

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

Commission on Human Rights and
Opportunities ex rel.
Randall L. Saex

: CHRO No. 0410175
: Fed No. 16aa400238

v.

Wireless Retail, Inc.

: July 26, 2006

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

Preliminary statement

On November 4, 2003, Randall L. Saex, (“complainant”), of Westfield, Massachusetts filed an affidavit of illegal discriminatory practice (“complaint”) with the Commission on Human Rights and Opportunities (“commission”). In his complaint, he alleged that Wireless Retail, Inc. (“respondent”) of Scottsdale, Arizona, his former employer, discriminated against him in violation of Title VII of the Civil Rights Act of 1964, as amended (“Title VII”);¹ the Age Discrimination in Employment Act (“ADEA”);² and General Statutes §§ 46a-58 (a); 46a-60 (a) (1), (4) and (8); 46a-64a and 46a-81.

¹ 42 U.S.C. 2000e

² 29 U.S.C. 621-634

According to the complainant, in January and March 2003 the respondent harassed him, gave him less training than other employees, delegated unequal duties to him, gave him a warning and poor evaluation, and did not reasonably accommodate him. It then terminated his employment on or about May 10, 2003. He further alleged that his age (46 years old), religion, creed and ancestry (Jewish) and sex (male) were factors in the respondent's actions.

After preliminary investigation, the commission's investigator concluded that there was reasonable cause to believe that an unfair practice was committed as alleged in the complaint and, on November 8, 2005, certified the complaint to the attorney general and the commission's executive director.

After due notice to the parties, a hearing conference was held on December 28, 2005. At the hearing conference, a settlement conference was scheduled for February 28, 2006. The commission and the complainant appeared at the settlement conference but the respondent did not. By motion filed on March 6, 2006, the commission moved that the respondent be defaulted for failure to appear at the settlement conference and that a hearing in damages be held. The respondent did not file an objection to the motion. The commission's motion was granted on March 22, 2006. The respondent did not file a motion to set aside the default. After due notice to the parties, the hearing in damages was held on May 9, 2006 at which time the commission and the complainant appeared but the respondent did not. Briefs were to be filed on June 27, 2006 at which time the record closed.

For the reasons stated herein, the respondent is found to have violated §§ 46a-58 (a); 46a-60 (a) (1), (4) and (8); 46a-64a and 46a-81. The complainant is awarded relief as is herein set forth.

Findings of fact

The commission's exhibits are designated by "CHRO" followed by the exhibit number. The complainant and the respondent did not proffer any exhibits. References to the transcript are designated as "Tr." followed by the page number. Based upon a review of the pleadings, exhibits and transcripts and an assessment of the credibility of the witness, the following facts relevant to this decision are found ("FF"):

1. The respondent hired the complainant as a store manager in March 2002. Tr. 10-11.
2. In January 2003, the respondent promoted the complainant to assistant field manager. Tr. 14.
3. The complainant's compensation package as an assistant field manager consisted of a salary, telephone and accessory commissions based upon the sales performance of his territory, bonuses and a car allowance. Tr. 16-18; CHRO 17, CHRO 18D – 18S.
4. The complainant's compensation from his salary, commissions, bonuses and allowances averaged \$1,027.50 per week. CHRO Exs. 18G through 18S.

5. The respondent provided the complainant with a benefit package that included medical, dental, prescription drug and vision coverage; a life insurance policy; and short-term disability insurance. Tr. 19- 21, 26; CHRO Exs. 19 – 23, CHRO 46.
6. The complainant paid \$21.06 biweekly for the medical, dental, prescription and vision coverage. CHRO 18G – 18S.
7. The respondent's dental benefit coverage paid 100% of the costs of a dental examination, cleaning and x-rays. It paid 80% of the charge for fillings and 50% of the charge for crowns. Tr. 21; CHRO 22.
8. The respondent's benefit package also included a health care flexible spending account program to which the complainant contributed \$1,500.00 annually as a pre-tax deduction to pay for his unreimbursed medical expenses. Tr. 22-23; CHRO 18A-18S, CHRO 24.
9. By participating in the health care flexible spending account program, the complainant reduced his federal tax liability by \$500.00 per year. Tr. 23.
10. Also as a benefit, the respondent provided the complainant with a cellular telephone with unlimited business and personal usage at no cost to the complainant. Tr. 24-25; CHRO 25.
11. Also as a benefit, the respondent provided a 401(k) retirement plan. The complainant participated in the plan. At the time of his termination, his total

account balance was \$7,461.33 and his vested account balance was \$7,034.90, a difference of \$426.43. Tr. 25; CHRO 26.

