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

Commission on Human Rights and Opportunities ex rel. Stephen Urban, Complainant

CHRO No. 0830309

v.

United Pet Supply, Inc., Respondent

August 2, 2012

I. PARTIES

Stephen Urban, 272 Springdale Avenue, 2nd floor, Meridan, Connecticut 06451 (complainant). United Pet Supply, 831 Little Britain Road, Suite 300, New Windsor, New York 12553 (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 Kimberly Jacobsen and Law Student Intern Poojitha Kondabolu.

II. PROCEDURAL BACKGROUND

1. On February 14, 2008, complainant filed an affidavit of illegal discriminatory practice (the complaint) with the Commission alleging that respondent had terminated his employment as a consequence of his physical disability in violation of Connecticut General Statute (C.G.S.) 46a-60(a)(1) and 42 U.S.C. 12101 et seq., the Americans with Disabilities Act.

2. The Commission investigated the charges of the complaint, found reasonable cause to believe that an unfair practice had been committed and attempted, without success, to conciliate the matter. Thereafter, on April 28, 2011, 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 May 3, 2011 Chief Human Rights Referee J. Allen Kerr, Jr., designated Donna Maria Wilkerson Brillant as presiding referee in the matter and issued a Notice of Contested Case Proceeding and Hearing Conference which he sent to all parties, along with a copy of the complaint.

4. On May 23, 2011, respondent filed an answer and special defenses to the complaint.

5. Both parties appeared at the scheduled hearing conference on June 2, 2011 at which time dates, times and deadlines to control the course of proceedings in this matter were established.

6. The proceedings were stayed when Referee Wilkerson Brillant's term, and those of the other human rights referees expired, on July 1, 2011.

7. On December 12, 2011, Governor Dannel P. Malloy appointed new human rights referees and on January 17, 2012 the chief human rights referee issued a Notice of Status Conference Scheduling (the scheduling notice) directing the parties to find mutually convenient dates for a status conference and informing them that the undersigned would serve as presiding referee with respect to the proceedings.

8. On January 18, 2012, respondent's counsel emailed Commission counsel to inform her that respondent was no longer in business and would not be responding to the scheduling notice or participating in the proceedings. Commission counsel forwarded said email to Office of Public Hearings (OPH).

9. On January 19, 2012, I issued a Notice of Status Conference instructing the parties to appear on February 21, 2012 to reestablish a schedule for the subject proceedings.

10. Complainant and the Commission appeared at the status conference. Respondent did not.

11. The Commission filed a motion to default respondent for its failure to appear at the lawfully noticed status conference which I granted on March 14, 2012, setting down April 10, 2012 for a hearing in damages.

12. On March 14, 2012, OPH sent notice of the hearing in damages to respondent, respondent's counsel and its agent for service of process. Said notice was sent certified via United States Postal Service (USPS), return receipt requested.

13. USPS was unable to deliver notice of the hearing in damages to either respondent or respondent's representatives and returned them to OPH with their envelopes stamped "return to sender, not deliverable as addressed, unable to forward."

14. I convened the hearing in damages shortly after 10:00 a.m., on April 10, 2012 at OPH, 25 Sigourney Street, Hartford, Connecticut. Neither respondent nor any representative of respondent appeared. Complainant and the Commission appeared and complainant was heard.

15. The employee of the transcription service previously retained to record the hearing failed to report as scheduled whereupon complainant and the Commission agreed that the proceeding would be recorded on a cassette recorder. Accordingly, both the

original recording and OPH's transcription of that cassette recording which was completed on May 20, 2012, have been incorporated into and made a part of the OPH file.

lll. FINDINGS OF FACT

The following facts, relevant to this decision, are based on a review of the pleadings, evidence in the record, matters noticed and an assessment of complainant's credibility. References to testimony are to the witness and the transcript page (Tr.) where the testimony is found. The Commission was the sole party to introduce exhibits. Its exhibits are denoted as "Ex." followed by the exhibit number. Based on the complaint, exhibits and testimony, the following facts relevant to this decision are found:

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

2. Complainant began working for respondent on July 28, 2007 (Complaint ¶ 3).

3. In mid-October 2007, one of respondent's customers left a package containing a newly purchased shirt in respondent's store. Complainant, the store's manager, returned the shirt and pocketed the cash refund. Complainant admitted his thievery to his immediate supervisors who assured him that they "had his back" and would not report the theft to their boss (Complaint ¶ 4, Tr. 13-14).

