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

Commission on Human Rights	:	CHRO No. 0420316
and Opportunities, *ex rel.*	:	EEOC No. 16AA400634
Jennifer Taranto, Complainant	:	
v.	:	
Big Enough, Inc., Respondent	:	June 30, 2006

MEMORANDUM OF DECISION

Procedural Background

On January 13, 2004, Jennifer Taranto ("the complainant") filed with the Commission on Human Rights and Opportunities ("the commission") an Affidavit of Illegal Discriminatory Practice ("the complaint"), alleging that Big Enough, Inc. ("the respondent") terminated her employment because of her pregnancy, in violation of General Statutes § 46a-60 (a) (1) and (a) (7), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., and as enforced through § 46a-58 (a).

A commission investigator determined that there was reasonable cause for believing that the respondent had committed an "unfair practice" as described in the complaint. After failing to eliminate the unfair practice by conference, conciliation and persuasion, on December 5, 2005 the investigator certified the complaint for public hearing.

On December 15, 2005, the Office of Public Hearings served upon the complainant and respondent, by certified mail, return receipt requested, a "Notice of Contested Case Proceeding and Hearing Conference" and a copy of the complaint pursuant to General Statutes § 46a-84 (a). The notice states, in pertinent part:

> The contested case proceeding commences with a hearing conference. Pursuant to General Statutes §46a-84(b), as amended, **the hearing conference shall be held on January 4, 2006 at 9:30 [a.m.] in Conference**

> **Room A [at] the offices of the Commission . . .. All parties shall appear at the hearing conference.**
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> * * *
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> Absent a showing of good cause, **failure to appear** at any proceeding, including the hearing conference, may result in the imposition of **sanctions**. Sanctions may include the default of the absent party . . .
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> * * *
>
> A copy of the complaint . . . is hereby served on the respondent with this Notice. Within fifteen days of receipt of this Notice and the enclosed complaint, the respondent shall file, under oath, an answer to the complaint . . . in accordance with §46a-54-86a of the Regulations [of Connecticut State Agencies]. . . . **Failure to file an answer may result in an order of default and a hearing in damages in accordance with §46a-54-88a(a)(1) of the Regulations**.[1]

(Emphasis in original.)

In response to the notice, the respondent's former president, John Maisano, sent a letter dated December 30, 2005 to the undersigned referee, stating that the respondent had been dissolved and that "[n]o one from the former company will be able to attend this hearing."

Despite receiving notice of the contested case proceeding and hearing conference (with a copy of the complaint appended thereto), the respondent failed to attend the January 4, 2006 hearing conference and failed to file an answer to the complaint.

On January 5, 2006, the commission filed a motion for default against the respondent for its failure to appear at the hearing conference and its failure to file an answer to the

[1] The respondent is required to file an answer at two separate junctions. First, the respondent must reply when initially served with the complaint. General Statutes § 46-83 (a). (The respondent filed such answer in early March 2004.) If the commission finds reasonable cause to believe that a discriminatory practice has occurred, and is unable to eliminate such practice informally, the case is then certified to public hearing. Thereafter, upon receipt of the formal notice of the contested case proceeding (to which a copy of the complaint is attached), the respondent must file its answer a second time or face an order of default. General Statutes § 46a-84 (f).

complaint. A copy of the motion was served upon the respondent in the manner required by law.

On January 20, 2006, having received neither an answer to the complaint nor a response to the motion for default, I granted the motion for default and scheduled a hearing in damages for February 24, 2006. All parties were given due notice of the ruling and the hearing in damages.

I conducted a hearing in damages on February 24, 2006. The complainant appeared pro se and the commission appeared through its counsel, Michelle Dumas Keuler. The respondent did not appear at the hearing and did not submit any documents in response to any of the orders or notices described above. The record closed on April 7, 2006, when the commission filed its post-hearing memorandum.

Findings of Fact

1. At all times pertinent hereto, the complainant lived in Brewster, NY. The respondent was located in South Norwalk, CT. (Testimony of complainant, Transcript p. 11) [2]

2. On or about September 3, 2003, the respondent hired the complainant as a product manager. Her annual salary was $100,000 and, upon her hiring, the respondent promised an increase to $120,000 within six months. (Tr. 11-13, 74; see also complaint and Ex. CHRO-1) [3]

[2] The complainant was the sole witness in this case. All subsequent references to her testimony simply comprise the abbreviation "Tr." and the page number. The exhibits offered by the commission on the complainant's behalf are marked with the prefix "CHRO" followed by a number.

[3] Although the respondent did not challenge the alleged salary increase, the record is not clear when the salary increase was to begin. The complaint itself simply alleged "within six months," while the respondent's initial March 2004 answer stated "after January 1, 2004," a date consistent with the complainant's testimony that the respondent planned to consult its financial backers in January 2004 to allot for a salary increase. (Tr. 13) Neither statement, however, is convincing evidence that the raise would actually begin in January. Commission counsel, although making passing reference to January 2004 in her post-hearing brief, ultimately based her calculations on an increase at six months.

