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

Commission on Human Rights and Opportunities ex rel. Laura Pullicino, Complainant

CHRO No. 0920214

v.

Pelham Sloane, Inc., Respondent

May 10, 2012

I. PARTIES

Laura Pullicino, 228 Shadduck Road, Middlebury, Connecticut 06762 (complainant). Pelham Sloane, Inc., 303 Linwood Avenue, Fairfield, Connecticut 06824 (respondent). The Commission on Human Rights and Opportunities, with offices at 25 Sigourney Street, Hartford, Connecticut (the Commission or CHRO). CHRO was represented by Attorney Alix Simonetti. Complainant was represented by Attorney Leonard A. McDermott, 35 Porter Avenue, 2B, P.O. Box 205, Naugatuck, Connecticut 06770.

II. PROCEDURAL BACKGROUND

1. On November 18, 2008, complainant filed an affidavit of illegal discriminatory practice (the complaint) with the Commission alleging that respondent had terminated her employment as a consequence of her physical disability (cancer) in violation of Connecticut General Statute (C.G.S.) 46a-60(a)(1).

2. The Commission investigated the charges of the complaint, found reasonable cause to believe that a discriminatory practice had occurred and attempted, without success, to conciliate the matter. On September 3, 2010, a Commission investigator certified the complaint to public hearing in accordance with C.G.S. §46a-84(a) and §46a-54-77(d)(2)(C) of the Regulations of Connecticut State Agencies (the Regulations).

3. On September 27, 2010, Chief Human Rights Referee J. Allen Kerr, Jr., designated Jon P. FitzGerald as presiding referee in the matter and issued a "Notice of Contested Case Proceeding and Hearing Conference" (the "notice of contested case proceeding").

4. In pertinent part, the notice of contested case proceeding instructed respondent of its obligation to respond to the complaint enclosed therewith as follows:

> "Within fifteen (15) days after receipt of this notice and complaint, the respondent shall file an answer under oath to the complaint and any

amendments thereto in accordance with §46a-54-86a of the Regulations of Connecticut State Agencies (the Regulations)."

It also notified respondent that:

"Failure to file an answer may result in an order of default and a hearing in damages pursuant to §46a-54-88a (a) (1) of the Regulations."

5. The notice of contested case proceeding further instructed all parties of their obligation to appear at an initial hearing conference and set the date and time of said hearing conference for October 8, 2010 at 10:00 a.m. With respect to the obligation to appear on that date, the notice cautioned all parties that:

"Absent a showing of good cause, failure to appear at any proceeding, including the hearing conference, may result in the imposition of sanctions" and that possible sanctions included default of the absent party or dismissal of the complaint.

6. The Office of Public Hearings (OPH) sent duplicate notices of contested case proceeding to respondent, one to its business address and one to the residence of its chairman. Notice in both cases was by certified mail, return receipt requested.

7. The United States Postal Service (USPS) was unable to deliver notice of contested case proceeding to respondent at either address. In both instances, USPS returned the notice of contested case proceeding to OPH "because the forwarding order for [the relevant] address is no longer valid."

8. Nevertheless, the hearing conference went forward on October 8, 2010 as scheduled. Complainant, the Commission and complainant's attorney appeared, the latter via telephone. Respondent did not.

9. Later that day Referee FitzGerald conducted an online inquiry of the Connecticut Secretary of State's business records (www.concord-sots.ct.gov) seeking additional options that would ensure respondent's notification of the existence and status of the OPH proceeding.

10. As of October 8, 2010, the Secretary of State's (the Secretary's) online business record described respondent's business status as "active" and indicated that respondent had designated its executive vice president Robert M. Bruder as its agent, providing the Secretary with both business and residential addresses for the record.

11. Referee FitzGerald downloaded, printed and attached the Secretary's online business record (which, as printed is officially entitled "business inquiry") to the hearing conference summary and order that he issued later that day.

12. In the hearing conference summary and order Referee FitzGerald: a) summarized the procedural status of the case and noting that respondent had not filed its post-certification answer to the complaint; b) issued orders establishing dates, times and deadlines to control subsequent proceedings in the matter; and c) reiterated that absent a showing of good cause, failure to appear at any proceeding or to comply with an order of the referee, could result in sanctions, including default of the noncomplying party.

13. The hearing conference summary and order was sent to all parties by first class U.S. mail. Duplicate originals were sent to respondent at the five (5) addresses listed on the business inquiry. Three of the envelopes were returned, unopened to OPH; two were not.

14. Respondent did not respond to the order and did not file an answer to the complaint.

15. On April 6, 2011 the Commission and complainant filed a joint motion for default of respondent both for its failure to appear and its failure to file an answer to the complaint.

16. On April 27, 2011 Referee FitzGerald granted the motion, issuing an order of default against respondent and scheduling a hearing in damages for July 26, 2011. Respondent was notified of the default judgment by certified mail at five locations. Signed receipts from three of the locations were returned to OPH.

