COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* THE TRAVELERS INDEMNITY COMPANY ET AL.
(AC 46677)

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* YALE UNIVERSITY ET AL.
(AC 46678)

Elgo, Moll and Suarez, Js.

Syllabus

In each of two cases, the plaintiff Commission on Human Rights and Opportunities filed an administrative appeal in the Superior Court from a decision of its human rights referee dismissing a complaint for age discrimination per se in violation of statute (§ 46a-60 (b) (6)) against each defendant, an insurance company and a university. The complainant, who was in his fifties, had alleged that each defendant's use of the phrase "recent college graduates" or "recent graduate" in published job advertisements were written so as to discriminate against individuals on the basis of age. The trial court found that those phrases were not a proxy for age because a recent college graduate can be of any age and rendered judgment in each case dismissing the appeal. In separate appeals to this court, the plaintiff claimed that the trial court improperly concluded that each defendant had not engaged in age discrimination per se in violation of § 46a-60 (b) (6). *Held*:

The defendant in each case could not prevail on its claims that the trial court did not have subject matter jurisdiction over the plaintiff's administrative appeal, as the matter was not moot because the insurance company no longer used the phrase "recent college graduates" in its advertisements, the plaintiff's standing to bring the administrative appeal was not dependent on the complainant's standing, despite the latter having abandoned his failure to hire claim and his failure to participate in these appeals, and the plaintiff had statutory (§ 46a-82 (b)) standing, having made a colorable claim that each defendant had engaged in a discriminatory practice that affected the interests of the complainant and others.

The trial court did not err in resolving the plaintiff's claim that the referee had improperly decided the case, as it properly analyzed and resolved the plaintiff's claim that the job posting amounted to age discrimination per se, having properly concluded that the phrases "recent college graduate" and "recent graduate" did not express a preference for a younger class of applicants and the plaintiff failed to demonstrate that the referee acted unreasonably, arbitrarily, illegally, or in abuse of her discretion.

Argued May 28—officially released October 29, 2024

Procedural History

Appeal, in each case, from a decision of a human rights referee for the plaintiff dismissing a complaint alleging age discrimination by the named defendant, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Budzik, J.*; judgment in each case dismissing the appeal, from which the plaintiff filed separate appeals to this court. *Affirmed.*

Michael E. Roberts, for the appellants (plaintiff in each case).

Allison P. Dearington, with whom, on the brief, was *Jessica L. Chamberlin*, for the appellee in AC 46677 (named defendant).

Kevin C. Shea, with whom, on the brief, was *Jordan J. Kowalski*, for the appellee in AC 46678 (named defendant).

Opinion

SUAREZ, J. These two appeals, although not consolidated, involve closely related claims. In Docket No. AC 46677, the plaintiff, the Commission on Human Rights and Opportunities (CHRO), appeals from the judgment of the trial court dismissing its administrative appeal brought against the defendant Travelers Indemnity Company (Travelers).[1] The plaintiff claims that the trial court erred in concluding that Travelers had not engaged in age discrimination per se, in violation of General

[1] The CHRO brought the administrative appeal to the Superior Court in its own capacity. The CHRO was named as a defendant in its capacity as the agency under which the human rights referee issued the decision from which the commission appealed. See, e.g., *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 157 n.1, 140 A.3d 190 (2016). Glenn Liou, the complainant in the underlying action, was named as a defendant for the purpose of making him a party to the appeal pursuant to General Statutes § 4-183. Liou, however, is not participating in this appeal.

Statutes § 46a-60 (b) (6),[2] by means of posting a job advertisement that contained the phrase "recent college graduate." In Docket No. AC 46678, the CHRO appeals from the judgment of the trial court dismissing its administrative appeal brought against the defendant Yale University (Yale).[3] The plaintiff claims that the court erred in rejecting its claim that Yale had engaged in age discrimination per se, in violation of § 46a-60 (b) (6), by means of posting a job advertisement that contained the phrase "recent graduate." We affirm the judgments of the trial court.

I

AC 46677

The following undisputed facts, as set forth by the trial court, and procedural history are relevant to this appeal. "In November of 2015, Travelers publicly posted a job notice for an entry level systems engineer. The job description stated, inter alia, that Travelers was '[s]eeking upcoming and/or recent college graduates with one or less years of experience in this job area for the IT Early Career Area.' On November 3, 2015, Glenn Liou viewed Travelers' job description on job search websites, which may have included the websites Indeed.com and Careerbuilder.com. [Liou] applied for the Travelers job. In his application, [Liou] indicated

[2] Section 46a-60 is part of the Connecticut Fair Employment Practices Act, which is codified at General Statutes § 46a-51 et seq. Although § 46a-60 has been amended several times since the events underlying these two appeals; see, e.g., Public Acts 2017, No. 17-118; those amendments have no bearing on the merits of these appeals. In the interest of simplicity, we refer to the current revision of the statute.

[3] Similar to the procedural history in AC 46677; see footnote 1 of this opinion; in AC 46678, the CHRO was named as a defendant in its capacity as the agency under which the human rights referee issued the decision from which the commission appealed, and Glenn Liou, the complainant in the underlying action, was named as a defendant for the purpose of making him a party to the appeal pursuant to General Statutes § 4-183. Liou is not participating in this appeal.

that he had a bachelor's degree and experience in various computer and programming areas. [Liou] never heard back from Travelers."

In 2016, Liou filed an affidavit of alleged discriminatory practice with the CHRO claiming to be aggrieved by Travelers' failure to hire him. He averred that he was fifty-five years of age and that, by seeking to hire "recent college graduates," Travelers was "trying to discourage old candidates age [forty] and above from applying" for the posted position. Liou's original complaint was amended to add the CHRO as a prosecuting party pursuant to § 46a-54-40a (a) (2) of the Regulations of Connecticut State Agencies, thereby purporting to expand the scope of the original complaint for the purpose of seeking relief on behalf of other persons aggrieved by the job posting. The amended complaint alleged that "the advertisements published by [Travelers] were written in such a manner as to have the purpose or effect of restricting employment opportunities so as to discriminate against individuals on the basis of age" and had "the purpose or effect of indicating a preference or specification so as to discriminate against individuals on the basis of age." The amended complaint expressly alleged age discrimination in violation of § 46a-60.

On February 13, 2019, a human rights referee (referee) held a public hearing. Thereafter, the CHRO and Travelers submitted posthearing briefs.[4] In her memorandum of decision, the referee noted that the CHRO contended that the language of the job posting was inherently unlawful per se under § 46a-60 (b) (6) and that it need not present proof of discriminatory effects. The referee noted that Travelers argued that neither the CHRO nor Liou had standing because of the lack

[4] Liou joined in the CHRO's posthearing brief. By the time of the hearing, Liou abandoned his individual failure to hire claim.

of any demonstrated injury to Liou, or persons other than Liou, caused by the job posting at issue. Alternatively, Travelers argued that the job posting did not violate § 46a-60 (b) (6), as argued, because it did not reflect a preference for workers of a certain age and there was no proof that it restricted the employment opportunities of any allegedly aggrieved person.

In her memorandum of decision, the referee concluded that "there is a complete lack of evidence to support the charge of discriminatory practice in violation of § 46a-60 (b) (6). The [CHRO], as a complaining party in its own name, and the individual complainant [Liou], have proved no set of facts that would entitle them to relief under the direct or inferential allegations in the compliant. There is no evidence, let alone ample evidence, to support a finding that the inclusion of 'recent college graduates' in [Travelers'] job notice was intended to, and did, have the discriminatory effect [of] imposing an age restriction segregating or separating employees because of their age or expressing a preference for a younger class of applicants [or] erecting a barrier restricting and limiting job opportunities of applicants because of their age." Thus, the referee dismissed the amended complaint.

The CHRO appealed from the referee's decision to the Superior Court pursuant to General Statutes § 46a-94a and in accordance with General Statutes § 4-183. In its memorandum of decision dismissing the CHRO's administrative appeal, the court, after summarizing the findings of the referee, stated: "The basic issue in this appeal is whether Travelers' advertisement of a job seeking 'recent college graduates' is, by itself, per se age discrimination. The court concludes that it is not. As an initial matter, the court observes that there is no evidence in the record as to the age characteristics of recent college graduates. Therefore, there is no factual

basis upon which the referee can make the factual conclusion that 'recent college graduates' is a proxy for age. The court recognizes that some courts have held that advertising for 'recent college graduates' is per se age discrimination. . . .

"Nevertheless, this court agrees with those courts holding that the phrase 'recent college graduates' is not per se discriminatory. . . . The court reaches the conclusion that the phrase 'recent college graduates' is not per se discriminatory both because this court views [cases supporting that conclusion] to be better reasoned and also because, on the factual record before the referee in this case, there was no factual basis to conclude that 'recent college graduates' evidences a preference for younger applicants.

"Finally, this court holds that CHRO's reliance on *Evening Sentinel* v. *National Organization for Women*, 168 Conn. 26, 357 A.2d 498 (1975), is misplaced. The court in *Evening Sentinel* held that newspaper job advertisements published under the headings 'Help Wanted Male' and 'Help Wanted Female' were per se sex discrimination and that the newspapers publishing such advertisements may be prohibited from publishing such facially discriminatory advertisements. . . . The court in *Evening Sentinel* said nothing about age discrimination generally, or whether the phrase 'recent college graduates' constituted per se age discrimination. As relevant to the case at bar, *Evening Sentinel* stands only for the proposition that an entity may be prohibited from publishing facially discriminatory job advertisements. *Evening Sentinel* offers no assistance in determining whether the phrase 'recent college graduates' is, in fact, discriminatory or, more accurately, is a proxy for age. As set forth above, this court concludes that, standing by itself, the phrase 'recent college graduate' is not a proxy for age because a recent college

graduate can be of any age." (Citations omitted.) This appeal followed.

A

Before reaching the merits of the claim raised by the CHRO in this appeal, we will address three distinct arguments raised by Travelers by which it challenges the trial court's subject matter jurisdiction over the administrative appeal brought by the CHRO. "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Hepburn* v. *Brill*, 348 Conn. 827, 838–39, 312 A.3d 1 (2024). "[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 107 Conn. App. 507, 511, 946

A.2d 252, cert. denied, 289 Conn. 902, 957 A.2d 870 (2008).

1

First, Travelers argues that "this case [was] moot and should [have been] dismissed" because it "long ago agreed to stop using the phrase 'recent college graduate' in its Connecticut job postings."[5] Travelers relies on the fact that the CHRO made clear in the trial brief that it submitted to the referee that it sought the issuance of an order causing Travelers to "cease and desist from publishing, or causing to be published, job postings with language indicating a preference directed to upcoming or recent college graduates." Travelers notes that, during the 2019 public hearing before the referee, its counsel represented that Travelers had voluntarily stopped using the language at issue and that it would not use similar language in the future. Travelers argues that, because it had already implemented the primary relief sought by the CHRO, the record reflects that there was no longer a controversy between the parties. The CHRO argues that Travelers' bare assurances that it has voluntarily ceased the conduct at issue does not give rise to mootness because there exists a possibility that Travelers may once more engage in the conduct at issue in the future.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the

[5] Before the referee, Travelers argued that the case was moot because it had already implemented the primary relief requested by the CHRO. Before the trial court, Travelers likewise argued that the case had become moot.

interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . A case is considered moot if [the trial] court cannot grant . . . any practical relief through its disposition of the merits . . . . [I]t is not the province of [the] courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . When . . . events have occurred that preclude [the] court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Kemon* v. *Boudreau*, 205 Conn. App. 448, 467, 258 A.3d 755 (2021).

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice, because, [i]f it did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways. . . . The voluntary cessation exception to the mootness doctrine is founded on the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior. . . . Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent, and a case becomes moot only if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. . . . The heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (Citations omitted; internal quotation marks omitted.) *Boisvert* v. *Gavis*, 332 Conn. 115, 139–40, 210 A.3d 1 (2019).

