

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

MOHAMMED AHMED, ZAKIR AHMED, SYED Y,
BAKTH, HASAN AHMED, AMINUR RASHID,
HELAL AHMED, SANJIT K. DEV, MD
MESHKATH HUSSAIN,

Complainant,

v.

GILT MANAGEMENT, LLC,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10110237
10110238
10110239
10110240
10110241
10110242
10110243
10110481

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on March 31, 2008, by Robert J. Tuosto, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, ACTING COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED,

DATED:

6/16/08


GALEN D. KIRKLAND
ACTING COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF
HUMAN RIGHTS

on the Complaint of

MOHAMMED AHMED, ZAKIR AHMED,
SYED K. BAKTH, AMINUR RASHID,
HELAL AHMED, HASNAN AHMED,
SAMJIT L. DEV, MESHKATH HUSSAIN,
Complainants,

v.

GILT MANAGEMENT, LLC,
Respondent.

RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case Nos.: 10110237, 10110238,
10110239, 10110240, 10110241,
10110242, 10110243, 10110481

SUMMARY

Complainants, eight former employees of Respondent, alleged that they suffered unlawful discrimination on the basis of their Bangladeshi nationality when they were treated differentially by Respondent, and when their employment was terminated. However, Complainants failed to prove their cases and their complaints are dismissed.

PROCEEDINGS IN THE CASE

On February 15, 2006 and March 2, 2006, Complainants filed verified complaints with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on January 22-23, 2008.

Complainants and Respondent appeared at the hearing. The Division was represented by Pamela Chen, Esq., Deputy Commissioner for Enforcement, by Bellew S. McManus, Esq. Respondent was represented by Judith A. Stoll, Esq., of the law firm of Kane Kessler, P.C., New York, New York.

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

1. Complainants, eight restaurant workers of Bangladeshi nationality, alleged that they were subjected to unlawful discrimination by being treated differentially while working for Respondent, and by having their services terminated. (ALJ Exhs. 1, 4, 7, 10, 13, 16, 19, 22; Tr. 12)

2. Respondent denied unlawful discrimination in its verified Answers. (ALJ Exhs. 25, 26, 27, 28, 29, 30, 31, 32)

Background

3. In December, 2005, Respondent opened a restaurant, named ‘Gilt’, in the New York Palace Hotel. Respondent intended to attain a four star rating by offering fine dining to its patrons. The previous month Respondent hired 40 employees, which included approximately

14-15 Bangladeshis, for various positions in the restaurant. Complainants were eight of the Bangladeshis originally hired. (Respondent's Exh. 6; Tr. 67, 101, 102, 104, 275, 276, 286, 304)

4. While the standard probationary period for such restaurant positions was 60 days, Respondent had negotiated with the union representing its workers to have a 180 day probationary period. This was done because 60 days was thought of as not enough time to judge an employee's work performance. During the probationary period an employee's services could be terminated for any reason. (Joint Exhs. 2, 3; Tr. 106, 107, 257, 289, 291-92, 372)

Employee Compensation

5. Employee wages were set according to the collective bargaining agreement and the classification of each employee: Front Waiters, Back Waiters and Bussers were the classes of employees originally hired. Additionally, the position of Expediter evolved over time. (Joint Exh. 1; Tr. 81, 280-86, 293)

6. In addition to wages, employees earned additional compensation by pooling all the money earned in tips and distributing it according to the number of "points" each class of worker was assigned. Initially, each front waiter earned five points, each back waiter earned four points, and each Busser earned three points. (Respondent's Exh. 5; Tr. 82-84, 250-53, 293-94)

7. Complainant Mohammed Ahmed, who eventually worked as an Expediter, received four points as he was classified a Back Waiter. An individual who was originally hired in January, 2006, also eventually became an Expediter but received five points because he was classified as a Front Waiter. (Tr. 295-97, 359, 367)

December, 2005 to February, 2006

8. In the time period from the opening of Gilt until February, 2006, 14 employees were terminated or voluntarily resigned. One of the 14 was Bangladeshi. (Respondent's Exhs. 1, 6; Tr. 114, 307-08)

