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

CHRO ex rel. Rosa DiMicco,
Complainant

CHRO No. 0420438
Fed No. 16aa400982

v.

Neil Roberts, Inc.,
Respondent

September 12, 2006

FINAL DECISION
HEARING IN DAMAGES

I.

The Parties

The complainant is Rosa DiMicco, 218 Noble Street, West Haven, Connecticut. She is represented by the firm of Hurwitz and Sagarin, LLC 147 North Broad Street, Milford, Connecticut 06460. The commission on human rights and opportunities ("commission") is located at 21 Grand Street, Hartford, Connecticut 06106. The commission is represented by David L. Kent, commission attorney. The respondent is Neil Roberts, Inc., d.b.a. Neil Roberts School Uniform Company, 500 Boston Post Road, Orange Connecticut, believed to be a division of Uniform Authority, Inc., f/k/a Ibily School Uniforms, Inc., 999 NW 159th Drive, Miami, Florida. The respondent was not represented by counsel.

II.

Procedural History

The complainant filed her employment discrimination complaint with the commission on March 19, 2004. The complaint alleged discrimination on the basis of gender and

sexual harassment in violation of General Statutes §§46a-58a, 46a-60 (a) (1), 46a-60 (a) (8) (a) (b) and (c), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. After a full and thorough investigation of the complaint, the commission investigator issued a reasonable cause finding on September 28, 2005. The case was certified to public hearing on December 21, 2005.

On December 27, 2005, Chief Human Rights Referee Donna Maria Wilkerson issued a notice of contested case proceeding and hearing conference. Human Rights Referee Leonard E. Trojanowski was assigned as the presiding referee and the hearing conference was scheduled for January 10, 2006. Respondent's chief executive officer, Eduardo Barea and Attorney Ginger Schroder participated in the hearing conference by telephone. At the conference, respondent represented that it was seeking Connecticut counsel and needed additional time to file its answer. The referee ordered that the answer be filed by February 10, 2006. Thereafter, the respondent sought and the referee granted a further extension of time to February 17, 2006. No answer was filed and the respondent ceased to participate in the public hearing proceedings.

On February 28, 2006, the commission filed a motion for default of the respondent and for a hearing in damages. On or about March 20, 2006, Referee Trojanowski issued an order of default against the respondent and scheduled a hearing in damages for May 18, 2006.

On May 18, 2006, a hearing in damages occurred at the commission. The commission and the complaint were in attendance at the hearing. Neither the respondent nor any representative of the respondent appeared at the hearing in damages. I (J. Allen Kerr, Jr., Human Rights Referee) presided over the hearing in substitution for Referee Trojanowski.

Upon entering a default, the presiding officer shall conduct a hearing which will be limited to determining the relief necessary to eliminate the discriminatory practice and make the complainant whole. Section 46a-54-88a of the Regulations of Connecticut State Agencies. The default admits the material facts that constitute a cause of action and conclusively determines the liability of a defendant. See, *Sklyler Ltd. Partnership v. S.P. Douthett & Co.,* 18 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).

As a result of the default, and based upon the pleadings, I conclude that the complainant was sexually harassed, retaliated against and terminated from her employment on the basis of her sex in violation of General Statutes §§ 46a-60 (a) (1), 46a-60 (a) (8) (a) (b) (c), 46a-56 (a) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and the Civil Rights Act of 1991.

III.

Findings of Fact

Complainant's exhibits will be referenced as "C Exh." followed by the number. Transcript pages will be referenced as "Tr." followed by the page number.

The factual allegations contained in the complaint affidavit dated March 9, 2004 are herewith deemed established as a result of the default. In addition, the following facts are deemed to be established as a result of the complainant's testimony at the hearing in damages and complainant's exhibits admitted into evidence:

1. While employed by the respondent the complainant earned $740.38 for a forty-hour week. Tr. 10, C Exh. 1.
2. The respondent contributed $52.47 per week toward the complainant's medical insurance while the complainant contributed $17.49 per week. Tr. 11, C Exh. 1.
3. The complainant received two weeks paid vacation from the respondent as a benefit of employment. Tr. 12.
4. A part owner of the respondent, Steve Sitkoff ("Sitkoff"), made comments to the complainant, stared at her chest and would kiss and hug her when she walked into a room. Tr. 39.
5. The complainant's daughter also worked for the respondent, and on occasion Sitkoff would make comments like, "God, I would do anything to be your father," Tr. 39.

