

State of Connecticut

Office of Public Hearings - 25 Sigourney Street, 7th floor, Hartford, CT 06106

Main (860) 418-8770

officeofpublichearings@ct.gov

Fax (860) 418-8780

October 28, 2014

Roxanne Punzalan
72 Amston Road
Colchester, CT 06415

Xin Chun Zheng, Member
11 King Arthur Drive 5H
Niantic, CT 06357

Alix Simonetti, Esq.
CHRO
25 Sigourney St., 7th fl.
Hartford, CT 06106

RE: CHRO ex rel, Roxanne Punzalan v. Zheng Trust LLC dba Koto Japanese Restaurant CHRO No. 1140112; Fed. No. 16a201100064.

FINAL DECISION RE: HEARING IN DAMAGES

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 certified mail, return receipt requested to the complainant and the respondent. The return post office receipt shall be proof of such service.

Very Truly yours,


Kimberly D. Morris
Secretary II

cc.

Alix Simonetti, Esq. - via email only
Michelle Gramlich, Esq. - via email only
Patricia Cofrancesco, Esq. - via email only
Michele C. Mount, Presiding Human Rights Referee

Certified No. 7014 0150 0001 0774 0850 (R Punzalan)

Certified No. 7014 0150 0001 0774 0843 (C. Zheng)

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and
Opportunities ex rel. Roxanne Punzalan,
Complainant

CHRO No. 11401

v.

Zheng Trust LLC dba Koto Japanese Restaurant,
Respondents

October 28, 2014

FILED/RECEIVED
CHRO - OPH
2014 OCT 28 AM 11:50
RECEIVED BY/FILED WITH:

FINAL RULING ON HEARING IN DAMAGES

I
Preliminary Statement

On October 8, 2010, a complaint was filed with the Commission on Human Rights and Opportunities (CHRO) against the Respondent Zhang Trust, LLC d/b/a as Koto Japanese Restaurant (LLC) claiming that complainant had been discriminated due to her pregnancy. The respondent owners repeatedly harassed her after she began pregnant and cut complainant's hours.¹ CHRO found reasonable cause and the complainant was set to the Office of Public Hearings (OPH). A Notice of Contested Case Proceeding (notice) was sent out to the parties with instructions to the parties than outlined their responsibilities. Respondent did not file an answer as required by General Statute § 46a-84, Connecticut Regulations of State Agencies § 46a-54-86a and the notice by the time the initial status and scheduling conference was held on October 23, 2013.

Two members of the LLC, Xin Chun Zheng and Sheng Lin, appeared pro se. Respondent's members appeared at the scheduling conference with another individual who was introduced as an interpreter, due to respondent's lack of fluency in English. However, Xin Chun Zheng answered most questions and made comments without the aid of an interpreter. Most

¹ Co-workers Siobhan Cappiello and Maria Silva provided affidavits. They averred that the respondent's comments to and about the complainant being unmarried, and that no one wanted to look at a pregnant woman when they were eating. (TR) 44

notably Mr. Chun asked the undersigned, what if he moved back to China, how would this tribunal find him in China? Further, when the respondent was sworn in at the initial hearing he replied immediately and said that he understood without the aid of an interrupter. At the hearing conference, the undersigned told them that their LLC must file an answer immediately, or risk being defaulted. Further, the members were informed that they should consult an attorney because the contested case process is a very serious matter. On December 4, 2013, the complainant and the CHRO filed a Motion for Default for respondent's failure to file an answer and settlement conference report in defiance of written and oral orders. Moreover, the OPH and the complainant were unable to contact the respondent. The respondent's failure to file an answer after two written warnings and one verbal order, pursuant to the relevant statutes and regulations, and the lack of any response or contact with the OPH or other parties resulted in a default order on January 21, 2014.

