SUBJECT MATTER INDEX ENTRY

Inc. ICL 3/12

X Board Ruling after Administrative Hearing (R)
__ Commission Order (CO)
__ Hearing Officer Order (HO)

NOTE: Citation updated to reflect denial of PLA, but does not yet have reporter cite to Appellate Court opinion, which was published.

Case Citation *Alexander v. 1212 Restaurant Group et al.*, CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist. Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012).

MAIN CATEGORY EMPLOYMENT DISCRIMINATION
SUBCATEGORY 1 Sexual Orientation Discrimination
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist. Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Restaurant company and individual agents discriminated against employee based on perceived sexual orientation by creating hostile work environment through frequent, continuing comments and derogatory epithets insinuating that he is gay. No discrimination found in connection with termination of Complainant's employment, which was due to disputes about authority and attendance. R

MAIN CATEGORY SEXUAL ORIENTATION DISCRIMINATION
SUBCATEGORY 1 Liability Found
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist. Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Restaurant company and individual agents discriminated against employee based on perceived sexual orientation by creating hostile work environment through frequent, continuing comments and derogatory epithets insinuating that he is gay. No discrimination found in connection with termination of Complainant's employment, which was due to disputes about authority and attendance. R

MAIN CATEGORY SEXUAL ORIENTATION DISCRIMINATION
SUBCATEGORY 1 Liability Not Found
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist. Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Although restaurant company and individual agents discriminated against an employee based on perceived sexual orientation by creating hostile work environment, no discrimination found in connection with termination of Complainant's employment;, which was due to disputes about authority and attendance. R

MAIN CATEGORY EMPLOYMENT DISCRIMINATION
SUBCATEGORY 1 Harassment
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist. Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Restaurant company and individual agents discriminated against employee based on perceived sexual orientation by creating hostile work environment affecting his ability to perform his job through frequent, continuing comments and derogatory epithets insinuating that he is gay. Noting that CHR has been guided by federal law principles defining harassment, CHR found it "hard to imagine a workplace more objectively offensive to an employee,

flipside

more viciously permeated with anti-gay vitriol, than what has been found to have existed...." R

MAIN CATEGORY EMPLOYMENT DISCRIMINATION
SUBCATEGORY 1 Employment Relationship
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist. Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Individual Respondent was supervisory employee not unpaid consultant where working 20-30 hours per week for valuable consideration in form of future ownership interest in company and Complainant employee was required to perform under his direction as designee of majority owner. Majority owner of company not liable for the supervisor's conduct as employer because company was the employer, but found liable for own actions or inactions in connection with workplace harassment. R

MAIN CATEGORY AGENCY LAW
SUBCATEGORY 1 Principal Liability
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist. Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Individual Respondent was supervisory employee not unpaid consultant where working 20-30 hours per week for valuable consideration in form of future ownership interest in company and Complainant employee was required to perform under his direction as designee of majority owner. Majority owner of company not liable for the supervisor's conduct as employer because company was the employer, but found liable for own actions or inactions in connection with workplace harassment. R

MAIN CATEGORY SEXUAL ORIENTATION Discrimination
SUBCATEGORY 1 Perception

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist, Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Restaurant company and individual agents discriminated against employee based on perceived sexual orientation by creating hostile work environment through frequent, continuing comments and derogatory epithets insinuating that he is gay. Even if Respondents did not perceive Complainant to be homosexual or bisexual, they still violated the CHRO by maintaining an anti-gay atmosphere that interfered with the employee's ability to perform his job "because of" sexual orientation. R

MAIN CATEGORY DAMAGES
SUBCATEGORY 1 Emotional Distress
SUBCATEGORY 2 Employment

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist, Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Emotional distress damages of $35,000 imposed jointly and severally against corporate and individual Respondents for workplace harassment based on perceived sexual orientation in light of prior CHR decisions, corroborated evidence of almost daily incidents over one-year period, and physical effects supported by testimony and records of Complainant's treating physician. R

MAIN CATEGORY PUNITIVE DAMAGES
SUBCATEGORY 1 Awarded

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist. Aug. 25, 2011), PLA denied Ill. S.Ct. No

113274 (Jan. 25, 2012). Punitive damages of $140,000 imposed jointly and severally against corporate and individual Respondents for workplace harassment based on perceived sexual orientation, based on finding of mid-range level of reprehensibility of the conduct warranting an amount four times the moderate compensatory damages. R

MAIN CATEGORY PUNITIVE DAMAGES
SUBCATEGORY 1 Standard to Determine Amount to Award

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist, Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Punitive damages of $140,000 imposed jointly and severally against corporate and individual Respondents for workplace harassment based on perceived sexual orientation, based on finding of mid-range level of reprehensibility of the conduct warranting an amount four times the moderate compensatory damages. R

MAIN CATEGORY FINES
SUBCATEGORY 1 After Administrative Hearing
SUBCATEGORY 2 Employment

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Oct. 16, 2008), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist, Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Fines of $500 each imposed against corporate and two individual Respondents for workplace harassment based on perceived sexual orientation. R

City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Demetri G. Alexander
Complainant,
v.