6. The conduct of Sitkoff made it difficult for the complainant to go to work and she became irritable and cranky and she never knew what he was going to do or say. Tr. 31.
7. Sitkoff terminated the complainant wrongfully on February 1, 2004, for the pretextual reason that she was not a team player. Tr. 12.
8. Following the termination, the complainant collected unemployment, collecting approximately $340 per week from February 2004 through June 2004. Tr. 14.
9. During this period of unemployment the complainant collected a total of $6,858.00 in unemployment payments. C Exh. 2.
10. The complainant had no medical or vacation benefits during her period of unemployment. Tr. 14, 15.
11. As a result of her wrongful termination and the events leading up thereto the complainant stayed home and avoided social situations. Tr. 32.
12. She has also experienced difficulty relating to males, including one with whom she is in a personal relationship. Tr. 33, 34.
13. The complainant has not sought medical treatment for her symptoms and difficulties. Tr. 34.
14. In June of 2004 the complainant went to work at the New Haven Register for a salary comparable to what she had earned with the respondent, and where she received medical benefits after three months and would have received vacation benefits after one year. Tr. 15, 16.
15. The complainant worked at the New Haven Register from June 2004 until November 2004, at which time she left voluntarily. Tr. 16.

IV.

Discussion

"In an action at law, the rule is that the entry of a default operates as a confession by the defaulted defendant of the truth of the material facts alleged in the complaint, which are essential to entitle the plaintiff to some of the relief requested. It is not the equivalent of an admission of all of the facts pleaded. The limit of its effect is to preclude the defaulted defendant for making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive." (Internal quotation marks omitted.) *Murray v. Taylor,* 65 Conn. App. 300, 334-35, cert. denied, 258 Conn. 928 (2001).

I find that Connecticut case law on the scope of hearings in damages has arisen primarily from trial court proceedings initiated by a writ, summons and complaint signed only by an attorney. A proceeding before the commission is initiated by a verified complaint affidavit. In the complainant's affidavit she gave far greater particulars than in her testimony at her default hearing, not only as to liability, but as to damages. Because the complainant rightly points out that victims of discrimination are entitled to a presumption in favor of relief in favor of a proven discriminator (*Teamsters v. United States,* 431 U.S. 324 (1977)), and because the complaint in issue is both detailed and in

affidavit form, I am prepared to supplement the complainant's sworn testimony with her complaint affidavit where necessary to effectuate a fair and just decision. While the complainant's sworn testimony did not contradict the information provided in her complaint affidavit, it was inexplicably less detailed and complete and in my view constitutes a failing on the complainant's part that must be reflected in this decision to some degree.

A.

Emotional Distress

I find that as a result of recent judicial developments, in particular the cases of *Trimachi v. Connecticut Workers Compensation Committee,* 2000 WL 872451 (Conn. Super. Ct. June 14, 2000) (Devlin, J.) and *Commission on Human Rights and Opportunities v. Board of Education of the Town of Cheshire,* 270 Conn. 665 (2004) that the complainant's inclusion of General Statutes § 46a-58 (a) in her complaint affidavit allows me to convert her federal claims into claims under Connecticut's anti-discrimination laws, and to award damages for emotional distress pursuant to General Statutes § 46a-86 (c). See, Commission on Human Rights and Opportunities *ex rel*. Tina Saddler v. Superior Agency dba Margaret Landry, CHRO No. 0450057 (Knishkowy, May 23, 2006).

A complainant need not present medical testimony to establish her internal emotional response to the harassment; her own testimony may suffice. See, S*chanzer v. United Technologies Corp.,* 140 F.Sup.2d 200 (D.Conn. 2000). Medical testimony however, may strengthen a case. See, *Busche v. Burkee,* 649 F.2d 509, 519 (7th Cir. 1981). The

testimony of relatives, friends and business associates may also provide insight into a complainant's emotional state. See, *Blackburn v. Martin,* 982 F.2d 125, 132 (4th Cir. 1992). In this matter the complainant relied solely on her own affidavit and testimony.