12. The complainant's supervisor, Harold Lott, made discriminatory comments about the complainant both privately to the complainant and also publicly in the presence of other employees. Tr. 29, 32, 46.
13. Lott's discriminatory comments created a physically, mentally and emotionally stressful working environment for the complainant and made it more difficult for him to do his job. Tr. 31, 46.
14. The complainant's physical stress manifested itself in his suffering intestinal problems, in tensions in his personal relationships with his family and friends, and in difficulty in sleeping. Tr. 32, 49. The complainant also experienced anxiety and depression. Tr. 48. The complainant's chronic anemia worsened, and his cholesterol and blood pressure increased. Tr. 49-50. The complainant developed severe acid reflux because of the discriminatory treatment. Tr. 52.
15. Lott denied the complainant time off to participate in a religious holiday with his family. Tr. 35-36.
16. Lott made offensive and discriminatory religious statements to the complainant. Tr. 32, 36.
17. The complainant continues to think about Lott's comments. Tr. 54. Lott's comments and the termination made, and continue to make, the complainant lose faith in people and to feel angry and hurt. Tr. 54.

18. The respondent terminated the complainant's employment on May 10, 2003. Tr. 44.
19. Following his termination, the complainant sought employment through newspaper classified advertisements and the internet both within and outside of the wireless industry. Tr. 58-61.
20. In November 2003, the complainant obtained employment in a sales position at Sleepy's, Inc. Tr. 62.
21. The complainant's compensation at Sleepy's consisted of commissions generated from his sales. Tr. 63.
22. The complainant became eligible for Sleepy's medical and dental benefit plan after three months of employment. Tr. 55-56, 64. The coverage was less extensive than the coverage available to him while he was employed with the respondent. Tr. 65-66; CHRO 45.
23. The complainant did not have a 401(k) plan, a car allowance, life insurance, short-term disability insurance or free cellular telephone usage as fringe benefits at Sleepy's. Tr. 66.
24. As a result of a job-related accident at Sleepy's, the complainant received workers' compensation benefits. The complainant had four herniated disks, related nerve damage, a burning pain in his left arm and numbness in his fingers. Tr. 67. In 2004, he received \$8,806.69 in workers' compensation benefits. CHRO 32.

25. As of the date of the hearing in damages, the complainant had not fully recovered from his injury. Tr. 72.
26. During his leave while on workers' compensation, the complainant did not receive medical insurance coverage through Sleepy's. He had to obtain his own coverage and pay premiums. Tr. 68-70; CHRO 34.
27. Upon his return to Sleepy's following his disability leave, the complainant had to maintain his own private insurance coverage because he again did not become eligible for Sleepy's medical and dental coverage until three months after employment. Tr. 68-70; CHRO 35.
28. Upon his return to Sleepy's following his disability leave, the complainant's hours were reduced from sixty hours per week to thirty-eight. Tr. 70.
29. Sleepy's told the complainant that it could not accommodate the medical restrictions of his injury and terminated his employment in December 2004. Tr. 71.
30. His back injury made it difficult for the complainant to obtain employment as a salesman because of the physical requirements of sales work, such as frequent and extended driving to appointments and sales locations. Tr. 72.
31. Following his termination from Sleepy's, the complainant sought employment through newspaper advertisements and employment agencies. Tr. 74-75.