1212 Restaurant Group, LLC d/b/a The State Room, Scott Schwab, and Russell Scalise
Respondent.

Case No.: 00-E-100

Date Mailed: October 30, 2008

TO:

Brad Grayson
Strauss & Malik, LLP
135 Revere Dr.
Northbrook, IL 60062

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150 N. Wacker Dr., Suite 1300
Chicago, IL 60606

FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on October 16, 2008, the Chicago Commission on Human Relations issued a ruling in favor of Complainant in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, the Commission ORDERED Respondents jointly and severally to pay damages in the total amount of $175,000 plus interest from August 1, 1999, and further ordered each Respondent to pay to the City of Chicago a fine of $500.[1] The Commission also awards Complainant attorney fees and associated costs.

Pursuant to Commission Regulations 100(15) and 250.150, parties seeking a review of this decision may file a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law; however, because attorney fee proceedings are now pending at the Commission, such a petition cannot be filed until after issuance of the Final Order concerning those fees.

Pursuant to Reg. 240.630, Complainant may now file with the Commission and serve on the other

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[1] **COMPLIANCE INFORMATION:** Parties must comply with a final order after administrative hearing no later than 28 days from the date of mailing of the later of a Board of Commissioners' final order on liability or any final order on attorney fees and costs, unless another date is specified. See Reg. 250.210. Enforcement procedures for failure to comply are stated in Reg. 250.220.

Payments of damages and interest are to be made directly to the Complainant. **Payments of fines** are to be made by check or money order payable to City of Chicago, delivered to the Commission at the above address, to the attention of the Deputy Commissioner for Adjudication and including a reference to this case name and number.

Interest on damages is calculated pursuant to Reg. 240.700, at the bank prime loan rate, as published by the Board of Governors of the Federal Reserve System in its publication entitled "Federal Reserve Statistical Release H.15 (519) Selected Interest Rates." The interest rate used shall be adjusted quarterly from the date of violation based on the rates in the Federal Reserve Statistical Release. Interest shall be calculated on a daily basis starting from the date of the violation and shall be compounded annually.

parties and the hearing officer a petition for attorney fees and/or costs, supported by argument and affidavit, no later than 28 days after the date of mailing of this order and ruling. Taking into account the intervening City holiday shut-down period, the petition is due on or before **December 1, 2008.** Any response to the petition must be filed with the Commission and served on the other parties and the hearing officer no later than 14 days after the filing of the petition. Replies will be permitted only on leave of the hearing officer. A party may move for an extension of time to file and serve any of the above items pursuant to the provisions of Reg. 210.320.

CHICAGO COMMISSION ON HUMAN RELATIONS
Dana V. Starks, Chair and Commissioner

City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60654
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IN THE MATTER OF:

Demetri G. Alexander
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v.

1212 Restaurant Group, LLC d/b/a The State Room, Scott Schwab, and Russell Scalise
Respondents.

Case No.: 00-E-100

Date of Ruling: October 16, 2008

FINAL RULING ON LIABILITY AND RELIEF

I. INTRODUCTION

Demetri Alexander, a restaurant creator, alleges that he was subjected to a hostile work environment as the result of almost daily, demeaning comments made to him about his perceived sexual orientation. These comments were directed at him by his immediate supervisor, the restaurant owner's designee Scott Schwab, and by the majority owner of the 1212 Restaurant Group, Ltd., Russell Scalise. The Complainant further contends that he was terminated from his position as "front of the house manager" for the restaurant known as "The State Room" because of his perceived sexual orientation. He has sought actual and punitive damages.

Alexander has apparently abandoned his claim that Respondents' alleged harassment of him was based upon his opposition to race discrimination at the restaurant, a claim upon which Substantial Evidence was found by the Commission. Complainant introduced no evidence in support of this claim. He did not argue this theory of liability in his post-hearing Memorandum. He did not file objections to the First Recommended Decision. Accordingly, his race discrimination claim is abandoned.

The Respondents, while admitting that some of the demeaning comments were made, contend that the conduct was not hostile, severe, or pervasive and further contend that there can be no liability because they did not perceive Mr. Alexander to be gay or bisexual. Respondents make numerous legal arguments with regard to individual liability, each of which will be addressed in this opinion.