The complainant and commission cite *Commission on Human Rights and Opportunities ex rel. Peoples v. Estate of Eva Belinsky,* 1988 WL 492460 (Conn. Super. November 8, 1988) for the proposition that the relevant factors to consider in awarding emotional distress include: 1) whether the discrimination occurred in front of others, 2) the degree of offensiveness of the discrimination and, 3) the subjective internal emotional reaction of the complainant.

The emotional distress attributable to both the harassment and termination has not been established by the complainant as having occurred in the presence of others. When discriminatory actions occur in front of other people, the victim may be further humiliated and thus deserving of a higher award for emotional distress. Conversely, the absence of a public display of discrimination militates against a substantial award. See, *Commission on Human Rights and Opportunities ex rel. Peoples v. Belinsky, Id.* In *Belinsky* it was found that the absence of such public display led to an award of $3,500, lower than the $5,000 requested. See also *Commission on Human Rights and Opportunities ex rel. McNeal-Morris v. Gnat,* CHRO No. 9950108, pp. 7-8 (January 4, 2000).

The degree of offensiveness established by the complainant was not extreme, although Sitkoff's conduct was nonetheless clearly unwelcome. The language employed by Sitkoff was neither crude nor profane, and while inappropriate, usually "complimentary."

Sitkoff was clearly "smitten" with the complainant, but his advances were at the very least inappropriate and his declaration to the complainant's daughter as to how he wished he could be her father, even disturbing. The internal emotional reaction resulting from these actions on the complainant was undoubtedly real, but the lack of detail and indignation, evident in the complainant's testimony were noteworthy.

I have given consideration to this commission's employment termination decision of *Commission on Human Rights and Opportunities ex rel. Canfield Knowles v. The Gilman Brothers, Co.,* CHRO No. 9240221 (Schoenhorn, August 8, 1995) and the recent commission decisions of *Commission on Human Rights and Opportunities ex rel. Tina Saddler v. Margaret Landry, dba Superior Agency, supra,* and *Commission on Human Rights and Opportunities ex rel. Elizabeth Lopes v. Comfort Suites,* CHRO No. 0540252 (Austin, October 25, 2005). *Canfield Knowles* was prominently cited in the joint memorandum and allowed an award for emotional distress in the amount of $5,000 for wrongful termination, based solely upon the complainant's testimony. *Saddler,* a recent housing decision, allowed for a $5,000 award after a comprehensive review of other emotional distress awards. *Saddler* involved only telephone contact with the discriminator and dissemination of his comments only within the complainant's immediate family. *Lopes* was a recent commission decision entailing, as in this matter,

sexual harassment and wrongful termination. The referee declined to make an award for emotional distress, citing in part the "garden variety" of the distress claim, in that it did not occur in the presence of others and lacked the requisite offensiveness.

In summary, the complainant was certainly confronted with the tepid but nonetheless unwelcome attention of an unwanted admirer, who happened to occupy a position of authority over her. At least some "hugging and kissing" were alleged and must be accepted as established and actionable. Sitkoff again crossed the line when he took the ill considered liberty of communicating his infatuation for the complainant to her grown daughter (who also worked for the respondent) in terms sufficiently "smarmy" to no doubt prove to be disquieting to the complainant. Finally, a certain amount of distress must be attributable to the termination itself inasmuch as the complainant believed it was for wholly unjustifiable reasons. The initial harassment was not severe, but in inadvisably involving the complainant's daughter and in predicating a termination on work related deficiencies when it was truly engendered by having been "romantically" rebuffed, Sitkoff exposed the respondent to an award for emotional distress, which I herewith set at $6,000.

B.

Back Pay

The complainant gave considerable testimony about her work history subsequent to her leaving the New Haven Register. While I am willing to award full back pay up to the time of the complainant's employment with the Register, the testimony made clear that

that job was at least comparable to that with the respondent (save deferred medical coverage and vacation pay), and but for her leaving the Register would have routinely terminated her wage claim at that point. The complainant claims, however, to establish that her termination, although voluntary, was a result of the residual effects of Sitkoff's harassment. However, her testimony was not sufficient, especially absent any medical testimony, that her voluntary termination after five to six months of employment was directly attributable to the emotional distress she experienced during her employment with the respondent. There was no expert testimony, no corroboration and no detail as to the nature of the voluntary termination. The complainant had an uncontested opportunity to convince me that not only had her emotional distress caused her to endure a reclusive existence for several months at home, but had made it impossible to continue with an apparently desirable employment situation with the New Haven Register despite having performed her duties there for a number of months without apparent incident. She did not grasp the opportunity and I must therefore terminate back pay with the complainant's acceptance of employment with the New Haven Register.

