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CONNECTICUT REPORTS

Vol. 351

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

D. S. *v.* D. S.
(SC 20830)

McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy, Js.*

Syllabus

The plaintiff appealed, on the granting of certification, from the judgment of the Appellate Court, which had affirmed the trial court's judgment dissolving his marriage to the defendant, who was a partner at a large law firm. The plaintiff claimed, inter alia, that the Appellate Court had incorrectly concluded that the defendant's interest in a potential stream of retirement payments, which was to be paid pursuant to the relevant provisions of the firm's partnership agreement, was too speculative to constitute marital property subject to equitable distribution under the statute (§ 46b-81) governing, inter alia, the assignment of property in marital dissolution cases. *Held*:

A trial court's determination of whether an asset or interest constitutes marital property for purposes of § 46b-81 presents a mixed question of law and fact subject to de novo review, the trial court's underlying factual findings are reviewed for clear error, and the question of how such determinations as to any particular asset fit into the mosaic of the trial court's financial orders is reviewed for abuse of discretion.

The Appellate Court correctly determined that the defendant's interest in the retirement payments did not constitute property subject to equitable distribution for purposes of § 46b-81.

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* This case originally was argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy. Thereafter, Chief Justice Robinson retired from this court and did not participate in the consideration of the case.

The listing of justices reflects their seniority status on this court as of the date of oral argument.

The defendant did not have an enforceable right to receive the retirement payments insofar as the defendant's firm had a contractual right under the partnership agreement to unilaterally reduce or eliminate them at any time, even after the defendant started receiving them, and, accordingly, the defendant's receipt of the retirement payments was too speculative.

Moreover, changes in the law firm's demographics and compensation structure supported this court's conclusion that the firm's exercise of its authority to modify or terminate the retirement payments was more than a theoretical possibility, and equitable considerations weighed in favor of a conclusion that those payments should be treated as a source of potential income for alimony rather than a nonmodifiable property distribution.

The Appellate Court correctly concluded that the trial court had not abused its discretion in awarding the plaintiff alimony that was contingent on the defendant's remaining an active partner at her law firm or on her being a retired partner receiving retirement payments from the firm.

The trial court weighed all of the factors enumerated in the alimony statute (§ 46b-82 (a)), as well as the equitable factors and the circumstances relevant to the dissolution of the parties' marriage, and crafted an alimony order with the intent of ensuring that the plaintiff would be financially supported for a limited time period and of incentivizing the plaintiff to initiate a good faith job search and to acquire employment commensurate with his earning capacity.

(*One justice dissenting*)

Argued February 7, 2024—officially released January 7, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Diana*, *J.*, rendered judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to the Appellate Court, *Prescott*, *Suarez* and *Bishop*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Charles D. Ray, with whom was *Justyn P. Stokely*, for the appellant (plaintiff).

Kenneth J. Bartschi, with whom were *Karen L. Dowd* and, on the brief, *Thomas P. Parrino* and *Randi R. Nelson*, for the appellee (defendant).

Opinion

DANNEHY, J. In this appeal, we consider whether an interest in an unfunded retirement benefit constitutes property pursuant to General Statutes § 46b-81, when that interest will never vest because it may be unilaterally revoked by a third party at any time. The plaintiff, D. S.,[1] appeals from the judgment of the Appellate Court affirming the trial court's judgment of dissolution.[2] On appeal, the plaintiff claims that the Appellate Court incorrectly concluded that the interest of the defendant, D. S., in a potential stream of retirement payments (retirement payments) pursuant to the partnership agreement of her law firm (firm) was too speculative in nature to constitute marital property subject to equitable distribution under § 46b-81. The plaintiff further claims that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion in ordering an alimony award that was tied to her employment at the firm.[3] We affirm the judgment of the Appellate Court.

[1] During the course of the trial in this case, the trial court ordered certain documents to be sealed and, at times, closed the hearings. Consistent with the Appellate Court's modification of those sealing orders pursuant to its authority under Practice Book § 77-2 (a), in this opinion, we do not refer to the parties or their children by name and do not identify any of the parties' past or present employers. See *D. S.* v. *D. S.*, 217 Conn. App. 530, 532–33 n.1, 289 A.3d 236 (2023).

[2] The plaintiff filed a petition for certification to appeal from the judgment of the Appellate Court to this court. We granted the plaintiff's petition for certification, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the defendant's interest in her law firm's retirement plan was too uncertain to qualify as martial property subject to equitable distribution pursuant to General Statutes § 46b-81?" And (2) "[d]id the Appellate Court correctly conclude that the trial court had not abused its discretion in awarding alimony that . . . was terminable at the defendant's sole discretion and . . . was specific to the defendant's employment at one particular firm?" *D. S.* v. *D. S.*, 346 Conn. 924, 924, 295 A.3d 419 (2023).

[3] The defendant contends that the plaintiff's claim challenging the court's alimony award is unpreserved. We disagree. The defendant's proposed financial orders included the provision that the plaintiff now disputes, that the defendant's alimony obligation would be limited to her association with the firm, either as an active partner or a retired partner receiving retirement payments. Although the plaintiff failed to raise this particular argument in

The record reveals the following relevant facts, either undisputed or found by the trial court. The plaintiff and defendant married in 1990, and have two children, one of whom was a minor at the time of trial.

The defendant is a partner at a large law firm, and earns an annual gross income of approximately $8 million. Until he was laid off in 2001, the plaintiff worked as an investment banker, earning more than $1 million in his most successful year. After 2002, the plaintiff made no real financial contribution to the family. Although he subsequently started his own private equity firm, this venture (and others) was unsuccessful, and that firm was dissolved several years later. During this time, in addition to managing her own growing professional responsibilities, the defendant performed legal work for the plaintiff's assorted failed business ventures, paid his employees' salaries, and handled two tax audits. At the time of the dissolution, the plaintiff had not worked for an employer for approximately eighteen years.

Despite the defendant's considerable income, the plaintiff's unchecked spending resulted in the family's accumulation of substantial debt. Although the defendant tried to institute restraints, the plaintiff rejected her efforts to demonstrate that their financial situation was dire and that his spending was unsustainable. Eventually, the defendant decided to stop providing the plaintiff with documentation of her income. The plaintiff's spending only accelerated, and the defendant was forced to borrow extensively to meet the family's financial obligations. At the time of dissolution, the defendant continued to borrow money through a line of credit to meet the family's financial obligations. Throughout this time,

the trial court in response to the court's direction, on March 5, 2021, to do so, during closing argument, the plaintiff's counsel contended that the defendant's proposed financial orders would "crush" the plaintiff and argued that the court should not adopt them. Additionally, as we discuss subsequently in this opinion, the plaintiff raised this issue in his motion to reargue.

the plaintiff refused to seek employment, despite his impressive educational credentials and experience in the investment banking profession.

The plaintiff also terrorized the family emotionally and physically with his explosive anger, jealousy, and attempts to control the defendant's behavior. On occasions when the defendant suggested that he obtain employment, the plaintiff became "unglued and belligerent, responding usually by yelling and swearing at the defendant." He sometimes verbally abused the defendant in front of their children. On one occasion, while the defendant was showering, the plaintiff slammed the shower door so hard that the door shattered, and shards of glass injured the defendant. The trial court found that the plaintiff was solely responsible for the breakdown of the marriage due to his abusive behavior and mismanagement of the family's finances.

In 2017, the plaintiff commenced this dissolution action seeking joint custody, child support, alimony, and an equitable division of the property in the marital estate. Following a twenty day trial, the court rendered judgment dissolving the marriage. The trial court issued financial orders relating to parenting, child support, costs for the children's schooling and activities, alimony, health insurance and related costs, the disposition of the parties' assets and liabilities, and attorney's fees. Relevant to the two issues presented in this appeal, first, the court determined that the defendant's interest in the retirement payments pursuant to the partnership agreement did not constitute property for purposes of § 46b-81. Specifically, the court found that the defendant's interest in the retirement payments involves "variables, risks and requirements that are not fixed and impossible to determine at this time." In making its finding, the court relied primarily on the testimony of the defendant's expert witness, Mark Harrison, regarding the nature of the defendant's interest. The

court concluded that the interest constituted a "mere expectancy" and had no value at the time of dissolution. Accordingly, the trial court treated these potential payments as a future stream of income to be awarded as alimony pursuant to General Statutes § 46b-82, rather than as property subject to distribution pursuant to § 46b-81. Second, the court ordered the defendant to pay the plaintiff $35,000 per month in alimony for the first twelve months after the date of dissolution, and $30,000 per month thereafter. The court ordered that this alimony obligation would terminate when the defendant was no longer employed as an active partner at the firm. Once the defendant ceased to be an active partner, as long as she was receiving retirement payments pursuant to the partnership agreement, she would be obligated to pay alimony to the plaintiff in the amount of 25 percent of her net after-tax income actually received. The court ordered that this alimony obligation would terminate upon the death of either the plaintiff or the defendant but not upon the plaintiff's remarriage.

The trial court further ordered that the defendant's alimony obligation, both prior to and after her employment as an active partner with the firm, would be "nonmodifiable upward and nonmodifiable as to increases in duration." The trial court denied the plaintiff's subsequent motion to reargue, which had challenged, among other aspects of the court's judgment, the alimony and property awards. The plaintiff appealed from the judgment of dissolution to the Appellate Court, which affirmed the judgment of the trial court. *D. S.* v. *D. S.*, 217 Conn. App. 530, 532, 552, 289 A.3d 236 (2023). This certified appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first contends that the Appellate Court and the trial court incorrectly concluded that the defen-

dant's interest in the retirement payments was too uncertain to qualify as marital property subject to equitable distribution pursuant to § 46b-81. On the basis of the unique facts of this case, we conclude that the retirement payments did not constitute property.

The record reveals the following additional facts relevant to our resolution of this issue. As we noted previously in this opinion, in concluding that the defendant's interest in the retirement payments was a mere expectancy, the court credited and relied heavily on Harrison's expert testimony. Harrison, in turn, relied in part on a report prepared by the plaintiff's witness, Henry Guberman,[4] which describes the details of the retirement payments as set forth in the partnership agreement. In particular, Guberman's report explained the provisions in the partnership agreement governing a retired partner's eligibility to receive the retirement payments and setting forth the methodology used to calculate that partner's benefit.

In his testimony, Harrison described some general, foundational facts helpful to understanding the nature of the defendant's interest in the retirement payments. He pointed out that the payments to retired partners pursuant to the partnership agreement are not listed as a liability on the firm's financial statements. He explained that, in order to qualify as a liability for purposes of accounting, the interest must "be probable to be paid in [a] reasonably estimable . . . amount." Because the firm does not consider these payments a liability, therefore, it would be a "leap" to categorize the payments as an asset. Additionally, he testified, the payments are not funded. The firm does not maintain any capital, so

[4] The plaintiff had proffered Guberman as an expert witness, but, following an extensive voir dire of Guberman by the defendant's counsel, the trial court declined to qualify him as an expert. Like Harrison, Guberman was unable to arrive at any conclusions regarding the present value of the payments that the defendant might receive upon her retirement.

the payments are paid out from future earnings. He further testified that payments to a retired partner pursuant to the partnership agreement are not transferable and not salable.

Harrison also testified regarding numerous contingencies on which the defendant's receipt of any payments pursuant to the partnership agreement depend. Those contingencies include the termination of the payments altogether, any amendments to the partnership agreement, any violation by the defendant of the agreement's noncompete clause, and the firm's continued operation.

Most significant, Harrison testified that, pursuant to the partnership agreement, the firm, "by the mutual consent of the then [p]artners constituting at least three-fourths in number and having at least 75 [percent] of the total [p]oints," has the authority unilaterally to end the program, terminating payments to former partners at any time. In addition, Harrison testified that there are several provisions of the partnership agreement, the amendment of which would impact both the likelihood of a retired partner's receiving the payments and the quantity of any such payments. For example, amendments can and have been made to certain of the variables used to calculate a retired partner's benefit, thus changing the amount of the resulting payments. Harrison testified that these variables had been reduced over the years and that the partnership agreement authorized the firm to make further reductions, all of which present an additional risk that impacts whether the firm will make the payments.

Harrison also testified regarding changes the firm had made to its calculation of an active partner's expected benefit. Specifically, in 2020, the firm moved away from a compensation system based entirely on seniority (lockstep), replacing that system with one that, instead,

prioritizes a partner's production level. According to Harrison, this change meant the firm recognized that not all partners are equal, and the firm needed to attract partners who could generate business in order to keep the firm profitable and "around for a long . . . time."

As to the firm's continued operation, Harrison observed that "twenty-two firms . . . almost [the] size [of the defendant's firm] have disbanded or gone bankrupt since the financial crisis in 2007." Harrison recognized that the firm had been around for a long time and was "top shelf" but noted that "there have been a lot of good firms that have had problems."

A

Our cases have not been entirely consistent as to the standard of review that governs a trial court's determination that a particular asset or interest constitutes marital property for purposes of § 46b-81, which presents a mixed question of law and fact. Several of our cases arguably have reviewed that determination under an abuse of discretion standard. See, e.g., *Dombrowski* v. *Noyes-Dombrowski*, 273 Conn. 127, 132–33, 869 A.2d 164 (2005); *Smith* v. *Smith*, 249 Conn. 265, 285–88, 752 A.2d 1023 (1999); *Eslami* v. *Eslami*, 218 Conn. 801, 808, 591 A.2d 411 (1991). For the most part, however, our recent decisions have indicated that the question ultimately is one of statutory interpretation—whether a particular asset or asset class qualifies as "property" for purposes of § 46b-81—and, therefore, is subject to our plenary review. See, e.g., *Reville* v. *Reville*, 312 Conn. 428, 446, 93 A.3d 1076 (2014); *Mickey* v. *Mickey*, 292 Conn. 597, 613, 974 A.2d 641 (2009); *Bender* v. *Bender*, 258 Conn. 733, 741, 785 A.2d 197 (2001). We take this opportunity to clarify the standard.

We have recognized that "applying the label" of "mixed question of law and fact" does not necessarily resolve the applicable standard of review. *Bortner* v.

Woodbridge, 250 Conn. 241, 264, 736 A.2d 104 (1999). As the United States Supreme Court has explained, the standard of review applicable to mixed questions of law and fact depends on the nature of the mixed question, and requires us to consider "which kind of court . . . is better suited to resolve" the question. *U.S. Bank, N.A.* v. *Village at Lakeridge, LLC*, 583 U.S. 387, 395, 138 S. Ct. 960, 200 L. Ed. 2d 218 (2018). When the resolution of the mixed question of law and fact requires courts to "expound on the law, particularly by amplifying or elaborating on a broad legal standard," the standard of review is de novo. Id., 396. Our decisions addressing the question of whether a particular marital asset constitutes property for purposes of § 46b-81 invariably have expounded upon the meaning of the statutory term "property." Accordingly, the standard of review of a trial court's determination whether an asset is classified as "property" is de novo.

The trial court's underlying factual findings, however, are reviewable under a clearly erroneous standard and will be reversed only if they find no support in the record or the reviewing court is left with the definite and firm conviction that a mistake has been made. See, e.g., *FuelCell Energy, Inc.* v. *Groton*, 350 Conn. 1, 14, 323 A.3d 268 (2024); *Bornemann* v. *Bornemann*, 245 Conn. 508, 527, 531, 752 A.2d 978 (1998). Lastly, the question of how these determinations as to any particular asset fit into the mosaic of all the trial court's financial orders is reviewable for abuse of discretion.

B

We turn our attention, then, to the legal standard for determining whether a particular interest that was acquired during the marriage constitutes divisible marital property for purposes of § 46b-81. Section 46b-81 provides in relevant part: "(a) At the time of entering a decree annulling or dissolving a marriage . . . the

Superior Court may assign to either spouse all or any part of the estate of the other spouse.

* * *

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

Our legislature has not defined the term "property" in § 46b-81, leaving courts to define it. In determining the equitable distribution of resources under the statute, courts should engage in a three step process, determining (1) whether the resource is property (classification), (2) what is the appropriate method for determining the value of the property (valuation), and, (3) what is the most equitable distribution of that property between the parties (distribution). *Krafick* v. *Krafick*, 234 Conn. 783, 792–93, 663 A.2d 365 (1995). Over the past one-half century, in considering the classification of marital assets, this court and the Appellate Court have refined the definition of what does, and does not, qualify as marital property for the purposes of § 46b-81. At one end of the spectrum, it is well established that certain categories of future interests, such as vested pension benefits and contractually guaranteed stock options, qualify as marital property per se, because the holder has a presently enforceable right to receive them. See, e.g., *Bornemann* v. *Bornemann*, supra, 245 Conn. 517–20

(stock options); *Krafick* v. *Krafick*, supra, 793–98 (vested pension benefits).[5] At the other end of the spectrum, certain types of future interests categorically do not qualify as marital property, because the possessor's present interest in them "is, at best, [a] speculative . . . [and] inchoate [hope]" that has none of the attributes of property and, instead, constitutes a mere expectancy. (Internal quotation marks omitted.) *Krause* v. *Krause*, 174 Conn. 361, 365, 387 A.2d 548 (1978). Examples of these include interests in a potential inheritance; see, e.g., id.; interests in future earnings from a professional degree; see, e.g., *Simmons* v. *Simmons*, 244 Conn. 158, 164, 708 A.2d 949 (1998); and a contingent remainder interest in a revocable inter vivos trust. See, e.g., *Rubin* v. *Rubin*, 204 Conn. 224, 227–28, 527 A.2d 1184 (1987).