17. By order dated May 24, 2011, Referee FitzGerald rescheduled the hearing in damages to July 8, 2011. Respondent was notified of the rescheduled hearing by certified mail at five locations. Signed receipts from two locations were returned to OPH.

18. Prior to the July 8, 2011 hearing date, Referee FitzGerald's term (and the terms of all other human rights referees) expired. Effective July 1, 2011, all OPH proceedings were stayed pending gubernatorial appointment of new human rights referees.

19. On December 12, 2011, Governor Dannel P. Malloy appointed new human rights referees, including the undersigned Ellen E. Bromley, who was then assigned to act as presiding human rights referee in this matter for such further processing as might be required.

20. Accordingly, on January 18, 2012 the undersigned referee issued notice that the hearing in damages had been scheduled for February 1, 2012. The following day, January 19, 2012, at CHRO's request, the hearing in damages was re-scheduled to February 8, 2012. Respondent was notified twice, once of the original date and then of the continued hearing date. It was notified both

times by certified mail at five locations. Signed receipts from two of the locations were received by OPH in advance of the hearing.

21. I convened the hearing in damages on February 8, 2012 at 10:00 a.m. at OPH, 25 Signourney Street, Hartford, Connecticut. Complainant, complainant's attorney and the Commission attended. Neither respondent nor any representative of respondent appeared. The proceeding was recorded by Post Reporting Service, Inc., 2015 Dixwell Avenue, Hamden, Connecticut (Post Reporting).

22. OPH received the transcript of the February 8th hearing in damages from Post Reporting on February 21, 2012.

23. The record closed and the matter is now before me for a determination of damages and to order such remedies as I deem appropriate.

III. FINDINGS OF FACT

1. All procedural, notice and jurisdictional prerequisites have been satisfied and this matter is properly before me to hear the complaint and render a decision. (OPH file)

2. The factual allegations contained in the complaint are deemed established as a result of respondent's default.

3. Complainant's testimony at the hearing in damages, as well as the exhibits admitted into evidence during that proceeding have established additional facts (a/k/a findings) to the extent that they add relevant detail to facts previously plead. The Commission's exhibits are referenced as "CHRO ex." followed by a number; complainant's exhibits, identified as "C" are also sequentially numbered. References to complainant's testimony are to the transcript from the hearing in damages (Tr.) and the page number where the testimony is found.

4. Complainant was employed by respondent as its supply chain manager from February, 2007 until respondent terminated her on October 12, 2008 after learning that she would require radiation treatments for recently diagnosed brain abnormalities and a lung mass. (OPH file)

5. Prior to being terminated complainant's gross weekly pay from respondent was $1114.00. (C1/Damage Analysis)

6. Between the date of her termination and the end of calendar year 2008, complainant received unemployment compensation benefits of $4,272 from the State of Connecticut. (C1; C2/2008 federal and state tax returns)

7. Subsequent to her termination, complainant maintained group health insurance benefits under COBRA through June, 2009 at a net cost of $2,281. She also made out-of-pocket payments of $6,013 for prescribed medications. (C1, C7/invoices for out of pocket medical expenses, TR 23)

8. In 2009, complainant's earned income through mitigation was $10,223. (C3/2009 federal and state tax returns, TR 19-20)

9. Complainant received $18,525 in unemployment compensation benefits from the State of Connecticut in 2009. (C 1, C 3)

10. In June of 2009 complainant became eligible for Social Security Disability benefits and Medicare. (C5/Form SSA-1099-Social Security Benefit Statement–2010)

11. Complainant's 2009 Social Security Disability income was $3,348. (C5 *at bottom of page)

12. Complainant received $21,932 in unemployment compensation benefits from the State of Connecticut in 2010. (C1, C5)

13. In 2010, complainant's Social Security Disability income was $20,088. (C1, C5 [as per the benefit statement, "$3,348 was paid in 2010 for 2009"])

14. In 2010 complainant's earned income through mitigation was $3,383. (C1, C4/2010 federal and state tax returns)

15. In 2011, complainant's Social Security Disability income (net of Medicare Part B premiums) was $19,740.60. (C1, C6)

16. On December 21, 2010, concerned that his client's health was so compromised that it had become necessary to preserve her sworn testimony "as quickly as possible," complainant's counsel notified OPH that he had scheduled her deposition. (OPH file/Joint Request for Extension)

17. Complainant's videotaped deposition was taken on December 22, 2010 by Del Vecchio Reporting Services, Inc., at a cost of $469. (C8)

18. In a motion dated May 20, 2011, complainant's counsel moved for an expedited hearing in damages "considering the Complainant's health condition" and "terminal disease." (OPH file)