The default hearing was set for May 28, 2014. Annie Chen, the third member of Zheng Trust LLC, contacted OPH. She claimed she did not work at the restaurant anymore which is irrelevant based on her membership in the LLC. In a series of emails from May 23 to May 27, 2014, the respondent, through Ms. Chen, requested clarification of the default hearing and requested it be rescheduled due another LLC member's inability to attend. The hearing was rescheduled for July 14, 2014 at 10:00am and began promptly on that date. Approximately ten (10) minutes after the start of the proceedings, the respondent walked into the hearing room. Respondent stated he thought that the hearing was a settlement conference. This seems to be a disingenuous statement as the default hearing was rescheduled at respondent's request. The undersigned explained that a default was entered and this proceeding was a hearing in damages only. He again claimed not to understand. OPH provided an interpreter to the complainant and she participated through a telephone speaker. The tribunal summarized what had occurred prior to respondent's appearance that morning. The purpose of the default

hearing was again explained. The respondent understood that he would get a written transcript of the record. He stated that he was going to get an attorney. The respondent had thirty (30) days to bring the transcript to an attorney and for the attorney to contact the Office of Public Hearings (OPH). Once he contacted an attorney, he/she, had thirty days to respond in writing to any claim for damages made during the proceeding. If the LLC failed to respond either on its own or through an attorney, the record would close and a ruling would be forthcoming. The transcript arrived at OPH on July 22, 2014 and forwarded by email and hard copy to the respondent on the same date. The Respondent had until August 22, 2014, to file any reply or contact the OPH. In August 21, 2014 the respondent's attorney contacted the OPH. It is noted that the respondent did not retain an attorney, until almost one year after he was advised to do so by this tribunal. The respondent submitted a reply brief on October 14, 2014, disputing complainant's damages calculations. For the reasons stated herein, the respondent illegally discriminated against the complainant and the complainant is awarded relief as set forth below.

II Findings of Fact

A Hearing in Damages is held after an order of default is issued. The hearing is limited to the relief necessary to eliminate the discriminatory practice and make the Complainant whole. General Statutes § 46a-83(i); Regulations of Connecticut State Agencies (hereinafter, "Regulations") § 46a-54-95(d). Based on the record and the exhibits admitted into evidence, including the Complaint, and the respondent's brief, the following facts are found:

1. The respondent was given legally sufficient notice of the Notice of Hearing in Damages Pursuant to an Order of Default.
2. The entry of default established the respondent's liability for violation of §§ 46a-60(a)(1), 46a-60(a)(7), 46a-58(a)
3. The complainant is a member of one or more protected classes, pregnant female.

4. As provided by law, the complainant is entitled to the relief necessary to make her whole. Relief includes back pay, prejudgment interest, emotional distress damages and post judgment interest.
5. Complainant notified the manager that she was pregnant in March of 2010. (TR 24)
6. Complainant's hours were cut to the beginning of May. (TR 24-25)
7. Prior to pregnancy complainant worked six shifts a week at night. Complaint ¶ 4
8. After complainant notified the respondent of her pregnancy, her shifts were cut to the point where complainant only worked three (3) shifts a week. Complaint ¶ 4
9. Complainant's pay was reduced as a result of her cut in hours after telling her employers that she was pregnant. (TR 24)
10. Respondent was angry when complainant complained about her abbreviated hours. This caused her great anxiety and depression. Complaint ¶ 5 (TR 31)
11. Respondent informed complainant that due to her pregnancy she could not work long hours on her feet, carrying heavy trays. (TR 31)
12. Respondent told complainant's co-workers that no one wanted to see a pregnant girl working and that complainant should be home where her boyfriend could take care of her. (TR 44) Affidavits of Siobhan Cappiello and Maria T. Silva
13. Respondent told complainant she could not serve in the Hibachi area as it was too fast paced for her, despite complainant providing a doctor's note stating that the complainant had no restrictions. (Complaint ¶ 5, Affidavits Siobhan Cappiello and Maria T. Silva)
14. Due to stress created by respondent's repeated harassment regarding the complainant's pregnancy, complainant ceased working in August 15, 2010. (Complaint ¶ 7)
15. The complaint's pay stubs indicate that she collected tips each week in varying amounts. (EX R- A)

