

OFFICE OF PUBLIC HEARINGS
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December 13, 2013

CHRO No. 0720118 - Commission on Human Rights and Opportunities ex rel. Rochelle Toepelt, Complainant v. Nailtique aka Nailtique, Inc., Respondents

FINAL DECISION AFTER HEARING IN DAMAGES

PARTIES

The complainant, Theresa Dowell, filed an affidavit of illegal discriminatory conduct (“affidavit” or “complaint”) on September 26, 2006. Pursuant to Regulations of Connecticut State Agencies (“Regulation”) §46a-54-79a(e) the complaint was amended, on January 14, 2011, to allow Rochelle Toepelt, the Executrix for Estate of Theresa Dowdell, to pursue this complaint.¹ Toepelt resides at 363 Weed Avenue, Stamford CT, 06902, and her mailing address is P.O. Box 223, Old Greenwich CT, 06870. The respondent, Nailtique, is located at 100 Greyrock Place, Stamford, CT 06901. The Commission on Human Rights and Opportunities (“commission” or “CHRO”) was represented by commission attorney Kimberly Jacobsen.²

PROCEDURAL BACKGROUND

1. On September 26, 2006, complainant filed an illegal discriminatory practice complaint (the complaint) with the commission. Specifically, the complainant alleged that on July 22, 2006, the respondent violated the Conn. Gen. Stat. sections 46a-64(a) and §46a-66(a) by denying services due to a disability.
2. The commission investigated the complaint and found reasonable cause to believe that a discriminatory practice had occurred. On December 10, 2010, after an unsuccessful attempt to conciliate the matter, a commission investigator certified the complaint in accordance with section 46a-84(a).
3. On December 21, 2010, J. Allen Kerr, Jr., Chief Human Rights Referee, issued a Notice of Contested Case Proceeding and Hearing Conference (“notice”) and designated Thomas C. Austin, Jr. as presiding referee.
4. The notice informed the respondent of its obligation to respond to the complaint pursuant to §46a-54-86a of the Regulations of Connecticut State Agencies (“Regulation”). The notice further

¹ The use the name of Rochelle Toepelt in the case caption was the result of a scrivener’s error at the time the affidavit was filed with the commission.

² At the Hearing in Damages, in lieu of Attorney Jacobsen, the commission’s case was presented by legal student intern Luke Matyi. He was supervised by commission attorney Robin Kinstler Fox.

informed the respondent that failing to answer the complaint may result in a default order and a hearing in damages in accordance with Regulation §46a-54-88a(a)(1). The notice set the date and time of the hearing conference for January 13, 2011, at 10:00 a.m., in the commission's Hartford, Connecticut office.

5. On December 21, 2010, the Office of Public Hearings ("OPH") sent the notice to the respondent via certified mail.
6. Referee Austin convened the hearing conference on January 13, 2011, at 10 a.m., as scheduled. The commission and the complainant appeared; however, the respondent did not. During the hearing, the referee was notified that the complainant had died on April 4, 2008.
7. On January 14, 2011, Referee Austin issued an order regarding the hearing conference. In the order, he continued the hearing to March 24, 2011, so that the commission and Toepelt would have sufficient time to (1) file a motion to amend the complaint pursuant to the Regulation §46a-54-79a(e) ("motion to amend"), and (2) if granted, file and serve the amended complaint on the appropriate parties.
8. On January 14, 2011, the commission filed a motion to amend to allow Toepelt to pursue the complaint as the legal representative for the complainant. That same day, the referee granted the motion.
9. The commission sent the respondent a copy of the amended complaint via certified mail on February 1, 2011.
10. On March 24, 2011, Referee Austin convened the hearing conference. Subsequently, he issued an order that, in relevant part, required the respondent to file its answer to the amended complaint before April 21, 2011.
11. When the respondent failed to file its answer by April 21, 2011 the commission filed a "Motion For Default of Respondent and for Hearing in Damages," dated May 2, 2011 ("default motion").
12. On May 25, 2011, the referee granted the default motion and scheduled a hearing in damages for June 28, 2011, at 10:30 a.m. Pursuant to the Regulation §46a-54-88(a)(b), notice of the order and the scheduled hearing was provided to all parties.
13. On May 31, 2011, the commission filed a motion titled "Request for Change of Venue for June 28, 2011 Default Hearing in Damages." In response, OPH Secretary Kimberly Morris sent a notice to all parties that the hearing was continued until July 13, 2011 and would be held in Bridgeport.
14. Prior to July 13, 2011, Referee Austin's term (and the term of all other human rights referees) expired. Accordingly, effective July 1, 2011, all OPH proceedings were stayed pending the appointment of new human rights referees by Governor Dannel P. Malloy. On December 12, 2011, the Governor appointed new human rights referees, including the undersigned.
15. On May 10, 2012, the undersigned was assigned this case for further proceedings and provided the parties with a "Notice of Hearing in Damages Pursuant to Order of Entry of Default, dated May 25, 2011." The hearing was scheduled for June 1, 2012 at 2:00 p.m. in Bridgeport, Connecticut.

