CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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

[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.

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

[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.

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

[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.

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 qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . age . . . ."[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

[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.

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

[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).

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

[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*.

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.

[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.

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

[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).

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]

[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

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SCOTT TORELL
(AC 45444)

Bright, C. J., and Cradle and Harper, Js.

Syllabus

The defendant acquittee, who previously had been found not guilty of certain crimes by reason of mental disease or defect, appealed to this court from the trial court's judgment granting the state's petition to extend his commitment to the Psychiatric Security Review Board pursuant to statute (§ 17a-593). The court relied on reports prepared by the board, as required by § 17a-593 (d), in determining, by clear and convincing evidence, that reasonable cause existed to believe that the acquittee remained mentally ill and that his discharge from the board's jurisdiction would constitute a danger to others. The court referred to the reasons set forth in the board's reports that the acquittee, who had been diagnosed with autism spectrum disorder, had not made progress in his treatment due to his refusal to cooperate with his treatment providers and did not consider his multiple sexual assaults of children to have been wrong. The court rejected as excessive the state's request that the acquittee's commitment be extended for a period not to exceed ten years and, instead, extended his commitment for a period not to exceed five years. On appeal, the acquittee claimed that the trial court improperly denied his motions to dismiss the state's petition on the grounds that his continued commitment to the jurisdiction of the board violated his rights to substantive and procedural due process. He further claimed that the court improperly denied his motion to strike those portions of the board's reports that recommended his continued commitment for a period not to exceed ten years. *Held*:

1. The trial court properly denied the acquittee's motion to dismiss the state's petition to extend his commitment to the board that alleged a violation of substantive due process under the federal constitution; given the court's determinations that the state satisfied its burden of proving by clear and convincing evidence that the acquittee suffered from a mental illness and would pose a danger to others if he were released from the board's jurisdiction, the court properly extended the acquittee's commitment and declined to address his claims that the care and medical

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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.

treatment he had received were so deficient as to shock the conscience and thus were violative of his right to substantive due process, as those issues and the remedy the acquittee sought were beyond the scope of the hearing on the state's petition and could be raised in other proceedings that were available to him.

2. The acquittee could not prevail on his claim that the trial court improperly denied his motion to dismiss that alleged a violation of his right to procedural due process under article first, § 8, of the state constitution because the lack of mandatory, biennial judicial review during the five year period of his extended commitment posed an unreasonable risk of an erroneous deprivation of his liberty: the acquittee was not entitled, as he claimed, to mandatory, biennial judicial review, as is required for civilly committed individuals, our Supreme Court in *State* v. *Long* (268 Conn. 508) having determined that such review is not constitutionally required; moreover, the acquittee's contention that § 17a-593, as applied to him, failed to provide certain protections guaranteed by the state constitution was unavailing, as the existing procedures under § 17a-593 did not expose him to an unreasonable risk of an erroneous deprivation of his liberty, he received the procedural protections identified in *Long*, including adequate notice and a hearing, and there would be little value in the imposition of mandatory judicial review without a petition being filed during his continued commitment as a procedural safeguard.

3. This court declined to address the acquittee's claim that the trial court improperly denied his motion to strike the board's recommendation that his commitment be extended for not more than ten years; the acquittee in his principal brief to this court did not analyze how he was harmed by the board's recommendation but mentioned harm only in his reply brief, which constituted an abandonment of that claim.

Argued September 29—officially released December 19, 2023

Procedural History

Petition for an order extending the defendant's commitment to the jurisdiction of the Psychiatric Security Review Board, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Jon C. Blue*, judge trial referee; thereafter, the court denied the defendant's motions to strike and to dismiss and rendered judgment granting the petition, from which the defendant appealed to this court. *Affirmed.*

Kevin Sembataska, deputy assistant public defender, with whom, on the brief, was *Richard E. Condon, Jr.*,

senior assistant public defender, for the appellant (defendant).

Meryl Gersz, assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Michele C. Lukban* and *Maxine V. Wilensky*, former senior assistant state's attorneys, for the appellee (state).

Susan Castonguay, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (Psychiatric Security Review Board).

Opinion

HARPER, J. The defendant, Scott Torell (acquittee),[1] appeals from the judgment of the trial court granting the state's petition seeking his continued commitment to the jurisdiction of the Psychiatric Review Board (board) pursuant to General Statutes § 17a-593 (c). The acquittee claims that the court improperly denied (1) his motion to dismiss alleging a violation of substantive due process, (2) his motion to dismiss alleging a violation of procedural due process, and (3) his motion to strike a portion of the board's report to the court recommending a period of continued commitment not to exceed ten years. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On May 11, 2005, the acquittee was found not guilty by reason of mental disease or defect under General Statutes § 53a-13[2] of

[1] General Statutes § 17a-580 (1) provides: " 'Acquittee' means any person found not guilty by reason of mental disease or defect pursuant to section 53a-13 . . . ." See also *State* v. *Guild*, 214 Conn. App. 121, 122 n.1, 279 A.3d 222 (2022).

[2] General Statutes § 53a-13 (a) provides that, "[i]n any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the require-

criminal charges alleged in two separate dockets. In Docket No. CR-03-021704, the acquittee was charged with attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1), five counts of sexual assault in the third degree in violation of General Statutes § 53a-72a (a), and three counts of risk of injury to a child in violation of General Statutes (Rev. to 2001) § 53-21 (a) (2).[3] In Docket No. CR-04-0223362, the acquittee was charged with sexual assault in the third degree in violation of General Statutes § 53a-72a, two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a, and two counts of risk of injury to a child in violation of General Statutes (Rev. to 2003) § 53-21.[4] On July 18, 2005, the court committed[5] the acquittee to the

ments of the law." See also *State* v. *Long*, 268 Conn. 508, 540, 847 A.2d 862 (verdict of not guilty by reason of mental disease or defect establishes that person committed act that constitutes criminal offense because of mental illness), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

Although § 53a-13 has been amended since the events giving rise to the acquittee's prosecution; see Public Acts 2023, No. 23-19, § 16; that amendment has no bearing on this appeal. Accordingly, we refer to the current revision of the statute.

[3] These charges arose from an alleged sexual assault of a fifteen year old victim between 2001 and 2002, when the acquittee was approximately eighteen or nineteen years old. "According to police reports, [the acquittee] befriended a . . . child with [whom] he began viewing pornographic images and engaging in mutual masturbation and fellatio at his home."

