



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**JULIE D. SAMS,**

Complainant,

v.

**BARBECUE INTEGRATED, INC. D/B/A SMOKEY  
BONES BAR & FIRE GRILL,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10199822

Federal Charge No. 16GB902066

**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 24, 2021, by Michael T. Groben, 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.


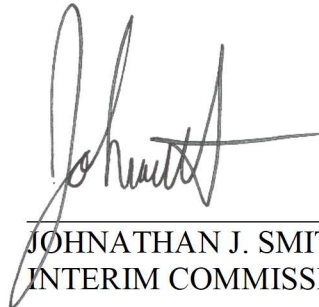
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE JOHNATHAN J. SMITH, INTERIM COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order 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: **June 3, 2021**  
Bronx, New York



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JOHNATHAN J. SMITH  
INTERIM COMMISSIONER



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**BARBECUE INTEGRATED, INC. D/B/A  
SMOKEY BONES BAR & FIRE GRILL,**

Respondent.

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

Case No. **10199822**

Federal Charge No. 16GB902066

**SUMMARY**

Complainant alleges that she was subjected to unlawful discrimination in employment due to her race, when Respondent suspended her and terminated her employment. Respondent denies the allegations. Complainant has failed to sustain her burden of proof, and the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On February 21, 2019, 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 Michael T. Groben, an Administrative Law Judge (“ALJ”) of the Division. The public hearing was held on November 4, 2020.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Rosalind M. Polanowski, Esq. Respondent was represented by Akerman LLP (Jeffrey Kimmel, Esq., and Cecilia R. Ehresman, Esq., of counsel).

At the public hearing, the parties stipulated to certain facts regarding the case. (Tr. 8-10; Joint Exhibit 7)

### **FINDINGS OF FACT**

1. Complainant is African-American. (Tr. 37)
2. Respondent operates a restaurant in Liverpool, New York (“the restaurant”). (Tr. 8; Joint Exhibit 7)
3. Complainant was hired as a server by Respondent in December 2018. She worked at the restaurant until February 18, 2019. (Tr. 8-9, 22-23, 95, 143-44; Joint Exhibit 7)
4. Dolores Fullerton (“Fullerton”) is the general manager of the restaurant. Her duties include overseeing daily operations, hiring and firing employees, and training employees. (Tr. 55-56, 93-95, 145)
5. Fullerton is White. (Tr. 24, 38)

6. Before Complainant was hired, she was interviewed by Fullerton and Ryan Bassett (“Bassett”), Respondent’s service manager. Fullerton and Bassett both liked Complainant and approved hiring her. (Tr. 55-56, 95)

7. Complainant’s duties as a server included waiting on tables, cleaning tables and performing “side work” such as restocking supplies at the end of her work shift (referred to as “closing”). (Tr. 23)

8. Nicole Virginia (“Virginia”) is a server at the restaurant. Virginia is White. (Tr. 24-25, 29, 38, 46, 68-69)

9. Jolie Anne Murray (“Murray”) has worked for Respondent for 15 years. She has been the bar manager of the restaurant for about two and one half years. (Tr. 99, 113, 142-43)

10. Murray’s duties include supervising the bar staff and hostesses (also known as “greeters”) and closing the restaurant at the end of the day. (Tr. 143, 146)

11. Murray is White. (Tr. 24, 37, 46, 132)

12. William Sears (“Sears”) is a server and shift captain at the restaurant. One of Sears’ duties as a shift captain is to ensure that Respondent’s other servers complete their side work. (Tr. 169-70)

13. Respondent will remove or “cut” a server from waiting tables if, e.g., there are too many servers on the floor, or as may be necessary to allow all of the servers an equal opportunity to earn tips by waiting tables. (Tr. 113-14)

14. Once a server has been cut from table service, that server is only allowed to perform side work and is not permitted to wait on any more tables during that shift. (Tr. 146)

15. On two occasions during Complainant's employment, after Murray cut Complainant from waiting tables, Complainant directed the hostess on duty to continue to assign her to work at tables, in violation of Respondent's policy. (Tr. 146, 152, 173)

16. On both occasions, Murray told Complainant that once she was cut, she had to stop serving tables. Murray informed Fullerton of both incidents. (Tr. 70-71, 112, 114, 132, 146, 152)