16. The hearing in damages was convened on June 1, 2012. Toepelt and the commission attended the hearing; however, neither the respondent nor any representative of the respondent appeared. The undersigned presided over the hearing. The transcript of the hearing in damages was received by OPH on June 18, 2012.

FINDINGS OF FACT

Based on a review of the record, the following facts relevant to this decision are found. References to testimony are to the transcript page (Tr.) where relevant testimony is found. The factual allegations contained in the complaint are deemed established as a result of the default judgment. Additional facts are deemed to be established as a result of complainant's testimony at the hearing in damages. These additional facts will be limited to those that add relevant detail to facts previously plead.

The following facts are found:

1. On July 22, 2006, Theresa Dowell was 91 years old and she lived with a number of physical disabilities. She suffered a stroke, and as a result, was unable to speak, walk, and had difficulty using her hands. Because she was partially paralyzed, the complainant required the use of a wheelchair to move about, a lift to facilitate her use of the bathroom, and a feeding tube for sustenance and the administration of medication. Tr. 8.
2. Dowell was quite conscious of her surroundings. Her awareness was not effected by her disabilities. Despite her inability to communicate using words, she possessed the ability to communicate effectively her understanding of and her emotional reaction to the respective events she encountered throughout the day. Tr. 8-9.
3. Toepelt, the complainant's daughter, spent a great deal of time with her mother. She relocated the complainant to Connecticut, so that they would be closer together after the complainant's husband died. After Dowell became disabled, Toepelt assumed responsibility for her care. In addition to supervising Rowell's live-in aide, the complainant spent a minimum of four hours a day with her mother for approximately five years. Toepelt was with her mother every day -- including in the morning when she awoke and in the evening when she went to bed. Tr. 7, 8 and 10.
4. The complainant was concerned about her personal appearance. Prior to her becoming incapacitated, she would diligently maintain her hair, nails, etc. After the complainant became disabled, Toepelt regularly would take her to the beauty parlor and the nail salon -- alternating each month between the services provided to the complainant. Such trips made her mother "feel special." Tr. 10.
5. On July 22, 2006, Toepelt took the complainant to respondent's place of business to receive a manicure. They were accompanied by Dowell's aide and her aide's five-year old daughter. Tr. 10-11. Affidavit ¶ 1.
6. The complainant and Toepelt entered the store, and respondent's employees ignored them. A short while later, when the aide and her daughter entered the store, an employee of the respondent approached the aide and offered services to her. When the aide replied that she did not want a manicure and that she was with the complainant and Toepelt, the employee walked away. Affidavit ¶ 2. Tr. 11.

