State of Connecticut
Commission on Human Rights and Opportunities
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April 4, 2017

CHRO ex rel. Kathy Treacy v. VITAS Innovative Hospice Care CHRO No. 1320021.

FINAL DECISION

Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent by via by via email to the commission and certified mail to the complainant, and respondent.

Very Truly yours,

Kimberly D. Morris
Secretary II

cc.

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STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

CHRO ex rel. Kathy Treacy, Complainant

CHRO No. 1320021

v.

VITAS Innovative Hospice Care, Respondent

April 4, 2017

FINAL DECISION

I
PROCEDURAL BACKGROUND

On July 24, 2012, the pro se [1] complainant, Kathy Treacy, of 218 Bedford Street, Apartment 4C, Stamford, Connecticut, filed an affidavit of illegal discriminatory practice (complaint) with the Connecticut Commission on Human Rights and Opportunities (commission) alleging that the respondent, VITAS Innovative Hospice Care, whose business address is 99 Hawley Lane, Suite 1204, Stratford, Connecticut, discriminated against her in the terms and conditions of her employment based on her learning disability and/or mental disorder in violation the Connecticut Fair Employment Practices Act, specifically, General Statutes § 46a-60 (a) (1), as well as the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and the more general provisions of Connecticut's antidiscrimination law at General Statutes § 46a-58 (a). The commission is located at 450 Columbus Boulevard, Suite 2, Hartford, Connecticut.

A commission investigator made a reasonable cause finding, and on June 30, 2014, the matter came before the Office of Public Hearings for a public hearing pursuant to the certification process. In due course, on October 30, 2015, the chief human rights referee reassigned the case to the undersigned as presiding referee in substitution for Referee Michele Mount. A public hearing was held on April 6 and 7, 2016. All statutory and procedural prerequisites to the public hearing have been satisfied and this complaint is properly before the undersigned for decision.

The issues addressed in this decision are whether the complainant proved by a preponderance of the evidence that the respondent discriminated against her on the basis of her learning disability and/or mental disability when, before she commenced her job, it abruptly terminated an employment relationship after the complainant disclosed her mental disorder, and, if so, whether the complainant is entitled to any damages or other relief. For the reasons set forth herein, it is found that the complainant established by a preponderance of the evidence that the respondent violated General Statutes § 46a-60 (a) (1) when it terminated the parties' employment relationship.

[1] When she instituted the present action, the complainant was represented by counsel, Attorney Stephen P. Horner, who withdrew his appearance on March 18, 2016, for health reasons. Thereafter complainant appeared pro se, including at the public hearing.

II
PARTIES' POSITIONS

The complainant contends that she was the victim of intentional discrimination stemming from her learning disability and/or mental disability when the respondent abruptly rescinded an offer of employment after learning that the complainant had been diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD) and that a positive test result on a pre-employment drug screen had been triggered by a legal medication she was taking for ADHD. The respondent contends that the complainant has not established either a learning disability or a mental disability within the meaning of the law. The respondent also contends that it had no knowledge of the complainant's ADHD mental disorder, or of the legitimate medical reason for the positive drug test result, when it rescinded the employment offer. The respondent further argues that evidence of complainant's lack of diligence and poor responsiveness in following through and communicating with its agent, Total Compliance Network (TCN), concerning the medical reasons for the drug test result, constitutes a legitimate business reason for the decision to rescind the job offer and that complainant failed to establish that the reason articulated by respondent is pretextual.

III
FINDINGS OF FACT

The following relevant facts are derived from the pleadings, exhibits admitted and testimony adduced at the public hearing, and the record file in this matter. [2]

1. All procedural notices and jurisdictional prerequisites have been satisfied and this matter is properly before this presiding officer to hear the matter and render a decision (Record File).

2. The complainant is a Licensed Clinical Social Worker (LCSW) in Connecticut, and a Licensed Masters Social Worker (LMSW) in the State of New York. She received a Master of Science (MS) degree in Social Work from Columbia University in 1999 (C/CHRO Exs. 3, 8).

3. The respondent is a provider of hospice care services (Tr. 163).

4. The complainant has been diagnosed with Attention Deficit/Hyperactive Disorder (ADHD) since childhood (Tr. 9).

5. In the most recent Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) published by the American Psychiatric Association, ADHD is included in the section on Neurodevelopmental Disorders. The principal characteristics of ADHD are inattention, hyperactivity, and impulsivity (DSM-5 Attention Deficit/Hyperactivity Disorder Fact Sheet).

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[2] References made to the transcript pages are designated as "Tr.", followed by the accompanying page numbers. References to the complaint are designated as "Complaint ¶ ", followed by the paragraph number. References to the answer are designated as "Answer ¶ ", followed by the paragraph number. References made to the exhibits are designated either "C/CHRO Ex." for the complainant and commission, and "R. Ex." for the respondent, followed by the accompanying exhibit numbers. References made to the briefs are designated as "R. Brief" and "R. Reply Brief" for the respondent, "C. Brief" for the complainant, and "CHRO Brief" and "CHRO Reply Brief" for the commission, followed by the accompanying page numbers.

6. During the time period in question, the complainant was taking the prescription medication Vyvanse, which was prescribed by her psychiatrist, Dr. Israely (Israely), to treat her ADHD, a mental disorder (Tr. 11, C/CHRO Exs. 13, 19).

7. The complainant is a member of a protected class because of her mental disability, ADHD (Tr. 9, C/CHRO Exs. 13, 19).

8. Sometime in February of 2012, a marketing representative of the respondent approached the complainant at her place of employment, Long Ridge of Stamford, and asked her to come to work for the respondent (Tr. 12).

9. Thereafter, the complainant completed a job profile for the respondent and was contacted by Laurie St. John (St. John), general manager of the respondent's Fairfield program (Tr. 13).

10. On February 24, 2012, the complainant signed an authorization and release for the respondent to conduct a background investigation. On that date, she also signed pre-employment reference request forms (Tr. 14-15, C/CHRO Exs. 4 and 7).

11. After several meetings and discussions with the complainant, the respondent, on April 3, 2012, extended to the complainant an offer of at-will employment as a full-time hospice social worker in the respondent's Stamford office. The offer was communicated verbally by St. John on that date (Tr. 13, 16-17, C/CHRO Ex. 6).

12. On April 4, 2012, St. John wrote the following email to Nancy Wallent (Wallent), respondent's vice-president, requesting approval of the job offer: "Nancy, I would like to offer Kathleen Treacy LCSW $32/hour, $66,560 annually. She has many years of experience and lives in the Greater Stamford area which is our fastest growing region. She has many connections in the Stamford community and is well known at Norwalk and Stamford Hospitals. She has years of facilitating groups and is willing to start evening bereavement groups for working people in our Stamford office. Please approve", to which Wallent responded "Approved" (C/CHRO Ex. 5).

13. On April 4, 2012, the complainant met in person with Laura Raymond (Raymond), the respondent's business manager, who repeated the verbal job offer (Tr. 18).

14. The offer of employment was expressly conditioned on complainant's successful completion of a routine pre-employment drug screen test, a medical examination, and a tuberculosis skin test (PPD test) (Tr. 18-19, 160).

15. When it extended the job offer, respondent had already initiated a background check and a reference check on complainant, which the complainant passed (Tr. 14, C/CHRO Exs. 4, 7).

16. On April 4, 2012, the complainant accepted the verbal offer of employment and requested an official, written offer of employment (Tr. 18).

17. On April 4, 2012, Raymond provided complainant with a folder containing forms for new employees, including a copy of the respondent's drug testing policy and a copy of the VITAS medical health questionnaire to take with her to Concentra Medical Centers (Concentra) in

Stamford, Connecticut, when she had the medical examination and took the PPD test (Tr. 19, 33, C/CHRO Ex. 13, pp. 2-3, C/CHRO Ex. 9).

18. Raymond instructed the complainant to complete the drug screen test at Concentra within forty-eight hours of the official, written offer of employment (Tr. 18)

19. Raymond also instructed the complainant to complete the medical examination and take the PPD test at Concentra, and indicated that there was no particular deadline for completing the medical examination and the PPD test, although complainant would need to complete those tests before her start date of May 7, 2012 (Tr. 19, 82-83).

20. On April 5, 2012, the respondent provided complainant with a written employment offer on certain terms. The offer letter was signed by Raymond, the respondent's business manager. Complainant was offered the position of full-time social worker earning $32.00 per hour, with a bi-weekly rate of $2,560.00 and an annual pay rate of $66,560.00, which included full benefits and mileage reimbursement. The offer letter stated that there were opportunities for overtime. The offer letter included a provision that complainant successfully complete a drug screen test within forty-eight hours of the date of the offer letter (Tr. 17, C/CHRO Ex. 6).

21. The offer letter stated that complainant was scheduled to begin work on May 7, 2012 (Tr. 18, C/CHRO Ex. 6).

22. Although completion of a medical examination and a tuberculosis skin test (PPD test) were not mentioned in the written offer letter, there is no dispute that the offer of employment was expressly contingent not only on complainant's successful completion of a drug test within forty-eight hours of the date of the letter, but also on her completion of a medical exam and PPD test. No particular timeframe for completing the latter two tests was specified (Tr. 19, 82-83, C/CHRO Ex. 6).

23. When the complainant accepted the respondent's employment offer, she was employed full time as the director of social services at Long Ridge of Stamford, a 150-bed skilled nursing facility (Tr. 5, 10). When she was employed at Long Ridge of Stamford, the complainant received full health benefits through her employer (Tr. 73).

24. Complainant wished to change employment because of the appeal of working in smaller groups and one-on-one with patients (Tr. 10-11).

