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

Commission on Human Rights
And Opportunities ex rel. Jennifer Swindell,
Complainant

CHRO No. 0840137
Fed No. 16a200800138

v.

Lighthouse Inn,
Respondent

January 29, 2009

FINAL DECISION
HEARING IN DAMAGES

I.

The Parties

The pro se complainant is Jennifer Swindell of 28 James Ave., Quaker Hill (Waterford), Connecticut 06375. The commission on human rights and opportunities (commission) is located at 21 Grand Street, Hartford, Connecticut 06106. The commission was represented by David Kent, commission attorney. The respondent is Lighthouse Inn whose business address is 43 Guthrie Drive, New London, Connecticut 06320. The respondent was not represented by counsel at the hearing in damages.

II.

Procedural History

The complainant filed an affidavit of illegal discriminatory practice (affidavit) with the commission on October 15, 2007. The affidavit alleged discrimination on the basis of race (African-American), and having opposed discrimination leading to retaliation and termination in violation of General Statutes §§46a-58 (a), 46a-60 (a) (4) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and the Civil Rights Act of 1991.

On July 31, 2008, Robert Brothers, Jr., Acting Executive Director, acting through Donald E. Newton, Chief of Field Operations, entered a default order pursuant to Regulations of Connecticut State Agencies §§ 46a-54-46 and 46a-54-57a. On August 4, 2008, Jon P. FitzGerald, Chief Human Rights Referee, scheduled a hearing in damages for September 4, 2008, and assigned the hearing to Human Rights Referee J. Allen Kerr, Jr.

As a result of a motion dated August 18, 2008, the hearing was continued to October 20, 2008, upon which date the hearing convened, the complainant presented testimony and entered exhibits into evidence, and the respondent did not appear.

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 to

make the complainant whole. Regulations of Connecticut State Agencies § 46a-54-88a. The default admits the material facts that constitute a cause of action and conclusively determines the liability of a defendant. See *Skyler Limited Partnership v. S.P. Douthett & Company, Inc.,* 212 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 affidavit, the testimony and exhibits, I conclude that the complainant was discriminated against on the basis of her race and retaliated against and terminated from her employment in violation of General Statutes §§ 46a-58 (a), 46a-60 (a) (4), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and the Civil Rights Act of 1991. The respondent entity acted at all times through the action of its agent, owners and employees.

III.

Findings of Fact

The complainant's and commission's exhibits will be referenced as "C/CHRO" followed by the number. Transcript pages will be referenced as "TR" followed by the page number.

The detailed factual allegations contained in the affidavit are herewith deemed established as a result of the default. Additional 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. These additional facts (a/k/a findings) will be limited to those that add relevant detail to facts having been plead in the affidavit.

The relevant allegations of the affidavit, legally incorporated and accepted for the purpose of establishing liability, can be summarized as follows: The complainant, Jennifer Swindell, a female African-American, began working for the respondent, referred to by complainant and commission as "Lighthouse Inn," at its 43 Guthrie Drive, New London, Connecticut, establishment, as a banquet server in May, 2006. On June 23, 2007, a dispute occurred between the complainant and Maureen Clark (Clark), respondent's owner, after a fellow employee had credited a "black lady" with having made a particularly good wedding cake. The complainant asserted that the lady had a name, Diane, and that "African-American" was a term she preferred to "black." Clark approached an elderly African-American employee who agreed with Clark that "black" was an acceptable term and the complainant was so informed. Clark then stated that the establishment was free of racism. The complainant states in her affidavit that this is not true and proceeds to recount anti-Semitic remarks made by a caterer and also by respondent's manager in her presence, despite their awareness that the complainant had a Jewish "boyfriend" at the time. There is no allegation that the anti-Semitic incidents were brought to Clark's attention relative to the June 23, 2007 incident.

After this incident, the complainant asserts she received fewer calls for banquet duty and endured harassment through the workplace demands made upon her when she

was called, culminating in a nonactionable incident involving her complaining about some overcooked prime rib, which occurred on July 21, 2007, after which the complainant received no further calls for banquet duty. She learned only through a credit check for car financing in September 2007 that she had been terminated.

Additional Findings from October 20, 2008 hearing in damages

1. The complainant worked banquets only and not in the respondent's restaurant (TR 14).
2. The complainant ceased to work for the respondent at the end of July 2007 (TR15-16).
3. The complainant earned $6098 between May 2006 and December 2006 (C/CHRO 11, TR 17).
4. The complainant made no attempt to contact respondent after learning of her termination through a credit check in September 2007 (TR 21-23).
5. The complainant was attempting to explain that she believed "African-American" to be more politically correct than "black" when Clark cut her explanation off (TR 25-26).
6. The complainant reported the racial terminology dispute to the general manager (Christine) but heard nothing further (TR 30).
7. The complainant heard anti-Semitic comments made by a manager of the respondent (Kevin) and also by the woman who books banquets (Karen) (TR 27-28).

8. The complainant heard anti-Semitic comments made by a server named Casey (TR 27-28).
9. The complainant complained about Karen's comments to Kevin and Karen later apologized (TR 28-29).
10. The complainant is not Jewish although she had a Jewish boyfriend at the time the anti-Semitic comments were made (TR 32-33).
11. The respondent's busiest season is September through December (TR 33).
12. January through April is the slowest season (TR 34).
13. The complainant was paid $5.90 per hour plus tips.
14. The complainant worked a lot in the summer when others servers took days off (TR 35).
15. The complainant attempted to find alternate employment after her termination (TR 36-37).
16. The respondent closed for business in August of 2008 (TR 39).