This court has articulated and refined a two part test by which trial courts may determine, on a case-by-case basis, whether a potential interest constitutes divisible marital property under § 46b-81. In the first part of the *Bender* test, we ask whether the holder has "a *presently* enforceable right [to receive the interest] . . . based on contractual principles or a statutory entitlement . . . ." (Citation omitted; emphasis added.) *Mickey* v. *Mickey*, supra, 292 Conn. 628 (citing *Bender* v. *Bender*, supra, 258 Conn. 733). If the party has such a right, the interest is part of the marital estate and is distributable as property. *Mickey* v. *Mickey*, supra, 625. If the party does not have a presently enforceable right, we proceed to the second part of the *Bender* test, which involves a more fact intensive analysis. See id., 625–27.

[5] We have previously defined the term "vested" to refer to "pension interests 'in which an employee has an irrevocable . . . right, in the future, to receive his or her account balance (under a defined contribution plan), or his or her accrued benefit (under a defined benefit plan), regardless of whether the employment relationship continues.' [3 A. Rutkin, Family Law and Practice (1995) § 36.13 [2], p. 36-71; see id., § 37.11 [1] [b], pp. 37-157 through 37-159; see also 2 A. Rutkin et al. Valuation and Distribution of Marital Property (1991) § 23.02 [2] [a], p. 23-8] . . . ." (Citation omitted.) *Krafick* v. *Krafick*, supra, 234 Conn. 788–89 n.12.

The second part of the *Bender* inquiry is "built [on the] foundation" established by our prior cases defining property for purposes of § 46b-81. *Bender* v. *Bender*, supra, 258 Conn. 753. In *Bender*, we explained that an interest that falls short of a presently enforceable right nevertheless qualifies as divisible marital property if a party's expectation in the interest "as a practical matter, is sufficiently concrete, reasonable, and justifiable as to constitute a presently existing property interest for equitable distribution purposes." Id., 749. This second prong of the *Bender* inquiry recognizes that the definition of "property" for purposes of equitable distribution should not be given a "narrow construction." (Internal quotation marks omitted.) Id., 753. We did not purport in *Bender*, however, to overrule our prior precedent defining property for purposes of § 46b-81. See id. The focus of the inquiry remains on obtaining an enforceable right in the interest. Our focus in the second prong, however, is on the likelihood that the holder *eventually* will acquire an enforceable right in the interest, that is, whether the interest will likely vest or whether the holder will otherwise acquire a definitive right to it. See *Mickey* v. *Mickey*, supra, 292 Conn. 628 ("[w]e conclude that *Bender* stands for the proposition that, even in the absence of a presently enforceable right to property based on contractual principles or a statutory entitlement, a party's expectant interest in property still may fall under § 46b-81 if the conditions precedent to the eventual acquisition of such a definitive right are not too speculative or unlikely").

In *Mickey*, we collected and synthesized the considerations relevant to a trial court's assessment of whether the party's interest is so speculative that it does not constitute property for purposes of § 46b-81, or, by contrast, is "sufficiently *concrete*, *reasonable* and *justifiable* as to constitute a presently existing property interest

for equitable distribution purposes." (Emphasis in original; internal quotation marks omitted.) Id.

Under the second part of the *Bender* inquiry, a central question that courts consider is whether the party's "right" to the interest is one that always can be unilaterally revoked, meaning that the holder will never have a vested interest, or amended by a third party. That a will may be revised until the moment of death, or a revocable trust revoked, explains, in no small part, why those interests are too speculative to qualify as part of the marital estate.

We recognize a lack of consistency in our law regarding whether, in assessing what weight should be given to a third party's unilateral authority to revoke or modify a right to a future interest, a trial court should consider the likelihood that the third party will ever exercise that authority. In *Bender*, we considered the likelihood of exercise relevant to the inquiry. In that case, we assumed the municipality had the authority to discontinue the pension plan before the interest vested but, nevertheless, described the exercise as merely a theoretical possibility that did not prevent the unvested pension from constituting a presently existing property interest. *Bender* v. *Bender*, supra, 258 Conn. 749. We also assumed in *Mickey* that disability benefits were terminable at the state's discretion at any time before the defendant suffered an injury. *Mickey* v. *Mickey*, supra, 292 Conn. 630–31. In *Mickey*, however, we stated that "the likelihood that the legislature would decide to modify or terminate the disability benefits . . . is irrelevant to our analysis," and that what mattered was simply that it had the authority to do so. (Emphasis omitted.) Id., 631 n.26. We take this opportunity to clarify that, because the second prong of the *Bender* inquiry focuses on the likelihood that a party will eventually obtain an enforceable legal right, the *likelihood* that a third party will exercise its right to unilaterally revoke

or modify a party's right to a future interest is relevant to the analysis.

In addition to the authority of a third party to unilaterally terminate a party's right to receive the future interest, and whether the likelihood that the third party will exercise its authority is merely theoretical, courts also consider the nature of other contingencies involved, that is to say, other risks that the party will never obtain a right to the interest. The nature of these contingencies or risks sheds light on the reasonableness of the party's expectancy in the interest. A prudent person will not plan her retirement in reliance on the expected receipt of an income source that can be unilaterally denied to her, or that she is unlikely ever to receive, or the receipt of which is subject to incalculable risks. See, e.g., id., 628–29 and n.22; *Dombrowski* v. *Noyes-Dombrowski*, supra, 273 Conn. 132–33; *Bender* v. *Bender*, supra, 258 Conn. 754. This, in turn, may depend on considerations such as whether a potential income source has been funded, and whether it is transferable and negotiable. See, e.g., *Simmons* v. *Simmons*, supra, 244 Conn. 168–69.

Finally, in light of the equitable nature of dissolution proceedings, we have suggested that equitable considerations may be taken into account when assessing whether a potential interest should be considered part of the marital estate. In *Mickey*, we explained that the trial court must retain "a measure of flexibility to avoid a patently unfair result. For example . . . this approach allows a court to avoid the inequity that would occur if the marriage dissolves shortly before one of the spouse's pensions vests, especially when the pension is the primary marital asset." *Mickey* v. *Mickey*, supra, 292 Conn. 630. In addition to whether the interest represents the primary marital asset, other relevant equitable considerations include whether the benefit "represent[s] the 'fruits' of the marital partnership that § 46b-81 is

designed to equitably parse"; id., 631; and whether it can be characterized as a form of deferred income that was earned and otherwise would have been enjoyed during the marriage. See, e.g., id., 632; *Bender* v. *Bender*, supra, 258 Conn. 752.

C

With these principles in mind, we turn our attention to the present case. It is undisputed that the defendant's interest in the retirement payments does not qualify as property under the first part of the *Bender* test, because she has no legally enforceable present right to receive it. The parties disagree, however, as to whether the defendant's interest in the retirement payments qualifies as divisible marital property under the second part of the *Bender* test. Our review of the relevant considerations persuades us that it does not.

First, not only does the defendant have no presently enforceable right to receive the retirement payments, but she never will. At any time, before and even after the defendant begins to receive retirement payments, the firm has a contractual right under the partnership agreement to unilaterally reduce or cancel those payments. The firm reserves the right to terminate the program for all retired partners, or for an individual former partner, by a three-quarters vote of the partnership. The firm's contractual authority to terminate the program or the defendant's payments thereunder at any time and "without any ascertainable standard" was central to Harrison's opinion, credited by the trial court, that the defendant's interest in her retirement payments was "the epitome of a mere expectancy." Harrison testified that he had evaluated the retirement programs of many law firms and other professional service companies but that he had "never seen anything like" the provision of the partnership agreement that allowed a small committee to recommend the suspension of a

partner's retirement payments if it determined, for any reason, that paying it would be inequitable to the remaining partners and the firm.

As a result of the firm's contractual authority to unilaterally terminate the payments, even after the defendant begins to receive them, the defendant's interest in the stream of retirement payments will never vest, and the defendant will never have a contractual cause of action against the firm for continued payments. The plaintiff does not contend otherwise. This significant fact distinguishes the defendant's interest from the unvested pension at issue in *Bender*, where we simply assumed the municipality had the authority to discontinue the pension plan, despite recognizing that the record was silent on the defendant's rights under the collective bargaining agreement and without reference to any contractual authority providing such authority. *Bender* v. *Bender*, supra, 258 Conn. 749 and n.6

In addition, we described in *Bender* the employer's exercise of its assumed authority to discontinue the pension plan as simply "theoretically possible . . . ." Id., 749. In the present case, however, *other* risks involving, for example, changes in the firm's demographics and compensation structure, support our conclusion that its exercise of its authority to terminate or amend the retirement payments is more than a theoretical possibility. The trial court determined that, even assuming the firm continues to exist in its present form, there was a real possibility that it would, at some point, cease paying the retirement payments. That factual finding, which would be reviewable for clear error if the plaintiff had challenged it, finds support in Harrison's and the defendant's testimony, both of which the trial court credited, and business records that had been created long before the present action was initiated. Such evidence tended to show that, although the firm had never failed to make payments under the partnership agree-

ment, demographic pressures had resulted in fundamental changes to the firm's partnership compensation structure, led to significant cuts in partners' retirement payments, and called into question the long-term viability of the program.

Over time, as a result of normal demographic trends,[6] the ratio of retired partners to active partners at the firm has risen steadily. Between 1990 and 2015, the ratio of retired to active partners had more than tripled. Equally significant, of the remaining active partners, the number who were fifty years of age or older was substantially higher in 2015 than it had been in 1990, suggesting that the demographic pressures would only continue to intensify.

The potential impact of these increasing pressures on the firm's finances was not merely a matter of speculation. At the time of trial, those pressures already had resulted in significant changes that, Harrison testified, were necessary "to keep this firm from imploding." The firm had made a series of cuts to the retirement payments, and the result of these ongoing cuts was that the retirement income received by a partner was expected to fall by as much as 50 percent between 2015 and 2040, with the average yearly payment (in constant dollars) dropping to $400,000. In addition, as of January 1, 2021, the firm discontinued its pure lockstep, or seniority, method of compensating partners and moved to a modified system that places a premium on partners' production levels.

Harrison testified that these recent developments reduced the likelihood that a retired partner would ultimately receive a retirement payment that met the part-

[6] See, e.g., R. Zahorsky, "Pensions Howling at the Door: WolfBlock Dissolution Underlines the Danger," 95 ABA J. (June, 2009) pp. 28, 30 (discussing unsustainability of unfunded law firm pension plans as baby boom partners retire).

ner's expectations, or receive one at all. He specifically testified as to the interrelated nature of the risks, stating that the transition away from the lockstep method of compensation, together with fewer active partners having to support more retirees, meant that "the biggest and best producers are going to say, 'why do I want to be here, let me go to another firm that has funded their retirement [plans] . . . ." Harrison testified that, despite the firm's long history and prestige, it might cease operating. He explained that this was not a mere theoretical possibility because, in the fourteen years between the 2007 financial crisis and the date of dissolution, twenty-two firms of nearly the same size had disbanded or gone bankrupt, more than one and one-half each year.

The defendant, who was familiar with the firm's present financial condition at the time of trial, concurred with Harrison's view that the contingencies to which her receipt of the retirement payments was subject rendered the interest a mere expectancy. According to the defendant, "[g]iven that we [had] moved to a modified lockstep compensation system, the current pension calculation doesn't really work and is going to have to be amended at some point. [The] partnership agreement . . . could be amended and . . . the payments could be eliminated." The defendant testified that "those payments are subject to a variety of conditions and uncertainty, and are not necessarily something I can count on." This testimony is consistent with the 2016 prelitigation presentation, during which the defendant warned the firm's partnership that the retirement payments could be cut by one half over the next twenty-five years and concluded with a message, one that the trial court reasonably could have interpreted as a caution to the partners that they should not rely on the retirement payments when engaging in retirement planning. At trial, the defendant characterized the presentation as

showing "partners how they needed to save for retirement because payments postretirement were uncertain." There was credible evidence, then, that the defendant did not treat her interest in the retirement payments as property, in the sense of a reliable source of retirement income, and that, long before the present action was commenced, she had, on behalf of the firm, advised her partners against relying on it.[7] Additionally, with the exception of the plaintiff's testimony that he and the defendant had contemplated eventually moving to Wyoming on the basis of the plaintiff's belief that they would pay fewer or no taxes on the defendant's retirement income, the plaintiff offered no other testimony or evidence that the parties had ever factored in the defendant's retirement payments when planning for retirement.

Harrison opined, for example, that the defendant's retirement payments could amount to "anything from zero to a lot of money," and he stated that, if he were to attempt to place a present value on the expected payments, the amount would be so low, in light of these various risks, that he would lose his credibility before the trial court. For her part, the defendant testified that the retirement payments "can, and, in all likelihood, will be reduced over time. [T]here's no way to calculate exactly what those payments will be, *if any*." (Emphasis added.) The firm's executive director, who was responsible for the new partner financial presentations, gave substantially similar testimony, agreeing that "no one can possibly know, within a reasonable degree of certainty, the amount, *if any*, that [the defendant] may

[7] The plaintiff and the dissent construe the defendant's 2016 presentation to mean that the firm had taken the steps necessary to shore up its finances. But the trial court, as the finder of fact, reasonably could have embraced the interpretation, advanced by both Harrison and the defendant, that the *best case* scenario was a significant, ongoing cut in payments and that the worst case scenario was a total termination of the program.

receive . . . upon her departure from the firm." (Emphasis added.)

Consistent with the testimony of both Harrison and the defendant, the trial court found that the retirement payments were "unique in form and substance . . . ." The fact that the firm has struggled with intensifying demographic pressures and had, shortly before trial in the present case, transitioned to a new partnership compensation structure, in tandem with the fact that the partnership agreement contains the unique escape valve allowing the firm to terminate payments under the retirement payments at any time, provides more than adequate support for the trial court's determination that "[the] stream of payments involves variables, risks and requirements that are not fixed and [are] impossible to determine," and, therefore, that it was too speculative to qualify as a presently existing property interest.

The plaintiff claims that the fact that it is impossible to predict the size of the retirement payments that the defendant will receive, and, thus, to calculate the present value of the defendant's interest in those payments with any certainty, did not preclude the trial court from classifying it as property because there are other methods of distributing marital assets. See, e.g., *Bender* v. *Bender*, supra, 258 Conn. 750 n.7 (noting that, regardless of length of employee's service, unvested pension constituted marital property, and observing that "the trial court could choose simply not to distribute it because its value—not its classification—was too insignificant *or conjectural* in the marital scheme of things" (emphasis added)). According to the plaintiff, if we conclude that the defendant's interest in the retirement payments is not so speculative as to be a mere expectancy, the trial court could have treated the interest as property and assigned each party some fixed percentage of whatever payments she ultimately receives. But Harrison

did not merely testify that this range of contingencies made it impossible to place a present value on the defendant's potential retirement payments. Rather, he concluded that the range and scope of contingencies rendered the defendant's receipt of the retirement payments too speculative to qualify as property.[8]

The plaintiff points to a 2016 email exchange in which the defendant estimated that, at that time, her retirement payments might have a present value of $14 million. The trial court reasonably could have declined to afford any weight to that evidence, in light of (1) the agreement of both parties' experts that the retirement payments were impossible to value with any degree of confidence, (2) the plaintiff's testimony that her 2016 email likely reflected "a back of the envelope calculation that one of [her] partners had done," and (3) the fact that the email exchange itself indicated that it was predicated on optimistic assumptions as to discount rates and that, "with the cutback, the pension isn't worth much."

Finally, we examine relevant equitable considerations, such as whether the interest in question is the divorcing couple's primary asset or source of retirement security. That certainly was not the case here. Aside from the retirement payments, the defendant owned three conventional retirement plans through the firm: a Keogh plan valued at almost $1.8 million, a 401k plan valued

[8] We observe that, even if the trial court had determined that the defendant's interest in the retirement payments was property, the court would have been well within its discretion to do exactly what it did and, instead, award the plaintiff a 25 percent share as alimony. See General Statutes § 46b-82 (court may order alimony "in addition to *or in lieu of*" award of property (emphasis added)); see also, e.g., *Mickey* v. *Mickey*, supra, 292 Conn. 630 and n.24 (court has discretion to consider equities of situation and to fashion alimony award that accounts for marital asset). Because there is no indication in the record that the trial court contemplated this alternative approach, any determination by this court regarding the propriety of any such action by the trial court would require speculation.

at over $1.5 million, and a defined benefit pension plan with an annual benefit of approximately $197,000. The trial court awarded 35 percent of the value of each of those plans—well over $1 million—to the plaintiff. And, notably, the judgment did not deny the plaintiff a share of the defendant's retirement payments; he simply would receive his share of any payments in the form of alimony, rather than as a property distribution.