[4] These charges arose from an alleged sexual assault of an eleven year old victim that occurred on June 5, 2004. "[The acquittee] exposed himself to [the victim], rubbed the [victim's] penis and forced the [victim] to touch and stroke his own penis in a van in which he had driven the [victim] and the [victim's] nine year-old [sibling] to a . . . park, stopping only when the [victim's sibling], who had been away from the van, returned."

[5] "When an individual is found not guilty by reason of mental disease or defect, the individual—the acquittee—is committed to the custody of the Commissioner of Mental Health and Addiction Services for examination of the acquittee's mental condition. General Statutes § 17a-582 (a). Once the examination is complete, a hearing is held, and the court determines whether the examinee should be confined, conditionally released, or discharged. General Statutes § 17a-582 (e) (1) and (2)." (Footnotes omitted.) *State* v. *Vasquez*, 194 Conn. App. 831, 835–36, 222 A.3d 1018 (2019), cert. denied, 334 Conn. 922, 223 A.3d 61 (2020).

jurisdiction of the board for a period of time not to exceed fourteen years.[6] At this time, the acquittee was diagnosed with, inter alia, pedophilia, sexual attraction to both genders, nonexclusive type.

On November 21, 2012, the acquittee filed an application for discharge, arguing that he no longer suffered from a psychiatric disability to the extent that his discharge from the jurisdiction of the board would constitute a danger to himself or others.[7] After an extended delay, the court, *Hon. Jon C. Blue*, judge trial referee, held a hearing on the acquittee's application on January 23, 2018. On February 21, 2018, the court issued a memorandum of decision dismissing the acquittee's application for discharge. The court found that the acquittee

[6] See General Statutes § 17a-582; *State* v. *Harris*, 277 Conn. 378, 382–83, 890 A.2d 559 (2006) (after acquittee has proven defense of mental disease or defect, he or she may be committed to jurisdiction of board for maximum term of commitment not to exceed maximum sentence that could have been imposed had that individual been convicted); *State* v. *Foster*, 217 Conn. App. 476, 506 n.1, 289 A.3d 191 (*Seeley*, *J.*, concurring) (same), cert. granted, 346 Conn. 920, 291 A.3d 1041 (2023); see generally *State* v. *Long*, 268 Conn. 508, 519–20, 847 A.2d 862 (review of statutory commitment scheme for acquittees as set forth in General Statutes §§ 17a-580 through 17a-603), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

Our Supreme Court has observed that, "[a]lthough the purpose of an order of commitment issued as a result of an insanity acquittal is significantly different from that of a prison sentence imposed as a result of a criminal conviction . . . the effect of such a commitment on the acquittee is no less a deprivation of liberty than that of a prison sentence." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Imperiale*, 337 Conn. 694, 712, 255 A.3d 825 (2021).

[7] "[W]e note that the confinement of insanity acquittees, although resulting initially from an adjudication in the criminal justice system, is not punishment for a crime. The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. . . . As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness. . . . [A]s a matter of due process, an acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." (Citation omitted; internal quotation marks omitted.) *State* v. *Ardizzone*, 215 Conn. App. 854, 866, 283 A.3d 982 (2022), cert. denied, 346 Conn. 905, 287 A.3d 1089 (2023);

had failed to establish, by a preponderance of the evidence, that he would not be a danger to himself or to others if his application was granted and he was discharged from the jurisdiction of the board.[8] In support of this finding, the court referenced the acquittee's past volatile behavior, poor self-control, and refusals to discuss the offenses leading to his arrests, to take responsibility for his behavior, to participate in most recommended treatment, to consider recommendations that he take psychotropic medications, and to take part in group therapy. Additionally, the court noted that, in its December 5, 2017 report, the board indicated that the acquittee had made no progress since the prior report dated December 22, 2015, and continued to find that he required "care, custody and treatment for his mental illness and without such, would pose a danger to himself or others."

Prior to the expiration of the term of commitment, on January 25, 2019, the state filed a petition for continued commitment pursuant to § 17a-593 (c).[9] Therein, it alleged that "reasonable cause exists to believe the acquittee remains mentally ill to the extent that this discharge at the expiration of his maximum term of commitment (7/17/2019) would constitute a danger to [himself] or other[s]."[10] The court referred the petition

see id. ("acquittee bears the burden of proving that he or she is a person who should be discharged" (internal quotation marks omitted)).

[8] See, e.g., *State* v. *Ardizzone*, 215 Conn. App. 854, 866–67, 283 A.3d 982 (2022), cert. denied, 346 Conn. 905, 287 A.3d 1089 (2023).

[9] General Statutes § 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee." See also *State* v. *Dyous*, 307 Conn. 299, 307, 53 A.3d 153 (2012); *State* v. *Warren*, 100 Conn. App. 407, 412–13, 919 A.2d 465 (2007).

[10] See generally *State* v. *March*, 265 Conn. 697, 704–707, 709, 830 A.2d 212 (2003) (Supreme Court interpreted terms "psychiatric disabilities" and

to the board[11] for an evaluation and report pursuant to § 17a-593 (d).[12]

The board set forth the following findings of fact in its report: "[The acquittee] is an individual with psychiatric disabilities diagnosed as Unspecified Paraphilic Disorder;[13] Cannabis Use Disorder In Sustained Remission in a Controlled Environment, Unspecified Personality Disorder with Borderline and Schizotypal Traits, and Rule Out Autism Spectrum Disorder. . . . During the first several years of [his] hospitalization . . . [h]e demonstrated minimal involvement in treatment activities and denied responsibility for his sexual offenses against children. Between October, 2010, and March, 2012, [the acquittee] demonstrated adequate progress such that he was transferred to a less restrictive hospital setting. Since then, [the acquittee] has not made any appreciable progress but instead has had several

"mental illness or mental disease" and discussed phrase "danger to self or others"); see also Regs., Conn. State Agencies § 17a-581-2 (a) (5) and (6).

[11] "The board is an administrative body consisting of a psychiatrist, a psychologist, a probation expert, a layperson, an attorney who is a member of the state bar, and a layperson with experience in victim advocacy. General Statutes § 17a-581 (b). The purpose of this administrative body is to manage, monitor and review the status of each acquittee to ensure the protection of the general public. . . . That being its purpose, the board has general and specific familiarity with all acquittees beginning with their initial commitment . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Dyous*, 307 Conn. 299, 324, 53 A.3d 153 (2012); see also *State* v. *Long*, 268 Conn. 508, 519–20, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

[12] General Statutes § 17a-593 (d) provides: "The court shall forward any application for discharge received from the acquittee and any petition for continued commitment of the acquittee to the board. The board shall, within ninety days of its receipt of the application or petition, file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report." See also *State* v. *Dyous*, 198 Conn. App. 253, 263–64, 233 A.3d 1138, cert. denied, 335 Conn. 948, 238 A.3d 17 (2020).

