



State of Connecticut
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

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Promoting Equality and Justice for all People

February 15, 2023

CHRO ex rel. Zainab Kinge v. David Makuch CHRO No. 2250062.

FINAL DECISION FOLLOWING A 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 via email to the commission, complainant, respondent and/or counsel.

Very Truly yours,


Kimberly D. Morris
Secretary II

cc.

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

Commission on Human Rights and
Opportunities, ex rel. Zainab Kinge,
Complainant

v.

David Makuch
Respondent

**OFFICE OF
PUBLIC HEARINGS -CHRO**
DATE 2/15/23
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CHRO No. 2250062

February 15, 2023

**FINAL DECISION FOLLOWING A HEARING IN DAMAGES
AFTER THE ENTRY OF AN ORDER OF DEFAULT**

I
PRELIMINARY STATEMENT

Zainab Kinge, the complainant, filed her affidavit of illegal discriminatory practice (complaint) with the commission on human rights and opportunities (commission) on October 21, 2021. In her complaint, she alleged that the respondent, David Makuch, a former tenant in her apartment building, violated General Statutes § 46a-64c (a) (2) and § 46a-64c (a) (9) She further alleged that he also violated Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Amendments of 1968 (Title VIII) and as enforced through General Statutes § 46a-58 (a).

According to Ms. Kinge, while Mr. Makuch was a tenant in the apartment building, he discriminated against her in the terms, conditions, and privileges of her rental. She alleged that he created a hostile housing environment by coercing, intimidating, and threatening her, and by interfering with her housing rights. She alleged that her race and color (African American/black) were the primary factors in this treatment.

The executive director defaulted Mr. Makuch on August 29, 2022 for his failure to file an answer under oath to the affidavit. The commission then transferred the matter to the office of public hearings to conduct a hearing in damages. The hearing in damages

was held on November 15, 2022 via zoom. Ms. Kinge and Mr. Makuch appeared and testified. Ian McKelvey also testified in support of Ms. Kinge. Post-hearing briefs were due on January 24, 2023, at which time the record closed.

For the reasons stated herein, David Makuch is found to have discriminated against Zainab Kinge. Relief is ordered as set forth herein.

II PARTIES

The parties to this action are the commission on human rights and opportunities, 450 Columbus Boulevard, Hartford, Connecticut; Zainab Kinge of South Windham, Connecticut, and David Makuch of Hampton, Connecticut.

III FINDINGS OF FACT

References to testimony in the transcript are designated as “Tr.” followed by the page number. The commission’s exhibits are designed by “CHRO” followed by the exhibit number.

“Failure to answer any allegation or part of an allegation shall be deemed an admission of such allegation without the need for further proof.” Regs., Conn. State Agencies § 46a-54-86a (b).

Based upon the pleadings, exhibits, and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found:

1. The apartment building at issue is a two-story, non-owner-occupied building containing four separate apartments, two on each floor. Affidavit, ¶ 3. Tr. 14-15.

2. During the relevant time period, Ms. Kinge lived on one of the two second floor apartments with her boyfriend, Mr. McKelvey. Affidavit, ¶¶ 3, 4; Tr. 14-15.
3. During the relevant time period, Mr. Makuch lived in the other second floor apartment with his wife. Affidavit, ¶¶ 3, 5; Tr. 15.
4. Ms. Kinge moved in with Mr. McKelvey in May 2019. Mr. McKelvey had resided in the apartment for approximately 20 years before she moved in. Affidavit, ¶ 4; Tr. 14.
5. Until Ms. Kinge moved in with him, Mr. McKelvey had no problems with Mr. Makuch and had no impression that Mr. Makuch was racist. Tr. 61.
6. The unit occupied by Ms. Kinge and Mr. McKelvey share a bedroom wall with Mr. and Mrs. Makuch's bedroom. Affidavit, ¶ 5; Tr. 15.
7. Ms. Kinge self-identifies as Black/African American. Mr. McKelvey is White/Caucasian. Mr. and Mrs. Makuch are White/Caucasian. Affidavit, ¶ 6.
8. On November 21, 2019, after Mr. McKelvey left for work, Mr. Makuch began repeatedly pounding on the shared bedroom wall shouting "wake the f- up n-". Affidavit, ¶ 7; Tr. 16-17.
9. Ms. Kinge was terrified, horrified, and shocked. She felt she was living next door to a person who was unhinged. She did not know what he was going to do. Tr. 17. She felt threatened and as though she could not leave her apartment. Tr. 17-18.
10. Ms. Kinge telephoned Mr. McKelvey. Mr. McKelvey could hear the banging on the walls and the racial slurs through the telephone. Tr. 59-60.
11. Mr. McKelvey returned home and attempted to have a conversation with Mr. Makuch. Mr. Makuch repeatedly used vulgar and racist language in referring to Ms. Kinge. He