7. When the complainant told another employee that her mother wanted to have a manicure, he replied that there would be a 25 minute wait. The complainant informed the employee that she would wait and remained in the store with her mother. Affidavit ¶ 3. Tr. 11.
8. While waiting, Toepelt and the aid began to give the complainant a calcium supplement through her feeding tube. Upon dispensing the supplement, a female employee approached Toepelt, the aide, and the complainant, and screamed that they were not allowed to do so in the store. Tr. 12. The employee then stated, "I spoke with my manager and we do not do handicapped anymore." Affidavit ¶¶ 4, 5. Tr. 13.
9. There were two customers in the store when the employee uttered these remarks; however, they did not hear any of the conversation between the complainant and respondent's employees. Tr. 16 and 17.
10. Two of respondent's employees refused to give the complainant the manager's name. Affidavit ¶ 5. Tr. 13.
11. During the relevant timeframe in which the complainant was seeking a manicure, the two other customers who were receiving service in the respondent's establishment were not aware of the interaction between Toepelt, the complainant, and the respondent's employees. Tr. 16 and 17.
12. On July 22, 2006, the complainant was aware of what happened and became very upset because of the treatment she received by respondent's employees. The complainant's hands started to shake, and her facial expression reflected anger and unhappiness. The next day, out of character, the complainant did not want leave her home. Tr. 9, 14 and 15.
13. After being informed that the store "did not do handicapped anymore," Toepelt immediately told the employee that what she was doing was illegal, but the employee ignored her. Tr. 13.
14. The complainant did not experience severe or long-term emotional distress. She resumed her normal activities after a short time. Tr. 16.

ANALYSIS and ORDER OF RELIEF

The commission took all of the proper procedural steps to bring this complaint to a hearing in damages. Due to respondent's failure to answer the complaint and failure to appear at the hearing, Referee Austin properly entered the default order on May 25, 2011. See section 46a-84(f); Regulations §46a-54-88a(a). The default order established the liability of the respondent for discrimination against the complainant in violation of section 46a-64(a).

Following an order of default, a hearing in damages serves the purpose of determining what relief is necessary to eliminate the discriminatory practice and make the complainant whole. Section 46a-84(f); Regulation §46a-54-88a(b).

A human rights referee may award damages for a violation of this section in accordance with subsections (a) and (c) of section 46a-86, which state in relevant part, the following –

- (a) If, upon all the evidence presented at a hearing conducted pursuant to section 46a-84, the presiding officer finds that the respondent has engaged in any discriminatory practice, the presiding officer shall state the presiding officer's findings of fact and shall issue and file with the commission and cause to be served on the respondent and order

requiring the respondent to cease and desist from the discriminatory practice and . . . to take such affirmative action as in the judgment of the presiding officer will effectuate the purposes of this chapter.

- (b) In addition to any other action taken under this section, upon a finding of a discriminatory practice prohibited by section ... 46a-64 ..., the presiding officer shall determine the damage suffered by the complainant, which shall include, but not be limited to ... costs actually incurred by the complainant as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs.

THE COMMISSION'S PRAYER FOR RELIEF

At the hearing on damages, the commission submitted a prayer for relief that requested the following:

- monetary compensation for travel and mailing expenses incurred by Rochelle Toepelt, in her capacity as the legal representative of the complainant's estate pursuant to Regulation 46a-54-79a(e),
- unspecified monetary compensation for emotional distress,
- the respondent is to cease and desist "from engaging in any discriminatory conduct with regard to any future customers,"
- the respondent "shall not engage in, or allow any of its employees to engage in, any conduct against the [c]omplainant or any party to or participant in these proceedings in violation of ... §§ 46a-64(a) and 46a-66(a),"
- prejudgment and post judgment interest in the amount of 10% compounded per annum to the date of payment of such monies to the complainant; and
- any further relief deemed just and proper by the referee.

TRAVEL AND MAILING EXPENSES

At the hearing in damages, Toepelt, the complainant's legal representative, sought only reimbursement for expenditures incurred for travel and postage necessary to pursue the complaint. These totaled \$195.78. She submitted sufficient evidence to establish that those damages should be awarded.

EMOTIONAL DISTRESS

In a case that involves a discriminatory refusal to service a person because of a protected trait, the actual out-of-pocket damages will, not surprisingly, be typically small. This case is no exception. (See also, CHRO ex rel. Harrison v. Greco, CHRO Case No. 7930493 (June 3, 1985), p. 13.) Section 46a-86(c), therefore, authorizes a referee to award emotional distress damages as a component of "damages suffered." In addition to compensating a complainant, these damages are intended to deter discrimination and encourage the filing of complaints that allege a violation of the state's public accommodation law. Such damages, however, may not be punitive. Chestnut Realty, Inc. v. CHRO, 201 Conn. 350, 365-66 (1986).