Other equitable considerations also weigh in favor of the trial court's conclusion that the retirement payments should be treated as a source of potential income for alimony, rather than a nonmodifiable property distribution. The court found that the plaintiff was entirely responsible for the breakdown of the marriage, both financially and relationally. The court found that "the plaintiff did not contribute to the acquisition, preservation or appreciation of the parties' assets [but, rather, that] he was the primary reason the assets were recklessly depleted and wasted." The court faulted the plaintiff's "rage," "verbal intimidation," "constant arguing and abusive behavior," and "obsessive, jealous, threatening" conduct for the breakdown of the marriage, concluding that the plaintiff had "terrorized the family emotionally and physically with his rage, explosive anger, control and jealousy." The court also found that the plaintiff had an earning capacity of "$150,000 after about six months of [short-term or] gig assignments and selective placement by a professional placement service." Nevertheless, the court granted the plaintiff generous property and alimony awards and required the defendant to assume the majority of the couple's debts. The plaintiff will not be left destitute, and he did not suffer any injustice, as a result of the trial court's property distribution and alimony awards.

In conclusion, there was adequate support in the record for the trial court's factual findings. On this factual record, and in light of the trial court's credibility

determinations, we conclude that the trial court correctly determined that the defendant's receipt of the retirement payments was too speculative to constitute property for purposes of § 46b-81.[9]

We have two primary disagreements with the dissenting opinion. First, although, if we had been the triers of fact, our own findings might be guided by the same sorts of commonsense intuitions that animate much of the dissent, as an appellate tribunal, we must accept, unless clearly erroneous, the factual findings and credibility determinations made by the trial court. Those findings firmly ground the trial court's determination that the defendant's interest in the retirement payments is too speculative to qualify as present marital property. Second, with respect to the governing legal principles as applied to the facts found by the trial court, we have a fundamental disagreement as to what constitutes property under § 46b-81, as construed by this court in *Bender* and its progeny.

As we discussed, although the property question ultimately is a legal one, to the extent that it hinges on underlying factual findings, credibility determinations, and assessments of the probability of various outcomes, we defer to the trial court unless its findings and determinations are clearly erroneous. The dissent relies throughout its opinion on its own assumptions and determinations regarding the defendant and her law firm, untethered from the trial court's memorandum of decision, everything from the firm being "among the

[9] The plaintiff contends that the conclusion that the defendant's interest in the retirement payments does not qualify as divisible marital property is in tension with the determination reached by several other courts that substantially similar retirement plans are marital property. See, e.g., *Hussey* v. *Hussey*, Docket No. FST-FA-01-0183296-S, 2003 WL 21494762, *4 (Conn. Super. June 11, 2003); *Douglas* v. *Douglas*, 281 App. Div. 2d 709, 712–13, 722 N.Y.S.2d 87 (2001); *Wright* v. *Wright*, 61 Va. App. 432, 451–53, 737 S.E.2d 519 (2013). None of those decisions is binding on this court, however, and each is readily distinguishable.

most profitable . . . in the world" to "shock" at anyone questioning its financial future.

At the same time, despite the lack of any claim in this appeal that the trial court's factual findings and credibility determinations were clearly erroneous, the dissent affords no deference to the findings that the trial court did make, such as the court's determination that the defendant's expert witness was credible and its reliance on that expert's testimony in concluding that the defendant's interest amounted to a mere expectancy. Harrison provided detailed testimony regarding the unique nature of the partnership agreement and the retirement payments. He also testified without objection that, on the basis of his analysis, the retirement payments were a mere expectancy. After stating that it credited Harrison's testimony, the trial court found: "This stream of payments involves variables, risks and requirements that are not fixed and impossible to determine at this time. This future income is not carried as a liability by the law firm on [its] books, not guaranteed, not transferable, not salable, not funded and can be entirely eliminated at any time. Thus, its value today is found to be a mere expectancy." The dissent's analysis rejects the trial court's determination to credit Harrison's testimony, despite the lack of any challenge to that determination in this appeal.[10]

[10] The dissent contends that Harrison's testimony that the defendant's interest in the retirement payments is "the epitome of a mere expectancy" went to the "ultimate legal issue" in the case and is entitled to no weight. As we noted, the plaintiff's counsel did not object to this testimony, and the plaintiff does not in this appeal challenge its admission into evidence. Therefore, whether the court abused its discretion in admitting this single statement is not before this court. We note, however, that the finder of fact is an experienced trial judge, and, notwithstanding the dissent's assertions to the contrary, it is clear from the record and the memorandum of decision that the trial court made an independent determination of whether the retirement payments were property under the statute and did not merely rely on Harrison's statement that the interest was a mere expectancy. The trial court also credited the testimony of the defendant, who was familiar with the firm's financial condition at the time of trial and who echoed Harrison's analysis that it was possible that the firm would have to terminate the retirement payments altogether.

In addition to being grounded on an improper rejection of the factual findings and credibility determinations of the trial court, the dissent's analysis is predicated on an incorrect premise: that, pursuant to *Bender*, retirement benefits of all types qualify as marital property per se. Neither *Bender* nor any of the subsequent cases applying its expanded understanding of marital property support the dissent's reading of that case. When this court considered in *Bender* whether unvested government pension benefits qualified as property subject to equitable distribution pursuant to § 46b-81, it could have adopted a per se rule that retirement benefits qualify as marital property. It did not. Instead, as we explained previously in this opinion, the second part of the *Bender* inquiry requires trial courts to engage in a probabilistic assessment of the claimed property interest to determine whether the interest is too speculative to constitute property subject to equitable division.[11] That is, pursuant to *Bender* and its progeny, in determining whether a retirement benefit constitutes property under § 46b-81, trial courts must assess the

[11] As the present case illustrates—and as this court may not have contemplated when crafting its rule in *Bender*—retirement benefits come in myriad forms, some of which defy a probabilistic assessment. One treatise has observed that, "[i]n recent years . . . there is now a broad general consensus that retirement plans *of all types* . . . constitute property" for purposes of equitable distribution. (Emphasis altered.) 2 B. Turner, Equitable Distribution of Property (3d Ed. 2005) § 6:22, p. 135; see, e.g., Ala. Code § 30-2-51 (b) (1) (Supp. 2023) ("The marital estate is subject to equitable division and distribution. Unless the parties agree otherwise, and except as otherwise provided by federal or state law, the marital estate includes any interest, whether vested or unvested, either spouse has acquired, received, accumulated, or earned during the marriage in any and all individual, joint, or group retirement benefits including, but not limited to, any retirement plans, retirement accounts, pensions . . . ."); Fla. Stat. Ann. § 61.075 (6) (West 2019) ("[a]s used in this section . . . (a) 1. '[m]arital assets and liabilities' include . . . e. [a]ll vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs"). Neither of the parties, however, has asked this court to revisit *Bender* or to adopt a per se rule that retirement benefits of all types accrued during the marriage constitute property, a step that would be necessary in order to adopt the dissent's position.

likelihood that the owning spouse will ever acquire a legally enforceable right to that retirement benefit. See *Mickey* v. *Mickey*, supra, 292 Conn. 628 ("*Bender* stands for the proposition that, even in the absence of a presently enforceable right to property based on contractual principles or a statutory entitlement, a party's expectant interest in property still may fall under § 46b-81 if the conditions precedent to the eventual acquisition of such a definitive right are not too speculative or unlikely"); id., 623 n.19 (question turns on whether third party can unilaterally revoke interest); see also id., 641 n.8 (*Norcott*, *J.*, concurring and dissenting) ("[U]nder the second prong of *Bender* . . . our inquiry properly would focus on the likelihood that an enforceable right to such benefits would be obtained . . . and not on whether the benefits were likely actually to be received. See *Bender* v. *Bender*, supra, 258 Conn. 749–50 (analyzing likelihood that defendant would obtain enforceable right to unvested pension benefits, and not likelihood that such benefits subsequently would be received)." (Emphasis omitted.)).

Nor do two other cases cited by the dissent, *Reville* v. *Reville*, supra, 312 Conn. 428, and *Tilsen* v. *Benson*, 347 Conn. 758, 299 A.3d 1096 (2023), demand a different result. In *Reville*, in one brief aside, this court suggested that, under *Bender*, the trial court would have been required to treat an unvested pension as distributable property. See *Reville* v. *Reville*, supra, 458. That comment, however, was dictum, in light of our repeated statements in that decision that resolving the property question was not necessary to the resolution of the case. Id., 458–59. The comment also was made without the benefit of any discussion of the relevant considerations summarized in *Mickey* and, indeed, without any analysis of the specific details of the plan. To the extent that our statement in *Reville* was predicated on a view that any unvested retirement plan or income source categorically qualifies as marital

property, we again clarify that, under *Bender* and *Mickey*, whether an unvested plan qualifies as marital property requires a fact-specific analysis according to the considerations discussed in those cases. See, e.g., *Czarzasty* v. *Czarzasty*, 101 Conn. App. 583, 594, 922 A.2d 272 (requiring case-by-case analysis under § 46b-81), cert. denied, 284 Conn. 902, 931 A.2d 262 (2007).

The dissent also cites *Tilsen* for the proposition that distributions from a limited partnership were marital property, even though the plaintiff in that case never would obtain an enforceable right to receive those distributions under the partnership agreement. That characterization glosses over the fact that this court never determined that the interest at issue in *Tilsen* was property. Rather, we relied on the parties' stipulation that it be treated as such. See *Tilsen* v. *Benson*, supra, 347 Conn. 806. Moreover, to the extent that the trial court in that case made any independent findings concerning the property question, those findings, contained in a footnote, were dicta to the effect that the parties previously had relied on the distributions as part of their budget and as a source of retirement savings. See id., 804, 806 n.26. In that regard, *Tilsen* simply exemplifies the equitable exception that both *Bender* and *Mickey* left open, and is readily distinguished from the present case, in which the defendant's testimony, credited by the trial court, established that she did not view the retirement payments as something she could "count on."

II

The plaintiff next claims that the trial court abused its discretion by awarding alimony that was specific to the defendant's employment at one particular firm.[12] On the

[12] The plaintiff also claims that the trial court improperly delegated its authority by ordering that the defendant's alimony obligation would automatically terminate when she was no longer employed as an active partner at the firm. Specifically, the plaintiff claims that the alimony order unlawfully permits the defendant to stop paying alimony, without seeking approval from the court, simply by changing her employment. The trial court's order

basis of the facts of this case, and applying the required deferential standard of review, we disagree.

"An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did . . . . In determining whether a trial court has abused its discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Birkhold* v. *Birkhold*, 343 Conn. 786, 808–809, 276 A.3d 414 (2022). "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such

in the present case stands in sharp contrast to the one at issue in this court's recent decision in *R. H.* v. *M. H.*, 350 Conn. 432, 433, 324 A.3d 720 (2024), in which we reversed in part the judgment of the trial court on the basis that the court improperly delegated its authority when it gave a parent the authority to "decide the nature and scope of the visitation of his ex-spouse . . . ."

In the present case, the court's order did not give the defendant the authority to make a binding decision as to the terms of her alimony obligation to the plaintiff. The trial court, not the defendant, determined the appropriate amount of alimony and then articulated the circumstances under which it would terminate. The court concluded that the plaintiff should receive alimony as long as the defendant is employed as an active partner at her firm or is receiving retirement payments pursuant to the firm's partnership agreement. Although the defendant has some measure of control over when these requirements would no longer be satisfied, the determination of the conditions themselves was not left to her discretion. Accordingly, we conclude that the court did not delegate its authority to the defendant. We find the plaintiff's arguments to the contrary unpersuasive.

parent's securing employment." General Statutes § 46b-82 (a). Although our review is limited to whether the court correctly applied the law and reasonably concluded as it did, it is "well established that, in awarding alimony, the trial court must take into account all the statutory factors enumerated in . . . § 46b-82 (a) and that its failure to do so constitutes an abuse of discretion." (Footnote omitted.) *Oudheusden* v. *Oudheusden*, 338 Conn. 761, 768–69, 259 A.3d 598 (2021). "The trial court does not need to give each factor equal weight or make express findings as to each factor, but it must consider each factor. . . . In addition, it is a long settled principle that the defendant's ability to pay is a material consideration in formulating financial awards. . . . Finally, the trial court's financial orders must be consistent with the purpose of alimony: to provide continuing support for the nonpaying spouse, who is entitled to maintain the standard of living enjoyed during the marriage as closely as possible. . . . When exercising its broad, equitable, remedial powers in domestic relations cases, a court must examine both the public policy implicated and the basic elements of fairness." (Citations omitted; internal quotation marks omitted.) Id., 769.

Under the trial court's alimony order, the duration and amount of alimony are contingent on the defendant's being either an active partner in the firm or a retired partner receiving retirement payments. That is, the initial alimony award (after the first twelve months postdissolution) in the amount of $30,000 per month will cease when the defendant is no longer an active partner in the firm. After the defendant ceases to be an active partner, to the extent that she receives the retirement payments pursuant to the partnership agreement, she is obligated to pay the plaintiff alimony in the amount of 25 percent of her net after-tax income. The plaintiff claims that this order improperly conditions the defendant's alimony obligation

on her association with the firm, either as an active or retired partner receiving the retirement payments.

The alimony order in the present case reflects the trial court's intention to ensure that the plaintiff would be financially supported for a limited time period, specifically, while the defendant remained an active partner at the firm and, thereafter, if and during the time that the defendant received the retirement payments from the firm. The trial court explained that the purpose of the duration and amount of its alimony order was to "provide the plaintiff with the financial incentive to initiate a good faith job search and acquire employment commensurate with his earning capacity so that he may contribute toward his own expenses."

The record reveals that the trial court weighed the appropriate statutory and equitable factors in crafting its alimony order. The trial court described the parties' financial circumstances as "dire" and found that, beginning in 2016, the plaintiff's spending habits "accelerated considerably and were out of control." The plaintiff had voluntarily been out of work for eighteen years and had not sought employment since 2008. The plaintiff explained his refusal to seek employment by contending that he was responsible for caring for the parties' children while the defendant worked. Although such an arrangement would not be unreasonable, the court explicitly rejected the plaintiff's contention that he was too busy in this role to secure a job. At the time of the trial in 2021, the defendant had, since 2018, been paying the plaintiff pendente lite monthly alimony of $37,500 per month. On the basis of the expert testimony of a psychologist, the court determined, however, that the plaintiff had an earning capacity of $150,000 after about six months of "gig assignments . . . ." Although the court acknowledged that, given the plaintiff's age and medical concerns, a "focused genuine effort" on his part would be necessary to find productive employment, it

nevertheless found that he would be able to do so, provided he did make such an effort.

The trial court also concluded that the plaintiff was "solely responsible and at fault" for the breakdown of the marriage and that the "emotional cost" he inflicted on the defendant and the family could not be measured. The court found that "[t]he plaintiff's behavior destroyed the love, respect and foundation of this marriage." The court noted that the plaintiff had "terrorized the family emotionally and physically with his rage, explosive anger, control and jealousy," and characterized him as "a bully who verbally, physically and financially abused the defendant and exposed their children to his deportment." The trial court found that, during the marriage, the defendant "paid and paid and paid as the plaintiff [had] become her biggest creditor." The trial court described the plaintiff as the primary reason the marital assets were recklessly depleted and wasted. The trial court's memorandum of decision describes a "rampage" that included, despite the defendant's efforts to curb the plaintiff's spending, "tens of thousands of dollars in credit card charges each month at restaurants, traveling, buying expensive designer clothing and gifts, and leasing expensive foreign cars (and horses) . . . ." The trial court noted that the defendant struggled to keep up with the bills and had no alternative but to regularly secure "enormous loans to meet the [plaintiff's] extravagant spending behavior" and that, as a result, the defendant was "left dealing with carrying debt that [was] overwhelming . . . ."

We have previously observed that, although alimony "is not to be considered either as a reward for virtue or as a punishment for wrongdoing, a spouse whose conduct has contributed substantially to the breakdown of the marriage should not expect to receive financial kudos for his or her misconduct." *Robinson* v. *Robinson*, 187 Conn. 70, 72, 444 A.2d 234 (1982). There is

no indication that the court fashioned the defendant's alimony with an intent to punish the plaintiff for his behavior. But, in light of the foregoing factors—including the plaintiff's "considerable" potential to earn his own income on the basis of his "personal effort" and his sole responsibility for the breakdown of the marriage—the limitations imposed by the court were an appropriate exercise of its discretion.

The plaintiff, however, challenges the duration of the alimony order, insofar as it is contingent on the defendant's affiliation with the firm. According to the plaintiff, the trial court abused its discretion in tying the alimony award to the defendant's being an active partner at the firm, because she could leave the firm at any time.

It is well established that a trial court may award time limited alimony for the purpose of allowing a spouse to become self-sufficient. See, e.g., *Dan* v. *Dan*, 315 Conn. 1, 11, 105 A.3d 118 (2014) ("[u]nderlying the concept of time limited alimony is the sound policy that such awards may provide an incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self-sufficiency" (internal quotation marks omitted)); *Bornemann* v. *Bornemann*, supra, 245 Conn. 539 ("rehabilitative alimony, or time limited alimony, is alimony that is awarded primarily for the purpose of allowing the spouse who receives it to obtain further education, training, or other skills necessary to attain self-sufficiency").