said Ms. Kinge should be kicked “the f- out”, that he intentionally “woke her black ass up”, that Mr. McKelvey should “beat that b-”, and that 90% of all problems come from blacks, all the while pounding the swastika tattooed on his chest. Affidavit, ¶ 8; Tr. 18-19, 21, 59-60.

12. Ms. Kinge and Mr. McKelvey called the police. The police had a difficult time calming Mr. Makuch. Affidavit, ¶ 9; Tr. 21-22.
13. Thereafter, Mr. Makuch would repeatedly play music loud enough to be heard by Ms. Kinge, but then turn the volume down when Mr. McKelvey returned home. Affidavit, ¶ 10.
14. Since the apartment door did not have a peephole Ms. Kinge and Mr. McKelvey installed a camera outside the door. Ms. Kinge wanted to see if Mr. Makuch was coming down the hall way because she feared he would ambush her if she walked out the door. Affidavit, ¶ 11.
15. Ms. Kinge and Mr. McKelvey also installed a camera outside of the building to record the parking lot due to damage to their motor vehicle as well as to another tenant’s vehicle. Affidavit, ¶ 12.
16. On September 27, 2021, Ms. Kinge passed Mr. Makuch’s door as she walked down the hallway to the laundry room that is across from Mr. Makuch’s apartment. Mr. Makuch opened his door and began yelling that the landlord “only helps n-s”. His wife closed the door but Mr. Makuch could be heard yelling for her to “leave the f-ing door open. F- that b-.” Affidavit, ¶ 14; Tr. 25-29, 64; CHRO 13, 14.
17. Ms. Kinge felt threatened by Mr. Makuch. Tr. 25.

18. As Ms. Kinge returned to the apartment, Mr. Makuch glared at her and said “f-ing n-” and “all n- must die”. Affidavit, ¶¶ 15, 16; Tr. 29, 32, 65.
19. Ms. Kinge called the police. Mr. Makuch continued making racist remarks about Ms. Kinge. Tr. 24; CHRO 13.
20. After the police left, Mr. and Mrs. Makuch went out to their car in the parking lot. Mr. Makuch turned to Ms. Kinge’s outdoor camera, held up his middle finger and yelled “f-you n-”, “see this b-? I hope you can see it, you f-ing monkey b-!” He then spat on Ms. Kinge and Mr. McKelvey’s vehicle. Affidavit, ¶¶ 16, 17; Tr. 33, 37.
21. As a result of the September 27, 2021 incident, Ms. Kinge obtained a protective order against Mr. Makuch. The protective order was renewed on October 11, 2022. Tr. 42-44; CHRO 9.
22. For two years Mr. Makuch would blare his music through the shared bedroom wall and then turn down the volume when Mr. McKelvey returned home. Tr. 42, 63. The blaring of his music preventing her from mourning the death of a beloved grandmother. Tr. 55.
23. Because of the stress and trauma, Ms. Kinge and Mr. McKelvey moved their bed out of the bedroom with the shared wall and into the living room. Tr. 33. She felt assaulted by the situation. Tr. 34; CHRO 11.
24. The experience of living near Mr. Makuch has left Ms. Kinge feeling angry, degraded, disgusted, intimidated, terrorized, humiliated, and with a long-term feeling of fright. Tr. 39, 46.