Here, Travelers has asserted that it has ceased using the allegedly discriminatory job posting and that it will

not use similar language in future job postings. The voluntary cessation by Travelers occurred in the context of the public hearing before the referee in this action and not because external factors make the job posting at issue in this case unnecessary. Nor is there undisputed evidence to support a conclusion that it is absolutely clear that similar language could not reasonably be expected to be used by Travelers in the future. Without passing on the veracity of its representation, we nonetheless observe that there is also nothing in the record to undermine a belief that Travelers strategically altered its conduct in an attempt to evade review of its posting. Nothing in the record suggests that Travelers would not be free to resume its practice of using similar language in a job posting in the future. Only the representations of public officials or official governmental actors are accorded some amount of deference with respect to the voluntary cessation exception. See, e.g., *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 21, 287 A.3d 557 (2023) ("[w]hen governmental actors have voluntarily ceased the conduct alleged to have been unlawful . . . we have determined that some deference is appropriate"); *Sullivan* v. *McDonald*, 281 Conn. 122, 127, 913 A.2d 403 (2007) ("[w]hen the parties are public officials, the court may place greater stock in their representations than the court otherwise might"). In the present case, it is undisputed that Travelers is a private entity.

Here, beyond its representations during the context of this administrative appeal, nothing in the record makes it absolutely clear that Travelers will not resume using job postings that contain the same or similar language at issue in this case—language that Travelers continually insists was proper in the first place. We cannot say that there is any reasonable expectation that the conduct will not reoccur in the future. Accordingly, we are not persuaded in light of the facts of the present

case that Travelers' voluntary cessation of using the challenged language should have permitted it to evade judicial review of the referee's decision in this case.

2

Second, Travelers argues that the trial court's judgment of dismissal should be affirmed on the ground that Liou lacked standing to bring the complaint.[6] According to Travelers, it is undisputed that Liou was a recent college graduate and, thus, "he claims to be a part of the group to which Travelers' posting referred . . . ." Also, Travelers relies on the fact that Liou, in fact, applied for the position at issue. Moreover, Travelers argues that nothing in Liou's application demonstrated that he possessed the technical skills required of the position. Travelers argues that Liou did not meet the legitimate nondiscriminatory criteria set forth in the job posting. Travelers argues that, in light of these undisputed facts in the record, Liou could not demonstrate that Travelers restricted his employment opportunities.

As we have explained previously in this opinion, although Liou filed the complaint before the CHRO, the CHRO became a party in its own right independent of Liou, who abandoned his failure to hire claim. The CHRO brought the administrative appeal from the decision of the referee to vindicate its own interests, not necessarily those of Liou. Likewise, Liou is not participating in the present appeal. Travelers has not cited any authority to support the proposition that the trial court's subject matter jurisdiction over the administrative appeal brought by the CHRO was in any way dependent on whether Liou had standing to bring the appeal

[6] Before the referee, Travelers argued that "a justiciable controversy" did not exist because Liou did not present any evidence of a compensable injury. Before the trial court, Travelers argued that the administrative appeal should be dismissed because Liou did not suffer a direct injury and, thus, lacked standing.

in his own right. Because the CHRO has standing in its own right, any issue as to Liou's standing did not deprive the Superior Court and does not deprive this court of subject matter jurisdiction.

3

Third, Travelers argues that the judgment of dismissal should be affirmed on the ground that the CHRO lacked standing to bring the complaint.[7] Travelers argues that "[t]he CHRO failed to establish standing in the matter before the referee as there is no demonstrated injury to the public merely because Travelers posted the job position in question (and where the CHRO's claim is based on a complaint filed by [Liou] who suffered no injury). CHRO's general invocation of the public interest is no substitute for evidence of a demonstrated alleged injury to the public." Travelers argues that § 46a-60 (b) (6) obligated the CHRO to prove that its job posting discriminated against more than one individual, but it failed to demonstrate that it had caused any harm to Liou, let alone others. Travelers also argues that, to demonstrate that an actual controversy existed, it was insufficient for the CHRO to raise merely "symbolic interests on behalf of others who may not have applied [for] the job because of the posting's language . . . ."

Our Supreme Court has explained that "[s]tanding is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in

[7] Before the referee, Travelers argued that the CHRO lacked standing because it had not proven a direct injury capable of redress. Likewise, before the trial court, Travelers argued that the CHRO lacked standing and the administrative appeal should be dismissed because it failed to present any evidence that Travelers, by means of the job posting at issue, had discriminated against or harmed any individual.

hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . .

"Statutory aggrievement [however] exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation. . . .

"In order to determine whether a party has standing to make a claim under a statute, a court must determine the interests and the parties that the statute was designed to protect. . . . Essentially the standing question in such cases is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . The plaintiff must be within

the zone of interests protected by the statute." (Citations omitted; internal quotation marks omitted.) *McWeeny* v. *Hartford*, 287 Conn. 56, 64–65, 946 A.2d 862 (2008).

As we have explained previously in this opinion, the CHRO joined Liou's individual complaint brought against Travelers and sought an order of general applicability enjoining Travelers from using the job posting at issue. In its amended complaint, the CHRO alleged that, upon information and belief, Travelers had published job advertisements seeking "recent college graduates . . . ." The CHRO further alleged that the advertisements discriminated on the basis of age in violation of federal and state law and that they "adversely affect[ed] the legal rights of persons other than and in addition to [Liou]." Contrary to Travelers' arguments, the CHRO thus made a colorable claim that Travelers had engaged in a discriminatory practice that adversely affected the interests of Liou and others.

General Statutes § 46a-82 (b) provides: "The commission, whenever it has reason to believe that any person has been engaged or is engaged in a discriminatory practice, may issue a complaint, except for a violation of subsection (a) of section 46a-80 [pertaining to certain types of employment discrimination cases]." The statute unambiguously places the CHRO within the zone of interests safeguarded by the statute. The right of the CHRO to file a complaint in this matter was not dependent on a showing of classical aggrievement, as Travelers' arguments seem to suggest, but upon a showing of statutory aggrievement, which it readily satisfied by means of the colorable claim set forth in its amended complaint on behalf of the public interest. "The commission clearly is empowered by statute to prosecute complaints on issues of public interest but it must strictly comply with the governing statutes and the regulations it has caused to be issued." *Groton* v. *Commission on*

Human Rights & Opportunities, 169 Conn. 89, 100, 362 A.2d 1359 (1975). Pursuant to § 46a-82 and § 46a-54-40a (a) (2) of the Regulations of Connecticut State Agencies,[8] the CHRO was empowered to prosecute a complaint on an issue of public interest based upon its colorable claim of a discriminatory job posting that affected the rights of Liou and others. For the foregoing reasons, we reject Travelers' argument that the CHRO lacked standing.

B

Next, we address the CHRO's claim that the court improperly concluded that Travelers had not engaged in age discrimination per se, in violation of § 46a-60 (b) (6), by means of posting a job advertisement that

[8] Section 46a-54-40a of the Regulations of Connecticut State Agencies provides: "(a) The commission may amend any complaint filed under section 46a-82 (a) of the Connecticut General Statutes to substitute or add itself as a complaining party whenever:

"(1) A complainant wishes to withdraw her or his complaint, but the commission believes that the practices complained of raise issues of public policy or affect the legal rights of persons similarly situated to the complainant;

"(2) A complainant wishes to pursue her or his complaint, and the commission believes that the practices complained of adversely affect the legal rights of persons other than the complainant; or

"(3) A complainant dies and the commission believes that the practices complained of raise issues of public policy or affect the legal rights of persons similarly situated to the complainant. Alternatively, or additionally, the complaint may be amended pursuant to section 46a-54-38a of the Regulations of Connecticut State Agencies to allow a representative of the complainant's estate to pursue the complaint.

"(b) The commission may amend a complaint to substitute or add itself as the complaining party under subsection (a) of this section at any time after a complaint has been filed under section 46a-82 of the Connecticut General Statutes but prior to appointment of the presiding officer in accordance with section 46a-84 (b) of the Connecticut General Statutes. Any such amendment shall relate back to the date the original complaint was filed with the commission. Any amendment to substitute or add the commission shall be by a majority vote of the members present and voting at a commission meeting and shall be signed by a commissioner authorized by the commission to sign."

contained the phrase "recent college graduates." We are not persuaded.

The CHRO argues that, before the referee, it litigated its claim "under a 'per se' theory of discrimination relying primarily on our Supreme Court's decision in *Evening Sentinel* v. *National Organization for Women*, [supra, 168 Conn. 26]. The referee noted the [CHRO's] choice of theory multiple times in her final decision but ultimately elected to apply a different theory, doing so based on her own reading of the operative complaints and an overly limited reading of *Evening Sentinel*, and only after the parties had tried the case and submitted it for decision."

The CHRO argues that, before the court, its primary claim of error was that "the referee erred in applying a different theory of discrimination than the [CHRO] had chosen, thereby altering the burden of proof after the case had been tried and briefed, without any prior notice to the parties." (Internal quotation marks omitted.) According to the CHRO, before the court, it "secondarily argued that if the court were to agree as to the primary claim, it should further conclude that only one action by the referee was appropriate as a matter of law: finding that the use of 'upcoming and/or recent college graduates' by Travelers in advertising an employment opportunity was discrimination per se." (Emphasis omitted.) Thus, the CHRO argues, by means of its administrative appeal, it sought a judgment modifying the agency's decision in its favor *rather* than a judgment remanding the case to the agency for further proceedings, namely, a determination of whether Travelers had engaged in age discrimination per se.

The CHRO claims that the court improperly "reframed the appeal" by distilling the appeal to one issue, namely, whether Travelers had engaged in age discrimination per se in light of *Evening Sentinel*. The CHRO argues

that the court thereby bypassed the primary claim that it had raised in its appeal, namely, whether the referee had improperly decided the case on the basis of an improper legal theory on which the CHRO had not relied. Moreover, the CHRO argues that the court mistakenly stated in its memorandum of decision that the CHRO claimed that the referee "did not address" its claim that per se discrimination had occurred. The CHRO argues that the court's statement was inaccurate because it expressly argued before the court that the referee had correctly acknowledged more than once in her decision the CHRO's argument that discrimination per se had occurred, but that the referee had nonetheless erroneously applied a different legal theory to its claim. According to the CHRO, for the trial court to have "bypass[ed]" its primary claim and merely to have resolved the issue of whether Travelers had engaged in discrimination per se amounted to an abuse of the trial court's discretion and is a basis for this court to reverse its judgment dismissing the appeal.

"Judicial review of an administrative decision is governed by [§] 4-183 (a) of the [Uniform Administrative Procedures Act (UAPA), General Statutes § 4-166 et seq.], which provides that [a] person who has exhausted all administrative remedies . . . and who is aggrieved by a final decision may appeal to the [S]uperior [C]ourt . . . .

"Review of an appeal taken from the order of an administrative agency such as the [CHRO] is limited to determining whether the agency's findings are supported by substantial and competent evidence and whether the agency's decision exceeds its statutory authority or constitutes an abuse of discretion. . . . [E]vidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . In determining whether an administrative finding is supported by

substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbelieve the evidence presented by any witness . . . . As with any administrative appeal, our role is not to reexamine the evidence presented to the [CHRO] or to substitute our judgment for the agency's expertise, but, rather, to determine whether there was substantial evidence to support its conclusions. . . . If the decision of the agency is reasonably supported by the evidence in the record, it must be sustained." (Citations omitted; internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 212 Conn. App. 578, 586–87, 276 A.3d 447, cert. denied, 345 Conn. 901, 282 A.3d 466 (2022).

"Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Cases that present pure questions of law, however, invoke a broader standard of review . . . . For pure questions of law, plenary review should be applied . . . [if] the issue of law ha[s] not been time-tested by the [agency] or previously considered by the courts." (Citation omitted; internal quotation marks omitted.) *O'Reggio* v. *Commission on Human Rights & Opportunities*, 219 Conn. App. 1, 11, 293 A.3d 955 (2023), aff'd, 350 Conn. 182, A.3d (2024).