[13] At some point in 2013, the pedophilia diagnosis was changed to paraphilia, not otherwise specified.

instances of sexually inappropriate and aggressive behaviors. On two separate occasions, he fractured his hand punching a window and a door. Continuing to exhibit poor insight regarding his psychiatric illness and its relationship to his criminal offenses, he has failed to accept responsibility for his criminal actions, remaining adamant that he was not responsible for his sexual abuse of children. He has also been unable or unwilling to address the index offense in individual therapy, and attempts to encourage him to do so have been met with excessive defensiveness. He has additionally refused to participate in other therapeutic treatment activities, and remains opposed to his treatment team's recommendation that he consider psychotropic medications to help manage his mood lability and impulsivity. [The acquittee] has, in short, failed to appreciate that his psychiatric illness and the resultant sexual offenses brought him under the [b]oard's jurisdiction. The [b]oard, therefore, finds that [the acquittee] remains at risk for reengaging in sexually offending behavior and that he requires care, custody and treatment for his mental illness and that without such treatment he would pose a danger to himself or others. The [b]oard further finds that [the acquittee] continues to require the [b]oard's oversight and that he cannot be safely discharged from its jurisdiction." (Footnote added.) In conclusion, the board requested that the court grant the petition for continued commitment for a period not to exceed ten years.

On September 11, 2020, the acquittee requested that the court refer the matter back to the board for the purpose of preparing an updated report. The court granted this request. The board subsequently submitted its updated report to the court on January 28, 2021. The updated report noted that the acquittee's diagnosis had been changed from unspecified paraphilic disorder to autism spectrum disorder. The board found that the diagnosis change "has not resulted in any clinical progress. In fact, his limited engagement in treatment

declined further and he exhibited threatening behaviors toward other patients. Concerned about his risk, the hospital recommended to [the acquittee] that he consider medication to address the possibility of psychotic symptoms. [The acquittee] refused to comply with this recommendation. He remains resistant to attempts by his hospital treaters to individualize treatment modalities to accommodate his autism disorder." The board iterated its view that the acquittee could not be safely discharged from its jurisdiction and again recommended that the court grant the state's petition for continued commitment for a period not to exceed ten years.

On January 29, 2021, the acquittee filed a motion to strike the ten year recommendation contained in the board's reports submitted to the court. On February 16, 2021, the acquittee filed motions to dismiss the state's petition for continued commitment based on violations of his rights to substantive and procedural due process. With respect to the former, the acquittee argued that § 17a-593 (c), as applied to him, violated his substantive due process rights as guaranteed by the fifth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution; specifically, his rights to freedom from detention of infinite duration and to treatment as an involuntarily confined individual. As to the latter, the acquittee contended that § 17a-593 (c), as applied to him, violated article first, § 8, of the Connecticut constitution because it failed to provide him with certain procedural protections otherwise provided by the civil commitment process, including the right to periodic judicial review.

On October 28, 2021, the board submitted another report, dated October 26, 2021, to the court regarding the petition for continued commitment.[14] After reviewing

[14] During the pendency of the resolution of the state's petition, the court granted the parties' motions to extend his commitment.

numerous reports from the hospital and considering the testimony from various medical providers, the board noted that the acquittee "exhibits a complex psychological profile that includes autism, personality disorder, and a primary psychotic disorder." The board specifically iterated that the acquittee's primary diagnosis was changed from unspecified paraphilic disorder to autism spectrum disorder in 2019, but that this change "has not resulted in any clinical progress, despite the hospital's continuous attempts to engage [the acquittee] in treatment and implement strategies specifically designed for persons with [autism spectrum disorder] which have been suggested by third-party consultation. In fact, his limited engagement in treatment declined further and he exhibited threatening behaviors toward other patients and staff." The board further found that the acquittee refused to comply with the treatment recommendation of medication to address the possibility of other psychotic symptoms and remained resistant to all attempts at individualized treatment modalities to accommodate his autism spectrum disorder. The board again opined that the acquittee required its oversight and that he could not safely be discharged from its jurisdiction. It repeated the recommendation that the court grant the state's petition for continued commitment for a period not to exceed ten years.

The court heard evidence on the state's petition for continued commitment over four days in December, 2021, and argument from the parties on February 28, 2022.[15] On March 2, 2022, Judge Blue issued a memorandum of decision granting the state's petition for continued commitment for a period of time but limited commitment to a period of time not to exceed five years.

[15] During her closing argument, the prosecutor offered a recommendation to the court that the acquittee's commitment to the jurisdiction of the board be continued for a period of at least seven years.

At the outset, the court observed that the acquittee "presented a challenging case to psychiatrists" and that his diagnosis had changed over the years due to an evolving understanding of the acquittee's mental status. After identifying the appropriate legal standard,[16] the court explained that the issue had been narrowed during the hearing to whether the state had demonstrated, by clear and convincing evidence, that the acquittee, if released, would be a danger to others.[17] The court then addressed the acquittee's argument that, had he been diagnosed properly with autism spectrum disorder from the start of his confinement, he would have received appropriate treatment so that he would not constitute a danger to others. Acknowledging this as a possibility, the court explained that the evidence established that the acquittee had been diagnosed with autism spectrum disorder for four years and that he had not made progress due to his refusal to cooperate with his treatment

[16] In *State* v. *Metz*, 230 Conn. 400, 425, 645 A.2d 965 (1994), our Supreme Court concluded that § 17a-593 (c) "imposes the same burden on the state at a hearing for the continued commitment of an acquittee beyond his current definite period of commitment as is imposed in a civil commitment hearing under [General Statutes] § 17a-498 (c); namely, to show by clear and convincing evidence that the acquittee is currently mentally ill and dangerous to himself or herself or others or gravely disabled." See also *State* v. *Dyous*, 307 Conn. 299, 308, 53 A.3d 153 (2012); *State* v. *Harris*, 277 Conn. 378, 386, 890 A.2d 559 (2006). "Unlike the finder of fact at a civil commitment hearing, however, the court at a continued commitment hearing must [consider] that its primary concern is the protection of society. . . . General Statutes § 17a-593 (g)." (Internal quotation marks omitted.) *State* v. *Dyous*, supra, 308–309. A member of this court, however, recently noted that, "in 2022, the legislature added the phrase 'and its secondary concern is the safety and well-being of the acquittee' to subsection (g) of § 17a-593. See Public Acts 2022, No. 22-45, § 5." *State* v. *Foster*, 217 Conn. App. 476, 517 n.10, 289 A.3d 191 (*Seeley*, *J.*, concurring), cert. granted, 346 Conn. 920, 291 A.3d 1041 (2023).