4. Complainant was not immediately disciplined for his theft and (as more specifically set forth in subparagraphs a. and b.) during the following eight weeks, events that would affect his employment and events that would affect his health proceeded on parallel tracks. Specifically, during the same time period that complainant was having health problems that caused him to be absent from work, word of the theft he had committed reached respondent's district manager.

   a. Complainant was diagnosed with double pneumonia on Wednesday, October 17, 2007 and missed two days of work that week. He returned to work on the following Monday, but his illness persisted. (Tr. 13) Over the next two weeks his doctors prescribed medications and ordered x-rays (Tr. 15). Then, on November 9, 2007, after being diagnosed with cardiomyopathy, congestive heart failure and diabetes, complainant began a medical leave of absence from work (Complaint ¶ 6, ¶ 7, Tr. 14-15).

   b. Shortly after his return from medical leave on December 3, 2007, complainant was terminated on orders of respondent's district manager who, after learning of the theft complainant had committed, instructed complainant's supervisor to terminate his employment (Complaint ¶ 4, Exhibit B, Tr. 14-15).

5. Complainant was terminated from his job at respondent United Pet Supply on December 12, 2007 (Complaint, ¶ 4).

6. On February 14, 2008, complainant filed an affidavit of illegal discriminatory practice alleging violations of The Americans with Disabilities Act and Connecticut's Fair Employment Practices Act. The complaint included a description of the theft as respondent's articulated reason for firing him, but characterized that reason as a pretext, claiming that the basis for termination had been complainant's newly diagnosed disability status, including the "restrictions that needed to be met" since he was [now] "susceptible to having heart attacks and strokes."

7. Respondent initially indicated its intent to defend in this matter by appearing at the initial hearing conference, filing a timely answer and pleading affirmative defenses to the complaint, but, after going out of business (prior to February 2012), subsequently defaulted.

8. Respondent paid complainant, who as a manager was not eligible for overtime, at the rate of ten ($10.00) dollars per hour, based on a forty (40) hour week, even when complainant worked longer hours. (Ex. A, Tr. 4).

9. Six weeks after he was terminated by respondent, complainant began working for Levendi Services, a/k/a Mo's Southwest Grill (Mo's). He worked at Mo's for a week, earning $400. (Ex. E, Tr. 7).

10. On February 5, 2008, complainant began working at Olympia Sport Center (Olympia), where he remained employed for the next fifteen (15) months.

11. Complainant was employed for 47 weeks in 2008, earning $25,192 for the year ($536/week, $13.40/hour). (Ex. F, Tr. 8).

12. Complainant also received $1,764 in unemployment compensation benefits in 2008. (Ex. G).

13. On May 5, 2009, Olympia terminated complainant's employment. (Tr. 8).

14. Complainant testified to the following possibilities when asked why he had been terminated by Olympia:

    a) he didn't know why Olympia had let him go;
    b) that the company "didn't give me a definitive answer;"
    c) he had been hurt on the job in 2008 and had "an ongoing worker's comp claim against them;"
    d) "they knew I was nearing the end of that claim and there was going to be a settlement on it;" and

e) “they no longer wanted to pay me wages while being employed by them and also get settlement from them. It would be more economical for them . . . to let me go and then just pay me unemployment, pay me a settlement amount and I would go away. For them that would be cheaper in the long run.” (Tr. 8-9).

15. For the first 18 weeks of 2009, complainant worked for Olympia where he earned $10,354 ($569/week, $14.22/hour). (Exhibit H).