The CHRO's primary argument is that the court decided the appeal on the basis of an issue that it raised sua sponte rather than addressing the claim that the CHRO had advanced. A review of the court's memorandum of decision unmistakably contradicts the CHRO's contention that the court did not consider whether the

referee had applied a different legal theory to its claim of age discrimination than that on which the CHRO had relied. In footnote 1 of its decision, the court stated: "[A]fter reviewing the parties' memoranda of law, the court concludes that CHRO is only claiming that Travelers' advertisement is illegal per se under the holding of [*Evening Sentinel*]. . . . CHRO claims that the decision below did not address this claim. . . . [In its brief, the CHRO argues that 'the referee erred in applying a different theory of discrimination than the [CHRO] had chosen']. The court disagrees." (Citations omitted.) The court then cited to two portions of the referee's decision in which the referee specifically referred to the CHRO's claim that the job advertisement at issue constituted age discrimination per se.[9]

Focusing on the court's use of the word "address," the CHRO argues that the court misconstrued its claim to be that the referee simply had failed to address or acknowledge the per se theory on which it had relied. Viewing the court's decision in its entirety, however, we disagree with this interpretation of the court's decision. "As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making . . . . Effect must be given to that which

[9] Specifically, the court referred to the portion of the referee's decision in which she stated, "[t]he [CHRO] contends that [Travelers'] advertisement of an employment opportunity indicating, inter alia, that it was seeking upcoming and/or recent college graduates with one or less years of experience in this job area for the IT Early Career area is illegal per se, or inherently unlawful in and of itself, under . . . § 46a-60 (b) (6) without the need for extrinsic proof . . . ." The court also referred to the portion of the referee's decision in which she stated: "The term recent college graduate in a job advertisement does not in and of itself establish any employment restriction against the prohibited factor of age." (Internal quotation marks omitted.)

is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Sessa* v. *Reale*, 213 Conn. App. 151, 161–62, 278 A.3d 44 (2022). We are persuaded that the court clearly recognized the nature of the CHRO's claim of error and that the issue before it was whether the referee had failed to *apply* the per se theory to the facts of the present case. The court referred to portions of the referee's decision in which she plainly had identified and rejected the per se discrimination claim raised by the CHRO. The court also unambiguously rejected this claim. Our review of the referee's decision amply supports the court's conclusion in this regard. For these reasons, we conclude that the CHRO has failed to demonstrate that the court did not resolve this aspect of its appeal.

The CHRO also argues that it was improper for the court to have reached the merits of the legal conclusion that had been reached by the referee, namely, that the CHRO had failed to prove its claim that the job advertisement constituted age discrimination per se. The CHRO argues that the court could not properly reach the merits of this argument unless it first concluded that the referee had improperly failed to resolve the claim of age discrimination per se. The CHRO has not set forth any persuasive authority in support of this contention. The CHRO recognizes that it invited the court to consider whether, as a matter of law, Travelers' job advertisement constituted age discrimination per se. Contrary to the CHRO's arguments, the court did not consider this claim sua sponte but was guided by authority submitted to it by both parties. Moreover, the fact that the CHRO argued that the court should consider the merits of this issue only after first concluding that the referee had failed to reach the merits of the issue did not as a matter of law dictate the proper

analytical path that the court should follow in addressing the appeal. Even if the court deemed it appropriate to have reached the merits of the dispositive discrimination per se claim without first considering what the CHRO deems to have been its "primary" claim of error, it was the prerogative of the court to do so in light of the fact that the discrimination per se claim had been adequately briefed by the parties and, in light of the claim raised by the CHRO, was squarely before it. Although the court was limited to the claims properly before it, the CHRO has not demonstrated that the court's analytical path was either an abuse of its discretion or legally incorrect.

Lastly, beyond arguing that the referee applied the "wrong theory" to its age discrimination claim and that the court erred in failing to resolve this "primary claim" of error, the CHRO argues that, in consideration of the analysis and conclusion in *Evening Sentinel*, Travelers engaged in age discrimination per se in violation of § 46a-60 (b) (6). There is no dispute as to the referee's findings with respect to the substance of the job advertisement at issue. The referee concluded that the reference to "recent college graduates" in Travelers' job advertisement did not indicate a preference or specification so as to discriminate on the basis of age. The referee also concluded that *Evening Sentinel*, which involved a gender segregated advertising scheme and a claim of discrimination in hiring on the basis of gender, was factually distinguishable from the present case. The court, in its review of the referee's decision, likewise concluded that the phrase "recent college graduates" did not express a preference for a younger class of applicants and that *Evening Sentinel* did not support the CHRO's claim. We agree with the court's analysis and likewise conclude that the CHRO did not demonstrate that the referee acted unreasonably, arbitrarily, illegally, or in abuse of her discretion.

II

AC 46678

We now turn our attention to the CHRO's appeal from the judgment of the trial court dismissing the administrative appeal that it brought against Yale. The following undisputed facts, as set forth by the court, and procedural history are relevant to this appeal. "On or about September 11, 2017, [Yale] publicly posted a job notice for a Social Entrepreneurship Fellow. The job description for the position stated, inter alia, that the 'fellowship is designed to provide a recent graduate with an opportunity to deepen their knowledge of how [s]ocial [e]ntrepreneurship at [Yale] functions at an operational level while broadening communication and networking skills.' . . . The job posting further describes the advertised 'Social Entrepreneurship Fellow position as a one year position under the supervision of [Yale's] School of Public Health with a focus and central role in Yale's mission to be a home for those at Yale interested in creating innovative solutions to challenges in health and education and . . . to inspire and support students from diverse backgrounds and disciplines to seek innovative ways to address real-work problems.' . . .

"The Social Entrepreneurship Fellow job posting included a statement that Yale is an equal opportunity employer, and that Yale does not discriminate on the basis of, inter alia, age. The job posting required a bachelor's degree, was not limited to recent graduates, and did not include an age requirement.

"[Liou] applied for the Social Entrepreneurship Fellow position. At the time of his application for the Social Entrepreneurship Fellow, [Liou] was fifty-seven years old. [Liou] was not selected to be interviewed for the Social Entrepreneurship Fellow and was not hired for

the position. [Liou] has a bachelor's degree in electrical engineering.

"[Katherine] Suits did an initial review of applications received by Yale for the Social Entrepreneurship Fellow.[10] [Suits] did not review an applicant's age, or when an applicant graduated from college when selecting those applicants who might be interviewed. [Suits] never became aware of [Liou's] age, or when he had graduated from college. [Suits] forwarded what she considered to be qualified applicants to [Martin] Klein for review.[11] [Suits] did not forward [Liou's] application for further review because [Suits] did not consider [Liou's] degree in electrical engineering, and his work experience at the United States Postal Service and as an insurance agent, among other positions, to be a good fit for the Social Entrepreneurship Fellow. [Klein] was never aware of [Liou's] application for the Social Entrepreneurship Fellow.

"No factual evidence was presented with respect to the demographics or age characteristics of recent graduates." (Footnotes added.)

In 2017, Liou filed an affidavit of alleged discriminatory practice with the CHRO claiming to be aggrieved by Yale's failure to hire him for the fellowship. Although he had raised other claims initially before the referee, Liou ultimately claimed that, in violation of § 46a-60 (b) (6), Yale had engaged in age discrimination by way of its advertising. Liou focused on the fact that Yale's job advertisement included the phrase "recent graduate." The CHRO appeared before the referee in support of Liou's complaint. On November 13, 2019, the referee held a public hearing with respect to the issue of liability

[10] The record reflects that Suits is a recruiter employed by Yale.

[11] The record reflects that Klein was the Senior Advisor to the Dean of Yale's School of Public Health.

only. Following the hearing, the CHRO and Yale filed posthearing briefs.

The referee thereafter issued a memorandum of decision in which she considered and rejected the CHRO's argument that the reference to "recent college graduate" in Yale's posting "is facially discriminatory and a violation of § 46a-60 (b) (6) in and of itself . . . ." The referee noted Liou's reliance on *Evening Sentinel* but concluded that the decision was distinguishable and, thus, not persuasive authority. The referee concluded that Liou "failed to prove by a preponderance of the evidence that [Yale] posted the Social Entrepreneurship Fellow position in such a manner as to restrict employment . . . or indicate a preference or specification, so as to discriminate against individuals on the basis of age. . . .

"Under any analysis, the Social Entrepreneurship Fellow job posting did not restrict employment at all. And the *Evening Sentinel* decision, on which the complainant relies, held newspapers, which were nonemployer entities, liable for aiding and abetting unlawful employment advertising practices of others involving facial gender based classifications, and is inapposite. *Evening Sentinel* is materially distinguishable and does not change this conclusion." The referee, therefore, dismissed the complaint.

In August, 2022, the CHRO appealed from the referee's decision to the Superior Court. In its memorandum of decision dismissing the CHRO's administrative appeal, the court, after summarizing the findings of the referee, stated that "the phrase 'recent graduate' is not per se discriminatory . . . because, on the factual record before the referee in this case, there was no factual basis to conclude that 'recent graduate' evidences a preference for younger applicants. Indeed, here, the referee found that the Yale job advertisement

was not restricted by age, [the advertisement] was not restricted to recent graduates, [Yale] specifically stated [in the job advertisement] that [it] did not discriminate on the basis of age, and that Yale officials did not know [Liou's] age. These facts provide a substantial basis for [the referee's] conclusion that Yale did not discriminate on the basis of age.

"Finally, this court holds that CHRO's reliance on *Evening Sentinel* . . . is misplaced. . . . The court in *Evening Sentinel* said nothing about age discrimination generally, or whether the phrase 'recent graduate' constituted per se age discrimination. As relevant to the case at bar, *Evening Sentinel* stands only for the proposition that an entity may be prohibited from publishing facially discriminatory job advertisements. *Evening Sentinel* offers no assistance in determining whether the phrase 'recent graduate' is, in fact, discriminatory, or more accurately, is a proxy for age. As set forth [previously], this court concludes that, standing by itself, the phrase 'recent graduate' is not a proxy for age because a recent graduate can be of any age." Thus, the court dismissed the appeal. This appeal followed.

A

Before reaching the merits of the CHRO's appeal, we address a question of subject matter jurisdiction raised by Yale. Yale appears to argue that the CHRO lacked standing to bring the underlying administrative appeal before the trial court. Yale argues that, although the trial court did not consider this issue, this court nonetheless may sustain the trial court's judgment after concluding that the CHRO did not have standing to challenge the referee's decision. Yale also argues that the CHRO lacks standing to bring the present appeal before this court and that this court should dismiss the appeal.

These distinct jurisdictional challenges are grounded in Yale's argument that "[t]he [CHRO] must establish

that it suffered some direct injury because of [Yale's] job posting to seek redress through the judicial process. . . . [T]he [CHRO] has failed to do so . . . ." Yale recognizes that, in its administrative appeal, the CHRO alleged that it brought the appeal "on behalf [of] and in the interest of the people of the state of Connecticut . . . ." The CHRO also alleged that it "is aggrieved by the final decision of the [referee], in that the improper application of the law to this complaint will, if not corrected, thwart the [CHRO's] statutory mandate of enforcing Connecticut's civil rights and antidiscrimination statutes, in this [case] as well as in cases to come." Yale maintains, however, that, "[i]n this case, the [CHRO] has raised hypothetical interests on behalf of others who may have not applied to the [Social Entrepreneurship] Fellow advertisement because of the advertisement's language . . . without any evidence that others did indeed not apply because of the 'recent graduate' language." According to Yale, "[t]he [CHRO] has not demonstrated how, if at all, it has been aggrieved by the referee's and the Superior Court's dismissal of its claims. It has not identified a legitimate injury to the public solely due to [Yale's] posting in question; nor can it, particularly given that the [CHRO's] claim remains tethered to a complaint filed by [Liou], who also suffered no injury. Put differently, the [CHRO's] general reference to the public interest does not negate its need to show tangible evidence of an actual injury to the public."

The arguments raised by Yale with respect to the CHRO's standing to participate in the proceedings before the referee and to bring the underlying administrative appeal are legally indistinguishable from those raised by Travelers in the appeal in AC 46677. Accordingly, for the reasons set forth in part I A 3 of this opinion, we reject Yale's claim that the CHRO lacked standing before the trial court. To the extent that Yale

also argues that this court lacks subject matter jurisdiction over the present appeal, not because the CHRO was not aggrieved by the judgment from which it appeals but because the CHRO lacked standing before the trial court, that argument likewise fails.

B

We now turn to the CHRO's claim that the court improperly concluded that Yale had not engaged in age discrimination per se, in violation of § 46a-60 (b) (6), by means of posting a job advertisement that contained the phrase "recent college graduate." We are not persuaded.

