. 1,

Findings of Fact ¶ 13. When Bagnall expressed her discomfort at this statement, Charves laughed and told her that she could sell "Judge Judy," which had an older audience. Tr. 106-07, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 13. Bagnall did not report these disparaging comments regarding age to Human Resources. Tr. 97-98, Feb. 24, 2004; R. Ex. 1, Findings of Fact ¶ 14.

Bagnall also testified that Charves treated her differently than the Account Executives he hired, who were in their twenties or thirties. Tr. 133, Feb. 23, 2004. She stated that other employees had "constant access" to Charves and she believed that they were assigned more active business. Id. at 134. Bagnall testified that Charves treated her disrespectfully in sales meetings and invited other Account Executives to social gatherings every few weeks while excluding Bagnall. Tr. 143, Feb. 24, 2004; R. Ex. 1, Findings of Fact ¶ 12. In addition, Bagnall testified that other employees had more access to Perdisatt than she did, and they interacted with him on a more regular basis than she did. Tr. 134-35, Feb. 23, 2004.

At the end of March 2000, Bagnall requested a meeting with Perdisatt and Charves in order to discuss her progress at work and to ask for more accounts.[2] Tr. 108, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 17. The meeting became "hostile" after Perdisatt told Bagnall that she was "not making any attempt to bring in new business" and "not dealing with business in a timely manner." Tr. 108-09, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 17. Bagnall testified that Perdisatt told her that her "so-called experience wasn't showing." Tr. 109, Feb. 23, 2004. Perdisatt testified that he was concerned that he did not see Bagnall developing leads for new business when other Account Executives seemed able to do so. Tr. 59, Feb. 25, 2004.

[2] Perdisatt testified that he initiated the meeting. Tr. 55, Feb. 25, 2004. The Commission resolved this disputed issue of fact in favor of Bagnall's testimony that she, in fact, asked for the meeting. See R. Ex. 1, Findings of Fact ¶ 17.

After the meeting, Perdisatt sent Bagnall a memorandum which outlined the issues her supervisors had raised with her, including delays in inputting orders, inability to service clients quickly, and failing to spend time on new business development. Tr. 112-13, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 17; Complainant's Ex. 8, Mar. 29, 2000. The memorandum suggested that Bagnall "continue to use the training resources the station affords [her] to accomplish [her] sales goals." Complainant's Ex. 8. It concluded by noting that her success was the business's success, and that Perdisatt wanted Bagnall to accomplish their "mutual goals." Id. Bagnall testified that concerns regarding her speed in attending to clients stemmed from her difficulty with Employer's computer program, which other Account Executives struggled with as well, and one incident in which she needed information that was unavailable to her because Perdisatt was out of the office. Tr. 114-15, 162-63, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 17. She also testified that, prior to the March 24 meeting, she was unaware that her supervisors were concerned about her work product. Tr. 115, Feb. 23, 2004.

Throughout her employment, Bagnall testified that she orally requested that Perdisatt give her specific accounts from companies who she had prior contact with at Citadel. Id. at 122. When Perdisatt asked her to request the accounts in writing, she did so, in a memorandum dated March 29, 2000. Id.; R. Ex. 1, Findings of Fact ¶ 15; Complainant's Ex. 10. Bagnall was assigned three of the five accounts she asked for in writing. Bagnall requested and did not receive the Block Island Ferry and the World Wrestling Foundation. Tr. 123-25, Feb. 23, 2004. Bagnall requested and received the Providence Civic Center and the Rhode Island Public Transit Authority, but was unable to sell advertising time to either entity. Id. at 125-26. Finally, Bagnall requested the Rhode Island Lottery, which Charves assigned to her in mid-May; Bagnall testified

that without this delay in assignment she would have generated business from the account by May. Id. at 130-31.

Additionally, Bagnall testified that beyond "new business" accounts, she had success with existing accounts on her account list. Id. at 135. For example, she increased the advertising purchased by Katherine Gibbs by moving them to a prime time slot for the first time. Id. at 135-36. Bagnall also worked on several larger promotions, including one for the Hip Hop Music Awards and one for Disney on Ice. Id. at 149-51. Galbo testified that Bagnall solicited a local radio station to become involved with the Hip Hop Music Awards promotion and sold sponsorships for the promotion to Katherine Gibbs and Kentucky Fried Chicken. Tr. 63-66, Mar. 17, 2004. In addition, Bagnall testified that she was actively working on building new business, but "it doesn't happen over night," and she expected returns from her efforts in six months to one year. Tr. 138, Feb. 23, 2004.

