ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

GAIL WHITTEMORE,
Complainant,

v.

VITAL DEVELOPMENT GROUP, INC., GARY GELMAN, AKA IGOR GELMAN, INDIVIDUALLY,
Respondents.

Federal Charge No. 16GA600799

NOTICE AND FINAL ORDER

Case No. 10109007

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 15, 2013, by Robert J. Tuosto, 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: 5/9/2013
Bronx, New York

Galen D. Kirkland

GALEN D. ~~KIR~~KLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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on the Complaint of

GAIL WHITTEMORE,
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VITAL DEVELOPMENT GROUP, INC. and GARY GELMAN,
Respondents.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10109007**

SUMMARY

Complainant charged that Respondents unlawfully discriminated against her on the basis of her age when it terminated her employment. Respondents defaulted and an inquest was held. The complaint has been proven against Respondents, and Complainant is awarded damages.

PROCEEDINGS IN THE CASE

On November 28, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Majesty Casino Boat 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. Notices of hearing were duly served on all parties by the Division's Calendar Unit notifying all parties that a preliminary conference was scheduled for July 24, 2007 and that public hearing dates were scheduled for September 5-6, 2007. (ALJ's Exhibits 5, 6) At the preliminary conference held on July 24, 2007, Complainant appeared and the Division was represented by Anton Antomattei, Esq., Senior Attorney. Respondent did not appear at the preliminary conference. On July 24, 2007, the Division amended the complaint to change Respondent's name from Majesty Casino Boat to Vital Development Group, Inc. ("VDG") (ALJ's Exh. 3) Accordingly, new notices of hearing were duly served on all parties notifying them that public hearing dates were scheduled for September 5-6, 2007. (ALJ's Exhibits 7, 8) None of these notices were returned to the Calendar Unit and are presumed to have been delivered.

The public hearing was held on September 5-6, 2007. Complainant appeared at the hearing and the Division was represented by Mr. Antomattei. Respondent VDG did not appear and has defaulted. No post-hearing briefs were filed.

On January 8, 2008 then-Commssioner Kumiki Gibson issued a Final Order after hearing which was duly served on all parties. The aforementioned Final Order directed that Complainant be awarded damages against Respondent VDG in the amount of $33,800, and directed it to promulgate policies and procedures to the prevent of unlawful discrimination and harassment in accordance with the Human Rights Law.

On August 17, 2011 a compliance hearing was held before ALJ Jackson pursuant to the Compliance Unit's directive of October 26, 2010. Neither Complainant nor Respondent VDG appeared at the compliance hearing. The Division was represented by Sandrea S. O'Neil, Esq., Senior Attorney. During the compliance hearing Ms. O'Neil submitted entity information obtained from the N.Y.S. Department of State ("NYSDOS") indicating that Respondent VDG was inactive and had been dissolved by proclamation on April 27, 2011. Upon further inquiry, it was learned via the NYSDOS that another corporate entity named JAM CRUISES, considered to be a possible successor-in-interest to Respondent VDG, was also dissolved by proclamation on January 27, 2010. Following the compliance hearing, it was recommended that the Division not commence enforcement proceedings.

On March 9, 2012 this case was reopened so that the Division could amend the caption to name Gary Gelman, a/k/a Igor Gelman, individually. A Notice of Reopening was issued by Commissioner Galen D. Kirkland to amend the caption to read "Gail Whittemore v. Vital Devlopment Group. Inc. and Gary Gelman, AKA Igor Gelman, Individually." The Notice of Reopening also scheduled this matter for a hearing in order to provide Respondent Gelman with an opportunity to examine witnesses and present evidence in defense of the merits of the complaint and to allow Complainant to present any additional evidence, as necessary. The Notice of Reopening is admitted into the record as ALJ Exh. 11.

On July 24, 2012 a second compliance hearing was held. Neither Respondent appeared at the compliance hearing. The Divison was represented by Bellew S. McManus, Esq., Senior Attorney. Following the compliance hearing, it was again recommended that the Division not commence enforcement proceedings. ALJ Jackson's February 27, 2013 compliance memo is admitted into the record as ALJ Exh. 10.