17. On another occasion, shortly before Complainant left Respondent's employ, a customer left an expensive "Patagonia" headband (also referred to as a scarf) at the restaurant. Sears placed the headband in a safe place and arranged for the customer to come back to pick it up. When the guest arrived, the headband was gone.<sup>1</sup> (Tr. 146-47, 171-74)

18. After Sears searched for the headband "for about 25 minutes," Complainant produced the headband from the pocket of her apron and gave it to the customer in the presence of Sears and Virginia. (Tr. 146-47, 172, 174-75)

19. Sears described the headband incident to Murray, who then told Complainant not to take a customer's belongings again. Murray informed Fullerton what had occurred. (Tr. 112-13, 129-30, 134-35, 147, 173-74)

20. Sears observed that Complainant became argumentative and confrontational with her co-workers over the course of her employment. (Tr. 170, 173)

21. Respondent maintains a team member handbook (the "handbook") for the benefit of its employees, which, *inter alia*, sets forth policies regarding conflicts or violence in the workplace. (Joint Exhibit 5)

22. Complainant received a copy of the handbook when she was hired. (Tr. 8-9, 62-63; Joint Exhibits 2, 5 and 7)

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<sup>1</sup> Sears is also known as "Billy." (Tr. 147)

23. The handbook prohibits violence, quarreling, fighting, threatening co-workers or disrupting their work, and prohibits any acts or threats of physical violence, whether or not they occur on Respondent's premises. (Tr. 63-65; Joint Exhibit 5, pp. 11-12, 42)

24. The handbook also states that any person who makes "substantial threats [or] exhibits threatening behavior...shall be removed from the premises...and shall remain off premises pending the outcome of an investigation..." (Tr. 65-66; Joint Exhibit 5, p. 43)

25. On the evening of Friday, February 15, 2019, Complainant was involved in a workplace conduct incident involving Virginia. (Tr. 8-9, 29-30, 33; Joint Exhibit 7)

26. Kristin Woodcock ("Woodcock") is a server at the restaurant. (Tr. 144-45)

27. Brooke Whalen ("Whalen") is a server at the restaurant. (Tr. 100-01)

28. Marcy Marino ("Marino") is a server at the restaurant. (Tr. 109)

29. Fullerton learned of the incident that evening from a Facebook Messenger message sent to her by Virginia. In pertinent part, Virginia's message stated that Complainant had said to Woodcock that she was "going to slap the shit outta" [*sic*] Virginia and "she doesn't need this job." (Tr. 96-99; Respondent's Exhibit 2)

30. Fullerton called Murray at the restaurant. After the two discussed the incident, Fullerton asked Murray to get written statements from witnesses to the incident. (Tr. 99-100, 145)

31. In response to Fullerton's question, Murray advised that Complainant had already left the restaurant. (Tr. 100)

32. Murray then spoke to the servers involved, including Woodcock, who told her that Complainant had threatened to strike Virginia. (Tr. 144-45, 148-49)

33. When Fullerton arrived at the restaurant on Saturday, February 16, 2019, she discussed the incident of the previous evening with Whalen and Woodcock. Woodcock added that she was

afraid of Complainant, because Complainant had told her she had previously lost a job for hitting another person at work. (Tr. 100-01, 108-09, 119)

34. Fullerton also reviewed written statements from Whalen and Woodcock. (Tr. 101-105)

35. Whalen's statement stated in pertinent part that Complainant, "stated to me that she didn't need this job, it is just a fun job and because of that she would punch Nikki in the face." (Tr. 105-06; Respondent's Exhibit 3)

36. Woodcock's statement stated in pertinent part, "I overheard Julie telling another server (Brooke) that she wanted to smack Nicole and didn't care because she didn't need this job." (Tr. 107-08; Respondent's Exhibit 4)

37. At the time of the incident, Virginia had been employed for over five years by Respondent and there had been no complaints about her threatening or assaulting other employees. (Tr. 118)

38. After speaking to Murray, Woodcock, and Whalen and receiving their statements, Fullerton decided that it would be appropriate to terminate Complainant's employment. (Tr. 119-20)

