

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

Commission on Human Rights
and Opportunities ex rel. Robert
Whitney, Complainant

CHRO No. 0630256
Fed No. 16aa600317

v.

Regal Stageways Limousines,
Respondent

March 26, 2012

I. PARTIES

The complainant is Robert Whitney (complainant) who resides at 112 Beecher Street, Southington, Connecticut. The respondent is Regal Stageways Limousines (respondent) located at 331 Main Street, Bristol, Connecticut. 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.

II. PROCEDURAL BACKGROUND

1. On November 8, 2005, complainant filed an employment discrimination complaint (the complaint) with the Commission alleging that respondent had terminated his employment in violation of Connecticut General Statutes (C.G.S.) §46a-58a, §46a-60(a)(1) and the Age Discrimination in Employment Act of 1967 (the ADEA), 29 USC 621-634. Specifically, complainant, a limousine driver, alleged that on or about May 13, 2005 respondent employer had ordered complainant to return respondent's car/limousine, accused him of being too old and senile to do his job, and then fired him.
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 April 10, 2010, a Commission investigator certified the complaint to public hearing in accordance with C.G.S. §46a-84(a).
3. On April 16, 2010, Chief Human Rights Referee J. Allen Kerr, Jr. designated himself as presiding referee in this 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 that was 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.”

The notice set the date and time of the hearing conference for May 14, 2010 at 10:00 a.m.

5. On April 16, 2010, the Office of Public Hearings (OPH) sent the notice of contested case proceeding to respondent by certified mail, return receipt requested.
6. On April 17, 2010, the United States Postal Service (USPS) attempted to deliver the notice of contested case proceeding to respondent. Unable to obtain the signature required prerequisite to certified mail delivery, the USPS left notice of its delivery attempt along with instructions informing respondent how, where and when to pick up the piece of certified mail.
7. The USPS left second and third notices at respondent’s address on May 7, 2010 and May 11, 2010 respectively, again informing respondent of delivery attempts and providing instructions as to how and where to pick up its certified mail.
8. On May 26, 2010, the USPS designated the certified envelope as unclaimed and returned the mail to OPH, where it was stamped “received” on June 1, 2010.
9. Referee Kerr convened the hearing conference on May 14, 2010, at 10:00 a.m., as scheduled. Complainant and the Commission appeared. Respondent did not.
10. After the hearing conference, Referee Kerr issued a conference summary and order dated May 17, 2010 in which, among other scheduling orders and instructions, he:
 - a) provided respondent with additional time within which to file its answer to the complaint, extending that deadline to May 21, 2010;
 - b) referred the case to Human Rights Referee Thomas C. Austin, Jr. (the settlement referee) for settlement purposes;
 - c) ordered that ex parte settlement conference reports be submitted to the settlement referee by June 18, 2010;
 - d) ordered the parties to appear before the settlement referee for a settlement conference on June 25, 2010 at 10:00 a.m.; and

e) notified the parties that absent a showing of good cause, failure to appear at any lawfully noticed hearing or conference could result in the imposition of sanctions, including default or dismissal of the complaint.

11. The conference summary and order was sent to the respondent by First Class U.S. Mail (First Class Mail). That mailing was not returned to OPH.
12. Respondent did not respond to the order, failing to file either an answer to the complaint or a settlement conference report.
13. On June 25, 2010 settlement referee Austin convened the scheduled settlement conference. Complainant and the Commission appeared. Respondent did not.
14. Notwithstanding respondent's failure to appear, after convening the settlement conference, settlement referee Austin placed a telephone call to respondent. He reached respondent, offered to reschedule settlement discussions at respondent's convenience and, after confirming the availability of the other parties, re-scheduled the settlement conference for a date and time agreeable to respondent, July 8, 2010 at 9:30 a.m.
15. Settlement referee Austin then prepared and instructed OPH to send all parties a "Notice of Settlement Conference Continuance," to the agreed upon date and time.
16. OPH sent the Notice of Settlement Conference Continuance to respondent by First Class Mail. That mailing was not returned.
17. On July 8, 2010, the settlement referee convened the continued settlement conference. Complainant and the Commission appeared. Respondent did not. Once again settlement referee Austin placed a telephone call to respondent.
18. The settlement referee's contemporaneous notes state "Resp. failed to appear" and "Called Resp. who stated he would not appear this despite the S. Conf. Being scheduled at his convenience."
19. On August 4, 2010 the Commission filed a motion for default of respondent and for a hearing in damages.
20. On August 19, 2010 Referee Kerr issued an order of default against respondent and scheduled a hearing in damages for October 6, 2010.
21. After several continuances, of which all parties were notified by First Class Mail, which mail was not returned to OPH, a hearing in damages was scheduled for May 27, 2011, at 11:30 a.m. at OPH.
22. Respondent was notified of the hearing in damages by First Class Mail. That mail was not returned to OPH.