"Assessing emotional distress damages is necessarily imprecise, but that 'damages may be difficult to assess is, in itself, insufficient reason for refusing them once the right to damages has been established.'" CHRO ex rel. Cooper v. Gorski, CHRO Nos. 9710196 and 9710197 (final decision, January 5, 2001) (citing Griffin v. Nationwide Moving and Storage Co., 187 Conn. 405 (1982)). The following three factors are considered relevant in determining an appropriate award for emotional distress: (1) the subjective

internal emotional reaction of the complainants to the discriminatory experience ... whether the reaction was intense, prolonged, and understandable; (2) the degree to which the discriminatory act was in public; and (3) the offensiveness of the discriminatory act. See CHRO ex rel. Aguiar v. Frenzilli, 2000 WL 35575655 (CHRO No. 9850105), p. 4 (relying on CHRO ex rel. Peoples v. Estate of Eva Belinsky³ and CHRO ex rel. Harrison v. Greco⁴ to determine an award for emotional distress).

In the instant matter, the "public" who witnessed the discriminatory statement included the complainant's daughter, her aide, and her aide's daughter.⁵ The uncontested evidence is that the respondent's agent said, "I spoke with my manager and we do not do handicapped anymore." Although this single statement is per se offensive, it is not the type of severely egregious, venomous, and persistent verbal or physical assault that has supported substantial awards for emotional distress by the courts or this tribunal.⁶

There is sufficient evidence that the complainant experienced a material emotional reaction to the statement. She became angry, sad, and her hands began to shake. The next day, she was reluctant to leave her home as she previously had done without hesitation, on a regular basis, with the assistance of her daughter. Fortunately, the evidence reveals that, the complainant was resilient and suffered no long term effects from this discrete act of discrimination. With the encouragement and support of her daughter, she was able to resume her regular activities after a short time.

After carefully considering the evidence in the record and prior awards for emotional distress, I determine that \$250.00 is a reasonable award for the distress caused by the actions of the respondent's agents.

ORDER

Pursuant to subsection (b) of section 46a-54-88a of the Regulations of Connecticut State Agencies, the undersigned orders the respondent to pay \$445.76 in damages to the complainant in order to make her whole.

The respondent is ordered to pay this amount to Rochelle Toepelt as the Executrix for the Estate of Theresa Dowell, on or before January 27, 2014.

³ 1988 WL 492460, Docket No. CVNO8806-1209 (Nov. 8, 1988).

⁴ CHRO Case No. 7930493 (Memorandum of Decision, June 3, 1985).

⁵ Neither of the two other customers in the salon at the time of the incident witnessed the discriminatory action.

⁶ Compare, for example, Saex v. Wireless Retail, Inc., CHRO No. 0410175 (final decision – hearing in damages, July 26, 2006); Jane Doe v. Claywell Electric, CHRO No. 0510199 (final decision - hearing in damages, December 9, 2008); Brown v. Jackson, CHRO Nos. 0750001, 0750002 (memorandum of decision, November 17, 2008); Lawton v. Jansen, CHRO No. 0550135 (final decision - hearing in damages, October 18, 2007); and Weller-Bajrami v. Lawrence Crest Cooperative, Inc., CHRO No. 9950095 (final decision, August 28, 2001); to Swindell v. Lighthouse Inn, CHRO No. 0840137, final decision - hearing in damages, January 29, 2009).

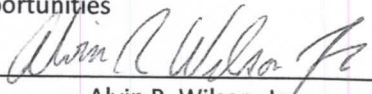
Commencing on January 28, 2014, if the respondent has not paid this award in full, it also must pay post judgment interest in the amount of 10% compounded per annum on any unpaid balance of this award.

The undersigned further orders the respondent, and its agents, to cease and desist from any and all actions prohibited by section 46a-64(a).

So ordered.

Dated at Hartford, Connecticut this 13th day of December 2013.

Office of Public Hearings
Commission on Human Rights and
Opportunities

By: 
Alvin R. Wilson, Jr.
Presiding Human Rights Referee

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