[17] Based on the evidence presented, there was no dispute that the acquittee suffered from a mental illness, and that the court determined that there was "scant evidence" that, if the acquittee was released, he would pose a danger to himself. See, e.g., *State* v. *Corr*, 87 Conn. App. 717, 721, 867 A.2d 124 (acquittee did not contest that he suffered from psychiatric disability), cert. denied, 273 Conn. 929, 873 A.2d 998 (2005).

providers. Ultimately, the court reasoned that the present matter was not a medical malpractice action but, rather, a proceeding limited to the determination of whether the acquittee would present a danger to others if released. The court then considered all of the evidence, including the testimony of the acquittee's expert witness, Catherine F. Lewis, a psychiatrist, and determined that the state had met its burden of showing, by clear and convincing evidence, that the acquittee would be dangerous to others if released from the jurisdiction of the board. Although the court "unhesitatingly [paid] tribute to [Lewis'] expertise, her intellect, and her passion," it ultimately found that her opinion on the issue of the acquittee's danger to others was not supported by credible evidence. Specifically, the court referred to the reasons set forth by the board in its reports, as well as "the overwhelming evidence in the record that [the acquittee], even today, does not consider his multiple sexual assaults of minor children to have been wrong."[18]

The court then turned to the acquittee's constitutional arguments. It first observed that a motion to dismiss, by its nature, alleges a lack of jurisdiction, and that the court had both subject matter and personal jurisdiction to hear and decide the state's petition for continued commitment. Turning to the merits of the motion to dismiss alleging a substantive due process violation,

[18] This court has recognized: "[T]he goals of a treating psychiatrist frequently conflict with the goals of the criminal justice system. . . . While the psychiatrist must be concerned primarily with therapeutic goals, the court must give priority to the public safety ramifications of releasing from confinement an individual who has already shown a propensity for violence. As a result, the determination of dangerousness in the context of a mental status hearing reflects a societal rather than a medical judgment, in which the rights and needs of the [acquittee] must be balanced against the security interests of society. . . . The awesome task of weighing these two interests and arriving at a decision concerning release rests finally with the trial court." (Internal quotation marks omitted.) *State* v. *Corr*, 87 Conn. App. 717, 725, 867 A.2d 124, cert. denied, 273 Conn. 929, 873 A.2d 998 (2005).

the court stated: "If [the acquittee] feels that his treatment, or lack thereof, has denied him his constitutional rights, he is free to pursue an action under 42 U.S.C. § 1983, but the parameters of the present proceeding are determined by statute. That statute, [§ 17a-593 (c)], requires the court not to judge the adequacy of the treatment [the acquittee] received in the past but to determine whether the state has established by clear and convincing evidence that [the acquittee] is mentally ill and, if released, would be a danger to himself or others." If the state satisfies that standard, then the commitment of the acquittee does not "shock the conscience," which is the test for whether an Executive Branch action constitutes a violation of substantive due process.

Next, the court addressed the acquittee's procedural due process claim. "Procedural due process requires adequate notice and hearing. [The acquittee] has had plenty of both. He has been represented by counsel throughout both the administrative and judicial processes. In the proceedings before this court, he has had ample opportunity to confront and cross-examine the witnesses against him and to submit whatever evidence he wished in his favor. . . . The hearing has been fair throughout. There has been no violation of procedural due process."

After determining that it would grant the state's petition for continued commitment, the court turned to the length of time that the acquittee would remain under the jurisdiction of the board. The court first denied the acquittee's motion to strike, concluding that the board's recommendation was not binding, and "[t]he authority to decide the actual length of any continued commitment lies in the court alone."[19] The court then determined that the ten year recommendation by the board

[19] See, e.g., *State* v. *Dyous*, 198 Conn. App. 253, 264, 233 A.3d 1138 (Superior Court not bound by board's recommendation but considers board's report in addition to other evidence presented by parties and makes its own findings

and the seven year recommendation by the state, were excessive. The court committed the acquittee to the jurisdiction of the board for a period of time not to exceed five years. This appeal followed. Additional facts will be set forth as necessary.

I

The acquittee first claims that the court improperly denied his motion to dismiss alleging a violation of substantive due process under the federal constitution. Specifically, he argues that the medical treatment he received was substantially below the standard of care so as to shock the conscience and that his commitment is not rationally related to the requisite therapeutic purpose.[20] The state counters, inter alia, that the court properly concluded that "the acquittee's complaints as to the quality of his treatment are not directly germane to the trial court's assessment of whether the acquittee is a person who should be discharged, and any treatment failures should more appropriately be raised in a different procedural context." We agree that the court properly limited the issue to whether to grant or deny the state's petition for continued commitment and that the acquittee's arguments regarding the quality of medical care and treatment he received should be adjudicated in another proceeding.

Before addressing the specifics of the acquittee's claim, we briefly review the relevant legal principles

as to mental health condition of acquittee), cert. denied, 335 Conn. 948, 238 A.3d 17 (2020); *State* v. *Damone*, 148 Conn. App. 137, 170–74, 83 A.3d 1227 (ultimate determination of mental illness and dangerousness is legal decision that rests with court and involves consideration of entire record available, including acquittee's history of mental illness, present and past diagnoses, past violent behavior, nature of criminal offense, need for continued medication and therapy, and prospects for supervision if released), cert. denied, 311 Conn. 936, 88 A.3d 550 (2014); see also General Statutes § 17a-593 (g).

[20] We note that the acquittee has not raised an independent substantive due process claim under the state constitution.

pertaining to the substantive due process doctrine and the recommitment procedure for individuals found not guilty of a criminal offense pursuant to § 53a-13 and who have reached the end of the term of maximum commitment. "Freedom from unjustified governmental intrusions into personal security and bodily freedom are basic, historically recognized liberty interests that are protected by the federal constitution. . . . As a matter of federal law, [i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection; that is, the nature of commitment [must] bear some reasonable relation to the purpose for which the individual is committed. . . . The United States Supreme Court has recognized involuntary commitment to a mental institution, in particular, as involving more than a loss of freedom from confinement . . . due to its stigmatizing consequences, and the potential exposure to invasive, compulsory medical and psychiatric treatment. . . .

"The law of federal due process accordingly imposes significant constitutional constraints on involuntary commitments. Even for the purpose of psychiatric treatment, a state may not confine an individual, unless the individual is both mentally ill and dangerous. . . . Federal law has, however, recognized that insanity acquittees are a special class that should be treated differently from other candidates for commitment . . . . Thus, when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the [c]onstitution permits the [g]overnment, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Metz*, 230 Conn. 400, 412–14, 645 A.2d 965 (1994).