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 from 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., 334, 335 (Conn. App. 2001).

A.

Emotional Distress

As previously held in *Commission on Human Rights & Opportunities ex rel. Jane Doe v. Claywell Electric,* 2008 WL 545539 (CHRO No. 0510199, December 9, 2008) and *Commission on Human Rights & Opportunities ex rel. DiMicco v. Neil Roberts, Inc.,* 2008 WL 4753465 (CHRO No. 0420438, September 12, 2006), the inclusion of a claim under General Statutes § 46a-58 (a) in the complaint affidavit of an employment discrimination case, allows me to convert federal claims (as were made here) into claims under Connecticut law, and to award damages for emotional distress pursuant to General Statutes § 46a-86 (c). Findings in *Doe and DiMicco* (as in the case before me now) were made in reliance on *Commission on Human Rights & Opportunities ex rel. Tina Saddler v. Margaret Landry dba Superior Agency,* 2006 WL 4753474 (CHRO No. 0450057, May 23, 2006), which in turn was predicated on the findings made by the Connecticut Supreme Court in *Commission on Human Rights & Opportunities v. Board of Education of the Town of Cheshire,* 270 Conn. 665 (2004).

While the complainant offered no expert or corroborative testimony to support her claim for damages for emotional distress, a complainant need not present medical testimony, and, in fact, her own testimony may suffice. *Schanzer v. United Technologies Corp.,* 140 F. Sup. 2d 200 (D. Conn. 2000). Medical testimony, however, can strengthen such a claim. *Busche v. Burkee*, 649 F. 2d 509 (7th Cir. 1981).

As previously set forth, I am prepared and authorized to make an award for emotional distress. The termination was handled callously and with no apparent sensitivity, and for the complainant to first learn of it during a credit check for a car loan caused unnecessary and easily avoidable humiliation and embarrassment.

The emotional distress claim predicated on the racial and religious slurs the complainant heard and or endured are another matter. The anti-Semitic slurs overheard by the complainant are neither actionable nor compensable. While the complainant may have had a Jewish boyfriend, she herself was not Jewish, and the law is clear that this type of "hostile work environment" claim must fail if the employees actually targeted are not in the same protected class as the complainant. *Illiano v. Mineola Union Free School Dist*., 585 F. Sup. 2d 341 (E.D.N.Y., 2008), *Smith v. AUSC Intern, Inc*., 148 F. Sup. 2d 302 (S.D.N.Y. 2001). Not only was the complainant not a member of the targeted class, but the targeted class consisted of respondent's patrons and customers as opposed to her fellow employees. The discussions about the baker of "Diane's" cake permit me to make an award-albeit in a nominal amount-as a result of the entry of default. The interjection of the term "black lady" in the conversation was

gratuitous, tactless and wholly unnecessary. The enlistment of an elderly African-American employee to vouch for the appropriateness of the term “black” was sophistical at best. The cake baker (Diane) could and should have been addressed (inasmuch as her name had been forgotten) simply as “the lady,” especially in light of the complainant’s obvious sensitivity to racial characterizations. Having said that, however, this unfortunate exchange on racial nomenclature arose more from thoughtlessness than from an intent to injure and warrants a modest award to the complainant in the sum of $200.

I make a combined award for emotional distress in the amount of $1,000 ($800 for the termination and $200 for the “cake incident.”

B.

Back Pay

Having found that the complainant was wrongfully terminated from her employment, and mitigation efforts having been testified to and not rebutted, an award for back pay is both authorized and required. *State v. Commission on Human Rights & Opportunities,* 211 Conn. 464, 479 (1989). While the evidence was not precise as to the date the respondent ceased to engage in the banquet business (end of July or early August 2007), an award equal to one year of otherwise expected earning is herewith deemed appropriate. It was established that the complainant had earned $6,098 from May through December in 2006. It was also established that September through December was the busiest time for banquets, and January through April the slowest. It was further

established that the complainant was more frequently called in for work in the summer. Based upon the foregoing-and in particular based on the slow period of January to April being the period for which earnings must be estimated to arrive at a full year's award, I find lost wages to have been established at $8,000.

C.

Interest

Pursuant to *Thames Talent Ltd. v. Commission on Human Rights & Opportunities*, 265 Conn. 127 (2003), pre-judgment and post-judgment interest is awarded on the lost wages and emotional distress award.

Order of Relief

1. The respondent shall pay the complainant the following:
    a. Back pay in the amount of $8,000.
    b. Emotional distress damages in the amount of $1,000.
    c. Prejudgment interest and post-judgment at the rate of 10 per cent per annum, compounded annually to the date of payment.
2. 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.
3. 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).

4. The respondent shall post at all Connecticut business locations the commission posters concerning equal employment in conspicuous places visible to all employees and applicants for employment (see General Statutes §§ 46a-54 (13) and 46a-60).

It is so ordered this 29th day of January 2009.

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J. Allen Kerr, Jr.,
Presiding Human Rights Referee

cc.

Jennifer Swindell
Christopher Plummer, Owner
David Kent, Esq.