

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

JEAN FRITZ CHERY,

Complainant,

v.

LEMON LIMITED PARTNERSHIP,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10105024

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 January 15, 2008, by Thomas J. Marlow, 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 KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”), WITH THE FOLLOWING**

**AMENDMENTS:**

- The mental anguish damages shall be increased to \$50,000. *See State Div. of Human Rights v. ARC XVI Inwood, Inc.*, 17 A.D.3d 239, 796 N.Y.S.2d 238 (1st Dept. 2005)
- Within sixty days of the date of this Final Order, Respondent shall promulgate

policies and procedures for the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. These policies and procedures shall include the establishment and formalization of a reporting mechanism for employees who believe they have been aggrieved, and shall contain the development and implementation of a training program in the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. A copy of the policies and procedures and the training program shall be provided to all employees.

- A copy of the policies and procedures and the training program shall be produced within sixty days of this Order to Caroline J. Downey, General Counsel of the Division at One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458.
- Respondent shall prominently post a copy of the Division's poster (available at the Division's website at [www.dhr.state.ny.us](http://www.dhr.state.ny.us) under the homepage heading, "NYS Division of Human Rights Is...") in places on Respondent's premises where employees are likely to view it.

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**, this day of February 8, 2008.

  
KUMIKO GIBSON  
COMMISSIONER

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

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on the Complaint of

JEAN FRITZ CHERY,

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v.

LEMON LIMITED PARTNERSHIP,

Respondent.

RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER

Case No. 10105024

SUMMARY

Complainant alleged that Respondent discriminated against him, because of race, in the terms, conditions, and privileges of his employment. Respondent denied the allegations. The New York State Division of Human Rights ("Division") finds that Respondent discriminated against Complainant because of race in the conditions of Complainant's employment but that the evidence does not support a finding that the termination of Complainant's employment was because of his race. Complainant is entitled to relief in the form of an award of compensatory damages for his mental anguish.

PROCEEDINGS IN THE CASE

On April 11, 2005, Complainant filed a verified complaint with the 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 complaint 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 Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on October 29, 2007.

Complainant appeared at the hearing. Complainant was represented by William Perniciaro, Esq. Respondent appeared at the hearing through its counsel, Pesetsky & Bookman, by Randye F. Bernfeld, Esq.

Both Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

#### **FINDINGS OF FACT**

1. The race of Complainant is black. (Tr. 57-58; ALJ’s Exhibit 1)
2. Complainant was employed by Respondent as a porter at its restaurant, known to Complainant as The Lemon Restaurant, located at 230 Park Avenue South, New York, NY, from January 15, 2002, to April 8, 2005. (Tr. 11-12, 16; ALJ’s Exhibit 1)
3. Complainant was hired by Isaac Wallace (“Wallace”) who was the supervisor of Respondent’s restaurants. (Tr. 13) Wallace is black. (Tr. 54)
4. During the time of his employment at The Lemon Restaurant, Complainant worked six days per week, Monday through Saturday, and never missed work for sickness, holidays, or vacation. (Tr. 14-15) He also worked extra hours. (Tr. 14)

5. In 2004, a white man named Jason became the general manager of The Lemon Restaurant. (Tr. 16-18, 20, 23-24) Complainant does not know the last name of Jason. (Tr. 18)

6. In 2004 and 2005, a white man named Chris was the bar manager of The Lemon Restaurant. (Tr. 16, 18, 39) Complainant does not know the last name of Chris. (Tr. 18)

7. Between January 15, 2002, and April 8, 2005, a man described by Complainant as a Chinese man and known to him as Tan, was the busboy manager of The Lemon Restaurant. (Tr. 22-23, 25-27)

8. Respondent also had another restaurant in New York City between January 15, 2002, and April 8, 2005, known to Complainant as Pop Restaurant. (Tr. 11-12, 37)

9. In or about May of 2004, a black porter working at Pop Restaurant murdered the white manager of Pop Restaurant. (Tr. 37-38, 50)

10. This porter was hired by Wallace and once lived at the same shelter where Complainant once lived. (Tr. 52-53)

11. Prior to the murder, Jason, Chris, and Tan called Complainant "Negro," "all the time," in a manner Complainant did not like. (Tr. 24-25, 38)

12. After Jason became the general manager, he would stay after the restaurant was closed and have parties. (Tr. 16-18, 20, 24) When Jason had the parties, Complainant would have to serve them, bringing liquor, beer, and ice and often would be called Negro. (Tr. 24)

