

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

ANDREW W. HAY,

Complainant,

v.

STEVE'S PIER ONE, INC.,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 7943328

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 May 9, 2007, by Robert M. Vespoli, 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 ADDITION TO THE ORDER AS PARAGRAPH 5, IMMEDIATELY FOLLOWING PARAGRAPH 4, WHICH APPEARS ON PAGE 13 OF THE ORDER:

5. In addition to the forgoing remedies, within sixty (60) calendar days of the date of this Order, Respondent shall promulgate policies and procedures for the prevention and redress of sexual discrimination and sexual harassment in the

workplace. These policies and procedures shall include a formalized complaint and reporting mechanism for employees in the event they encounter discriminatory and/or harassing behavior or treatment, and the development and implementation of an orientation program and regular training programs for all supervisory staff and employees regarding sexual discrimination and sexual harassment in the workplace. A copy of these policies and procedures shall be prominently posted in the workplace and shall be made individually available to all supervisory staff and employees. They shall also be provided to Caroline Downey, Acting General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, within the sixty-five (65) calendar days of the date of this 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, this 6th day of June, 2007.


KUMIKI GIBSON
COMMISSIONER

TO:

Complainant

Andrew W. Hay
112 Woods Ave.
Roosevelt, NY 11575

Respondent

Steve's Pier One, Inc.
Attn: Carl Genova, Managing Partner
33 Bayville Avenue
Bayville, NY 11709

Respondent Secondary Address

Steve's Pier One, Inc.
Attn: Steve Karathanos
33 Bayville Avenue
Bayville, NY 11709

Respondent

Steve's Pier One, Inc.
c/o Lobster House
Attn: Carl Genova, Managing Partner
33 Bayville Avenue
Bayville, NY 11709

Hon. Andrew Cuomo, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

State Division of Human Rights

Joshua Zinner, Deputy Commissioner for Enforcement
One Fordham Plaza, 4th Floor
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Marilyn Balcacer, Esq., of Counsel
Enforcement Unit

Robert M. Vespoli
Administrative Law Judge

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Acting General Counsel

Matthew Menes
Adjudication Counsel

Peter G. Buchenholz
Adjudication Counsel

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

ANDREW W. HAY,

Complainant,

v.

STEVE'S PIER ONE, INC.,

Respondent.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 7943328

SUMMARY

Complainant alleged that he was the victim of sexual harassment during his employment with Respondent. The New York State Division of Human Rights ("Division") finds that Respondent discriminated against Complainant by subjecting him to a hostile work environment. Further, the Division finds that Respondent's discriminatory conduct resulted in Complainant's constructive discharge. Complainant is entitled to relief in the form of an award of compensatory damages for back pay and mental anguish.

PROCEEDINGS IN THE CASE

On May 20, 2002, 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division.

A preliminary conference was held on January 5, 2006. Complainant appeared at the preliminary conference. The Division was represented by Gina M. Lopez Summa, Esq., former General Counsel, by Marilyn Balcacer, Esq., of Counsel. Carl Genova appeared on behalf of Respondent and the presiding ALJ granted Respondent leave to obtain counsel. At that time, the preliminary conference was continued until February 10, 2006.

The Complainant appeared at the February 10, 2006 conference and the Division appeared by Ms. Balcacer. The Respondent did not appear. During the preliminary conference, public hearing dates were scheduled for October 24-26, 2006. On February 10, 2006, the Division's Calendar Unit sent continuation letters to all parties advising them of the public hearing dates and a telephone status conference scheduled for April 21, 2006. (ALJ Exhibit VI) Respondent failed to appear at any succeeding status conferences despite continuation letters sent by the Calendar Unit to all parties advising them of the relevant dates. (ALJ Exhibits VII, VIII) None of the letters sent to Respondent were returned to the Calendar Unit as undeliverable and are presumed received. Division searches reveal that Respondent is still conducting business at the same address. (Complainant's Exhibits 2, 3, 4)

A public hearing was held on October 24, 2006. Complainant appeared at the public hearing. The Division was represented by Gina M. Lopez Summa, Esq., former General Counsel, by Matthew Menes, Esq., of Counsel. Respondent did not appear and is in default.