32. To enhance his skills and employment prospects, the complainant enrolled in a one year Microsoft office computer certificate program at Springfield Technical Community College and completed the course in May 2006. Tr. 75-76.
33. Following his termination by the respondent, the complainant incurred dental expenses of \$1,145.00 that would have been paid through the respondent's dental program. Tr. 80, 83; CHRO 22, CHRO 38.
34. Following his termination by the respondent, the complainant incurred additional expenses in paying insurance premiums for medical coverage that he would not have incurred had he remained employed with the respondent. Tr. 55. He paid \$7,833.88 in insurance premiums for "COBRA" medical coverage (CHRO 34, 35, 36) and he paid \$558.02 for insurance coverage during his employment at Sleepy's (CHRO 31). In addition, the State of Massachusetts required the complainant to obtain medical insurance in order to enroll at the community college. Tr. 78-79. The complainant paid a premium of \$753.00 for the insurance. Tr. 79; CHRO 39. These insurance premium payments total \$9,144.90.
35. The complainant incurred costs of \$115.90 for postage, supplies and printing for the processing of his complaint. Tr. 80-81; CHRO 40.
36. Following his termination by the respondent, the complainant incurred \$1,051.76 in charges for a cellular telephone that he would not have incurred had he remained employed. Tr. 56; CHRO 37.

37. The complainant received \$10,871.00 in unemployment compensation benefits from the State of Massachusetts in 2003 following his termination by the respondent and \$7,354.00 in unemployment compensation benefits from the State of Massachusetts in 2005 following his termination by Sleepy's for a total of \$18,225.00. Tr. 58, 73-74; CHRO 27, CHRO 44.
38. The complainant received \$1,840.00 in compensation from his employment at Sleepy's in 2003 (CHRO 28) and \$21,306.12 in compensation from Sleepy's in 2004 (CHRO 30) for a total of \$23,146.12.
39. The respondent is no longer doing business in Connecticut and Massachusetts. Tr. 81.

Analysis

I

General Statutes § 46a-84 (f) provides in part that if the respondent "fails to appear at the hearing after notice in accordance with section 4-177, the presiding officer or hearing adjudicator may enter an order of default and order such relief as is necessary to eliminate the discriminatory practice and make the complainant whole." Section 46a-54-88a (a) of the Regulations of Connecticut State Agencies also provides that the "presiding officer may, on his or her own motion or upon motion by a party, enter an order of default against a respondent if the respondent . . . (2) Fails to appear at a lawfully noticed conference or hearing." This section further provides: "(b) Upon

entering an order of default, the presiding officer may take evidence and issue such orders as may be necessary. The office of public hearings shall notify the parties of the entry of default and inform them of the date, time, and place a hearing in damages will be held. The hearing shall be limited to the relief necessary to eliminate the discriminatory practice and make the complainant whole. Service of the notice of entry of the default and hearing in damages shall be made upon the respondent by certified mail, return receipt requested, or other mail service that confirms receipt.”

In this case, the respondent failed to attend a settlement conference after due notice. On March 6, 2006, the commission filed and served its motion to default the respondent for its failure to appear and also for a hearing in damages. Fourteen days after the filing of the motion; Reg., Conn. State Agencies, § 46a-54-87a (b); and there being no objection, the motion was granted on March 22, 2006. By certified mailings, claimed by the respondent on March 27, 2006 and March 28, 2006, the office of public hearings notified the respondent of the date, time and place of the hearing in damages (CHRO 16).

II

General Statutes § 46a-86 (b) provides that “upon a finding of a discriminatory employment practice, the presiding officer may order the hiring or reinstatement of employees, with or without back pay . . . and, provided further, interim earnings, including unemployment compensation and welfare assistance or amounts which could

have been earned with reasonable diligence on the part of the person to whom back pay is awarded shall be deducted from the amount of back pay to which such person is otherwise entitled.” In addition to back pay, the presiding officer is also authorized to award relief including (1) prospective monetary relief (front pay) *Silhouette Optical Limited v. Commission on Human Rights and Opportunities*, 10 Conn. L. Rptr. No. 19, 603 (February 28, 1994); (2) prejudgment and postjudgment compounded interest on the award of front and back pay; *Id.*, 604; and (3) ordering the respondent to pay to the commission the amount of unemployment compensation paid to the complainant, which the commission shall then transfer to the appropriate state agency. General Statutes § 46a-86 (b).

The deduction for interim earnings and amounts that the complainant could have earned through reasonable diligence is often referred to as mitigation of damages. In determining the amount of back pay 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 [respondent] bears the burden of proving that the nonbreaching party [complainant] has failed to mitigate damages.” (Citations omitted; internal quotation marks omitted.) *Ann Howard’s Apricots Restaurant, Inc. v. Commission on Human Rights and Opportunities*, 237 Conn. 209, 229 (1996).