16. Complainant collected $10,354 in unemployment compensation benefits in 2009. (Exhibit I).

17. In 2010, complainant worked at JT Ghamo, The Tuxedo Place (JT Ghamo), where he earned $10,921 (Exhibit J, Tr. 9).

18. Complainant also collected $16,226 in unemployment compensation benefits in 2010. (Exhibit K).

19. In 2011, complainant continued to work at JT Ghamo, earning $16,954. (Exhibit L).

20. Complainant collected $3,456 in unemployment compensation benefits in 2011. (Exhibit M).

21. On June 3, 2011, a Connecticut Department of Labor unemployment compensation administrator (the administrator) ruled that complainant had received unemployment benefits in the amount of $10,354 for weeks with respect to which he was not entitled to benefits, ordering him to refund the overpayment and ruling that he must forfeit 21 weeks of future unemployment compensation benefits due to his fraudulent failure to report his income during a period when he collected unemployment benefits (Exhibit V).

22. Complainant appealed the administrator’s ruling. In a decision mailed to interested parties on November 28, 2011, the Board of Review of the Connecticut Department of Labor’s Employment Security Appeals Division (the Board of Review) upheld the administrator’s ruling (Exhibit V).

23. In relevant portions, Section III of the Board of Review’s decision entitled “Findings of Fact and Conclusions of Law” reviews complainant’s contradictory defenses as follows: a) “In his appeal to the board, the claimant alleges for the first time that he is living with stress and chronic medical conditions which caused him to overlook the fact that the administrator was overpaying him.” b) [But, at the initial referee’s hearing] “the claimant cited several conflicting explanations for the overpayment. He initially claimed that he reported his earnings, but that a fault occurred with the administrator’s “server” such that the

administrator did not receive his earnings during a period which spanned nearly one year. [Then he]"attributed the overpayment to retaliation by a former employer and incompetence by the Connecticut Department of Labor." (Exhibit V).

IV. CONCLUSIONS OF LAW AND ANALYSIS

The Commission took all of the proper procedural steps to bring the complaint to a hearing in damages.

Default

The default order was properly entered as a result of respondent's having failed to appear at a lawfully noticed status conference (C.G.S. §46a-84(f); Regulations §46a-54-88a(a)(2)).

A default admits the material facts that constitute a cause of action and conclusively determines the liability of a defendant. *Skyler Ltd. Partnership v. S.P. Douthett & Co.,* 212 Conn. 802 (1989).

With respect to the present matter, respondent's default established its liability for violations of the Connecticut Fair Employment Practices Act (CFEPA), (C.G.S. §46a-60(a)(1)), and the Americans with Disabilities Act (ADA), (42 U.S.C. § 12112 et seq.), as cited in the complaint, and also relieved complainant of the not insignificant burden of having to prove that respondent's proferred reason for terminating his employment, the fact that while working in respondent's store he had committed a theft, was a pretext for discrimination.

"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 prayed. 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." (Emphasis in original; internal quotation marks omitted.) Catalina v. Nicolelli, 90 Conn.App. 219, 221, 876 A.2d 588 (2005).

A hearing in damages is held following a default so that the presiding referee can take evidence to: 1) determine what measures will be necessary to eliminate respondent's discriminatory practice(s); 2) fashion orders that ensure against future civil rights violations by respondent; and 3) 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).

Mitigation

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).

A complainant in an employment discrimination case such as this has a duty to mitigate his damages by using reasonable diligence to find other suitable employment. The goal of this mitigation requirement is to prevent former employees from simply remaining idle. Raimondo v. Amax, Inc., 843 F.Supp. 806, 809 (D.Conn.1994).

Here complainant found new employment approximately six (6) weeks after respondent terminated him, working first at Mo's, then moving onto Olympia where he remained employed for the next fifteen months. His pay at Olympia was substantially similar to, actually more than the average weekly wage he had earned while working for respondent.