On April 26, 2000, Charves submitted an evaluation of Bagnall's work from February through the present date. Id. at 141-42; R. Ex. 1, Findings of Fact ¶ 20, Complainant's Ex. 12, Apr. 26, 2000. In most categories, he rated Bagnall a "2," meaning that she "consistently [met] standards and expectations" or a "3," meaning that she "consistently exceed[ed] standards and expectations." R. Ex. 1, Findings of Fact ¶ 20; Complainant's Ex. 12. She received a "1," meaning that she "need[ed] improvement," in her use of software to manage accounts and generate new business, as well as the category entitled, "Meticulous negotiator on all transactional business." R. Ex. 1, Findings of Fact ¶ 20; Complainant's Ex. 12. In the written comments, Charves noted that Bagnall needed to improve her skills and performance to "win in negotiations." R. Ex. 1, Findings of Fact ¶ 20; Complainant's Ex. 12. Charves testified that, although he intended the evaluation to be conditional because of the short period of time in

which they had worked together, he wanted it to be a "productive evaluation" which might motivate Bagnall to improve. Tr. 37, Feb. 26, 2004. Thus, he gave Bagnall a generally favorable review to make her "hopeful" and "give her the benefit of the doubt." Id.

Bagnall met with Perdisatt and Charves for weekly meetings to review her accounts. Tr. 140, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 21. At one such meeting on May 24, 2000, Bagnall testified that Perdisatt told her that she "wasn't doing a very good job and he didn't think that [she] had any skills that he could see." Tr. 140, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 21. Her supervisors expressed doubt at Bagnall's future business projections. Tr. 146, Feb. 23, 2004. Bagnall testified that:

> "their concept of generating new business and my concept of generating new business was somewhat different, and as a commission salesperson, time that I would spend on getting business that was three, four, five months out was not unusual; that was not an unusual thing to do. I think their idea of new business was tomorrow or next week . . . or the week after next . . . [and] I would put energy into people's advertising campaigns that would probably be greater by going long-term . . . ." Id. at 146-47.

Bagnall further clarified that her concept of "new business" was business "that would be ongoing and long-term and that would build up . . . ." Tr. 24, Mar. 17, 2004. She also noted that she believed her sale of additional business to an existing client, Katherine Gibbs, should have been counted as new business for the station. Tr. 155, Feb. 23, 2004. Perdisatt testified that he was concerned because Bagnall had not brought in any new business despite his attempts to help generate leads and his impression of her prior experience in other media, including radio and magazine advertising. Tr. 68-69, Feb. 25, 2004.

After the meeting, Perdisatt wrote a follow-up memorandum outlining Bagnall's performance issues, which included her failure to bring in new business, to spend time on new business development, and to respond to her existing clients. Tr. 154, Feb. 23, 2004; R. Ex. 1,

Findings of Fact ¶ 22; Complainant's Ex. 15. The memorandum noted that she was improving in inputting orders on the computer. R. Ex. 1, Findings of Fact ¶ 22; Complainant's Ex. 15. Moving forward, Perdisatt asked Bagnall to keep a daily log of her activity, including telephone calls, faxes, and emails. R. Ex. 1, Findings of Fact ¶ 22; Complainant's Ex. 15. Bagnall testified that keeping her daily logs took a long time; Charves threatened to terminate her if she did not maintain them; and she did not observe any other Account Executives filling out similar logs. Tr. 165-68, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 24. Based on this observation, as well as her belief that other employees received more assistance and better account lists, Bagnall testified that she believed that she was treated differently than the rest of the Account Executives. Tr. 168-69, Feb. 23, 2004.

In the spring, Employer was seeking out new Account Executives, and Charves was assigned to screen applicants. Tr. 150-51, Feb. 26, 2004; R. Ex. 1, Findings of Fact ¶ 25. Charves recruited Ware, who began working as an Account Executive in May 2000. Tr. 126-27, 131, Feb. 24, 2004; R. Ex. 1, Findings of Fact ¶ 25. She was forty when she began working for Employer. Tr. 51, 148, Feb. 24, 2004; R. Ex. 1, Findings of Fact ¶ 25. She was assigned a large account load and was guaranteed $5833 per month for her first year. Tr. 170, Feb. 23, 2004; Tr. 130, Feb. 24, 2004; R. Ex. 1, Findings of Fact ¶ 25. Ware testified that she brought new business into the station on her first day of work, which she estimated brought between $18,000 and $20,000 to Employer. Tr. 154-55, Feb. 24, 2004. In her first three months of employment, Ware brought five new clients into the station, and, in fact, brought at least one new client into the station for each of her first six months of employment. Id. at 156-62. One of these accounts came directly from Ware's prior job, but the rest were generated while she was with Employer. Id. at 162.