The CHRO's arguments are indistinguishable from the arguments that it raised in connection with its appeal in AC 46677, which involved a nearly identical claim of age discrimination based on similar language in a job advertisement, was brought by the same parties, and was adjudicated by the same referee. The referee's decisions in both underlying cases follow the same analytical path. The same trial court judge rendered the judgments at issue in both appeals, and the court's decisions follow the same analytical path and are based on the same authority. The CHRO's brief in each appeal raises similar legal arguments. As it did in AC 46677, the CHRO argues, primarily, that the referee failed to evaluate the case under the legal theory under which it was brought, as a claim of age discrimination per se under *Evening Sentinel*. The CHRO also argues that the court failed to resolve this primary claim and abused its discretion by reaching the merits of the secondary question raised in its administrative appeal, namely, whether Yale's job advertisement amounted to discrimination per se. Finally, the CHRO argues that, "[i]f this court finds that the [trial court] erred in not deciding the primary claim before it, and that the referee erred in applying a different theory than the [CHRO] had

chosen, it may then address the ultimate question: whether the use of 'recent graduate' in a job advertisement by Yale was discriminatory per se."

It would serve no useful purpose for this court to repeat the analysis set forth in part I B of this opinion, which governs our resolution of the CHRO's arguments. Having carefully reviewed the referee's decision and the decision of the trial court, we conclude that the referee carefully addressed and properly rejected the CHRO's claim of discrimination per se and that the court did not err in resolving the CHRO's claim that the referee had improperly decided the case on a different legal theory. We likewise conclude that the court properly analyzed and resolved the CHRO's claim that the job posting amounted to age discrimination per se and rejected its reliance on *Evening Sentinel*.

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KENYAL VICKERS
(AC 46030)

Moll, Suarez and Prescott, Js.

Syllabus

The defendant appealed from the trial court's judgment convicting him of, inter alia, sexually assaulting two women within ten minutes of each other in a Walmart store. He claimed, inter alia, that the court's denial of his motion to sever the charges against him was improper because the incidents as to each victim were separate and distinct and should have been tried separately.

The trial court did not abuse its discretion in denying the defendant's motion to sever the charges and concluding that he would not be substantially prejudiced by trying the charges as to both victims together, as the evidence of each incident was cross admissible to establish the defendant's intent as to each victim, whose testimony was relevant to prove that he was the individual who committed both assaults in close temporal proximity in the same store.

This court declined to review the defendant's claim that the trial court committed plain error by failing, sua sponte, to instruct the jury regarding the proper use of the evidence following the denial of his motion to sever the charges, as the defendant's claim was explicitly conditioned on a threshold determination by this court, which did not occur, that his failure to request or to challenge the absence of a limiting instruction constituted a waiver of his right to challenge the denial of the motion to sever, and the state acknowledged that he had not waived that right.

Argued May 20—officially released October 29, 2024

Procedural History

Substitute information charging the defendant with four counts of the crime of breach of the peace in the second degree, two counts of the crime of sexual assault in the fourth degree and one count each of the crimes of attempt to commit robbery in the third degree, attempt to commit larceny in the second degree and failure to appear in the first degree, brought to the Superior Court in the judicial district of Danbury, where the court, *D'Andrea*, *J.*, denied the defendant's motion for severance; thereafter, the case was tried to the jury before *D'Andrea*, *J.*; subsequently, the court denied the defendant's motion for reconsideration; verdict and judgment of guilty of two counts each of sexual assault in the fourth degree and breach of the peace in the second degree, and one count of failure to appear in the first degree, from which the defendant appealed to this court. *Affirmed.*

Gary A. Mastronardi, assigned counsel, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, former state's attorney, and *Matthew Knopf*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Kenyal Vickers, appeals from the judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the fourth degree

in violation of General Statutes § 53a-73a (a) (2), two counts of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (2), and failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1). On appeal, the defendant claims that the trial court (1) improperly denied his motion for severance of the charges as to two separate victims, and (2) committed plain error in failing to instruct the jury, sua sponte, on the proper use of the evidence following the denial of his motion for severance. We are not persuaded and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On May 3, 2018, at approximately 9:40 p.m., the first victim, D, and her wife, J, were shopping at the Walmart store in Danbury.[1] D was browsing in the shoe department when the defendant approached her. The defendant bumped into D, apologized to her, and continued down the aisle. Shortly thereafter, he again approached D and asked her where the children's shoes were located. After D answered, the defendant left again but returned a third time. He then pinned her against a shoe rack with one hand while using his other hand to attempt to take her purse. After D dropped her purse, the defendant lifted her dress, pulled down the shorts she was wearing underneath, and touched her buttocks, vaginal area, and breast.

D struggled with the defendant and yelled to J, who was shopping in a different aisle, for assistance. When

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

Furthermore, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

J approached the defendant and D, he briskly walked toward another area of the store. J attempted to pursue the defendant, and D reported the incident to store employees. While calling 911 to report the assault, D also simultaneously attempted to track the defendant's location within the store.

At this time, the second victim, M, was shopping in the aisle containing cleaning supplies. A Walmart employee was working in the same aisle restocking merchandise on shelves. While reaching for a bottle on the top shelf, M observed a police officer pursuing the defendant, who was moving toward her. As the defendant passed behind M, he reached out and grabbed her buttocks. She quickly grabbed her cell phone and took a photograph of the defendant as he ran away. The store employee immediately confirmed to M that he had seen the defendant grab her buttocks. The police apprehended and arrested the defendant in an adjoining aisle.

The following procedural history is relevant to the defendant's claims on appeal. After his on-site arrest, the defendant was charged under one docket number with robbery in the third degree in violation of General Statutes § 53a-136, two counts of breach of the peace in the second degree in violation of § 53a-181, and three counts of sexual assault in the fourth degree in violation of § 53a-73a. The initial charges related to both victims.

The defendant subsequently was released on a professional surety bond but failed to appear in court on July 18, 2018. He was rearrested on April 20, 2019, on a failure to appear warrant and was charged with failure to appear in the first degree in violation of § 53a-172 (a) (1).

On March 2, 2020, the defendant filed a motion to sever the charges, asserting that the charges relating to each victim should be tried separately because they

involved separate and distinct incidents. The court heard argument on the motion on January 18, 2022. During that argument, defense counsel contended that severance was required because the charges related to two discrete incidents at the Walmart store, occurring approximately ten minutes apart, and involving different complaining witnesses, who differed in age by twenty years. The prosecutor responded, asserting that the charges pertaining to the two victims involved a continuous course of conduct at the Walmart store with similar victims, both of whom described the perpetrator in the same manner. The prosecutor argued that, because the evidence with respect to one victim would be cross admissible with respect to the charges involving the other victim, severance was not warranted. The court took the matter under advisement.

That same day, defense counsel also filed a motion to withdraw as the defendant's attorney on the basis of a breakdown of the attorney-client relationship. The court granted that motion on January 19, 2022, and new counsel was appointed the next day. The court continued to defer ruling on the motion for severance until the defendant's newly appointed counsel had an opportunity to review it On March 15, 2022, new defense counsel adopted the motion to sever that had been filed by previous counsel and was permitted to make additional argument.

On March 15, 2022, immediately prior to jury selection, the court issued an oral decision denying the defendant's motion to sever the charges. Although the ruling is not a model of clarity,[2] the court appears to have concluded that the motion should be denied, as the charged offenses were "legally related" because the incidents "did, in fact, occur at the same location a

[2] The defendant did not seek an articulation of the court's ruling on his motion to sever. See Practice Book § 66-5.

short proximity from each other." The court also discussed and applied the *Boscarino* factors,[3] concluding that the defendant would not be substantially prejudiced by the joinder of all of the charged offenses for trial.

Jury selection then commenced. Thereafter, on the first day of evidence, the court heard argument on a motion for reconsideration of the court's prior ruling on the defendant's motion for severance. The prosecutor contended that the motion should be denied, in part because the evidence pertaining to the charges with respect to one victim was cross admissible with respect to the other victim. Defense counsel addressed the state's cross admissibility argument by contending that a particular video taken from security camera footage inside the store only would be admissible, if at all, with respect to the charges relating to D but would not be admissible with respect to the charges involving M. Defense counsel also asserted briefly that the charges should be severed because the defendant might want to exercise his right to remain silent with respect to the charges involving one victim but may want to testify as to the charges involving the other victim.

Immediately following argument, the court orally denied the defendant's motion for reconsideration. The

[3] "[Our Supreme Court, in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987)] identified several factors that a trial court should consider in deciding whether a severance [or denial of joinder] may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Internal quotation marks omitted.) *State* v. *Brown*, 195 Conn. App. 244, 250, 224 A.3d 905, cert. denied, 335 Conn. 902, 225 A.3d 685 (2020); see also *State* v. *Payne*, 303 Conn. 538, 543 n.2, 34 A.3d 370 (2012).

court did not specifically reference the issue of cross admissibility but repeated some of the reasons it had given when it denied the motion for severance. It also stated that the defendant had failed to make a sufficient showing that his desire to testify regarding some of the charges, but to remain silent as to other charges, justified separate trials.

The state then presented evidence in support of the charges. D and J testified with respect to the incident in the shoe aisle, provided a physical description of the perpetrator, and described how he walked quickly through the Walmart store after grabbing D. M then testified regarding the assault that occurred in the cleaning products aisle. The state also presented testimony, inter alia, from two Walmart employees who were present in the store on the night of May 3, 2018, and from the responding police officers. At no point did the defendant object or claim that the evidence was not cross admissible, nor was any testimony or exhibit admitted into evidence for a limited purpose.

During trial, on March 29, 2022, the state again amended its long form information and charged the defendant with attempt to commit robbery in the third degree, attempt to commit larceny in the second degree, two counts of sexual assault in the fourth degree, four counts of breach of the peace in the second degree, and failure to appear in the first degree. Two of the breach of the peace counts were charged in the alternative to the other two counts.

The jury returned a verdict of not guilty with respect to the charges of attempt to commit robbery, attempt to commit larceny and two of the counts of breach of the peace. The jury found the defendant guilty of two counts of sexual assault in the fourth degree, two counts of breach of the peace in the second degree, and failure to appear in the first degree. The court subsequently

imposed a total effective sentence of six years and 728 days of incarceration, execution suspended after three years, and five years of probation, subject to special conditions.[4] This appeal followed. Additional facts and procedural history will be set forth as necessary to address the specific claims of the defendant.

I

The defendant first claims that the court improperly denied his motion for severance of the charges relating to the two separate victims. Specifically, the defendant contends that the court abused its discretion by concluding, after applying the factors set forth in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987), that he would not be substantially prejudiced if the charges relating to D and M were tried together. In response, the state contends that the defendant was not deprived of a fair trial by joinder of the offenses because the evidence pertaining to each victim was cross admissible, and that, even if the evidence was not cross admissible, the court did not abuse its discretion by concluding, pursuant to the *Boscarino* factors, that the defendant would not be substantially prejudiced if all of the charges were tried together. We agree with the state.

We begin with the applicable standard of review and relevant legal principles regarding the denial of a motion for severance. General Statutes § 54-57 provides: "Whenever two or more cases are pending at the same time against the same party in the same court for offenses of the same character, counts for such offenses may be joined in one information unless the court orders otherwise." Our Supreme Court has explained that this statute "is directed at prosecutors, and governs the circumstances under which they may join multiple

[4] It is unclear why the court imposed a sentence with respect to some of the counts in days, while imposing a sentence on some of the counts in years.

charges in a single information." *State* v. *Payne*, 303 Conn. 538, 547, 34 A.3d 370 (2012). Practice Book § 41-18 provides: "If it appears that a defendant is prejudiced by a joinder of offenses, the judicial authority may, upon its own motion or the motion of the defendant, order separate trials of the counts or provide whatever other relief justice may require."[5] In the present case, the state charged the defendant in a single information, and the defendant subsequently filed a motion to sever the charges with respect to D and M.