25. After accepting the respondent's job offer, but prior to commencing employment with the respondent, the complainant in good faith resigned from her full time position at Long Ridge of Stamford, providing her former employer with a five weeks' notice (Tr. 63, 83).

26. Respondent has an arrangement with Concentra to conduct pre-employment medical examinations for the respondent and to collect donor samples for the respondent's pre-employment drug screen tests. Concentra communicates the results of its medical examinations and PPD tests directly to the respondent, and returns the VITAS medical health questionnaire, as completed by job applicants, directly to the respondent (Tr. 122-123, 133-134).

27. Although donor samples for pre-employment drug screen tests conducted for the respondent are collected by Concentra in Connecticut, the donor samples are then sent to Total Compliance Network (TCN), a provider of drug screen services, located in Coral springs, Florida.

28. The respondent contracts with TCN, as its agent, to conduct the actual drug screen analyses and to communicate with the respondent and with job applicants concerning the results (Tr. 122-123, C/CHRO Ex. 10, R. Ex. 9). At all relevant times, TCN conducted its onsite drug screen analyses at facilities in Coral Springs, Florida (Tr. 123, C/CHRO Ex. 10).

29. When a drug screen test result is positive, it is the policy of TCN to contact the donor to discuss the result and provide an opportunity for the donor to present information concerning a legitimate explanation for the positive test result. The policy further provides that if TCN is unable to contact a donor who tested positive within three working days, then TCN will request that the employer direct the donor to contact TCN as soon as possible (C/CHRO Ex. 12).

30. On April 5, 2012, within forty-eight hours of receiving the written job offer, the complainant provided a urine sample for the pre-employment drug screen test at Concentra in Stamford, Connecticut, in compliance with an express condition of the job offer (Tr. 21).

31. The urine sample was collected at Concentra, in Stamford, but unbeknownst to the complainant the sample was sent to respondent's agent, TCN, a drug testing facility in Florida, where the actual drug test analysis was conducted (Tr. 21).

32. In their initial conversation on April 4, 2012, when the job offer was extended, Raymond did not inform or explain to the complainant that the actual drug test analysis would be performed by TCN, a laboratory located in Coral Springs, Florida, or that if any questions arose concerning the drug screen a representative from TCN would contact her from Florida (Tr. 21).

33. Nor, when she provided a urine sample at Concentra, was the complainant informed by Concentra that the donor sample would be sent to Florida where the actual drug test analysis would be performed by TCN (Tr. 21, 82-83).

34. On or about April 9, 2012, the drug testing laboratory reported to Dr. Seth Portnoy (Portnoy), the medical review officer at TCN in Florida, a positive result on complainant's drug screen analysis (C/CHRO Ex. 11).

35. On April 10 and 11, 2012, in accordance with its policies, TCN attempted without success to contact the complainant by telephone from Coral Springs, Florida, to discuss the positive test result (Tr. 55-57, 75-76, 125, 138, C/CHRO Ex. 17, R. Exs. 12, 15,).

36. On April 12, 2012, TCN faxed the positive result to Raymond, with a notation that TCN had been unable to contact the complainant (Tr. 127, R. Ex. 5, Medical Review Officer Determination/Verification Report, from Seth Portnoy, D.O.).

37. On that date, a representative from TCN also spoke with Raymond on the telephone about the test result and the inability of TCN to contact the complainant directly about the result (Tr. 127-128, R. Ex. 5 and C/CHRO Ex. 11).

38. On April 12, 2012, Raymond placed a telephone call to the complaint but did not leave a voice message (Tr. 129, 141, C/CHRO Ex. 17).

39. On April 12, 2012, Raymond also notified St. John of the positive test result and St. John also attempted to contact the complainant (Tr. 129, 161-163, R. Ex. 5 and C/CHRO Ex. 11).

40. On April 12, 2012, the complainant recognized the respondent's telephone number on her call log and on April 13, 2012, the complainant returned the respondent's call and spoke with Raymond (Tr. 22-24, 58-59; C/CHRO Ex. 17).

41. In their phone conversation on April 13, 2012, Raymond asked the complainant to fill out a job application online, but did not mention the positive drug screen test result to complainant or that TCN had been unable to reach her (Tr. 22-24, 58, C/CHRO Ex. 2). It was not until April 18, 2012, that Raymond informed complainant for the first time about the positive drug screen test result (Tr. 22, 24, Answer ¶ 9).

42. Raymond's failure, in their phone conversation of April 13, 2012, to direct the complainant to contact Portnoy, TCN's medical review officer, as soon as possible was a breach of both TCN policy and the respondent's own drug testing policy (C/CHRO Exs. 9 and 12).

43. On April 13, 2012, after being informed by Raymond that she needed to complete a job application online, complainant completed the online application that evening, submitting the application online a few minutes after midnight on April 14, 2012 (Tr. 22-23, C/CHRO Ex. 2).

44. St. John testified that there had been no contact with the complainant after the respondent received notice of the positive drug test result from TCN on April 12, 2012 (Tr. 163, 167, 170).

45. Neither the complainant's positive test result nor her failure to respond to calls from TCN on April 10 and 11, 2012, were issues of concern for the respondent on April 13, 2012.

46. After the telephone conversation between Raymond and the complainant on April 12, 2012, there was no further communication between the respondent and the complainant until April 18, 2012.

47. On April 18, 2012, the complainant returned a phone call from Raymond and Raymond informed the complainant for the first time that her drug test result was positive (Tr. 22, 24, Answer ¶ 9).

48. Learning for the first time on April 18, 2012, from Raymond about the positive drug test result, the complainant was in shock (Tr. 24). Complainant also learned then for the first time that the actual test analysis had been conducted by TCN in Florida (Tr. 25).

49. During the complainant's telephone conversation with Raymond on April 18, 2012, Raymond instructed complainant to call Portnoy, the medical officer/director of operations at TCN in Florida, about the positive test result and to answer his questions (Tr. 25). At the same time, Raymond also reminded complainant to complete her medical exam and tuberculosis skin test at Concentra in Stamford (Tr. 25).

50. Thus, on April 18, 2012, Raymond asked the complainant to perform the following three tasks, namely (1) to call Portnoy at TCN in Florida concerning the positive drug screen test; (2) to

complete her medical examination at Concentra; and (3) to complete the PPD tuberculosis skin test at Concentra – in furtherance of the employment process by completing performance of the three express conditions of the employment offer (Tr. 25).

51. As early as April 12, 2012, Raymond was aware of the positive result on complainant's drug screen test. On April 18, 2013, knowing that complainant's drug screen result was positive and that TCN had been trying unsuccessfully to contact her for information concerning any possible legitimate explanation for the test result, Raymond instructed the complainant to continue with the medical exam, the PPD test, and to speak with Portnoy at TCN concerning the drug screen test result (Tr. 25, 144, 170-171).

52. After her conversation with Raymond on April 18, 2012, the complainant proceeded promptly to complete the three tasks that Raymond had asked her to perform.

53. In the late morning on April 18, 2012, the complainant called Portnoy at TCN in Florida, discussed her positive drug test with him, and answered his questions (Tr. 26). During her telephone conversation with Portnoy, complainant told him that she was taking a legal medication called Vyvanse which was prescribed by her psychiatrist to treat her ADHD. Portnoy told her that the ADHD medication, Vyvanse, had caused the positive result on her drug screen test (Tr. 27, 30).

54. During complainant's telephone conversation with Portnoy on April 18, 2012, he asked her to fax a copy of her prescription drug history to him and she agreed to do so. Portnoy did not say that it was necessary for her to fax the documentation to him that day. Complainant was not told a specific date that Portnoy needed to receive the documentation (Tr. 27, 30-31, 70).

55. In the early afternoon on April 18, 2012, the complainant completed the physical exam and tuberculosis skin test at Concentra in Stamford, as Raymond had instructed her to do and in compliance with two of the three conditions of the employment offer (Tr. 26, 30, C/CHRO Ex. 13, R. Ex. 7).

56. In connection with her pre-employment medical examination at Concentra on April 18, 2012, the complainant completed the form labeled VITAS medical health questionnaire which Raymond had previously given to her (Tr. 33, C/CHRO Ex. 12).

57. At that time, the complainant disclosed on the VITAS medical health questionnaire form that she was diagnosed with a psychiatric disorder, ADHD, and was under medication, a prescription drug called Vyvanse (Tr. 33, C/CHRO Ex. 12).

58. Also on April 18, 2012, after speaking with Portnoy and completing her medical examination and PPD test at Concentra, the complainant obtained a copy of her prescription drug history from CVS Pharmacy later that day (Tr. 28, C/CHRO Ex. 19).

59. Because of work obligations and scheduled meetings at work in the evening on April 18, 2012, the complainant was unable to fax her Vyvanse prescription drug history to Portnoy that same day as soon as she had obtained it (Tr. 29-30).

60. Moreover, the complainant did not want to fax the prescription drug information to Portnoy while she was at work because of concerns about confidentiality on the office fax machine (Tr. 30).

61. The following day, on April 19, 2012, after learning that the respondent was terminating the employment relationship, the complainant did fax the information to Portnoy, and on April 20, 2012, Portnoy formally notified the respondent that he had contacted the complainant on April 18, 2012, and that the final determination of complainant's drug screen test was negative (Tr. 61, C/CHRO Ex. 15, 16, 19).

62. According to TCN's policies and procedures, TCN's medical review officer is "an agent of the employer whose responsibility is to make a determination on test results and report them to the employer." (C/CHRO Ex. 12) See also (C/CHRO Ex. 10).