19. In 2011, complainant received $534 in unemployment compensation benefits from the State of Connecticut. (C1)

20. In 2011, complainant's Social Security Disability income was $20,086. (C 6/Form SSA-1099-Social Security Benefit Statement–2011)

IV. CONCLUSIONS OF LAW AND ANALYSIS

Complainant has satisfied the burden of a prima facie disability discrimination case, demonstrating: (1) that she was disabled under the applicable statute; (2) that respondent was subject to the applicable statute; (3) that she was qualified to perform the essential functions of her position with or without reasonable accommodation, and (4) that she suffered an adverse employment action because of her disability. *Giordano v. City of New York,* 274 F.3d 740, 747 (2nd Cir. 2001); *Shaw v. Greenwich Anesthesiology Assocs.,* P.C., 137 F.Supp.2d, 48, 54 (D.Conn. 2001); *Feathers v.Vivisection Investigation League, Inc*., 2000 Conn. Super. LEXIS 2319."

Once complainant establishes a prima facie case, the burden shifts to respondent to proffer a legitimate, non-discriminatory reason for its action. *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142, 120 S.Ct. 2097 (2000)*. Respondents who default by failing to appear forfeit the opportunity to provide an explanation for their actions.

In this case, the default order was properly entered against respondent as the result of its failure to answer the allegations in the complaint, as well as its failure to appear at the lawfully noticed initial hearing conference. (C. G. S. §46a-84(f); Regulations §46a-54-88a(a)(1)).

"[The] 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).

Accordingly, respondent's refusal to participate in our proceedings: 1) constitutes its admission that it failed, as alleged in the complaint, to "engage in an interactive process of accommodation;" 2) functions as its effective confession to having terminated complainant's employment upon learning of her disability (cancer diagnosis) and corollary need for radiation treatments; and 3) establishes its liability for violating the Connecticut Fair Employment Practices Act (§46a-60(a)(1)).

When defendants' liability has been established by virtue of a default, plaintiff's burden at a hearing in damages is limited to proving the amount of damages. *Whitaker v. Taylor*, 916 A.2d 834, 99 Conn. App., 719, 734-735 (2007).

Following a respondent's default in an employment discrimination case, evidence is taken at the hearing in damages to enable the presiding referee: 1) to determine what measures will be necessary to eliminate respondent's discriminatory practice(s); 2) to fashion orders that ensure against future civil rights violations by respondent; and 3) to quantify the damages incurred by complainant and order relief to make him/her whole. (C.G.S. §46a-84(f); Regulations §46a-54-88a(b)).

Generally speaking, the phrase "make whole relief" refers to compensation awarded to a party for a loss sustained. In fashioning specific orders of "make whole relief" in employment discrimination cases, our legislature has authorized human rights referees to make back pay awards, but mandated that they do so after deducting interim earnings, including unemployment compensation *or amounts which could have been earned with* reasonable diligence on the part of the person to whom back pay is awarded. (C.G.S. §46a-86 (b) (emphasis added).

The statutory mandate that requires deductions from damage awards follows a well-established legal doctrine known as "mitigation of damages." The doctrine, which is two-pronged, obligates injured victims to take reasonable steps to limit or mitigate their losses, and prohibits them from recovering damages for any harm that they could have avoided or minimized with reasonable effort. See Restatement (Second) of Torts, § 918(1).

Neither common law doctrine nor Connecticut's statute requires precision with regard to the issue of mitigation. Rather, as the Connecticut Supreme Court noted within the context of an employment discrimination case, a hearing officer is free to consider properly admitted evidence of damages and whether the documentary evidence sufficiently demonstrates a reasonable effort to mitigate. *Ann Howard's Apricots Restaurant, Inc. v. Commission on Human Rights and Opportunities*, 237 Conn. 209, 233, footnote 14 (1996) (complainant had testified directly, but passed away prior to respondent's opportunity to cross examine).

Respondent discharged complainant in October of 2008. During the following two years complainant worked periodically at several different jobs. Although the employment was not full time and the compensation was far less than what respondent had been paying her, there is nothing in the record for this period that would require me to conclude that complainant failed to exercise reasonable diligence in mitigating her damages as required by statute (C.G.S. 46a-86(b)). Complainant's testimony, supported by her tax returns, presented sufficient credible evidence of mitigation in support of a back pay

award for the period beginning with her termination through the end of calendar year 2010. Here, however, complainant's work history ends. Her duty to mitigate does not.

Complainant was able to satisfy her duty to mitigate in 2010, notwithstanding her eligibility for Social Security Disability Insurance (SSDI) (effective in late 2009) and her receipt of benefits thereunder. [1]

The record after 2010, however, is devoid of testimony, evidence of earned income (even a small amount from part-time or sporadic employment), or any other indicia of, or action undertaken by complainant that could enable me to find that she had exercised a reasonable effort to mitigate damages in 2011 and 2012.

