

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

Commission on Human Rights and
Opportunities ex rel.
Edgardo Cosme

: CHRO No. 0510210
: EEOC No. 16aa500357

v.

Sunrise Estates, LLC.

: June 29, 2007

FINAL DECISION

Preliminary statement

On December 6, 2004, Edgardo Cosme (complainant) filed an affidavit of illegal discrimination with the commission of human rights and opportunities (commission). He filed an amendment on December 14, 2004. In his affidavit as amended (affidavit), he alleged that his former employer, Sunrise Estates, LLC. (respondent), illegally discriminated against him in violation of the federal Americans with Disabilities Act (ADA), 42 U.S.C. 12101, and General Statutes § 46a-60 (a) (1). According to the affidavit, the respondent delegated to the complainant unequal duties compared with its non-disabled employees, failed to reasonably accommodate his mental and learning disabilities and terminated his employment because of his mental and learning disabilities.

After preliminary investigation, the commission's investigator concluded that there was reasonable cause to believe that unfair practices had been committed as alleged in the affidavit and, on July 3, 2006, certified the affidavit to the commission's executive director and the attorney general. The undersigned was appointed the presiding human rights referee on July 10, 2006. The respondent filed its post-certification answer denying the allegations of discrimination on August 3, 2006.

The public hearing was held on May 1, 2007, at which time the complainant and the commission appeared. Despite notice and opportunity to be heard, the respondent did not appear and the commission filed a motion to default the respondent for its nonappearance. The motion was taken under advisement and the public hearing proceeded on the merits as to liability and damages. In support of the affidavit, the commission and the complainant introduced ten exhibits and called five witnesses.¹

The commission served upon the respondent a copy of the motion for default. After fourteen days elapsed from the filing of the motion; Regs., Conn. State Agencies § 46a-54-87a (b); with no response filed by the respondent, the commission's motion was granted on May 17, 2007.²

¹ During the public hearing, the complainant withdrew his claim that his learning disability was a factor in the respondent's actions. Transcript pages 100 – 01.

² The respondent was also served with a copy of the entry of the order of default. As of the date of the issuance of this decision, the respondent has not moved to set aside the order.

Notice was served on the parties that post-hearing briefs were to be served and filed on June 28, 2007. The complainant and the commission timely filed their briefs; the respondent did not file a brief.

For the reasons set forth, it is found that the respondent violated § 46a-60 (a) (1) when it failed to reasonably accommodate the complainant's mental disability, when it discriminated against him in the terms and conditions of his employment because of his mental disability, and when it terminated his employment because of his mental disability. The complainant is awarded back pay in the amount of \$36,696, front pay in the amount of \$45,136, prejudgment interest in the amount of \$10,996 and additional relief as ordered herein.

Findings of fact

Based upon a review of the pleadings, exhibits³ and transcripts and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found (FF):

1. In 1987, the complainant was hired by GMH Realty, Inc. (GMH), owners of apartment buildings located at 45 Barbour Street, Hartford, Connecticut, and 128 Nelson Street, Hartford, Connecticut, to perform

³ The commission and the complainant submitted joint exhibits that will be referred to as "C/CHRO" followed by the exhibit number.

maintenance and custodial work at these buildings. Transcript pages (Tr.) 15 – 16, 68 – 69; Affidavit and Answer, ¶ 4.

2. GMH also employed Hector (also known as Anthony) Vasquez as the complainant's supervisor. Tr. 17; Affidavit and Answer, ¶ 4.
3. The building on Barbour Street has four floors with forty-four apartments and the building on Nelson Street has three floors with six apartments. Tr. 18; Affidavit and Answer, ¶¶ 5, 7.
4. In July 2004, GMH sold the apartment buildings to the respondent. Tr. 16; C/CHRO 10; Affidavit and Answer, ¶ 12.
5. In addition to the Barbour Street and Nelson Street buildings, the respondent also owned apartment buildings on Weston Street, Elm Street and Brook Street in Hartford, Connecticut. Tr. 18.
6. The respondent maintained an office in the Barbour Street building. Tr. 22; Affidavit and Answer, ¶ 3.
7. After its purchase of the Barbour Street and Nelson Street apartment buildings, the respondent continue to employ the complainant to perform custodial, maintenance and grounds keeping work at these buildings. Tr. 17, 19 – 20.
8. After its purchase of the Barbour Street and Nelson Street apartment buildings, the respondent also continued to employ Vasquez as the complainant's supervisor. Tr. 17; Affidavit and Answer, ¶ 4.