63. TCN procedure specifies that TCN will provide a job applicant with an opportunity to discuss a positive test result with TCN's medical review officer (MRO). The procedure further stipulates:

> *"If the MRO is unable to contact a donor who tested positive within 3 working days of receipt of the test results..., the MRO shall contact the employer and request that the employer direct the donor to contact the medical review officer as soon as possible.* If the MRO has not been contacted by the donor within 24 hours from the request to the employer, the MRO shall verify the report as positive. As a safeguard to employees and job applicants, once a MRO verifies a positive test result, the MRO may change the verification of the result if the donor presents information to the MRO which documents that a serious illness, injury, or other circumstance unavoidably prevented the employee from contacting the MRO within the specified time frame and if the donor presents information concerning a legitimate explanation for the positive test result." (Emphasis added.) (C/CHRO Ex. 12)

64. TCN procedure further provides that the medical review officer (MRO)

> "will notify the employee or job applicant of a confirmed positive test result, within 3 days of receipt of the test result from the laboratory, and inquire as to whether prescriptive or over-the-counter medications could have caused the positive test result. Within 5 days of notification to the donor of the positive test result, provide an opportunity for employee or job applicant to discuss the positive test result and to submit documentation of any prescriptions relevant to the positive test result." (C/CHRO Ex. 12)

65. According to the respondent's own policy manual concerning pre-employment drug testing (Policy Number 8:21), "Positive lab results will be reviewed by a qualified physician (MRO). The MRO will interview the applicant prior to determining a positive test result." The policy further provides: "Test results could take up to two weeks from time of collection. Due to this time requirement, it could happen that an applicant may complete the hiring process and actually start work before drug test results are received by VITAS." (C/CHRO Ex. 9)

66. On April 18, 2012, the complainant was responsive and promptly performed all of the three tasks which earlier that day Raymond had required of her, namely to call Portnoy at TCN to discuss the positive test result, to complete her medical examination at Concentra, and to complete her PPD test at Concentra (Tr. 26-27, 30, C/CHRO Ex. 13).

67. In addition, also on April 18, 2012, after speaking with Portnoy, the complainant obtained her prescription drug history from CVS Pharmacy as Portnoy had requested her to do in their telephone conversation that day (Tr. 28, C/CHRO Ex. 19).

68. The complainant was not scheduled to begin working for respondent until May 7, 2012 (Tr. 18, C/CHRO Ex. 6).

69. Before April 18, 2012, the complainant's ADHD had not been disclosed to the respondent or mentioned in any of complainant's interactions with the respondent.

70. On April 18, 2012, the complainant placed a phone call to Raymond to notify her that she had completed all three tasks that Raymond had requested her to perform earlier that day (Tr. 49). When Raymond did not answer her telephone, the complainant left a voice message for her stating: she had spoken with Portnoy; had informed Portnoy that she has ADHD and was taking Vyvanse for her ADHD; Portnoy had informed her that Vyvanse had probably caused the positive drug test; and at Portnoy's request she was going to fax a copy of her prescription drug history to TCN (Tr. 50, 86).

71. At or about 6:18 p.m. on April 18, 2012, and after the complainant completed her medical examination and tuberculosis skin test at Concentra Medical Centers, Concentra faxed to Raymond a one-page summary report, entitled "Non-Injury Work Status Report," confirming that during the medical examination time period from 1 p.m. to 2:17 p.m. that day, the complainant had completed her "TB Skin Test" and "Physical PrePlacement." In the report, Concentra stated that complainant was "Able to perform essential functions" and had "No medical restrictions" (C/CHRO Ex. 13, p. 1, R. Ex. 7).

72. Concentra did not fax a full copy of complainant's completed medical health questionnaire, including the disclosure of complainant's ADHD and Vyvanse medication on the form, to Raymond on April 18, 2012 (Tr. 49-50, 133-134). It is the practice of Concentra to send a full copy of the completed medical health questionnaire of job applicants to the respondent via regular mail (Tr. 133-134, 143). Thus, a full copy of the VITAS medical health questionnaire form, as completed by complainant at Concentra on April 18, 2012 (C/CHRO Ex. 13, pp. 3-4), was delivered to respondent by regular mail and had not been received by respondent on or before April 19, 2012 (Tr. 43-46, 133-134, 143).

73. On the morning of April 19, 2012, Raymond called TCN to ask whether the complainant had contacted TCN and had sent in the prescription drug documentation yet. Raymond was told by TCN that complainant had contacted TCN the previous day on April 18, 2012, and that she was going to fax her prescription history to them, but that they had not yet received it (Tr. 132, R. Exs. 1 and 12). The conversation between Raymond and TCN occurred in the morning of April 19, 2012, before the decision to rescind the complainant's job offer was made (Tr. 138).

74. On her call log for April 19, 2012, Raymond noted that complainant had called TCN and would be faxing in a prescription drug history to TCN (R. Exs. 1 and 12).

75. Raymond was aware that whenever a drug screen test result is positive, it is the policy of TCN to attempt to contact the donor and request some sort of documentation from the donor which might provide a legitimate explanation for the positive test result (Tr. 149).

76. Raymond acknowledged that it would not be unusual for an employee to fulfill her work obligations rather than send personal faxes while at work (Tr. 144).

77. As of April 18, 2012, and before the respondent rescinded the employment offer on April 19, 2012, the complainant had substantially performed all of her obligations arising out of the conditional offer, including successful completion of the drug screen test, subject only to providing documentation confirming her ADHD prescription medication to TCN.

78. After her telephone conversation with TCN in the morning of April 19, 2012, Raymond spoke with St. John by telephone. They decided to rescind the employment offer because of the complainant's inability to take direction or to follow through on company timelines (Tr. 132, 167, 170). St. John then consulted Nancy Wallent, respondent's vice-president, by phone and she concurred in the decision (Tr. 167).

79. The respondent's decision to rescind the job offer was made in the morning of April 19, 2012, shortly after Raymond had spoken with TCN and had been told that the complainant intended to fax her prescription medication history to TCN (Tr. 132, 170-171, 176).

80. On April 19, 2012, when Raymond recommended to St. John that the complainant's job offer be rescinded, Raymond knew that the complainant had contacted Portnoy at TCN on April 18, 2012, and would be faxing her prescription medication history to him to document a legitimate explanation for the positive test result in accordance with TCN policies (Tr. 143, 165, 170-171, 176).

81. When Raymond spoke with St. John on April 19, 2012, to discuss rescinding the complainant's job offer, she told St. John that she had called TCN that morning "to see if Kathleen had submitted the necessary paperwork to [TCN]." Raymond testified, "I had called them just to see if the paperwork was received." Raymond was told by TCN that as of the morning of April 19, 2012, TCN had not received the documentation from complainant (Tr. 132, 147, 175-176).

82. On the morning of April 19, 2012, after speaking first with TCN and then with St. John by telephone and making the joint decision to rescind the employment offer, Raymond placed a telephone call to the complainant and left a voicemail message asking her to call Raymond to discuss the job offer. The complainant returned Raymond's call around 4 p.m. that day (Tr. 52).

83. In that conversation of April 19, 2012, Raymond informed complainant that the respondent was rescinding the job offer because of the positive result on complainant's drug screen test and because complainant had not been responsive in getting back to TCN (Tr. 52-54).

84. TCN policy clearly provides an opportunity for a job applicant to "submit documentation of any prescriptions relevant to the positive test result" ... "[w]ithin 5 days of notification to the donor of the positive test result." (C/CHRO Ex. 12).

85. Complainant asked Raymond what she meant by "not getting back to TCN", and Raymond said that TCN had placed fifteen telephone calls to complainant and complainant had not returned the calls (Tr. 54).

86. Prior to April 19, 2012, the respondent had not informed the complainant that previously on April 10 and 11, 2012, TCN had attempted unsuccessfully to reach her in connection with the positive test result (Tr. 53-54).

87. Respondent's notes from TCN of TCN's attempts to contact the complainant concerning the positive test result indicate nine attempts (not fifteen) to contact the complainant by phone from Florida on April 10 and 11, 2012 (R. Ex. 12).

88. Complainant's telephone records show nine calls from an unidentified phone number in Coral Springs, Florida. Six of the calls occurred on April 10, 2012, and three of the calls occurred on April 11, 2012. Three of the calls were about twenty seconds in duration, in which brief voicemail messages were recorded without explaining the nature of the call. None of the three messages that were left from the Coral Springs telephone number, two on April 10, 2012, and one on April 11, 2012, identified either the purpose of the call or the identity of the caller. Complainant testified that the message was left by a "formal sounding person" saying "This is a message for Kathleen Treacy, please call us back." (Tr. 56). Four of the calls were between six and eight seconds long. Two calls of zero-seconds duration were simply hang-ups. At the time, the complainant was not aware that her urine sample had been sent to a laboratory in Florida, TCN, which would be conducting the drug screen analysis. The complainant did not learn until April 19, 2012, that the calls placed to her from Florida on April 10 and 11, 2012, were from TCN, the respondent's drug testing agent. (Tr. 54, 56, 57, C/CHRO Ex. 17).

89. Raymond testified that complainant had not followed through on protocol (Tr. 136).

90. Raymond asked Holly Bessoni-Lutz, respondent's patient care administrator, to be present in the room as a witness during her telephone call with the complainant on April 19. 2012. At the public hearing, Bessoni-Lutz stated that complainant had not responded to the TCN people and that was the reason for the termination. She also testified that the complainant was surprised when Raymond told her "we called, we called, we asked you for things, we called, you didn't call back." Tr. 152-152, 155).

91. All of complainant's medical exams and urine collection for the drug screen test occurred at the medical offices of Concentra in Stamford, Connecticut (Tr. 169).

92. Until Raymond informed complainant for the first time on April 18, 2012, to call Portnoy at TCN in Florida to discuss the drug screen test, the complainant had not been apprised by respondent, and did not know, that the analysis for her pre-employment drug screen test was performed by respondent's agent TCN, an entity located in Florida (Tr. 56-57, 108, 169).