Notwithstanding the fact that respondent's failure to appear at the hearing in damages precluded its rebuttal on any and all aspects of evidence of mitigation that complainant might proffer, respondent's absence does not relieve complainant of its burden, here unmet, to actually produce such evidence. Similarly, respondent's uncontested liability does not relieve me of my responsibility to take evidence of complainant's mitigation efforts into account in determining an appropriate damages award.

The general rule is that if a plaintiff is injured or becomes ill subsequent to a discriminatory or otherwise unlawful termination, back pay may be tolled because the claimant is considered to have left the job market or is otherwise unemployable. *Smith*

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[1] Receipt of SSDI is neither dispositive of a recipient's ability to work nor preclusive of a claim of continued ability to perform essential job functions, with or without assistance or accommodation The Social Security Act's strict definition of disability is designed to identify and provide insurance benefits to individuals who are so disabled that they are unable to perform any substantial gainful work. Eligibility for SSDI benefits is limited to those with medically determinable impairments that are expected to result in death or which have lasted or are expected to last for a continuous period of 12 months or more. In contrast, the Americans with Disabilities Act (ADA), which is designed to prevent discrimination against disabled people who wish to work, takes a different approach in determining what is meant by disability, and prohibits job discrimination against disabled individuals who are able to perform the essential functions of a job "with or without an accommodation." The Connecticut Fair Employment Practices Act (C.G.S. §46a-60) is interpreted in accordance with the ADA, *Curry v. Allan S. Goodman, Inc.,* 286 Conn. 390, 407, 944 A.2d 925 (2008). In *Cleveland v. Policy Management Systems Corp.,* the Supreme Court held that pursuit and receipt of SSDI benefits neither automatically estops a recipient from pursuing an ADA claim nor erects a strong presumption against the recipient's success. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work, 526 U.S. 795, 797-98 (1999).

v. Office of Personnel Management, 778 F.2d 258, 263 (5th Cir. 1985*) Ostapowicz v. Johnson Bronze Co.,* 541 F.2d 394, 401 (3d Cir. 1976) (holding back pay period tolled during period of illness). Here complainant testified to two post-termination surgeries (which may have affected her ability to sustain employment) and her attorney filed requests for expedited proceedings and permission to videotape her deposition to accommodate her failing health. It may be that complainant was unable to proffer evidence of mitigation in 2011 and 2012 because her health had deteriorated to the point where it precluded any employment at all, but that not for me to determine, nor would it affect the proverbial bottom line. Regardless of the reason, it is complainant's total failure to present evidence of mitigation during this period that leaves me with no legal basis to support her request for continued back pay in 2011 and 2012, which I hereby decline, as I must, to award.

IV. ORDER OF RELIEF

1. Respondent shall pay the complainant the sum of $76,793 as back pay for the period of October 28, 2008 to December 31, 2010, broken down as follows:

October 28, 2008 – December 30, 2008	
9 weeks x $1,114	$10,026
Less unemployment	$ 4,272
	$ 5,754
2009	
52 weeks x $1,114	$57,928
Less unemployment	$18,525
	$39,403
2010	
52 weeks x $1,114	$57,928
Less unemployment	$21,932
	$35,996

Less earned income of $13,606

Plus unreimbursed medical expenses of $8,295

Plus the cost of complainant's deposition $951

2. Pursuant to C.G.S. 46a-86(b) respondent shall pay $44,729 to the CHRO representing the unemployment compensation amount paid to complainant. The CHRO shall then transfer such amount to the appropriate state agency.

3. Pursuant to *Thames Talent Ltd. v. Commission on Human Rights and Opportunities*, 265 Conn. 127 (2003), pre-judgment and post-judgment interest is awarded on the lost wages. Interest shall be paid at the rate of 10% per annum,

compounded annually, on the back pay award and any outstanding balance, until paid in full.

4. Complainant's request that I order an award of damages to compensate her for emotional distress suffered as a result of her illegal termination is denied. Human Rights Referees cannot award attorney fees or damages for emotional distress in adjudicating employment discrimination claims brought under C.G.S. 46a-60(a) (1). *Bridgeport Hospital v. Commission on Human Rights & Opportunities*, 232 Conn. 91 (1995).

5. Respondent shall cease and desist from discriminating against present and future employees and applicants for employment on the basis of disability and all other protected basis.

6. Respondent shall post in prominent and accessible locations, visible to all employees and applicants for employment, such notices regarding statutory anti-discrimination provisions as the Commission shall provide. Respondent shall post the notices within three working days of their receipt.

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

It is so ordered this 9th day of May, 2012.

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Ellen E. Bromley
Presiding Human Rights Referee

c:

Laura Pullicino
John A. Jensen, Jr./Pelham Sloane
Robert M. Bruder
Alix Simonetti, Esq.-via fax only
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