13. Tan would call Complainant an "African monkey." (Tr. 26)

14. After the murder, Complainant's work experience became worse. (Tr. 38) Jason, Chris, and Tan continued to call Complainant "Negro" and started saying, "Do you trust a Negro? No, I never did, I never will," speaking among themselves in a manner that Complainant could hear whenever he was working near them. (Tr. 24-25, 38-40)

15. Complainant told Wallace that he was being called "Negro." (Tr. 53)

16. Complainant did not like the way he was being treated but he continued to work there because he loved his job and had to pay the bills and was responsible for four children and his mother. (Tr. 25)

17. On or about April 8, 2007, while Complainant was working at The Lemon Restaurant, Jason asked Complainant if he saw \$8,000 that Chris, the bar manager, left at the bar. (Tr. 16-18) Complainant answered, "No." (Tr. 17)

18. Never before had Complainant heard of a bar manager leaving money at the bar. (Tr. 20)

19. On or about April 9, 2007, Jason told Complainant that his employment at The Lemon Restaurant was terminated. (Tr. 17) At that time, he talked with Complainant about the missing money and finally said, "I'm asking you nice and easy. Please leave. You're fired." (Tr. 18)

20. When Complainant worked at The Lemon Restaurant, there were two busboys, two waiters, and one waitress working there, all of whom were black. (Tr. 51-52) Complainant was the only person fired at the time this money was missing. (Tr. 27)

21. There was another black porter working at The Lemon Restaurant when Complainant worked there. (Tr. 15, 27-28) This other porter was fired eleven months before Complainant was fired. (Tr. 28) According to Complainant, the other porter was fired because, "They claim that he was lazy." (Tr. 52)

22. Complainant testified that his emotions did not "rise up" until he was fired. (Tr. 25) When his emotions finally did "rise up," they left him with a "permanent migraine" and he had trouble sleeping. (Tr. 25, 61)

23. When Complainant returned to The Lemon Restaurant to “clean up” his locker, he observed two Mexican men doing the work he had done when he worked there. (Tr. 28-29)

24. The experience that Complainant had while working at The Lemon Restaurant left him with “fear in my heart.” (Tr. 34)

### OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual’s race. Human Rights Law § 296.1(a)

The complaint raised an issue of discrimination in the conditions of employment because of race. Complainant can sustain his burden of proving discrimination in the conditions of employment because of race by showing that there was a hostile work environment at his place of employment and it existed because of his race.

To establish that a hostile work environment existed, Complainant would have to show that he was a member of a protected class, that the conduct or words upon which the claim of discrimination is based were unwelcome, that the conduct or words were prompted because of his race, that the conduct or words were “sufficiently severe or pervasive to alter the conditions of the victim’s employment,” and that Respondent is responsible for the conduct or words. *See Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4<sup>th</sup> Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 669 N.Y.S.2d 122 (Sup. Ct. N.Y. County 1997), *appeal dismissed*, 256 A.D.2d 269, 682 N.Y.S.2d 167 (1<sup>st</sup> Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919, 691 N.Y.S.2d 383 (1999), *lv. to appeal denied*, 94 N.Y.2d

753, 700 N.Y.S.2d 427 (1999). In evaluating a work environment to determine if it was hostile, one must consider the totality of the circumstances from both a reasonable person's standpoint as well as from the Complainant's subjective perspective. *See Father Belle*, 221 A.D.2d at 51.

The evidence establishes that Respondent subjected Complainant to a hostile work environment, one that was filled with discriminatory ridicule and insult, with white managers calling him Negro in a manner he did not like, and a Chinese manager calling him an "African monkey." Complainant was credible when he said this went on all the time, when he said that the behavior became worse when a white man named Jason became the general manager, and when he said that he had to do his work with the same managers nearby, hearing them say, "Do you trust a Negro? No, I never did, I never will."

With Jason as the general manager, the conditions of his employment also changed, in that, after the restaurant would close in the early morning hours, Complainant would have to bring liquor, beer, and ice upstairs to Jason's parties where the discriminatory ridicule and insult would continue. It is clear that Jason used his authority to engage in his harassment of Complainant and I credit Complainant's testimony that he did not like the way he was being treated. I find that the unlawful discriminatory conduct of Respondent's managers was sufficiently severe and pervasive to alter the conditions of Complainant's employment.

Complainant also told Respondent's restaurant supervisor that he was being called a "Negro" but this did not stop the unlawful behavior. Under the conditions of employment as described by Complainant, I find the Respondent liable for the unlawful behavior of its managers. *Id.* at 55.