As previously noted, the acquittee filed a motion to dismiss,[21] alleging that his commitment to the jurisdiction of the board constituted a violation of substantive due process in that continued commitment would violate his right to freedom from detention of indefinite duration and his right to treatment as an involuntarily confined individual. "Substantive due process is the embodiment of society's desire to prevent government from abusing [its] power, or employing it as an instrument of oppression. . . . To that end, a claim of a violation of substantive due process must allege a level of executive abuse of power . . . which shocks the conscience. . . . A salient example of such abuse of power may be found in the very case in which the standard was first enunciated. In *Rochin* v. *California*, [342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952)] the United States Supreme Court held that the forced pumping of a suspect's stomach to retrieve evidence shocked the conscience. As the court described it, [i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." (Citations omitted; internal quotation marks omitted.) *ATC Partnership* v. *Windham*, 251 Conn. 597, 608, 741 A.2d 305 (1999), cert. denied, 530 U.S. 1214, 120 S. Ct. 2217, 147 L. Ed. 2d 249 (2000); see also *D'Amico* v. *Johnson*, 53 Conn. App. 855, 864, 733 A.2d 869 (1999).

[21] Practice Book § 10-30 (a) provides: "A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; and (4) insufficiency of service of process."

The acquittee did not cite to this rule of practice in his motion to dismiss alleging a violation of substantive due process, nor has he appeared to challenge the jurisdiction of the trial court or explain why a motion to dismiss is the proper procedural vehicle to raise his specific constitutional claims.

Additionally, we note that, "[a]lthough no objective measure has been developed to identify such a violation with scientific precision, it is understood that malicious and sadistic abuses of power by government officials, intended to oppress or to cause injury, and designed for no legitimate government purpose, unquestionably shock the conscience. . . . The doctrine is designed to protect the individual against . . . the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . ." (Citations omitted; internal quotation marks omitted.) *Gawlik* v. *Semple*, judicial district of New Haven, Docket No. CV-16-5036776-S (September 4, 2018) (reprinted at 197 Conn. App. 86, 112, 231 A.3d 347), aff'd, 197 Conn. App. 83, 231 A.3d 326 (2020), cert. denied, 335 Conn. 953, 238 A.3d 730, cert. denied, U.S. , 141 S. Ct. 1713, 209 L. Ed. 2d 479 (2021); see generally *Bolmer* v. *Oliveira*, 594 F.3d 134, 143 (2d Cir. 2010) (physician's decision to involuntarily commit mentally ill person shocks conscience and violates substantive due process when based on substantive and procedural criteria that are substantially below standards generally accepted in medical community).

Our legislature has set forth the procedures for continuing the commitment of an acquittee to the jurisdiction of the board when he or she approaches the maximum term of commitment.[22] See *State* v. *Dyous*, 307 Conn. 299, 307, 53 A.3d 153 (2012). "Section 17a-593 (c) authorizes a state's attorney to seek a court order for the continued commitment of an acquittee [i]f reasonable cause exists to believe that the acquittee

[22] Our Supreme Court expressly has noted that these statutory procedures for the recommitment of acquittees implicate the liberty interest of such individuals. See *State* v. *Long*, 268 Conn. 508, 524, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004); see also *State* v. *Long*, 301 Conn. 216, 238, 19 A.3d 1242, cert. denied, 565 U.S. 1084, 132 S. Ct. 827, 181 L. Ed. 2d 535 (2011).

remains mentally ill or [a person with intellectual disability] to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others . . . .'' (Internal quotation marks omitted.) *State* v. *Metz*, supra, 230 Conn. 408. ''The court shall forward . . . any [such] petition . . . to the board. The board shall . . . file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report. General Statutes § 17a-593 (d). Within ten days of receipt . . . of the board's report . . . either the state's attorney or counsel for the acquittee may file notice of intent to perform a separate examination of the acquittee. An examination conducted on behalf of the acquittee may be performed by a psychiatrist or psychologist of the acquittee's own choice . . . . General Statutes § 17a-593 (e). After receipt of the board's report and any separate examination reports, the court shall . . . commence a hearing on the . . . petition for continued commitment. General Statutes § 17a-593 (f). At that hearing, the state bears the burden of proving by clear and convincing evidence that the acquittee is currently mentally ill and dangerous to himself or herself or others or gravely disabled . . . a burden identical to that borne by an applicant for an order of civil commitment. Unlike the finder of fact at a civil commitment hearing, however, the court at a continued commitment hearing must [consider] that its primary concern is the protection of society . . . . General Statutes § 17a-593 (g).'' (Citation omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Dyous*, supra, 307–309.

At the conclusion of a hearing for the continued commitment of an acquittee beyond his or her maximum

term of confinement, the trial court, by statute, must issue one of two possible orders—the acquittee is or is not a person who should be discharged from the jurisdiction of the board. See General Statutes § 17a-593 (g); *State* v. *Jacob*, 69 Conn. App. 666, 672, 798 A.2d 974 (2002); see also *State* v. *Lindo*, 110 Conn. App. 418, 424, 955 A.2d 576, cert. denied, 289 Conn. 948, 960 A.2d 1038 (2008). The trial court in the present matter, on several occasions, described its task as a "binary" choice and indicated that the determination of whether the medical treatment provided to the acquittee shocked the conscience, constituting a violation of substantive due process, was outside of the scope of the hearing on the state's petition.[23]

We agree that, following a § 17a-593 proceeding to determine whether to continue the commitment of an acquittee beyond the maximum term of his or her commitment, the question before the trial court is whether

[23] For example, the court stated: "*But my choice*, and you'll correct me if I'm wrong, *seems to be*, *under the statute*, *a binary one*. I can either grant the petition for continued commitment or deny it. You want me to deny it; correct? . . . Which means that [the acquittee] could just walk out of here. I mean, he's certainly done his term and more, and he could just walk out of here and do whatever he wants, which would be wonderful for a person who wasn't demonstrably a danger to himself or others. But it causes the court, you know, considerable concern, because there's no way I can impose any supervision on him or treatment. *I just have the binary choice of either grant or deny*, and it's not a question of deciding what punishment he deserves. *It's just a question of whether the state has met its burden of proof*, and I have to be guided by the concern for safety of society. So, that's where I am. It may be that, if he was receiving some inhumane treatment, he might have some other legal recourses, but that would not be addressed here." (Emphasis added.)