9. The complainant worked an average of 36 hours per week and earned an average of \$315 per week. C/CHRO 10.
10. While employed by the respondent, the complainant rented from the respondent an apartment in its Nelson Street building. Tr. 45. The respondent charged him rent of \$157 per week and deducted the amount from his paycheck. Tr. 62 – 64; C/CHRO 10.
11. The complainant's duties included cleaning the hallways (including removing fecal material), sweeping, mopping, removing dead cats from the basement, removing trash from the parking lot and yard, raking leaves in the fall, shoveling snow in the winter, plumbing and electrical work, replacing light bulbs, repairing leaking faucets and toilets, and repairing appliances Tr. 19, 20, 22, 24, 28; Affidavit and Answer, ¶¶ 4, 7, 11.
12. While GMH owned the Barbour Street and Nelson Street buildings, the complainant received assistance from other employees in the performance of his duties. Tr. 24 – 25; Affidavit and Answer, ¶ 6.
13. After the respondent purchased the Barbour Street and Nelson Street buildings, the complainant received no assistance from any of the respondent's other employees. Tr. 22, 25; Affidavit and Answer, ¶ 9.

14. The complainant asked Vasquez to assign other employees to assist him with his work. The respondent refused to provide him with any assistance. Tr. 29 – 30.
15. In addition to Vasquez and the complainant, the respondent employed at least four other employees. Tr. 19.
16. Vasquez and the four other employees would have breakfast together in their truck in the parking lot of the Barbour Street building. Vasquez did not allow the complainant to join them. Tr. 26 – 27.
17. After they had breakfast, Vasquez and the other employees would throw their trash out of the truck and onto the ground for the complainant to pick up, and they would laugh at the complainant. Tr. 27.
18. Vasquez also did not allow the complainant to join him and the other employees when they had lunch in the office at the Barbour Street building. Tr. 29.
19. Vasquez would speak to the complainant by screaming at him. He did not scream at the other employees. Tr. 109.
20. The complainant cannot read or write. He attended special education classes when he was in public school but did not graduate. Tr. 13, 68; Affidavit, ¶ 2.

21. The respondent knew that the complainant could not read; Affidavit and Answer, ¶ 2; yet gave him documents to sign. Tr. 122 – 23.
22. Since September 26, 2001, the complainant has been diagnosed with recurrent and severe major depression and with post traumatic stress disorder. Tr. 84 – 87.
23. The complainant received, and continues to receive, individual therapy sessions, medication evaluations, and anti-psychotic and anti-depressant medication at the Hartford Behavior Health Center (HBHC). Tr. 13 - 14, 84 – 91, 121 – 22; C/CHRO 3, 4.
24. The complainant's diagnoses are defined as mental disorders in the most recent edition of the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders." Tr. 98 – 99.
25. The complainant saw a therapist weekly and refilled his prescriptions on a monthly basis. Tr. 38.
26. The complainant provided Vasquez with at least a one-week notice of his appointments and gave Vasquez his appointment cards. Tr. 32, 37 – 38.
27. The complainant told Vasquez that the medication was to keep him calm and explained to Vasquez that he took the medication as a result of seeing a friend shot dead while the complainant and the friend sat in an automobile Tr. 13, 34.

28. Vasquez told the complainant that his medication made him slow and stupid. Tr. 33 – 34.
29. Vasquez called the complainant retarded and crazy. Tr. 35, 89 – 90.
30. Several times each week Vasquez would call the complainant slow, mental and retarded in the presence of tenants and the other employees. Tr. 35.
31. When GMH had owned the Barbour Street and Nelson Street buildings, it allowed the complainant to take time from his workday to attend his counseling sessions and medication evaluations at HBHC. Tr. 38 – 39.
32. The respondent required the complainant to schedule his appointments for counseling sessions and medication evaluations after work hours. Tr. 39; C/CHRO 2.
33. If the complainant made a late afternoon appointment, the HBHC pharmacy would be closed by the time he arrived and he would be unable to get his medications. Tr. 39.
34. If the complainant were unable to get to the pharmacy before it closed, he would run out of medication and become stressed and unable to sleep. Tr. 44.
35. Because the respondent required him to schedule his appointments after his working hours, the complainant had to change therapists. Tr. 40 – 41, 83 – 84, 125; C/CHRO 2.