II. PROCEDURAL HISTORY

This case has had a unique and protracted procedural history. The Complaint was filed on September 8, 2000. On April 29, 2004, the Chicago Commission on Human Relations issued a Substantial Evidence finding with respect to the claims of sexual orientation and race discrimination. An administrative hearing was conducted over six trial days between July 11, 2005, and August 16, 2005, with seventeen witnesses testifying in person or by telephone.

Each party, ably represented by counsel, filed extensive post-hearing memoranda. The case then sat, undecided, for over two years. On April 8, 2008, the Commission appointed a new hearing officer and sought position statements from the parties regarding the need for further evidentiary proceedings. Each party agreed, indeed urged, the new hearing officer to decide the

case based upon the transcript of prior testimony and exhibits admitted at the hearing.

A First Recommended Decision was issued on May 28, 2008. The Respondents filed timely objections, supported by their legal arguments. The Complainant did not file any objections.

For the most part, the Respondents' objections merely reargued the inferences to be drawn from the testimony at hearing. Those objections that focus upon specific findings and rulings are addressed herein. Any additional objection not specifically mentioned in this ruling has been rejected.

III. FINDINGS OF FACT

A. Facts Related to Complainant's Termination of Employment[1]

In 1998, Demetri Alexander, a Chicago area restaurateur of some note[2], was approached by Richard Daniels to discuss opening a new restaurant. By May of 1999, Daniels had brought in an 85% majority owner, Russell Scalise, to underwrite the financing and operation of the restaurant. Scalise, a successful trader at the Chicago Mercantile exchange, had no prior restaurant experience. (*Scalise at 78)* The corporate entity 1212 Restaurant Group, L.L.C. therefore hired Mr. Alexander to be the creative force behind the restaurant.[3]

The parties entered into an employment contract dated May 12, 1999. (*Complainant's Exhibit 1*) The contract specifically states, "Employer desires to hire Employee as restaurant creative director and front house manager." It contains an attached exhibit describing Mr. Alexander's initially assigned duties as follows:[4]

> To assist in the inception and development of the restaurant including but not limited to creative concept, décor, theme, milieu, menu, hiring of staff, promotion, advertising, selection of tableware, kitchen equipment, trade fixtures and restaurant and food suppliers, management of front of house, and to implement the Company business plan and projections, Employee's responsibilities do not

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[1] The record in this case consists of six days of testimony along with various documents admitted into evidence. Since the transcript is not consecutively numbered, witness testimony will be referenced by the witness' name and the transcript page of his or her testimony, rather than the date of the transcript.

[2] One witness, Stephen Gaither, testified, "When people think of restaurants in Chicago, they think of Demetri Alexander..." (*Gaither at 6)*

[3] Mr. Scalise stated that he was buying into Demetri's ability to create and operate a successful restaurant. (*Scalise at 78)*

[4] Efforts by Mr. Scalise to suggest that the Complainant was not hired to be a manager are disingenuous at best and reflect poorly on his credibility. In one breath, Scalise admitted that Alexander had been hired to be "front of the house manager," (*Scalise at 78)* and shortly thereafter testified that he had never told Complainant he was to be front of the house manager at the time he signed the employment contract. He said he thought that Alexander's duties were to "greet and seat" people and assist in anything that was needed. (*Scalise at 81)* Later in his testimony, Scalise remarkably stated that Alexander was not a manager. When asked whether Alexander had any management responsibilities, Scalise replied "No." (*Scalise at 159)* Apparently forgetting this testimony, Scalise later was asked whether he had requested that the Complainant sign in and out to verify whether he was working, his response was "No. Managers didn't." (*Scalise 195)* In his objections, Scalise contends that only Alexander's initial duties were outlined in the Management Agreement and those duties later changed to a rather highly paid *meet & greeter.* As can be seen throughout the transcript, Respondent Scalise's testimony was not fettered by the truth.

include fiscal controls and systems, purchasing and hiring and supervision of additional employees related to these functions.

The employment contract provided Alexander with a weekly salary of $1,200, an incentive payment of 1½% of the gross food and beverage sales per month, and an option to purchase a 20% ownership interest for $100 after all investors had recouped their investment. The contract also included the following language: "Employee shall report to and perform his duties, under the direction of Scott Schwab, as designee of Russell Scalise ("Company Manager") or such other person as may, from time to time, be designated by Company." *(Complainant's Exhibit 1, ¶ 2)*

Schwab was also a novice when it came to the restaurant business. *(Schwab at 13)* He was a fellow commodities trader who had known Scalise from work for approximately 4-5 years prior to 1999. *(Schwab at 6)* Neither Scalise nor Schwab had any prior relationship with the Complainant.