3. The respondent provided, or was supposed to provide, medical benefits after the complainant had worked six weeks. (Tr. 14-15, 40) The complainant did not know if the respondent would have paid her salary during her maternity leave. (Tr. 19)

4. The complainant commuted to South Norwalk four days a week, usually accompanied by other family members who had jobs nearby. The commute took approximately fifty minutes each way. The driver and passengers shared gasoline expenses; the complainant estimated her expenses to be $20 to $25 each week. (Tr. 11-12, 96)

5. On or about September 30, 2003, the complainant told the respondent's president, John Maisano, that she was pregnant (approximately two months pregnant at the time) and that she expected to work until her delivery date and return to work after her maternity leave. At first, Maisano was taken aback and appeared concerned or annoyed. When the complainant told him she felt bad about any possible impact of her maternity leave on the respondent, Maisano said words to the effect of "Yeah, that is bad" and "This is a problem," remarks that worried the complainant. Maisano also made disapproving comments about other employees who had been pregnant and who, despite claiming other intentions, decided not to return to work after giving birth. Maisano then telephoned the complainant's, Jeff Zelenko, to inform him of the complainant's pregnancy. (Tr. 42-48, 50 ; Ex. CHRO-1, ¶6)

6. The following day, the complainant met with Zelenko to discuss her pregnancy, her anticipated childcare needs, and their implications for her work. After this meeting, their relationship began to deteriorate. Zelenko became increasingly impatient with and hostile toward the complainant, limiting her responsibilities and decision-making authority, questioning her judgment, criticizing her work, embarrassing her in front of others and manipulating situations to make her appear incompetent. (Tr. 51-59)

7. On or about October 21, 2003, after Zelenko and the complainant attended a business meeting in Manhattan, he informed her that she was terminated. (Tr. 59; Ex. CHRO-1, ¶10) Previously, Zelenko had mentioned to the complainant that he was

planning to terminate another employee, who did similar work—but did not perform as well as the complainant—for lack of funding. Now he informed the complainant that the other employee would be the one to remain. (Tr. 52-53, 59-60)

8. The complainant's experience in prior jobs had always been positive, characterized by promotions, pay increases and bonuses; no one had ever complained about her work. (Tr. 60-61, 64) Following her conversations with Maisano and Zelenko—and continuing beyond her termination—she felt guilty about her pregnancy and "mortified" to have anyone complain about her work. Consequently, she began to suffer from anxiety and low self-esteem. (Tr. 59-61, 63-64)

9. On or about October 28, 2003, the complainant obtained employment with her previous employer, the Tommy Hilfiger Corporation ("Hilfiger") in Manhattan, doing freelance work in men's design and sweater design. (Tr. 20-21) She began working three days a week, eight to ten hours per day, at the rate of $35 per hour. (Tr. 27)

10. The complainant had been the main "breadwinner" in her family. (Tr. 52) As a result of the complainant's termination and subsequent position at a lower salary (at least for four weeks) the family suffered financially and her marriage became strained. (Tr. 61-63)

11. The complainant began to receive health insurance benefits from her husband's benefit package with his employer, but she was unable to identify the value, cost or effective date of such insurance. When the complainant's husband changed jobs in July 2004, his benefits package improved, but the complainant was again unable to provide any pertinent details. (Tr. 41-42)

12. When Hilfiger's vice president of children's design went on maternity leave four weeks after the complainant started her new job, Hilfiger designated the complainant as temporary vice president. The complainant's salary increased to $72 per hour and she worked five days a week. Although the complainant was briefly earning at a higher rate than at Big Enough, she knew this position was merely an interim responsibility that would end when the vice president returned. (Tr. 29-31)

13. After the complainant returned to Hilfiger at the end of October 2003, she began to feel “mentally better” (Tr. 65), but she still experienced some ongoing anxiety and some loss of self-esteem from her ordeal with the respondent. She also was unhappy with—and felt guilty about—the amount of time spent away from her family, especially when she temporarily held the vice-president position. (Tr. 63-64, 67-70)

14. The complainant remained in the vice-president position until her own maternity leave, April 23 through July 5, 2004. Her maternity leave was unpaid. (Tr. 31-32, 88)

15. When the complainant returned to Hilfiger after her maternity leave, she was placed in the men’s design division, working three days a week, eight to ten hours per day, at $45 per hour. Since her return, during each quarter she has worked two or three extra days for special projects or presentations. As of the date of the public hearing, she was still working in men’s design with the same schedule and rate of pay. (Tr. 32-34, 36-37; Ex. CHRO-7)

16. The complainant commuted to her Hilfiger job by train. She paid $172 semi-annually—on a calendar year basis—for a parking permit for the local commuter lot and, from October 2003 to October 2005, $272 per month for train fare. In October 2005, the monthly fare rose to $289. (Tr. 21-25; Exs. CHRO-5, CHRO-6) The commute took an hour and forty-five minutes each way. In April 2005, Hilfiger moved to a different Manhattan address, adding fifteen minutes each way to the complainant’s travel time. (Tr. 25)

17. Changes and downsizing at Hilfiger, the result of overall industry decline, led the complainant to fear that she might lose her position amidst anticipated mass layoffs in March or April, 2006. As of April 7, 2006, when she filed her post-hearing brief, she was still employed at Hilfiger, but she worried about her ability to find and perform well in a new job should her Hilfiger position end. (Tr. 33, 39-40, 70-72)

18. The respondent ceased doing business on or before June 30, 2005, filed a certificate of dissolution with the State of Delaware on June 30, 2005, and filed a certificate of withdrawal with the Connecticut secretary of the state on January 18, 2006.

Discussion and Conclusions

A. All jurisdictional prerequisites have been satisfied and the commission has taken all of the proper procedural steps to bring this complaint to a public hearing.

B. According to General Statutes § 46a-84 (f), "If the respondent fails to file a written answer prior to the hearing within the time limits established by regulation . . . the presiding officer . . . 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-54-86a of the Regulations of Connecticut State Agencies ("the regulations") requires the respondent to file its answer to the complaint no later than fifteen days after it receives the hearing notice and copy of the complaint, even if it filed an earlier answer in response to the initial filing of the complaint. (See note 1 above.) Furthermore, according to § 46a-54-88a of the regulations, the presiding officer may enter an order of default against a respondent who fails to file a written answer as provided for in section § 46a-54-86a or fails to appear at a lawfully noticed conference or hearing. In the present case, the respondent failed to file an answer as required by the regulation, failed to appear at the duly noticed hearing conference,[4] and failed to respond to the motion for default. Accordingly, I entered an order of default on January 20, 2006.