On July 26, 2012 the Notice of hearing which was sent to Respondent Gelman was returned to the Division as "undeliverable."

This matter was then reassigned to ALJ Robert J. Tuosto pursuant to N.Y.C.R.R. § 465.12 (d)(2).

FINDINGS OF FACT

1. Complainant was born on December 23, 1944. (Tr. 31; ALJ's Exh. 1)

2. From June 2005 until August 2005, Respondent VDG owned and operated the Majesty Casino Boat, and employed approximately eighty people thereon. (Tr. 38-39, 49, 74-75; Complainant's Exhibits 5, 6)

3. In or about June 2005, Complainant began working for Respondent VDG as a bartender on the Majesty Casino Boat. (Tr. 21-22, 27, 61; Complainant's Exh. 6) Complainant had over 43 years of bartending experience. (Tr. 27)

4. Respondent Gelman was an owner and vice-president of the Majesty Casino Boat. (Tr. 26, 65-66; ALJ's Exh. 9) Almost immediately after Complainant began working for Respondent VDG, Respondent Gelman told Respondent's food and beverage manager at that time, Michele Fritz, to terminate Complainant's employment. (Tr. 61-62, 68-69)

5. Complainant, who was 60 years old at the time, was the oldest bartender employed by Respondent. (Tr. 28, 63) Respondent Gelman referred to Complainant as "the old lady." (Tr. 69, 73)

6. Because the customers liked Complainant and because Fritz considered Complainant one of her best workers, Fritz talked Respondent Gelman out of terminating Complainant's

employment. (Tr. 64-65, 68) However, Respondent Gelman did not allow Complainant to work on the boat when Respondent VDG hosted events that catered to a "young crowd." (Tr. 73-74)

7. In or about August 2005, Respondent Gelman unequivocally told Fritz to terminate Complainant's employment. (Tr. 64-65, 68-70) Respondent Gelman told Fritz to tell Complainant that she was being dismissed because business was slow. (Tr. 70) However, Respondent VDG was still very busy. (Tr. 29, 64, 70)

8. On or about August 8, 2005, Fritz told Complainant not to come to work anymore because business was slow. (Tr. 22, 25-26, 64, 70)

9. Approximately three days later, Complainant went to Respondent VDG's office to speak with Respondent Gelman about her employment status. (Tr. 29, 32) At that time, Respondent VDG posted a sign in its office window that stated "bartender wanted." (Tr. 33, 72) Although Respondent Gelman was not in Respondent VDG's office, Complainant spoke to him by telephone. Respondent Gelman told Complainant that he had to dismiss her because business was slow. (Tr. 29, 32)

10. Respondent VDG never called Complainant to come back to work. (Tr. 30)

11. Immediately after personnel for Respondent VDG dismissed Complainant, Respondent Gelman instructed Fritz to look for a younger replacement for Complainant because Respondent VDG was very busy and needed to hire more staff. (Tr. 70-72, 74) Personnel for Respondent VDG hired a man and a woman, both in their twenties, shortly after Complainant was dismissed. The man worked as a bartender and the woman worked as a waitress on the boat. (Tr. 74)

12. The record establishes that the staff on the Majesty Casino Boat was primarily less than 30 years of age. (Tr. 34, 62-63)

13. Complainant earned approximately $200.00 per week working for Respondent. (Tr. 43, 48; Complainant's Exh. 6) Although Complainant received health insurance benefits from Respondent, those benefits cannot be valued in this record. (Tr. 76-77)

14. Complainant diligently searched for work after she stopped working for Respondents. (Tr. 49-57; Complainant's Exhibits 7, 7A) She did not collect unemployment. (Tr. 30)

15. Complainant eventually found employment in June 2006 working as a bartender for Coin Castle Casino, Inc. (Tr. 57-58, 83; Complainant's Exh. 8) Coin Castle Casino, Inc. later became known as Long Island Casinos, Inc. (Tr. 85-86; Complainant's Exh. 8) Complainant earned approximately $360.00 per week in this job from June 2006 until on or about June 17, 2007, when her employer stopped doing business. (Tr. 84-85, 87; Complainant's Exh. 8)