FINDINGS OF FACT

1. Complainant began working for the Respondent as a waiter in or about July, 1999. (Tr. 24-25)
2. Respondent is a restaurant located in Bayville, New York employing 30 or more people. (Tr. 26-27, 57; Complainant's Exhibits 1-4) Joe Genova, Carl Genova and Nick (last name unknown) are some of the owners and managers of Respondent. (Tr. 27-28, 56-57; Complainant's Exhibits 1, 2)
3. Soon after Complainant began his employment with Respondent, he began to experience unwelcome comments and conduct of a sexual nature from several male dishwashers and cooks. (Tr. 44, 136) Complainant could only recall the first names of these individuals identifying them as Rene (last name unknown), Chris (last name unknown), Emanuel (last name unknown) and a man known only as "Marijuana." (Tr. 39-45, 47-48, 63-65, 67-68, 78-80, 135-36, 146-48)
4. These co-workers directed humiliating Spanish slang insults at Complainant. (Tr. 64, 78-79) Complainant understood some of these terms to mean "homosexual," "prostitute," "hooker" and "old female horse." (Tr. 40-41)
5. These individuals also threw things at Complainant, exposed their genitals to him and touched him inappropriately by grabbing him and poking his buttocks with foreign objects. Complainant's sometimes emotional testimony regarding this offensive conduct is credible and is corroborated by his co-worker, Stacia Maderakis. (Tr. 39, 42-43, 45, 47-48, 62-63, 68, 78-80, 135, 146-48)

6. Respondent had no sexual harassment policy during the relevant time period. (Tr. 136) Complainant complained to Joe Genova, Carl Genova and Nick but they did nothing to stop the offensive behavior. (Tr. 46-49, 69, 85-86, 135-36, 145) This offensive behavior directed at Complainant by his co-workers was unwelcome, occurred on a consistent basis and continued up until Complainant left Respondent's employ in or about May, 2001. (Tr. 49, 80-81, 135-36)

7. The cooks and dishwashers sometimes directed comments and conduct of a sexual nature at female co-workers. Many of these female co-workers complained to management but management failed to intervene. (Tr. 68-69, 81)

8. In or about February, 2001, Joe Genova began to request oral sex from Complainant. (Tr. 76, 91, 93) Complainant resisted but complied with Joe Genova's requests on two occasions after work. Complainant felt compelled to comply with Joe Genova's insistent requests for oral sex because Complainant felt threatened and intimidated by him. (Tr. 94-95, 111, 139-41) This conduct, together with the regular harassment from the dishwashers and cooks, compelled Complainant to leave Respondent's employ in or about May, 2001. (Tr. 91-93, 141-42)

9. Complainant accurately declared his earnings in the form of tips and wages on his income tax returns. (Tr. 36) He worked approximately 30 hours per week for Respondent. (Tr. 24-26) In 2000, his only full year working for Respondent, Complainant earned \$20,365.22, approximately \$392.00 per week. (Tr. 114-15; Complainant's Exhibit 8) Complainant did not receive medical benefits from Respondent. (Tr. 109)

10. In or about June, 2001, Complainant began working for CVS Sea Cliff, L.L.C. ("CVS"). (Tr. 109, 121) At CVS he worked roughly 28 hours per work earning \$6.50 per hour, a weekly sum of approximately \$182.00. (Tr. 122) Complainant continued to work part-time at CVS up until at least 2005. (Complainant's Exhibits 10-13)

11. In or about August, 2001, Complainant began to work as a waiter at a restaurant called the White Whale. (Tr. 122-23) At the White Whale, Complainant earned income equal to or greater than the income he earned while he worked for Respondent. (Tr. 123-24) Complainant continued to work at the White Whale up until at least 2005. (Tr. 122-33; Complainant's Exhibits 10, 11-A, 12, 13)

12. The Division finds that Complainant found comparable employment and fully mitigated his pecuniary damages in or about August, 2001 when he obtained employment at the White Whale. (Tr. 122-33; Complainant's Exhibits 8-13)

13. Complainant was emotionally traumatized by the work environment he was exposed to during his employment with Respondent. He felt "angry," "humiliated," "depressed" and "violated," and he continues to feel that way today. (Tr. 105-09; Complainant's Exhibit 6) He sought treatment from a psychiatrist, Dr. Han Soo Lee, in or about December, 1999 until in or about August, 2000, at times discussing his emotional distress and humiliation caused by the harassing behavior he experienced at work. (Tr. 96, 98-99; Complainant's Exhibit 6) Complainant's treatment sessions with Dr. Lee began shortly after the onset of the harassing behavior leveled at Complainant from the dishwashers and cooks. (Tr. 44, 135-36) Dr. Lee prescribed Celexa and Wellbutrin to treat Complainant's depression. (Tr. 99-100; Complainant's Exhibit 6)

14. Complainant also experienced gastrointestinal symptoms which he attributed to his depression. (Tr. 108; Complainant's Exhibit 6) Dr. Lee prescribed Donnatal to treat this condition. (Complainant's Exhibit 6)

OPINION AND DECISION

The record establishes that Respondent discriminated against Complainant by denying him equal terms, conditions and privileges of employment by subjecting him to a hostile work environment.

