

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

Commission on Human Rights and
Opportunities ex rel. Wayne Rawls,
Complainant
v.

CHRO No. 1040065
Fed No. 16aa20091457

Dev's on Bank Street, LLC,
Respondent

April 1, 2011

**FINAL DECISION
HEARING IN DAMAGES**

I.

The Parties

The complainant is Wayne Rawls, 281 Gardner Avenue Apt. D-2, New London, CT 06320. The commission on human rights and opportunities ("commission") is located at 25 Sigourney Street, Hartford, Connecticut 06106. The commission is represented by Kimberly Jacobsen, commission attorney. The complainant is represented by attorney Thomas J. Riley, 43 Broad Street, P.O. Box 58, New London, CT 06320. The respondent is Dev's on Bank Street, LLC, 341-345 Bank Street, New London, CT 06320.

II.

Procedural History

The complainant filed his employment discrimination complaint with the commission on August 14, 2009. The complaint alleged termination on the basis of a disability (perception of disability) in violation of General Statutes § 46a-60 (a) (1), and the

Americans With Disabilities Act, 42 U.S.C. 12101 et seq. On June 21, 2010, Robert J. Brothers, Jr., executive director of the commission, entered a default order pursuant to Regulations of Connecticut State Agencies § 46a-54-57a. I, as chief referee, then assigned the case to myself as presiding referee for a hearing in damages to be held August 4, 2010. On August 2, 2010 a motion to amend the complaint was granted and the hearing in damages was rescheduled for September 16, 2011. The amended complaint alleged a violation of General Statutes § 46a-58 (a), deprivation of state and federal rights, privileges and immunities.

On September 16, 2011 a hearing in damages was held at the commission. The commission, the complaint and complainant's attorney were in attendance at the hearing. Neither the respondent nor any representative of the respondent appeared at the hearing in damages. I presided over the hearing.

The commission and complainant filed a joint post hearing memorandum on September 26, 2011.

As a result of the default, and based upon the pleadings, commission exhibits 1-18, complainant's exhibits 1-12, and evidence presented at the hearing and the joint memorandum I conclude that the complainant was terminated from his employment on the basis of his disability and or the perception thereof, in violation of General Statutes §§ 46a-60 (a) (1), 46a-58 (a), Title VII of the Civil Rights Act of 1964, as amended, 42

U.S.C. 2000e and the Civil Rights Act of 1991 and the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.

III.

Findings of Fact

1. The complainant was hired by respondent as a line cook in October 2007 for twelve dollars an hour for a thirty five hour week. TR p.6.
2. The complainant was made sous chef in March of 2008 for fourteen dollars an hour for a thirty hour week. TR p. 8.
3. In June of 2008 the complainant was promoted to executive chef and entered into an agreement with respondent calling for seven hundred dollars a week for a fifty to fifty five hour week. TR p.9, Complainant EX 2.
4. Upon accepting the position of executive chef the complainant gave up a second job at the opportunities industrialization center. TR p. 7-9.
5. The complainant left work on December 19, 2008 because of headaches and was admitted to the hospital on December 20, 2008. TR p. 10.
6. The complainant was diagnosed with a brain tumor which was surgically removed on December 24, 2008, and he was discharged on December 31, 2008. TR 10-12.
7. The complainant called the respondent's manager, Candace Devendittis on January 1, 2009, and January 4, 2009 to update her on his prognosis, which was good. TR p. 12.
8. The complainant stopped by the restaurant on February 3, 2009 to pick up tax forms and confirmed to the manager that he was coming back to work. TR p. 13.

