NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of PAULA LEWIS, Complainant, v. SOUTHAMPTON CATCOVE LLC, Respondent.	NOTICE AND FINAL ORDER Case No. 10124606

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 August 25, 2009, 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 GALEN D. KIRKLAND, 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: OCT 02 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

PAULA LEWIS,

Complainant,

v.

SOUTHAMPTON CATCOVE LLC,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10124606**

SUMMARY

Complainant alleged that Respondent paid her less than similarly situated male employees because of her sex and that this conduct resulted in her constructive discharge. Complainant also alleged that Respondent retaliated against her because she supported an age discrimination complaint filed by a co-worker against Respondent. Since the record does not support Complainant's allegations, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 24, 2008, Complainant filed a verified complaint 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 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 Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on May 20 and 21, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by Gregory S. Lisi, Esq. Respondent was represented by Michael J. Cannon, Esq.

The parties filed timely post-hearing briefs.

FINDINGS OF FACT

1. Complainant is female. (Tr. 45)

2. During all relevant times, Complainant resided at 85 Laurel Valley Drive, Sag Harbor, New York 11963. (Tr. 11)

3. Respondent has operated as a hotel since 1997. (Tr. 407-08) On October 10, 2005, Beatrice Gotthelf, the managing partner for Respondent, hired Complainant to work as an administrative assistant at a starting salary of $39,000.00 per year. (Tr. 7, 407-08, 428-29)

4. Complainant has a high school education. (Tr. 85) Before she was hired by Respondent, Complainant was unemployed for approximately two and one-half years, and she had no prior experience in the hotel industry. (Tr. 88-89, 428)

5. Peter Iwanowski was Respondent's general manager from February 18, 2005, until December 2005. He received a salary of $90,000.00 per year during his employment with Respondent. (Tr. 9, 417-18, 504) Iwanowski earned a degree in hotel management and had over thirty-five years of experience in the hospitality industry. (Tr. 121-22; Respondent's Exh. 4) In his previous job, Iwanowski earned $200,000.00 per year as a hotel general manager. He

relocated from Tarrytown, New York to take the general manager position with Respondent. (Tr. 420-22)

6. Iwanowski did not receive a relocation stipend, but he did receive a housing allowance of $1,750.00 per month. (Tr. 421-22, 505) Because Iwanowski had a pre-existing medical condition, Respondent agreed to pay approximately $1,000.00 per month for the insurance premiums on his existing medical coverage. (Tr. 423-24, 506-07) Iwanowksi's compensation package also included a profit sharing incentive, which was to be adjusted on a sliding scale according to annual net profits. Iwanowski did not earn any compensation for this hiring incentive. (Tr. 424-25, 501-03)

7. After Iwanowski left Respondent's employ, Gotthelf promoted Complainant to the general manager position in December 2005 and raised Complainant's salary to $60,000.00 per year. (Tr. 7, 38) In May 2006, Respondent raised Complainant's salary to $70,000.00 per year. (Tr. 8) In August 2006, Respondent raised Complainant's salary to $90,000.00 per year. (Tr. 8) Between October 2005 and August 2006, Respondent gave Complainant a total of $51,000.00 in pay raises. As a result, Complainant became one of Respondent's highest paid employees. (Tr. 226-27)

8. Complainant alleged that Gotthelf paid her less than male employees because of her sex. (Tr. 40-41; ALJ's Exh. 1) Complainant alleged that male employees received greater compensation packages including higher salaries, medical benefits, life insurance benefits, retirement plans, housing allowances, relocation reimbursements, and profit sharing incentives. (Tr. 38-39, 43-44, 61, 224-25; ALJ's Exh. 1)

9. During the relevant time period, life insurance benefits and retirement plans were not available to Respondent's employees. (Tr. 225-26, 285)

10. In addition to Iwanowski, Complainant compared her compensation to the compensation Respondent paid to Chefs Samih Nelovic, Joseph Hsu and Peter Dunlop; Francis Bee, the director of marketing and sales; and Harold House, a salesperson. (ALJ's Exh. 1)

11. The record shows that Nelovic, Hsu and Dunlop were executive chefs employed by Respondent. Each of these employees had years of training and experience working as chefs in the hospitality industry. (Tr. 133, 439-43)

12. Complainant offered no evidence into the record regarding the job duties, skills, responsibilities or conditions of employment of either Bee or House.