It is unlawful for an employer to discriminate against an employee on the basis of sex. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.1(a). “The law forbids not only opposite-sex sexual harassment in the workplace, but same-sex sexual harassment as well.” *State Div. of Human Rights v. Stoute*, 36 A.D.3d 257, 263, 826 N.Y.S.2d 122, 126 (2d Dept. 2006) (citations omitted).

In order to sustain a claim of sexual harassment based on a hostile work environment, a complainant must demonstrate that he or she was subjected to conduct that produced a work environment permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of his or her employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

In the case at bar, the conduct described by Complainant is sufficiently severe and pervasive to sustain his claim of sexual harassment. The record evinces numerous specific facts regarding incidents of verbal and physical harassment directed at Complainant. Complainant’s co-workers directed humiliating insults at him. They also threw things at Complainant, exposed their genitals to him and touched him inappropriately by grabbing him and poking his buttocks

with foreign objects. Complainant's sometimes emotional testimony regarding this offensive conduct is credible and is corroborated by his co-worker, Maderakis.

The offensive behavior directed at Complainant by his co-workers was unwelcome and it occurred on a regular and consistent basis. It began shortly after Complainant began working for Respondent in or about July, 1999, and it continued up until Complainant left Respondent's employ in or about May, 2001. The harassment described by Complainant created an abusive work environment and clearly rises to the level of objective severity and pervasiveness required to constitute an actionable claim under the Human Rights Law. Accordingly, Complainant prevails on his sexual harassment claim.

The Division finds that Complainant was constructively discharged by Respondent when he left Respondent's employ in or about May, 2001. In order to establish a claim of constructive discharge, a complainant must show that a reasonable person under similar circumstances would feel compelled to resign in order to avoid continuing discrimination. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 234 (1980).

The hostile work environment that Respondent imposed upon Complainant would lead a reasonable person to feel compelled to resign. The harassing conduct of the cooks and dishwashers toward Complainant occurred continuously for almost two years up until Complainant left Respondent's employ. Further, Complainant was compelled by Joe Genova, a manager and owner of Respondent, to perform sexual acts. Although it may be argued that Complainant's participation in these sexual acts was "voluntary," it was at the same time "unwelcome." The U.S. Supreme Court has explained that,

the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against [his] will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." ... The

correct inquiry is whether [complainant] by [his] conduct indicated that the alleged sexual advances were unwelcome, not whether [his] actual participation in sexual intercourse was voluntary.

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).

Joe Genova was persistent in his requests for oral sex toward the end of Complainant's employment with Respondent. Complainant reluctantly complied with these requests on two occasions after work. Complainant credibly testified that he felt compelled to comply with Joe Genova's insistent requests for oral sex because Complainant felt threatened and intimidated by him. This conduct, together with the regular harassment from the dishwashers and cooks, compelled Complainant to leave Respondent's employ in or about May, 2001. Such conduct would compel any reasonable person to resign his position. Therefore, the Division finds that Complainant was constructively discharged by Respondent.

In the case at bar, Respondent must be held liable for the acts of its employees because its managers and owners knew about the harassment, participated in the harassment and failed to take corrective action. *See Father Belle* at 53, 642 N.Y.S.2d at 746. *Father Belle* stands for the rule that a "corporate employer may be held directly liable for acts of discrimination perpetrated by a high-level managerial employee." *Id.* at 54, 642 N.Y.S.2d at 747. Where the complainant is discriminated against by a low-level supervisor or a co-employee, the complainant need only show that "upper-level supervisors had knowledge of the conduct and ignored it." *Id.*

Complainant complained to Joe Genova, Carl Genova and Nick on numerous occasions, yet Respondent did nothing to end the hostile work environment. Liability must be imputed to Respondent because it knew of the sexual harassment, an owner and manager participated in harassing conduct and Respondent took no remedial action.

Damages

The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner* at 79, 436 N.Y.S.2d at 235.