93. The complainant did not know anyone in Coral Springs, Florida (Tr. 55). Complainant did not respond to the telephone calls from Florida because she believed them to be from a telemarketer (Tr. 57, 95).

94. At no time during the employment process was the complainant told that she would receive a follow-up call from TCN if the drug screen test was positive (Tr. 21, 82-83).

95. In her telephone conversation with complainant on April 12, 2012, Raymond could have informed complainant of the positive test result; that the drug screen analysis had been performed in Florida; that TCN had been attempting to reach her to discuss the test result; and there was an urgent need for her to return TCN's calls. But she did not.

96. In her telephone conversation with Raymond on April 19, 2012, the complainant begged Raymond not to rescind the employment offer. Complainant told Raymond that she had completed everything she had been asked to do on April 18, 2012; that Portnoy had told her to send the prescription history; and she intended to do so that day, on April 19, 2012. Complainant also told Raymond that when she explained to Portnoy that she was taking the prescription Vyvanse he had said to her: "Don't worry about it, everything is fine, and ... just send in the prescription history." (Tr. 61, 87-88).

97. Raymond continued to maintain that the complainant's job offer was being rescinded because of the positive drug screen test and the complainant's lack of diligence and responsiveness in following through and returning multiple calls from TCN (Tr. 61).

98. The respondent had known since April 12, 2012, of complainant's positive test result and her failure to return TCN's calls on April 10 and 11, 2012. When Raymond spoke with the complainant on April 13, 2012, and again on April 18, 2012, neither the positive test result nor complainant's failure to return calls from TCN had presented an issue and did not result the termination of the employment relationship.

99. When the complainant told Raymond on April 19, 2012, that she would fax her prescription drug history to Portnoy at TCN that day, Raymond told her "Don't bother." (Tr. 61, 87)

100. When the complainant nevertheless faxed her prescription drug history to Portnoy on April 19, 2012, after speaking with him for the first time on April 18, 2012, it was well within the five-day period provided from the date of notification to the donor of a positive test result (in this case April 18, 2012) to submit documentation of any prescriptions relevant to a positive test result pursuant to TCN policy (C/CHRO Ex. 12).

101. On April 20, 2012, TCN sent to the respondent a Medical Review Officer Determination/Verification Report, from Portnoy, stating that a final determination of "negative" was made with respect to complainant's drug test. The determination notes that "Contact Made 4/18/12. Rx received from donor to clear 4/20/12." (C/CHRO Ex. 15).

102. The drug test was negative, as confirmed by the verbal representations by Portnoy to the complainant on April 18, 2012, and the written verification report to the respondent from TCN on April 20, 2012, confirming that TCN had made contact with the complainant on April 18, 2012, and the test result was negative. Portnoy also confirmed the negative test result in a letter to complainant, in which he wrote: "Dear Ms. Treacy. This letter is to verify that the Drug Screen Test that you took on 04/05/2012 has been reviewed by me and the final determination of the result is NEGATIVE, dated 04/20/2012." (C/CHRO Exs. 15, 16)

103. On April 20, 2012, at 11:59 a.m., one day after the decision to rescind the employment offer had been made, Raymond wrote in an email to St. John on the subject of Kathleen Treacy: "Per Jaslyn and Susan leave it the way it is; if I wanted to call her back and let her know that the

decision was solely made on the fact that it took her so long to contact us back and TCN." (R. Ex. 11)

104. Raymond testified that, viewing the complainant's application in retrospect, even beginning with complainant's meeting with St. John on April 3, 2012, when the initial job offer was extended, there had been concerns about complainant's ability to take direction because she showed up at the respondent's Stratford office, when St. John was expecting to meet her in the Stamford office (Tr. 139).

105. On April 20, 2012, complainant informed her former boss at Long Ridge of Stamford that respondent had rescinded her job offer (Tr. 62). Her former boss immediately placed a call to Raymond to intercede on the complainant's behalf when she spoke in strong support of the complainant and explained how the rescission of the job offer had prejudiced and was harming complainant (Tr. 63).

106. Complainant's former employer had already hired a replacement for the position which the complainant had vacated and therefore was unable to retain complainant as an employee (Tr. 62).

107. Complainant was denied unemployment compensation because it was determined that she had resigned from her previous employment voluntarily and was therefore ineligible (Tr. 63, 94, C/CHRO Ex. 22).

108. The complainant searched for another full-time position as a licensed social worker for more than one and one-half years. She conducted job searches on Career Builder, Monster, and other online job-search engines. She contacted recruiters and personnel agencies. She applied for several positions every day and had many interviews for positions (Tr. 64, 67, 100-101, C/CHRO Ex.23).

109. Complainant applied for anything that resembled social work. She also applied for secretarial positions, employment in customer service and the retail sector, and other jobs (Tr. 64).

110. In September of 2012, complainant was hired as a part-time employee at Chico's (Tr. 67).

111. While employed at Chico's, complainant earned $411.70 in 2012 (Tr. 71, C/CHRO Ex. 25).

112. In November of 2012, complainant began working as a therapist part-time for Bridges, in Milford, Connecticut, as a per diem social worker without benefits (Tr. 68).

113. While employed at Bridges, complainant earned $1,610 in 2012 and $23,037 in 2013 (Tr. 71, C/CHRO Ex. 25, 26).

114. In 2012, complainant also earned $100.00 from Geriatric Psychological Services (Tr. 71, C/CHRO Exs. 25, 26).

115. On October 28, 2013, complainant finally obtained a full-time social work position, with benefits, at Optimus Health Care in Stamford, CT. That position paid at least as much as she would have earned with respondent (Tr. 69).

116. During 2013, complainant earned $10,004.16 from Optimus Health Care (Tr. 72, C/CHRO Ex 25/26).

117. The complainant tracked her mileage commuting from her home in Stamford, Connecticut, to a part-time job as a therapist with Bridges, in Milford, Connecticut, for eleven months from November 26, 2012 to October 25, 2013, and incurred travel costs of $5,637.60, based on the federal mileage rate of $0.555 per mile. She also incurred mileage costs for the expense of traveling to numerous job interviews from May 1, 2012, to August, 30, 2013, in the total amount of $616.84 (Tr. 65-69, C/CHRO Ex. 23).

IV
ANALYSIS AND CONCLUSION
Applicable Statutes

The complainant claims that respondent terminated/constructively discharged her because of her learning disability [3] and/or mental disability [4] in violation of the Connecticut Fair Employment Act (CFEPA), specifically General Statutes § 46a-60 (a) (1), [5] and the more general provisions of General Statutes § 46a-58 (a).[6] The complainant also alleges discrimination based on complainant's disability in violation of the Americans with Disabilities Act, 42 U.S.C. 12101, et seq. (ADA).[7] In the present case, without waiving any claims the complainant may have in another forum to pursue her federal claims, the commission has conceded in its reply brief that complainant is pursuing her claims before the Commission on Human Rights and Opportunities solely pursuant to § 46a-60 (a) (1) (CHRO Reply Brief, p. 1). Accordingly, the only claim before the tribunal is the claim of discrimination related to learning disability and/or mental disability arising under §§ 46a-60 (a) (1).

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[3] Under the CFEPA, a learning disabled person is "an individual who exhibits a severe discrepancy between educational performance and measured intellectual ability and who exhibits a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in a diminished ability to listen, speak, read, write, spell or to do mathematical calculations." General Statutes § 46a-15 (19).

[4] Under the CFEPA, a mentally disabled person is "an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders"; " General Statutes § 46a-51 (20).

[5] General Statutes § 46a-60 (a) (1) provides in pertinent part that "[i]t 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] ... learning disability ..."

[6] General Statutes § 46a-58 (a) provides in pertinent part that: "[i]t shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of" inter alia "mental disability."

[7] The ADA prohibits discrimination against any "qualified individual on the basis of disability in regard to," inter alia, "discharge of employees." 42 U.S.C. § 12112 (a).

Standard

Our courts and this tribunal generally look to the analogous federal law for guidance when analyzing state employment discrimination claims, and the analysis is the same under both. *Board of Education of Norwalk v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 505 n. 18 (2003); *Craine v. Trinity College*, 259 Conn. 635, 637 n. 6 (2002); *State v. Commission on Human Rights & Opportunities,* 211 Conn. 464, 469-470 (1989); *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 107-108 (1996); *Tomik v. United States Parcel Service, Inc.,* 157 Conn. App. 312, 328 (2015).

Under our employment discrimination statutes, claims of disparate treatment are analyzed for liability under one of two theories: the mixed-motive *Price-Waterhouse* model; *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); or the pretext *McDonnell Douglas* model; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 104-105.

Under the mixed-motive *Price Waterhouse* methodology, a complainant must submit enough evidence, whether directly or circumstantially, that if believed, would establish that a discriminatory reason more likely than not motivated the respondent's action. *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 103-105. Complainant has the initial burden of showing that she was a member of a protected class and that an impermissible factor more likely than not played a motivating role in the employment decision. Id. If the complainant's prima facie case is sufficiently revealing of a discriminatory factor motivating the employer's decision, the burden of production and persuasion shifts to the respondent to prove by a preponderance of the evidence that a legitimate, nondiscriminatory reason existed at the time of the decision and had motivated that decision. *Levy v. Commission on Human Rights & Opportunities,* supra, 106.

"Often, a plaintiff cannot prove directly the reasons that motivated an employment decision. Nevertheless, a plaintiff may establish a prima facie case of discrimination through inference by presenting 'facts [that are] sufficient to remove the most likely bona fide reasons for an employment action....' *Tyler v. Bethlehem Steel Corp.,* 958 F.2d at 1180. From a showing that an employment decision was not made for legitimate reasons, a fact finder may infer that the decision was made for illegitimate reasons. It is in these instances that the *McDonnell Douglas* model of analysis must be employed." *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 357, citing *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green,* supra, 411 U.S. at 792.