Employer also hired Couture, who was twenty-six, in March; Fiore, who was twenty-two, on May 30, and Mitson, who was twenty-three, on June 26. Tr. 95, Feb. 25, 2004; Tr. 76, Feb. 26, 2004; Tr. 4, Mar. 16, 2004; R. Ex. 1, Findings of Fact ¶ 25. Couture brought new business into the station by April 2000, roughly one month after he began working for Employer. Tr. 8-9, Mar. 16, 2004. Couture testified that some of his new business accounts were suggested by Charves and others came about from his own Yellow Pages and newspaper research, as well as cold calling. Id. at 9-12. Mitson brought new business into the station in her fourth, fifth, and sixth months of employment. Tr. 208-09, Feb. 25, 2004. Mitson testified that she developed new business accounts by "prospecting" or observing other local television stations, billboards, phone books, and radio stations to see what companies were advertising in the area. Tr. 64-65, Mar. 16, 2004. Fiore brought new business into the station by her second month of employment. Tr. 76-77, Feb. 26, 2004. Fiore testified that the new business she brought into the station was largely a result of her own research into new possible accounts. Tr. 54-56, Feb. 27, 2004.

With the exception of Ware, all of the Account Executives hired in 2000 were in their twenties or early thirties. R. Ex. 1, Findings of Fact ¶ 26. Perdisatt testified that they tended to hire younger employees because the position "didn't attract anyone usually with a tremendous amount of experience simply because the dollars . . . weren't that great." Tr. 139, Feb. 25, 2004; R. Ex. 1, Findings of Fact ¶ 26. Charves testified that people who were substantially older than twenty years old were generally "overqualified for the position [he] was looking to fill," and he did not give "overqualified" applicants with substantial experience an interview for what he viewed as an entry-level position. Tr. 184-86, Feb. 26, 2004; R. Ex. 1, Findings of Fact ¶ 26.

On June 30, 2000, Perdisatt met with Bagnall and terminated her from her job. Tr. 173, Feb. 23, 2004; R. Ex. 1, Findings of Fact ¶ 27. Bagnall protested that she thought the

termination was the result of age discrimination because most of the other newly hired Account Executives were thirty or younger. Tr. 173, Feb. 23, 2004. Perdisatt responded by stating, "That's ridiculous. We hired Jeannette Ware and she's old."[3] Id. at 174. Bagnall asked for a termination letter describing the reason for her termination, which Perdisatt declined to provide. Id.; R. Ex. 1, Findings of Fact ¶ 27. Perdisatt testified that at the conclusion of Bagnall's six-month probationary period, he concluded that there was "no sense in continuing the relationship." Tr. 76, Feb. 25, 2004; R. Ex. 1, Findings of Fact ¶ 28. He testified that he expected Bagnall to bring new business to Employer because of her prior experience, and he did not observe that happening or believe that it would happen in the future. Tr. 75, Feb. 25, 2004; R. Ex. 1, Findings of Fact ¶ 28. Charves testified that he did not have any input into Perdisatt's decision to terminate Bagnall. Tr. 149, Feb. 26, 2004.

Bagnall's June commission report showed that she did not develop any "new" business for Employer during her tenure. Complainant's Ex. 19 at 13. Moreover, at the end of June 2000, her commissions from her "regular" sales—to existing accounts—exceeded her draw by $3661.79. Id.; R. Ex. 1, Findings of Fact ¶ 30. Her "regular" business in April, May, and June 2000 produced less revenue than those same accounts produced in 1999. R. Ex. 1, Findings of Fact ¶ 30. Her "pending" third quarter report projected that her "regular" business sales in July, August, and September would exceed the revenue produced from those accounts in 1999. Complainant's Ex. 18 at 12; R. Ex. 1, Findings of Fact ¶ 30. Bagnall also produced a pending sale with a radio station, which, if completed, would have counted as "new" business. R. Ex. 1, Findings of Fact ¶ 30. In comparison, Account Executives hired around the same time as

[3] At the February 24, 2004 hearing before the Commission, Bagnall admitted that, in June of 2004, she prepared a document describing her meeting with Perdisatt, which did not include their alleged conversation regarding age discrimination or Perdisatt's comments regarding Jeannette Ware and her age. Tr. 101-02, Feb. 24, 2004.

Bagnall all generated "new" business in the first six months of their employment, although the actual amount varied, as outlined above. Id. ¶ 31.

B

Administrative Decision and Appeal

On November 30, 2005, after the conclusion of the hearings and a review of the testimony and post-hearing briefs submitted by both parties, the Commission published a decision concluding that Bagnall "did not prove that the respondent discriminated against her with respect to terms and conditions of employment and termination of employment because of her age." R. Ex. 1 at 8. Specifically, the Commission found that although Bagnall established a prima facie case of age discrimination, the Employer presented legitimate, non-discriminatory reasons for its actions which Bagnall could not prove were merely pretext. Id. at 8-9.