16. Complainant stated that Respondents' boat, the Majesty Casino Boat, crashed in or about October 2006 and did not sail again. (Tr. 36-37)

17. Complainant credibly testified that, up to the date of the public hearing, she continued to feel nervous, depressed and self-conscious after Respondents discharged her. (Tr. 95-99, 101) Complainant's testimony is corroborated by her daughters, Kim Gusmano and Lori Whittemore, who testified that Complainant suffered from depression, low self-esteem and social withdrawal up to the date of the public hearing. (Tr. 106-07, 120-21, 124-26)

OPINION AND DECISION

The Human Rights Law makes it an unlawfully discriminatory practice for an employer to discriminate against an employee based on her age. Human Rights Law § 296.1(a).

A complainant has the burden of establishing a prima facie case by showing that she is a

member of a protected group, that she was discharged from a position for which she was qualified and that her discharge occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to a respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for a complainant's discharge. The burden shifts to a complainant to show that a respondent's proffered explanations are a pretext for unlawful discrimination. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003).

Here, Complainant has established a prima facie case against both Respondents. Complainant was sixty years of age when she was discharged and had more than 43 years of experience working as a bartender. Although Respondent VDG (directly through Respondent Gelman) told Complainant that she was dismissed because business was slow, this reason is patently false. The record establishes that Respondent VDG terminated Complainant's employment during its busiest season, and that it immediately sought to replace her with a younger employee. Shortly after Complainant was discharged, Respondent VDG hired a new bartender that was less than 30 years of age. Therefore, given Respondents' default, Complainant has proven that she was unlawfully discriminated against on the basis of her age when her employment was terminated on or about August 8, 2005.

Damages

Respondents have defaulted and must be held accountable for their unlawfully discriminatory conduct. The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). 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. New York State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

Complainant diligently began looking for work after Respondents terminated her employment on or about August 8, 2005. Complainant fully mitigated her damages when she found comparable employment working as a bartender on a casino boat in June 2006, earning more money than she earned working for Respondents.

Complainant is therefore entitled to damages for back pay between August 8, 2005 and June 2006, an approximate forty-four week period. Since Complainant earned approximately $200.00 per week working for Respondent, she is entitled to $8,800.00 in back pay damages. Although Complainant received health insurance benefits from Respondent VDG, those benefits cannot be valued in this record.

Complainant is also entitled to recover compensatory damages for mental anguish and humiliation caused by Respondents' unlawfully 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 v. New York 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).

Here, Complainant credibly testified that, up to the date of the public hearing, she continued to feel nervous, depressed and self-conscious as a result of Respondents' discriminatory conduct. Complainant's testimony is corroborated by her daughters who testified that Complainant suffered from depression, low self-esteem and social withdrawal up to the date of the public hearing. Accordingly, an award of $25,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 727 N.Y.S.2d 499 (3d Dept. 2001); *Georgeson & Co., Inc. v. Stewart*, 267 A.D.2d 126, 700 N.Y.S.2d 9 (1st Dept. 1999); *New York City Health & Hospitals Corp. v. New York State Div. of Human Rights*, 236 A.D.2d 310, 654 N.Y.S.2d 310 (1st Dept. 1997); *State Div. of Human Rights v. Demi Lass Ltd.*, 232 A.D.2d 335, 648 N.Y.S.2d 925 (1st Dept. 1996).

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 Respondents, their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondents 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 (60) days of the date of the Commissioner's Order, Respondents shall pay, jointly and severally, to Complainant the sum of $8,800.00 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from August 21, 2006, a reasonable intermediate date, until the date payment is actually made by Respondents.

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay, jointly and severally, to Complainant the sum of $25,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondents' unlawful discrimination against her. 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 Respondents in the form of a certified check made payable to the order of Complainant, Gail Whittemore, and delivered by certified mail, return receipt requested, to the New York State Division of Human Rights, Caroline Downey, Esq., Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Respondents shall furnish written proof to the New York State Division of Human Rights,

Caroline Downey, Esq., Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained within this Order.

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

DATED: March 15, 2013
New York, New York

Robert J. Tuosto
Administrative Law Judge