Under the pretext *McDonnell Douglas* model, a complainant may prove intentional discrimination indirectly by establishing that the reason given by the respondent was pretextual or was not credible. *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 103-105. The *McDonnell Douglas* model uses a three-stage, burden-shifting paradigm and is used where the complainant has only circumstantial or indirect evidence of discrimination. *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 106. Under this approach, complainant bears the burden of persuasion throughout the litigation, including a modest initial burden of establishing a prima facie case, which, if satisfied, creates a presumption of discrimination. *Levy v. Commission on Human Rights & Opportunities,* supra, at 108.

If the complainant establishes a prima facie case, the burden of production then shifts to the respondent to articulate a legitimate, non-discriminatory reason for the employer's action. *Reeves v. Sanderson*

Plumbing, 530 U.S. 133, 142 (2000); *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 108. Where the respondent articulates a legitimate, non-discriminatory reason for the adverse employment action, the presumption of discrimination disappears and the burden of persuasion then shifts back to the complainant who must prove by a preponderance of the evidence that the reason proffered by the respondent is actually a pretext for prohibited discrimination or is not worthy of credence. *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 705 (2006); *Board of Education of Norwalk v. Commission on Human Rights & Opportunities*, supra, 266 Conn. at 506; *Levy v. Commission on Human Rights & Opportunities,* supra, at 106. Although the burden of production shifts to the respondent, the ultimate burden of persuading the trier of fact of intentional discrimination remains at all times with the complainant. *Board of Education of Norwalk v. Commission on Human Rights & Opportunities,* supra, at 507.

In the present matter, the complainant argues first that under the method of proof set forth in *McDonnell Douglas*, it may be inferred that discrimination was the motivating factor in the termination of her employment because the respondent's proffered explanation for the decision to rescind the job offer is unworthy of credence, and that the complainant has shown by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons but were a pretext for discrimination. The complainant also argues, in the alternative, that a stated rationale for the adverse action, namely a positive drug screen result which was caused by complainant's mental disability medication, constitutes direct evidence of disability-based discrimination and the mixed-motive *Price Waterhouse* method of analysis therefore applies. The respondent analyzes the case under the method of proof set forth in *McDonnell Douglas*. In the present matter, the mixed-motive *Price Waterhouse* analysis does not apply. The correct legal standard is the burden-shifting method of proof set forth in the *McDonnell Douglas* pretext model. *Craine v. Trinity College*, 259 Conn. 625 (2002).

McDonnell Douglas Framework: Application

In order to establish a prima facie case of discrimination under *McDonnell Douglas*, a complainant must demonstrate that (1) she was a member of a protected class; (2) she was qualified for the position; (3) she was subjected to an adverse employment decision; and (4) the circumstances give rise to an inference of discrimination. See *McDonnell Douglas Corp. v. Green,* supra, at 802; *Reeves v. Sanderson Plumbing Products, Inc.,* supra, 530 U.S. at 142; *Feliciano v. AutoZone, Inc.,* 316 Conn. 65, 73-74 (2015); *Board of Education of Norwalk v. Commission on Human Rights & Opportunities,* supra, 266 Conn. at 505; *Perez-Dickson v. Bridgeport*, 304 Conn. 483, 514 (2012); *Jackson v. Water Pollution Control Authority*, supra, 278 Conn. at 705; *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 107; *Eaddy v. Bridgeport,* 156 Conn. App. 597, 604 (2015). "The plaintiff's burden of establishing a prima facie case is not onerous ..." *Levy v. Commission on Human Rights & Opportunities,* supra, 236 Conn. at 107; see *Perez-Dickson v. Bridgeport,* supra, 304 Conn. at 514.

Prima Facie Case

In order to meet the first required element of her prima facie case, the complainant must prove that she is a member of a protected class. In the present case, the respondent argues that complainant failed to establish her protected status, namely that she was a learning disabled individual [8] or that she suffered

[8] In the complainant's brief and commission's reply brief, the sole focus of the argument concerning complainant's protected status is based on her mental disability, specifically Attention Deficit/Hyperactivity Disorder (C. Brief, pp. 2-3; CHRO Reply Brief, pp. 1--3), and not a learning disability. The complainant's employment discrimination claim based on learning disability is therefore deemed abandoned.

from a substantially limiting mental disorder within the meaning of state or federal law. The respondent further argues that the complainant failed to establish that she suffered from a mental disorder which substantially limited her in major life activities within the meaning of the ADA, 42 U.S.C. § 12102; 29 CFR § 1630. 2 (g) to (j). [9]

To establish her protected status, the complainant argues that she has been diagnosed with Attention Deficit/Hyperactivity Disorder, a mental disorder listed in the most recent Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published by the American Psychiatric Association; [10] that during the time period in question, she was under the care of a medical provider who prescribed medication for said disability; and that she therefore meets the standard of having a mental disability pursuant to Connecticut law.

Connecticut cases make clear that the Connecticut Fair Employment Practices Act confers broader protection for disability claims than are available under the ADA, for "'federal law defines the beginning and not the end of [Connecticut courts] approach to the subject.' *State v. Commission on Human Rights & Opportunities*, 211 Conn. 464, 479 (1989)." *Beason v. United Techs. Corp.,* 337 F. 3d 271, 276 (2d Cir. 2003). General Statutes § 46a-51 (20) defines mental disability as "an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders..." Attention Deficit/Hyperactivity Disorder is a psychiatric disorder of the neurodevelopmental type and is listed within the DSM-5. "To be 'disabled' under Connecticut law is different from being 'disabled' under the ADA." *Shaw v. Greenwich Anesthesiology Associates*, 137 F. Supp. 2d 46, 65 (D. Conn. 2001). "The CFEPA's definition of physical disability is broader than the ADA's." *Beason v. United Techs. Corp.,* supra, 337 F. 3d at 276. There is no requirement in Connecticut that the complainant establish that she was substantially limited in her major life activities in order to be considered an individual with a mental disability as defined under § 46a-51 (20) and § 46a-60.

The EEOC regulations [11] are not controlling here, as demonstrated by the following Connecticut cases which support the finding that complainants can be disabled pursuant to the CFEPA without regard to whether such individuals were substantially limited in a major life activity. See, e.g., *Gilman Bros. Co. v. Commission on Human Rights & Opportunities,* Superior Court, judicial district of Hartford, Docket No. CV 950536075 (May 13, 1997) (1997 WL 275578, *3); *Tordonato v. Colt's Mfg. Co.*, Superior Court, judicial district of New Britain, Docket No. CV 970481610S (December 16, 2000) (2000 WL 33124392, *5). Human rights referee decisions also recognize the difference between the state and federal definitions of

[9] The EEOC regulations define major life activities as exemplified by "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR § 1630.2 (i). The same regulations describe a disability as an impairment that "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." 29 CFR § 1630.2 (j) (1) (2).

[10] Judicial notice is taken of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and the listing of ADHD as a disorder therein.

[11] See footnote 9 of this decision.

disability. See, e.g., *Commission on Human Rights & Opportunities ex rel. Kowalczyk v. City of New Britain,* 2002 WL 34249748, *18-19, CHRO No. 9810482 (March 15, 2002); *Commission on Human Rights & Opportunities ex rel. Saksena v. Connecticut Department of Revenue Services,* 2001 WL 36041438, *10-11, CHRO No. 9940089 (August 9, 2001); *Commission on Human Rights & Opportunities ex rel. Secondo v. Housing Authority,* 2000 WL 35575649, *16-17, CHRO No. 9710713 (June 9, 2000) ("Although the complainant is not disabled under the ADA ... the broader definition of disability under state law yields a different result than the federal definition.")

The credible evidence established that complainant had been diagnosed with ADHD and was, during the time period in question, under the care of Israely, a psychiatrist, who prescribed Vyvanse, a medication for the control of her mental disability. The complainant disclosed her diagnosis and medication for ADHD, a psychiatric disorder, on the VITAS Medical Health Questionnaire which was provided to her by respondent when she accepted the offer of employment, and which she completed as part of a pre-employment medical examination conducted for the respondent by Concentra Medical Center on April 18, 2012. She disclosed her mental disability to the medical officer of respondent's drug testing agent and directly to the respondent in a telephonic voicemail message for the respondent's business manager on that date. Complainant testified credibly about her disability and her medication for such disability, Vyvanse, which is corroborated by her documented prescription drug history. Complainant meets the standard of having a mental disability pursuant to Connecticut law.

Turning to the second prima facie element, the complainant had solid professional and academic credentials and a good understanding of the profession and the nature of her new employment. At the hearing, she described her duties as director of social work at her previous employer and explained the reasons for desiring to transition to the new position with respondent. According to her resume, the complainant earned a master-of-science degree in social work from Columbia University, was a licensed clinical social worker with the State of Connecticut and a licensed master social worker with the State of New York, and had more than ten years of experience working in her professional field. Indeed, the respondent recruited the complainant at her then place of employment and extended an employment offer to her after conducting an extensive hiring process and a thorough background and reference check. Following respondent's rescission of the job offer, complainant's former employer interceded without delay on her behalf to defend and vouch for her. The record supports the finding that complainant was qualified for her new job as a hospice social worker based on her background, her training, her credentials, including both her licensure with the State of Connecticut and the State of New York, and her work experience before being hired by the respondent.