The Commission accepted Perdisatt's testimony that he fired Bagnall on the basis of her poor employment record. Id. at 12. In addition, it found that Bagnall did not prove that Employer's reasons for firing her were pretext for age discrimination or that age was one of the factors that caused Employer to terminate her. Id. The Commission found that, although some of Charves's comments and actions indicated a bias against older employees, any such bias was not a factor in Bagnall's termination. Id. at 14. The Commission examined Charves's actions to determine if they rose to the level of a hostile work environment, but ultimately concluded that they did not because they were not "severe or pervasive" enough. Id. at 14-16. Bagnall timely appealed the Commission's decision.

II

Standard of Review

"When reviewing an agency decision pursuant to § 42-35-15, the Superior Court sits as an appellate court with a limited scope of review." Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). This Court's review of a decision of the Commission is governed by G.L. 1956 § 42-35-15(g), which provides as follows:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> "(1) In violation of constitutional or statutory provisions;
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> "(2) In excess of the statutory authority of the agency;
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> "(3) Made upon unlawful procedure;
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> "(4) Affected by other error [of] law;
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> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
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> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

This Court's review is "circumscribed and limited to 'an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision.'" Nickerson v. Reitsma, 853 A.2d 1202, 1205 (R.I. 2004) (quoting Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). This Court defers to an agency's factual determinations and decision if they are supported by legally competent evidence. R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994); Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007)

("The Superior Court must defer to the agency's determinations regarding questions of fact"). "Legally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting the agency's findings." Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993) (citing Sartor v. C.R.M.C., 542 A.2d 1077, 1082-83 (R.I. 1988)); see also Arnold v. R.I. Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003) (defining legally competent evidence as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance") (quotation omitted).

This Court may not "substitute its judgment for that of the agency in regard to the credibility of the witnesses or the weight of the evidence concerning questions of fact." Costa v. Registrar of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988). However, "'[q]uestions of law determined by the administrative agency are not binding upon [this Court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record.'" Iselin v. Ret. Bd. of Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1048-49 (R.I. 2008) (quoting State Dep't of Envtl. Mgmt. v. State Labor Relations Bd., 799 A.2d 274, 277 (R.I. 2002)).

III

Analysis

On appeal, Bagnall challenges the Commission's decision on the grounds that it was affected by error of law; it was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and/or that it was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Specifically, Bagnall argues that the Commission committed reversible error in its standard of review by de facto holding Bagnall to a substantially more stringent standard than it actually articulated. In addition, Bagnall contends that the Commission's decision ignored evidence that unambiguously

established that she was terminated on the basis of her age by disregarding the evidence it used to establish her prima facie claim of age discrimination when it was considering whether Employer's stated reasons for her termination were merely pretext.[4]

In response, the Commission argues that its decision was supported by the evidence, as well as Rhode Island's Fair Employment Practices Act (FEPA) and relevant case law. Specifically, the Commission contends that its decision properly concluded that Bagnall failed to prove that Employer's proffered reason for her termination was pretext for discrimination, or that age was one of the factors motivating Employer. Employer agrees with and incorporates the Commission's arguments on appeal regarding the Commission's consideration of the evidence presented. Employer also contends that the Commission erred in finding that Bagnall established a prima facie case of age discrimination.

A

The State Fair Employment Practices Act

"The Fair Employment Practices Act prohibits an employer from discharging an employee on the basis of age and disability." Bucci v. Hurd Buick Pontiac GMC Truck, LLC, – A.3d –, 2014 WL 843593, at *5 (R.I. Mar. 4, 2014). In enacting FEPA, the General Assembly declared that it is "the public policy of this state to foster the employment of all individuals in this state in accordance with their fullest capacities, regardless of their . . . age . . . and to safeguard their right to obtain and hold employment without such discrimination." Sec. 28-5-3. This Court's interpretation of FEPA "remain[s] faithful to federal precedents interpreting federal antidiscrimination statutes, such as Title VII." DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13,

[4] Bagnall explicitly declined to appeal the Commission's findings regarding "Harassment on the Basis of Age" because she did not bring this claim to the Commission. Therefore, this part of the decision is not addressed in this appeal.

21 (R.I. 2005); see also Neri v. Ross-Simons, Inc., 897 A.2d 42, 48 (R.I. 2006) (noting that "[t]his Court has adopted the federal legal framework to provide structure to our state employment discrimination statutes"). As such, this Court applies "the now familiar three-part burden shifting framework as outlined by the United States Supreme Court in McDonnell-Douglas Corp., 411 U.S. at 802-04, 93 S. Ct. 1817." Bucci, 2014 WL 843593, at *5; accord Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights, 484 A.2d 893, 898 (R.I. 1984). The McDonnell-Douglas burden shifting approach "allocates burdens of production and orders the presentation of evidence so as 'progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" Ctr. for Behavioral Health, R.I. Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998) (quoting Woodman v. Haemonetics Corp., 51 F.3d 1087, 1091 (1st Cir. 1995)).