The fact that the plaintiff has suggested hypothetical scenarios in which he could be disadvantaged by the conditions of the alimony order does not render the order unreasonable. Although the plaintiff introduced evidence that, in 2016, he and the defendant had discussed some of the potential financial implications that could result if she were to leave her firm, she never did so. Rather, the defendant testified that she did not

know when she would retire. She also stated, however, that she was "unlikely to be able to work . . . past sixty-two" because "[t]he average retirement age at [the firm] is sixty." The defendant never testified that she planned to leave the firm before her retirement. The defendant described that her amended proposed order with respect to alimony was intended to give her some "breathing room" to pay down debts while she was still an active partner in the firm, because she would be unlikely to work at the firm past the age of sixty-two. The defendant also testified that the age of sixty-two was significant because, at that time, she would no longer be receiving income from the firm. Although she would then be entitled to retirement payments under the partnership agreement, the defendant noted that "those payments are subject to a variety of conditions and uncertainty, and are not necessarily something I can count on." The trial court found that the defendant's testimony was "credible and reliable." Accordingly, it fashioned an order based on the premise that the defendant would continue to be employed as an active partner at her firm for approximately five more years before retiring, during which time the plaintiff would be entitled to monthly payments of $30,000 in alimony. Furthermore, the court ordered that the plaintiff would be entitled, limited by either his or the defendant's death, to a percentage of any retirement payments the defendant might receive, providing him with additional, potentially long-term, support. The trial court did not abuse its discretion by limiting the duration of the plaintiff's first alimony award to the duration of the defendant's employment as an active partner at the firm and the plaintiff's second alimony award to the defendant's potential receipt of the retirement payments. Provided the plaintiff obtained a job and adjusted his lifestyle, the court anticipated that such an arrangement would allow him to "live comfortably." Contrary to the plaintiff's asser-

tions, he has not demonstrated that this order was irrational or inconsistent with the purpose of the alimony statute.

In reviewing an alimony order, we do not substitute our judgment for that of the trial court, which is in the best position to fashion an effective and equitable arrangement. An award of alimony is permissive, not mandatory, and "rest[s] in the sound discretion of the trial court . . . ." *Debowsky* v. *Debowsky*, 12 Conn. App. 525, 526, 532 A.2d 591 (1987). Here, it is apparent that the trial court considered the various circumstances attending the dissolution of the parties' marriage and issued an order that would provide the plaintiff with appropriate financial support. We do not suggest that conditioning alimony on a party's relationship with a particular employer is appropriate in every instance, and this case should not be read to so hold. Under the unique facts of this case, however, it was reasonable for the court to expect that the defendant's departure from her firm would coincide with her retirement from full-time employment. We therefore conclude that the Appellate Court correctly held that there was no abuse of discretion.

The judgment of the Appellate Court is affirmed.

In this opinion McDONALD, D'AURIA, MULLINS and ALEXANDER, Js., concurred.

ECKER, J., dissenting. In *Bender* v. *Bender*, 258 Conn. 733, 749, 753–54, 785 A.2d 197 (2001), and its progeny, we eschewed a formalistic legal definition of the term "property" in General Statutes § 46b-81,[1] concluding

[1] General Statutes § 46b-81 provides in relevant part: "(a) At the time of entering a decree annulling or dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse. . . .

* * *

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall

that, in divorce proceedings, the legislature intended "a spectrum of interests that do not fit comfortably into our traditional [property] scheme . . . [to] be available in equity for courts to distribute." *Mickey* v. *Mickey*, 292 Conn. 597, 625, 974 A.2d 641 (2009). Our jurisprudence establishes that retirement benefits—whether vested or unvested, funded or unfunded, contributory or noncontributory—generally constitute property subject to equitable distribution because, "as a practical matter," the parties' expectation of receiving these benefits "is sufficiently concrete, reasonable and justifiable as to constitute a presently existing property interest for equitable distribution purposes." *Bender* v. *Bender*, supra, 749; see also *Reville* v. *Reville*, 312 Conn. 428, 445–46, 93 A.3d 1076 (2014) (unvested, unfunded, noncontributory pension plan subject to discontinuation or alteration was not excluded from definition of property); *Bender* v. *Bender*, supra, 749 (unvested pension benefits constituted property); *Krafick* v. *Krafick*, 234 Conn. 783, 795, 663 A.2d 365 (1995) (vested pension benefits constitute property "[w]hether the plan is contributory or noncontributory" (internal quotation marks omitted)). Until today, we have never excluded an expected stream of future retirement benefits acquired during the life of a marriage from the definition of property subject to equitable distribution pursuant to § 46b-81.

Our prior precedent holds that retirement benefits generally constitute marital property due to the unique nature of these benefits and the important economic role that they serve. More particularly, we have categorized retirement benefits as property because "employers and

consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

employees treat [them] as property in the workplace"; *Bender* v. *Bender*, supra, 258 Conn. 750; they "represent a form of deferred compensation for services rendered" during the marriage; (internal quotation marks omitted) id.; they "are significant marital assets"; id., 752; and "they represent the fruits of the marital partnership in practical and emotional ways . . . ." Id., 754. Our jurisprudence is consistent with the "broad general consensus [among our sister states] that retirement plans of all types do constitute property" subject to equitable distribution at the time of divorce. (Emphasis omitted.) 2 B. Turner, Equitable Distribution of Property (3d Ed. 2005) § 6:22, p. 135.

Despite this foundational understanding about the nature and function of retirement benefits, the majority concludes that the retirement benefits at issue in this case do not constitute marital property within the meaning of § 46b-81 because, among other things, they "will never vest" and "may be unilaterally revoked by a third party at any time." According to the majority, the touchstone of the property inquiry is whether "the holder *eventually* will acquire an enforceable right in the interest, that is, whether the interest will likely vest or whether the holder will otherwise acquire a definitive right to it." (Emphasis in original). Part I B of the majority opinion. In my view, the majority's conclusion that an irrevocable, vested, and enforceable legal right is the sine qua non of marital property under § 46b-81 is inconsistent with the fundamental principles underlying *Bender* and its progeny. See *Bender* v. *Bender*, supra, 258 Conn. 753 (rejecting notion that "enforceable contract rights" are "the sine qua non of 'property' under § 46b-81"). In the present case, the evidentiary record discloses that the retirement benefits at issue were unquestionably the fruits of the marital partnership and that the parties' expectation of receiving those benefits as a practical matter was the very opposite of speculative, and certainly was "sufficiently concrete, reasonable

and justifiable as to constitute a presently existing property interest for equitable distribution purposes." Id., 749. I therefore dissent.[2]

The categorization of an interest as marital property under § 46b-81 proceeds in three stages, asking, "first, whether the resource is property within § 46b-81 to be equitably distributed (classification); second, what is the appropriate method for determining the value of the property (valuation); and third, what is the most equitable distribution of the property between the parties (distribution)." (Internal quotation marks omitted.) Id., 740. The present appeal is focused exclusively on the first stage of the analysis, classification, and we must determine whether the retirement payments at issue correctly were classified as falling outside the statutory definition of "property" in § 46b-81. As the majority correctly points out, this is a mixed question of law and fact. See part I A of the majority opinion. We review the facts found by the trial court for clear error, but the ultimate issue of classification is a legal one subject to de novo review. See id.; see also *Reville* v. *Reville*, supra, 312 Conn. 446; *Mickey* v. *Mickey*, supra, 292 Conn. 613. See generally *Crews* v. *Crews*, 295 Conn. 153, 164, 989 A.2d 1060 (2010) ("[w]hen the trial court conducts a legal analysis or considers a mixed question of law and fact, plenary review is appropriate, even in the family law context").

[2] Because the trial court's legal error in categorizing the retirement payments as nonproperty necessarily affects its award of those payments as alimony, I need not address the claim on appeal challenging the trial court's alimony award. See part II of the majority opinion; see also *Tuckman* v. *Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013) ("We previously have characterized the financial orders in dissolution proceedings as resembling a mosaic, in which all the various financial components are carefully interwoven with one another. . . . Accordingly, when an appellate court reverses a trial court judgment based on an improper alimony, property distribution, or child support award, the appellate court's remand typically authorizes the trial court to reconsider all of the financial orders." (Internal quotation marks omitted.)).

"The term 'property' is not defined in § 46b-81 or elsewhere in the [relevant statutory scheme]." *Krafick* v. *Krafick*, supra, 234 Conn. 794. We have held that this term must be construed broadly to effectuate the legislative purpose of the equitable distribution statutes, which "is to recognize that marriage is, among other things, a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—*the fruits of which* are distributable at divorce." (Emphasis in original; internal quotation marks omitted.) Id., 795; see also *Bornemann* v. *Bornemann*, 245 Conn. 508, 515–16, 752 A.2d 978 (1998) ("in enacting § 46b-81, the legislature acted to expand the range of resources subject to the trial court's power of division, and did not intend that property should be given a narrow construction").

Bender and its progeny reject the formalistic legal criteria traditionally used to determine the existence of a property interest. The "legislative purpose [animating § 46b-81] counsels against interpreting the term 'property' so as to be strictly limited to the confines of traditional property law, defined solely by enforceable contract rights, to the exclusion of other interests that . . . are appropriately recognized as property within the marital context." *Bender* v. *Bender*, supra, 258 Conn. 753. As *Bender* makes clear, a "presently enforceable" right to an asset under traditional property or contract principles is "*not* the sine qua non of property under § 46b-81." (Emphasis added; internal quotation marks omitted.) *Mickey* v. *Mickey*, supra, 292 Conn. 625. Although a legally enforceable right may be "*sufficient* for purposes of § 46b-81, [it] is not *necessary*." (Emphasis in original.) Id., 629. The definition of property is expansive and includes "a spectrum of interests that do not fit comfortably into our traditional [property] scheme and yet [are] available in equity for courts to distribute." Id., 625. An "unconventional" or "inchoate"

interest contingent on the happening or nonhappening of future events may constitute distributable property under § 46b-81 if the contingency is not "overly speculative." (Internal quotation marks omitted.) Id.; see, e.g., *Tilsen* v. *Benson*, 347 Conn. 758, 804, 806 n.26, 299 A.3d 1096 (2023) (under *Bender* and its progeny, net distributions historically made by limited partnership to plaintiff were property for purposes of § 46b-81, even though plaintiff had no enforceable right to receive distributions under partnership agreement). An inchoate interest is not overly speculative if, "as a practical matter," a party's expectation of receiving the property "is sufficiently concrete, reasonable and justifiable as to constitute a presently existing property interest for equitable distribution purposes." *Bender* v. *Bender*, supra, 749.

Utilizing this analytical framework, we concluded in *Bender* that "unvested pension benefits are not too speculative to be considered property subject to equitable distribution under § 46b-81." Id. Such benefits properly are categorized as marital property because "employers and employees treat retirement benefits as property in the workplace," and because they "represent a form of deferred compensation for services rendered . . . ." (Citation omitted; internal quotation marks omitted.) Id., 750. "Most retirement plans permit the employee to take a reduction in present salary in exchange for increased future retirement benefits, and employees frequently make use of these provisions. Likewise, employers frequently use lucrative retirement packages in lieu of additional salary to attract and retain desirable employees. If retirement benefits were truly only [a mere expectancy], employers and employees would not treat them as a substitute for present wages." (Internal quotation marks omitted.) Id., 750–51. Retirement benefits, regardless of funding source and vesting status, "represent a trade-off for potentially higher wages not

earned during the marriage; they often represent . . . the only or principal material asset; and . . . they represent the fruits of the marital partnership in practical and emotional ways . . . .'' Id., 754. For this reason, ''any uncertainty regarding vesting is more appropriately handled in the valuation and distribution stages, rather than in the classification stage.'' Id., 749–50.

In arriving at our holding in *Bender*, we noted that ''our conclusion is also consistent with the majority of other appellate courts that have addressed this issue.'' Id., 751 n.8; see id. (citing cases). Indeed, my research reveals that, ''[e]xcept for Indiana[3] and Arkansas,[4] all American jurisdictions now treat both vested and unvested pensions as property.'' (Emphasis omitted; footnotes altered.) 2 B. Turner, supra, § 6:22, pp. 137–39. The overwhelming majority of states recognize that retirement benefits acquired during marriage constitute marital property, regardless of funding structure or vesting status, because ''employees frequently decide to [forgo] present salary in exchange for future retirement benefits. Salary earned during the marriage, of course, is marital property. If pensions do not constitute property, then spouses who own [retirement benefits] would have a powerful incentive to exchange marital property salary for separate property [retirement benefit] rights. The result would work substantial prejudice on [nonowning] spouses, as the courts would essentially be forced to tolerate dissipation of the marital estate. As long as the workplace continues to permit and even

[3] In Indiana, property is defined by statute in relevant part as ''a present right to withdraw pension or retirement benefits'' or ''the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested (as defined in Section 411 of the Internal Revenue Code) but that are payable after the dissolution of marriage . . . .'' Ind. Code Ann. § 31-9-2-98 (b) (1) and (2) (LexisNexis 2019).

[4] See, e.g., *Pelts* v. *Pelts*, 514 S.W.3d 455, 457 (Ark. 2017) (retirement benefit ''contingent on continued employment is too speculative to be vested and subject to division'').

favor exchanges of salary for retirement benefits, there are substantial practical problems in treating only one side of the exchange (salary) as marital property." (Emphasis omitted.) Id., pp. 133–34.

Despite the foregoing authority, the majority relies on *Mickey* v. *Mickey*, supra, 292 Conn. 597, to conclude that the heart of the property inquiry is not whether retirement benefits should be available for distribution by trial courts in accordance with the equitable circumstances prevailing in any particular case but, rather, whether the holder of the benefit has or will "[obtain] an enforceable right in the interest." Part I B of the majority opinion. The majority retreats from the "nuanced approach" that we adopted in *Bender* and returns to a "traditional, fairly rigid" definition of property; *Mickey* v. *Mickey*, supra, 625; concluding that the focus of the property inquiry "is on the likelihood that the holder *eventually* will acquire an enforceable [legal] right in the interest, that is, whether the interest will likely vest or whether the holder will otherwise acquire a definitive right to it." (Emphasis in original.) Part I B of the majority opinion. The majority's conclusion is inconsistent with *Mickey* and our subsequent case law.

Mickey did not involve retirement benefits accrued during a marriage, which generally satisfy the statutory definition of property. Indeed, in *Mickey*, we explicitly reaffirmed the abiding principle that "deferred compensation" earned during a marriage "assumes the qualities of an asset" and, therefore, "is distributable as marital property." *Mickey* v. *Mickey*, supra, 292 Conn. 632. Instead, the issue on appeal in *Mickey* was whether disability benefits resulting from injuries sustained after the end of a marriage satisfy the statutory definition of property. Id., 599. We held that "*disability* benefits awarded under General Statutes § 5-192p as a result of a disability incurred *after* a marriage has been dissolved [do not] constitute distributable marital property under

. . . § 46b-81." (Emphasis added; footnote omitted.) Id.; see id., 600. Our reasoning was twofold. First, disability benefits for an injury that occurred after the end of a marriage, unlike retirement benefits acquired during the life of a marriage, are too speculative at the time of the dissolution to constitute distributable marital property under § 46b-81. We reasoned that "[a] potential disability is, by its very nature, an accidental event that every employee and employer strives to avoid. It is difficult to perceive how a property interest tied to such an occurrence is sufficiently concrete, reasonable and justifiable . . . to treat any benefits that *might* accrue, *if* the accident eventually occurs *and* is serious enough to cause permanent disability, as a presently existing property interest eligible for equitable distribution at the time of dissolution." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 630. Second, "[a] benefit derived from an injury occurring years after dissolution, meant solely to compensate for the loss of future wages, simply does not represent the fruits of the marital partnership that § 46b-81 is designed to equitably parse." (Internal quotation marks omitted.) Id., 631. Thus, we concluded that postdissolution disability benefits are not fruits of the marriage and do not constitute property. Nothing in *Mickey* requires deferred compensation acquired during the marriage to be or to eventually become vested or irrevocable.

The majority's conclusion also is inconsistent with our recent decision in *Tilsen* v. *Benson*, supra, 347 Conn. 758, in which we held that discretionary distributions from a family limited partnership constitute divisible marital property, even when there is no enforceable or definitive right to receive those distributions. See id., 804–807. The plaintiff in *Tilsen*, Jon-Jay Tilsen, was a limited partner in a family partnership that historically had made annual distributions to its partners, including

Tilsen, but Tilsen had no role in the management of the business and no enforceable right to receive the discretionary distributions. See id., 764, 795, 804–805. We nonetheless determined that the distributions were property subject to equitable distribution under § 46b-81 in light of the trial court's "unchallenged findings that the parties have regularly received the . . . distributions since 1997 and have relied on them as part of their budget, particularly as a source of retirement savings." Id., 806 n.26. The distributions were a marital asset, and Tilsen's "interest in the . . . distributions [was], 'as a practical matter . . . sufficiently concrete, reasonable and justifiable as to constitute a presently existing property interest for equitable distribution purposes.' " Id.; see also id. (quoting *Bender* v. *Bender*, supra, 258 Conn. 749, and citing to *Mickey* v. *Mickey*, supra, 292 Conn. 628, among other cases, in support of this holding).[5] Our holding in *Tilsen* is consistent with

[5] The majority incorrectly characterizes this aspect of *Tilsen* as dictum and incorrectly states that I "[gloss] over the fact that this court never determined that the interest at issue in *Tilsen* was property." Part I C of the majority opinion. Our analysis of whether the discretionary distributions constituted property was not dictum. "Dictum includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case. . . . [I]t is not dictum [however] when a court . . . intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy . . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Internal quotation marks omitted.) *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009). In *Tilsen*, we intentionally took up, discussed, and decided an issue germane to the case. Notably, the parties in *Tilsen* did *not* stipulate that the discretionary distributions satisfied the statutory definition of property in § 46b-81. To the contrary, Tilsen argued on appeal that the trial court improperly had categorized the distributions as property, and this court rejected that claim on the merits. See *Tilsen* v. *Benson*, supra, 347 Conn. 806 n.26. The parties stipulated that " 'the court shall have the right to make a determination as to what portion/percentage of such [partnership] distributions the [wife] is entitled.' " Id., 805. This stipulation recognized that the trial court had the authority to distribute the partnership distributions as part of its financial orders; it did not provide that those distributions were distributable as *property* (as opposed to alimony).

