

**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.,

Respondent.

**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 December 13, 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”). 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 8th day of January, 2007.

KUMIKI GIBSON
COMMISSIONER

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VITAL DEVELOPMENT GROUP, INC.,

Respondent.

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

Case No. **10109007**

SUMMARY

Complainant charged that Respondent discriminated against her on the basis of her age when it terminated her employment. Respondent defaulted and an inquest was held. The complaint is sustained and 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 November 28, 2005, 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 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 and 6, 2007. (ALJ’s Exhibits 5, 6) At the preliminary conference held on July 24, 2007, Complainant appeared and the Division represented the complaint by Anton Antomattei, Esq., of Counsel. 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. (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 and 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 and 6, 2007. Complainant appeared at the hearing and the Division was represented by Antomattei. Respondent did not appear and has defaulted. No post-hearing briefs were filed.

FINDINGS OF FACT

1. Complainant was born on December 23, 1944. (Tr. 31; ALJ’s Exh. 1)
2. Respondent is a corporation that is listed as an active entity by the New York State Department of State. (Complainant’s Exh. 1)
3. From June 2005 until August 2005, Respondent owned and operated the Majesty Casino Boat and employed approximately eighty people to work on the boat. (Tr. 38-39, 49, 74-75; Complainant’s Exhibits 5, 6)

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

5. Gary 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, Gelman told Respondent's food and beverage manager at that time, Michele Fritz, to terminate Complainant's employment. (Tr. 61-62, 68-69)

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

7. Because the customers liked Complainant and because Fritz considered Complainant one of her best workers, Fritz talked Gelman out of terminating Complainant's employment at that time. (Tr. 64-65, 68) However, Gelman did not allow Complainant to work on the boat when Respondent hosted events that catered to a "young crowd." (Tr. 73-74)

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

9. 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)

10. Approximately three days later, Complainant went to Respondent's office to speak with Gelman about her employment status. (Tr. 29, 32) At that time, Respondent posted a sign in its office window that stated "bartender wanted." (Tr. 33, 72) Although Gelman was not in

Respondent's office at that time, Complainant spoke to him on the telephone. Gelman told Complainant that he had to dismiss her because business was slow. (Tr. 29, 32)

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

12. Immediately after Respondent dismissed Complainant, Gelman instructed Fritz to look for a younger replacement for Complainant because Respondent was very busy and needed to hire more staff. (Tr. 70-72, 74) Respondent 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)

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

14. 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)

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

16. 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)

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

18. Complainant credibly testified that, up to the date of the public hearing, she continued to feel nervous, depressed and self-conscious after Respondent 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 Division finds that Respondent discriminated against Complainant on the basis of her age when it terminated her employment on or about August 8, 2005.

It is unlawful for an employer to discriminate against an employee based on her age. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(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 Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for Complainant's discharge. The ultimate burden rests with Complainant to show that 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).

Complainant has established a prima facie case. Complainant was sixty years of age when she was discharged and had over forty-three years of experience working as a bartender. Although Respondent told Complainant that she was dismissed because business was slow, this reason is patently false. The record establishes that Respondent terminated Complainant's

employment during Respondent's busiest season and that Respondent immediately sought to replace Complainant with a younger employee. Shortly after Complainant was discharged, Respondent hired a new bartender who was less than thirty years of age.

Respondent has defaulted and must be held accountable for its 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 Respondent terminated her employment on or about August 8, 2005. She 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 Respondent.

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, those benefits cannot be valued in this record.

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 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).

In the case at bar, 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 Respondent’s 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, the Division finds that 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 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 (60) days of the date of the Commissioner's Order, Respondent shall pay 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 Respondent.

2. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay 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 Respondent's 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 Respondent 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, 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 within this Order.

4. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall promulgate policies and procedures for the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. These policies and procedures shall include the establishment and formalization of a reporting mechanism for employees in the event of discriminatory and/or harassing behavior or treatment, and shall contain the development and implementation of a training program in the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. Training shall be provided to all employees. A copy of these policies and procedures shall be provided, simultaneously, to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: December 11, 2007
Hempstead, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive, flowing style.

Robert M. Vespoli
Administrative Law Judge