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CASE NO.:01-17-0003-9979

INTERIM AWARD.

VS.

Respondent

Preliminary arguments were heard on the Respondent's motion for Summary Adjudication of

1 Claimant's prayer seeking Punitive Damages and the Claimant's Motion for Reconsideration of the
2 Summary Adjudication of its cause of action for Retaliation. Both Motions were denied. The
3 Claimant failed to prove by clear and convincing evidence that the conduct in support of the prayer
4 for Punitive Damages rose to the level of malicious, oppressive or fraudulent; and the Ruling
5 underlying the Motion for Reconsideration was affirmed.
6

7 Counsel then proceeded to argue the merits of the remaining causes of action to wit: Hostile
8 Work Environment; Sexual Harassment; Disparate Treatment; Failure to Prevent Discrimination;
9 Constructive Discharge in Violation of Public Policy and Negligent Infliction of Emotional Distress.

10 The evidence compels the conclusion that the Claimant has met his burden of proving he was
11 subjected to a hostile work environment as a result of extreme and pervasive sexual harassment which
12 also was the driving force behind the further finding that the Claimant was constructively terminated.
13

14 In December of 2013 the Claimant, at the time a 47 year old married man, with a family
15 consisting of three children between the ages of six and twelve was hired as a Kitchen Manager in a
16 restaurant (the Restaurant) owned by Respondent. Upon completing an eight to ten week training
17 course he commenced his employment where he was introduced to an atmosphere rife with sexual
18 conduct, both verbal and physical, occurring throughout the workday. It is apparent that the highly
19 successful Respondent's restaurant operations are exceptionally well organized and in the kitchen
20 require a virtual assembly line approach to the taking of and filling food orders from the restaurant.
21 As a consequence of this work atmosphere it is not surprising that the co-workers indulged in what to
22 each other may be characterized as welcome banter however to a newcomer could be considered
23 unwelcome and sufficiently offensive to create a hostile work atmosphere as it did to the Claimant
24 herein.
25

26 While the banter between the employees continued the Claimant, characterized by Dr. Carroll,
27 a psychiatric expert retained by the Respondent, as a shy and introverted man, soon became the target
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1 of the conduct. Sharing of sexual exploits became common, suggesting outrageous contests such as
2 semen tasting in which he would be expected to participate and physical touching including simulated
3 anal sex were increasing in frequency. The comments were diffuse in their subjects however the
4 sexual theme was dominant and offensive. In the words of the Claimant he soon began to feel his
5 "manhood" threatened. While this sexually dominated harassment continued the lack of respect soon
6 turned to emasculating derision in the form of confrontations including challenging his competence
7 and directing him to perform tasks beneath his position, ultimately driving the Claimant to determine
8 "he couldn't take it anymore" and causing him to resign.

10 The critical element necessary to prove a hostile work atmosphere is that the harassment was
11 because of the Claimant's sex. This less than definitive phrase has understandably been the subject of
12 much litigation. The most revealing treatment of this language may be found in the cases of Singleton
13 v. United States Gypsum Co. (2006), 140 Cal. App.4th 1547 and Taylor v. Nabors Drilling USA, LP
14 (2014) 222Cal.App.4th 1228. The significant language defining the meaning of this phrase included
15 using sex "as a weapon to create a hostile work environment" and to "target (the subject's)
16 heterosexual identity." Such was the case here.

18 The Claimant also contends that he was the subject of disparate treatment the elements of
19 which appear to be incorporated in the finding of a hostile work atmosphere based upon sexual
20 harassment. In any event the evidence supports an independent finding of this FEHA violation as
21 well. Additionally the Claimant alleges that the Respondent failed to take all reasonable steps
22 necessary to prevent the harassment, a claim which although unnecessary to provide the Claimant
23 relief is supported by the evidence. The failure to adequately follow up on the complaint registered by
24 the Claimant in June of 2014 standing alone supports this finding however it is buttressed by the
25 finding of the Arbitrator that the conduct in question was one of long standing and necessarily came to
26 the attention of not only the departmental managers but the general manager, Gary Cottrell, the
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1 combination of which is sufficient to impute an awareness to the Respondent. It is unnecessary
2 because of the finding that the harassment was conducted by Stephen Scott as well as Juan Ponte both
3 supervisors of the Respondent, thereby rendering the Respondent liable for their conduct. In making
4 this finding the Arbitrator specifically rejects the testimony of outright denial by each of these
5 individuals as patently incredible.
6

7 As a result of these violations of the Federal Employment and Housing Act (FEHA) the
8 Claimant seeks non-economic damages (emotional distress) and economic damages (loss of income).