"the theme running through this area of our jurisprudence, which . . . pays mindful consideration to the equitable purpose of our statutory distribution scheme, rather than to mechanically applied rules of property law. In order to achieve justice, equity looks to substance, and not to mere form." *Bender* v. *Bender*, supra, 751. The focus of the property analysis is not on eventual vesting per se; it is on the practical likelihood that the asset will be received and the nature of the asset in the context of the marital partnership.

Looking to the nature of the retirement payments at issue in this case, as our case law instructs, it is clear to me that they are a direct product of the parties' thirty-year marriage subject to equitable distribution under § 46b-81. The defendant, D. S., worked as a partner for her employer, a large international law firm, for twenty-three years prior to the dissolution of her marriage to the plaintiff, D. S. See footnote 6 of this opinion. The parties were married during all of those twenty-three years, and the retirement payments are deferred compensation for services rendered by the defendant while married. As such, the retirement payments plainly constitute the fruits of the parties' marital partnership. The fact that the retirement payments are unvested, noncontributory, and unfunded has no bearing on their inherent nature as marital assets because, regardless of the funding mechanism used to pay the benefits, they represent a trade-off of one type of marital property (current salary) in exchange for another type of marital property (future retirement benefits). See, e.g., *Mickey* v. *Mickey*, supra, 292 Conn. 632; *Bender* v. *Bender*, supra, 258 Conn. 754; *Krafick* v. *Krafick*, supra, 234 Conn. 794–95. To categorize the retirement payments as anything other than a divisible marital asset "would be to blink our eyes at reality." *Bender* v. *Bender*, supra, 752.

The record also establishes beyond any doubt that the defendant's expected receipt of the retirement pay-

ments is not overly speculative. Contrary to the majority's suggestion, my assessment in this regard is not based on my disagreement with the trial court about the evidentiary facts. See part I C of the majority opinion. The facts are the facts, and, in my estimation, there simply is no factual basis to support the trial court's conclusion that the defendant is unlikely to receive retirement benefits from her employer when she retires. All of the evidence indicates that she almost certainly will receive those benefits. As the author of a leading treatise on family law, Brett R. Turner, observes, the Appellate Court's decision in this case "reached the wrong result. [Although] the amount of benefits likely to be received was difficult to predict in advance, there was no evidence suggesting that the [defendant] was likely to receive nothing." 2 B. Turner, Equitable Distribution of Property (4th Ed. 2024) § 6:22; see *D. S.* v. *D. S.*, 217 Conn. App. 530, 536–45, 289 A.3d 236 (2023).

First, the defendant *currently* is eligible to receive these payments under the *existing* partnership agreement. At the time of trial, the defendant testified that she was "currently eligible for [the retirement] benefits" and that, if she were to retire today, she "would be entitled to payments under the [firm's] partnership agreement . . . ." Although the retirement benefits do not mature until after the defendant retires, her retirement is anything but a speculative, distant, and unforeseeable event. To the contrary, the defendant, who was fifty-seven years old at the time of trial, testified that the average retirement age at the firm was sixty and that she planned to retire by age sixty-two "[a]t the latest . . . ." The amount of the benefits at issue, moreover, is anything but trivial; in 2016—when its profits per partner were significantly less than they were at the time of trial—the firm projected that, if the defendant retired in 2025, her retirement payments would be $1,458,000 annually.

Second, the record demonstrates that the defendant's law firm has never once failed to make retirement payments to an eligible retired partner. Past performance may not guarantee future results, but the firm's decades long record of consistent performance, without exception, strongly indicates that the benefits are not "overly speculative" from the perspective of a soon to be retired senior partner such as the defendant. *Mickey* v. *Mickey*, supra, 292 Conn. 625; see *Tilsen* v. *Benson*, supra, 347 Conn. 806 n.26 (discretionary distributions from limited partnership were property subject to equitable distribution under § 46b-81 due to trial court's "unchallenged findings that the parties have regularly received the . . . distributions since 1997 and have relied on them as part of their budget, particularly as a source of retirement savings"). The realistic expectation of the receipt of the retirement payments was supported not only by the firm's past performance but also by its projected future earnings. There was no evidence presented at trial that the firm faced any realistic prospect of financial distress or insolvency in the foreseeable future. Quite the opposite is true; the firm historically is one of the most successful and prosperous law firms in the world, and the evidence at trial established that it was enjoying a period of increased profitability.[6] On this record, there is no reason to believe that the firm would have been unable to fund payments to retired partners.

[6] The parties agreed to various sealing orders in the trial court "on the basis that revealing certain information would be detrimental to one or more of the parties." *D. S.* v. *D. S.*, supra, 217 Conn. App. 532 n.1. The Appellate Court amended those sealing orders but, "in the spirit of the trial court orders and the parties' reliance on them, [did] not, in [its] opinion, refer to either party or their children by name . . . [or] identify any of the parties' past or present employers." Id., 532–33 n.1. The majority opinion follows suit, and I will not upset this arrangement by identifying the defendant's employer by name. I will observe, however, that the firm is among the most profitable law firms in the world, and anyone learning the identity of the defendant's employer would be shocked to hear that Connecticut courts have questioned the firm's financial future.

Third, the pool of funds from which the retirement payments are made each year is capped at 30 percent of the firm's net profits, and the payment to each retired partner is capped at a specified percentage to further ensure that the ratio between the total retirement payments and the firm's net income is sustainable. These caps do not portend the cessation of the retirement payments; again, just the opposite is true. The caps are designed to ensure the *continued* fiscal health of the retirement program. As the evidence at trial demonstrated, in 2016, the firm presented a written report to the partnership, stating that it expected the caps to continue to maintain the fiscal stability of the firm over the next twenty-five years. The 2016 report, which the defendant herself presented to the partnership, expressly was intended to inform the partners what to expect of the firm's retirement plan over the next twenty-five years in light of the changes that had occurred over the past twenty-five years (primarily the firm's increased profitability and increased ratio of retired partners to active partners). "What does it mean for the [f]irm" and for "individual partners" over the next twenty-five years, asked the report. Its answer to the question was direct and unequivocal: "The cap will do what it is meant to do to avoid destabilizing the [f]irm." To ensure fiscal stability, the report warned that, "[o]ver the next [twenty-five] years, the [retirement] benefit cutback could be as much as 50 [percent] for partners with 10 [percent] caps." The report forecast a reduction in the amount of the retirement payments—it contains no suggestion, express or implied, that the retirement payments will be eliminated over the next twenty-five years.

Fourth, although it is true that the partnership agreement theoretically *could* be amended at some point in the future to terminate the firm's obligation to pay the retirement benefits altogether, the occurrence of such an amendment is pure speculation. There was no evidence

that the partners ever have considered amending the partnership agreement to terminate the retirement payments, and it would not be easy to do so. Termination of the retirement payments would require a supermajority vote of at least three quarters of the partners having at least 75 percent of the points held by the equity partners. In the absence of any evidence indicating a realistic probability that a supermajority of the partners would coalesce to implement such a drastic and unprecedented change, the risk that these payments would be terminated rests on hypothetical conjecture without basis in fact.

To support its conclusion to the contrary, the majority relies heavily on the testimony of the defendant's expert witness, Mark Harrison. This reliance is misplaced because Harrison's opinion was based on nothing more than theoretical possibilities without any case-specific evidentiary support. Harrison read or paraphrased portions of the partnership agreement to the court and then speculated, with no factual basis, about possible future scenarios that may or may not one day occur. Harrison opined, for example, that the defendant's receipt of the retirement payments was speculative because the firm might one day become insolvent. However, this opinion had nothing to do with the firm's actual financial condition—Harrison acknowledged that he did not have access to the firm's financial records. Instead, his opinion was based solely on the fact that "twenty-two firms of almost [the same] size have disbanded or gone bankrupt since the financial crisis in 2007." After making this observation, Harrison was quick to add that "this is a wonderful firm. I don't want to make it sound like it's not. [It has] been around for a long time, and [it is] as top-shelf as they come." Understood in context, it is apparent that Harrison's opinion testimony was not based on any analysis regarding the probability that this specific firm was at risk of insolvency or bankruptcy but, instead, on the possibility

that a generic firm of a similar size might one day go out of business.[7] Such hypothetical scenarios and theoretical possibilities fail to apply the proper analysis under *Bender* and its progeny.

Although Harrison characterized the retirement payments as "the epitome of a mere expectancy," this testimony was entitled to no weight. Whether the defendant's interest in the retirement payments was a mere expectancy or sufficiently concrete, reasonable, and justifiable to constitute distributable property under § 46b-81 was the ultimate legal issue to be decided by the trial court, not a factual issue on which an expert witness may opine. See, e.g., *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 652 n.30, 850 A.2d 145 (2004) (agreeing that expert testimony "amounted to an improper legal opinion on the ultimate issue in the case"); *Kelly* v. *Waterbury*, 96 Conn. 494, 499–501, 114 A. 530 (1921) (expert witness was not permitted to testify as to ultimate legal issue of defendant's negligence); *Fuller* v. *Metropolitan Life Ins. Co.*, 70 Conn. 647, 677, 41 A. 4 (1898) (expert testimony on "[t]he meaning and legal effect of the [insurance] policy" was inadmissible because that issue "was a question of law for the court"); 1 R. Mosteller et al., McCormick on Evidence (8th Ed. 2020) § 16, p. 168–69 ("at common law courts do not allow opinion on a question of law, unless the issue concerns foreign law" (footnote omitted)). To the extent that Harrison's opinion may be characterized as one of fact, it was devoid of the requisite case-specific evidentiary support. See, e.g., *Commissioner of Transportation* v. *Larobina*, 92 Conn.

[7] The majority seizes on Harrison's groundless conjectural musings about a financial collapse of the firm, but this aspect of Harrison's opinion has no value, and it would be clearly erroneous for a judge to rely on it in the present case without first learning much more about the past and present financial condition of the firm, as well as the various indicators of future performance used in the law firm industry, none of which was known to Harrison by his own admission.

App. 15, 26, 882 A.2d 1265 ("[n]o weight may be accorded to an expert opinion [that] is totally conclusory in nature and [that] is unsupported by any discernible, factually based chain of underlying reasoning" (internal quotation marks omitted)), cert. denied, 276 Conn. 931, 889 A.2d 816 (2005); see also footnote 7 of this opinion. Harrison's expert testimony simply does not provide a basis to deem the likelihood of the defendant's receipt of the retirement payments overly speculative.[8]

To put the point directly, there is not a shred of factual evidence in this record to support a finding that there is a realistic possibility, much less a likelihood, that the defendant will be divested at any time in the foreseeable future of her current contractual right to receive the retirement payments. There is evidence to support a finding that her payments will be reduced between now and 2040 by as much as 50 percent, but, even with that reduction, her annual payments will approach $750,000 based on the firm's own projection.

In sum, the majority's legal determination that the retirement payments do not constitute marital property, as defined by § 46b-81, is unsupported by the factual record, inconsistent with our case law, and contrary to the legislature's intent "to expand the range of resources subject to the trial court's power of division . . . ."

[8] I acknowledge that the retirement payments may be difficult, if not impossible, to value. Indeed, the trial court found that the value of the retirement payments could not be quantified at the time of trial and, therefore, was "a mere expectancy." As we explained in *Bender*, however, difficulties in valuation do not defeat the categorization of a marital resource as property under § 46b-81. See *Bender* v. *Bender*, supra, 258 Conn. 749–50 and n.7. For example, the trial court may account for the difficulties in valuation by awarding a percentage of the retirement payments instead of a lump sum or by distributing a portion of the retirement payments as alimony in lieu of property. See footnote 9 of this opinion. There are many tools at the trial court's disposal, but excluding the retirement payments entirely from the pool of marital assets subject to equitable division under § 46b-81 is not one of them.

(Internal quotation marks omitted.) *Bender* v. *Bender*, supra, 258 Conn. 743. The majority's return to a traditional, rigid definition of property in § 46b-81—"defined solely by enforceable contract rights, to the exclusion of other interests that . . . are appropriately recognized as property within the marital context"—upsets settled precedent and is contrary to the legislative purpose animating our statutory scheme. Id., 753; see *Mickey* v. *Mickey*, supra, 292 Conn. 625. As Turner stated in his learned treatise, the rule adopted by the majority "poses a significant potential threat to the policy that retirement benefits earned during the marriage are marital property." 2 B. Turner, Equitable Distribution of Property (4th Ed. 2024) § 6:22. On the present factual record, the retirement payments plainly constitute marital property under § 46b-81, and, therefore, I would reverse the judgment of the Appellate Court upholding the decision of the trial court and remand for the entry of new financial orders.[9]

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[9] I recognize that the trial court could have exercised its discretion to award a percentage of the retirement payments as alimony in lieu of property. See General Statutes § 46b-82 (a) ("[a]t the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or *in lieu of* an award pursuant to section 46b-81" (emphasis added)). To properly exercise its discretion, however, the trial court first must correctly categorize the retirement payments as property under § 46b-81. As we explained in *Krafick* v. *Krafick*, supra, 234 Conn. 783, "[§] 46b-81 requires a trial court to make an equitable distribution of the parties' *property*; to go about doing so sensibly, a court must determine at the outset which of the parties' resources are subject to division and assignment under that provision. Although § 46b-82 authorizes the trial court to award alimony 'in addition to or *in lieu of* [a distribution of property] pursuant to section 46b-81' . . . the trial court may decide to exchange alimony for property only *after* determining the value of the property in the estate." (Emphasis in original.) Id., 798 n.22.

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COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* DANCE RIGHT, LLC, ET AL.
(AC 46950)

Bright, C. J., and Suarez and Clark, Js.

Syllabus

The plaintiff appealed from the trial court's order remanding its administrative appeal from the decision of its human rights referee, which concluded that the defendant employer had discriminated against its former employee, M, on the basis of her disability but that M failed to establish that she had been constructively discharged. The plaintiff claimed, inter alia, that the court erred by remanding the matter to the referee without sustaining the appeal. *Held*:

The trial court erred in remanding the matter to the referee for an amended decision while retaining jurisdiction over the appeal because, pursuant to statute (§ 4-183), there was no legal basis for the remand, as there was no ambiguity in the referee's decision that required a clarification or an articulation.

The trial court should have dismissed the appeal because there was substantial evidence in the record to support the referee's finding that M failed to prove that she was constructively discharged.

Argued October 16, 2024—officially released January 7, 2025

Procedural History

Appeal from the decision of a human rights referee for the plaintiff concluding that the named defendant discriminated against the complainant Amber Frazier Manning but that the complainant Amber Frazier Manning failed to establish that she had been constructively discharged, brought to the Superior Court in the judicial

district of New Britain, where the court, *Hon. Henry S. Cohn*, judge trial referee, remanded the matter to the human rights referee for the plaintiff, from which the plaintiff appealed and the named defendant cross appealed; thereafter, the named defendant withdrew its cross appeal. *Reversed*; *judgment directed.*

Michael E. Roberts, human rights attorney, for the appellant (plaintiff).

Kristi D. Kelly, for the appellee (named defendant).

Opinion

CLARK, J. The plaintiff, the Commission on Human Rights and Opportunities (commission), appeals from the order of the trial court remanding its administrative appeal from the decision of the commission's human rights referee (referee).[1] In the administrative proceedings before the commission, the referee found that the defendant Dance Right, LLC (Dance Right), discriminated against the complainant, Amber Frazier Manning, on the basis of her disability by failing to provide her with a reasonable accommodation, but that the complainant failed to establish that she had been constructively discharged.[2] In the commission's administrative appeal, the trial court, following oral argument, issued an order (remand order) in which it determined that the referee's findings with respect to the reasonable accommodation claim conflicted with the finding that

[1] "Due to unusual procedures applicable to proceedings before the commission, in this administrative appeal, the commission is named as both a plaintiff (in its own capacity) and as a defendant (in its capacity as the agency under which the commission's human rights referee issued the decision from which the commission appealed). See General Statutes § 46a-94a." *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 157 n.1, 140 A.3d 190 (2016).

[2] The complainant, who was also named as a defendant, did not file an appearance or otherwise participate in the proceedings before the Superior Court and likewise has not participated in this appeal.