In a hearing in damages following a default order, the complainant need not prove the respondent's liability. All relevant, unanswered allegations in the complaint are deemed admitted without further proof and are therefore found to be true. See § 46a-54-86a (b) of the regulations. Thus, the entry of default established the respondent's liability for sex discrimination based on the complainant's pregnancy, in violation of General Statutes § 46a-60 (a) (1) and (7), and Title VII. As required by law, the hearing in damages was limited to eliminating the discriminatory practices and determining the appropriate relief to make the complainant whole. General Statutes §§ 46a-83 (i) and 46a-86; § 46a-54-88a (b) of the regulations; *State of Connecticut v. Commission on Human Rights and*

[4] The hearing begins with the hearing conference. General Statutes § 46a-84 (b).

Opportunities, 211 Conn. 464, 478 (1989); *Commission on Human Rights and Opportunities ex rel. Gilmore v. City of Waterbury,* CHRO No. 9620571 (August 11, 2000); *Commission on Human Rights and Opportunities ex rel. Rose v. Payless Shoesource,* CHRO No. 9920353 (November 1, 1999).

C. Back pay, the most common form of relief, is specifically authorized by General Statutes § 46a-86 (b). Back pay awards, which ordinarily run from the date of termination to the date of judgment, compensate for earnings lost because of the employer's discriminatory actions. Back pay awards may also include salary increases and fringe benefits, as long as the employee (or former employee) can prove, rather than merely speculate, that she would have earned these absent the discriminatory actions. *Saulpaugh v. Monroe Community Hospita*l, 4 F.3d 134, 144-45.[5] (2nd Cir. 1993), cert. denied, 510 U.S. 1164 (1994). The complainant began working for the respondent on September 3, 2003 for an annual salary of $100,000, with the assurance of an increase to $120,000 at some point in 2004. The respondent terminated the complainant on October 21, 2003 and she now seeks back pay from that date until the date of this decision. As discussed below, the claim for back pay must be offset by any interim earnings the complainant received.

In its prayer for relief, the commission initially calculated the complainant's back pay, without any offsets, from the date of her termination to the date of the public hearing as $276,152.76, a figure derived from her $100,000 starting salary and her expected raise to $120,000.

The anticipated increase to $120,000 cannot be written off as mere speculation. According to the complaint, the respondent told the complainant at the outset that she could expect such increase within six months. The respondent conceded this point in its original answer to the complaint, and in fact implied that the raise might begin even sooner (but without providing a specific date) (Ex. CHRO-1). Absent any convincing

[5] This tribunal may review federal precedent concerning employment discrimination for guidance in interpreting and enforcing Connecticut anti-discrimination statutes. *Perodeau v. Hartford*, 259 Conn. 729, 738 (2002)

evidence on any of the possible dates, I will rely on the six-month estimate, just as the commission purported to do in its post-hearing calculations. The commission, however, incorrectly identified February 23, 2004 as the beginning date for the higher salary; since the complainant began work on September 3, 2003, the six-month point would fall on March 3, 2004.

While compensation for the loss of benefits is considered part of a back pay award, the complainant failed to identify any benefits, with one possible exception, to which she may have been entitled. The only possible benefit would have been medical coverage, but the complainant was uncertain when that coverage began and, in any event, she offered no evidence to demonstrate its value, her contribution (if any), the cost of obtaining substitute coverage, or any out-of-pocket medical expenses that would have been covered. (See FF 11.) Her husband ultimately included her in his coverage, but the complainant could not identify the cost of her inclusion or the value of the coverage. Because the complainant failed to describe lost benefits with any specificity, I decline to award any such damages.

The complainant received no salary from Hilfiger during her ten-week maternity leave. She also did not know whether her maternity leave would have been paid had she remained employed by the respondent. (Tr. 19) Accordingly, any calculations for back pay should exclude entirely this ten-week period. See *Grindstaff v. Burger King, Inc*., 494 F.Sup. 622, 625 (E.D. Tenn. 1980).

Ordinarily, an award of back pay runs from the date of termination until the date of judgment. *Saulpaugh v. Monroe Community Hospita*l, supra, 4 F.3d 144. Under certain circumstances, however, the award will cease prior to the time of judgment:

> In termination cases, the back pay period normally will terminate on the day the plaintiff would have been laid off or would have been discharged for some other non-discriminatory reason had the plaintiff remained with the defendant-employer. Closure or sale of a business or a division thereof also terminates back pay unless the plaintiff can establish that he or she would have been retained elsewhere by his or her former employer or by the purchaser.

B. Lindemann & P. Grossman, Employment Discrimination Law (3rd Ed. 1996), Chapter 41, p. 1803; see also *Schrand v. Federal Pacific Electric Co*., 851 F.2d 152, 159 (6th Cir. 1988) (back pay terminated at the time the employer ceased operations); *EEOC v. Regency Architectural Metals Corp*., 896 F. Sup. 260, 271 (D.Conn. 1995) (back pay calculations ended at the time defendant, the former employer, went out of business); *Sivell v. Conwed Corporation*, 166 F. Sup. 23, 25 (D.Conn. 1987) (any compensation awarded to wrongfully discharged employee must be limited to that point in time when such employee would have been discharged due to legitimate business reasons); *Commission ex rel. Gilmore v. City of Waterbury*, supra, CHRO No. 9530587, pp. 3-5 (back pay award ceased at the point the employee's former position was eliminated). The record does not reveal when the respondent ceased operations; at best, it contains a certificate of dissolution filed on June 30, 2005. [6] Moreover, the complainant has presented no evidence to suggest the existence of any purchaser or successor organization that might have retained the respondent's employees or carried on the respondent's business. Accordingly, any back pay award shall cease to accrue as of June 30, 2005, the most logical termination point on this less-than-thorough record.