III

A

The complainant also alleged that the respondent violated § 46a-58 (a) when it terminated his employment because of his age, religion, creed, ancestry and sex. 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.” The complainant alleged that the specific laws of the United States that the respondent violated are the ADEA, when it terminated his employment on account of his age, and Title VII, when it terminated his employment on account of his religion and sex. However, because age is not enumerated as a protected basis under § 46a-58 (a), the commission does not have jurisdiction to adjudicate the ADEA- based claim.³

³ 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.”

B

Because the complainant's Title VII allegation⁴ is based on claims that the respondent terminated him on the basis of his religion and sex and because religion and sex are enumerated in § 46a-58 (a) as protected bases, the respondent's violation of § 46a-58 (a) entitles the complainant and the commission to the remedies available under General Statutes § 46a-86 (c). *Commission on Human Rights and Opportunities v. Board of Education of the Town of Cheshire*, 270 Conn. 665, 727 (2004). Remedies available under § 46a-58 (a) include awards for emotional distress. *Commission on Human Rights and Opportunities ex rel. Douglas Peoples v Belinsky*, 1988 WL 492460, 5 (Conn. Super.). While emotional distress damages are not available for a § 46a-58 (a) claim arising from § 46a-60; *Commission on Human Rights and Opportunities v. Truelove & Maclean, Inc.*, 238 Conn. 337, 346 (1996); in this case, the complainant's § 46a-58 (a) claim is not in conjunction with his § 46a-60 claim but rather arises from the respondent's unlawful employment practice under Title VII.

The award for emotional distress damages must be limited to compensatory, rather than punitive, amounts. *Chestnut Realty, Inc. v. Commission on Human Rights and Opportunities*, 201 Conn. 350, 365-66 (1986). "That such compensatory damages may be incapable of precise mathematical computation and necessarily uncertain does

⁴ Title VII provides in relevant part: "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2 (a) (1).

not, however, prevent them from being awarded.” *Commission on Human Rights and Opportunities ex rel. Tyrone Cohen v. Patrick Menillo*, CHRO Case No. 9420047, Memorandum of Decision, p. 12 (June 21, 1995). “That damages may be difficult to assess is, in itself, insufficient reason for refusing to award them once the right to damages has been established.” *Griffin v. Nationwide Moving & Storage Co.*, 187 Conn. 405, 420 (1982). The complainant need not present medical testimony to establish emotional harm. His own testimony may suffice. *Commission on Human Rights and Opportunities ex rel. Malisa McNeal-Morris v. Czeslaw Gnat*, CHRO Case No. 9950108, Memorandum of Decision, p. 7 (January 4, 2000).

The criteria to be considered for awarding an emotional distress award are: “[1] the subjective internal emotional reaction of the complainant to the discriminatory experience which he has undergone . . . [2] whether the discrimination occurred in front of other people; [3] the degree of offensiveness of the discrimination and [4] the impact on the complainant.” (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights and Opportunities ex rel. Donna Harrison vs. John Greco*, CHRO Case No. 7930433, Memorandum of final decision, p. 15, June 3, 1985; *Peoples v. Belinsky*, supra, 1988 WL 492460, 6.

In this case, the complainant’s subjective internal emotional reaction to the discrimination included anxiety and depression. The experience made, and continues to make, the complainant lose faith in people and to feel hurt and angry. Further, some of the discriminatory comments were public, made in the presence of the complainant’s

co-workers. He was denied time off from work to celebrate a religious holiday with this family. The impact of the discriminatory termination was severe, as there is a direct connection from the termination to the back injury the complainant incurred while employed at Sleepy's to the limitations the back injury will have on his future employment prospects. He experienced intestinal problems, anxiety and depression. His anemia, cholesterol level and blood pressure worsened and he developed severe acid reflux. The anxiety and stress caused by the respondent's harassment would also strain the complainant's personal relationships with family and friends. Also, Lott's discriminatory comments continue to run through the complainant's thoughts. FF 12-17, 24-25, 30.

Conclusions of law

As a result of the entry of a an order of default against the respondent for its failure to appear at a settlement conference, a hearing in damages was held for the sole purpose of determining the relief necessary to eliminate the discriminatory practice and make the complainant whole. The commission and the complainant presented sufficient credible and detailed evidence from which damages are awarded for back pay; the tax benefits the complainant would have obtained through the health care flexible spending account benefit; reimbursement of dental bills, cellular telephone use, insurance premiums, postage, printing and supplies; the difference between the actual

and vested value of his 401(k) plan; pre- and post-judgment interest; and emotional distress.