36. Even when the complainant scheduled his appointments after his work hours, he would miss therapy sessions and medication evaluations because the respondent would not allow him to leave work at his scheduled departure time. Tr. 41 – 43.
37. The complainant offered to arrive at work earlier in the morning on the days he had an appointment in order for him to complete his duties, leave work early and arrive on time for his medical appointments. The respondent refused to allow him to begin work earlier and would not provide anyone to assist him. Tr. 41 – 43.
38. The respondent never offered any proposals to assist the complainant in arriving on time to his medical appointments. Tr. 43.
39. The respondent maintained no written anti-discrimination policies or written procedures informing its employees about how to complain about discrimination. See Order re: Commission on Human Rights and Opportunities' motion for sanctions for failure to comply with order compelling production (Sanctions), Request 7 and 8.
40. The complainant was a good worker who competently performed all his assigned job duties. Tr. 106 – 07; Sanctions; Request 14 – 16.
41. The respondent never received any written complaints from its tenants about the complainant's job performance. Sanctions, Request 25 – 28.

42. The respondent never provided the complainant with any written job evaluations, warnings or other discipline regarding poor or inadequate job performance. Sanctions, Request 9, 20 and 23.
43. The respondent delegated to the complainant more arduous and/or distasteful job duties than it assigned to his non-disabled co-workers. Sanctions, Request 14 – 16.
44. Vasquez terminated the complainant's employment on September 17, 2004. Tr. 47.
45. The complainant did not receive a paycheck from the respondent for the last week he worked. Tr. 64.
46. After terminating the complainant, the respondent evicted him from his apartment. Tr. 51.
47. While the complainant was away from his apartment renting a truck to move his possessions, his apartment was burglarized and several items of personal property were stolen. Tr. 57 – 59.
48. After his termination, the complainant was unable to eat and became nervous and physically ill. He increased his sessions with his therapist and was given a higher dosage of his medications. Tr. 51.
49. Following his termination, the complainant sought employment with hotels and restaurants. Because the complainant is illiterate, his brother assisted him with the employment applications. Tr. 52.

50. The landlord of the apartment where the complainant's mother resided hired the complainant to do minor repairs and paid the complainant \$1,000. Tr. 53, 65 - 66; C/CHRO 13.
51. The complainant received \$3,942 in unemployment compensation from the State of Connecticut. Tr. 61- 62; C/CHRO 11, 13.
52. On August 1, 2006, the complainant obtained employment with the Easter Seals Greater Hartford Rehabilitation Center, Inc. (Easter Seals). He works approximately two and one-half hours a day, five days a week and currently earns \$7.65 per hour. His average weekly gross earnings are \$98. Tr. 54 – 56; C/CHRO 12, 13.
53. The respondent's termination of the complainant's employment triggered anxieties in the complainant that interfered in his daily activities such as sleeping, eating, concentration, ability to think clearly, ability to make decisions clearly, and ability to focus. This impact remains with the complainant. Tr. 90.
54. Reinstatement is not a viable remedy given the complainant's mental health; Tr. 91 – 92; and the respondent's hostile treatment of the complainant during his employment.
55. The complainant's depression and post-traumatic stress disorder limit his ability to work and to sustain competitive employment. Tr. 93.

56. The complainant's experiences while employed by the respondent limit his ability to work and contribute to his need for a more supportive work environment. Tr. 93 – 94.

Analysis

I

General Statutes Section 46a-60

A

The complainant alleged that the respondent violated § 46a-60 (a) (1) when it assigned him unequal job duties compared with the duties of his non-disabled co-workers, failed to reasonably accommodate his mental disability and subsequently, on September 17, 2004, terminated his employment because of his mental disability. Section 46a-60 provides in relevant part: “(a) It shall be a discriminatory employment practice in violation of this section: (1) For an employer, by the employer or the employer’s agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or 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 race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability” A person with a mental

disability is one “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).