13. Complainant alleged that Gotthelf stated that men needed to make more money than women because men have families to support. (Tr. 45, 51-53) Kari Keclik, a controller at Respondent from July 2006 to April 2007, testified that she heard Gotthelf say that men should make more money than women because men have more responsibilities. (Tr. 355-56, 360-61)

14. Keclik and Complainant have known each other since 2006, and they have remained friendly since they left their employment with Respondent in the spring of 2007. (Tr. 372-73)

15. Although Keclik testified that she believed that Gotthelf discriminated against Complainant on the basis of sex, Keclik offered no firsthand knowledge of the facts underlying Complainant's disparate pay claim. (Tr. 359-62, 391-95)

16. The record shows that women dominated the management positions at Respondent in 2005, 2006, and 2007. (Tr. 172, 284-85, 400-01; Respondent's Exh. 7)

17. Gotthelf credibly denied that she believed men should earn more money than women. To emphasize how much things have changed in the business community over the years, Gotthelf had often spoken publicly about an unfair labor practice she experienced as a young female banker in the 1970s. At that time, she had asked for a raise and was told by her employer

that men were entitled to earn more money than women because they had mortgages and families to support. (Tr. 488-90; Respondent's Exh. 7)

18. From 2005 through 2007, medical insurance coverage for each employee cost Respondent about $3,600.00 per year. (Tr. 435-37) Complainant alleged that Gotthelf forced Complainant to choose between medical benefits and pay raises. (Tr. 59-60) Complainant's friend, Helen Jean Lewicki, offered contradictory testimony on this issue. (Tr. 170-75, 177-78)

19. Lewicki, Keclik's predecessor, was a controller at Respondent from September or October 2005 to September 2006. (Tr. 158, 375) Lewicki attended a meeting in which she discussed acquiring medical benefits with Gotthelf and Complainant. (Tr. 165-66) In that meeting, Lewicki and Complainant declined medical benefits because they were both receiving cheaper medical benefits from other sources. (Tr. 172-73)

20. Complainant was never forced to give up medical benefits in exchange for an increase in salary. (Tr. 173-75) Complainant admitted that during her employment with Respondent she was receiving medical benefits which were being paid for by a former employer. (Tr. 234, 250)

21. Complainant alleged that on December 18, 2006, Gotthelf denied Complainant's request for a year-end bonus because Gotthelf believed that Complainant made enough money and that men were entitled to earn more money than women. (Tr. 47-49, 51-53; ALJ's Exh. 1)

22. Between 2005 and 2007, Respondent did not have a mid-year or year-end bonus program to reward its employees for job performance. (Tr. 459) The year-end bonuses Complainant referred to were gifts worth less than $1,000.00 that Gotthelf gave to employees at the end of the 2005 and 2006 calendar years as a token of her appreciation for their work. (Tr. 286-87, 459-60) Complainant admitted that only the staff in housekeeping and maintenance received gifts plus cash and that no employee received more than $1,000.00. (Tr. 187-92) In

2006, Complainant received gifts from Respondent that were commensurate with gifts received by other members of Respondent's executive staff. (Tr. 460-61)

23. In December 2006, after Respondent allegedly refused to pay her a year-end bonus, Complainant felt that she had to quit her job because she was working in a "toxic" environment. (Tr. 52-53) Complainant informed Respondent that she was resigning approximately three weeks before her last day of work. (Tr. 55-56) Complainant's last day of employment with Respondent was April 10, 2007. (Tr. 9)

24. On March 18, 2007, Daniel Stein sent an email with his resume to Respondent seeking a job as chief financial officer ("CFO"). (Tr. 55, 150; Respondent's Exh. 6) Complainant and Gotthelf were impressed by Stein's financial background and extensive experience in the hotel industry. (Tr. 149-50, 445; Respondent's Exh. 6)

25. In or about April 2007, Respondent hired Stein to work as the CFO. (Tr. 150-51, 445-46, 448-49) Stein was earning $125,000.00 per year working for his previous employer, and he agreed to accept $100,000.00 per year working for Respondent. (Tr. 446) Stein and his family relocated from Florida. As a result, Respondent reimbursed Stein for relocation expenses up to $10,000.00 and paid Stein a housing allowance of $2,000.00 per month for a period of one year. (Tr. 447-48) Stein also elected to receive health benefits from Respondent. (Tr. 448)

26. Complainant admitted that Stein was very experienced in the financial aspects of the hotel industry and that experience is relevant to salaries offered by Respondent. (Tr. 153-54)