16. The complaint pay stubs show that her work hours per week varied as well. (Ex R-A)
17. The pay stubs illustrate the decrease in pay and hours starting in May of 2010. (Ex R-A)
18. Complainant was unable to work during the period of October 2010 to December 2010, due to her pregnancy. (TR 26)
19. Complainant signed two retainer agreements with her attorney. (EX C-7)
20. The first agreement was for representation at the CHRO fact finding in mediation process. The complainant signed an \$800 retainer agreement and in the event of recovery 25% of the proceeds. (EX C-7)
21. The second agreement was for representation in the amount of \$3,500 for the OPH hearing conference and settlement conference. (EX C-7)
22. Complainant was employed at Heartland Pub beginning in January, 2012. (TR 28-29, Ex C- 6)
23. Complainant also submitted a breakdown of the attorney fees based on quarter-hour increments.

III Law

“Upon entering a default, the presiding officer shall conduct a hearing which will be limited to determining the relief necessary to eliminate the discriminatory practice and make the complainant whole. Section 46a-54-88a of the Regulations of Connecticut State Agencies. The default admits the material facts that constitute a cause of action and conclusively determines the liability of a defendant. *See, Skylyer Ltd. Partnership v. S.P. Douthett & Co.*, 18 Conn. 802 (1989). A Hearing in Damages was held on June 8, 2014. Evidence need not be offered to support those allegations, and the only issue before the tribunal is the determination of damages. *See, Carothers v. Butkin Precision Mfg. Co.*, 37 Conn. App. 208, 209 (1995).”

Commission on Human Rights and Opportunities ex rel. Wayne Rawls, Complainant v. Dev's on Bank Street, LLC, Respondent 2006 WL 4753465 (CT.Civ.Rts.). The entry of a default also operates as a confession by the defendant to the truth of the material facts alleged in the complainant interpreting state employment law, it is appropriate to review federal case law for guidance. *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 103 (1996).

IV Damages

The order of default in this case established that the respondents violated General Statutes §§ 46a-58 (a), 46a-60 (a) (1), (5) and (7), and Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e and the Civil Rights Act of 1991. Pursuant to General Statutes § 46a-86 (b), the presiding referee has the authority “to order the hiring or reinstatement of employees, with or without back pay ...” The Connecticut Supreme Court has further stated that “the victim of a discriminatory practice is to be accorded [her] rightful place in the employment scheme, that is [s]he has a right to be restored to the position [s]he would have attained absent the unlawful discrimination ... such an order for relief may include retroactive and prospective monetary relief ... where prohibited discrimination is involved the hearing officer has not merely the power but the duty to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” (Citations omitted; internal quotation marks omitted.) *State v. Commission on Human Rights & Opportunities*, 211 Conn. 464, 478 (1989); see also *Silhouette Optical Limited v. Commission on Human Rights & Opportunities*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV92520590 (January 27, 1994).

A. Back Pay

“This remedial goal is furthered by vesting in a [human rights referee] broad discretion to award reinstatement, back pay or other appropriate remedies specifically tailored to the

particular discriminatory practices at issue [Section 46a-86 (b)] vests discretion in a [human rights referee] to grant such relief under the proper circumstances." *Commission on Human Rights & Opportunities v. Truelove and Maclean, Inc.*, 238 Conn. 337, 350-51 (1996). Consistent with federal law, the goal of the courts is to make the complainant whole and put her in the position she would have been in absent the discriminatory conduct. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994). In addition, the amount of back pay awarded must be reduced by the amount that the complainant has earned through reasonable mitigation. See General Statutes § 46a-86 (b).

The respondents' liability for back pay begins when the discriminatory act causes economic injury. The period during which the respondents are liable for back pay ends when the complainant obtains a comparable or higher paying job. See *Commission on Human Rights & Opportunities ex rel. Isabel Gomez v. United Security Inc.*, CHRO No. 9930490, p. 5 (Jan. 28, 2000), citing *Harkless v. Sweeney Independent School District*, 466 F. Sup. 457, 469 (S.D. Tex) aff'd. 608 F.2d 594, 22 FEP1571 (5th Cir. 1979).