During a colloquy with the acquittee's counsel, the court subsequently distilled the proceeding as if the state had satisfied its burden with respect to the questions of mental illness and a danger to himself or others, then it would have to grant the state's petition for continued commitment, and if it did not, it would have to deny the petition. Finally, in its closing remarks, the court stated: "*And*, *fortunately or unfortunately*, *I have to make a binary choice that*, *either—that is*, *either at the end of the day*, *the state's petition for recommitment must be either granted or denied*." (Emphasis added.)

the acquittee is or is not a person who should be discharged from the jurisdiction of the board. The resolution of that inquiry is based on whether the state has demonstrated, by clear and convincing evidence, that reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities, which includes any mental illness or mental disease as defined by the current Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatry Association, to the extent that his discharge would constitute a danger to himself or herself or to others. See, e.g., *State* v. *Dyous*, supra, 307 Conn. 308; *State* v. *Metz*, supra, 230 Conn. 408; see also General Statutes § 17a-593 (c). In this appeal, the acquittee does not claim that the procedures set forth in § 17a-593 (c) violate his substantive rights to due process under the federal constitution. The acquittee also has not challenged the trial court's conclusions that he suffered from a mental illness and that he would pose a danger to others if released from the board's jurisdiction. Instead, the acquittee advances only his argument that the medical treatment he has received has been deficient or inadequate so as to shock the conscience, constituting a violation of substantive due process.

As a remedy for this alleged constitutional violation, the acquittee argues that the state's motion for continued confinement should have been dismissed and that he should have been released to the community despite his continued mental illness and dangerousness to others. The petitioner cites no authority for this proposition, and we are aware of none. Instead, the law provides other remedies for such a constitutional violation. For example, a detained person who claims that the medical care he has received is so inadequate or inappropriate as to shock the conscience may bring an action alleging a violation of his substantive due process

rights pursuant to 42 U.S.C. § 1983.[24] See, e.g., *Charles* v. *Orange County*, 925 F.3d 73, 85 (2d Cir. 2019). Such a claim may also be raised in a petition for habeas corpus alleging deliberate indifference in violation of the eighth amendment's prohibition on cruel and unusual punishment. See, e.g., *Faraday* v. *Commissioner of Correction*, 288 Conn. 326, 338–39, 925 A.2d 764 (2008). These methods of raising a constitutional violation related to the provision of medical care to detained persons provide remedies that directly address the constitutional violation—either injunctive relief requiring the provision of the medical treatment requested or damages for the failure to do so. By contrast, the relief the acquittee seeks in the present case would not address the alleged constitutional violation. In particular, his release would not result in his receiving the treatment to which he claims he is entitled. Instead, the result would be that he would be released into the community while still suffering from a mental illness and still posing a danger to others. Given the availability of other remedies, substantive due process does not require the result the acquittee seeks.

In the present case, the court determined that the state had satisfied its burden of establishing that the acquittee suffered from a mental illness and that, if released from the jurisdiction of the board, he would pose a danger to others. Given those determinations, the court properly extended his commitment to the jurisdiction of the board and declined to address the other issues raised that are beyond the scope of the

[24] Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

present proceeding. We conclude, therefore, that the court properly denied the motion to dismiss filed by the acquittee alleging a violation of substantive due process.

II

The acquittee next claims that that the court improperly denied his motion to dismiss alleging a violation of procedural due process. Specifically, he argues that the court's imposition of an additional term of commitment to the jurisdiction of the board not to exceed five years improperly denied him mandatory biennial judicial review in violation of his right to due process pursuant to article first, § 8, of the Connecticut constitution. The state counters that, pursuant to our Supreme Court's decision in *State* v. *Long*, 268 Conn. 508, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004), the acquittee's procedural due process claim must fail. We agree with the state.

The following additional facts are relevant to this claim. On February 16, 2021, the acquittee filed a motion to dismiss, alleging a violation of procedural due process on the ground that § 17a-593 (c), as applied to him, failed to provide certain protections guaranteed by our state constitution. Specifically, he argued, inter alia, that he was entitled to "[p]eriodic judicial review, which includes the basic procedural safeguards of an initial civil commitment hearing as articulated in *Fasulo* v. *Arafeh*, [173 Conn. 473, 378 A.2d 553 (1977)]." The state filed an objection to this motion on May 4, 2021.

In its memorandum of decision, the court described the acquittee's procedural due process claim as "particularly weak" and rejected it, stating: "Procedural due process requires adequate notice and hearing. [The acquittee] has had plenty of both. He has been represented by counsel throughout both the administrative and judicial processes. In the proceedings before this

court, he has had ample opportunity to confront and cross-examine the witnesses against him and to submit whatever evidence he wished in his favor. In view of the stakes, the court made every effort to bend over backward and allowed him to introduce contested evidence. The hearing has been fair throughout. There has been no violation of procedural due process."

On appeal, the acquittee contends that his state constitutional right to due process has been violated because the lack of mandatory biennial judicial review poses an unreasonable risk of an erroneous deprivation of his liberty during his five year period of continued commitment to the jurisdiction of the board. He further claims entitlement, as an acquittee, to mandatory biennial judicial review as required for civilly committed individuals by *Fasulo* v. *Arafeh*, supra, 173 Conn. 473, and General Statutes § 17a-498.[25] We conclude that the

[25] In *Fasulo* v. *Arafeh*, supra, 173 Conn. 477, our Supreme Court considered the procedural due process claims of two individuals committed indefinitely to a state hospital and confined for periods of twenty-six years and thirteen years. It held that "the due process clause of the Connecticut constitution mandates that involuntarily confined civilly committed individuals be granted periodic judicial reviews of the propriety of their continued confinement." Id., 479. Furthermore, the state must bear the burden of proof with respect to the necessity of recommitment under our constitution. Id., 480–81. Finally, it explained that a discretionary provision with uncertain legal standards was insufficient to safeguard the constitutional rights of individuals such as the plaintiffs. Id., 482.

General Statutes § 17a-498 (c) (3) provides in relevant part: "If the [Probate Court] finds by clear and convincing evidence that the respondent has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, the court shall make an order for his or her commitment, considering whether or not a less restrictive placement is available, to a hospital for psychiatric disabilities to be named in such order, there to be confined for the period of the duration of such psychiatric disabilities or until he or she is discharged or converted to voluntary status . . . ."

General Statutes § 17a-498 (g) provides in relevant part: "If the patient's last annual review did not result in a hearing, and *in any event at least every two years*, *the Probate Court shall*, within fifteen business days, *proceed with a hearing* in the manner provided in subsections (a), (b), (c) and (f) of this section. . . ." (Emphasis added.)