"A joint trial expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called to testify only once." (Internal quotation marks omitted.) *State* v. *Wilson*, 142 Conn. App. 793, 799–800, 64 A.3d 846, cert. denied, 309 Conn. 917, 70 A.3d 40 (2013).[6] Our Supreme Court has noted that

[5] See, e.g., *State* v. *LaFleur*, 307 Conn. 115, 157, 51 A.3d 1048 (2012) (reasoning argument for joinder is most persuasive if offenses are based on same act or criminal transaction because it is unduly inefficient to require state to resolve same issues at numerous trials); *State* v. *Vaught*, 157 Conn. App. 101, 112, 115 A.3d 64 (2015) (same).

[6] "[Our Supreme Court] has recognized, however, that improper joinder may expose a defendant to potential prejudice for three reasons: First, when several charges have been made against the defendant, the jury may consider that a person charged with doing so many things is a bad [person] who must have done something, and may cumulate evidence against him . . . . Second, the jury may have used the evidence of one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all." (Internal quotation marks omitted.) *Cancel* v. *Commissioner of Correction*, 189 Conn. App. 667, 679–80, 208 A.3d 1256, cert. denied, 332 Conn. 908, 209 A.3d 644 (2019); accord *State* v. *Ellis*, 270 Conn. 337, 374–75, 852 A.2d 676 (2004).

"severance is not necessarily to be had for the asking." (Internal quotation marks omitted.) *State* v. *King*, 187 Conn. 292, 302, 445 A.2d 901 (1982), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012).[7] Specifically, "[i]n the trial court, when multiple charges have already been joined in a single information by the state pursuant to § 54-57, and the defendant has filed a motion to sever the charges for trial pursuant to Practice Book § 41-18, the defendant bears the burden of proving that the offenses are not of the same character . . . and therefore that the charges should be tried separately." (Citation omitted; internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 549. Additionally, we have explained that "[t]he decision to sever cases for trial is within the sound discretion of the trial court and that discretion must not be disturbed unless it has been manifestly abused. . . . The discretion of a court to order separate trials should be exercised only when a joint trial will be substantially prejudicial to the rights of the defendant, and this means something more than that a joint trial will be less than advantageous to the defendant. . . . On appeal, it is always the defendant's burden to show that the denial of severance resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions." (Citation omitted; internal quotation marks omitted.) *State* v. *Labarge*, 164 Conn. App. 296, 304, 134 A.3d 259, cert. denied, 321 Conn. 915, 136 A.3d 646 (2016); see also *State* v. *Payne*, supra, 549.

To meet his burden of demonstrating that the charges should be tried separately, "the defendant must prove

[7] In *State* v. *Payne*, supra, 303 Conn. 549–50, our Supreme Court rejected the blanket presumption in favor of joinder and held that, if charges are set forth in separate informations and the state moves to join the multiple informations for trial, it bears the burden of proving that the defendant will not be substantially prejudiced by joinder pursuant to Practice Book § 41-19. See also *State* v. *James A.*, 345 Conn. 599, 614, 286 A.3d 855 (2022), cert. denied, U.S. , 143 S. Ct. 2473, 216 L. Ed. 2d 439 (2023).

that the evidence of the separate charges would not be cross admissible if the cases were tried separately. . . . This is because [when] evidence of one incident would be admissible at the trial of the other incident, separate trials would provide the defendant no significant benefit. . . . Under such circumstances, the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial. . . . Accordingly, we have found joinder to be proper [when] the evidence of other crimes or uncharged misconduct [was] cross admissible at separate trials." (Citation omitted; internal quotation marks omitted.) *State* v. *Labarge*, supra, 164 Conn. App. 305–306; accord *State* v. *Anderson*, 318 Conn. 680, 692, 122 A.3d 254 (2015); see also *State* v. *Crenshaw*, 313 Conn. 69, 83–84, 95 A.3d 1113 (2014). If the evidence is not cross admissible, then the trial court is required to consider the *Boscarino* factors to assess whether the defendant will suffer undue prejudice from the joinder of offenses. See *State* v. *Labarge*, supra, 306; see also *State* v. *James A.*, 345 Conn. 599, 620–21, 286 A.3d 855 (2022), cert. denied, U.S. , 143 S. Ct. 2473, 216 L. Ed. 2d 439 (2023); *State* v. *Crenshaw*, supra, 83 n.8.

In the present case, the defendant filed a motion to sever the offenses on March 2, 2020. The court heard argument on the motion on January 18, 2022. Defense counsel claimed that, if the defendant had been charged in two separate informations, then the state would not be permitted to join them for trial. At that time, defense counsel did not address the matter of cross admissibility of the evidence. The prosecutor began his response by pointing out that the two incidents occurred within minutes of each other, which indicated a clear course of conduct by the defendant at the Walmart store. He then specifically argued that, if the matters were tried separately, the evidence would be cross admissible. Defense counsel did not respond to the prosecutor's

cross admissibility argument. The court did not rule on the defendant's motion.

After new defense counsel adopted the motion to sever filed by prior counsel, the court heard additional argument. Again, the issue of the cross admissibility of the evidence was not addressed by defense counsel in her initial or rebuttal arguments with respect to the motion for severance. The prosecutor reasserted that the evidence regarding the two incidents was cross admissible.

The court began its oral ruling by contrasting the facts of the present case with those in *State* v. *Boscarino*, supra, 204 Conn. 714.[8] Additionally, the court noted that the two incidents in the present case were "*legally related* here because they did, in fact, occur at the same location a short proximity from each other." (Emphasis added.) Ultimately, the court denied the defendant's motion to sever.

On March 24, 2022, prior to the start of evidence, defense counsel moved for reconsideration of the denial of the motion to sever. She argued that it was "clear" that the defendant would suffer prejudice as a result

[8] Specifically, the court concluded: "Consequently, [our Supreme Court has] identified several factors that the trial court should consider in deciding whether severance may be necessary to avoid undue prejudice resulting in consolidation of multiple charges for a trial. Those factors include, one, whether the charges involve discrete, easily distinguishable facts, scenarios. Clearly, these are discrete and easily distinguishable facts, scenarios that occurred over seconds and not a long period of time as the other case that I had—*Boscarino* that I had previously cited to.

"Two, whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part. Clearly, that is not present—present here and will not create the . . . prejudice that was apparent in the *Boscarino* matter. And finally, three, the duration and complexity of the trial could make it difficult for the jury to deal with this. This is not going to be a ten week trial with dozens of witnesses. This should be several days long with possibly half a dozen to ten short—relatively short witnesses. Based on the three criteria here, there is no basis for the motion to sever to be granted."

of the joinder of the two separate incidents alleged in the operative information in a single trial. Defense counsel further pointed out that it would be difficult for the jury to consider the relative strengths of the victims' testimony regarding their individual identifications of the defendant as the perpetrator. The prosecutor disagreed, pointing out that the two incidents occurred within minutes, in the same building by the same person. Furthermore, he again asserted that "[a]ll the evidence is cross admissible." In response, defense counsel countered that the evidence was not cross admissible.[9] The court orally denied the motion for reconsideration.

Our decision in *State* v. *Carty*, 100 Conn. App. 40, 916 A.2d 852, cert. denied, 282 Conn. 917, 925 A.2d 1100 (2007), is informative with respect to the present appeal. In that case, the first victim left her house at about 2 a.m. to purchase drugs and cigarettes on March 27, 2001. Id., 42. The defendant drove next to her as she walked along the street, and, after a brief conversation, she got into his car. Id. The defendant drove to a parking lot, pulled out a knife, placed it against her neck, and demanded that the first victim give him all of her money. Id., 42–43. A similar incident occurred a few days later. Id., 43. In the early morning of April 1, 2001, the second victim walked to a gasoline station to purchase cigarettes. Id. The defendant, who was at the gasoline station, ultimately agreed to drive the second victim back

[9] In response to the prosecutor's cross admissibility argument, defense counsel stated the following in arguing for reconsideration of the denial of the motion to sever: "[The prosecutor] made reference to [§] 54-57 that talks about cross admissibility as a factor that the court should consider in determining whether severance is appropriate. And essentially, if evidence would be cross admissible, there would be no reason to consider a severance because two trials wouldn't be necessary. I would submit . . . that, in this case, we do have issues of evidence that would not be cross admissible between these two matters . . . ." During the trial, defense counsel did not, however, object to any evidence on the ground that it was not cross admissible or seek to have any evidence admitted for a limited purpose only.

to her residence. Id. The defendant drove into a parking lot, jumped over the middle of the seat, placed a knife against the throat of the second victim, and took her money. Id.

The defendant was charged with two counts of robbery in the first degree and one count of possession of a weapon in a motor vehicle. Id., 44. The state moved to consolidate the two matters and, following the granting of that motion, the defendant was convicted of all charges. Id. On appeal, the defendant claimed, inter alia, that the court improperly granted the state's motion to consolidate the robbery charges. Id. The state countered that (1) the defendant was not prejudiced by joinder because the evidence of both robberies would have been cross admissible as acts of misconduct to prove identity, and (2) even if it were not cross admissible, the court did not abuse its discretion in granting the joinder motion because the jury could distinguish the underlying facts of each crime. Id.

In resolving the issues on appeal, this court noted that, at trial, "the state presented arguments for joinder both under the factors enunciated in *State* v. *Boscarino*, supra, 204 Conn. 722–24, and under the theory that the evidence from each case would be cross admissible. Although the [trial] court granted the state's motion to consolidate the charges without explaining the theory on which it relied, we conclude that the court could have properly joined the charges under either theory." *State* v. *Carty*, supra, 100 Conn. App. 45 n.5. This court then set forth the relevant legal principles regarding cross admissibility of evidence when multiple charges are tried together. We began with the general rule that evidence of guilt of one crime is inadmissible to prove that a defendant is guilty of a different crime. See id., 46; see also Conn. Code Evid. § 4-5. "The rationale of this rule is to guard against its use merely to show an evil disposition of an accused, and especially the

predisposition to commit the crime with which he is now charged. . . . The fact that such evidence tends to prove the commission of other crimes by an accused does not render it inadmissible if it is otherwise relevant and material. . . . Such evidence is admissible for other purposes, such as to show intent, an element in the crime, identity, malice, motive or a system of other criminal activity. . . . The analysis on the issue of other crimes evidence is two-pronged. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crimes evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Carty*, supra, 46; see also *State* v. *Michael R.*, 346 Conn. 432, 447, 291 A.3d 567 (to be cross admissible, evidence must be relevant and more probative than prejudicial), cert. denied, U.S. , 144 S. Ct. 211, 217 L. Ed. 2d 89 (2023); Conn. Code Evid. § 4-3.

In the present case, the trial court did not explicitly state that the evidence of the two assaults was cross admissible. After reviewing the record, we conclude that the court implicitly determined that it was cross admissible. Initially, we note that the prosecutor consistently argued to the court that the evidence from the two incidents was cross admissible. Additionally, the court observed that the two incidents were legally related. Other courts have considered or used the phrase "legally unrelated" or "legally connected" as shorthand in discussing the cross admissibility of evidence. See, e.g., *State* v. *Fana*, 109 Conn. App. 797, 803, 953 A.2d 898, cert. denied, 289 Conn. 936, 958 A.2d 1246 (2008); *State* v. *Quinones*, 21 Conn. App. 506, 512, 574 A.2d 1308, cert. denied, 215 Conn. 816, 576 A.2d 546 (1990).

We conclude that the evidence of each incident would be relevant[10] to the other to prove the state's theory that the defendant was the individual who assaulted each of the victims.[11] Specifically, we address the applicable exceptions to § 4-5 (a) of the Connecticut Code of Evidence.[12] We begin with the exception for identity. It is axiomatic that "[i]t is the state's burden to prove every element of the crime, including [identity] . . . ." (Internal quotation marks omitted.) *State* v. *Murrell*, 7 Conn. App. 75, 80, 507 A.2d 1033 (1986); see also *State* v. *Faust*, 161 Conn. App. 149, 183, 127 A.3d 1028 (2015) (identity of defendant is element of proof of all crimes), cert. denied, 320 Conn. 914, 131 A.3d 252 (2016). The testimony of each victim was relevant to prove that the defendant was the individual who was present in the Walmart store and who committed both of the sexual assaults in close temporal proximity. Here, the testimony of D and M placed the defendant in the store and identified him as the perpetrator of the sexual assaults.