I therefore find a net award for back pay in the amount of $7,220. This represents nineteen weeks without her $740 per week salary with the respondent, less $360 per week received from unemployment compensation.

C.

Lost Benefits

The evidence established that the complainant was deprived of the respondent's $52.47 per week contribution toward her medical insurance for the 19 weeks she collected unemployment and the first 13 weeks (90 days) she worked at the New Haven Register, resulting in an amount of $1,679.

The complainant was similarly deprived of her two week paid vacation benefit for one year (the period the New Haven Register would have required for a similar benefit) plus the initial nineteen weeks she received unemployment compensation. I therefore award an amount equal to two weeks vacation benefits ($1,480) plus 73% of one week ($540) for a total lost vacation benefit of $2,020.

Lost benefits total $3,699.

D.

Attorney's Fees

While General Statutes § 46a-86 (c) allows for the recovery of reasonable attorneys fees, my ability to calculate the fee is well regulated by Connecticut law. It begins with the calculation of an "objective" lodestar figure (verifiable hours expended at reasonable hourly rate). *LeBlanc-Sternberg v. Fletcher,* 143 F.3d 748, 763-64 (2nd Cir. 1998), *Ernest v. Deeve and Company,* 92 Conn. App. 572, 576 (2005). In addition, I have the

additional authority to adjust the fee in my discretion by applying twelve criteria set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d. 744 (5th Cir. 1974).

However, any award of attorney's fees must be based on adequate documentation, preferably employing the aforementioned "lodestar" approach. See, *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The totality of the submission by complainant's counsel is an affidavit indicating an earned fee of $16,878.85 and a total request for $25,000, which provides for that fee plus future costs of collection. The submission is patently inadequate, especially considering the relaxed environment of an uncontested hearing in damages, where ample opportunity existed for the presentation of unopposed documentation and supporting affidavits. I am without the most basic necessities (time records, affidavits on dates, hourly rates etc.) with which to exercise any discretion, and hence I decline to make an award for attorney's fees.

E.

Interest

Pursuant to the request of the complainant and the commission, and pursuant to General Statutes § 37-3a and *Thames Talent Ltd. v. CHRO, et al.,* 265 Conn 127 (2003), prejudgment interest is herewith allowed on the complainant's award, compounded annually, from February 2004, at the rate of 10% per annum, compounded annually, to September 2006. Hence, the complainant's back pay award of $7,220 her last benefits award of $3,699 and emotional distress award of $6,000 are supplemented with prejudgment interest in the amount of $4,750.

V.

ORDER OF RELIEF

1. The respondent shall pay the complainant the following:
    a. Back pay in the amount of $7,220.
    b. Lost benefits in the amount of $3,699.
    c. Emotional distress damages in the amount of $6,000.
    d. Prejudgment interest on the above in the amount of $4,740.
2. The respondent shall pay to the commission $6,858 to be forwarded to the appropriate state agency for reimbursement of unemployment compensation benefits paid to the complainant.
3. The respondent shall cease and desist from the practice complained of concerning the complainant and concerning all employees who may or will in the future become similarly situated.
4. The respondent shall not engage in or allow any of its employees to engage in any conduct against the complainant or any party to or participant in these proceedings in violation of General Statutes § 46a-60 (a) (4).
5. All moneys paid to the complainant shall include post judgment interest in the amount of 10% compounded per annum to the date of payment of such moneys to the complainant.
6. The respondent shall post at all Connecticut business locations the commission posters concerning equal employment in conspicuous places visible at all employees and applicants for employment (see General Statutes §§ 46a-54 (13) and 46a-60).

It is so ordered this 12th day of September 2006.

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J. Allen Kerr, Jr.
Presiding Human Rights Referee

cc.

Rosa DiMicco
Attorney Brian J. Wheelin
Attorney David Kent