39. Complainant was scheduled to work Saturday, February 16, and Sunday, February 17, 2019. (Tr. 33)

40. On February 16, 2019, after Fullerton spoke with Woodcock and Whalen and reviewed their statements, she telephoned Complainant and told her not to come in that weekend. Fullerton told Complainant to report to the restaurant on Monday. (Tr. 31-32, 33-35, 109)

41. During that telephone call, Complainant suggested that Fullerton speak to Marino about the incident. Fullerton did so, and Marino stated that she had not seen "anything." (Tr. 109-11)



42. William Fuhr (“Fuhr”) has been Respondent’s manager of operations for four years. Fuhr oversees the restaurant and nine of Respondent’s other restaurants. His duties involve oversight of human resources functions, hiring, and job safety. (Tr. 161-62)

43. Fullerton informed Fuhr of the circumstances of the incident, including the fact that she had taken statements from Complainant’s co-workers, and he agreed with Fullerton that terminating Complainant’s employment was the correct decision. (Tr. 96, 112, 162-64)

44. At the time Fullerton contacted him, Fuhr was unaware of Complainant’s race. (Tr. 163)

45. On Monday, February 18, 2019, Complainant met with Fullerton and Bassett to discuss the workplace conduct incident that occurred on February 15, 2019.<sup>2</sup> (Tr. 8-9, 56-57, 130; Joint Exhibit 7)

46. Complainant recorded the meeting. (Tr. 8-9, 38; Joint Exhibits 6 and 7)

47. During the meeting, Complainant stated that during the February 15, 2019, incident Virginia had deliberately bumped into her and that she had stated in response, “I should just bump the fuck out of her back.” (Tr. 30; Joint Exhibit 6, pp. 1, 2, 5 and 8)

48. None of the witnesses to the February 15, 2019, incident told Fullerton that Virginia had bumped Complainant, and she so informed Complainant. (Tr. 117-18; Joint Exhibit 6, p. 3)

49. Complainant expressed her concern to Fullerton that she was being targeted because of her race, and her belief that Zach (no last name), a White server, had called Murray a “bitch” several times and had never been disciplined for that.<sup>3</sup> (Tr. 35-36, 41-44, 45-48, 50, 80-81, 84-85, 128-29; Joint Exhibit 6, pp. 6-7)

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<sup>2</sup> The transcript incorrectly states Bassett’s name as "Brian." (Tr. 115)

<sup>3</sup> Joint Exhibit 6 incorrectly states Zach’s name as "Jack." (Tr. 46; Joint Exhibit 6, p. 7)

50. On two occasions during Complainant's employment, Zach called Murray a "bitch." The second time he did so, Fullerton was informed, and she directed him to stay home during his next shift and to report to her before his following shift to discuss the matter. Zach never returned to work. (Tr. 115-16, 125-28, 135-36)

51. Complainant also complained that Zach had threatened Ashley (no last name), a fellow employee, and had not been disciplined for that. (Tr. 49-50; Joint Exhibit 6, p. 8)

52. During Complainant's employment at the restaurant, Ashley (no last name), a server, was dating Zach. After she "egged" Zach's car, he threatened to call the police and have her arrested unless she paid for the damage. (Tr. 46, 114-15)

53. When Ashley appealed to Fullerton to intercede, Fullerton advised her that she could not do anything because Zach's conduct occurred away from the restaurant, and he had not threatened violence to Ashley in violation of the rules of Respondent's handbook. (Tr. 115, 123-25, 134; Joint Exhibit 5, p. 42)

54. During the February 18, 2019, meeting, Fullerton also reminded Complainant of the incident in which she had continued to serve tables after being cut. (Joint Exhibit 6, p. 4)

55. Complainant's employment with Respondent was terminated effective February 18, 2019. (Tr. 8-9, 22-23, 50, 57; Joint Exhibit 7)

56. Fullerton terminated Complainant's employment because she had threatened a fellow employee. (Tr. 95-96, 112-13, 118)

57. No one at the restaurant ever used a racial slur in addressing Complainant. (Tr. 67)

### **OPINION AND DECISION**

Pursuant to New York State Executive Law art. 15 (the "Human Rights Law"), it is an

unlawful discriminatory practice for an employer “because of an individual’s...race [or] color...to discriminate against such individual in compensation or in terms, conditions or privileges of employment.” Human Rights Law § 296.1(a).