[10] See, e.g., *State* v. *Patrick M.*, 344 Conn. 565, 600, 280 A.3d 461 (2022) (evidence is relevant if it has any tendency to make existence of any fact that is material to determination of proceeding more or less probable than it would be without said evidence); *State* v. *Patterson*, 344 Conn. 281, 295, 278 A.3d 1044 (2022) (noting broad definition of relevance).

[11] During cross-examination, D admitted that she had told the 911 operator that she could not see the person who had assaulted her in the Walmart store for a brief time period as she was following him in the store, but she had told the police she had kept him in view at all times. Additionally, D acknowledged that the police had shown her a photographic lineup a few days prior to trial but that she was unable to identify the man who had assaulted her.

[12] Section 4-5 (a) of the Connecticut Code of Evidence provides: "Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b)."

Section 4-5 (c) of the Connecticut Code of Evidence provides: "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

The evidence, therefore, was not offered for the defendant's propensity to engage in the illegal conduct but only for the purpose of corroborating each victim's testimony that it was the defendant who had assaulted them. See, e.g., *State* v. *Mooney*, 218 Conn. 85, 126–30, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 330 (1991); *State* v. *Gerald A.*, 183 Conn. App. 82, 100, 107–108, 191 A.3d 1003, cert. denied, 330 Conn. 914, 193 A.3d 1210 (2018).

Additionally, we note that other misconduct evidence "may be used to complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings . . . [and] is admissible to corroborate crucial prosecution testimony." (Citations omitted; internal quotation marks omitted.) *State* v. *Michael R.*, supra, 346 Conn. 448–49. We emphasize that the evidence regarding the assault of each victim served to establish the presence of the defendant in the Walmart store and completed the story of his movements, actions, and conduct within the store on May 3, 2018, during his single, unbroken course of conduct. See, e.g., *State* v. *Gould*, 241 Conn. 1, 23, 695 A.2d 1022 (1997) (misconduct evidence often used to complete story of charged crime by placing it in context of nearby and nearly contemporaneous happenings); *State* v. *Bardales*, 164 Conn. App. 582, 603, 137 A.3d 900 (2016) (same); see also *State* v. *Crenshaw*, supra, 313 Conn. 85–86 (evidence was cross admissible to complete story of what happened to victim over two days and therefore "essential" to consider two cases together).

Moreover, the cross admissible evidence was relevant to establish the defendant's intent with respect to each sexual assault that occurred in the Walmart store on May 3, 2018. Sexual assault in the fourth degree is a specific intent crime. See, e.g., *State* v. *Juan J.*, 344 Conn. 1, 22, 276 A.3d 935 (2022) (to obtain conviction of sexual assault in fourth degree, state is required to

prove defendant acted with intent to make contact with intimate parts of person for purpose of sexual gratification of actor or for purpose of degrading or humiliating such person, or any contact of intimate parts of actor with person for purpose of sexual gratification of actor or for purpose of degrading or humiliating such person); *State* v. *Tahir L.*, 227 Conn. App. 653, 660, A.3d (2024) (conviction of sexual assault in fourth degree requires state to prove defendant had specific intent to obtain sexual gratification or to humiliate complainant), petition for cert. filed (Conn. September 16, 2024) (No. 240159). The evidence regarding the assault of D in the shoe aisle was relevant to demonstrate that the defendant did not make accidental or inadvertent contact with M in the cleaning supplies aisle but, rather, touched D with the intent required for a conviction of sexual assault in the fourth degree. See also *State* v. *Beavers*, 290 Conn. 386, 400–401, 963 A.2d 956 (2009) (absence of mistake or accident exception in § 4-5 (c) of Connecticut Code of Evidence is close corollary of intent exception, and our Supreme Court has recognized that same uncharged misconduct evidence is admissible for dual purposes of proving defendant's intent and that occurrence was result of intentional act rather than accident); *State* v. *Kalil*, 136 Conn. App. 454, 465–67, 46 A.3d 272 (2012) (police chief's testimony about defendant's misconduct at one location was admissible to demonstrate defendant's intent to commit crime at another location hours later), aff'd, 314 Conn. 529, 107 A.3d 343 (2014). Similarly, evidence of the assault of M further demonstrated that the defendant possessed the necessary intent with respect to D.[13] In

[13] Although the state did not argue in its appellate brief that the evidence of the two assaults was cross admissible pursuant to the propensity exception for sexual crimes; see Conn. Code Evid. § 4-5 (b); we note that the trial court also could have determined that the evidence of each assault was probative of the defendant's propensity to engage in aberrant and compulsive sexual behavior. See *State* v. *Eddie N. C.*, 178 Conn. App. 147, 158 n.9, 174 A.3d 803 (2017), cert. denied, 327 Conn. 1000, 176 A.3d 558 (2018). "In *State* v. *DeJesus*, [288 Conn. 418, 466, 953 A.2d 45 (2008), our Supreme Court]

other words, the cross admissible evidence had the tendency to make it more probable that the defendant committed the crimes against each victim. See, e.g., *State* v. *Michael R.*, supra, 346 Conn. 448–49.

For these reasons, we conclude that the court properly determined, albeit implicitly, that the evidence from the two assaults was cross admissible.[14] As a result of this determination, the defendant was not prejudiced by the denial of his motion to sever. Furthermore, we need not consider the defendant's arguments that the court improperly applied the *Boscarino* factors in this case. Our Supreme Court has explicitly stated that if "evidence is cross admissible . . . our inquiry [as to whether joinder would be prejudicial to the defendant] ends." (Internal quotation marks omitted.) *State* v. *James A.*, supra, 345 Conn. 615; see id., 620–21; see also *State* v. *Michael R.*, supra, 346 Conn. 444; *State* v. *Crenshaw*, supra, 313 Conn. 82 n.6; *State* v. *LaFleur*, 307 Conn. 115, 155, 51 A.3d 1048 (2012); *Leconte* v.

held that, in cases involving sexual misconduct, [e]vidence of [other sexual] misconduct is admissible [for propensity purposes] if the offense is proximate in time, similar to the offense charged, and committed with persons similar to the prosecuting witness. . . . Citing strong public policy reasons, [the] court in *DeJesus* explained that sexual misconduct is often a behavioral pattern, making past misconduct highly probative of other conduct. . . . These factors long have served as the predominant framework for considering the admission of other sexual misconduct evidence to establish a common plan or scheme; see, e.g., *State* v. *Esposito*, 192 Conn. 166, 169–70, 471 A.2d 949 (1984); and have since been codified. Conn. Code Evid. § 4-5 (b) . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Samuel U.*, 348 Conn. 304, 322, 303 A.3d 1175 (2023).

[14] It is well established that appellate courts have "never required the talismanic recital of specific words or phrases if a review of the entire record supports the conclusion that the trial court properly applied the law. . . . Rather, [our Supreme Court and] this court [presume] that the trial court properly applied the law in the absence of evidence to the contrary." (Citations omitted; internal quotation marks omitted.) *State* v. *Henderson*, 312 Conn. 585, 597–98, 94 A.3d 614 (2014); see also *State* v. *James K.*, 209 Conn. App. 441, 465, 267 A.3d 858 (2021), aff'd, 347 Conn. 648, 299 A.3d 243 (2023); *State* v. *Papineau*, 182 Conn. App. 756, 771–72, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018).

Commissioner of Correction, 207 Conn. App. 306, 327–28, 262 A.3d 140, cert. denied, 340 Conn. 902, 263 A.3d 387 (2021); *State* v. *Labarge*, supra, 164 Conn. App. 306. Accordingly, we conclude that the court did not abuse its discretion in denying the motion to sever.

II

The defendant also claims that the trial court committed plain error by failing to instruct the jury, sua sponte, on the proper use of the evidence following the denial of his motion to sever. Specifically, he argues that, if this court were to conclude that his failure to request a jury instruction regarding the joinder of the offenses constituted a waiver of his right to challenge the denial of his motion to sever, then we should reverse his conviction pursuant to the plain error doctrine. We decline to review the merits of this claim.

In his principal appellate brief, the defendant states: "*However*, *even if the state*, *on appeal*, *should argue*, *and even if this court were to find*, that, by failing to submit a proposed cautionary instruction, or to timely object to the court's failure to give one, the defense had now somehow waived its right to raise, on appeal, the claim that the court's denial of severance was an abuse of discretion which had resulted in 'substantial injustice' in this case, for the following reasons, reversal of the defendant's convictions, and an order requiring a new trial, would still be required since such reversal is warranted under the 'plain error doctrine.' " (Emphasis added.) See Practice Book § 60-5. The defendant's further argues in his brief: "Accordingly, in this case, even if this court were to somehow conclude that (a) joinder was proper; *and (b) that*, *by failing to request a proper jury instruction*, *or register a timely objection to the court's failure to give one*, *defense counsel had waived or forfeited the right to contest the trial court's joinder/severance decision on appeal*, this court, nonetheless,

under the plain error doctrine, must order reversal of the defendant's convictions and remand for a new trial." (Emphasis added.)

In its appellate brief, the state counters that it "concedes that the defendant did not waive his right to challenge the trial court's denial of his motion to sever by failing to request a limiting instruction or [by] not objecting to its absence. *The state's concession renders the defendant's claim of plain error superfluous because the defendant tethers it to the state*['s] *making a waiver argument*. . . . Consequently, the court does not need to review it." (Citation omitted; emphasis added.) The state further argues that the defendant failed to demonstrate that the trial court committed plain error in failing to give a cautionary or limiting instruction regarding the joining of the charges of both incidents.

The defendant's claim of plain error was conditioned explicitly on the threshold determination of this court that his failure to request a jury instruction, or object to the absence of such an instruction, constituted a waiver of his claim that the trial court improperly denied his motion to sever. That condition precedent did not occur because we have reviewed the merits of the defendant's claim regarding the motion to sever in part I of this opinion. Our reading of the defendant's brief is supported by the state's acknowledgment in its brief that he did not waive his claim regarding the denial of the motion to sever. Accordingly, we need not consider the defendant's claim of plain error.

Even if we were to consider this claim, we would conclude that the defendant failed to demonstrate plain error. Our Supreme Court has explained that, "[t]o prevail, the defendant must satisfy the two-pronged plain error test. First, the defendant must establish that there was an obvious and readily discernable error . . . .

Second, the defendant must establish that the obvious and readily discernable error was so harmful or prejudicial that it resulted in manifest injustice. . . . The plain error doctrine is a rule of reversibility, not reviewability, and the defendant is not entitled to relief unless the alleged error is both so clear and so harmful that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Put another way, plain error is reserved for only the most egregious errors. When an error of such magnitude exists, it necessitates reversal." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Mebane*, Conn. , , A.3d (2024).

The defendant failed to identify the specific jury instruction that the court should have provided in the present case. In light of our conclusion that the evidence regarding the two separate victims was cross admissible, it is entirely unclear what instruction the defendant believes was required in order to avoid a manifest injustice. Properly constructed jury instructions may well differ depending on whether the evidence is cross admissible, as opposed to instructions in cases in which the evidence is not cross admissible, but the charges nonetheless were still properly joined for trial in accordance with the *Boscarino* factors.[15]

More importantly, the defendant has not demonstrated that the trial court's failure to provide such

[15] Compare *State* v. *Michael R.*, supra, 346 Conn. 451–52, 452 n.18 (jury was instructed that evidence may apply to more than one count, but defendant was entitled to separate and independent determination of guilt for each count), with *State* v. *Norris*, 213 Conn. App. 253, 287, 277 A.3d 839 (preferrable for trial court to instruct jury that evidence in domestic violence case was not admissible in hospital assault case and that cases were consolidated solely for judicial economy, and to emphasize requirement that jury consider evidence in each case separately), cert. denied, 345 Conn. 910, 283 A.3d 980 (2022). See generally Connecticut Criminal Jury Instructions 2.2-6, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited October 23, 2024).

an instruction to the jury was an obvious and readily discernable error that resulted in manifest injustice. Simply stated, the defendant has not met his burden of establishing a "most egregious" error warranting reversal of his conviction. Accordingly, we conclude that, even if we were to consider this claim under the plain error doctrine, the defendant would not be entitled to a reversal of his conviction.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN W. MILLS *v.* STATEWIDE GRIEVANCE COMMITTEE
(AC 46607)

Seeley, Westbrook and Sheldon, Js.