B

With respect to the complainant’s allegations that the respondent failed to reasonably accommodate his mental disability,⁴ he must first establish a prima facie case that: (1) he is disabled as defined by the applicable statute; (2) he is able to perform his essential job duties with or without a reasonable accommodation; (3) reasonable accommodations for his disability exist; (4) the respondent was aware of his disability; and (5) the respondent failed to provide an accommodation. *Conte v. Board of Education*, judicial district of New Haven, Docket No. CV-02-0466475 (2003 WL 21219371, 4) (May 15, 2003). If the complainant meets his burden, the respondent must then show that the identified accommodations are not reasonable or that they

⁴ While § 46a-60 (a) does not specifically require an employer to reasonably accommodate an employee’s disability, an employer’s duty to provide such reasonable accommodation is, nevertheless, well established in Connecticut law. See, for example, *Conte v. Board of Education*, judicial district of New Haven at New Haven, Docket No. CV-02-0466475 (2003 WL 21219371, 4) (May 15, 2003); *Trimachi v. Connecticut Workers Compensation Committee*, judicial district at New Haven, Docket No. CV-97-0403037s (June 14, 2000) (27 Conn. L. Rptr. 469, 473); *Commission on Human Rights & Opportunities ex rel. Kochev v. Eastman Kodak Co.*, CHRO Case No. 8310319, 29-30 (April 30, 1996); *LaRoche v. United Technologies Corp.*, CHRO Case No. FEP-PD-60-1, 10-11 (August 28, 1978).

would cause it an undue hardship to implement. Whether a proposed accommodation is reasonable is necessarily fact specific and must be decided on a case-by-case basis. Both the complainant and the respondent are required to engage in a cooperative, interactive, good faith process to determine an appropriate accommodation. *Commission on Human Rights & Opportunities ex rel. Grant v. Yale-New Haven Hospital*, CHRO No. 9530477, Final decision, p. 26 (October 13, 1999).

In this case, the complainant established his prima facie case as well as his ultimate burden of proving by a preponderance of the evidence that the respondent failed to provide him with a reasonable accommodation for his mental disability. With respect to the five elements of a prima facie case, first, since the complainant's diagnoses of depression and post traumatic stress disorder are defined in the latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders; he is mentally disabled as defined by Connecticut law. FF 22, 24; §§ 46a-51 (20), 46a-60 (a) (1). Second, the complainant was able to perform the essential functions of the job. For nearly seventeen years he had performed similar job duties at the same buildings, first for GMH and then for the respondent. FF 1, 7. A credible witness to the complainant's job performance testified that he was a good worker and was liked by the tenants. FF 40; Tr. 106 - 07. Further, the respondent never received any written complaints from its tenants critical of the complainant's job performance and the complainant never received from the respondent any written

discipline or written job evaluations indicating poor or inadequate performance. FF 41, 42.

Third, reasonable accommodations for the complainant's disability existed. The accommodation sought by the complainant was time off to attend his therapy sessions and medical evaluations. A modified work schedule is an appropriate and reasonable accommodation when it satisfies the complainant's condition while permitting the employer to satisfy its needs of having the complainant work a regular and predictable schedule. *Ezikovich v. Commission on Human Rights & Opportunities*, 57 Conn. App. 767, 775, cert. denied, 253 Conn. 925 (2000). The respondent could have, as GMH had done, allowed the complainant time off during the workday. FF 31. As is evident by the nearly three years that GMH had allowed him time off during the day for his appointments, the complainant could take time off and still timely complete the essential functions of his job. Alternatively, as suggested by the complainant, the respondent could have allowed him to arrive at work early on days when he had an appointment so that he could complete his duties and leave work early. FF 37. As the complainant provided the respondent with advance notice of his appointments; FF 26; either proposal would have satisfied the respondent's need for the complainant to work a regular and predictable schedule.

Fourth, the respondent was aware of the complainant's disability. The complainant had discussed it with Vasquez and provided Vasquez with his medical appointment card a week prior to an appointment. FF 26, 27. Finally, the respondent

did not provide the complainant with any accommodations. It did not allow the complainant to leave during the workday for his appointments. FF 32. It did not allow the complainant to arrive at work early on the days he had appointments so that he could leave work early. FF 37. Indeed, it even frequently refused to allow the complainant to leave at the end of his scheduled workday so that he could attend his appointments. FF 36. It also did not engage the complainant in an interactive, good faith process to determine an appropriate accommodation. FF 38.

Although the respondent did not appear at the public hearing, it did file an answer. In its answer, the respondent claimed that the complainant was accommodated on those occasions when he requested an accommodation. Answer, ¶ 13. Assuming that the filing of an answer satisfies the respondent's burden to articulate a non-discriminatory reason, the burden of production shifts back to the complainant, who retains the burden of persuasion, to prove he was the victim of intentional discrimination.