1

Prima Facie Case

In the first step of the McDonnell-Douglas analysis, a plaintiff must prove a prima facie case of age discrimination. See Bucci, 2014 WL 843593, at *6; Barros, 710 A.2d at 685. Specifically, the plaintiff must prove that:

> "(1) she was at least forty years of age; (2) her job performance met the employer's legitimate expectations; (3) the employer subjected her to an adverse employment action (*e.g.*, an actual or constructive discharge); and (4) the employer had a continuing need for the services provided by the position from which the claimant was discharged."

Neri, 897 A.2d at 49 (quoting Ramirez Rodriguez v. Boehringer Ingelheim Pharm., Inc., 425 F.3d 67, 78 n.11 (1st Cir. 2005)). "Once a prima facie case of discrimination is established, a presumption that the employer unlawfully discriminated against the employee arises." Barros,

710 A.2d at 685. In this case, the Commission found that Bagnall had satisfied this first step and proved a prima facie case of discrimination.[5]

2

Legitimate, Nondiscriminatory Reason

Once presented with a prima facie case of discrimination, the second step of a McDonnell-Douglas analysis shifts the burden to the employer to produce a "legitimate, nondiscriminatory reason for terminating the employee." Neri, 897 A.2d at 49. The employer-defendant has "a burden of production rather than persuasion." Id. When the employer provides such justification, it "eliminates the presumption of discrimination created by the *prima facie* case." Id. In this case, the Commission found that Employer had proffered a legitimate, nondiscriminatory reason, as follows:

> "Mr. Perdisatt testified that he had expected the complainant, as an experienced salesperson, to bring new business to the station, that he did not see her bringing in new business or developing existing business and did not believe that it would happen in the future."

R. Ex. 1 at 12. Bagnall challenges this finding on the basis that Perdisatt's comparison of Bagnall's performance with "experienced salesperson[s]" rather than Account Executives making approximately her income was in error. Bagnall contends that this standard unfairly prejudices older employees, who generally have more experience than younger employees. In

[5] In its Memorandum in Support of Affirming the Commission's Decision and Order, Appellee-Employer argues that Bagnall did not establish a prima facie case of age discrimination. This argument is rendered moot given that this Court is upholding the Commission's decision on other grounds. Nevertheless, this Court notes that the Commission's finding of a prima facie case of age discrimination was not clearly erroneous. See § 42-35-15(g). The evidence clearly established that Bagnall was at least forty years of age; she possessed the "necessary skills to perform her job," Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000); she was terminated by Employer; and Employer continued to have a need for Account Executives after she was terminated. See Neri, 897 A.2d at 49. This Court will not disturb the Commission's findings on this factual issue. See Envtl. Scientific Corp., 621 A.2d at 208.

response, the Commission contends that an assessment of an employee's abilities must incorporate their experience.

Bagnall fails to cite any applicable case law holding that Employer's use of subjective criteria, such as experience, is an impermissible basis for its proffered nondiscriminatory reason for terminating her. See Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1132 n.1 (R.I. 2002) (noting that "[s]imply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised"). Moreover, although there is no case law directly on point, the Rhode Island Supreme Court has held that although "subjective legitimate, nondiscriminatory reasons could potentially mask discriminatory animus when proffered . . . , they do not necessarily warrant a finding of pretext." Casey v. Town of Portsmouth, 861 A.2d 1032, 1039 (R.I. 2004). Furthermore, courts have found that "unsatisfactory performance" may qualify as a legitimate, nondiscriminatory reason for an adverse employment action. See Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 20 (1st Cir. 1999).

In this case, the Commission found Perdisatt's "subjective" justification—that Bagnall had not generated any new business for the station—sufficient to satisfy Employer's burden of production. Given the standard of review, this Court must defer to the Commission's findings of credibility and its determination of the weight to give to the evidence presented before it. See Nickerson, 853 A.2d at 1205. Applying that standard to the evidence in this case, this Court cannot justify disturbing the Commission's findings of fact. There was sufficient evidence to support the Commission's conclusion that Bagnall's work performance was weak when compared with any other Account Executive employed at that time, even those making her same salary. The evidence supports the finding that Bagnall did not generate any new business for

Employer during her six months of employment, even though she acknowledged that she was told on multiple occasions that her supervisors wanted her to do just that. R. Ex. 1, Findings of Fact ¶ 30. At the same time, the Commission found that Account Executives who were hired during Bagnall's tenure all produced varying amounts of new business within the first six months of employment, a finding that was supported by the evidence on the record. Id. ¶ 31; see Envtl. Scientific Corp., 621 A.2d at 208. Therefore, this Court accepts the Commission's conclusion that Employer proffered a legitimate, nondiscriminatory reason for terminating Bagnall. See Rodriguez-Cuervos, 181 F.3d at 20; accord Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 7 (1st Cir. 2000) (accepting employer's proffer that it discharged plaintiff "because she was not adequately performing her job").