23. The hearing was convened on May 27, 2011. Complainant and the Commission were in attendance. Neither respondent nor any representative of respondent appeared. Referee Kerr presided over the hearing.
24. The transcript of the hearing in damages, dated May 27, 2011, was received by OPH on June 7, 2011.
25. By order dated June 21, 2011, Referee Kerr set July 8, 2011 as the date on which the record would close, ordering the Commission to file any proposed computation of damages by that date.
26. Prior to the date set for closing the record, however, Referee Kerr's term (and the terms of all other human rights referees) expired. Accordingly, effective July 1, 2011, all OPH proceedings were stayed, pending gubernatorial appointment of new human rights referees.
27. Governor Malloy appointed new human rights referees, including the undersigned Human Rights Referee Ellen E. Bromley, on December 12, 2011.
28. The undersigned was assigned this matter for such further processing as may be required, including but not limited to reviewing the complainant's computation of damages.
29. On January 18, 2012, the Commission filed a post hearing brief on damages and a transmission of complainant's supplemental documents. The latter consisted of a copy of the complaint, complainant's affidavit (Affidavit) and his income tax returns for 2008, 2009 and 2010.
30. The record closed on January 18, 2012 and the matter is now before me for a determination of damages and ordering such other remedies as are deemed appropriate in the circumstances.

III. FINDINGS OF FACT

Findings of fact are based exclusively on the evidence in the record and on matters noticed. 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 "CHRO Ex." followed by the exhibit number. Complainant's submissions are identified as noted above. 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. The factual allegations contained in the complaint are deemed established as a result of the default. Additional facts are deemed to be established as a result of complainant's testimony at the hearing in damages and the exhibits admitted into

evidence. These additional facts (a/k/a findings) will be limited to those that add relevant detail to facts previously plead.

3. The relevant allegations of the complaint affidavit, legally incorporated and accepted for the purpose of establishing liability can be summarized as follows: complainant, Robert Whitney, a 71 year old man, was employed by respondent, Regal Stageways Limousines as a limousine driver from late 2002 until May 13, 2005 on which date respondent instructed him to bring in [return] respondent's car and, after stating that complainant was too old and senile to do his job, fired him.
4. Prior to being terminated, complainant was being paid ten (\$10.00) dollars per hour (Tr. 7)
5. Complainant worked an average of forty-five (45) hours per week. (Tr. 7)
6. Complainant also earned gratuities, averaging about one hundred and fifty (\$150.00) dollars per week. (Tr. 8)
7. Six (6) weeks after being terminated by respondent, complainant began working at Castle Sedans. His hours and duties were similar to those previously required by respondent and his pay was substantially equivalent. (Tr. 9-11)
8. Due to reductions in both force and fleet size attributable to the failing economy, complainant's employment with Castle Sedans terminated in January, 2008. (Tr. 11-12)
9. From April, 2008 until December 2, 2009, complainant worked as an independent contractor making deliveries for Avant Courier Service (Avant). He drove his own car, paid for his own gas and tolls and was reimbursed on the basis of mileage, as calculated by Avant. (Tr. 12-14)
10. Complainant testified that he earned \$18,000 during the first year he worked for Avant. (Tr. 13)
11. Complainant also drove for Bill's Limo LLC (Bill's) on an ad hoc basis during 2008. (Affidavit)
12. In calendar year 2008 complainant reported \$7,319 in income as an independent contractor on account of work performed at Avant's request and \$4,733 in wages from Bill's. (complainant's U.S. Individual Income Tax Return 2008, form 1040 line 21 and Schedule C)
13. In calendar year 2009 complainant reported \$21,835 in income as an independent courier. (complainant's U.S. Individual Income Tax Return 2008, form 1040 line 21 and Schedule C)

14. From December 2, 2009 through December 16, 2010 complainant was unable to work due to accident injuries and rehabilitation. (Tr. 14-15)

15. Complainant has not found employment since December 16, 2010, the date on which he was cleared by his doctor to return to work. (Tr. 19, Affidavit)

IV. CONCLUSIONS OF LAW AND ANALYSIS

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

The default order was properly entered as a result of respondent's having failed to answer the allegations in the complaint and having failed to appear at a hearing and settlement conferences, all lawfully noticed (Connecticut General Statutes §46a-84(f); Regulations §46a-54-88a(a)(1),(2)).

A default admits the material facts that constitute a cause of action and conclusively determines the liability of a defendant. *Skylar 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 C.G.S. §46a-60(a)(1), 46a-58 (a) and the Age Discrimination Act of 1967, as amended, 29 USC 621 et seq. (ADEA), all as cited in the complaint.

The purpose of the hearing in damages that follows the determination of liability is to determine the relief necessary to eliminate the discriminatory practice and to make complainant whole, placing him in the position he would have been in absent respondent's discriminatory action. Connecticut General Statutes §46a-86; Regulations §46a-54-88a(b); *State of Connecticut v. Commission on Human Rights and Opportunities*, 211 Conn. 464, 478 (1989).

"In an action at law, the rule is that the entry of a default operates as a confession by the defaulted defendant of the truth of the material facts alleged in the complaint, which are essential to entitle the plaintiff to some of the relief requested. It is not the equivalent of an admission of all of the facts pleaded. The limit of its effect is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive." (Internal quotation marks omitted.) *Murray v. Taylor*, 65 Conn. App., 334, 335 (Conn. App. 2001).