In addition, General Statutes § 37-3a authorizes the human rights referee to award pre-judgment interest on the back pay award. The award of interest on back pay is within the discretion of the human rights referee. See *Silhouette Optical Limited v. Commission on Human Rights & Opportunities*, supra, Superior Court, Docket No. 92-520590, pp.21-22." 2008 WL 7211987 (CT.Civ.Rts.), 3-4

In this case complainant submitted damages calculated on an average hourly rate, from January 2010 to August 2010. The respondent disputes the amount of back pay requested by the complainant. Respondent's Exhibit A includes pay stubs for the complaint for the year of 2010. Based on the specificity of the pay stubs, they were used them to calculate back pay damages, rather than the complainant's W-2s, which show total amounts of income, but, not

where the income was obtained. The weekly pay was averaged using the period January 2010 until the end of April 2010, prior to complainant's cut in hours. At this time, respondent illegally reduced complainant's hours based on her pregnancy creating a loss of income. Complainant's average weekly pay was \$162.21, prior to May 2010. Damages are included for the loss of income due to her illegal decrease in hours from May 2010 to August 2, 2010. Further, this number represents the hourly pay used in calculating complainant's loss of income during September and October of 2010. During the first five months of 2010 complainant made an average of \$162.21 per week. From May to August 2010, complainant's average weekly salary was a \$108.12. This resulted in a \$54.09 loss per week for a total of \$865.44 in the last 16 weeks. Additionally, for the 8 weeks during September and October the complainant lost \$1,297.68 in salary (8 x \$162.21.) Complainant lost a total of \$2,163.12 in the year 2010 in salary.

The same method described above was used in calculating complainant's tips. For the months January to April 2010, complainant averaged \$411.94 a week in tips. For the last months of her employment complainant averaged \$219.38 a week in tips. The respondent's illegal cut in hours resulted in a loss of \$292.00 in tips for 16 a weeks, totaling \$3,080.96. An additional eight weeks during September and October at \$411.94 per week resulted in a loss of \$3,295.52. The total amount of complainant's lost tips for 2010 equals \$6,376.48. The total loss of income, for the complainant (salary + tips) in 2010 was \$8,539.60, (\$6,376.48 +\$2,163.12).

The average of tips and salary per week, at the higher amount for 2010, was used in determining complainant's loss for 2011. Her weekly salary of \$162.21 plus the amount of tips she collected, \$411.94 per week, (the average for 2010) totals \$574.15 per week of income. The complainant's total loss for 2011 was \$14,927.90 (26 x \$574.15). Complainants back pay for 2010 and 2011 equals \$23,467.50.

Complaint also collected unemployment in 2010 (\$815) and 2011(13,606) for a total of \$14,421. The unemployment collected by complainant mitigates her loss of back pay was inducted from the total back pay lost. Therefore, complainant is entitled to **\$9,861.50 for back pay to be paid by the respondent.**

B. Emotional Distress

In this case, the respondents deprived the complainant of her rights to a work environment free of sex discrimination (based on her pregnancy). The respondent's deprivation of the complainant's rights to a work environment free of sex discrimination constitutes a violation of § 46a-58 (a) and enables the complainant and commission to seek the remedies available to them under § 46a-86 (c) (Citations omitted.)