The complainant has, unfortunately, provided little documentary evidence of her earnings with either employer. Instead, I must rely on her testimony, which, although poorly corroborated and lacking in specific figures, appears truthful and convincing. Lack of precision in the calculations, however, need not bar recovery of back pay, and ambiguities should be resolved in favor of the former employee. *Woolridge v. Marlene Industries Corp*., 875 F.2d 540, 546, 549 (6th Cir. 1989); see also *Furr v. AT&T Technologies, Inc.,* 8324 F.2d 1537, 1548 (10th Cir. 1987) (the wrongdoer shall bear the risk of the uncertainty). Therefore, the complainant's lost wages, prior to any offset other than the unpaid maternity leave, are as follows:

[6] According to General Statutes § 33-884 (b), "[d]issolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name [or] . . . prevent, abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." See *Montanaro Bros. Builders, Inc. v. Rosen*, 1997 WL 684933 (Conn. Super.).

October 22- December 31, 2003 (Annual salary of $100,000; $1923.077/week x 10 weeks)	$ 19,230.77
January 1 – March 2, 2004 ($1923.077/week x 8 weeks + 5 days, rounded to 9 weeks)	$ 17, 307.69
March 3 – December 31, 2004 (Annual salary of $120,000; $2307.69/week x 33 weeks, excluding ten-week maternity leave)	$ 76,153.77
January 1 – June 30, 2005 (Half of annual salary)	$ 60,000.00
TOTAL BACK PAY, 10/22/03 – 6/30/05	$155,401.85

D. In an employment discrimination case such as this, the complainant has a duty to mitigate her damages by using reasonable diligence to find other suitable employment. *Reed v. A.W. Lawrence & Co.,* 95 F.3d 1170, 1182 (2nd Cir. 1996); *Ann Howard's Apricots Restaurant, Inc. v. Commission on Human Rights and Opportunities*, 237 Conn. 209, 229 (1996); see also General Statutes § 46a-86 (b), which requires this tribunal to deduct from any back pay award "amounts which could have been earned with reasonable diligence." To satisfy her duty, the complainant need not go into another line of work, accept a demotion, or take a demeaning position. *Dailey v. Societe Generale*, 108 F.3d 451, 456 (2nd Cir. 1997).

Notwithstanding the complainant's duty to mitigate, it is the respondent who bears the evidentiary burden of demonstrating that the complainant has failed to satisfy this duty. *Dailey v. Societe Generale*, supra, 108 F.3d 456. "In order to meet this 'extremely high' burden of proving failure to mitigate, the [employer] 'must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment.'" *Evans v. State of Connecticut*, 967 F.Sup. 673, 680 (D.Conn. 1997), quoting *Bonura v. Chase Manhattan Bank,* 629 F.Sup. 353, 356 (S.D.N.Y. 1986). The respondent, by virtue of its default, has obviously not met its burden in this case, and I accordingly find, under the circumstances of this case, that the complainant has satisfied her obligation.

One important goal of the mitigation requirement is to prevent former employees from simply remaining idle. *Raimondo v. Amax, Inc*., 843 F.Sup. 806, 809 (D. Conn. 1994). Given the complainant's pregnancy and her family's financial needs, the complainant quickly took a job with a familiar and supportive former employer, doing the type of work she enjoyed and for which she was trained; her prompt action is certainly consistent with this goal. Although commuting to Manhattan has created certain obvious difficulties in terms of both salary and time, the complainant's choice does not render her mitigation efforts unreasonable, particularly because in her chosen field—fashion design—most positions were (and are) in Manhattan, thus limiting her ability to find a new position closer to home. In fact, even the New York market had begun to shrink by that time. Furthermore, any additional search for another similar job would be difficult for the same market-related reasons, as well as unrealistic—at least through her pregnancy, her temporary (and time consuming) full time position, and her maternity leave.

The complainant testified that for the first four weeks at Hilfiger she worked eight to ten hours per day, three days a week, at the rate of $35 per hour. She provided no documentary evidence showing the exact number of hours worked, but testified to an average of 27 hours per week.[7] For purposes of calculating offsets to the back pay award, I will rely on that weekly average, as opposed to the 28.5 hours used by the commission, without explanation, in its calculations. Working 27 hours per week at the rate of $35 per hour, the complainant's approximate earnings for this four-week period would have been $3,780.

For the following 21 weeks (not 23, the figure used by the commission), from late November 2003 until she began her maternity leave on April 23, 2004, the complainant worked full time, covering for a manager on maternity leave—40 hours per week at the

[7] Other than her own testimony, the complainant provided almost no evidence demonstrating her earnings with Hilfiger. As noted above, the complainant's imprecision in her calculations will not bar a back pay award. Lack of specificity, however, has forced me to rely upon estimates, arbitrary averages, and unsubstantiated figures, while trying to ensure that the numbers are sufficiently accurate so as not to compromise the complainant's recovery or, conversely, to over-compensate her by underestimating her offset earnings.

rate of $72 per hour. Normally, a back pay award terminates when the employee obtains a comparable or higher paying position. Although the complainant's salary was for a brief time higher than what she would have been earning with the respondent, the position was merely a temporary one, in which the complainant covered for another manager on maternity leave. She had no expectations of retaining this position—or this salary—when the absent employee returned from her leave. Given the specific circumstances, I will not curtail her recovery at the point she began her temporary assignment. See *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 693-94 (8th Cir. 1983) (tribunal may calculate earnings on a yearly basis, especially when victim had fluctuating earnings during the back pay period). Absent any documentary evidence demonstrating the complainant's actual income, I calculate her earnings for the 21 weeks, at the rate of $72 per hour, 40 hours per week, as $60,480.