With regard to the third prima facie element, this action arose after the respondent extended to the complainant an offer of at-will employment on April 4, 2012, which the complainant accepted. Thereafter, on April 19, 2012, three weeks before the complainant was scheduled to commence working for the respondent, the respondent abruptly changed its mind and rescinded its offer prior to complainant's commencing employment but after she had left her former employment. There is no doubt the complainant has shown that she was subjected to an adverse employment decision, which may be characterized as the termination of an at-will employment relationship [12] in the form of the rescission of

[12] An at-will employment relationship with the complainant began when the complainant accepted the respondent's offer of employment. *Petitte v. DSL.net. Inc.,* 102 Conn. App. 363, 461 (2007). The relationship is not conditioned on the prospective employee actually commencing employment. Id.

the employment offer prior to the commencement of her employment. The third prima facie element is established.

Concerning the fourth prima facie element, whether the adverse action occurred under circumstances giving rise to an inference of discrimination in this case, the respondent argues in part that the respondent had no notice or knowledge of the complainant's mental disability when the decision to rescind the job offer was made on April 19, 2012, and therefore the complainant cannot show that she suffered an adverse action motivated by discriminatory intent. According to the argument, the respondent did not learn of the complainant's ADHD diagnosis until after it decided to rescind the offer of employment and therefore complainant failed to establish that she suffered an adverse employment action because of a mental disability, the import being that an employee cannot show intentional discrimination unless the employer knows of the disability. In that sense, the employer's knowledge of the plaintiff's disability is an element that is frequently added to the prima facie case in ADA cases and in disability-based discrimination cases under the Connecticut Fair Employment Practices Act. See generally, Larson, Employment Discrimination, §156.02 [1] [c]; see also *Cordoba v. Dillard's, Inc.*, 419 F3d 1169 (11th Cir. 2005); *Hedberg v. Indiana Bell Tel. Co, Inc.*, 47 F3d 928 (7th Cir. 1995) (If an employer discharged the plaintiff without having knowledge of plaintiff's disability, ADA claim cannot succeed. Statute does not require "clairvoyance"); *Peters v. Hartford Hospital,* Superior Court, judicial district of Hartford, Docket No. CV 146055702S (June 6, 2016) (2016 WL 3536522, *3); *Nobitz v. Hamden*, Superior Court, judicial district of New Haven, Docket No. CV 010455315S (May 18, 2004) (2004 WL 1245527, *3). The complainant vigorously contends that the respondent had knowledge of complainant's mental disability before it rescinded the offer of employment.

I am not persuaded by the respondent's argument that complainant did not establish the respondent's notice or knowledge of complainant's mental disability for the following reasons. First, the complainant testified that on April 18, 2012, she placed a telephone call to Raymond after speaking with Portnoy at TCN and completing her medical examination and PPD test at Concentra. The purpose of the call was to report to Raymond that the complainant had completed the three tasks which Raymond earlier that day had requested her to perform and to inform Raymond of the results of her conversation with Portnoy. When Raymond did not answer the phone, the complainant left a detailed voice message for Raymond stating that she had completed her medical exam and PPD test; that she had spoken with Portnoy at TCN and had told him that she had ADHD and was taking Vyvanse for the ADHD; that Portnoy had told her the Vyvanse medication had caused the positive result; and that she would be faxing a copy of her prescription history to Portnoy at his request.

The complainant contends that her voice message of April 18, 2012, is what prompted Raymond to contact TCN early in the day on April 19, 2012, and the fact that Raymond did so confirms that Raymond had received the complainant's voice message in which she also disclosed her mental disability to the respondent.

In her testimony, Raymond denied receiving the complainant's detailed voice message of April 18, 2012. Raymond placed a telephone call to TCN on the morning of April 19, 2012, to ask whether complainant had contacted TCN and "had submitted the paperwork to them." (Tr. 132). She testified: "I had called them just to see if the paperwork was received." (Tr. 147). Although Raymond denied receiving the complainant's voice message, her very precise question to TCN early in the day on April 19, 2012, presupposes knowledge that complainant would be submitting information to TCN, which in turn leads to the reasonable and logical inference that Raymond received that information by listening to complainant's voice message, and in doing so she also learned that the complainant had ADHD.

In addition, as a general matter under the law of agency, the rules of imputation charge a principal with the legal consequences of knowledge of a fact known by an agent when knowledge of the fact is material to the principal's legal relations with third parties. See Restatement (Third) of Agency § 5.03 (2006) (imputing to the principal material facts "an agent knows or has reason to know"). "A notification given to an agent is effective against a principal if the agent had actual or apparent authority to receive the notification..." Restatement (Third) of Agency §§ 5.01 (2) and 5.02 (2006); see *Apollo Fuel Oil v. United States*, 195 F. 3d 74, 76-77 (2d Cir. 1999) ("In general, when an agent is employed *to perform certain duties* for his principal and acquires knowledge *material to those duties*, the agent's knowledge is imputed to the principal") (Emphasis added); *Mallis v. Bankers Trust Co.*, 717 F. 2d 683, 689-690 (2d Cir. 1983) (same); *City of West Haven v. U.S. Fidelity & Guaranty Co.*, 174 Conn. 392, 395 (1978); *Lane v. United Elec. Light & Water Co.*, 88 Conn. 670 (1914); *Stump v. Ind. Equip Co.*, 601 N.E.2d 398, 403 (Ind. Ct. App. 1992); Mechem on Agency § 1803 ("It is the general rule, settled by an unbroken current of authority, that notice to or knowledge of an agent, while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to or knowledge of the principal."); Joseph Story, Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law § 140 (N. St. John Green ed., 8th ed. 1874):

> [N]otice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; *otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party.* (Emphasis added.) Id.

On this point, the evidence establishes the following. On April 18, 2012, the respondent, through Raymond, directed complainant to contact Portnoy, the medical officer/director of operations of TCN, respondent's drug-testing agent, in furtherance of completion of complainant's pre-employment drug test, a matter within the purview of Portnoy's authority. That day, the complainant contacted Portnoy about the test result and disclosed to him her ADHD mental condition and Vyvanse prescription medication to treat the disorder.[13] The disclosure was made to respondent's agent[14] and the information disclosed went to a material matter on the subject matter and within the scope of the agency. Under the agency rule of imputation, Portnoy's knowledge, which he gained on April 18, 2012, of the complainant's ADHD disorder is imputed to respondent and respondent is charged with Portnoy's knowledge. See, e.g., *Apollo Fuel Oil v. United States*, supra, 195 F. 3d at 76-77; *City of West Haven v. U.S. Fidelity & Guaranty Co.*, supra, 174 Conn. at 395; *Lane v. United Elec. Light & Water Co.*, supra, 88 Conn. at 670. Under the imputation principle therefore, the respondent, as principal, knew, or had reason to know, of the complainant's mental disability and the legitimate medical explanation for the drug test result through the knowledge of these material facts gained, on April 18, 2012, by its agent.

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[13] On that date, she also disclosed her ADHD psychiatric disorder and Vyvanse prescription drug medication on the respondent's health questionnaire, entitled "VITAS Medical Health Questionnaire," which she completed in connection with her medical examination at Concentra, also at the respondent's direction and request.

[14] C/CHRO Exs. 10, 12; See Findings of Fact Nos. 28, 62.

The absence of an alternative explanation for the sudden urgency for Raymond to know on the morning of April 19, 2012, whether TCN had received the complainant's prescription drug history — nearly three weeks before the complainant's scheduled start date on May 7, 2012; seven days after receiving notice of the positive drug screen result on April 12, 2-12; and only one day after informing complainant for the first time about the drug screen result and asking her to contact Portnoy to discuss the result — suggests that Raymond had received the complainant's telephonic voice message and was aware that the complainant had ADHD.

The complainant has submitted sufficient credible evidence for the tribunal to conclude that as of April 18, 2012, the respondent was aware and had knowledge of the complainant's mental disability.

Prior to the complainant's disclosures of her ADHD on April 18, 2012, the respondent did not treat the positive drug test or the responsiveness of the complainant as urgent matters, including in the amicable telephonic conversation between Raymond and complainant on April 18, 2012. After the disclosures of complainant's ADHD on April 18, 2012, however, events subsequently flowed quickly from the moment on the morning of April 19, 2012, when Raymond called TCN to inquire whether or not the complainant had faxed her prescription drug history to Portnoy and learned that TCN had not yet received the documentation. An evaluation of all previous and subsequent events together demonstrates that Raymond's telephone conversation with TCN on April 19, 2012, represents a turning point in the relationship between the parties. It was only after the complainant disclosed her mental disability to an agent for the respondent, and directly to the respondent in her voice message to Raymond, both on April 18, 2012, that suddenly, and with great urgency, the respondent on the morning of April 19, 2012, made the decision to terminate the employment relationship specifically for the stated reasons that complainant's drug test result was positive, when it was not, and that complainant had not been responsive in returning calls from TCN. It is important to note in this latter regard that, until this critical juncture, the complainant had not known either that the testing facility was located in Florida or that the testing facility had unsuccessfully attempted to reach her to discuss the test result.

Had Raymond waited just one more day, the respondent would have received Portnoy's formal report that the drug screen test was in fact negative, not positive. The respondent's precipitous decision on April 19, 2012, to rescind the employment offer, without regard to the revised test result, was well within the five-day period for TCN to receive the complainant's medication information and three weeks prior to the complainant's scheduled start date of May 7, 2012. The respondent's unreasonable refusal to allow the complainant time to submit the requested explanatory documentation to TCN within the time allowed was in violation of its own policy [15] and of the policy of its agent TCN, and suggests that the adverse decision was motivated by an impermissible factor, the complainant's mental disability.

