



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

ORLANDO QUINTO,

Complainant,

v.

QUALITY MEATS AND FOURTH WALL
RESTAURANTS, LLC,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10131829

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 26, 2011, by Thomas S. Protano, 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: **MAR 16 2011**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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

Case No. 10131829

SUMMARY

Complainant alleged that he had been harassed because of his national origin and perceived sexual orientation. When he complained to Respondent, it took prompt remedial action to end the harassment. Therefore, the complaint must be dismissed.

PROCEEDINGS IN THE CASE

On February 26, 2009, 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"). On September 28, 2009, Complainant amended his complaint, which had been based upon national origin, to include his sexual orientation as a basis for discrimination as well.

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 S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on September 22, 2010 and September 23, 2010.

Complainant and Respondent appeared at the hearing. The Division was represented by Aaron Woskoff, Esq. Respondent was represented by A. Michael Weber, Esq.

Permission to file post-hearing briefs was granted. Respondent’s attorney filed a timely submission.

FINDINGS OF FACT

1. Complainant is a Nicaraguan, heterosexual male. (Tr. 9)
2. Fourth Wall Restaurants, LLC (hereinafter, “Respondent”) owns Quality Meats, a restaurant. (Tr. 157)
3. Complainant was hired by Respondent to work in Quality Meats as an assistant chef in September of 2007. (Tr. 9, 11)
4. Respondent has an anti-harassment policy and an employee manual. Complainant received a copy of the policy. (Respondent’s Exhibit 7; Tr. 140-41, 195-96)
5. Complainant alleges that several of his co-workers, including Raj Roy, Marcial Martinez, Omar Reyes, Ricardo Hernandez, Margarito Rebolledo, Maria Guzman and Edward Porfiano called him derogatory names such as “faggot” and “she-male.” In addition,

Complainant alleges he was called "*maricon*" and "*pato*", which are derogatory Spanish terms for homosexuals. (ALJ Exhibit 2; Tr. 10, 30-31)

6. Complainant alleged that his co-workers told him that "all Nicaraguans are *maricon*" and that "Dominicans are real men." (ALJ Exhibit 2)

7. None of Complainant's co-workers are from the Dominican Republic. (Tr. 13-14)

8. Complainant alleged that the harassment began December, but he had difficulty remembering the year. He "think[s] it was in December of 2007" but he really doesn't remember. (Tr. 22)

9. Complainant stated that he complained about the behavior "many times," but is not specific about when he complained. He stated that he complained for the first time in 2008 to Chef Kiss, his supervisor, in January, 2008. Kiss allegedly told Complainant to speak to the general manager of Quality Meats, Maurizio Chiovaro. (Tr. 25, 27)

10. Complainant stated at hearing that he went to Chiovaro immediately after speaking to Kiss, but the harassment continued through 2008. (Tr. 27, 48-50)

11. Complainant later said that the first time he complained to Chiovaro was in February 2009. (Tr. 100)

12. In February of 2009, Complainant made his only complaint of harassment to Kiss who referred Complainant to Chiovaro. Complainant then went to Chiovaro and said that Raj Roy, a co-worker, had been calling him derogatory names. This scenario is similar to the one Complainant alleged took place in February of 2008. (Tr. 45, 168)

13. Chiovaro spoke to Roy, who admitted to the allegations. Roy told Chiovaro that he was joking with Complainant. Chiovaro then told Roy to stop joking with Complainant in that manner. (Tr. 168-69)

14. A few days later, Complainant told Chiovaro that, in addition to Roy, other employees had harassed him. Complainant then met with Chiovaro and Lawrence Knapp, chef de cuisine. (Tr. 169-70)

15. At that meeting, Chiovaro asked Complainant to give him a list of five individuals who had harassed him and Complainant complied. (Respondent's Exhibit 6; Tr. 171-72)

16. Chiovaro and/or Knapp met with each of the employees Complainant named on his list. Three of the employees were spoken to on the same day Complainant provided his list; two others, who were unavailable that day, were spoken to by Knapp when they were available. The employees were told that harassment was not tolerated and that it must cease. (Tr. 173, 175, 180)

17. Complainant was invited by Chiovaro to be present when the first three co-workers were admonished. However, Complainant chose not to attend the meeting. (Tr. 174)
Complainant later claimed the meeting never took place. (ALJ Exhibit 2)