After her ten-week maternity leave, the complainant returned to Hilfiger on July 6, 2004 and was placed in a position working three days a week, 24 to 30 hours per week at $45 per hour (see FF 15). At the time of the public hearing, the complainant still held the same position and was earning the same salary for the same number of hours per week. In determining the complainant's salary for mitigation purposes, the commission based its calculations on an average workweek of 28.5 hours. A more appropriate figure would be 27 hours per week, the average of 24 and 30, which is consistent with the complainant's testimony and is much closer to the only documentary evidence showing actual income: an earning statement noting 53 working hours in the first two weeks of January 2006 (Ex. CHRO- 7); i.e., an average of 26.5 hours per week during that pay period. Thus, working an average of 27 hours per week at $45 per hour from July 6, 2004 to June 30, 2005, a period of just under one year, the complainant earned approximately $63,180,[8] an amount that must offset any back pay award.

[8] Again, lacking supporting documents, and recognizing that the commission has rounded off its time periods to full weeks (and never calculated on partial weeks), I, too, am forced to estimate the complainant's earnings at Hilfiger. The figure proposed here reflects my rounding off this period to one full year.

The complainant testified that she also worked an additional two or three days each quarter (see FF 15), but she offered no documentary corroboration. To estimate this income, I will take the average number and assume that she worked an additional 2.5 days each quarter, for a total of ten additional days from July 6, 2004 through June 30, 2005. At a rate of $45 per hour, or $360 per eight-hour day, the complainant would have earned an additional $3,600 for that period. This amount must also be deducted from her damages.

Accordingly, the total back pay award must be offset by the complainant's interim earnings of $131,040 for the period of October 22, 2003 through June 30, 2005.

E. An award of pre-judgment interest is an appropriate means of fully restoring the complainant to the economic position she would have been in but for her termination. *Gierlinger v. Gleason*, 160 F. 3d 858, 873 (2nd Cir. 1998); *Thames Talent, Ltd. v. Commission on Human Rights and Opportunities*, 265 Conn. 127, 143-44 (2003); *Silhouette Optical v. Commission,* supra, 10 Conn. L. Rptr. No. 19, 599. A meaningful award must include the interest that the complainant would have earned had she not been deprived of her salary. By the same token, the respondent should not be permitted to enjoy the interest earned on the money it retained because of its unlawful act. *Donovan v. Sovereign Security, Ltd*., 726 F.2d 55, 58 (2nd Cir. 1984). As stated by the Second Circuit Court of Appeals, it is "ordinarily an abuse of discretion not to include pre-judgment interest on a back pay award." *Saulpaugh v. Monroe,* supra, 4 F.3d 145.

This tribunal, like state and federal courts, has the discretion to choose a pre-judgment interest calculation best designed to make the complainant whole. *Silhouette Optical v. Commission*, supra, 10 Conn. L. Rptr., 599. An appropriate rate of interest, as levied in other commission decisions, is ten percent. Id.; see, e.g., *Commission on Human Rights and Opportunities ex rel. Williams. v. M.N.S. Corporation*, CHRO No. 0010124 (March 1, 2001); *Commission ex rel. Rose v. Payless Shoesource*, supra, CHRO No. 9920353. Moreover, the interest should be compounded, with interest accruing in one

year bearing annual interest thereafter. *Saulpaugh v. Monroe,* supra, 4 F.3d 145; *Silhouette Optical*, supra.

F. The complainant's monetary damages, comprising back pay and pre-judgment interest, are as follows, rounded off to nearest whole number:

2003

Lost wages (10/22/03 – 12/31/03)	$ 19,231
Interim income	
(4 weeks @ $35/hr, 27 hrs/wk)	3,780
(5 weeks @ $72/hr, 40 hrs/wk)	14,400
Net loss	1,051
Compound Interest (10% compounded annually through date of decision, 6/30/06)	283
Subtotal	$ 1,334

2004 (excluding 10-week maternity leave)

Lost wages (9 weeks @ $100K/yr) (33 weeks @ $120K/yr)	$ 93,461
Interim income	
(16 weeks @ $72/hr, 40 hrs/wk)	46,080
(26 weeks @ $45/hr, 27 hrs/wk)	31,590
(5 add'l 8-hr. days @ $45/hr)	1,800
Net Loss	13,991
Compound interest (through 6/30/06)	2,150
Subtotal	$16,141

2005

Lost wages (1/1/05 – 6/30/05; 50% annual salary)	$ 60,000
Interim income	
(26 weeks @ $45/hr, 27 hrs/wk)	31,590
(5 add'l 8-hr. days @ $45/hr)	1,800
Net Loss	26,610
Compound interest (through 6/30/06)	1,299
Subtotal	$27,909
TOTAL (back pay plus compound interest)	$45,384