25. As a result of Mr. Makuch's conduct, Ms. Kinge has difficulty sleeping, more anxiety, and seems more troubled and less secure in her home. Tr. 65.
26. Mr. Makuch's conduct has left Ms. Kinge hypervigilant, jumpy, anxious, and hypersensitive to noises. She has set up a perimeter of cameras. Tr. 52-53, 62-63.
27. Ms. Kinge has had to sleep with the lights on. Tr. 54.
28. As a result of the distress caused by Mr. Makuch, Ms. Kinge obtained psychotherapy. Tr. 43, 47; CHRO 17.
29. According to her counselor, Ms. Kinge suffers from anxiety, sleep disturbance, and being always on edge because of the behavior of Mr. Makuch. CHRO-17.
30. Mr. Makuch was out to terrorize the Ms. Kinge and the relationship between Ms. Kinge and Mr. McKelvey. Tr. 62, 66.
31. Mr. Makuch's hostile behavior became a source of day-to-day torment. Tr. 62.
32. As a result of the hostile housing environment created by Mr. Makuch, Ms. Kinge spent \$969.21 in out-of-pocket costs for security lights, outdoor cameras, batteries, flash drives, and marshal fees related to obtain protective orders. Tr. 49; CHRO 19, 20.

IV

APPLICABLE STATUTES AND REGULATIONS

A respondent must file an answer under oath to the affidavit. General Statutes § 46a-83 (a); Regs., Conn. State Agencies § 46a-54-43a. If the respondent fails to file the answer, the executive director or designee is authorized to enter an order of default. General Statutes § 46a-83 (l); Regs., Conn. State Agencies § 46a-54-46a. Upon the entry of the order of default, the presiding human rights referee shall "enter, after notice and hearing, an order eliminating the discriminatory practice complained of and making the complainant whole." § 46a-83 (l).

General Statute § 46a-86 provides in relevant part that:

(a) If, upon all the evidence presented at the hearing conducted pursuant to section 46a-84, the presiding officer finds that a respondent has engaged in any discriminatory practice, the presiding officer shall make written findings of fact and file with the commission and serve on the complainant and respondent an order requiring the respondent to cease and desist from the discriminatory practice and to take such affirmative action as is necessary to achieve the purpose of this chapter.

* * *

(c) In addition to any other action taken under this section, upon a finding of a discriminatory practice prohibited by section 46a-58, 46a-59, 46a-64, 46a-64c, 46a-81b, 46a-81d or 46a-81e, the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, the expense incurred by the complainant for obtaining alternate housing or space, storage of goods and effects, moving costs and other costs actually incurred by the complainant as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs. The amount of attorney's fees allowed shall not be contingent upon the amount of damages requested by or awarded to the complainant.

V
STANDARD

Section 46a-86 (c) authorizes the presiding officer to award compensatory, or emotional distress, damages for violations of statutes including §§ 46a-58 and 46a-64. *Commission on Human Rights & Opportunities v. Board of Education*, 270 Conn. 665, 686, 855 A.2d 212 (2004). “Damages that may be awarded under § 46a–86(c) include damages for emotional distress.” *Commission on Human Rights & Opportunities v. Sullivan Associates*, Docket Nos. CV-94-4031061s, CV954031060s, 2011 WL 1992014, *2 (Superior Court, judicial district of New Haven, April 28, 2011). “Punitive damages are not authorized. The CHRO's authority for awarding damages differs from the authority of courts.” *Commission on Human Rights & Opportunities v Cantillon*, Docket HHB-CV-17-6039406, n 9, 2019 WL 5549576 (Superior Court, judicial district of New Britain, October 2, 2019); *Chestnut Realty, Inc. v. Commission on Human Rights & Opportunities*, 201 Conn. 350, 366 (1986).

A complainant need not present expert medical testimony to establish his or her internal, emotional response to the harassment; his or her own testimony, or that of friends or family members, may suffice. *Busche v. Burke*, 649 F.2d 509, 519 n. 12 (7th Cir. 1981); see also, *Marable v. Walker*, *supra*. However, medical testimony may strengthen a case. *Id.* As the Supreme Court stated in *Carey v. Phipus*, “[a]lthough essentially subjective, genuine injury in this respect [mental suffering or emotional anguish] may be evidenced by one's conduct and observed by others.” *Carey v. Phipus*, 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042 (1978).