3

Pretext

Finally, once the defendant has produced a legitimate, nondiscriminatory reason for discharging the plaintiff, the burden shifts back to the plaintiff to focus on "the ultimate question of 'discrimination *vel non*.'" Neri, 897 A.2d at 50 (quoting Casey, 861 A.2d at 1037). At this point, "a plaintiff must do more than simply cast doubt upon the employer's justification," but also need not "come forward with evidence of the 'smoking gun' variety." Barros, 710 A.2d at 685 (quotations omitted). The employee may prove pretext "'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Newport Shipyard, Inc., 484 A.2d at 898 (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258, 101 S. Ct. 1089, 1096 (1981)). Moreover, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to

conclude that the employer unlawfully discriminated." Casey, 861 A.2d at 1038 (quotation omitted). The plaintiff must demonstrate "not only that the offered reasons are false, but 'that discrimination was the real reason.'" Bucci, 2014 WL 843593, at *8 (quoting McGarry v. Pielech, 47 A.3d 271, 281 (R.I. 2012)).

In its decision, the Commission utilized the modified standard of proof set forth in Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004) for the pretext prong. The Fifth Circuit in Rachid applied a "modified McDonnell-Douglas approach" to a discrimination case, retaining the first two steps of the original McDonnell-Douglas analysis but replacing the third with the following:

> "[T]he plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative)." Id. (quoting Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)).

The Commission applied this particular standard of proof, including the "mixed-motives alternative," because § 28-5-7.3 specifically states that "[a]n unlawful employment practice may be established . . . when the complainant demonstrates that . . . age . . . was a motivating factor for any employment practice, even though the practice was also motivated by other factors."

Bagnall contends that, although the Commission articulated an acceptable legal standard of review for its analysis of pretext, it de facto held her to a more stringent standard. Specifically, Bagnall argues that she presented sufficient evidence that discriminatory intent was "a motivating" factor in the employer's decision based on circumstantial evidence. Further, Bagnall contends that, in undergoing its analysis, the Commission both ignored the evidence on the record proving her prima facie case for discrimination and failed to address Bagnall's

evidence that Employer's nondiscriminatory justification for termination was pretext. The Commission, in response, argues that it correctly cited and applied the "mixed motive" standard of proof to the facts of the case and concluded, based on its own analysis of the credibility of the witnesses and evidence presented, that Bagnall did not prove that Employer was motivated by age discrimination or that its justification was pretext. Employer adopts the Commission's arguments on this point.

To support her argument, Bagnall cites to various pieces of evidence in the record that she contends prove that Employer's justification for terminating her was pretext, most significantly by questioning the veracity of some of the testimony. Specifically, Bagnall contends that Perdisatt and Charves exaggerated the performance of the Account Executives she was compared to, while diminishing Bagnall's own sales. See Tr. 33-34, Mar. 16, 2004 (establishing that Couture sold two new accounts in his first six months of employment and that both were small); Tr. 135-37, 155, Feb. 23, 2004 (Bagnall testifying that she brought in $8000 of "new prime time business" from Katherine Gibbs, an existing customer). In addition, Bagnall argues that the Commission should not have compared her performance with substantially younger employees because she did not receive adequate training from Employer, while the other Account Executives did. See Tr. 87-96, Mar. 16, 2004 (Mitson testifying that she did not earn commissions in her first three months of employment). Moreover, Bagnall claims that her performance from January through June 2000 should not have been compared with other Account Executives' performances from July through December, because the Christmas season generates more advertising dollars. See Tr. 11, 208-214, Feb. 25, 2004 (Cahow testifying that "advertising just cranks it out for Christmas"). Bagnall also argues that, although the Commission did not cite Bagnall's alleged difficulty in using the computer as a legitimate,

nondiscriminatory reason for her termination, the testimony surrounding this issue was conflicting and thus provided further evidence of pretext. See Tr. 31, 33, 37, 39-40, Feb. 25, 2004; Tr. 15, Mar. 17, 2004. Finally, Bagnall contends that allegedly false testimony regarding her attendance, work hours, and organizational skills also provided evidence of pretext, although none of these factors were cited by the Commission as legitimate, nondiscriminatory reasons for her termination. See Tr. 6-9, Feb. 27, 2004.

Bagnall's citations to inconsistencies in the record, "without more, does not give rise to a suspicion of mendacity" that would tend to indicate that Employer's proffer was merely pretext. Bucci, 2014 WL 843593, at *10. In this case, it appears clear that Bagnall's discharge was a direct result of her inability to solicit new business for Employer within her first six months of employment. R. Ex. 1 at 12. The Commission found that, although Bagnall had improved sales to some existing clients, she neither met nor exceeded sales on those accounts for the previous year. Id. In addition, she was the only Account Executive hired in 2000 who was unable to bring in any new business for Employer during her first six months of employment.[6] Id.