G. As the commission correctly states, courts have awarded damages for the costs associated with parking and automobile use that resulted, albeit indirectly, from a discriminatory termination. See *Berndt v. Kaiser Aluminum & Chemical Sales, Inc*., 604 F. Sup. 962, 965-66 (E.D. Pa. 1985), aff'd, 789 F.2d 1986 (3rd Cir. 1986) (company car expense); *Harmon v. San Diego County*, 477 F. Sup. 1084, 1092 (S.D. Cal. 1979), aff'd, 736 F.2d 1329 (9th Cir. 1984) (parking expenses); *Harkless v. Sween Independent School District*, 466 F. Sup. 457, 460 (S.D. Texas 1978) (mileage); *Harp v. New York State Division of Human Rights*, 237 App. Div. 2d 898, 899 (1997) (mileage). Since October 28, 2003, the complainant has commuted to Hilfiger's Manhattan office, parking at a local commuter lot and taking the Metro North railroad to and from Grand Central Station. The complainant is entitled to recover the difference between the travel expenses to the respondent's office in South Norwalk and the expenses getting to and from the Hilfiger office. The complainant claims that from the time she began working for Hilfiger until the public hearing, she spent $7,692.77 on train fare and $807.16 on parking fees. Given the sparse support in the record, practical logic leads to somewhat different dollar figures. The cost of the train was $272 per month; it did not increase

until after June 30, 2005, the date at which I have cut off the complainant's recovery. The complainant apparently paid the monthly fee from November 2003 through June 2005, exclusive of the two full months of maternity leave.[9] For these eighteen months, the complainant would have paid $4,896.

The Town of Southeast, New York, where the complainant boards the train to Manhattan, issues annual or semi-annual parking permits to persons leaving their cars in the commuter lot. Annual permits run from January 1 through December 31 of each year. Semi-annual permits, which the complainant purchased, begin either January 1 or June 1 and cost $172. Pro-rating this figure, the complainant first claims reimbursement of $6.62 per week for each of the last ten weeks of 2003. Nothing in the record suggests that parking could be purchased for a pro-rated portion of the annual or semi-annual fee. The only evidence, the 2006 rules and regulations for the Southeast parking facility (Ex. CHRO-4), refers to meter parking at $2.25 per day. Assuming that the complainant parked there three days a week from October 28, 2003 through the end of the year, she would have spent $67.50. For 2004 and the first half of 2005, the complainant would have spent an additional $516 for the semi-annual permits, for a total of $583.50.

The complainant is entitled to recover the combined train and parking expenses, $5,479.50, offset by what she would have spent traveling to and from the respondent's office for this same time period. According to the complainant's testimony, her commuting expenses—the shared cost of gasoline—amounted to $20 to $25 per week (see FF 4). Recognizing the increased cost of gasoline during the past two years, I will use the higher figure. Accordingly, had she continued working for the respondent, her approximate commuting costs would be measured from October 22, 2003 until June 30, 2005, exclusive of her ten-week maternity leave and three weeks of vacation (two weeks for 2004 and one for the first half of 2005). For 75 weeks (88 weeks minus

[9] Since the complainant paid monthly, she likely would have paid in full for April and July 2004, months in which she worked at least three weeks prior to and after her maternity leave.

vacation and maternity leave), the complainant's commuting expenses would have been approximately $1,875. Her recoverable expenses, therefore, are $3,604.50.

H. The complainant also seeks emotional distress damages in the amount of $20,000. Prior to the Connecticut Supreme Court's decision in *Bridgeport Hospital v. Commission on Human Rights and Opportunities*, 232 Conn. 91 (1995), commission hearing officers routinely awarded emotional distress damages in employment discrimination cases. In *Bridgeport Hospital*, however, the Connecticut Supreme Court held that it could not award emotional distress damages under § 46a-86 (a) for employment discrimination cases predicated upon violations of § 46a-60. Id., 92-93.

The commission now argues that recent cases have illuminated an alternative path for the recovery of emotional distress damages in employment discrimination claims in this forum. First, in *Trimachi v. Connecticut Workers Compensation Committee* [sic], 2000 WL 872451 (Conn. Super.), the Connecticut Superior Court recognized that General Statutes § 46a-58 (a) "expressly converted a violation of federal antidiscrimination laws into a violation of Connecticut antidiscrimination laws."[10] Evaluating a claim of disability discrimination in the workplace, the court determined that an employer violates § 46a-58 (a) if it violates the applicable federal law (in that case, the Americans with Disabilities Act). See also *Commission on Human Rights and Opportunities ex rel. Scarfo v. Hamilton Sundstrand*, CHRO No. 9610577 (September 27, 2000) (following *Trimachi*, the referee determined that violation of the ADA constituted a violation of §46a-58 (a)).

In a more recent decision, *Commission on Human Rights and Opportunities v. Board of Education of the Town of Cheshire*, 270 Conn. 665 (2004), the Connecticut Supreme Court held that the commission has subject matter jurisdiction under § 46a-58 (a) to adjudicate alleged violations of General Statutes § 10-15c, a state law concerning

[10] General Statutes § 46a-58 (a) expressly provides that "[i]t 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 the laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability."

discrimination in public schools. Thus, a violation of § 10-15c may constitute a violation of § 46a-58 (a). The court further acknowledged that the remedies identified in § 46a-86 (c),[11] are available to victims of violations of § 46a-58. Id., 686, 688. The logic of extending the commission's jurisdiction to state education statutes via § 46a-58 (a) is equally, if not more, applicable to extending jurisdiction to federal employment discrimination statutes. See *Commission on Human Rights and Opportunities ex rel. Valerie Kennedy v. Eastern Connecticut State University,* CHRO No. 0140203 (December 27, 2004).

By virtue of the default order, and given the respondent's concomitant silence on this critical issue, I conclude that the respondent violated not only § 46a-60 (a) (1), but also Title VII pursuant to § 46a-58 (a) and, consequently, § 46a-58 (a) itself. Accordingly, the complainant may avail herself of the remedies under § 46a-86 (c), which have typically included emotional distress damages in claims of discrimination in housing and public accommodation, but which also explicitly apply to violations of §46a-58.