27. After Complainant left, Respondent hired Lawrence Berry to replace Complainant as general manager in April 2007. (Tr. 151, 449-50) Berry had over twenty years of experience in the hotel industry when Respondent hired him, and his starting salary was $65,000.00 per year. (Tr. 450-52; Respondent's Exh. 5) Since Berry lived on Long Island, he did not receive

relocation pay or a housing allowance from Respondent. (Tr. 452) Berry did not receive a profit sharing incentive or bonus package in addition to his base salary. (Tr. 452-53) Berry chose not to receive medical benefits from Respondent because he received medical benefits from another source. (Tr. 453)

28. Complainant alleged that after she resigned, Gotthelf filed a false claim with Respondent's insurance company alleging that Complainant had stolen money from Respondent. Complainant charged that Gotthelf filed this insurance claim after Complainant informed Gotthelf that Complainant supported an age discrimination complaint that Keclik filed with the Division against Respondent. (Tr. 70-71, 76-78, 259; ALJ's Exh. 1)

29. Complainant averred that Gotthelf filed this insurance claim because Complainant testified as a witness for Keclik before the Division. (Tr. 76-77; ALJ's Exh. 1) Complainant stated that Keclik filed her discrimination complaint with the Division within two months of her resignation in April 2007. (Tr. 68)

30. On June 4, 2007, Respondent filed an employee dishonesty claim with its insurance company regarding Complainant and Keclik. This claim related to an alleged loss that Respondent discovered on March 20, 2007. (Complainant's Exh. 2; Respondent's Exhibits 11, 12)

31. Keclik's discrimination complaint was filed with the Division on December 4, 2007. (Tr. 321)

32. Respondent had reporting procedures in place to handle discrimination complaints that were outlined in the employee handbook, which Complainant received and read when she was hired. (Tr. 92-94, 96-97; Respondent's Exhibits 1, 2) Complainant did not avail herself of these procedures or inform Respondent about instances of alleged discrimination. (Tr. 491-92)

OPINION AND DECISION

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).

In order to establish a prima facie disparate pay claim, Complainant must show that she is a member of a protected group; she was paid less than non-members of her group for work involving substantially the same amount of skill, effort, and responsibility; and she performed such work under substantially similar conditions as the non-members of her group. *Classic Coach v. Mercado,* 280 A.D.2d 164, 170, 722 N.Y.S.2d 551, 555 (2d Dept. 2001).

Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant, a female, is a member of a protected group. Respondent promoted Complainant to the position of general manager in December 2005 and raised her salary to $60,000.00 per year.

Complainant compared her compensation to the compensation Respondent paid to Nelovic, Hsu, Dunlop, Bee and House. Complainant described Bee as a director of marketing and House as a salesperson. However, Complainant offered no evidence into the record regarding their respective job duties, skills, responsibilities or conditions of employment. Furthermore, Hsu, Nelovic and Dunlop are experienced executive chefs who possessed different skills and performed job functions that were distinct from Complainant's in both form and

substance. Accordingly, the record does not establish that any of these individuals are similarly situated employees for the purposes of Complainant's disparate pay claim.

Complainant also alleged that Stein was a similarly situated male employee who received more generous compensation from Respondent. However, Respondent hired Stein to work as the CFO. Respondent subsequently hired Berry to replace Complainant as the general manger after Complainant left Respondent's employ. Unlike Complainant, Stein had extensive education, training and experience in the financial aspects of the hotel industry and was hired to work as the CFO, a position involving different skills and responsibilities than the general manager position. Stein also relocated from Florida with his family and accepted a significant reduction in salary to work for Respondent. Therefore, the record does not establish that Stein was a similarly situated employee.

Iwanowski and Berry were two male employees who held the general manager position for Respondent. Iwanowski was Complainant's predecessor as general manager, and Berry was Complainant's successor. Iwanowski's starting salary was $90,000.00 per year, $30,000.00 more than Complainant's starting annual salary. Unlike Complainant, Iwanowski also received a housing allowance, profit sharing incentive and reimbursement for medical benefits. Respondent hired Berry at a starting salary of $65,000.00 per year, $5,000.00 more than Complainant's starting annual salary. Berry did not receive any additional benefits. Moreover, Complainant performed the general manager job under substantially similar conditions as Iwanowski and Berry.

Complainant also produced evidence showing that Gotthelf made statements indicating that men were entitled to earn more money than women. Accordingly, Complainant has established a prima facie disparate pay claim with respect to Iwanowski and Berry.

The burden of production then shifts to Respondent to show that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden.