“[E]vidence establishing the falsity of the legitimate, nondiscriminatory reasons advanced by the employer may be, in and of itself, enough to support the trier of fact's ultimate finding of intentional discrimination.” (Internal quotations omitted.) *Jacobs v. General Elec. Co.*, 275 Conn. 395, 401 (2005). The “factfinder's disbelief of the reasons put forward by the defendant (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. Thus, rejection of the defendant's proffered reasons will

permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, [n]o additional proof of discrimination is required” (Internal quotation marks omitted.) *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 706 (2006).

In this case, for the reasons detailed in the analysis of the complainant’s prima facie case, the complainant met his burden of establishing the falsity of the respondent’s explanation and the failure of the respondent to provide a reasonable accommodation. Credible testimony from the complainant, his sister and his therapists persuasively established that the respondent repeatedly refused to allow the complainant to leave work to arrive at his appointments on time. FF 32, 36, 37. The respondent’s refusal to accommodate the complainant resulted in the complainant having to change to a new therapist and caused him to arrive at the HBHC pharmacy too late to pick up his prescriptions. FF 33, 34, 35. Had the respondent accommodated the complainant’s request, he would not have had to change therapists and he would not have arrived at the pharmacy after it closed. The respondent offered no evidence that allowing the complainant to leave work during the workday or to leave early at the end of the day was unreasonable or would cause it an undue hardship.

C

With respect to the complainant's claim of discriminatory termination and work assignments, the analytical "framework for the burden of production of evidence and the burden of persuasion in an employment discrimination case is well established." *Jacobs v. General Elec. Co.*, supra, 275 Conn. 400. First, the complainant must establish the four elements of a prima facie case of employment discrimination. The elements are: "(1) he is in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination." (Internal quotation marks omitted.) *Id.* Once the complainant establishes a prima facie case, the respondent then must produce a legitimate, nondiscriminatory reason for its adverse employment action. The respondent's burden is one of production, not persuasion, involving no credibility assessment. *Id.*

After the complainant has established his prima facie case and the respondent has produced a legitimate, nondiscriminatory reason for its action, the complainant, who retains the burden of persuasion, must demonstrate that the respondent's proffered reason was not the true reason for the employment decision. Discrimination "can be proven either directly, with evidence that the employer was motivated by a discriminatory reason, or indirectly, by proving that the reason given by the employer was pretextual." *Id.*, 401. "[T]here must be not only sufficient evidence that the

employer's reasons are false (pretextual) but also sufficient evidence that the employer's reasons were a pretext for intentional discrimination. Stated another way, there must be sufficient evidence on the record that the . . . protected trait or traits played a role in the decision-making process and actually motivated the employer's decision." (Internal quotations omitted.) *Board of Education v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 507 (2003).

The complainant established the four elements of his prima facie case relative to his termination claim. First, the complainant is in a protected class. As his diagnoses of depression and post traumatic stress disorder are defined in the latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, he is mentally disabled as defined by Connecticut law. FF 22, 24; §§ 46a-51 (20), 46a-60 (a) (1). Second, there is substantial evidence that he was qualified for his position. He had been doing the same type of work since 1987. FF 1, 7, 11. Uncontradicted testimony by a former co-worker (who was also a tenant in the Barbour Street apartment) described the complainant as a very good worker. FF 40, 41 42; Tr. 106. The tenants liked him and were disappointed when he was terminated. Tr. 106 - 07. Further, the complainant never received any written discipline or written warnings from the respondent. FF 42. Third, the complainant's termination; FF 44; constitutes an adverse employment action. Fourth, the complainant's termination clearly occurred under circumstances giving rise to an inference of discrimination. Despite the

complainant's unblemished work history; FF 40, 41, 42; he was terminated simply for referring to Vasquez a tenant who was complaining about another tenant. Tr. 48 – 49.

Although the respondent did not appear at the public hearing, it did file an answer. In its answer, the respondent denied discriminating against the complainant because of his mental disability. Answer, ¶ 18. According to the respondent's answer, on more than one occasion it notified the complainant that his job performance was substandard; Answer, ¶ 10; and "there was a verbal confrontation between the Complainant and the Respondent's representative which resulted in the termination of employment of the Complainant;" Answer, ¶ 16. Again assuming that the filing of an answer satisfies the respondent's burden to articulate a non-discriminatory reason, the burden of production shifts back to the complainant, who retained the burden of persuasion, to prove he was the victim of intentional discrimination.