However, the commission and the complainant did not produce sufficient evidence in support of the complainant's claims for mileage for his travel to and from the commission's offices and for life insurance. As to mileage, there is no evidence in record as to the dates of his travel and the federal mileage rate used for federal tax purposes varies from year to year. Further, as the complainant did not obtain a replacement life insurance policy, he incurred no costs that need to be reimbursed.

Order

1. The respondent is ordered to pay the complainant \$121,414.69 in back pay. Back pay is calculated at the complainant's average compensation rate of \$1,027.50 per week for the date of his termination, May 10, 2003, to the date of judgment (167 weeks) for a total of \$171,592.50 less the complainant's mitigation totaling \$50,177.81 (unemployment compensation benefits of \$18,225.00, FF 37; workers' compensation benefits of \$8,806.69, FF 24; and compensation from Sleepy's of \$23,146.12, FF 38).
2. The respondent is ordered to pay the complainant \$1,500.00 representing the federal income tax benefit the complainant would have had by participating in the

health care flexible spending account program for three years at \$500.00 per year. FF 9.

3. The respondent is ordered to pay the complainant \$1,145.00 in reimbursement of dental expenses that would have been paid through the respondent's dental program. FF 33.
4. The respondent is ordered to pay the complainant \$1,051.76 in reimbursement of cellular telephone charges the complainant would not have incurred had he not been terminated. FF 36.
5. The respondent shall pay the complainant the \$7,396.92 in reimbursement of medical insurance premiums that the complainant would not have incurred but for his termination. The reimbursement is calculated as the \$9,144.90 costs the complainant incurred (FF 34) less the \$1,747.98 he would have paid as a member of the respondent's medical insurance plan (at the rate of \$21.06 biweekly from the date of termination to the date of judgment, FF 6).
6. The respondent shall pay the complainant \$115.90 in reimbursement of his postage, supplies and printing costs relative to the processing and resolution of his complaint. FF 35.
7. The respondent shall pay the complainant \$426.43 for the difference between the complainant's 401(k) total account balance and his vested balance. FF 11.

8. The respondent shall pay the complainant \$25,496.00 in prejudgment interest awarded on the back pay award of \$121,141.69, calculated at the rate of 10 percent per annum compounded annually.
9. The respondent shall pay the complainant \$10,000.00 in emotional distress damages.
10. The respondent shall pay to the commission the sum of \$18,225.00 in reimbursement for unemployment compensation benefits paid to the complainant by the State of Massachusetts (FF 37). The commission shall then transfer such amount to the appropriate Massachusetts state agency.
11. The respondent shall pay the complainant front pay in the amount of \$53,417.00, representing his average compensation of \$1,027.25 for 52 weeks. As the respondent is no longer doing business in Connecticut and Massachusetts (FF 39) an order of reinstatement is not a viable option. The award is reasonable as to the amount of time for reasons including: the respondent provided no information on current employment opportunities in its offices or where its business offices are currently located; the respondent did not provide information on transfer opportunities or severance packages available to its employees when it ceased to do business in Connecticut and Massachusetts; the complainant's diligent efforts in seeking employment; the complainant's physical limitations from the back injury that followed from his termination by the

respondent; and time for the complainant to utilize the skills he obtained from his course at Springfield Technical Community College.

12. The respondent shall pay the complainant postjudgment interest on the back pay and front pay awards at the rate of 10 percent per annum, compounded annually.
13. Pursuant to General Statutes § 46a-60 (a) (4), the respondent shall not engage in or allow any of its employees to engage in any conduct against the complainant.
14. Should prospective employers seeking references concerning the complainant ever contact it, the respondent shall provide only the dates of said employment, the last position held and rate(s) of 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 before such information is provided, unless required by law to provide such information.
15. The respondent shall cease and desist from all acts of discrimination prohibited under federal and state law and shall provide a nondiscriminatory work environment pursuant to federal and state law.

Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mr. Randall Saex
Wireless Retail, Inc.
Kimberly Jacobsen, Esq.