The complaint also raised the issue of discrimination in the termination of Complainant's employment. To prove a claim of unlawful discrimination arising from the termination of

employment, a complainant first must show that he is a member of a protected class, that he was qualified for the position, that he suffered an adverse employment action, and that this adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. *See Stevenson v. Hotel Employees & Rest. Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 811 N.Y.S.2d 633 (2006). Complainant, whose race is black, had been working at The Lemon Restaurant for over three years. There was no evidence presented that, prior to April 8, 2005, there were any complaints regarding his work. After the termination of his employment, he observed two Mexican men doing the work he had performed when he worked for Respondent. Complainant has met the burden of establishing a prima facie case of discrimination. Such burden has been described as “de minimis.” *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1<sup>st</sup> Dept., 1998).

Although Complainant has established a prima facie case of discrimination, Respondent has established a legitimate, non-discriminatory basis for the termination of Complainant’s employment. The evidence establishes that, at or around the time of the termination, Respondent, through its manager, questioned Complainant about money that was allegedly missing. Respondent has also presented evidence that there were other black employees of Respondent whose employments were not terminated when Complainant was fired. The employment of another black porter was terminated by Respondent, but this was done eleven months before Complainant was fired and is too remote in time to support an inference of unlawful discrimination in the termination of Complainant.

The evidence does establish that the manager, who spoke with Complainant about the alleged missing money and who later terminated Complainant, participated in ridicule and insult of Complainant but this was prior to his termination. This behavior must be considered with all

of the other evidence and does not lead to a conclusion that the termination was based on discrimination regarding his race. In fact, Complainant alleged that, at the time of the termination, the manager spoke to him about the missing money in a manner that was free of ridicule. According to Complainant, the manager concluded this conversation by saying, "I'm asking you nice and easy. Please leave."

The evidence does not support a finding that the two conversations about missing money just before the termination of Complainant's employment were pretexts for discrimination, therefore, absent a finding of pretext, the complaint that the termination of Complainant's employment was because of his race must be dismissed. *See Stephenson*, 6 N.Y.3d at 271.

Complainant is entitled to recover compensatory damages for mental anguish caused by unlawful discriminatory conduct for which the Respondent is liable. See Human Rights Law § 297.4 (c) (iii). Although the mental anguish did not become manifest until Complainant's employment was terminated, and much of this anguish can be attributed to what Complainant considered to be an unlawful, discriminatory termination of employment, it is obvious that some of the mental anguish experienced by Complainant after he was terminated, including trouble sleeping, headaches, and a general feeling of fear, came from the unlawful discriminatory conduct that Complainant endured during his employment. It is obvious that Complainant, in order to work and provide for his loved ones, held in this mental anguish that was caused by the discriminatory conduct for which Respondent is liable. Considering the hostile environment that Complainant experienced and the needs he had, it follows that Complainant would hold in his mental anguish "as night follows day." *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 184 (1978).

The evidence referred to above supports an award of \$10,000.00 for mental anguish. *See*

*New York State Dept. of Correctional Servs. V. State Div. of Human Rights*, 215 A.D.2d 908, 626 N.Y.S.2d 588 (3<sup>rd</sup> Dept. 1995). This award is reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *See New York City Transit Authority v. State Division of Human Rights*, 78 N.Y.2d 207, 573 N.Y.S.2d 49 (1991).

### 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 complaint with regard to the conditions of employment be and hereby is sustained; and it is further

ORDERED, that the complaint with regard to the termination be and hereby is dismissed; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors, and assigns shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors, and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days from the date of the Final Order in this matter, Respondent shall pay to Complainant the sum of \$10,000.00, without any withholdings or deductions, as compensatory damages for the mental anguish suffered by Complainant as a result of the unlawful acts of discrimination for which the Respondent is liable. Respondent shall also pay interest to Complainant on

this award, at a rate of nine percent per annum, from the date of the Commissioner's Order until the date payment is made.

2. The aforesaid payment shall be in the form of a certified check made payable to the order of Complainant and delivered to Complainant's attorney, William P. Perniciaro, Esq., 84 New Dorp Plaza, Staten Island, NY 10306, by certified mail, return receipt requested.
3. When Respondent mails said certified check to Complainant's attorney, Respondent shall simultaneously furnish written proof of said payment to Caroline Downey, General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458.
4. Respondent shall cooperate with the Division during any investigation into its compliance with the directives contained in this Order.

DATED: January 15, 2008  
Bronx, New York



Thomas J. Marlow  
Administrative Law Judge