Respondent showed that any disparities in compensation between Complainant, Iwanowski and Berry were related to significant differences in their training, education, experience, and previous compensation. In determining the compensation offered to a prospective employee, an employer is entitled to consider the nature and extent of the employee's relevant work experience, background, skills, "marketplace value" and previous salary. *Kent v. Papert Companies, Inc.*, 309 A.D.2d 234, 244, 764 N.Y.S.2d 675, 683 (1st Dept. 2003) (citations omitted).

Iwanowski earned a degree in hotel management and had over thirty-five years of experience in the hospitality industry. In his previous job, Iwanowski earned $200,000.00 per year as a hotel general manager, and he relocated from Tarrytown, New York to work for Respondent. Berry had more than twenty years of experience in the hotel industry when Respondent hired him. Prior to working for Respondent, Complainant was unemployed for approximately two and one-half years and had no training, education, or experience working in the hotel industry. These differences constitute legitimate, nondiscriminatory reasons for any disparity in compensation between Complainant and these two employees. *Id.* at 245, 764 N.Y.S.2d at 683.

As Complainant began to demonstrate that she could adequately perform the general manager's job, Respondent awarded Complainant with substantial pay raises over a short period of time. Between October 2005 and August 2006, Respondent gave Complainant a total of $51,000.00 in pay raises, and Complainant became one of Respondent's highest paid employees.

Respondent, which employs mostly women in management positions, showed that any statements made by Gotthelf regarding men needing to earn more money than women were taken out of context, did not show discriminatory intent, and had no bearing on Complainant's compensation.

The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant has failed to rebut evidence that any differences in compensation were related to legitimate business reasons.

Complainant alleged that she was forced to choose between medical benefits and pay raises. However, this claim is thoroughly contradicted in the record. The cost to Respondent to provide medical insurance for Complainant was de minimis (i.e., $3,600.00) in comparison to the significant pay raises Complainant received from Respondent. The record firmly establishes that Complainant declined medical benefits from Respondent because she was already receiving them from another source.

Complainant also alleged that on December 18, 2006, Gotthelf denied Complainant's request for a year-end bonus because Gotthelf believed that Complainant made enough money and that men were entitled to earn more money than women. However, Respondent did not have a bonus program to reward its employees for job performance between 2005 and 2007. In 2006, Complainant received gifts from Respondent that were commensurate with gifts received by other members of Respondent's executive staff.

Since Complainant has failed to demonstrate that other similarly situated male employees received more compensation from Respondent because of their sex, Complainant's disparate pay claim must be dismissed.

Next, Complainant alleged that Respondent constructively discharged her by subjecting her to unlawful discrimination in the workplace. In order to establish a claim of constructive discharge, 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, 78, 436 N.Y.S.2d 231, 234, (1980). Since Complainant did not show that Respondent subjected her to unlawful discrimination, Complainant's constructive discharge claim must be dismissed.

Finally, Complainant alleged that Respondent subjected her to unlawful retaliation. The Human Rights Law prohibits an employer from retaliating "against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondent was aware that she participated in this activity, she suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

Complainant has failed to make out a prima facie case of retaliation. Complainant alleged that Respondent retaliated against her when Gotthelf filed a false employee dishonesty claim with Respondent's insurance company regarding Complainant and Keclik. Complainant alleged that Gotthelf filed this insurance claim because Complainant supported an age

discrimination complaint that Keclik filed with the Division against Respondent. Complainant cannot establish causation because any alleged protected activity could not have occurred until after the alleged retaliatory conduct. The record establishes that Respondent filed the employee dishonesty claim with its insurance company on June 4, 2007. However, Keclik did not file her discrimination complaint against Respondent until December 4, 2007. Complainant's inconsistent, contradictory testimony on this issue cannot support a viable claim of retaliation.

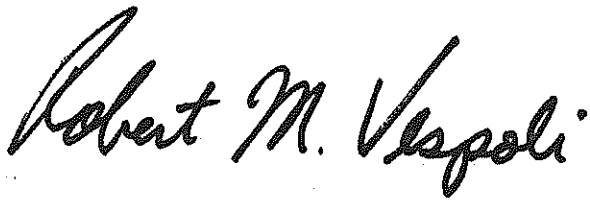
Accordingly, Complainant's retaliation claim must also be dismissed.

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 instant complaint be, and the same hereby is, dismissed.

DATED: August 25, 2009
Hauppauge, New York



Robert M. Vespoli
Administrative Law Judge