Dance Right did not constructively discharge the complainant and remanded the matter to the referee to issue an amended opinion addressing that conflict. On appeal, the commission claims that the trial court erred by (1) remanding the matter to the referee without sustaining the appeal, and (2) failing to conclude that Dance Right's failure to provide the complainant with a reasonable accommodation established, as a matter of law, that the complainant was constructively discharged.[3] We agree that the trial court's remand order was improper, but conclude that substantial evidence supported the referee's finding that the complainant was not constructively discharged. Accordingly, we reverse the judgment of the trial court and remand the case with direction to dismiss the commission's appeal.

The following facts, as found by the referee or as otherwise undisputed in the record, and procedural history are relevant to our resolution of this appeal. In or around March, 2014, the complainant was sexually assaulted while volunteering at an anime convention. At the time of the assault, the complainant was employed as an assistant manager at Brookstone in the Westfarms Mall in Farmington. Following the assault, the complainant had difficulty maintaining her performance at work and was terminated from her position in April, 2014. In August, 2014, the complainant was diagnosed with post-traumatic stress disorder (PTSD) as a result of the sexual assault. Shortly thereafter, the complainant began working at the jewelry counter at Sears. During her training, however, the complainant became concerned that it would be difficult to remove herself from her assigned post in the event of a panic attack or other

[3] The commission also claims that the referee improperly found that the complainant failed to mitigate her damages. As the commission concedes, we need not address that claim if we conclude, as we do in this opinion, that substantial evidence supported the referee's finding that the complainant was not constructively discharged.

PTSD related episode. In addition, during this time the complainant started experiencing worsening PTSD related symptoms, including panic attacks, loss of appetite, and insomnia. As a result, the complainant left her position with Sears.

Dance Right is a dance studio and franchise of Arthur Murray International. At all times relevant to this case, Dance Right was co-owned by Jonathan Stangel and Jessica Megargle, with Camilla Cazagrande serving as manager. In the fall of 2014, the complainant learned from Cazagrande, who was a friend of hers, that Dance Right was looking for an administrative assistant. On October 24, 2014, the complainant applied for the administrative assistant position and was hired on the same day. On her employment application, in response to a question asking whether she had any condition that might limit her ability to perform the duties of the position, the complainant disclosed her PTSD diagnosis. The complainant was initially hired on a trial basis at a rate of $10.50 per hour. On December 15, 2014, Dance Right agreed to make the complainant a salaried employee and increased her pay to an hourly equivalent of $12.50 per hour.

Dance Right maintained a handbook of policies and procedures primarily directed toward its dance instructors. The only policy in the handbook regarding sexual harassment stated in full: "Under no circumstances will sexually inappropriate behavior or comments be tolerated. Unnecessary actions of this nature will be dealt with in a manner appropriate to state and federal guidelines. If you have encountered sexual harassment, you are required to fill out a written complaint with management immediately so we may protect you." Dance Right did not maintain any written policy regarding disability discrimination or procedures for requesting reasonable accommodations.

As the administrative assistant, the complainant's job duties included, among other things, staffing the reception desk, answering and returning phone calls, confirming client appointments, tracking lessons, and speaking with clients in person and over the phone to ensure their accounts were up to date. One student, Ross White, often would call to ask questions about his lessons and instructors, sometimes calling more than one dozen times in a single day. When at the studio for his lessons, White would hang out near the reception desk, tell the complainant that she was "beautiful" or "wonderful," and, at times, would stare at her. White, along with other students, also occasionally brought candy, flowers, or dessert foods for the staff members at Dance Right, including the complainant. The complainant told Megargle that White's behavior made her uncomfortable and was having an effect on her PTSD. Megargle told the complainant that she should continue to be polite in her interactions with White and that she should be gracious and accept his gifts. The complainant also told Cazagrande about White's conduct and the effect it was having on her PTSD. In response, Cazagrande told the complainant that White previously had acted inappropriately while Cazagrande was his dance instructor, including an incident in which he unsnapped her bra while dancing. Cazagrande also told the complainant that, after she reported White's behavior, White was reassigned to a different instructor.

On January 17, 2015, Dance Right hosted an evening dance showcase at the Sheraton Hotel in Windsor Locks. At some point during the showcase, one of Dance Right's instructors, Raelynn Hall, reported to Megargle that while she was dancing with White, he grabbed her buttocks while performing a "dip" move. Megargle verbally reprimanded White that evening, and White left the event immediately thereafter. The complainant did not witness the incident, but Hall told her about it

later that evening. Hearing about the incident triggered the complainant's PTSD symptoms, causing her to experience anxiety, loss of appetite, and insomnia. Approximately one week after the event, the complainant told Megargle that White's conduct had triggered her PTSD symptoms and asked what action would be taken in response to the incident. Megargle told the complainant that she had reprimanded White at the event and did not think any further action was necessary, but that White might be asked to leave the studio if he continued engaging in inappropriate conduct. The complainant asked Megargle to provide her with any policies that Dance Right maintained regarding sexual harassment, but no such policy was ever provided.

On February 24, 2015, the complainant was working at the front desk while Hall and another instructor were giving a group dance lesson. Hall approached the complainant and told her that White had just groped her again. Hall told the complainant that, during the lesson, White ran his hand up her side to her breast and then down to the small of her back and her buttocks in a manner that was not appropriate for the dance moves being taught. The complainant did not witness the incident but reported it to Cazagrande, who said she would discuss it with Megargle. Later that evening, the complainant reported the incident to Megargle, who told the complainant that Dance Right would look into the incident and that they had to consider both sides before taking action. In addition, Hall, Cazagrande, and another instructor, Mary Jaqueline Kirchoff, called Stangel to notify him of the incident. Upon learning of the allegations, Stangel commenced an investigation by speaking with Kirchoff, Hall, Cazagrande, and the complainant.

Following the incident, the complainant's PTSD symptoms worsened. She felt that Dance Right was an unsafe environment and feared that she would be exposed to inappropriate sexual conduct without the

company taking any action. The complainant discussed the incident and the effect it had on her PTSD with Megargle and Stangel and requested that Dance Right accommodate her by removing White as a student. Stangel told the complainant that he understood her concerns but that he needed more information before summarily removing White from the studio. Stangel and Megargle offered to adjust the complainant's schedule so she could avoid working during White's lessons.[4] On or around February 26, 2015, Dance Right changed the complainant's pay structure from salary to hourly and reduced her pay to $12 per hour.

During the two weeks following the February 24, 2015 incident, the complainant asked Megargle on multiple occasions for an update on the status of the investigation. The complainant told Megargle that the situation was causing her anxiety and that she would have to resign if White was not asked to leave the studio. Megargle told the complainant that they were still investigating the incident. Megargle testified that, following the February 24, 2015 incident, White did not return to the studio for another lesson until March 10, 2015, and that she spoke with White about the incident that day. Megargle further testified that, after speaking with White, she had to confer with Stangel about what action should be taken regarding the incident.

On March 13, 2015, the complainant wrote a resignation letter to Megargle stating: "I am sorry I have to do this, but I feel I have no other choice. I am leaving [Dance Right] . . . because I feel it is an unsafe work

[4] The referee found that Dance Right's offer to accommodate the complainant by adjusting her schedule "would have resulted in a further loss of pay . . . ." The complainant, however, testified that she "never got any [answer]" about whether adjusting her schedule would affect her pay, and Stangel testified that it was not his intention that the complainant's pay would be reduced if she adjusted her schedule.

environment and a hostile one. I would not expect anyone to tolerate assault of any kind, especially in the workplace. It sickens and saddens me that it is not dealt with quickly and decisively here at [Dance Right]." Megargle received the complainant's resignation letter the following day, on March 14, 2015. Pursuant to a letter agreement dated March 17, 2015, Dance Right suspended White's lessons effective March 30, 2015, due to "two recent complaints [from] staff of inappropriate behavior."

On September 8, 2015, the complainant filed a complaint with the commission, alleging that Dance Right discriminated against her on the basis of her PTSD, in violation of General Statutes (Rev. to 2015) § 46a-60 (a) (1),[5] by failing to provide a reasonable accommodation and constructively discharging her. The commission investigated the complaint and, upon finding reasonable cause that a discriminatory practice occurred and that conciliatory efforts had failed, held a contested case hearing pursuant to General Statutes § 46a-84. The hearing was held over the course of five days in November, 2018, after which the parties submitted posthearing briefs.

On June 30, 2022, the referee issued a memorandum of decision. The referee first concluded that Dance

[5] General Statutes (Rev. to 2015) § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (1) [f]or an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need . . . to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . present or past history of mental disability . . . or physical disability . . . ."

The complaint initially alleged discrimination on the basis of a physical disability, but subsequently was amended to add an allegation of discrimination on the basis of a mental disability. The complaint also alleged that Dance Right violated General Statutes § 46a-58 (a), on the basis of a deprivation of rights under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., but that claim was abandoned following the hearing.

Right failed to provide the complainant with a reasonable accommodation. The referee found that the complainant had requested that Dance Right remove White as a student and provide a sexual harassment policy and that "[t]here is no evidence that [Dance Right] seriously considered whether the complainant's proposed accommodations would impose an undue hardship in the particular circumstances of [Dance Right's] studio workplace or would involve significant difficulties or expense." The referee found that Dance Right "established that . . . it was investigating the incident before taking any action to remove White as a customer and was moving forward with that investigation." The referee further found, however, that Dance Right "delayed addressing the complainant's requested accommodations while it [conducted the investigation]" and "did not articulate any reason for not engaging more directly in the interactive process with the complainant in the interim,[6] at a minimum providing the complainant with a requested sexual harassment policy or ameliorating the effect that [White's] presence was having on her PTSD condition." (Footnote added.) The referee also found that, although Dance Right proposed allowing the complainant to flex her schedule to avoid working while White was present, "there was no clarity in how the proposed alternative would work in light of the proposed terms, including a further wage reduction, or how such accommodation would have addressed [the complainant's] underlying concerns."

[6] "Once a disabled individual has suggested to his employer a reasonable accommodation, [the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq.] requires . . . that the employer and the employee engage in an informal, interactive process with the qualified individual with a disability in need of the accommodation . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. . . . In this effort, the employee must come forward with some suggestion of accommodation, and the employer must make a good faith effort to participate in that discussion." (Citation omitted; internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 416, 944 A.2d 925 (2008).

The referee further concluded, however, that the complainant failed to prove that she had been constructively discharged. The referee found that, "although [Dance Right] was aware that the complainant's PTSD was being triggered, and [was] aware of accommodations [that] she requested, there is no evidence that the respondent intentionally created the complained of work atmosphere." The referee further explained that "[a] claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign" and found that "[n]o such evidence has been presented here." (Internal quotation marks omitted.) On the basis of those findings, the referee determined that "[t]he complainant failed to establish a prima facie case of constructive discharge by showing that [Dance Right] intentionally created the complained of work atmosphere, and that the work atmosphere was so difficult or unpleasant that a reasonable person in the complainant's shoes would have felt compelled to resign."

On the basis of the determination that Dance Right had not constructively discharged the complainant, the referee found that the complainant voluntary resigned and, therefore, was not entitled to back pay.[7] The referee ordered Dance Right to "cease and desist from all acts of discrimination prohibited under federal and

[7] Alternatively, the referee found that, even if the complainant had been constructively discharged, she "affirmatively chose not to seek or apply for new employment in mitigation of her potential damages." Specifically, the referee found that, following her resignation, the complainant did not seek new employment or apply for unemployment compensation because she and her husband had "resolved that he would support them both financially through his job while she would work to maintain the household." As noted previously; see footnote 3 of this opinion; although the commission challenged the referee's determination that the complainant failed to mitigate her damages, we need not address that issue in light of our conclusion that there was substantial evidence to support the referee's finding that the complainant was not constructively discharged.

state law" and to post certain notices provided by the commission, but declined to award the complainant back pay damages.

On August 8, 2022, the commission timely appealed the referee's decision to the Superior Court. In its brief to the Superior Court, the commission claimed that the referee's determination that the complainant had not been constructively discharged conflicted with her conclusion that Dance Right had failed to provide the complainant with a reasonable accommodation. Specifically, the commission contended that the referee's conclusion that Dance Right failed to provide the complainant with a reasonable accommodation, and the factual findings underlying that conclusion, established as a matter of law that Dance Right constructively discharged the complainant. Dance Right argued that the court should dismiss the appeal because the evidence in the record supported the referee's finding that there was no constructive discharge.

On September 11, 2023, following briefing and oral argument, the court issued the remand order, in which it found "that there [was] a conflict between the referee's findings of fact and the referee's conclusion that there was no objective ground for a finding of constructive discharge or awarding of damages therefor." Quoting paragraph 93 of the referee's findings of fact (finding 93), the court further stated: "To illustrate, the referee found that '[Dance Right] was aware that the situation [following the February 25, 2015 incident] was causing the complainant anxiety, to the point where if no action was taken, the complainant would have no choice but to leave.' " Nevertheless, the court did not sustain the appeal but, rather, remanded the matter to the referee "for an amended opinion on this point and consideration of damages, if appropriate."

On September 13, 2023, the commission moved for reconsideration of the remand order. The commission

argued that, in finding that there was a "conflict" between the referee's factual findings regarding the reasonable accommodation claim and the determination that the complainant had not been constructively discharged, the court had agreed with "the crux of the . . . [c]ommission's claim of error on the issue of constructive discharge." The commission further contended that this "conflict" was not an ambiguity that required clarification but, rather, was a legal error that required the court to sustain the appeal. On September 21, 2023, the court issued an order denying the motion for reconsideration, which stated that the remand order had directed the referee "to clarify whether [the complainant] was constructively discharged when Dance Right failed to accommodate her . . . [and] to award her damages if appropriate" and that "[s]uch . . . clarification may be appealed subsequently to the court as part of the already pending administrative appeal." This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The commission first claims that the court erred in remanding the matter to the referee for an amended decision while retaining jurisdiction over the appeal.[8]

[8] On March 5, 2024, this court, sua sponte, ordered the parties to address in their briefs whether the remand order was an appealable final judgment because it was "a remand authorized by General Statutes § 4-183 (j)" or "an otherwise interlocutory order that satisfies the test for finality articulated in *State* v. *Curcio*, 191 Conn. 27, 31 [463 A.2d 566] (1983)," or, alternatively, "whether [the] appeal must be dismissed for lack of a final judgment." We conclude that the court's remand order is immediately appealable under the second prong of the finality test set forth in *State* v. *Curcio*, supra, 31, because it "so concludes the rights of the parties that further proceedings cannot affect them."

As the commission argues in its brief, the commission had a statutory right to obtain judicial review of the final decision of the referee. See General Statutes § 46a-94a (a) (providing right to appeal referee's decision "in accordance with [§] 4-183"). As we discuss subsequently in this opinion, the remand order, as supplemented by the order denying the motion for reconsideration, required the referee to issue an amended decision that, at a mini-

The commission contends that, because there was no ambiguity in the referee's decision that required a clarification or articulation, there was no basis for the court to remand the matter to the referee while retaining jurisdiction over the appeal. We agree.

We begin by setting forth the standard of review and legal principles applicable to this claim. The commission's claim that the court lacked the authority to issue the remand order is a question of law subject to plenary review. See, e.g., *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 239–40, 796 A.2d 1164 (2002) ("Whether the trial court had the power to issue [an] order, as distinct from the question of whether the trial court properly exercised that power, is a question involving the scope of the trial court's inherent powers and, as such, is a question of law. . . . Accordingly, our review is plenary." (Citation omitted.)). Likewise, "[t]o the extent the present claim requires us to interpret the trial court's order . . . our review is also plenary." *Glory Chapel International Cathedral* v. *Philadelphia Indemnity Ins. Co.*, 224 Conn. App. 501, 512, 313 A.3d 1273 (2024).

Judicial review of a decision of the commission is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. See General Statutes § 46a-94a (a). This court has recognized three circumstances under the UAPA in which a court is authorized to remand an administrative appeal to the agency. See *Connecticut Light & Power Co.* v. *Public Utilities Regulatory Authority*, 223 Conn. App. 136, 143–45, 307 A.3d 967 (2023).

mum, would have altered the referee's analysis with respect to the constructive discharge claim. The remand order further provided that any further proceedings in the trial court would be based on the amended decision. Accordingly, we conclude that the remand order so concluded the commission's right to obtain judicial review of the final decision that further proceedings could not affect that right.

First, General Statutes § 4-183 (j) provides in relevant part that a court in an administrative appeal "shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (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. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k)[9] of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment." (Footnote added.) Because a remand pursuant to § 4-183 (j) is a final judgment; see *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 675–76, 855 A.2d 212 (2004); the court does not retain jurisdiction following a remand issued pursuant to subsection (j).

Second, § 4-183 (h) provides that, "[i]f, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the addi-

[9] General Statutes § 4-183 (k) provides: "If a particular agency action is required by law, the court, on sustaining the appeal, may render a judgment that modifies the agency decision, orders the particular agency action, or orders the agency to take such action as may be necessary to effect the particular action."

tional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court." Although § 4-183 (h) does not expressly refer to a remand, our Supreme Court "[has] recognized that orders under subsection (h) fairly may be characterized as remands." *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 558, 964 A.2d 1213 (2009). Because § 4-183 (h) contemplates that the parties will return to the Superior Court for judicial resolution of the appeal after the agency takes additional evidence, the court retains jurisdiction pending a remand pursuant to that subsection.