The acquittee was found not guilty by reason of mental disease or defect pursuant to § 53a-13, and therefore his status under the relevant statutory

resolution of this claim is controlled by our Supreme Court's decision in *State* v. *Long*, supra, 268 Conn. 508.

In *Long*, the acquittee initially was committed to the jurisdiction of the board for five years, the maximum time allowable after he was found not guilty of assault in the second degree by reason of mental disease or defect pursuant to § 53a-13. Id., 511–12. The state petitioned the court to extend the acquittee's commitment, and he was recommitted for a period of time not to exceed three years. Id., 513. Multiple additional recommitments ensued, resulting in his commitment to the jurisdiction of the board for more than sixteen years.[26] Id. In March, 2001, the state filed another petition to continue the acquittee's commitment. Id. He moved to strike the board's report recommending continued commitment and to dismiss the state's petition, inter alia, on the basis of his claim that § 17a-593 violated his state constitutional right to procedural due process. Id. Although the trial court initially denied the acquittee's motions and granted the state's petition for recommitment, it sua sponte reconsidered its ruling and granted the motion to dismiss on the ground that § 17a-593 (c) was unconstitutional. Id., 513–14. "Specifically, the [trial] court concluded that § 17a-593 (c) violated the [acquittee's] due process rights under article first, § 8, of the Connecticut constitution because the statute failed to provide an acquittee with mandatory periodic judicial review of confinement as required by *Fasulo* v. *Arafeh*, supra, 173 Conn. 479. The court also determined that § 17a-593 (c) violated the [acquittee's] equal protection rights under the fourteenth amendment to the

framework is distinguishable from the civilly committed individuals in *Fasulo* v. *Arafeh*, supra, 173 Conn. 477.

[26] As noted by our Supreme Court, following the acquittee's initial five year commitment to the jurisdiction of the board, the court, on five occasions, recommitted the acquittee for three years, two years, eighteen months, eighteen months, and two years. *State* v. *Long*, supra, 268 Conn. 518–19.

United States constitution because it treats acquittees . . . differently from convicted prisoners who subsequently are civilly committed to a mental hospital at some point after they have been incarcerated . . . .'' (Footnotes omitted.) *State* v. *Long*, supra, 268 Conn. 514. Finally, it concluded that § 17a-593 (c) violated the acquittee's equal protection rights under article first, § 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments. Id., 514–15. Although it determined that § 17a-593 (c) was unconstitutional, the trial court expressly found that the state had proved, by clear and convincing evidence, that the acquittee has a mental illness and would be a danger to others if discharged from the board's jurisdiction. Id., 515.

On appeal, our Supreme Court considered and rejected all the bases on which the trial court had determined that the statute was unconstitutional. In conducting its procedural due process analysis, the court first identified the issue as whether mandatory judicial review was necessary before extending an acquittee's commitment beyond the initial period authorized by General Statutes § 17a-582 (e) (1) (A). Id., 520–21. It then noted that a validly enacted statute carries a strong presumption of constitutionality, and a challenger must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. Id., 521. Next, it observed that ''[a] procedural due process challenge to the validity of [a statute] cannot proceed in the abstract. . . . Due process is inherently fact-bound because due process is flexible and calls for such procedural protections as the particular situation demands. . . . The constitutional requirement of procedural due process thus invokes a balancing process that cannot take place in a factual vacuum.'' (Citations omitted; internal quotation marks omitted.) Id., 522–23.

The court then identified the applicable analytical framework, namely, the factors identified in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *State* v. *Long*, supra, 268 Conn. 523–24. "The United States Supreme Court [has] set forth three factors [which this court has followed] to consider when analyzing whether an individual is constitutionally entitled to a particular judicial or administrative procedure: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. . . . Due process analysis requires balancing the government's interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures." (Citation omitted; internal quotation marks omitted.) Id. The court recognized that it was "undisputed" that § 17a-593 (c) implicated the acquittee's liberty interest and that the state had an interest in confining individuals who posed a danger to themselves or others as a result of mental illness. Id., 524. "Thus, the only factor that we must address is whether, based upon the judicial review that the [acquittee] did in fact receive, the [acquittee's] liberty interest was subject to an unreasonable risk of erroneous deprivation, and the probable value of any additional procedural safeguards." Id., 524–25.

At the outset of its analysis, the court explained that "[t]he fundamental requisite of due process of law is the opportunity to be heard . . . [which] must be at a meaningful time and in a meaningful manner. . . . [T]hese principles require that a [party] have timely and adequate notice detailing the reasons for [the proposed

action], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (Internal quotation marks omitted.) Id., 525. Next, it noted that there had been five petitions for continued commitment, and, in each instance, the acquittee "(1) was given a copy of the petition . . . (2) was afforded the right to be present at the hearing and the right to be represented by counsel . . . (3) had the right to a separate and independent review of his mental health by an independent psychiatrist or psychologist of his choice . . . and (4) had the right to examine all documents and reports considered by the court in preparation of his defense. . . . [See General Statutes § 17a-593.] In each instance, the [acquittee] was in fact represented by counsel, supplied by the state. Furthermore, prior to each hearing, the board filed a report with the court, and gave copies to the [acquittee] and the state, as to whether the [acquittee] should be discharged. . . . In each instance, the trial court ordered the [acquittee] recommitted for periods ranging from eighteen months to three years during the term of recommitment, the [acquittee] had the right to apply directly to the court for his discharge every six months . . . however, he never exercised that right. Had the [acquittee] submitted such an application at any point during his commitment, the court would have been required to hold a judicial hearing on whether the [acquittee] should be discharged. . . . During his term of recommitment, the board received a report every six months from the hospital where he was confined. . . . Furthermore, the board was required to hold a hearing on the [acquittee's] mental health status once every two years . . . and the board had the option to recommend to the court that the [acquittee] be discharged . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 525–27. The court concluded that these

existing statutory procedures, as applied, did not expose the acquittee to an unreasonable risk of erroneous deprivation of his liberty. Id., 527. "*We further conclude that there would be little value in the imposition of additional procedural safeguards, such as mandatory judicial review without a petition being filed during the term of recommitment.*" (Emphasis added.) Id.