9 The Respondent challenges the claim for emotional distress on a variety of grounds however
10 the Taylor case supra dispenses with the basis for Respondent's position holding: "Proof of the
11 elements of the tort of intentional infliction of emotional distress, including the severity of the distress
12 (although established in this matter) is not a prerequisite for the recovery of compensatory damages
13 (under the FEHA) for mental anguish." Testimony of two co-workers as well as the Claimant's family
14 members more than support a finding that the Claimant's experience at the Respondent's restaurant
15 caused him to suffer extreme emotional distress. The co-workers testified that they had, on separate
16 occasions, observed the Claimant crying, apparently in response to the work atmosphere and the
17 Claimants wife testified that it was in the Spring after he had been hired, a matter of 6 months, that the
18 Claimant started to withdraw and "just stopped being a father and a husband". "He was like a
19 zombie". She described a man whose mood went from exhilarated to depressed. Exhilarated because
20 of the opportunity which the employment with the Respondent could mean to the Claimant and his
21 family and depressed because of what it became. She testified that prior to his employment with the
22 Respondent he participated in family events, was a good companion to his children as well as to her.
23 This testimony was corroborated by the Claimant's son as well.
24

25 The parties elected to retain experts to assist in the evaluation of this claim. Predictably their
26 opinions are in conflict. The Claimant's expert, Dr. Dellaverson, opined that that the Claimant suffers
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1 from a major depression and extreme anxiety arising from his experience at the Restaurant and Dr.
2 Carroll, the Respondent's expert, found that the Claimant did experience a temporary period of
3 emotional distress subsequent to the termination of his employment at the Restaurant and that he is
4 not now nor has he ever suffered from major depression arising from his experience at the Restaurant
5

6 The issue of the damages suffered by the Claimant rises and falls on the determination of the
7 extent and duration of this emotional distress condition which in turn requires an evaluation of the
8 qualifications of the respective experts with such opposing views, as well as an analysis of the basis
9 for the opinions expressed.

10 Dr. Dellaverson identified herself as a Licensed Clinical Social Worker which she explained
11 authorizes her to conduct psychological evaluations and treat Claimant. The examination was
12 described by the witness as consisting of "intake, presenting complaint, past history, mental status
13 examination, diagnosis, recommendations and conclusions" all of which were accomplished in and
14 limited to a personal interview with the Claimant conducted in March 2018, weeks before the Hearing
15 in this matter. It was this interview that Dr. Dellaverson relied upon exclusively in forming her
16 opinions.
17

18 Dr. Carroll is a Board Certified general and forensic psychiatrist. In preparation for his
19 examination of the Claimant he reviewed medical records, deposition transcripts of the Claimant's
20 wife, his teenage son Ethan and the testimony of Dr. Dellaverson. Dr. Carroll also required the
21 Claimant to take a test known as the Minnesota Multi-Phasic Personal Inventory (MMPI). He
22 explained that it is a psychological test consisting of 567 True or False questions that has been in use
23 for more than 50 years and is designed to permit the examiner to detect mental health conditions
24 including depression.
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26 This comparison requires the acceptance of Dr. Carroll opinions. They include that the
27 Claimant, as a result of his work experience at the Restaurant, suffered an Adjustment Disorder which
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1 caused emotional distress "for a good, I would say, at least three months, perhaps a little bit longer".
2 He specifically denied that the Claimant suffers from a major depression and attributes any anxiety he
3 may continue to experience to the litigation in which he is now involved. He declined to identify the
4 cause of this disorder acknowledging that there were two possibilities one of which he characterized
5 as being subjected to "extreme levels of sexual type of harassment" and the other, attributed to Juan
6 Ponte, presumably from a review of deposition testimony, was that he had difficulty doing his job. Dr.
7 Carroll candidly acknowledge that "I don't know specifically which one caused this".

9 A stated above it is the finding of the Arbitrator that the emotional distress condition was the
10 product of a hostile work atmosphere caused by sexual harassment. While it is difficult to determine
11 the extent and duration of the resulting condition it is clear that both experts recognized the existence
12 of a mental health condition resulting in a significant impact on the Claimant and his family life.
13 Neither expert addressed the existence and effect of this condition on the Claimant while still
14 employed , damages to which he is clearly entitled as the conduct complained of far exceeded the
15 parameters of the bargained for work atmosphere. Light v. Department of Parks & Recreation (2017)
16 14 Cal. App. 4th 75. The entirely credible Claimant's wife specifically recalled that the condition
17 manifested itself in the Spring of 2014 some 6 months, after commencing his employment and in
18 excess of one year prior to his termination. Taken in combination with the post termination period
19 requires a finding that the Claimant is entitled to recover the sum \$100,000 for the non-economic loss
20 he suffered.


22 While the evidence in support of the award for non-economic damages is compelling the same
23 cannot be said for the claim of economic loss. The Claimant contends he was unable to gain or hold
24 employment post termination because he continued to suffer from the effects of his experience at the
25 Restaurant. Interestingly, Dr. Dellaverson testified it was apparent the thought that he was disabled
26 had not occurred to the Claimant prior to her suggestion during the examination of him weeks before
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1 the Hearing. The Claimant acknowledged having been hired at two comparable food service locations
2 where he was employed for a period of months prior to being terminated. The Claimant further
3 testified that the stated reason for each of these terminations was "poor performance". The
4 combination of this testimony and Dr. Carroll's opinions compel the conclusion that the Claimant did
5 not meet his burden of proving economic damages beyond his immediate post termination loss of
6 \$1,800 incurred prior to his resumption of comparable employment.
7

8 Accordingly the Claimant is entitled to the following award:

- 9 1. Respondent, Cheesecake Factory Inc. et.al. shall pay to Claimant Peter Gathright the
10 sum of \$101,800 within 30 days from the issuance of this award.
- 11 2. Any application for an award for attorneys fees shall be subject to the following
12 briefing schedule:
 - 13 a. Application on or before June 20, 2018
 - 14 b. Opposition on or before July 27, 2018
 - 15 c. Reply on or before August 17, 2018

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18 Dated: June 6, 2018

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20 Hon. Thomas P. Nugent
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