A 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)

Complainant's actions speak for themselves with respect to his having met his initial burden. At the hearing in damages, he testified that six (6) weeks after respondent fired him he found work with Castle Sedans (Castle). He remained employed with Castle for the next two and a half years. There, his take home pay was approximately \$600 per week, or \$31,200 per year, substantially similar to what he had earned as respondent's employee. (Post Trial Brief, page 5)

When complainant's employment with Castle ended in January, 2008, his duty to mitigate his economic damages continued. He was unemployed for about four (4) months, from January through April, 2008, but then found work with Avant Courier Services (Avant) as an independent courier. (Tr. 11) In addition, he further supplemented his 2008 income by moonlighting for Bill's Limo LLC. (Affidavit; complainant's 2008 U.S. Individual Income Tax Return) Once again, complainant's subsequent, and relatively quick re-employment, sufficiently establishes that he fulfilled his duty to mitigate.

Complainant's success in mitigating the damages resulting from respondent's illegal discrimination did not, as it had previously, at least for the duration of his employment with Castle, eliminate them. At Avant, where he worked from April, 2008 through December 2, 2009, complainant was required to use his own vehicle and to pay his own expenses. Further, his compensation was determined pursuant to a mileage calculation that did not take complete account of actual distances travelled. (Tr. 12-14) His income was substantially reduced during this period.

The accident that ended complainant's tenure with Avant in December, 2009 left him unable to work for a year. He was medically cleared to return to work on December 16, 2010, but has not worked since then. Accordingly, complainant's request for relief includes the period of time between December 16, 2010 and the present.

While it is tempting to assess maximum damages against a respondent who has demonstrated flagrant disregard for our processes, mitigation is still a question of fact turning on reasonableness and diligence and the fact is that in any successful claim for illegal termination, it is the intent of the law to compensate the employee for the wrong that has been done, not to grant him a windfall by over-compensating him.

That said, notwithstanding the fact of complainant's un-rebutted testimony that he has been "looking for something" since having been cleared to return to work (Tr. 19), he provided no specific details about his job search and submitted no evidence, broadly referencing the "snug labor market" and his age as possible explanations for his continued unemployment. (Tr. 19, 20) Despite the difficult economy, it seems unlikely that reasonable diligence would have failed to yield an experienced independent contractor seeking employment in a familiar market with even a few assignments over the course of more than a year. (Affidavit) With respect to this final time period,

complainant has not demonstrated that he acted with the reasonable diligence required in an effort to offset or mitigate his damages.

Accordingly, I find that complainant is entitled to damages in the form of back pay relief, as specifically authorized by Connecticut General Statute §46a-86(b), from May 13, 2005, the date of his termination by respondent, through December 2, 2009, the date on which his employment with Avant terminated, but not for the period following his clearance to return to work on December 16, 2010 through the present. To the extent that complainant's damages were offset by his earnings during the period for which damages are awarded, such earnings shall be calculated on the net income basis set forth in the Commission's post hearing brief on damages. (Page 10, Column A)

An award of pre-judgment interest is within the discretion of this tribunal; it is an appropriate means of fully restoring the complainant to the economic position he would have been in but for his discharge. *Frank's Supermarket v. Michaud*, Docket No. CV95-549356S, Superior Court, judicial district of Hartford/New Britain at Hartford, pp. 17-18 (April 22, 1996); *Commission on Human Rights and Opportunities ex rel. Myles v. Ice Cream Delight and Bakery, Inc.*, CHRO No. 9310191, pp. 9-10 (September 1, 1999).

In fact, according to the Second Circuit, it is "ordinarily an abuse of discretion not to include pre-judgment interest on a back pay award." *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 145 (2nd Cir. 1993), cert. denied, 510 U.S. 1164 (1994). This tribunal, like state and federal courts, has the discretion to choose a pre-judgment interest calculation designed to make the complainant whole. *Silhouette Optical Ltd. v. Commission on Human Rights and Opportunities*, 10 Conn. L. Rptr. No. 19, 599 (February 28, 1994). An appropriate rate of interest, as used in other decisions, is ten percent. See General Statutes §37-3a; *Frank's Supermarket v. Michaud*, supra, 18-19; *Silhouette Optical Ltd. v. Commission*, supra; *Commission on Human Rights and Opportunities ex rel. Rose v. Payless Shoesource, Inc.*, CHRO No. 99203353 (November 1, 1999).

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, Ltd. v. Commission on Human Rights and Opportunities*, 265 Conn. 127, 144-45.

Accordingly, respondent shall pay complainant both pre- and post-judgment interest on the back pay award through the date of payment.

V. ORDER OF RELIEF

1. Respondent shall pay to complainant the sum of \$59,302 as back pay for the period of May 13, 2005 to December 2, 2009.
2. 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.
3. 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.
4. 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.
5. 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 26th day of March, 2012.

Ellen E. Bromley
Presiding Human Rights Referee

c:

Robert Whitney
Regal Stageways Limousines
Alix Simonetti, Esq.