In the present case, the acquittee, who received the procedural protections identified in *State* v. *Long*, supra, 268 Conn. 508, contends that due process requires mandatory biennial judicial review, which our Supreme Court specifically concluded was not constitutionally required. He therefore attempts to distinguish his case from *Long*. Specifically, he argues that, in *Long*, "the acquittee was subject to five recommitments over ten years, effectively entitling him to mandatory biennial judicial review. Moreover, the trial court granted the [acquittee's] motion to dismiss and thus did not impose any term of commitment." We are not persuaded by the latter argument, as our Supreme Court reversed the decision of the trial court granting the motion to dismiss and concluded that the protections set forth in § 17a-593 provided sufficient due process protection. As to the former, the acquittee presents a creative mathematical argument vis-à-vis the facts of *Long* to support his claim of a constitutionally required biennial judicial review for acquittees subjected to continued commitment following the expiration of their initial maximum confinement. This approach, however, fails to account for the fact that the acquittee in *Long* was subjected to a continued commitment for a three year period without a mandatory judicial review during that specific time frame, and our Supreme Court determined that this did not constitute a procedural due process violation.

Simply stated, we are not persuaded by the acquittee's effort to distinguish the present case from

State v. *Long*, supra, 268 Conn. 508, and, on the basis of that case, we conclude that the existing statutory procedures, as applied to the acquittee, do not expose him to an unreasonable risk of erroneous deprivation of his liberty and that there would be little value in the imposition of mandatory judicial review without a petition being filed during his continued commitment as a procedural safeguard. We further conclude, therefore, that § 17a-593 (c), as applied to the acquittee, does not violate his procedural due process rights under article first, § 8, of our state constitution.[27]

III

The acquittee's final claim is that the court improperly denied his motion to strike the portion of the board's report to the court recommending his continued commitment for a period not to exceed ten years. Specifically, he argues that the board lacks authority under the relevant statutory scheme to recommend a time frame for continued commitment. The board counters, inter alia, that this claim fails because the acquittee failed to argue in his principal appellate brief that he was prejudiced as a result of the court's denial of the motion to strike the challenged section of the board's report. We agree with the board.

As previously noted, the board submitted its report on the state's petition for an order of continued commitment on April 22, 2019. At the conclusion of this report, the board "respectfully recommends to the [c]ourt that it grant [the petition for an order of continued commitment of the acquittee] for a period not to exceed ten years." The board's ten year recommendation was repeated in its updated reports dated January 19, 2021, and October 26, 2021. On February 16, 2021, the

[27] To the extent that the acquittee contends that the court's authority to impose a continued commitment is limited to two years, we conclude that that claim is without merit.

acquittee filed an amended motion to strike the board's recommendations that the court grant the petition for continued commitment for a period not to exceed ten years. On February 28, 2022, the court orally denied the acquittee's motion to strike, stating that, in its view, the board was permitted to make a recommendation and that the ultimate decision with respect to the length of a continued commitment rested with the court. The court iterated these points in its memorandum of decision and ultimately ordered a period of continued commitment for a period of time not to exceed five years.

In his principal appellate brief, the acquittee argues that his evidentiary claim is based on a statutory interpretation of § 17a-593 and therefore is subject to plenary review. He then contends that, although it is a common practice for the board to issue a recommended time frame for continued commitment, this practice is not permitted under the relevant statutory framework. Absent from the acquittee's brief, however, is any analysis of how he was harmed by this recommendation. In its brief, the board identified the acquittee's failure to brief the issue of harm. In his reply brief, the acquittee speculated that the court used the board's ten year recommendation and his zero year recommendation to arrive at a period of continued commitment not to exceed five years.

In *State* v. *Myers*, 178 Conn. App. 102, 174 A.3d 197 (2017), this court stated: "It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling which was probably harmful to him. . . . It is also a well established principle that arguments cannot be raised for the first time in a reply brief. . . . [I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing. . . . In the present

case, the defendant appeals from an evidentiary ruling of a nonconstitutional nature. As such, it is the defendant's responsibility to analyze, in his principal brief, the harm that flows from an evidentiary ruling. The defendant did not do this but, instead, referenced harm only in his reply brief. Under our rules of appellate practice, issues cannot be raised and analyzed for the first time in an appellant's reply brief. . . . This rule is a sound one because the appellee is entitled to but one brief and should not therefore be left to speculate at how an appellant may analyze something raised for the first time in a reply brief, which the appellee cannot answer. . . . Specifically with regard to evidentiary rulings, this court, on multiple occasions, has declined to review claims where the appellant fails to analyze harmful error in his or her principal brief." (Citations omitted; internal quotation marks omitted.) Id., 106–107; see also *State* v. *Tomlinson*, 340 Conn. 533, 548, 264 A.3d 950 (2021) (it is defendant's burden to establish harm from any evidentiary error and, because he failed to brief issue of harm, claim was deemed abandoned and reviewing court declined to address it); *State* v. *Gonzalez*, 106 Conn. App. 238, 249, 941 A.2d 989 (same), cert. denied, 287 Conn. 903, 947 A.2d 343 (2008).

In the present case, the acquittee did not address the issue of harm in his principal brief, mentioning it only in his reply brief. Pursuant to our jurisprudence, such an approach constitutes an abandonment of his claim, and we therefore decline to address it.[28] We conclude,

[28] Even if we were to consider the acquittee's arguments regarding the board's nonbinding recommendation, we would consider them to be without merit. Aside from a general reference to a canon of statutory construction and a cursory discussion of the legislative history, the acquittee has not established why a specific statutory authorization is necessary for the board to offer its opinion as to the length of continued commitment following a petition filed by the state.

As we previously have recognized, "the [trial] court, in its role as finder of fact in matters brought under § 17a-593, may properly credit the board's opinions and rely on its findings. . . . [U]nder the acquittee statutory scheme, the board has general and specific familiarity with all acquittees

therefore, that the acquittee's arguments with respect to his motion to strike the board's recommendation of continued commitment not to exceed ten years fail.

The judgment is affirmed.

In this opinion the other judges concurred.

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beginning with their initial commitment and, therefore, is better equipped than courts to monitor their commitment. By placing oversight of these individuals in a single administrative agency, such as the board, which is comprised of laypersons and experts in relevant areas, including psychiatry, psychology, probation, and victim advocacy, the legislature reasonably could have believed that the board, with its expertise and familiarity with the mental status of each acquittee, would be better equipped than a court to monitor the individuals' recommitment." (Citation omitted; internal quotation marks omitted.) *State* v. *Warren*, 100 Conn. App. 407, 422, 919 A.2d 465 (2007); see also *State* v. *Dyous*, 198 Conn. App. 253, 270, 233 A.3d 1138, cert. denied, 335 Conn. 948, 238 A.3d 17 (2020); *State* v. *Metz*, 92 Conn. App. 206, 210 n.5, 883 A.2d 1264, cert. denied, 276 Conn. 934, 890 A.2d 572 (2005). Given the board's expertise, its recommendation, albeit nonbinding, properly serves to assist the court in determining the appropriate length of continued commitment of an acquittee.