Syllabus

The plaintiff attorney appealed from the judgment of the trial court dismissing his appeal from the decision of the defendant Statewide Grievance Committee, which found that he had violated the Rules of Professional Conduct by filing a motion that contained statements about the integrity of the judiciary with reckless disregard as to their truth or falsity. The plaintiff claimed, inter alia, that the court improperly dismissed his appeal because the record did not provide clear and convincing evidence that his statements violated rule 8.2 (a) of the Rules of Professional Conduct. *Held*:

The trial court properly dismissed the plaintiff's appeal because the grievance committee's determination that the plaintiff had violated rule 8.2 (a) of the Rules of Professional Conduct was not contrary to applicable law, as its reviewing committee applied the correct legal standard in considering whether the plaintiff had an objective, reasonable belief that his statements were true.

The trial court's dismissal of the plaintiff's appeal was not improper because sufficient evidence existed to support the grievance committee's decision that the plaintiff had violated rule 8.2 (a) of the Rules of Professional Conduct, as his statements, in attacking the judges' competence and alleged faithfulness to the law, attacked the integrity of the Probate Court and the Superior Court, and the plaintiff failed to provide proof of an objective and reasonable basis for his statements.

The trial court did not err by failing to conclude that a reprimand was not an appropriate sanction because the court was not required to make specific findings regarding aggravating and mitigating factors under the American Bar Association's Standards for Imposing Lawyer Sanctions, there was no indication that the court did not take those standards into account in reaching its decision, and the grievance committee did not abuse its discretion in issuing the reprimand because it properly found that the plaintiff had violated rule 8.2 (a) of the Rules of Professional Conduct.

Argued September 6—officially released October 29, 2024

Procedural History

Appeal from the decision of the defendant finding that the plaintiff's conduct violated the Rules of Professional Conduct and issuing a reprimand, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Cobb*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Suzanne B. Sutton, for the appellant (plaintiff).

Brian B. Staines, chief disciplinary counsel, for the appellee (defendant).

Opinion

WESTBROOK, J. The plaintiff attorney, John W. Mills, appeals from the judgment of the trial court dismissing his appeal from the decision of the defendant, the Statewide Grievance Committee (committee). The committee reprimanded the plaintiff after finding that he had filed a motion containing statements that violated rules 8.2 (a) and 8.4 (4) of the Rules of Professional Conduct.[1] The plaintiff claims on appeal that the court improperly

[1] Rule 8.2 (a) of the Rules of Professional Conduct provides: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Rule 8.4 of the Rules of Professional Conduct provides in relevant part: "It is professional misconduct for a lawyer to . . . (4) Engage in conduct that is prejudicial to the administration of justice . . . ."

dismissed his appeal because (1) the reviewing committee of the Statewide Grievance Committee (reviewing committee) applied the wrong test for determining whether he made statements knowing them to be false or with reckless disregard as to their truth or falsity, (2) the record does not provide clear and convincing evidence that his statements violated rule 8.2 (a), and (3) the committee abused its discretion by reprimanding the plaintiff. We disagree and affirm the judgment of the court.

The following procedural history and facts, as found by the reviewing committee, are relevant to this appeal. The litigation giving rise to this matter began in 2012, when a decedent's estate retained Attorney Douglas Mahoney to pursue a wrongful death claim on the estate's behalf. In March, 2014, the estate terminated Mahoney's legal representation and retained the plaintiff instead. In April, 2014, the estate reached a $50,000 settlement agreement with Progressive Insurance Company (Progressive) and that amount was deposited into Mahoney's IOLTA account.[2] The plaintiff thereafter filed an action on behalf of the estate against its decedent's underinsured motorist insurer, Liberty Mutual Insurance Company (Liberty Mutual). The estate subsequently reached a settlement with Liberty Mutual in the amount of $200,000, of which the estate owed a contingent fee of $66,666.66 to pay for its attorney's fees.

Mahoney requested hearings before the Probate Court to determine how the attorney's fees in connection with the Progressive and Liberty Mutual settlements should be split between himself and the plaintiff, and the court ordered a hearing regarding whether and how the fee for the Liberty Mutual settlement should

[2] "IOLTA stands for interest on lawyers' trust accounts." (Internal quotation marks omitted.) *Office of Chief Disciplinary Counsel* v. *Miller*, 335 Conn. 474, 476 n.1, 239 A.3d 288 (2020).

be split. The plaintiff appealed the order scheduling a hearing on this issue to the Superior Court, but the Probate Court proceeded with the scheduled hearing while the appeal was pending. Following the hearing, which the plaintiff did not attend, the Probate Court ordered him to pay Mahoney $40,000 of the $66,666.66 in attorney's fees he had received and was holding for the estate as part of the Liberty Mutual settlement proceeds. The Superior Court dismissed the plaintiff's original appeal from the Probate Court's order scheduling a fee splitting hearing because the challenged hearing already had taken place.

The plaintiff subsequently filed a new appeal with the Superior Court challenging the Probate Court's order to pay Mahoney $40,000 of the $66,666.66 in attorney's fees he had received and was holding as part of the Liberty Mutual settlement proceeds. He also filed a motion to stay the challenged payment order, which the court, *Frechette*, *J.*, denied. The plaintiff next filed a motion seeking to dismiss Mahoney's claim for a split fee in the Liberty Mutual case, arguing that the Probate Court lacked subject matter jurisdiction over that dispute, but the court denied that motion as well. Mahoney thereafter filed a motion to disqualify the plaintiff as counsel in their dispute concerning attorney's fees for the Liberty Mutual settlement, arguing that the plaintiff would be a necessary witness in any de novo hearing on that matter. The court granted the motion to disqualify. The plaintiff subsequently filed a motion for order to have a different judge assigned to hear and decide all pending motions concerning the Liberty Mutual settlement attorney's fees dispute, which the court denied. On January 20, 2017, the court held a trial de novo on the Liberty Mutual settlement attorney's fees dispute. Following the trial, the court, *Richards*, *J.*, awarded Mahoney $40,000 of the $66,666.66 in attorney's fees that the plaintiff was holding as part of the Liberty

Mutual settlement proceeds. On February 21, 2018, Mahoney moved the court, *Ozalis*, *J.*, to issue an order requiring the plaintiff to show cause why the court should not hold him in contempt for failing to comply with the order to pay Mahoney $40,000 from the attorney's fees he had received from the Liberty Mutual settlement proceeds.

Before Mahoney's contempt motion was resolved, the plaintiff filed an interpleader action in the Superior Court with respect to the monies he had been ordered to pay to Mahoney. The court, *Bellis*, *J.*, held settlement conferences with the parties that ultimately resolved the dispute, and the plaintiff filed a motion for an order requesting that the funds be disbursed in accordance with the prior court decision awarding Mahoney $40,000 of the plaintiff's contingent fee. In his motion for an order, the plaintiff stated: "While the undersigned genuinely appreciates the sincere efforts of this court to bring this matter to a close after years of litigation, the plaintiff is nevertheless completely disillusioned and disappointed with the prior judges who have 'heard' this case, and their unwillingness to make any meaningful effort to analyze the facts and the law. Decision after decision was not only legally incorrect, but devoid of *any* meaningful jurisprudence. The plaintiff has opted to resolve this case solely because it has become apparent that, in this instance, for whatever reason, justice is not possible. In thirty years of practice, I have never seen anything like this, where the rules and the law are simply and totally disregarded." (Emphasis in original.) After receiving this motion, the court, *Bellis*, *J.*, referred the plaintiff to the committee for investigation.

On February 15, 2021, the New Haven Judicial District Grievance Panel found probable cause that the plaintiff's statements in his motion for order violated rules 8.2 (a) and 8.4 (4) of the Rules of Professional Conduct. The reviewing committee subsequently conducted a

hearing on the matter. In its May 20, 2022 decision, the reviewing committee found the following facts by clear and convincing evidence: "[N]one of the decisions or motions the [plaintiff] took issue with were overturned on any appeal. The [plaintiff], in making the representations that he did, made false statements concerning the integrity of the judiciary." Moreover, "[t]he [plaintiff's] motion for order contained superfluous information that provided no added benefit or additional information to the court in guiding its decision on whether or not the motion for order should be granted. . . . While the [plaintiff] may not have named any specific judges in the matter, it was clear that the [plaintiff] intended to attack the judiciary without a basis to do so." The reviewing committee therefore concluded that the plaintiff violated rules 8.2 (a) and 8.4 (4) by making statements about the integrity of the judiciary with reckless disregard as to their truth or falsity. The reviewing committee reprimanded the plaintiff for these violations.

Pursuant to Practice Book § 2-35 (k),[3] the plaintiff requested review of the reviewing committee's decision. The committee thereafter issued a decision affirming the decision of the reviewing committee, from which the plaintiff, pursuant to Practice Book § 2-38,[4] appealed to the Superior Court. In its April 27, 2023 memorandum of decision, the court, *Cobb*, *J.*, found that clear and convincing evidence supported the reviewing committee's findings and conclusion that the plaintiff had violated rules 8.2 (a) and 8.4 (4) of the Rules of Professional

[3] Practice Book § 2-35 (k) provides in relevant part that, "[w]ithin thirty days of the issuance to the parties of the final decision by the reviewing committee, the respondent may submit to the Statewide Grievance Committee a request for review of the decision. . . ."

[4] Practice Book § 2-38 (a) provides in relevant part that "[a] respondent may appeal to the Superior Court a decision by the Statewide Grievance Committee or a reviewing committee imposing sanctions or conditions against the respondent . . . ."

Conduct. The court additionally found that the plaintiff had not sustained his burden of providing objective and reasonable proof in support of his statements about the judges. The court therefore dismissed the plaintiff's appeal. This appeal followed.

I

The plaintiff first claims that the trial court improperly dismissed his appeal because the committee's decision that he violated rule 8.2 (a) of the Rules of Professional Conduct is contrary to applicable law. The plaintiff argues that the reviewing committee should have applied a subjective, rather than an objective, test to determine whether he made the relevant statements knowing them to be false or with reckless disregard as to their truth or falsity. We disagree.

The issue before us is whether the reviewing committee applied the proper legal standard to the plaintiff's statements. "Because this presents a question of law, our review is plenary." *Burton* v. *Mottolese*, 267 Conn. 1, 25, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004).

Rule 8.2 (a) of the Rules of Professional Conduct provides in relevant part that "[a] lawyer shall not make a statement that the lawyer *knows to be false or with reckless disregard as to its truth or falsity* concerning the qualifications or integrity of a judge . . . ." (Emphasis added.) Our Supreme Court "has adopted an objective test for attorney speech pursuant to which an attorney speaking critically of a judge or a court must have an objective basis for the statements. . . . [W]holly conclusory allegations of judicial misconduct, without objective factual support, justify the imposition of attorney discipline." (Citation omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Burton*, 299 Conn. 405, 413, 10 A.3d 507 (2011); see also *Notopoulos* v. *Statewide Grievance Committee*,

277 Conn. 218, 227–28, 890 A.2d 509, cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006); *Burton* v. *Mottolese*, supra, 267 Conn. 49.

Our Supreme Court has noted that other states take different approaches in cases concerning alleged violations of rule 8.2 (a) of the Rules of Professional Conduct. In *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 234 n.14, it stated: "[S]everal courts have held that attorneys should be held to a higher standard when leveling criticism that may adversely affect the administration of justice. [*Matter of Westfall*, 808 S.W.2d 829, 837 (Mo.), cert. denied, 502 U.S. 1009, 112 S. Ct. 648, 116 L. Ed. 2d 665 (1991)]. Other courts have employed the criminal defamation standard set forth in [*Garrison* v. *Louisiana*, 379 U.S. 64, 78, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)], which was based on the seminal case of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) . . . ." (Internal quotation marks omitted.) Our Supreme Court has not, however, adopted either of these approaches and has consistently applied an objective test. Thus, the proper standard for determining whether a lawyer knowingly or recklessly made a false statement under rule 8.2 (a) is whether evidence shows that the lawyer had an objective, reasonable belief that the statement was true.