Criteria to be considered when awarding damages for emotional distress include: (1) the subjective internal emotional reaction of the complainant; (2) whether the discrimination occurred in front of other people; and (3) the degree of offensiveness of the discrimination and its impact on the complainant. *Commission ex rel. Peoples v. Belinsky,* supra, 1988 WL 492460, at *6-7; *Commission on Human Rights and Opportunities ex rel. Aguiar v. Frenzilli,* CHRO No. 9850105, pp. 9-15 (January 14, 2000); *Commission ex rel. Harrison v. Greco,* supra, pp. 15-17.

Maisano's unnerving—although not deliberately malicious—response to the complainant's announcement planted the seeds of self-doubt that lingered throughout

[11] According to § 46a-86 (c), "In addition to any other action taken hereunder, upon a finding of a discriminatory practice prohibited by section 46a-58, 46a-59, 46a-64, 46a-64c, 46a-81b, 46a-81d or 46a-81e, the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, the expense incurred by the complainant for obtaining alternate housing or space, storage of foods and effects, moving costs and other costs actually incurred by him as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs." (Emphasis added.)

the remainder of the complainant's brief employment with the respondent. Worse, after her lunch meeting with her supervisor, Zelenko, the latter became increasingly impatient and hostile toward her, and made her professional life difficult. His behavior continued for approximately four weeks before he terminated the complainant's employment. (Whether Zelenko's attitude and behavior toward the complainant were calculated to buttress an otherwise baseless defense that the complainant was incompetent is uncertain, since the respondent filed no formal defenses or justifications for its actions.) Unquestionably, this difficult four-week period made the complainant feel guilty about her pregnancy, contributed to her anxiety and low self-esteem, and magnified the pain and humiliation of her ultimate termination. On one hand, the respondent's actions and words—and their deleterious effect on the complainant—unequivocally merit some award of emotional distress damages. On the other hand, however, the complainant described few, if any, specific examples of deliberately offensive or antagonistic comments or situations. Compare *Commission ex rel. Thomas v. Mills*, supra, CHRO No. 9510408 (over the course of several months, the respondent repeatedly—and publicly—taunted, harassed, and threatened the complainant because of her disability and sexual orientation, causing her to live in fear that the respondent would seriously harm her).

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. Indeed, this was a critical factor justifying relatively large awards in cases such as *Commission ex rel. Thomas v. Mills,* supra, CHRO No. 9510409 and *Commission on Human Rights and Opportunities ex rel. Cohen v. Menillo,* CHRO No. 9420047 (June 21, 1995). Conversely, the absence of a public display of discrimination weighs against a substantial award. *Commission ex rel. Peoples v. Belinsky,* supra, 1988 WL 492460 (the absence of such public display led to an award $1500 lower than the $5000 requested); *Commission on Human Rights and Opportunities ex rel. McNeal-Morris v. Gnat,* CHRO No. 9950108 (January 4, 2000).

The record contains no evidence that anyone other than the complainant heard Maisano's remarks in their one brief conversation, or that anyone was present to

observe the complainant's immediate reactions. Nor is there any evidence that anyone overheard Zelenko terminate the complainant. While the complainant testified that one individual might have overheard her initial conversation with Zelenko (see Tr. 49-50), that person was a sympathetic colleague with whom the complainant had already shared her exchange with Maisano and her concerns about her pregnancy vis-à-vis her employment. Later, although Zelenko criticized her work in front of others, no apparent connection existed between his comments and her pregnancy.[12] Accordingly, I find that the complainant was not subjected to any discriminatory actions in front of others.

Upon learning that Hilfiger might soon be facing significant reorganization and that her own job might be at risk, the complainant began to worry about her ability to find and succeed in a position with another employer. She attributed her insecurity and self-doubt to her 2003 experiences with the respondent, although more than two years had passed by the time she learned of the potential downsizing at Hilfiger. Having long since satisfied herself (and her family) that her termination was due to her pregnancy and not to incompetence, it appears unlikely that a new wave of insecurity could be significantly blamed on the respondent. More likely, she faced a normal fear of the unknown after several years in a comfortable, challenging and supportive workplace.

Furthermore, while her difficulties with the respondent stemmed from her pregnancy, the complainant testified that she had no plans for more children, thus obviating the likelihood of future controversy similar to that with the respondent. Accordingly, I cannot contemplate any more than minimal damages for her job worries in late 2005 and early 2006. Several other factors militate against a significant award of emotional distress damages:

- The complainant need not present medical testimony to establish her internal emotional response to the discriminatory actions; her own testimony may suffice. See, e.g., *Schanzer v. United Technologies Corp.,* 140 F.Sup.2d 200 (D.Conn.

[12] In fact, the complainant testified that she only made the connection between her pregnancy and Zelenko's increasingly offensive behavior on the day she was terminated, when Zelenko told her that another employee, previously earmarked for termination, would remain in her stead. (Tr. 59; see FF 7)

2000); *Berry v. Loiseau*, 223 Conn. 786, 811 (1992); *Commission on Human Rights and Opportunities ex rel. Thomas v. Mills*, CHRO No. 9510408, pp. 6-7 (August 5, 1998). Medical testimony, however, may strengthen a case; *Busche v. Burkee,* 649 F.2d 509, 519 n. 12 (7th Cir. 1981); just as the testimony of relatives, friends and business associates may also provide insight into a complainant's emotional state; *Blackburn v. Martin,* 982 F.2d 125, 132 (4th Cir. 1992). In the present matter, although the complainant testified frankly about her emotional reactions, no other person, whether a friend, family member or medical expert, testified on the complainant's behalf.