Because of the temporal proximity between the respondent's abrupt termination of the employment relationship on April 19, 2012, and respondent's knowledge of complainant's ADHD which it acquired on April 18, 2012, the complainant has established an inference of discriminatory intent sufficient to satisfy the fourth element of her prima facie case. Complainant therefore satisfied all four prongs of her prima facie case under her state claim of mental disability-related discrimination.

[15] Respondent's policy manual concerning pre-employment drug testing contemplates that "it could happen that an applicant may complete the hiring process and actually start work before the drug tests are received by VITAS." C/CHRO Ex. 9.

Legitimate, Non-Discriminatory Reason of Respondent

The respondent articulated a non-discriminatory business reason for rescinding the conditional job offer, namely (1) that complainant's drug screen test result was positive and (2) that she lacked diligence and responsiveness in following through and communicating with its agent TCN concerning the reasons for the positive drug test. The respondent satisfied its minimal burden of production in articulating a legitimate, non-discriminatory reason for the employment decision. "This burden is one of production, not persuasion: it 'can involve no credibility assessment.' *St Mary's Honor Center v. Hicks*, [509 U.S. 502, 509 (1993)] ..." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000).

Pretext

The tribunal notes, preliminarily, that the complainant may establish "that [she] was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000), quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Further, "[t]he factfinder's disbelief of the reasons put forward by the [respondent] (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination ..." (Internal quotation marks omitted.) *Jackson v. Water Pollution Control Authority of Bridgeport*, 278 Conn. 692, 706 (2006), quoting *St. Mary's Honor Center v. Hicks*, supra, 509 U.S. at 511; *Reeves v. Sanderson Plumbing Products, Inc.*, supra, 530 U.S. at 148. As the Supreme Court noted in the *Reeves* case, "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'... Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision...." (Internal citations omitted.) Id. at 147.

On the merits of this case, we come to the pivotal role played by pretext on the ultimate question of whether the respondent intentionally discriminated against the complainant on the basis of her mental disability. The central focus of the tribunal's inquiry is on the facts surrounding the respondent's articulated reasons to justify the adverse employment action, and the inferences to be drawn therefrom, to wit: whether the respondent provided a truthful reason for terminating the complainant's employment agreement or whether the articulated reasons to justify the decision were artificial, or false. In this case, there is no serious dispute that the stated reason for the respondent's decision to rescind the job offer on April 19, 2012, was because of the complainant's positive drug test result and her lack of responsiveness in returning telephone calls from TCN or in following up with TCN.

The complainant presented substantial credible evidence for the tribunal to reject the respondent's proffered reasons as unworthy of credence, indicating that the decision to terminate the employment relationship was made for discriminatory reasons, as follows.

A

The complainant was responsive in performing tasks reasonably required of her and of which she was aware and had notice

The tribunal first considers the issue of the complainant's responsiveness. The evidence, taken as a whole, contradicts the respondent's assertion that the complainant failed to be diligent and responsive in following through and communicating with TCN.

The known facts demonstrate that the complainant was consistently responsive in performing required tasks within timeframes specified by the respondent. For example, the offer letter of April 5, 2012, included a provision that complainant successfully complete a drug screen test within forty-eight hours of the date of the letter. On April 5, 2012, the complainant was responsive and provided a urine sample at Concentra for the drug test. On April 12, 2012, complainant noticed a missed call from respondent's phone number on her call log and returned the call on April 13, 2012, when she spoke with Raymond. During that call, Raymond instructed complainant to complete a job application online. She completed the application that evening and submitted it a few minutes after midnight on April 14, 2012. On April 18, 2012, Raymond instructed complainant to take her medical examination and PPD test at Concentra. On April 18, 2012, the complainant completed her medical exam and PPD test. Also on April 18, 2012, Raymond instructed complainant to contact Portnoy at TCN to discuss the drug screen result, and she did so that day. On April 18, 2012, Portnoy asked complainant to provide documentation of her prescription history. On April 18, 2012, she obtained the requested documentation from CVS Pharmacy and she faxed the information to Portnoy on April 19, 2012. These events clearly show that the complainant responded quickly, positively, and well to each of the respondent's requests and to the request of Portnoy, agent of the respondent. Together they refute the respondent's justification for rescinding the complainant's job offer for lack of responsiveness.

The respondent specifically faults the complainant for not responding to phone calls on April 10 and 11, 2012, which were placed to her from an unidentified caller in Florida later identified as being TCN, the respondent's drug testing agent. The record shows that on April 10 and 11, 2012, in accordance with its policy, TCN made nine attempts to contact the complainant within three working days of its receipt on April 9, 2012 of the drug screen test results. After TCN was unable to contact the complainant, TCN faxed a written report to the respondent and contacted Raymond by telephone on April 12, 2012, also in accordance to TCN policy. Raymond acknowledged that on April 12, 2012, TCN informed the respondent that the complainant's drug test result was positive and that TCN had been unsuccessful in its attempts to contact the complainant. It is reasonable to assume that, also pursuant to policy, TCN would have at that time also requested the employer to "direct the donor to contact the medical review officer as soon as possible." [16]

On April 12, 2012, Raymond notified St. John of the complainant's test result and both of them attempted to contact the complainant by phone but left no message. Although Raymond knew on April 12, 2012, that a representative from TCN had been trying to reach complainant by phone to discuss the positive drug screen test, in her phone conversation with complainant on April 13, 2012, Raymond did not inform the complainant that the test was positive or that she should contact the medical officer at TCN regarding that result. Raymond, in her testimony, denied that the telephone conversation with complainant on April 13, 2012, took place (Tr. 129). In weighing the discrepancy in the testimony and the credibility of both

[16] C/CHRO Ex. 12.

witnesses on this matter, I am skeptical about the truthfulness of Raymond. The complainant's online submission of the application shortly after midnight on April 14, 2012, corroborates complainant's claim that the conversation with Raymond did take place.

Allowance should be granted the complainant for not contacting TCN until April 18, 2012. Her failure to return phone calls from TCN on April 10 and 11, 2012, was neither neglectful nor irresponsible, and was through no fault of her own. The respondent had not informed the complainant at the outset that the drug test analysis would be performed by TCN in Florida, or that representative from TCN would contact her if questions arose with regard to the drug test analysis. Complainant did not know anyone in Florida, was not expecting to be contacted by anyone in Florida about the drug screen, and assumed that the brief missed calls from an unrecognized telephone number in Florida were from a telemarketer. The evidence is clear that the complainant followed up promptly with TCN as soon as she was informed for the first time on April 18, 2012, that the drug screen analysis had been conducted by TCN in Florida and that she needed to call Portnoy, the medical officer there, to discuss the result.

Considerations of fairness call for the conclusion that to fault the complainant for her failure to fax a copy of her Vyvanse prescription drug history to Portnoy on April 18, 2012, after she had spoken with him for the first time on that day, would treat her performance of the drug-test condition as dependent on the minutiae of a fax deadline of which she had no knowledge or notice. Respondent's agent, Portnoy, had not imposed a same-day deadline, or any specific timeline, for receiving the documentation, and TCN procedures allow five days for a job applicant to provide follow-up information to the TCN doctor after notification of a positive test. The complainant's explanation for her failure to fax the information to Portnoy that day is entirely reasonable, namely that she had already performed the three tasks that Raymond required of her; that she had pre-scheduled meetings and other responsibilities at work; and that she was reluctant to use her employer's fax machine at work. If there was a departure from the respondent's "protocol" the consequences of which involved complete forfeiture of the complainant's employment opportunity, then it was incumbent upon the respondent to ensure that the complainant understood her full responsibilities under the company policies and protocols by communicating those "protocols" to her in advance. This the respondent did not do.

On the morning of April 19, 2012, after Raymond learned from TCN that documentation of complainant's prescription medication had not yet been received, the respondent unreasonably refused to allow complainant time to submit the information to TCN within the five-day period allowed by TCN policy and long before the May 7, 2012, start date of her employment. Raymond simply told the complainant "Don't bother."

In view of the above, the credible evidence and the reasonable and legitimate inferences to be drawn therefrom sustain the conclusion that the respondent's articulated justification for terminating the employment relationship on the basis of complainant's lack of responsiveness is false and not the true reason for the adverse action.

B

The result of the complainant's drug test was negative, not positive

The respondent's stated rationale for the adverse action is based, in part, on a positive drug test. The weight of the credible evidence also contradicts this claim.

The evidence shows that the complainant's legal use of the prescription drug medication, Vyvanse, which she was taking for ADHD, had caused the initial positive drug screen. On April 18, 2012, upon learning for the first time about the test result and that she should contact Portnoy at TCN, the complainant contacted Portnoy and informed him that she had ADHD and was taking a prescription medication, Vyvanse, as a control of the condition. Based on that information, Portnoy concluded, and verbally informed the complainant, that the drug was responsible for the positive test result, an interpretation which he verified on April 20, 2012, in a formal written report to the respondent confirming a final determination of negative, not positive, on complainant's drug test. The April 20, 2012, Medical Review Officer Determination/Verification Report from Portnoy to TCN refutes the respondent's argument that the complainant's drug test result was positive. [17]

Faced with the implications of Portnoy's final determination that the complainant's drug screen was negative, Raymond's email to St. John on April 20, 2012, indicates that Raymond and St. John were rethinking the respondent's rationale. [18]

The weight of evidence supports a finding that the respondent's stated rationale for rescinding the employment offer because of a positive drug test result was false and not the true reason for the employment action.

When it rescinded the employment offer on April 19, 2012, the respondent had notice not only of the complainant's mental disability, but also of the legitimate medical reason which had triggered the positive drug test result, through knowledge gained both in the voicemail message that complainant had left for Raymond on April 18, 2012, and also by imputation through the knowledge acquired from complainant by respondent's agent, Portnoy, in their conversation of April 18, 2012.