Complainant's having quickly secured replacement employment speaks for itself with respect to his having exercised the requisite diligence to mitigate the economic damages resulting from respondent's having terminated him.

Back Pay Award

Accordingly, I am granting complainant's request for back pay for the seven (7) week period beginning on December 12, 2007, the date of his termination, through February 5, 2008, the date on which he began working for Olympia.

Complainant remained employed by Olympia until May of the following year when that company terminated him. Testifying at the hearing in damages he said that he believed he had been let go because the company thought it would be better to pay him a workers compensation settlement and cover his unemployment, than to continue to employ him, but he did not testify to the amount he had received in the settlement. (Tr. 8-9).

Complainant was unemployed for the eleven months between May, 2008 when he left Olympia and April, 2009 when he took a less than full-time work at JT Ghamo. Although his request for back pay encompasses this period, he has provided no

evidence of and did not testify to having conducted a job search or exercising any other reasonable effort to satisfy his legal obligation to mitigate damages during this period. (Tr. 9, Tr. 11).

On this record, I am required to deny any claim for continued back pay.

Front Pay

Front pay is the amount of money an employee would have made while working for the employer in the future, without the discrimination.

The words "if applicable" follow complainant's request for front pay damages. I presume these words are intended to acknowledge the fact that respondent's being out of business forecloses the possibility of reinstatement as a remedy and arguably front pay, a substitute remedy in instances when reinstatement is infeasible or inappropriate, as well.

Whether or not there are circumstances in which front pay would be "applicable" as a standalone remedy is not relevant here. As was the case with back pay, evidence of mitigation is prerequisite front pay award. As complainant has failed to produce such evidence, its front pay request is denied as well.

Emotional Distress Damages

Complainant has not presented credible or detailed evidence demonstrating his emotional distress as a result of respondent's discriminatory conduct.

In response to Commission counsel's questions at the hearing in damages, he testified to: thinking about his termination by respondent on a monthly, sometimes a weekly basis; experiencing some anger and anxiety; and, as a corollary of these emotions, the potential for exacerbation of the symptoms of his chronic diseases, although he has not required specific medical or pharmaceutical intervention for same. (Tr. 11–13)

There are four criteria to be considered for awarding an emotional distress award:

> "[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.

After applying the above-referenced criteria to complainant's testimony, I decline to make an award for emotional distress.

Reimbursement for prescription costs

Complainant seeks reimbursement for prescription costs. At the hearing in damages he testified that he received medical coverage from respondent and that he "thought" the policy also covered prescription drugs. He provided a rough estimate of $4,500 for out-of-pocket prescription costs incurred subsequent to his termination. (Tr. 6-7)

"It is the hearing officer's prerogative to assess the credibility of the witnesses and believe or disbelieve any evidence presented." (Citation omitted.) Levy v. CHRO, 35 Conn. App. 474, 489, 646 A.2d 893 (1994).

Because I am unwilling to order reimbursement on complainant's word alone, in the absence of any evidence of prescription coverage, medical bills, receipts or other proof out his out of pocket payments upon which I could rely, I am denying the request.

V. ORDER OF RELIEF

1. Respondent shall pay to complainant the sum of $1,236.00 ($3,000.00 less unemployment compensation received of $1,764.00) as back pay for the period between his termination by respondent on December 12, 2007 to February 5, 2008, the date on which he began working at Olympia.
2. Respondent shall pay to the Commission the amount of $1,764.00, and the Commission shall transfer this amount to the State of Connecticut Labor Department as repayment of unemployment compensation paid to the Complainant, pursuant to General Statutes § 46a-86(b).
3. Respondent shall pay complainant prejudgment and post-judgment interest at the rate of 10% per annum, compounded annually, on the back pay award and any outstanding balance, until paid in full.
4. Respondent shall cease and desist from discriminating against present and future employees and applicants for employment on the basis of age and all other protected bases.
5. 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.

6. 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 2nd day of August, 2012.

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Ellen E. Bromley
Presiding Human Rights Referee

cc.

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