9. During February the complainant kept the sous chef informed of his plans. TR p. 13.
10. On February 19, 2009 the complainant was terminated. TR p. 13-14, Complainant EX 3.
11. The complainant applied for but did not initially collect unemployment compensation after his termination because he was under a twenty six week penalty for events from the year 2000. TR 14-15.
12. The complainant was next employed at a restaurant called Steakout as a line cook from March 19, 2009 through May 11, 2009 a rate of twelve dollars per hour, thirty to thirty five hours per week earning \$3,360.00. TR 15-16, Complainant EX 11.
13. The complainant left Steakout after hurting his back at a workout in the gym. TR p. 16.
14. The complainant again applied for unemployment compensation and again did not collect for the same reasons set forth in the previous denial. TR p. 17.
15. The complainant was next employed at Boston Culinary Group's Port and Starboard restaurant, a banquet facility, as a line cook, for twelve dollars an hour for thirty five to forty hours per week between June and September 2009 earning \$4,712.26. TR p. 17-20, Complainant's EX 5-6.
16. Between September 2009 and December 2009 the complainant was employed as a line chef at Devil's Hopyard golf course for twelve dollars an hour for between thirty five and forty hours per week earning \$6,002.64. TR p. 21-23, Complainant's EX 7-8.

17. The complainant left Devil's Hopyard when business slowed in December 2009.
TR p. 22.
18. The complainant sought to regain employment with Devil's Hopyard and Port and Starboard but was not successful, surmising that he guessed they, "hired other people". TR p 23-24.
19. The complainant has not worked since the week of December 17, 2009.
Complainant's EX 11.
20. One of the reasons for the complainant's inability to fully mitigate is because employers believe he might be of diminished capacity because of his surgery. TR p. 26.
21. Between March 7, 2009 and May 1, 2010 the complainant's claim for unemployment compensation resulted in ostensible payments of \$9,884, \$9,585 of which was retained as penalty/offsets for prior overpayments and \$299 of which was paid to the complainant. Complainant's EX 9-11.
22. Between May 1, 2010 and September 16, 2010 the complainant received unemployment compensation in the amount of \$4,465. Complainant's EX 9-11.
23. The complainant has sought no psychiatric or psychological help to assist him in dealing with the loss of his job and it has caused him no sleeplessness. TR p. 30.

IV.

Analysis

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. General Statutes § 46a-83 (i), Regulations of Connecticut State Agencies §46a-54-88a. The default admits the material facts that constitute a cause of action and conclusively determines the liability of a defendant. *Skyler Ltd. Partnership v. S.P. Douthett & Co.*, 212 Conn. 802 (1989). 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).

I am willing to assess damages from lost wages in the amount of seven hundred dollars per week from March 7, 2009 to May 1, 2010. A complainant is under a legal obligation to make reasonable efforts to mitigate damages, and the complainant's speculative testimony that he was not rehired by his last two employers because they had already hired others leads me to conclude that the complainant's efforts were less than reasonable in seeking to regain his position for the next golf/beach season. I am also cognizant of the complainant's testimony that one of the reasons for his inability to fully mitigate (attain a position as executive chef) was because prospective employers may have believed he was of diminished capacity because of his surgery. This is unfortunate, if true, and probably actionable as well, but actionable against the prospective employers who discriminated against him on the basis of the perception. It is clear from the complainant's testimony that reasonable efforts should have allowed him to attain employment as a line cook at twelve dollars per hour for a thirty five hour week. As such I will allow back pay damages in the amount off \$700 dollars per week until May 1, 2010, and \$280 dollars (difference between \$700 as executive chef and

\$420 as line cook) from said date to September 16, 2010, the hearing date and the last date for which I have evidence.

The complainant did little to document his claim for emotional distress but it can readily be assumed that his wrongful termination from a position he clearly enjoyed must have caused unquestioned disappointment. Although medical testimony is not necessary to establish emotional distress, it does strengthen the claim hence its complete omission is worthy of note. See, *Bushe v Burkee*, 649 F.2d 509 (7th Cir. 1981). The three factors generally considered in determining an award are: 1) whether the discrimination occurred in front of others 2) the degree of offensiveness and 3) the complainant's subjective reaction. The complainant's claim is not enhanced by any of the factual findings as applied to the relevant criteria. After reviewing my previous decision in *Commission on Human Rights and Opportunities ex rel Rosa DiMicco v. Neil Roberts, Inc.* 2006 WL 4753465 (CT Civ. Rts.) September 12, 2006, and the cases discussed therein I would award damages for emotional distress in the amount of \$1,500.