Even assuming, arguendo, that Perdisatt and Charves provided inaccurate testimony regarding other Account Executives' performances, and/or that they should not have compared her performance in the beginning of the year with others' performances at the end of the year, Bagnall's performance compared with other employees was not the "solitary evidence defendant presented to support the termination." Bucci, 2014 WL 843593, at *10. Both supervisors

[6] This Court also notes that Employer provided evidence that it was concerned with the "new business" sales of all Account Executives, regardless of age. Charves wrote a memo to Manouk Kirakosian (Kirakosian), an Account Executive, in March 2000 suggesting that he make phone calls to set up new appointments. R. Ex. 1 at 13. Kirakosian, who was twenty-seven, resigned that same month. Tr. 82-83, Feb. 25, 2004. Charves wrote another memo to Timothy Moran (Moran), another Account Executive, in September 2000 regarding his attendance record and its negative impact on his new business. R. Ex. 1 at 13. Moran, who was thirty-two, was terminated for performance issues in November 2000. Tr. 81, Feb. 25, 2004.

provided documented evidence that they told Bagnall orally and in writing that they wanted her to garner more "new to the station" business. Complainant's Exs. 8, 15; R. Ex. 1 at 13. Bagnall admitted in her testimony that despite this, she focused on "business that was three, four, five months out." Tr. 146, Feb. 23, 2004; R. Ex. 1 at 13. Thus, the Commission concluded that Employer's expectations of "new" business fundamentally differed from that of Bagnall and were the source of her difficulty at the company and the reason why she was terminated. R. Ex. 1 at 13. Whether or not Employer's sales goals or Bagnall's sales goals would have been better in the long-term, Bagnall's supervisors made it clear to her and all of the Account Executives that they wanted immediate results, and Bagnall was the only employee unable to produce new business. See Mesnick v. Gen. Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) ("Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions."); accord Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1266 (11th Cir. 2010) ("'A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute [her] business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and [she] cannot succeed by simply quarrelling with the wisdom of that reason.'") (quoting Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000)).

Bagnall also argues that Employer wrongly discounted the sales that she did make during her employment. For example, she contends that she was responsible for getting an existing client, Katherine Gibbs, to advertise on prime time for the first time but was not given "new business" credit for this. Tr. 135-36, Feb. 23, 2004. Bagnall argues that the lack of credit is evidence of pretext because another employee received "new business" credit for later getting

that same client to renew its existing account. However, Perdisatt acknowledged in his testimony that crediting the second employee for "new business" for this client was a computer error and that employee garnered new business in addition to Katherine Gibbs in her first six months of employment. Tr. 216-18, Feb. 25, 2004. This Court is mindful that "'[w]hen a plaintiff attempts to counter a claim by an employer that it fired an employee for poor performance, it is simply not sufficient for a plaintiff to present evidence that her performance was satisfactory.'" Bucci, 2014 WL 843593, at *10 (quoting Alvarez, 610 F.3d at 1266). "The plaintiff's burden is to demonstrate that it was unlawful discrimination that motivated the dismissal, and not simply an employer's erroneous belief or assessment about poor performance." Id. Thus, Bagnall's mere citation to alleged evidence that she did a better job than her supervisors claimed is insufficient to overcome her burden of persuasion. See id.

Bagnall provides a number of additional discrepancies in the testimony that she contends proves that Employer's justification for her termination was pretext. However, the examples she provides relate to issues which the Commission did not cite in determining that the Employer had proffered a legitimate, nondiscriminatory reason for her termination. For example, Bagnall cites to alleged inconsistencies revealed at the hearings which prove that Employer's claims that she had trouble using the computer, had inconsistent work attendance, did not work sufficient hours, and was extremely unorganized were untrue. The Commission, however, concluded that Employer's justification for terminating Bagnall was that she had not brought new business to the station and her supervisor, Perdisatt, did not believe she would be able to do so in the future. R. Ex. 1 at 12. Examples of inconsistencies which are unrelated to this justification are irrelevant and have no bearing on the Commission's determination of pretext. See Hux v. City of Newport News, Va., 451 F.3d 311, 315 (4th Cir. 2006) ("Once an employer has provided a

nondiscriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it.").

Moreover, even if the Commission found enough discrepancies in Employer's testimony that it "*dis*believed the employer[,] the factfinder must *believe* the plaintiff's explanation of intentional discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-47, 120 S. Ct. 2097, 2108 (2000) (emphasis in original). While "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation," such a showing is not necessarily "*always* adequate to sustain a . . . finding of liability." Id. at 147, 120 S. Ct. at 2109 (emphasis in original). Here, therefore, even if the Commission had discredited Employer's testimony, as Bagnall urges, it would have had to find that Bagnall presented sufficient evidence of intentional discrimination to find liability. See id. It explicitly concluded, however, that Employer was not motivated by Bagnall's age when it terminated her, but rather by her "record with respect to short-term results." R. Ex. 1 at 14.