Layoffs at Gilt-February, 2006

9. In February, 2006, after a "devastating" review Gilt received only a two star rating which led to a dramatic negative impact on business. Consequently, it was decided to end Gilt's lunch service which eliminated five shifts and the lay off of 14 employees of which eight (the Complainants) were Bangladeshi. 12 of the remaining front staff were retained of which six were Bangladeshi. (Respondent's Exhs. 2, 6; Tr. 69, 92, 117, 131, 133, 145-46, 256, 258, 264, 309-10, 311, 315, 348, 374)

10. Job performance was the only criterion used to make layoffs. Complainant Mohammed Ahmed was laid off from his Front Waiter position because he failed to demonstrate the necessary motivation or enthusiasm for his job. Complainant Zakir Ahmed was laid off from his Back Waiter position because of a lack of motivation as well as his stated desire to work only lunch service. Complainant Syed Bakth was laid off from his Busser position because he had been the subject of several complaints. Complainant Aminur Rashid was laid off from his Busser position because of a lack of knowledge about his job. Complainant Helal Ahmed was laid off from his Back Waiter position because of "terrible" communication and focus. Complainants Hasan Ahmed and Sanjit Dev were laid off from their Busser and Back Waiter positions, respectively, because they were difficult and lacked motivation. Complainant Meshkath Hussain was laid off from his Busser position because of both his lack of motivation and communication skills. (Respondent's Exh. 2; Tr. 310, 327, 332-37)

11. At least two of the supervisors who were responsible for staff hiring were also responsible for the decision to terminate the employment of Complainants in February, 2006. (Tr. 232, 233, 256, 258, 260, 275, 279, 310)

OPINION AND DECISION

The Human Rights Law makes it an unlawfully discriminatory practice for an employer, “because of the...national origin...of any individual...to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.” Human Rights Law § 296.1(a).

A complainant establishes a prima facie case of unlawful discrimination based upon nationality by showing that: 1) he is a member of a protected class; 2) he was qualified to hold the position; 3) he was terminated from employment or suffered another adverse employment action; and 4) the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). A complainant’s burden in establishing a prima facie case has been found to be ‘de minimis’. *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dep’t., 1998).

Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must produce evidence showing that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate, nondiscriminatory reason for its actions, a complainant must then show that the proffered reason is pretextual. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

Here, Complainants met the low threshold of making out a prima facie case: they were within the protected class, were qualified to hold the positions in question until the turndown in

Respondent's business, they suffered adverse employment actions, and the adverse employment actions occurred under circumstances giving rise to an inference of discrimination insofar as more than half of those laid off were the same nationality as Complainants.

However, Respondent articulated legitimate, nondiscriminatory reasons for its employment decisions, namely, that Complainants had rendered unsatisfactory job performances during their probationary periods. The reduction in force, necessitated by a dramatic downturn in Respondent's business, was entirely predicated upon these unsatisfactory job performances. Alternatively, the record is devoid of any proof that Complainants were laid off as a result of their national origin. In fact, in the time prior to February, 2006, only one of the 14 employees who separated from Respondent was Bangladeshi. Likewise, in the wake of this event half of the remaining front staff was Bangladeshi.

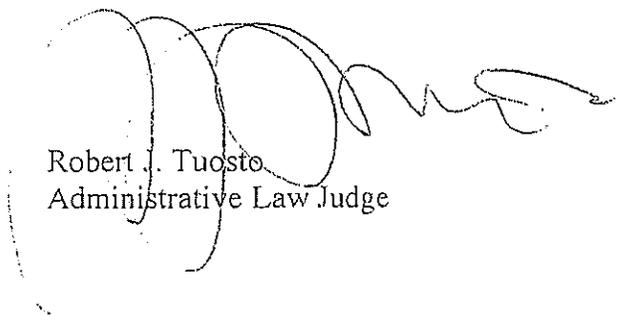
Additionally, any attempt to show differential treatment as to compensation was unavailing given that the comparator chosen was hired into a different job classification, i.e., a Front Waiter rather than Back Waiter.

Finally, a strong inference exists that no discrimination was involved in Respondent's employment decisions given that the supervisors who laid off Complainants were also the same individuals who hired them just three months earlier. *See Singh v. State of New York Office of Real Property Services*, 40 A.D.3d 1354, 837 N.Y.S.2d 378 (3d Dep't., 2007)(strong inference of no discrimination when the supervisors who terminated an employee were the same supervisors who hired her a little more than a year earlier).

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby ORDERED, that the complaints be, and the same hereby are, dismissed.

DATED: March 31, 2008
Bronx, New York



Robert J. Tuosto
Administrative Law Judge