18. Complainant did not complain to his superiors at Quality Meats after that. However, after he filed an amendment to his Division complaint in October of 2009, Amy Chamberlain of Stratex Partners, a human resources consulting firm that provides human resources service for Respondent, met with Complainant. During that conversation, Complainant stated that the harassment had stopped, but did not indicate when. (Tr. 139, 143-44)

19. Complainant admits that the harassment stopped in 2009. He stated "around June, July of 2009 I think that's when it stopped." (Tr. 26)

20. Complainant alleged that Chiovaro is "friendly towards the other employees" but Complainant is "not treated in the same manner." However, after Complainant admired Chiovaro's neckties, Chiovaro gave some of his ties to Complainant. In addition, Chiovaro has

given Complainant tickets to a Yankee game that were purchased by Respondent. Complainant took his nephew to the game. (ALJ Exhibit 2; Tr. 164)

21. At the public hearing, Complainant insisted he needed an interpreter in order to testify. However, his ability to speak and understand English is strong enough that he has acted as an interpreter for Spanish speaking employees, including his sister, at Quality Meats. He helped his sister with translations related to a discrimination complaint she had made against Respondent. (Tr. 87-88, 97, 188-90)

22. Despite his use of an interpreter, Complainant was evasive and had to be admonished repeatedly for failing to directly answer questions he was asked on the witness stand. (Tr. 12, 27, 45, 51, 54, 55, 72, 77-79)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment because of that person's national origin or sexual orientation. Human Rights Law §296.1(a). The term "sexual orientation" is defined as "heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived." Human Rights Law § 292.27.

In order to sustain a claim of sexual harassment, Complainant must demonstrate that he was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the alleged 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. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant has shown that he was subjected to offensive behavior. Respondent has acknowledged that Roy and others had directed sexually offensive comments towards Complainant. Although Complainant has not shown that anyone perceived him to be homosexual, such a finding is not necessary for him to prevail if the sexually charged hostility and ridicule is sufficient to create a hostile environment even though it might be directed towards a heterosexual. See, *Oncale v. Sundowner*, 523 U.S. 75, 118 S.Ct. 998 (1998).

In order for Respondent to be liable for the alleged harassment, Complainant must prove that the Respondent condoned the harassment by having knowledge of it and acquiescing in it. Respondent may disprove any allegation that it condoned the harassment by “showing that it reasonably investigated the complaints of discriminatory conduct and took corrective action.” *Vitale v. Rosina Food Products Inc.*, 283 A.D.2d 141, 143, 727 N.Y.S.2d 215, 217-18 (4th Dept. 2001).

Unfortunately for Complainant, his credibility in this case is lacking. Complainant repeatedly changed the dates of specific events during his testimony and evaded questions. His answers to direct questions were often vague and non-responsive. His use of an apparently unnecessary interpreter gave him additional time to formulate his answers, which makes his unwillingness to respond with direct answers to direct questions even more suspicious. His assertion that Chiovaro failed to treat him in a friendly manner is belied by the testimony that Chiovaro gave Complainant ties and baseball tickets. His claim that he was told “Dominicans are real men” by his non-Dominican co-workers is illogical. It is for these reasons, along with Complainant’s demeanor at the public hearing, that Complainant’s claims that the alleged

harassment continued well after his initial complaints cannot be credited.

What can be credited is the consistent testimony that Complainant made his complaint of harassment to Chiovaro in February of 2009. Chiovaro then spoke to the alleged harassers and indicated that such behavior would not be tolerated. Complainant himself acknowledged that the harassment ended after that. Although Complainant seemed to try to argue that the harassment did not end immediately but, instead, ended a few months later, his claims were, once again, vague. His assertions that the harassment continued until “June or July” cannot be credited because it is not believable that the harassers would ignore Chiovaro’s warnings for four to five months and then, mysteriously, cease harassing Complainant for unknown reasons. Moreover, Complainant never complained to Chiovaro or any other of Respondent’s employees after February of 2009, so Respondent had no reason to know that the harassment had continued.

The evidence has established that Complainant complained to Chiovaro one time, in February, 2009. Thereafter, Chiovaro investigated the charges, met with the alleged harassers and took action to stop the alleged harassment. Respondent has fulfilled its obligations under the Human Rights Law. *Id.*, at 143. Complainant’s attempts to prove otherwise were simply not credible and, therefore, the case must 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 case be, and the same hereby is, dismissed.

DATED: January 26, 2011
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano", written in a cursive style.

Thomas S. Protano
Administrative Law Judge