In this case, the complainant demonstrated that the respondent's explanation is pretextual and that it terminated his employment because of his mental disability. In addition to the reasons detailed in the analysis of his prima facie case, the complainant was the only employee excluded from participating in breakfasts and lunches with the non-disabled employees and was the only employee who his supervisor would converse with by screaming at him. FF 16, 18, 19. His supervisor and the non-disabled co-workers exacerbated his job duties by maliciously contributing to the trash he had to pick up. FF 17. Further evidence that the complainant's mental disability motivated the respondent's decision is his supervisor's repeated and public use of derogatory

comments regarding the complainant's disability and his need for medication. FF 28, 29, 30. Also, despite knowing that the complainant was illiterate, the respondent gave the complainant documents and insisted that he sign them. FF 20, 21.

Also, there was credible evidence that, contrary to the respondent's answer, the complainant's job performance was not substandard; FF 40, 41 42; and also that there was no "confrontation." Rather, the complainant simply referred to Vasquez a tenant who was complaining about another tenant. Tr. 47 – 50.

The complainant's allegation that the respondent delegated to him unequal job duties as compared with his non-disabled co-workers is essentially an allegation that the respondent discriminated against him in the terms, conditions and privileges of his employment. The complainant amply demonstrated disparate terms, conditions and privileges of employment because of his disability. He was delegated more arduous and/or distasteful duties than his non-disabled co-workers. FF 11, 43. The respondent refused to assign other employees to assist the complainant, even though he had received such assistance when GMH owned the buildings. FF 12 – 15. Further, in its answer, the respondent did not deny the complainant's allegation that the respondent "had [him] doing all of the worst maintenance duties" Complaint and Answer, ¶ 11. Also, the complainant was also the only employee excluded from office breakfasts and lunches and the only employee that his supervisor would communicate with through shouting. FF 16, 18, 19.

II

General Statutes Section 46a-58 (a) and the Americans with Disabilities Act

The complainant also alleged that the respondent violated the ADA when it discriminated against him on account of his mental disability. Although the commission can enforce certain federal laws through General Statutes § 46a-58 (a), it cannot prosecute an ADA claim based on mental disability discrimination. Section 46a-58 (a) states: “It 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 religion, national origin, alienage, color, race, sex, blindness or physical disability.” Because mental disability is not enumerated as a protected basis under § 46a-58 (a), the commission does not have jurisdiction to adjudicate the complainant’s ADA-based claim.⁵

⁵ General Statutes § 1-2z states: “The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.” Also, as recently as its 2007 session, the General Assembly amended § 46a-58 (a) to add a protected basis (sexual orientation) without expanding coverage to include mental disability. See Public Acts of 2007, No. 07-62.

III

Monetary damages and other relief

A

Statutes and case law

General Statutes § 46a-86 (a) provides that when a respondent is found to have engaged in a discriminatory practice, the presiding human rights referee shall issue “an order requiring the respondent to cease and desist from the discriminatory practice and further requiring the respondent to take such affirmative action as in the judgment of the presiding officer will effectuate the purpose of this chapter.” Further affirmative action includes ordering the respondent to pay the complainant back pay, provided that deductions are made for interim earnings, unemployment compensation and amounts the complainant could have earned with reasonable diligence. General Statutes § 46a-86 (b).

In addition to cease and desist and back pay orders, the presiding human rights referee is also authorized to award prospective monetary relief (front pay) *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, judicial district at Hartford, Docket No. CV-92-520590 (January 27, 1994) (10 Conn. L. Rptr. 599, 603). Front pay “serves a necessary role in making victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no reasonable prospect

of obtaining comparable alternative employment.” *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984).

Front pay should be granted only in limited circumstances: “(1) in the court’s discretion; (2) in lieu of reinstatement; (3) if not too speculative; and (4) for temporary relief only.” *Barry v. Posi-Seal Intern., Inc.*, 36 Conn. App. 1, 12 (1994). Factors to consider when awarding front pay also include the complainant’s education, age, prior salary, skills and vocational experience. *Broadnax v. New Haven*, United States Court of Appeals, Docket No. 04-2196CV (2d Cir. July 20, 2005) (2005 WL 1691545, 3). The award of front pay must be limited to a reasonable time period and supported by the evidence. *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 234 Conn. 1, 33-34 (1995). The award of front pay “is particularly appropriate in cases such as this, where the claimant took steps to mitigate [his] damages by seeking work elsewhere but had to settle for a lower paying job.” *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, supra, 10 Conn. L. Rptr. 603. Notably, the denial of front pay is particularly inappropriate when “the impossibility of reinstatement [is] the fault of the employer.” *Whittlesey v. Union Carbide Corp.*, supra, 742 F.2d 729 (a four-year award of front pay found reasonable).