Pursuant to General Statutes § 37-3a and the cases thereunder, prejudgment interest may be awarded for the use of money wrongfully withheld up to ten percent per annum. Given the current and recent cost of money, or the rate of interest thereon, I award prejudgment interest on lost wages from September 16, 2010 to date at the rate of five percent per annum. Post judgment interest is awarded at the rate of ten percent per annum at the rate of ten percent, a rate allowed by law and high enough to encourage a prompt satisfaction of judgment. Both interest awards are to be compounded annually.

The attorney's fee award is made in the amount of \$6,392.50 requested at the September 16, 2010 hearing in damages (complainant's EX 12), the agreement, invoice and requested hourly rates all appearing to be in good order. This is to be supplemented by the amount of \$4,682 equally well documented as an appendix in the October 28, 2010 post hearing memorandum. Combined the attorneys fee award is \$10,074.50.

The unemployment compensation issue is one perhaps of first impression and the joint post hearing memorandum makes a credible case for the proposition that the complainant should receive from the respondent unemployment compensation payments he was credited with (to repay prior improper payments) but never received in hand. After much thought, however, I find the argument ultimately unpersuasive. The joint memorandum states on page three, "In short, the Department of Labor suffered no loss for which the respondents should be required to compensate it." It then concludes the funds should therefore be paid to the complainant. I have two problems with this reasoning. The department will suffer no loss only if payments made by respondent are paid to the department. Only then will it have replenished the complainant's account with dollars as opposed to ephemeral credits. Even more troublesome, allowing the complainant to keep the entire award would allow him to be reimbursed in cash by the respondent for the "repayment" through credits of his obligation to the department. On the puzzling front I notice that there were numerous weeks when the complainant was gainfully employed and also received a full credit to his arrearage. If the department

because of accounting practices/internal controls will not or cannot accept any portion of the repayment then I would direct that the returned funds be returned by the commission to the respondent.

V.

Order

1. The respondent is ordered to pay the complainant as back pay through May 1, 2010 the sum of \$18,756.94, representing \$42,700 gross back pay less mitigation (\$14,059.06) and less unemployment paid or credited (\$9,884).
2. The respondent is ordered to pay the complainant as back pay from May 1, 2010 through September 16, 2010 the sum of \$855, which sum represents \$5320 (\$280 pay differential for nineteen weeks) less \$4,465 in unemployment paid during said period.
3. The respondent is ordered to pay prejudgment interest at the rate of five percent per annum on the full back pack pay award from September 16, 2010 to date, compounded annually.
4. The respondent shall pay to the commission the sum of \$9,884 in reimbursement for unemployment compensation benefits paid or credited to the complainant through May 1, 2010 by the State of Connecticut, and the further sum of \$4,465 paid to the complainant from May 1, 2010 through September 16, 2010 (the last date for which I have evidence) which sums the commission shall then transfer to the appropriate state agency. The payment shall be accompanied by a copy of this judgment so as to explain the unusual circumstances behind the award.

Should payment or a portion thereof be refused and returned the commission shall return it to the respondent.

5. The respondent shall pay the complainant the sum of \$1,500 for emotional distress.
6. The respondent shall pay post judgment interest at the rate of ten percent per annum, compounded annually.
7. The respondent shall pay the firm of Tobin Carberry O'Mally Riley and Sellinger PC the sum of \$10,074.50 for attorneys' fees and expenses.
8. The respondent shall cease and desist from the practice complained of herein with regard to the complainant and all similarly situated employees and shall not engage in or allow any of its employees to engage in any conduct in violation of General Statutes § 46a-60 (a) (1).
9. No further relief is ordered.

It is so ordered this 1st day of April 2011.

J. Allen Kerr, Jr.
Presiding Human Rights Referee

cc.

Wayne Rawls
Candace Devendittis
C. George Kanabis, Esq.
Thomas J. Riley, Esq.
Kimberly Jacobsen, Esq.