Third, this court recognized in *Commission on Human Rights & Opportunities* v. *Hartford*, 138 Conn. App. 141, 153–54, 50 A.3d 917, cert. denied, 307 Conn. 929, 55 A.3d 570 (2012), that the court has the authority to remand an administrative appeal to the agency for an articulation, while retaining jurisdiction over the appeal. We explained that, "[a]lthough the plain text of § 4-183 expressly refers to remands only in subsection (j) and implicitly refers to remands in subsection (h), it does not state that the types of remands addressed in § 4-183 constitute an exhaustive list despite the legislature's knowledge of how to express such an intent." (Footnote omitted.) Id., 153. We further observed that "[r]eviewing courts typically have the ability to obtain articulations from the tribunals whose decisions they review." Id., 153–54.[10]

[10] The commission argues that *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 138 Conn. App. 141, was wrongly decided and that we should conclude that judges of the Superior Court lack the authority to order articulations of an agency's decision. In light of our conclusion that the remand order was not an order for an articulation, we need not address that claim. In any event, as this court recently noted in response to an identical claim, "[i]t is well established . . . that one panel of this court cannot overrule the precedent established by a previous panel's holding." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Public Utilities Regulatory Authority*, supra, 223 Conn. App. 148 n.9.

In the present case, the remand did not fall within any of the circumstances described in the preceding paragraphs for which a remand is authorized. Although the order denying the commission's motion for reconsideration indicates that the court considered the remand to be for an articulation, the remand order authorized the referee to modify her legal conclusions and issue additional orders, which is not permissible in an articulation. "An articulation is appropriate where the [tribunal's] decision contains some ambiguity or deficiency reasonably susceptible of clarification," but it "is not an opportunity for a [tribunal] to substitute a new decision [or] to change the reasoning or basis of a prior decision." (Internal quotation marks omitted.) *Walshon* v. *Walshon*, 42 Conn. App. 651, 655–56, 681 A.2d 376 (1996); see also *Sosin* v. *Sosin*, 300 Conn. 205, 240, 14 A.3d 307 (2011) ("a trial court may not alter its initial findings by way of a further articulation" (internal quotation marks omitted)). Moreover, "[a]n articulation presupposes ambiguity or incompleteness in the legal reasoning of the [tribunal] in reaching its decision." (Internal quotation marks omitted.) *In re Jason R.*, 129 Conn. App. 746, 763, 23 A.3d 18 (2011), aff'd, 306 Conn. 438, 51 A.3d 334 (2012); see, e.g., *Connecticut Light & Power Co.* v. *Public Utilities Regulatory Authority*, supra, 223 Conn. App. 147–48 and n.8 (remand order constituted order for articulation because it "required [the agency] to clarify the bases for its decision," and agency's decision filed in compliance with remand "[did] not modify, in any way, the conclusions of [the agency] or the orders in the final decision" (internal quotation marks omitted)); *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 138 Conn. App. 153–54 (order remanding matter for referee to issue clarification regarding specific issues that court found to be unclear in referee's decision was order for articulation).

Here, the referee's decision was neither ambiguous nor incomplete. Although the order denying the motion

for reconsideration characterized the remand as requiring the referee "to clarify whether [the complainant] was constructively discharged," the referee unambiguously found that "[t]he complainant failed to establish a prima facie case of constructive discharge . . . ." Additionally, the referee found that the complainant was not entitled to damages, but the remand order directed the referee to "[consider] . . . damages, if appropriate." Thus, the remand order did not merely instruct the referee to clarify an ambiguity. Rather, the remand order required, at a minimum, that the referee "change the reasoning or basis of [the] prior decision"; *Walshon* v. *Walshon*, supra, 42 Conn. App. 656; and contemplated that the referee might reach a different legal conclusion with respect to the constructive discharge claim and issue additional orders beyond those included in the final decision.[11] This was not a permissible use of an articulation.

The remand order also was not authorized by § 4-183 (j). As discussed previously, § 4-183 (j) authorizes the court to remand an administrative appeal to the agency for further proceedings after sustaining the

[11] The transcript of the argument on the merits of the administrative appeal further supports our conclusion that the remand was not for an articulation. During the argument, the court asked the parties whether the matter should be remanded for the referee to "review or reissue her opinion, [taking] into account the conflicting portions of the findings of fact vis-à-vis the finding of no constructive discharge . . . ." In explaining the purpose of such a remand, the court stated that the referee "might have . . . the option of deciding whether or not that inconsistency can be resolved. In doing that, she still wouldn't have to issue any ruling on damages *or she might say . . . that I've changed my view, there is a constructive discharge and I'm going to issue damages*." (Emphasis added.) Later in the hearing, the court asked counsel for Dance Right: "[W]ouldn't you like [the referee] to look at [the] facts and say, oh, all that's going on here is a failure to accommodate and this two week period is too short . . . ? . . . Then you wouldn't have the problem at all. . . . Or maybe the [referee] looking at this would . . . come out entirely differently and they'd say, not only was it a failure to accommodate here but there was a lot going on here . . . that should be cleared up here one way or another."

appeal on the basis of a finding that the "substantial rights of the person appealing have been prejudiced" for one of the six reasons delineated in that subsection. Here, the court did not sustain the appeal or make a finding that the commission was prejudiced for one of the reasons delineated in § 4-183 (j). On the contrary, in its order denying the motion for reconsideration, the court made clear that it intended to retain jurisdiction over the appeal pending the remand, stating that the "clarification [issued by the referee in compliance with the remand order] may be appealed subsequently to the court as part of the *already pending administrative appeal*." (Emphasis added.) The court's intention to retain jurisdiction pending the remand indicates clearly that the remand order was not issued pursuant to § 4-183 (j). See, e.g., *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 138 Conn. App. 153 (concluding that "remand order was not issued under subsection (j) [of § 4-183]" in part because "the court indicated its intention to retain jurisdiction"); cf. *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 558 and n.7 (concluding that remand order was issued pursuant to § 4-183 (j) where "there [was] nothing in the record to suggest that the trial court intended to retain jurisdiction while the hearing officer reconsidered its decision [in accordance with the remand order]").

Finally, the remand order was not issued pursuant to § 4-183 (h) because neither party moved for leave to present additional evidence before the referee, and the court did not order the referee to take additional evidence on remand. See *Wakefield* v. *Commissioner of Motor Vehicles*, 90 Conn. App. 441, 443, 877 A.2d 1 (remand pursuant to § 4-183 (h) permits party to present additional evidence before agency upon demonstration "that the additional evidence is material and that there are good reasons for the failure to present it in the

proceeding before the agency''), cert. denied, 275 Conn. 931, 883 A.2d 1253 (2005).

Because there was no legal basis for the court to remand the matter to the referee for the purposes stated in its remand order while retaining jurisdiction over the appeal, we conclude that the court erred in remanding the matter to the referee for an amended opinion.

II

Having concluded that the trial court improperly remanded the case to the referee, we turn to the commission's challenge to the referee's finding that the complainant failed to prove that she was constructively discharged. The commission claims that the court erred in failing to sustain its appeal on the basis that the referee's conclusion that Dance Right failed to provide the complainant with a reasonable accommodation established, as a matter of law, that Dance Right constructively discharged the complainant. Dance Right argues that there was substantial evidence in the record to support the referee's finding that the complainant failed to prove her constructive discharge claim and, therefore, that the court should have dismissed the appeal. We agree with Dance Right.[12]

[12] We note that, because Dance Right argues that this court should reverse the court's judgment with direction to dismiss the commission's administrative appeal, it should have pursued its claim by way of a cross appeal. See *Mitchell* v. *Silverstein*, 67 Conn. App. 58, 60 n.5, 787 A.2d 20 (2001) (''[i]f an appellee wishes to change the judgment in any way, the party must file a cross appeal'' (internal quotation marks omitted)), cert. denied, 259 Conn. 931, 793 A.2d 1085 (2002). Although Dance Right did file a cross appeal challenging the trial court's remand order, it subsequently withdrew that appeal. Notwithstanding this procedural defect, we exercise our discretion to address Dance Right's claim because it is intertwined with our resolution of the commission's appeal, the issue was preserved before the trial court and fully briefed and argued by both parties on appeal to this court, and the parties agreed that this court can and should decide this issue. See *DeBeradinis* v. *Zoning Commission*, 228 Conn. 187, 198 n.7, 635 A.2d 1220 (1994) (exercising discretion to address claim that should have been raised by way of cross appeal ''[b]ecause the issue has been fully briefed and it appears that the parties will not be prejudiced''). Moreover, because ''the

We begin by setting forth the standard of review and legal principles that guide our resolution of this claim. "It is well established that [j]udicial review of [an administrative agency's] action is governed by the [UAPA] . . . and the scope of that review is very restricted." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Cantillon*, 207 Conn. App. 668, 672, 263 A.3d 887 (2021), aff'd, 347 Conn. 58, 295 A.3d 919 (2023). "Review of an appeal taken from the order of an administrative agency such as the [commission] 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." (Citation omitted; internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 212 Conn. App. 578, 586, 276 A.3d 447, cert. denied, 345 Conn. 902, 282 A.3d 466 (2022). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . . Ultimately, [t]he question is not whether the [reviewing] court would have reached the same conclusion but whether the record before the [agency] supports the action taken." (Citation omitted; internal quotation marks omitted.) *Hartford Police Dept.* v. *Commission on Human Rights & Opportunities*, 347 Conn. 241, 247, 297 A.3d 167 (2023).

"Normally, an employee who resigns is not regarded as having been discharged, and thus would have no

scope of the trial court's review of the [referee's] decision and the scope of our review of that decision are the same"; (internal quotation marks omitted) *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 63 n.15, 52 A.3d 636 (2012); remanding the case for the trial court to address the issue in the first instance would serve only to further delay resolution of the matter underlying this appeal.

right of action for abusive discharge [under the CFEPA]. . . . Through the use of constructive discharge, the law recognizes that an employee's voluntary resignation may be, in reality, a dismissal by an employer. . . . Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 178, 717 A.2d 1254 (1998).

"To plead a prima facie case of constructive discharge, a plaintiff must allege that (1) the employer intentionally created the complained of work atmosphere, (2) the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, and (3) the plaintiff in fact resigned." *Karagozian* v. *USV Optical, Inc.*, 335 Conn. 426, 430, 238 A.3d 716 (2020). "The standard contains a subjective inquiry (did the employer intend to create the working condition) and an objective inquiry (the impact the working conditions would have on a reasonable person)." Id., 443. "[A] claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign." (Internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 178. Rather, the intolerability requirement requires proof that "the working conditions imposed by the employer had become so onerous, abusive, or unpleasant that a reasonable person in the employee's position would have felt compelled to resign." *Suarez* v. *Pueblo International, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000).[13] "In other

[13] "We look to federal law for guidance in interpreting state employment discrimination law, and analyze claims under [the CFEPA] in the same manner as federal courts evaluate federal discrimination claims." (Internal quotation marks omitted.) *Karagozian* v. *USV Optical, Inc.*, supra, 335 Conn. 438 n.5.

words, work conditions must have been so intolerable that [the employee's] decision to resign was void of choice or free will—that her only option was to quit." (Internal quotation marks omitted.) *Equal Employment Opportunity Commission* v. *Kohl's Dept. Stores, Inc.*, 774 F.3d 127, 134 (1st Cir. 2014); accord *Brittell* v. *Dept. of Correction*, supra, 179 ("[h]ad the plaintiff established that she was given the choice either to continue working [under the same discriminatory conditions] or to leave the employ of the defendant, she might well have prevailed on [the intolerability] element of her claim").

On appeal, the commission argues that an employer's failure to provide an employee with a reasonable accommodation may establish both the subjective and objective elements of a constructive discharge claim as a matter of law. During oral argument before this court, however, the commission clarified that it is not claiming that a failure to provide a reasonable accommodation always amounts to a constructive discharge. Rather, the commission argues that if an employee requests a reasonable accommodation and puts the employer on notice that she will resign if the employer does not provide that accommodation, the employer's failure to provide the accommodation within a reasonable period of time establishes a constructive discharge as a matter of law.

The commission's argument ignores two important principles applicable to a constructive discharge claim. First, "[t]he existence of constructive discharge is an issue of fact to be resolved by the [fact finder], and judgment as a matter of law is only appropriate if the evidence is susceptible to but one interpretation." *Strickland* v. *United Parcel Service, Inc.*, 555 F.3d 1224, 1229 (10th Cir. 2009); see also *Green* v. *East Haven*, 952 F.3d 394, 405 (2d Cir. 2020) ("that this substantive standard is an objective one . . . does not necessarily mean that what a reasonable person in the plaintiff's shoes would have felt compelled to do is determinable

as a matter of law, for an objective question is often fact-specific''). As noted previously, under the UAPA, judicial review of an agency's factual determination is governed by the substantial evidence standard, which ''is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review.''[14] (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Hartford*, supra, 138 Conn. App. 149. Under the substantial evidence standard, ''[t]he question is not whether the evidence would also support a different, or even inconsistent conclusion but whether there is substantial evidence to support the [referee's] decision . . . .'' (Citation omitted.) *Woodbridge Newton Neighborhood Environmental Trust* v. *Connecticut Siting Council*, 349 Conn. 619, 645, 321 A.3d 363 (2024).

Second, although Connecticut courts have not addressed the issue, other courts—including the United States Supreme Court—have held that where an employee claims that she was constructively discharged on the basis of a discriminatory employment environment, ''[u]nless conditions are beyond ordinary discrimination, a complaining employee is expected to remain on the job while seeking redress.'' (Internal quotation marks omitted.) *Pennsylvania State Police* v. *Suders*,

[14] During oral argument before this court, the commission argued that the constructive discharge determination is a mixed question of law and fact subject to plenary review. See, e.g., *Crews* v. *Crews*, 295 Conn. 153, 163, 989 A.2d 1060 (2010) (''[i]t is settled that [q]uestions of law and mixed questions of law and fact receive plenary review'' (internal quotation marks omitted)). The commission, however, has not cited any authority for that proposition. Moreover, in *Brittell*, the Supreme Court concluded that, ''[i]n light of the fact-bound nature of determinations regarding the efficacy of an employer's response to illegal harassment by one or more of its employees . . . a clearly erroneous standard is appropriate for our review of the trial court's findings.'' *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 165. Accordingly, pursuant to § 4-183 (j), we review the referee's factual determination that the complainant was not constructively discharged under the substantial evidence standard.

542 U.S. 129, 147, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004), quoting *Perry* v. *Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997); see *Equal Employment Opportunity Commission* v. *Sears, Roebuck & Co.*, 233 F.3d 432, 440–41 (7th Cir. 2000) (same); see also *Poland* v. *Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) ("constructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer" (internal quotation marks omitted)). Courts have "set the bar high for a claim of constructive discharge because . . . antidiscrimination policies are better served when the employee and employer attack discrimination within their existing employment relationship, rather than when the employee walks away and then later litigates whether his employment situation was intolerable." *Poland* v. *Chertoff*, supra, 1184; see also *McKelvey* v. *Secretary of United States Army*, 450 Fed. Appx. 532, 535 (6th Cir. 2011) ("[constructive discharge] test deliberately sets a high bar, as the law generally expects employees to remain on the job while pursuing relief from harassment" (internal quotation marks omitted)); *Johnson* v. *Shalala*, 991 F.2d 126, 131 (4th Cir. 1993) (rejecting claim that failure to accommodate necessarily constitutes constructive discharge, in part because "once the employment relationship has terminated, the parties may harden their positions and become unable to resolve their dispute," and noting that "[i]t is far better for all concerned to resolve the dispute while the employment relationship is ongoing"), cert. denied, 513 U.S. 806, 115 S. Ct. 52, 130 L. Ed. 2d 12 (1994).

In the present case, there is substantial evidence in the record to support the referee's finding that the complainant's work conditions were not so intolerable that

a reasonable person in her position would have felt compelled to resign. Although the referee found Dance Right's handling of the complainant's accommodation request to be lacking for purposes of her reasonable accommodation claim, there is a substantial basis in the record from which the referee also reasonably could have determined that the complainant did not face such pervasive discrimination that a reasonable person in her position would have felt she had no choice but to resign.

As discussed previously, the incident that led to the complainant's request for White to be removed from the studio occurred on February 24, 2015, and the complainant resigned seventeen days later, on March 13, 2015. The referee found that, "[u]pon hearing about the February 24, 2015 incident, Stangel commenced an investigation into the incident by speaking with Hall and Kirchoff within a day or two of hearing about the complaint" and that "Stangel interviewed Cazagrande and the complainant [about the incident] on or about February 26, 2015." The referee further found that Stangel did not refuse the complainant's request that White be removed from the studio, but "told the complainant he understood her concerns but needed more information before removing a student from the studio summarily" and offered the complainant "the option of arranging [her] schedule to avoid her working during a time when White had lessons." Moreover, the record reflects that Dance Right was open to considering alternative arrangements that would have accommodated the complainant; specifically, Stangel testified that, even when the complainant rejected the offer to flex her schedule, he asked the complainant "to think on it and respond with something that she felt would have been more fair," but that the complainant never followed up on that conversation.