“[F]ront pay awards, like back pay awards, must be reduced by the amount [the complainant] could earn using reasonable mitigation efforts.” (Internal quotation marks omitted.) *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, supra, 10 Conn. L. Rptr. No. 603.

This reduction from awards of back pay and front pay for amounts that the complainant earned or reasonably could have earned is often referred to as the complainant's duty to mitigate damages. The complainant "has a duty to make reasonable efforts to mitigate damages. . . . What constitutes a reasonable effort under the circumstances of a particular case is a question for the trier. . . . Furthermore, we have concluded that the breaching party bears the burden of proving that the nonbreaching party has failed to mitigate damages. . . ." (Citations omitted; internal quotation marks omitted.) *Ann Howard's Apricots Restaurant, Inc. v. Commission on Human Rights & Opportunities*, 237 Conn. 209, 229 (1996).

The respondent can meet its burden of proving that the complainant failed to mitigate damages "by establishing (1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it. . . . [The respondent is] released from the duty to establish the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such employment." (Citation omitted; internal quotation marks omitted.) *Broadnax v. New Haven*, 415 F.3d 265, 268 (2d Cir. 2005).

Relief that can be awarded also includes prejudgment and postjudgment compounded interest on the awards of both front and back pay. *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, supra, 10 Conn. L. Rptr. 604. Additionally, the respondent can be ordered to pay to the commission the amount of

unemployment compensation received by the complainant, which the commission shall then transfer to the appropriate state agency. § 46a-86 (b).

In this case, as a result of the respondent's engaging in discriminatory practices, the complainant is entitled to back pay, prejudgment interest, front pay and postjudgment interest.

B

Back pay

The complainant is entitled to an award of back pay in the amount of \$36,696.

Back pay is calculated at the complainant's average compensation rate from the respondent of \$315 per week from the date of his termination to the date of judgment and also for his unpaid last week of employment (147 weeks) for a total of \$46,305, less mitigation of (a) \$3,942 in unemployment compensation benefits, (b) \$1000 in payment from his mother's landlord and (c) \$4,704 in wages from Easter Seals (\$98 per week for 48 weeks of employment). FF 9, 50, 51, 52.

The respondent offered no evidence that the complainant failed to use reasonable efforts to mitigate his damages.

C

Prejudgment interest

The complainant is entitled to an award of prejudgment interest on his back pay at the rate of 10% per annum, compounded annually, in the amount of \$10,996, calculated from the date of termination to the date of judgment.

D

Front pay

The complainant is entitled to an award of front pay in the amount of \$45,136.

This represents the complainant's average weekly compensation of \$315 from the respondent less his average weekly mitigation of \$98 from employment at Easter Seals for a four-year period from the entry of this judgment.

The complainant is not seeking reinstatement, and an order of reinstatement is not a viable option given the recommendations of the complainant's mental health therapists, the complainant's mental health, the respondent's aggravation of the complainant's mental health issues, and the respondent's repeated hostile treatment of the complainant because of his disability prior to his termination. FF 17 – 19, 21, 28 – 30, 32, 35 - 37; Tr. 91 – 92, 95 – 96, 102.

Under the circumstances of this case, a four-year award of front pay is a reasonable time period. The impossibility of reinstatement is the fault of the respondent. As is clearly evident from the credible testimony not only of the complainant and his sister but also of the complainant's mental health therapists, the respondent's on-going hostile treatment of the complainant, its failure to reasonably accommodate his disability and its arbitrary, baseless and discriminatory termination of his employment had serious long-term consequences on the complainant, aggravating his mental health issues to such an extent that he will be unable to work a full-time job for the foreseeable future. In addition, the complainant has limited education, skills and vocational experience, having not graduated from high school and having spent nearly seventeen years as a custodian at two apartment buildings owned first by GMH and then by the respondent. 1, 11 – 14, 16 – 19, 20, 21, 26 – 37, 49, 53 – 56.

E

Postjudgment interest

The complainant is entitled to an award of postjudgment interest at 10% per annum compounded annually on award of back pay and front pay from the date of this decision to the date of the complainant's receipt of payment.