In the present case, the reviewing committee, in its memorandum of decision, considered whether the plaintiff had "an objective, reasonable belief that the assertions were true," and it concluded that he "intended to attack the judiciary *without a basis to do so*." (Emphasis added; internal quotation marks omitted.) The trial court, in reviewing the committee's decision, also found that the plaintiff "did not sustain his burden of persuasion to provide objective and reasonable proof to support his statements about the judges." The reviewing committee applied the proper objective test,

and, therefore, the committee's decision is not contrary to applicable law.

II

The plaintiff next claims that the trial court improperly dismissed his appeal because the committee's finding that he violated rule 8.2 (a) of the Rules of Professional Conduct is not supported by clear and convincing evidence.[5] He argues that (1) the committee failed to meet its burden of proving misconduct, and (2) he had an objective, reasonable belief that his statements were true. We conclude that sufficient evidence exists to support the committee's decision. We therefore reject the plaintiff's claim.

The reviewing committee's conclusion that the plaintiff made statements with reckless disregard as to their truth or falsity is a factual finding. See *Cohen* v. *Statewide Grievance Committee*, 339 Conn. 503, 520, 261 A.3d 722 (2021) ("[t]he reviewing committee's conclusion that the plaintiff made a 'knowingly false statement' is a factual finding"). "Factual findings of the reviewing committee are reviewed under the clearly erroneous standard." Id. "Although the [committee] is not an administrative agency . . . the court's review of its conclusions is similar to the review afforded to an administrative agency decision." (Citation omitted.) *Weiss* v. *Statewide Grievance Committee*, 227 Conn. 802, 811, 633 A.2d 282 (1993). "The burden is on the [committee] to establish the occurrence of an ethics violation by clear and convincing proof." (Internal quotation marks omitted.) *Somers* v. *Statewide Grievance Committee*, 245 Conn. 277, 290, 715 A.2d 712 (1998).

"Upon appeal, the court shall not substitute its judgment for that of the [committee] or reviewing committee as to the weight of the evidence on questions of

[5] At the hearing before the court, the plaintiff conceded that his conduct violated rule 8.4 (4) of the Rules of Professional Conduct to the extent that his statements were "prejudicial to the administration of . . . justice . . . ."

fact. The court shall affirm the decision of the committee unless the court finds that substantial rights of the [plaintiff] have been prejudiced because the committee's findings, inferences, conclusions, or decisions are: (1) in violation of constitutional provisions, rules of practice or statutory provisions; (2) in excess of the authority of the committee; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Practice Book § 2-38 (f). Stated succinctly, in reviewing a decision of the committee to sanction the plaintiff, "our role is limited to reviewing the record to determine if the facts as found are supported by the evidence contained within the record and whether the conclusions that follow are legally and logically correct." (Internal quotation marks omitted.) *Somers* v. *Statewide Grievance Committee*, supra, 245 Conn. 290.

As stated in part I of this opinion, rule 8.2 (a) of the Rules of Professional Conduct provides in relevant part that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." The commentary to this rule explains that "[a]ssessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for . . . appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice." Rules of Professional Conduct 8.2, commentary.

Our Supreme Court has articulated a two-pronged test for determining whether an attorney has violated rule 8.2 (a) of the Rules of Professional Conduct. See *Statewide Grievance Committee* v. *Burton*, supra, 299 Conn. 412–13. "[I]n cases in which an attorney is subject to sanctions for violating rule 8.2 (a), the [committee] must first present evidence of misconduct sufficient to satisfy its burden of proving its case by clear and convincing evidence. . . . If the [committee] sustains its burden, then the burden of persuasion shifts to the [attorney] to provide proof of an objective and reasonable basis for the allegations." (Citation omitted.) Id. If the attorney presents "no evidence establishing a factual basis for [his or] her claims . . . the fact finder reasonably may conclude that the attorney's claims against the court were either knowingly false or made with reckless disregard as to [their] truth or falsity. . . . [U]nsupported allegations . . . do not give rise to an objective, reasonable belief that the assertions were true." (Citations omitted; internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 227–28.

Here, under the first prong, the record contains clear and convincing evidence to support the committee's finding that the plaintiff violated rule 8.2 (a) of the Rules of Professional Conduct. The plaintiff wrote, signed, and filed with the court a motion for order stating that the judges who determined the fee split had an "unwillingness to make any meaningful effort to analyze the facts and the law," that they "simply and totally disregarded" the law, and that "[d]ecision after decision was not only legally incorrect, but devoid of *any* meaningful jurisprudence," with the result that "justice is not possible" in this case. (Emphasis in original.) Although the plaintiff did not specifically name any judges, his statements clearly attack the judges' competence and alleged faithfulness to the law, thereby attacking the integrity of

the Probate Court and the Superior Court. Furthermore, the record shows, as the reviewing committee found, that none of the decisions or motions that the plaintiff took issue with was overturned on appeal. Had the Probate Court and the Superior Court truly failed to analyze the facts and the law, as the plaintiff contends, he could and should have pursued and provided grounds for such a claim on appeal. The plaintiff never appealed. Accordingly, on the basis of our review of the record, the committee met its burden of proving by clear and convincing evidence that the plaintiff made false statements concerning the integrity of the judiciary.

Under the second prong of the test, on which the burden of proof is shifted to the plaintiff, the record does not provide any proof of an objective and reasonable basis for the plaintiff's allegations. The plaintiff had opportunities to prove the truth of those allegations at the hearing before the reviewing committee and on appeal to the trial court, but he failed to establish a factual basis for such allegations in either forum. He testified before the reviewing committee that he had made the allegations because "he was frustrated and upset with the entirety of the case and how the fee split had been resolved. . . . Overall, the [plaintiff] felt as if he did not have due process in the matter as to the split of the legal fees . . . ." The plaintiff's own frustration and opinions on the matter do not constitute an objective and reasonable basis for his allegations that the judges were incompetent.

In reviewing the committee's decision, the court asked the plaintiff to look "at the paragraph that's at issue that he wrote in his motion for order, to go line by line, and then [the plaintiff] tell [the court] what proof he has for that particular statement . . . ." The plaintiff failed to provide proof for any statement

beyond conclusory claims that the decisions of the Probate Court and the Superior Court were legally incorrect. Following the hearing, the court found that the plaintiff's allegations were "unsupported by anything but his own opinions." On the basis of this review of the record, we agree with the committee that the plaintiff did not meet his burden of persuasion.

The plaintiff argues on appeal that his statements were true because the courts committed legal error, including, inter alia, that the Probate Court lacked personal jurisdiction over the plaintiff, the trial court improperly relied on the Probate Court's order, and the trial court improperly disqualified the plaintiff. We do not need to decide whether these allegations are correct because, even if the plaintiff genuinely believed that the Probate Court and the Superior Court misapplied the law or issued incorrect decisions, he should have raised those issues directly rather than disparaging the courts in a later motion for order. "Adverse rulings in court proceedings, and even incorrect rulings, do not in and of themselves amount to evidence of illegal or unethical behavior on the part of a judge. . . . If the plaintiff was dissatisfied with [judges'] conduct or rulings, he had available to him other more appropriate vehicles for complaint." (Citation omitted.) *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 230; see also *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 192 Conn. 1, 8, 469 A.2d 778 (1984) ("[t]he fact that a trial court has ruled adversely to the [plaintiff], even if some of those rulings have been determined on appeal to be erroneous, does not demonstrate personal bias"); *Office of Chief Disciplinary Counsel* v. *Vaccaro*, 226 Conn. App. 75, 89, 317 A.3d 785 (2024) (plaintiff should have challenged committee's findings via direct appeal rather than attempting to litigate same issue in subsequent proceeding).

The plaintiff also asserts that he needed to include the challenged statements in his motion for order to explain his reason for settling and to protect himself from additional grievances or continued litigation over the fee split. The standard, however, is whether the plaintiff had an objective, reasonable belief that his statements were true. His motivation to avoid further conflict with Mahoney has no bearing on whether his statements about the competency of the judges were true.

Clear and convincing evidence supports the committee's finding that the plaintiff made statements attacking the integrity of the judges of the Probate Court and the Superior Court. Because the committee met its burden, the burden of persuasion shifted to the plaintiff to provide proof of an objective and reasonable basis for his statements. The plaintiff, however, has not met his burden of showing an objective, reasonable basis for believing that the challenged statements were true, and, therefore, the committee properly concluded that the plaintiff's claims against the court were made with reckless disregard as to their truth or falsity. Accordingly, we conclude that the committee properly found by clear and convincing evidence that the plaintiff violated rule 8.2 (a) of the Rules of Professional Conduct.

III

Lastly, the plaintiff claims that the committee abused its discretion when it reprimanded him for violating rules 8.2 (a) and 8.4 (4) of the Rules of Professional Conduct. He argues that the trial court (1) should have made specific findings regarding aggravating and mitigating factors under the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA standards), and (2) should have concluded that a reprimand is not an appropriate sanction. We disagree.

"[T]he trial court possesses inherent judicial power, derived from judicial responsibility for the administration of justice, to exercise sound discretion to determine what sanction to impose in light of the entire record before it. . . . It is well established that in sanctioning an attorney for violations of the Rules of Professional Conduct, courts are, as they should be, left free to act as may in each case seem best in this matter of most important concern to them and to the administration of justice. . . . Whether this court would have imposed a different sanction is not relevant. Rather, we must determine whether the trial court abused its discretion in determining the nature of the sanction. . . . We may reverse the court's decision [in sanctioning an attorney] only if that decision was unreasonable, unconscionable or arbitrary, and was made without proper consideration of the facts and law pertaining to the matter submitted." (Internal quotation marks omitted.) *Office of Chief Disciplinary Counsel* v. *Vaccaro*, supra, 226 Conn. App. 90; see also *Disciplinary Counsel* v. *Serafinowicz*, 160 Conn. App. 92, 98–99, 123 A.3d 1279, cert. denied, 319 Conn. 953, 125 A.3d 531 (2015).

Here, the plaintiff argues that the trial court should have applied ABA standards 3.0, 9.22, and 9.32 and made findings as to certain aggravating and mitigating factors.[6] "Although the ABA [s]tandards are frequently

[6] Standard 3.0 provides that, "[i]n imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." A.B.A., Compendium of Professional Responsibility: Rules and Standards (2017 Ed.), p. 455, standard 3.0.

Standard 9.22 sets forth the following aggravating factors: "(a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience

used as a guide for courts in determining appropriate discipline, [t]he [s]tandards, originally promulgated in 1986, have not formally been adopted by the judges of this state. . . . Accordingly, although a court *should* consider . . . the existence of aggravating or mitigating factors . . . there is no express requirement that it do so. Further, even when a court is provided with relevant mitigating evidence, it is free to reject that evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Office of Chief Disciplinary Counsel* v. *Vaccaro*, supra, 226 Conn. App. 93. The court, therefore, was not required to consider the ABA standards in dismissing the plaintiff's appeal from the committee's decision to reprimand him. Moreover, there is no indication that the court did *not* take the ABA standards into account in reaching its decision. "The court was free to credit or reject this [evidence] as well as to exercise its discretion in considering evidence that might be irrelevant or cumulative. . . . Further, there is no requirement that the court set forth its express consideration of [specific] evidence in its memorandum of decision . . . ." (Citations omitted; internal quotation marks omitted.) Id., 96. Thus, the court may have considered the ABA standards without making express findings under any such factor.

The plaintiff also argues that a reprimand is not appropriate because, although he concedes that he violated rule 8.4 (4) of the Rules of Professional Conduct,

in the practice of law; (j) indifference to making restitution; (k) illegal conduct, including that involving the use of controlled substances." Id., p. 463, standard 9.22.

Standard 9.32 sets forth the following mitigating factors: "(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; (i) mental disability or chemical dependency including alcoholism or drug abuse . . . (j) delay in disciplinary proceedings; (k) imposition of

he maintains that he did not violate rule 8.2 (a) and, therefore, he should not be reprimanded. As discussed in part II of this opinion, however, the committee properly found that the plaintiff violated rule 8.2 (a). The plaintiff points to no other reason why a reprimand is not a proper sanction for these violations. Thus, the committee did not abuse its discretion by issuing a reprimand as a sanction to the plaintiff, and the trial court properly dismissed the appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

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other penalties or sanctions; (*l*) remorse; (m) remoteness of prior offenses." Id., p. 464, standard 9.32.