The Commission reviewed the testimony of Perdisatt, the person whose decision it was to terminate Bagnall, and concluded that he did not have an age bias. See id. Specifically, the Commission noted that Perdisatt only made one age-related remark to Bagnall, and it was in the context of defending himself against her charge of discrimination. Id. When accused by Bagnall of terminating her because of her age, Perdisatt responded that they had hired Ware, and "she's old." Tr. 174, Feb. 23, 2004. The Commission disapproved of Perdisatt's choice of words, but found that, in context, his statement was a defense to Bagnall's charge of discrimination. R. Ex. 1 at 12. Moreover, the Commission noted that Perdisatt was less than one year younger than

Bagnall, which, although not dispositive, was an "additional factor that weighs towards a finding that [Employer] did not discriminate." Id.

The Commission also reviewed Charves's actions and concluded that the evidence presented supported an age bias. In particular, Charves expressed a desire for a sales staff that was the same demographic as the station's prime-time programming audience, which the Commission concluded was a comment on age; he told Bagnall she could sell "Judge Judy," which had an older audience demographic; he commented that another woman was attractive "for an older lady"; he was rude to Bagnall in staff meetings; and he disregarded "overqualified candidates" for employment, which the Commission found was a veiled reference to older candidates. Id. at 16. However, the Commission concluded that Charves's generally positive review of Bagnall in April 2000 indicated that he "did not take the opportunity to disparage [Bagnall's] work performance." Id. at 12. Thus, the Commission concluded that his bias "did not extend into his evaluation of the complainant's work."[7] Id.

The Commission also concluded that the fact that Bagnall was required to keep daily logs was not evidence of age bias, but rather "a legitimate tool for evaluating how she was performing." Id. at 12-13. In addition, Bagnall did not claim that the daily logs prohibited her

[7] This Court notes that although the Commission found that Charves's age bias did not extend into his evaluation of Bagnall's work, it did analyze his actions to determine if they constituted harassment on the basis of age and thus created a hostile work environment for Bagnall. The Commission concluded that evidence of his bias was not frequent, severe, physically threatening, or humiliating. Thus, the Commission found that his remarks were not severe or pervasive enough to prove a violation of the law. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.") (quotations omitted). As noted above, Bagnall explicitly chose not to appeal the Commission's findings on this issue; this Court merely notes that the Commission did not simply dismiss evidence of Charves's age bias because they determined that it did not impact his evaluation of Bagnall's work.

from finding new customers. See Morales-Vallellanes v. Potter, 605 F.3d 27, 35 (1st Cir. 2010) ("A materially adverse change in the terms and conditions of employment 'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'") (quoting Marrero v. Goya of P.R., Inc., 304 F.3d 7, 23 (1st Cir. 2002)); Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) ("Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action."). Finally, her existing accounts were less lucrative than some Account Executives' but more lucrative than others, and she was given accounts she had specifically requested; both of these facts indicated to the Commission that "the terms and conditions of the complainant's employment [did not evidence] age bias." Id. at 13.

After a close review of the record, as well as the factual determinations and decision of the Commission, this Court concludes that Bagnall did not "cast any meaningful doubt that the defendant's proffered reason[] for termination [was] merely a cover-up for age discrimination." Bucci, 2014 WL 843593, at *12. The Commission's decision was supported by legally competent evidence. See R.I. Pub. Telecomms. Auth., 650 A.2d at 485. The Commission considered the testimony and evidence in the record, made credibility determinations, and drew the conclusion that Bagnall was terminated because of her inability to garner new customers for Employer and not because of her age. See id.; Envtl. Scientific Corp., 621 A.2d at 208. Thus, this Court "must defer to the agency's determinations regarding questions of fact." Town of Burrillville, 921 A.2d at 118.

IV

Conclusion

After review of the entire record, the Court finds that the Commission's decision contains reliable, probative, and substantial evidence to support its findings. Further, this Court concludes that the Commission's decision was not in violation of constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Substantial rights of the Appellant have not been prejudiced. Accordingly, the Commission's decision is affirmed. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Bagnall v. State of Rhode Island Commission for Human Rights, et al.**
CASE NO:	**PC-2005-6529**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 17, 2014**
JUSTICE/MAGISTRATE:	**Vogel, J.**
ATTORNEYS:	
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For Defendant:	**Thomas W. Lyons, III, Esq.** **Laurie Nicole Robinson, Esq.** **Cynthia M. Hiatt, Esq.**