F

Personal property

The complainant also claims damages for the theft of his personal property from his apartment. As the evidence is inadequate to find that the respondent or its employees were responsible for the theft, no damages are awarded.

Conclusions of law

1. The complainant is mentally disabled as defined under state law.
2. The complainant established a prima facie case that the respondent failed to provide him with a reasonable accommodation for his mental disability.
3. The complainant established a prima facie case that the respondent terminated his employment because of his mental disability.
4. The complainant established a prima facie case that the respondent discriminated against him because of his mental disability in the terms, conditions and privileges of his employment.
5. The complainant introduced credible persuasive evidence that the respondent's actions were motivated by discriminatory reasons and/or that its

explanations for its actions were unworthy of credence and a pretext for intentional discrimination.

6. The complainant established by a preponderance of evidence that he was the victim of intentional discrimination.
7. As a result of the respondent's discriminatory employment practices, the complainant is entitled to relief including awards of back pay, front pay, and pre- and post-judgment interest.

Order

1. The respondent is ordered to pay the complainant \$36,696 in back pay.
2. The respondent is ordered to pay the complainant \$10,996 in prejudgment interest.
3. The respondent is ordered to pay to the commission \$3,942 in reimbursement for unemployment compensation benefits paid to the complainant by the State of Connecticut. FF 51. The commission is ordered to then transfer such amount to the appropriate state agency.
4. The respondent is ordered to pay the complainant \$45,136 in front pay.
5. The respondent is ordered to pay the complainant postjudgment interest on the back pay and front pay awards at the rate of 10 percent per annum, compounded

annually, from the date of this decision to the date of the complainant's receipt of payment.

6. Pursuant to General Statutes § 46a-60 (a) (4), the respondent shall not engage in or allow any of its employees to engage in any retaliatory or discriminatory conduct against the complainant.
7. Should prospective employers seeking references concerning the complainant ever contact the respondent, the respondent is ordered to provide only the dates of the complainant's employment, the last position he held and the rate(s) of his pay. In the event additional information is requested in connection with any inquiry regarding the complainant, the respondent shall require written authorization from the complainant or his designated representative before such information is provided, unless required by law to provide such information.
8. The respondent is ordered to cease and desist from all acts of discrimination prohibited under federal and state law and to provide a nondiscriminatory work environment pursuant to federal and state law.
9. The commission is ordered to provide the respondent with notices regarding applicable statutory provisions. Pursuant to General Statutes § 46a-54 (13), within three days of its receipt of the notices the respondent is ordered to post the commission's notices in all its apartment buildings in conspicuous locations visible to all employees and applicants for employment.

10. The commission is ordered to provide the respondent with the names and contact information of approved service providers of diversity training and education. Within 90 days of its receipt of the contact information, the respondent is ordered to have, at its expense, its employees, officers, directors and management undergo and successfully complete fifteen hours of diversity training and education. The training and education program shall include information on: (a) federal and state statutory provisions concerning discrimination directed at protected classes; (b) remedies available to victims of discrimination; (c) standards for working with persons from diverse populations; (d) strategies for addressing differences that may arise from diverse work environments; (e) disability harassment prevention; (f) disability accommodation; and (g) such other training and education as deemed appropriate by the commission. The service provider shall notify the commission of those who attended and successfully completed the program.

11. Within 90 days of the issuance of this decision, the respondent is ordered to provide to the commission for the commission's approval (1) proposed written policies prohibiting the respondent's employees from engaging in discriminatory conduct prohibited under federal and state law, and (2) a proposed written complaint procedure for the use by the respondent's employees who believe they have been the victims of discrimination. The respondent is ordered to incorporate into its proposed policies and procedures all revisions recommended by the

commission. The respondent is ordered to then implement such policies and procedures.

Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mr. Edgardo Cosme, 2327 Main St., Apt. 1., Hartford, CT 06120
Lisa Levy, Esq., Greater Hartford Legal Aid, Inc., 999 Asylum Ave., 3rd Floor, Hartford,
CT 06105
Sunrise Estates, LLC, 51 Forest Rd., Suite 314, Monroe, New York, 10950
Marc N. Needelman, Esq., 800 Cottage Grove Rd., Suite 313, Bloomfield, CT 06002
Robin Kinstler Fox, Esq., Commission on Human Rights and Opportunities, 21 Grand
St., Hartford, CT 06106
Connecticut Department of Labor