However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence and be comparable to awards for similar injuries. *State of New York v. N.Y. State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

In the instant case, the Complainant is entitled to compensation for back pay. He earned approximately \$392.00 per week working for Respondent when he was constructively discharged in or about May, 2001. Approximately four weeks later in or about June, 2001, Complainant began working for CVS earning approximately \$182.00 per week. Complainant found comparable employment and fully mitigated his pecuniary damages in or about August, 2001, when he began working at the White Whale restaurant. Therefore, Complainant is entitled to lost wages for the approximate twelve week period between his constructive discharge in or about May, 2001 and the time he fully mitigated his damages in or about August, 2001.

During that twelve week period, Complainant would have earned \$4,704.00 had he continued working for Respondent. It took approximately four weeks before Complainant began working for CVS. He worked at CVS for the remaining eight weeks before he fully mitigated his damages earning approximately \$1,456.00. Thus, Complainant is entitled to \$4,704.00 in lost wages. This amount must be offset by \$1,456.00 which he earned at CVS during that time period. Complainant is therefore entitled to \$3,248.00 in back pay.

In order to effectuate the purpose of the Human Rights Law, the Division finds that an award of pre-determination interest in the instant case is warranted in order to make the Complainant whole. Respondent is therefore liable to Complainant for pre-determination

interest on the back pay amount at a rate of nine percent per annum from May 15, 2004, a reasonable intermediate date, through the date of this Order. *Aurecchione v. N.Y. State Div. of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002).

Complainant is also entitled to recover compensatory damages for mental anguish and humiliation caused by Respondent's discriminatory conduct. When considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge No. 196, etc. v. N.Y. State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *N.Y. State Dep't of Correctional Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

In the case at bar, Complainant credibly testified that he was harassed by the cooks and dishwashers on an almost daily basis for almost two years. These co-workers verbally and physically harassed him in a way that caused him to be intimidated, demeaned and humiliated during this time period. Furthermore, Joe Genova, an owner and manager of Respondent, intimidated Complainant into engaging in unwelcome sexual acts on at least two occasions after

work. Complainant felt “angry,” “humiliated,” “depressed” and “violated” as a result of this injurious work environment and he continues to feel that way today. Complainant produced credible evidence that he sought psychiatric treatment during his employment with Respondent and that he experienced gastrointestinal symptoms which are attributed to his depression. Complainant’s sometimes emotional testimony on this issue is sincere and credible.

In *Kowalewski v. N.Y. State Div. of Human Rights*, 26 A.D.3d 888, 809 N.Y.S.2d 347 (4th Dept. 2006), the court upheld a \$35,000.00 award for mental anguish and humiliation where a complainant was subjected to sexual touching and comments by her employer on a daily basis over the course of three years. Although similar to the facts in *Kowalewski*, the facts in the case at bar are far more severe in that Complainant was also compelled by Joe Genova, a manager and owner of Respondent, to perform oral sex on two occasions after work. Accordingly, the Division finds that an award of \$200,000.00 for mental anguish and humiliation is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See, e.g., Under the Elms, Inc. v. Tolbert*, 1 A.D.3d 373, 766 N.Y.S.2d 876 (2d Dept. 2003); *Town of Hempstead v. State Div. of Human Rights*, 233 A.D.2d 451, 649 N.Y.S.2d 942 (2d Dept. 1996), *lv. app. denied*, 90 N.Y.2d 807, 664 N.Y.S.2d 268 (1997); *Sier v. Jacobs Persinger & Parker*, 276 A.D.2d 401, 714 N.Y.S.2d 283 (1st Dept. 2000).

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 Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$3,248.00 as compensatory damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from May 15, 2004, a reasonable intermediate date, until the date payment is actually made by Respondent.

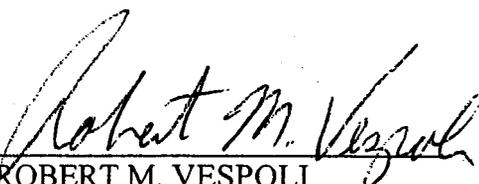
2. Within sixty days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$200,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful discrimination against him. Interest shall accrue on the award at the rate of nine percent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Andrew W. Hay, and delivered by certified mail, return receipt requested, to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Respondent shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One

Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in this Order.

4. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: May 9, 2007
Hempstead, New York


ROBERT M. VESPOLI
Administrative Law Judge