- The complainant claimed that her termination adversely affected her family and created tension with her husband, yet she returned to a job—albeit with lesser pay—of which her husband approved. In fact, her husband had been proud of the complainant's prior success with the prestigious Hilfiger and had not wanted her to leave for the job with the respondent. (See Tr. 53.)
- The complainant testified that she felt "mentally better" when she returned to the familiar and supportive atmosphere at Hilfiger. (See FF 13.)
- Although the complainant was upset by the loss of valuable "family time" due to her lengthy commute to Manhattan, with the exception of the 21-week period as interim vice president of children's clothing, she was actually at home more often than when she worked for the respondent. After the birth of her second child in April 2004, she worked only three days per week.
- Her concerns about her husband's new job—a law enforcement position with a busy schedule that he took in July 2004 to increase the family's income—are too remote in time from, and connected far too tenuously to, the circumstances of her termination.

The respondent's actions unquestionably warrant some amount of emotional distress damages. On this record, however, numerous factors preclude a significant award. In light of the foregoing, I conclude that an emotional distress award of $3,000 is fair and reasonable.

I. Reinstatement is a "complete remedy as it vitiates the wrongful act. It stops any negative impact on the employee's status." *Truskoski v. ESPN, Inc*., 823 F.Sup. 1007, 1015 (D.Conn. 1993). Under certain circumstances, where reinstatement may not be a viable remedy, an award of front pay may be an appropriate alternative. See, e.g., *Oliver v. Cole Gift Centers*, 85 F.Sup.2d 109, 116 (D.Conn. 2000); *Thames Talent. v. Commission*, supra, 265 Conn. 138 n. 15; *State v. Commission on Human Rights and Opportunities*, 211 Conn. 464, 478 (1989). Front pay has been defined as "an award for a reasonable future period required for the victim to reestablish her rightful place in the job market." *Barry v. Posi-Seal, Int'l., Inc*., 36 Conn. App. 1, 8 n.2 (1994), quoting *Goss v. Exxon Office Systems*, 747 F.2d 885, 889 (3rd Cir. 1984). The complainant, fearing that her work for Hilfiger is about to end, requests a front pay award in the amount of $53,310, reflecting one full year of salary at $120,000 offset by a year's worth of Hilfiger salary in the amount of $66,690 (again, erroneously calculated on the basis of a 28.5 hour workweek).

Front pay, like back pay, is "premised on the aggrieved party being entitled to hold his position against any discrimination, but subject to legitimate business decisions." *Sivell v. Conwed Corp*. supra, 116 F.Sup. 26. The complainant's entitlement to her old position with the respondent, or compensation for the wrongful deprivation of that position must, therefore, end when that position (or, in this case, the entire company) ceased to exist for non-discriminatory reasons. Id. See also *Schrand v. Federal Pacific*, supra, 851 F.2d 159. Accordingly, I deny the complainant's request for front pay.

J. Post-judgment interest compensates the successful litigant when that litigant does not have the use of her money between the order of payment and the actual payment by the losing party. As with pre-judgment interest, the employee should not have to bear further loss while the employer avails itself of the use of the money prior to payment; *Thames Talent v. Commission*, supra, 265 Conn. 144-45; and the imposition of post-judgment interest is often an impetus for faster payment. Other commission decisions have also applied post-judgment interest at the rate of ten percent, and I will follow suit here. See, e.g., *Commission on Human Rights and Opportunities ex rel. DeBarros v.*

The Hartford Roofing Co., CHRO No. 0430162 (May 10, 2005); Commission *on Human Rights and Opportunities ex rel. Hansen v. W.E.T. National Relocation Services*, CHRO No. 0020220 (November 14, 2001); *Commission on Human Rights and Opportunities ex rel. Chilly v. Milford Automatics, Inc*., CHRO No. 9830459 (October 3, 2000).

Final decision and order of relief

1. The respondent shall pay to the complainant the sum of $ 45,384, representing back pay and pre-judgment interest.

2. The respondent shall pay to the complainant the sum of $3,604.50, representing her travel expenses to and from Manhattan, less her commuting costs to her job with the respondent.

3. The respondent shall pay to the complainant the sum of $3,000 for her emotional distress.

4. Pursuant to General Statutes §37-3a, the respondent shall also pay post-judgment interest on the total award of damages. Said interest shall accrue daily on the unpaid balance from the date of this decision at the rate of ten percent (10%) per year.

5. The respondent shall cease and desist from all acts of discrimination prohibited by state or federal law.

6. Should prospective employers seek references concerning the complainant, the respondent shall provide only the dates of the complainant's employment, the last position she held, and her rate of pay. In the event additional information is requested in connection with any inquiry regarding the complainant, the respondent shall obtain written authorization from the complainant before providing such information, unless the respondent is required by law to provide such information.

7. The respondent shall not engage in any retaliation against the complainant in violation of General Statutes § 46a-60 (a) (4) or Title VII.

So ordered this 30th day of June, 2006.

_____
David S. Knishkowy
Human Rights Referee

PARTY LIST

Party	Represented by
Commission on Human Rights and Opportunities	Michelle Dumas Keuler, Esquire CHRO 21 Grand Street Hartford, CT 06106 Phone (860) 541-3428 Fax (860) 541-5265
Jennifer Taranto	Jennifer Taranto (pro se) 610 Farms & Market Road Brewster, NY 10509 Phone (845) 878-1199 Fax (845) 878-1199
Big Enough, Inc. Attn: John Maisano 20 Grey Rocks Rd. Wilton, CT 06897 -and- PO Box 2397 Noroton Heights, CT 06829	[did not appear at default hearing]