To make out a prima facie case of unlawful discrimination in employment, a complainant must show that (1) she is a member of a protected class, (2) she was qualified for the position, (3) she suffered an adverse employment action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 305, 786 N.Y.S.2d 382, 390 (2004) (citing *Ferrante v. Am. Lung Ass’n*, 90 N.Y. 623, 629, 665 N.Y.S.2d 25, 29 (1997)).

If a complainant makes out a prima facie case of unlawful discrimination, the burden shifts to the respondent to articulate a legitimate, independent and non-discriminatory reason for its actions. *Id.* If the respondent does so, the complainant must show that the reasons presented by respondent were merely a pretext for the unlawful discrimination by demonstrating both that the respondent’s stated reasons were false and that the real reason was unlawful discrimination. *Id.* at 305, 786 N.Y.S.2d at 391. The “burden of persuasion of the ultimate issue of discrimination always remains” with the complainant. *Stephenson v. Hotel Empls. and Rest. Empls. Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271, 811 N.Y.S.2d 633, 636 (2006).

Complainant is African-American, and she belongs to a protected class. Complainant was qualified for her position as a server, and she suffered an adverse employment action when Respondent terminated her employment. Complainant was involved in a workplace incident on February 15, 2019, involving a fellow server. Fullerton spoke to the witnesses to the incident and received statements from them and from the alleged victim, all of whom were White. Fullerton then discussed the incident with Respondent’s director of operations and the two decided that it

was appropriate to terminate Complainant's employment. However, Fullerton did this before she had ever discussed the incident with Complainant. Complainant also testified that Zach, a White employee, had committed serious violations of Respondent's work rules and had never been disciplined. Complainant has provided evidence of circumstances giving rise to an inference of unlawful discrimination. Complainant has established a prima facie case of unlawful discrimination due to race.

In response, Respondent articulated legitimate, independent and non-discriminatory reasons for its actions. Before the February 15, 2019, incident, Complainant had taken a headband or scarf which belonged to a customer, and also had continued to serve tables after being cut. Both incidents violated Respondent's work practices. Complainant's threat to her fellow server on February 15, 2019, was witnessed by her fellow employees, and pursuant to Respondent's workplace violence policies, the threat constituted sufficient grounds for termination. Respondent concluded, based on the written statements and discussions with witnesses to the incident, that Complainant was at fault in the incident and it determined to terminate her employment. Respondent also demonstrated that Zach, the White employee, had not been disciplined for the incident with his fellow employee Ashley, because it did not violate Respondent's work rules, and that following his insubordinate behavior, Zach was directed to report to Fullerton before he would be allowed to work again. Zach never returned to work. Complainant did not rebut Respondent's evidence in this regard.

Complainant was hired by Fullerton, the same person who terminated Complainant's employment less than four months later. When the individual who hires an employee is the same individual who fires that employee and the termination occurs within a short period of time after the employee was hired, one can infer that discrimination was not the reason for the adverse

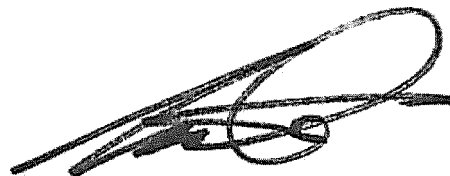
action. *See Singh v. State of N. Y. Off. of Real Prop. Servs.*, 40 A.D.3d 1354, 837 N.Y.S.2d 378 (3d Dept. 2007); *Dickerson v. Health Mgmt. Corp. of Am.*, 21 A.D.3d 326, 329, 800 N.Y.S.2d 391, 394 (1st Dept. 2005). “As many courts have recognized, there is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of his or her protected status.” *Youth Action Homes v. N. Y. State Div. of Human Rights*, 231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997). Complainant failed to rebut Respondent’s evidence, and the complaint is 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 complaint be, and hereby is, dismissed.

DATED: March 24, 2021  
Bronx, New York

A handwritten signature in black ink, appearing to read 'Michael T. Groben', with a large, stylized flourish at the end.

Michael T. Groben  
Administrative Law Judge