As of April 18, 2012, the complainant had substantially performed her obligations arising out of the conditional offer of employment sufficient to prevent forfeiture of the employment offer. Nevertheless, within one day of the complainant's disclosure of her mental disorder, the respondent's tone and attitude toward the complainant suddenly changed, and on April 19, 2012, the respondent abruptly terminated the employment relationship. The respondent's refusal to listen to the complainant's reasonable explanations, or to allow her an opportunity to provide confirmatory documentation to Portnoy within the five-day time period stated in TCN policy, indicates a predisposition to terminate the employment relationship for discriminatory reasons.

The tribunal's disbelief of the reasons put forward by the respondent as unworthy of credence, together with the elements of the prima facie case, are sufficient to establish that the complainant's mental disability played a role in a motivated the decision to rescind the employment offer. The weight of the credible evidence and the reasonable and logical inferences to be drawn therefrom sustain the conclusion that the respondent's termination of its employment relationship with the complainant was due to intentional discrimination motivated by discriminatory intent against her because of her mental disability.

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[17] In that report Portnoy also confirmed that he had made contact with the complainant on April 18, 2012. The report thus reaffirms that the complainant was timely in communicating with Portnoy and in providing him with the supporting document confirming the legitimate explanation for the initial test result.

[18] R. Ex. 11, Finding of Fact No. 104.

Conclusions of Law

With respect to complainant's § 46a-60 (a) (1) termination claim, the complainant established a prima facie case, the respondent articulated a non-discriminatory reason for the failure to hire complainant, and the complainant met her burden of persuasion of establishing by a preponderance of the evidence that the respondent's articulated reasons for terminating the employment relationship were actually a pretext for intentional discrimination.

V
DAMAGES AND OTHER RELIEF
Statutes and Case Law

General Statutes § 46a-86(b) provides in pertinent part that "upon a finding of a discriminatory employment practice, the presiding officer may order the hiring or reinstatement of employees, with or without back pay ... and, provided further, interim earnings, including unemployment compensation and welfare assistance or amounts which could have been earned with reasonable diligence on the part of the person to whom back pay is awarded shall be deducted from the amount of back pay to which such person is otherwise entitled."

In addition, General Statutes § 46a-86(c) provides additional remedies for a violation of § 46a-60 (a). These remedies include awards for (1) prospective monetary relief (front pay); *Silhouette Optical Limited v. Commission on Human Rights & Opportunities*, 10 Conn. L. Rptr. No 19, 603 (February 28, 1994); (2) prejudgment and post judgment compounded interest on the award of front and back pay; Id., 604; and the monetary value of lost fringe benefits, including medical expenses that would have been paid by medical insurance available through the respondent had the complainant been employed; *Commission on Human Rights & Opportunities, ex rel., Michele Milton v. Pulte Homes,* 2009 WL 5207457 *22 (CHRO No. 0630188) (December 3, 2009); *Commission on Human Rights & Opportunities ex rel. Crebase v. Proctor & Gamble Pharmaceuticals, Inc.,* 2006 WL 2965491 *29 (CHRO No. 0330171) (July 12, 2006); *Commission on Human Rights & Opportunities, ex rel. Downes v. zUniversity.com, Inc.,* 2003 WL 25592787 * 2 (CHRO No. 0120366) (September 12, 2003). "Furthermore, a nonbreaching party who attempts to mitigate his losses may recover his expenditures toward that goal from the breaching party. *Keefe v. Norwalk Cove Marina, Inc.*, 57 Conn. App. 601, 610) (2000); *Commission on Human Rights & Opportunities ex rel. Crebase v. Proctor & Gamble Pharmaceuticals, Inc.,* supra, 2006 WL 2965491 * 27.

"Upon a finding that a respondent has engaged in a discriminatory employment practice, the presiding officer may order the reinstatement of the complainant, back pay, front pay, the monetary value of lost fringe benefits, prejudgment interest and post-judgement interest. General Statutes §§ 37-3a, 46a-86(b); *State of Connecticut v. Commission on Human Rights and Opportunities,* 211 Conn. 464, 481 (1989); *Silhouette Optical Limited v. Commission on Human Rights and Opportunities*, judicial district of Hartford, Docket No. CV 92520590 (January 27, 1994) (10 Conn. L. Rptr. No. 19, 599, 601-04); *Commission on Human Rights and Opportunities ex rel. Roberta A. Dacey v. Borough of Naugatuck*, CHRO No. 8330054, 15-16 (August 10, 1999). Awards of back pay and front pay must be reduced by the amount the complainant earned, or could have earned, with reasonable diligence. § 46a-86(b); *Silhouette Optical Limited*, supra, 10 Conn. L. Rptr. 601-03." *Commission on Human Rights & Opportunities, ex rel., Downes v. zUniversity.com, Inc.,* 2003 WL 25592787 * 2 (CHRO No. 0120366) (September 12, 2003).

Back Pay

As stated previously in this decision, the complainant established by a preponderance of the evidence that the respondent discriminated against the complainant in terminating the employment relationship. Complainant's employment agreement with the respondent provided that, upon her performance of three express conditions, effective May 7, 2012, she would receive a salary of $32.00 per hour. Her gross bi-weekly pay would have been $2,500.00, and her annual pay would have been $66,560.00. The complainant testified that she conducted a diligent job search for employment in her professional career before securing full-time employment as a social worker at Optimus Health Care in Stamford, Connecticut, on October 28, 2013. Had complainant been paid $2,500.00 bi-weekly between May 7, 2012, and October 28, 2013, when she obtained a full time social work position, she would have earned $98,560.00. The complainant also testified that before securing full-time employment as a social worker in October of 2013, she obtained temporary employment at Chico's in September of 2012, where she earned $411.70; at Bridges, from November of 2012 to October of 2013, where she earned $1,610 in 2012 and $23,037 in 2013, for a total of $24,647; and at Geriatric Psychological Services, where she earned a total of $100.00 in 2012.

For purposes of computation, the complainant mitigated her back pay damages by a total amount of $25,158.70. Her damages are the difference between $98,560.00 and $25,158.70, or $73,401.30. Thus, the complainant's total back pay award is $73,401.30.

Medical Expenses
Job Search and Other Travel Expenses

The complainant seeks reimbursement in the amount of $1,259.95 for medical expenses which would have been paid by her medical insurance with the respondent had the employment relationship not been terminated. Because the record lacks specificity as to such matters as when that coverage would have begun, what complainant's contribution [if any] would have been, whether the plan would have excluded coverage for certain medical conditions, or what any out-of-pocket deductibles or copays would have been, the proof is too uncertain to allow an award of damages for medical expenses.

The complainant has requested an award to cover her mileage expenses for travel related to numerous job-search interviews from November 26, 2012, to January 24, 2013 ($616.84); and for travel to and from part-time work for eleven months from November 26, 2012, to October 25, 2013, in excess over what her regular commute would have been had the employment relationship not been terminated ($5,637.60), based on the federal mileage rate of $0.555 per mile. The tribunal finds an award of damages compensating the complainant for such costs incurred in the mitigation of her damages to be justified and reasonable.

Prejudgment and Postjudgment Interest

The complainant has requested both prejudgment and postjudgment interest on any award. General Statutes §§ 46a-68 (b) and 37-3a authorize the human rights referee to award prejudgment and postjudgment interest on the back-pay award, within the discretion of the human rights referee. *Thames Talent Ltd v. Commission on Human Rights & Opportunities*, 265 Conn. 127, 142-44 (2003); *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, Superior Court, judicial district of Hartford, Docket No. 92520590 (January 27, 1994) (2008 WL 7211987, *3-4). The award of interest is a proper component of an award for back pay under § 46a-86 (b) to compensate a person victimized by

discrimination who has been deprived of the use of money. *Thames Talent Ltd v.* Commission on Human Rights & Opportunities, supra; *Commission on Human Rights & Opportunities ex rel. Bentley-Meunier v. DEKK Group dba Dunkin Donuts*, 2012 WL 3195073, *4, CHRO No. 114032 (April 11, 2012); *Commission on Human Rights & Opportunities ex rel. Taranto v. Big Enough, Inc.*, 2006 WL 4753475, *9, CHRO No. 0420316 (October 5, 2006).

As part of the award the respondent shall pay prejudgment interest on the back-pay award at the rate of ten percent per annum, compounded annually, from May 7, 2012. The respondent shall pay postjudgment interest on the back-pay award at the rate of ten percent per annum, compounded annually, from the date of this decision.

ORDER OF RELIEF

Therefore, based on the foregoing the following remedies are hereby Ordered:

1. The respondent shall pay the complainant the sum of $73,401.30 in back pay for the period from May 7, 2012, through October 28, 2013.

2. The respondent shall pay the complainant $43, 877.03 in prejudgment interest on the award of back pay.

3. The respondent shall pay the complainant a total of $6,254.44 in reimbursement for travel expenses, including $616.84 in travel expense incurred for job interviews, and $5,637.60 incurred for her work commute.

4. The respondent shall pay postjudgment interest to the complainant on the back-pay award at the rate of ten percent per annum, compounded annually.

5. The respondent shall cease and desist from all acts of discrimination prohibited under federal and state law and the respondent shall provide a nondiscriminatory work environment pursuant to federal and state law.

6. Pursuant to General Statutes § 46a-54 (13), the respondent shall post in conspicuous locations in its Connecticut offices visible to all employees and applicants for employment notices regarding statutory provisions as the commission shall provide. The respondent shall post such notices within five days of its receipt of such notices from the commission.

It is so ordered this 4th day of April 2017.

Elissa T. Wright

Hon. Elissa T. Wright
Presiding Human Rights Referee

cc.

Kathy Treacy – via email only
Robin Kinstler-Fox, Esq. – via email only
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