Moreover, the evidence reflects that, after the February 24, 2015 incident, White did not return to the studio again until March 10, 2015. Megargle testified that she spoke with White about the incident on the day he returned and that White denied that he purposely groped Hall. Megargle further testified that she then had to confer with Stangel because he had interviewed the other witnesses. The record does not reflect the specific date on which Megargle conferred with Stangel. Stangel testified, however, that the decision to suspend White's lessons was made two or three days before the March 17, 2015 agreement formally suspending White from the studio, following a meeting at which Cazagrande advocated for removing White on the basis of the impact his actions had on the complainant.

Thus, the evidence reflects that less than three weeks passed from the time the incident occurred, on February 24, 2015, to the time Dance Right decided to suspend White's lessons. The evidence also reflects that White was present in the studio on only one occasion during that time period, and there is no evidence that the complainant was forced to have any further interaction with him during that time. Moreover, the referee found that, when the complainant inquired during that time period about what Dance Right intended to do about her concerns, Megargle informed the complainant that Dance Right was still investigating the situation. On the basis of the foregoing, we conclude that there was substantial evidence in the record to support the referee's finding that the complainant failed to prove that a reasonable person in her position would have felt compelled to resign.[15]

[15] Because we conclude that there was substantial evidence to support the referee's finding that the complainant failed to satisfy the objective component of her constructive discharge claim, we need not address whether the evidence was sufficient to support the referee's finding that the complainant failed to establish the subjective component of her claim. See *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 179 ("[e]ven if we assume, arguendo, that an employer's failure to remedy a hostile working

The commission has not cited a single case in which a court has held that an employer's failure to provide a reasonable accommodation established a constructive discharge claim as a matter of law. In its principal appellate brief, the commission relies on certain federal court decisions holding that, under the factual circumstances presented in those cases, evidence regarding an employer's failure to provide an accommodation was sufficient to permit a finding that the employee had been constructively discharged.[16] Under the substantial evidence standard, however, "[t]he question before us is not whether

environment may be considered the intentional creation of an intolerable work atmosphere . . . the plaintiff has not met her burden of establishing an essential element of her claim, namely, the existence of an intolerable work atmosphere that would compel a reasonable person in that situation to resign" (citation omitted; emphasis omitted)).

[16] We note that the cases on which the commission relies involved either an outright refusal to accommodate or a failure to respond to the employee's request for an accommodation. See *Johns* v. *Brennan*, 761 Fed. Appx. 742, 745–46 (9th Cir. 2019) (reversing district court's order granting motion for summary judgment for employer because evidence that employer repeatedly refused or failed to communicate with employee about accommodation request and failed to respond to her inquiries during five month period about returning to work with accommodation was sufficient for jury to conclude that working conditions were so intolerable that reasonable person would feel compelled to resign); *Talley* v. *Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1109, 1111 (6th Cir. 2008) (reversing district court's order granting motion for summary judgment for employer because evidence that employer refused to read employee's doctor's note, meet with employee to discuss accommodation request, or offer alternative accommodation was sufficient to survive summary judgment); *Smith* v. *Henderson*, 376 F.3d 529, 536–39 (6th Cir. 2004) (reversing district court order granting motion for summary judgment for employer because evidence that employer refused to honor previous accommodation restricting employee's schedule and "flatly denied" request for alternative accommodation was sufficient to survive summary judgment).

As discussed previously, Dance Right did not ignore the complainant's request for an accommodation or refuse to comply with her request. Although the referee found that Dance Right failed to reasonably accommodate the complainant's PTSD when it failed to engage more directly with the complainant or take ameliorative action while it investigated whether to remove White from the studio, that conduct does not amount to a complete failure to accommodate like the conduct at issue in the cases cited by the commission.

[the] evidence [in the record] compelled the conclusion reached by the [referee] or whether a different fact finder reasonably could have reached a different conclusion. Rather, the question is whether the evidence provides any substantial basis of fact from which the fact in issue reasonably could have been inferred." (Emphasis omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 125–26, 830 A.2d 1121 (2003). Thus, the question for this court is not whether there was sufficient evidence from which the referee could have reached a different conclusion, but whether there is a substantial basis in the evidence to support the referee's determination.

Lastly, to the extent the trial court construed the referee's finding 93 to mean that the referee had found that the complainant objectively had no choice but to resign, that interpretation is contradicted by the evidence cited by the referee in support of that finding. As noted previously, in the remand order, the court determined that the referee's finding that the complainant had not been constructively discharged was in conflict with finding 93 of the referee's memorandum of decision, in which the referee found that "Megargle was aware that the situation was causing the complainant anxiety, to the point where if no action was taken, the complainant would have no choice but to leave."

In support of finding 93, the referee cited Dance Right's answer to the complaint, in which Megargle (on behalf of Dance Right) stated that "the complainant [told] me [that] the situation adversely affected her including that she would have to leave if [White] was not asked to leave." Later in the memorandum of decision, the referee cited *Brittell* for the proposition that "[a] claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign"; (internal quotation marks

omitted) *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 178; and determined that the complainant failed to establish "that the work atmosphere was so difficult or unpleasant that a reasonable person in the complainant's shoes would have felt compelled to resign." In light of the totality of the referee's findings, it would be unreasonable to construe finding 93 as a finding by the referee that the complainant objectively had no choice but to resign. Rather, construing the evidence in the light most favorable to sustaining the referee's decision, the more reasonable interpretation is that the referee found that Megargle was aware that the complainant *subjectively* believed that she would have to resign if Dance Right did not comply with her request to remove White from the studio. As explained previously, however, a complainant's subjective belief regarding the intolerability of the working conditions alone is insufficient to support a constructive discharge claim.

On the basis of the foregoing, we conclude that there was a substantial basis in the evidence to support the referee's finding that the complainant failed to establish that she was constructively discharged and, therefore, that the trial court should have dismissed the administrative appeal.

The judgment is reversed and the case is remanded with direction to dismiss the administrative appeal.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHARLES ARTIS
(AC 46522)

Elgo, Seeley and Bishop, Js.

Syllabus

Convicted, following a plea of guilty, of the crime of manslaughter in the first degree, the defendant appealed, claiming that the trial court erred in failing to inform him, before accepting his plea, that he would be not eligible

to accumulate risk reduction credits to reduce his sentence pursuant to statute (§ 18-98e) and, thus, his plea was not knowingly or voluntarily made. The defendant requested, as a remedy, that this court provide him with eligibility to earn those credits. *Held*:

This court was unable to provide the defendant with the relief he requested, as it was not within the authority of this court to amend § 18-98e, which expressly provides that any person sentenced for manslaughter in the first degree is ineligible to earn risk reduction credits.

Argued September 18, 2024—officially released January 7, 2025

Procedural History

Information charging the defendant with the crime of manslaughter in the first degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Iannotti*, *J.*, on a plea of guilty; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Mary Boehlert, assigned counsel, for the appellant (defendant).

Alexander A. Kambanis, deputy assistant state's attorney, with whom, on the brief, were *John P. Doyle*, state's attorney, and *David J. Strollo*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. On December 15, 2022, the defendant, Charles Artis, pleaded guilty, in two separate dockets, to the crimes of manslaughter in the first degree in violation of General Statutes § 53a-55[1] and evading responsibility in the operation of a motor vehicle in violation

[1] General Statutes § 53a-55 provides: "(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and

of General Statutes § 14-224 (a).[2] Additionally, the defendant admitted to violating his probation.[3] These pleas and admission were entered pursuant to a plea bargain with the state containing an agreed upon sentence of twenty years of incarceration, execution suspended after fifteen years, followed by five years of probation with the right to argue for a lesser sentence. Before accepting the pleas and admission, the court canvassed the defendant and, after doing so, found that they were "knowing[ly] and voluntarily made [and that the defendant had been] assisted by competent counsel . . . ." When canvassing the defendant, the court did not inform him that the sentence to be imposed for his manslaughter conviction would make him ineligible to receive any risk reduction credits that could reduce his period of incarceration. See General Statutes § 18-98e.[4]

need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

"(b) Manslaughter in the first degree is a class B felony."

[2] General Statutes § 14-224 (a) provides: "Each operator of a motor vehicle who is knowingly involved in an accident which results in the death of any other person shall at once stop and render such assistance as may be needed and shall give such operator's name, address and operator's license number and registration number to any officer or witness to the death of any person, and if such operator of the motor vehicle causing the death of any person is unable to give such operator's name, address and operator's license number and registration number to any witness or officer, for any reason or cause, such operator shall immediately report such death of any person to a police officer, a constable, a state police officer or an inspector of motor vehicles or at the nearest police precinct or station, and shall state in such report the location and circumstances of the accident causing the death of any person and such operator's name, address, operator's license number and registration number."

[3] In 2021, the defendant previously pleaded guilty to violating a protective order and was sentenced to probation.

[4] General Statutes § 18-98e provides in relevant part: "(a) Notwithstanding any provision of the general statutes, any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date, *except a person sentenced for a violation of section* 53a-54a, 53a-54b, 53a-54c, 53a-54d, *53a-55*, 53a-55a, 53a-70a, 53a-70c or 53a-100aa, or is a persistent

Thereafter, on February 16, 2023, the court sentenced the defendant to twenty years of incarceration, execution suspended after fourteen years, followed by five years of probation. At sentencing, the court stated that the defendant "may accumulate good time credits and may be eligible for parole at some point in time. That is not up to this court, that will be up to the Department of Correction if and when they believe [the defendant] should be eligible for any good time credits and/or parole." This direct appeal followed.

On appeal, the defendant claims that, before he entered his plea on the manslaughter charge, the court was required, in accordance with Practice Book § 39-19,[5] to inform him that, by statute, an individual convicted of manslaughter in the first degree is disqualified from earning any risk reduction credits toward a reduction of his sentence but failed to do so. He avers that he "was not aware . . . when he pleaded guilty or at sentencing . . . that he was statutorily prohibited from being eligible to earn the good time credits because of the manslaughter charge" and that, consequently, his "sentence is akin to being a mandatory minimum," and his plea was not knowingly or voluntarily made. As a remedy for this, he requests that we "provide [him] with a right to earn good time credit on his manslaughter conviction" in accordance with the trial court's suggestion at his sentencing hearing that he "may accumulate good time credits," notwithstanding its inaccuracy.

dangerous felony offender or persistent dangerous sexual offender pursuant to section 53a-40, may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006. . . ." (Emphasis added.)

[5] Practice Book § 39-19 provides in relevant part: "The judicial authority shall not accept [a] plea without first addressing the defendant personally and determining that he or she fully understands . . . (2) The mandatory minimum sentence, if any . . . ."

It is not, however, within the authority of this court to amend § 18-98e, which expressly provides that any person sentenced for a violation of manslaughter in the first degree pursuant to § 53a-55 is ineligible to earn risk reduction credit toward a reduction of such person's sentence. See footnote 4 of this opinion. "It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) *State* v. *Richard P.*, 179 Conn. App. 676, 688, 181 A.3d 107, cert. denied, 328 Conn. 924, 181 A.3d 567 (2018). It is the role of the General Assembly to legislate and the role of the judiciary to adjudicate. For this court to accede to the defendant's request would amount to an invasion of the General Assembly's domain in violation of principles of separation of powers among the various branches of government. This we will not do. Stated simply, this court cannot provide the defendant with the only relief he requests and, therefore, we affirm the trial court's judgment on that basis.

To this end, we note that, in his principal appellate brief, the defendant broadly requests this court to "right the wrong of the trial court by finding that [his] guilty plea was not given knowingly, intelligently or voluntarily . . . and/or providing the defendant with the benefit of his bargain" by ordering that he may accumulate risk reduction credits, but he does not seek to withdraw his guilty plea. His reply brief is equally silent in this regard. The record reflects, as well, that at no time in the trial court did the defendant seek to withdraw his guilty plea. Although counsel for the defendant shifted course during oral argument before this court by requesting this court to remand this case to the trial court and "let [the defendant] withdraw his guilty plea," "[i]t is well settled that claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court." *Grimm* v. *Grimm*,

276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). The defendant has therefore abandoned this claim for relief. See id. In short, because the defendant does not seek to withdraw his guilty plea, we need not reach the question of whether an advisement regarding the unavailability of risk reduction credits is required pursuant to Practice Book § 39-19.[6]

The judgment is affirmed.

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[6] In pursuit of his claim on appeal, the defendant cites to our decision in *State* v. *Peterson*, 51 Conn. App. 645, 654–58, 725 A.2d 333, cert. denied, 248 Conn. 905, 731 A.2d 310 (1999), in which this court opined that the trial court's failure to inform the defendant, during his plea, of the mandatory minimum sentence required by the statute under which the defendant was pleading guilty, could form the basis for permitting a defendant to withdraw his guilty plea on grounds that the plea agreement was not knowingly and voluntarily made, provided other specified conditions were satisfied. Although there are similarities between a requirement that a defendant be informed of the mandatory minimum sentence he will face upon conviction and the fact that such a conviction will render him ineligible to receive any benefit from the risk reduction program, we need not decide, in this matter, whether the two situations are analogous because this case comes to us in a wholly different posture. Specifically, the defendant in *Peterson*, unlike the defendant in the matter at hand, was seeking to withdraw his guilty plea.

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NOTICE OF CONNECTICUT STATE AGENCIES

Commission on Human Rights and Opportunities

Notice of Noncompliance

The State of Connecticut Commission on Human Rights and Opportunities ("CHRO") hereby publishes notice pursuant to Regs. Conn. State. Agencies § 46a-68j-41(c), that The Nunes Companies, Inc. n/k/a NC Incorporated AMN, has been found to be in noncompliance with and in violation of the nondiscrimination and affirmative action provisions and set aside programs of General Statues §§ 4a-60, 4a-60g, and 46a-68c through 46a-68f inclusive.

All inquiries concerning the compliance or noncompliance of contractors shall be directed to the CHRO and not the commission on official legal publications.

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure
Receipt of a Completed 2024 Application
for a Moratorium
in the Town of Fairfield

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (12/30/2024) for a Certificate of Affordable Housing Project Completion (aka, a Moratorium) for the Town of Fairfield. As per Connecticut General Statutes Section 8-30g(1)(4)(B), upon publication in the Connecticut Law Journal, a thirty (30) day public comment period will begin on January 7, 2025 and end on February 6, 2025. Under the statute, DOH has ninety (90) days (March 31, 2025) to review the completed application, along with any public comments submitted during the thirty (30) day comment period. DOH will accept electronic input/comment on the completed application at CT.HOUSING.PLANS@ct.gov. DOH will not act as intermediary but shall take into consideration all input and comments received. A copy of this completed application, along with all comments received will be available for viewing electronically at the Department of Housing website (www.ct.gov/doh) or at the Connecticut Department of Housing by appointment. For information please e-mail Laura Watson, Economic and Community Development Agent, at laura.watson@ct.gov

NOTICES

Notice of Suspension of Attorney

Pursuant to Practice Book §2-54, notice is hereby given that on December 30, 2024, Robert L. Fiedler, juris number 307165, of West Hartford, CT was suspended from the practice of law for a period of 6 months, effective immediately.

Notice is further given that Assistant Chief Disciplinary Counsel Lee N. Johnson, ("OCDC Trustee," Juris No. 443752), 100 Washington Street, Hartford, CT 06106, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, inventory the active client files, receive the business mail, and take control of Respondent's clients' funds, IOLTA, and fiduciary accounts.

The complete orders and conditions may be viewed in the electronic file, docket number UWYCV24-6081049-S, *Office of Chief Disciplinary Counsel v. Fiedler, Robert L.*

Barbara N. Bellis, *Judge*

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in December 2024. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Catalbasoglu, Hacibey of Washington, DC
Coffin, Alexander James of Tampa, FL
Evans, Julia Christina of Liverpool, NY
Grimes, Christina Louise of Stamford, CT
Helwig, Jacob Jospeh of Milford, CT
Hyler, William Christopher of New York, NY
Insang, Jarell Davaughn of Mount Vernon, NY
Lubeth, Gilles of Boston, MA
Mihalek, Adrianna of Albany, NY
Patel, Suchit Hemant of Stamford, CT
Przypek, Kyle Anthony of Astoria, NY
Rossitto, Lauren of Fairmont, MN
Sahin, Kemal of Belmont, MA
Zunski, Alanna Marie of Oxford, CT

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in December 2024. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Andiman, Alexis Charlotte of New York, NY
Barnes, Douglas Allan of Morris, CT
Borne, Rebecca of New Haven, CT
Chesley, Stephen R. of Schenectady, NY
Daniels OConnell, Tracey Leigh of White Plains, NY
Hendler, Pablo Daniel of Woodbridge, CT
Leeds, Jacques Pierre of Houston, TX
Parr, Keely Dawn of Darien, CT
Prescott, Dana of Saco, ME
Tanella, Peter Herb of Cedar Grove, NJ
Urban, Alexander Christopher of Wilton, CT
Wan, Timothy of Smithtown, NY

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by the reviewing committee of the Statewide Grievance Committee:

Reviewing Committee Reprimands

October 11, 2024: Leslie F. Lyte - 434072
George P. Guertin - 402733

November 1, 2024: John J. Leen - 418795

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 999 Asylum Avenue, Fifth Floor, Hartford, Connecticut 06105. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Christopher L. Slack
Statewide Bar Counsel