In assessing damages for emotional distress the CHRO referees use a three-factor analysis which was enunciated in the case of *Commission on Human Rights and Opportunities ex rel. Harrison v. Greco*, CHRO No. 7930433 (1985), and which is sometimes referred to as the “*Harrison factors*.” This analysis of emotional distress damages also has superior court support. *Commission on Human Rights and Opportunities ex rel Peoples v. Belinsky*, Superior Court, judicial district of Stamford–Norwalk at

Norwalk, Docket No. 88061209 (November 8, 1988, Riefberg, J.). Under the *Harrison* analysis, the most important factor of such damages is the subjective internal emotional reaction of the complainants to the discriminatory experience which they have undergone and whether the reaction was intense, prolonged and understandable. *Harrison, supra*. Second, is whether the discrimination occurred in front of other people. *Id.* For this, the court must consider if the discriminatory act was in public and in view or earshot of other persons which would cause a more intense feeling of humiliation and embarrassment. *Id.* The third and final factor is the degree of the offensiveness of the discrimination and the impact on the complainant. *Id.* In other words, was the act egregious and was it done with the intention and effect of producing the maximum pain, embarrassment and humiliation.

Commission on Human Rights & Opportunities v Sullivan Associates, Docket Nos. CV-94-4031061s, CV-95-4031060s, 2011 WL 3211150, *4 (Superior Court, judicial district of New Haven, June 6, 2011).

VI ANALYSIS

A

Three factors are considered in determining the amount of compensatory emotional distress damages to be awarded pursuant to § 46a-86. The most important factor is the subjective internal reaction experienced by a complainant and whether that reaction was intense, prolonged, and understandable. Ms. Kinge's subjective internal reaction was intense; prolonged, lasting for over two years; and understandable. As a result of Mr. Makuch's discriminatory conduct, Ms. Kinge had to move her bed into the living room, purchase security cameras and lights, and obtain psychotherapy. His aggressive racist, misogynist behavior left her terrified, horrified, shocked, and convinced she was living next door to a person who was unhinged. She understandably felt terrified and trapped in her apartment. She understandably felt angry, degraded, disgusted,

intimated, humiliated, and terrorized. She continues to have long-term feelings of fright, to be hypervigilant, to be hypersensitive to noises, to feel less secure in her own apartment, and to sleep with the lights on.

B

The second factor to consider is whether Mr. Makuch's discriminatory conduct occurred in public. Mr. Makuch's discriminatory conduct and racist language were observed and heard by Mr. McKelvey, Mrs. Makuch, and the police.

C

The third factor to consider is whether Mr. Makuch committed the discriminatory acts with the intention of causing Ms. Kinge pain, embarrassment, and humiliation. Mr. Makuch's statements were not simply vulgar. For two years, he intentionally directed racist, misogynistic, and physically threatening statements as well as earsplitting music at an African-American black woman because she is an African-American black woman. His repeated use of the words "nigger", "cunt", "black ass", "monkey", and "bitch" along with physically threatening remarks that "all niggers must die" and that Mr. McKelvey should "beat that bitch", all demonstrate that Mr. Makuch intended to inflict pain, embarrassment, and humiliation on Ms. Kinge.

VII CONCLUSIONS OF LAW

1. As a result of the entry of a default order against Mr. Makuch for his failure to file an answer under oath, a hearing in damages was held to determine the relief necessary to eliminate the discriminatory practice and to make Ms. Kinge whole.

2. The commission and Ms. Kinge established by a preponderance of the evidence that Mr. Makuch violated §46a-64c (a) when he created a hostile housing environment against Ms. Kinge because of her race and color.
3. The commission and Ms. Kinge established by a preponderance of the evidence that Mr. Makuch violated §46a-58 (a) when, in violation of Title VIII, he created a hostile housing environment against Ms. Kinge because of her race and color
4. Through exhibits and testimony, the commission and Ms. Kinge presented sufficient evidence for an award of compensatory emotional distress damages and reimbursement of expenses.

VIII ORDER

1. The respondent David Makuch is ordered to pay the complainant Zainab Kinge \$150,000.00 in compensatory emotional distress damages. Mr. Makuch shall make payment on or before June 30, 2023.
2. The respondent David Makuch is ordered to reimburse the complainant Zainab Kinge \$969.32 in economic damages. Mr. Makuch shall make payment on or before June 30, 2023.
3. Post-judgment interest shall accrue at the compounded rate of 10% per annum on any balance outstanding on and after July 1, 2023.
4. Mr. Makuch shall cease and desist from any further discriminatory conduct toward Ms. Kinge.

5. Mr. Makuch shall not engage in any retaliatory conduct against Ms. Kinge or Mr. McKelvey.

It is so ordered this 15th day of February 2023.

/s/ Jon P. Fitzgerald
Hon. Jon P. Fitzgerald
Presiding Human Rights Referee

cc.

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