Commission on Human Rights & Opportunities ex rel. Ramseur v. Colonial Chimney and Masonry, Inc., 2005 WL 4828677 (CHRO No. 0440130, November 28, 2005). (citations omitted.) *Commission on Human Rights and Opportunities ex rel. Joselin Correa, Complainant v. La Casona Restaurant, Respondent.* 2008 WL 7211987 (CT.Civ.Rts.), 5

In interpreting our antidiscrimination and anti-retaliation statutes, we look to federal law for guidance in applying, drafting and modifying the Connecticut Fair Employment Practices Act "... our legislature modeled that act on its federal counterpart, Title VII [of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq.] ... and has sought to keep our state law consistent with federal law in this area." (Internal quotation marks omitted.) *Eagen v. Commission on Human Rights & Opportunities*, 135 Conn.App. 563, 579, 42 A.3d 478 (2012). Federal courts distinguish those claims and defenses in which the plaintiff has placed her mental health at issue, and thereby has expressly or impliedly waived the privilege, from those claims for "garden variety" emotional distress damages that do not constitute an express or implied waiver of the privilege. *Jaffee v. Redmond*, 518 U.S. 1 (1996); *In re Sims*, 534 F.3d 117 (2d Cir. 2008); *In re*

Consolidated RNC Cases, United States District Court, (S.D.N.Y. January 8, 2009) (2009 WL 130178); *Green v. St. Vincent's Medical Center*, 252 F.R.D. 125 (D. Conn. September 15, 2008); *Brown v. Kelly*, United States District Court, Docket No. 05 Civ 5442 (SAS) (S.D.N.Y. April 16, 2007) (2007 WL 113877); *Gattegno v. Price Waterhouse Coopers, LLP.*, 204 F.R.D. 228 (D. Conn. October 30, 2001); *Ruhlmann v. Ulster County Dept. of Social Services*, 194 F.R.D. 445 (N.D.N.Y. July 6, 2000); *Vanderbilt v Chilmark*, 174 F.R.D. 225 (D. Mass. June 18, 1997). A "garden variety" emotional distress claim is the type of emotional injury that would ordinary result from the alleged conduct. Such emotional distress is incidental to the alleged misconduct and has no long term or lasting effect. *In re Sims*, supra, 534 F.3d 129 *Murray v. Taylor*, 65 Conn. App. 300, cert. denied, 258 Conn. 928 (2001). (Citations omitted.)

Criteria to be considered when awarding damages for emotional distress include: the complainant's subjective internal emotional reaction to the respondents' actions; the public nature of the respondents' actions; the degree of offensiveness of those actions; and the impact of those actions on the complainant. *Commission ex rel. Peoples v. Belinsky*, supra, 1988 WL 492460, ; *Commission on Human Rights & Opportunities ex rel. Aguiar v. Frenzilli*, CHRO No. 9850105, pp. 9-15 (January 14, 2000). The complainant's testimony regarding her public scolding by respondent for working and being pregnant, her loss of income, and the humiliation of being told that her boyfriend should marry her, as well as her accompanying affidavits, presented detailed testimony establishing the existence of all of these factors. Emotional distress damages are awarded **in the amount of \$7,500.**

C. Attorney Fees

Complainant's request of attorney's fees for \$11,650, calculated by quarter of the hour, included the amount of \$3,500 as a retainer. It also included the hourly breakdown of actions

that should have been included in the retainer. The retainer amount is deducted from the overall calculated request, leaving a total of **\$8,150.00 due to complainant for attorneys' fees.**

**IV
Order**

1. Within one week of the date of this decision, **the respondents shall pay to the complainant damages in the amount of \$25,511.50** based on the following:
 - a. **\$9,861.50 for back pay.**
 - b. **\$7,500 for emotional distress.**
 - c. **\$8,150.00 for attorneys' fees.**
2. The respondent shall pay pre-judgment of 10% per annum and post-judgment simple interest shall accrue on the unpaid balance at the rate of 10% per annum, from the date payment is due.
3. The respondents shall cease and desist from engaging in any discriminatory conduct.
4. The respondent shall not—and shall ensure that its employees do not retaliate against the complainant or any person who participated in this proceeding.

It is so ordered this 28th day of October 2014.



Michele C. Mount,
Presiding Human Rights Referee

cc.

Roxanne Punzalan – certified no.
Zheng Trust LIC dba Koto Japanese Restaurant – certified no.
Patricia Cofrancesco, Esq.
Michelle Gramlich, Esq.
Alix Simonetti, Esq.