It did not take long for problems to surface. The Respondents have articulated a litany of performance related criticisms they contend resulted in their termination of Alexander's three-year employment contract a little over one year later, on June 12, 2000. Many of these criticisms are corroborated by the witnesses presented by Respondents at the administrative hearing – most of whom worked at the restaurant for some period of time while Alexander was employed. For his part, Alexander contends that these criticisms are either false or that they are pretextual reasons for his termination. Complainant argues that his perceived sexual orientation was a motivating factor in his termination. As shall be seen, the Commission accepts the recommended finding of the hearing officer that the Complainant has not sustained his burden of proving by a preponderance of the evidence that his job termination was motivated, even in part, by his perceived sexual orientation.

The criticisms of Alexander's performance by Respondents can be catalogued as follows:

1. During the build-out period, he was not available to meet with the contractor in the mornings as he was required to be. This resulted in expensive change orders.

2. Important tasks that Complainant was responsible for did not get done properly. Hosts did not get timely trained; an awning did not arrive on time; the menus were not ready for opening day.

3. After the restaurant finally opened on April 3, 2000, Alexander did not devote his full energies or time to his work at the restaurant.

4. An irreconcilable conflict arose between Alexander and the General Manager, Ken Sheridan, such that Sheridan came to believe Alexander should be terminated for cause.

Ample evidence exists to support each of these criticisms. Scott Schwab testified that he needed Alexander at the restaurant site in the morning. Because the Complainant was not dealing with the contractor, Ken Sheridan (hired in October 1999 to be General Manager) was forced to assume those duties. *(Schwab at 53)* Sheridan supported this testimony, stating that Alexander and the contractor could not stand each other and Alexander would often not be

present when the contractor was there. As a result, Sheridan began to meet with the tradesmen early in the morning. *(Sheridan at 158-159)*

Throughout this decision, the hearing officer substantially credited the testimony of Ken Sheridan citing the following reasons, which the Commission and adopts. For the most part, both the Complainant and the Respondents agree that Sheridan was a credible witness. The Complainant states in his Post-Hearing Reply Brief at p. 18, "There is no reason to reject or disbelieve any of Sheridan's testimony." For their part, the Respondents argue, "The Hearing Officer should credit the testimony of Kenneth Sheridan only as to his factual recollections and not to his assumptions and conclusions of what other people were thinking." *(Respondents' Post-Hearing Reply Brief at 62)* More importantly, Sheridan had nothing personal to gain through his testimony and his testimony, as credited, lends support both to the Complainant's hostile environment claim and to the Respondents' defense regarding the reasons for Alexander's termination.

Another reason to credit Sheridan is the fact that he had no personal relationship with either the Complainant or the Respondents. It is recognized that Sheridan claims that Respondent Scalise threatened his life after he voluntarily left his employment. *(Sheridan at 149)* Nevertheless, the bulk of Sheridan's testimony was consistent with that of other witnesses.

Between his hire in May of 1999 and the approaching opening of the restaurant in April of 2000, Mr. Alexander appears to have adequately handled his responsibilities to create, out of whole cloth, a restaurant. While the reporting relationship between Alexander and Schwab was never without its difficulties and the working relationship between Alexander and Sheridan deteriorated over time, there was nothing that occurred during this period of time that motivated Alexander's firing.

As the opening of the restaurant became imminent, however, the conflicts between the Complainant and his bosses intensified. Sheridan testified that when an awning did not arrive in time for the restaurant opening, he called the vendor and was told that Demetri had told the vendor not to do any more work on the awning until they got paid. *(Sheridan at 194)* Sheridan communicated this to Scott Schwab, fueling the flames of Schwab's growing anger at Alexander.

Sheridan testified that it was Alexander's responsibility to train the hosts. *(Sheridan at 160)* The Complainant, however, did not show up to do the training and as a result, the hosts did not know how to properly perform their duties. *(Sheridan at 203)* The menus, also Complainant's responsibility, were not ready for opening night. *(Alexander at 216)* According to Brittany Milligan, the restaurant was forced to use paper menus which looked terrible. *(Milligan at 43)*

Another pre-opening conflict involved Alexander's role at the mock dinners. The Complainant states that he invited approximately 15% of the people who attended the mock dinners. *(Alexander at 192-193)* Schwab complained that Alexander failed to provide people for the dinners and did not show up himself. *(Schwab at 130)*

Much time was spent during the administrative hearing discussing Alexander's attendance at the restaurant – especially after the restaurant opened. The Complainant testified that he was present at the restaurant every day for at least five weeks after the restaurant opened. *(Alexander at 102)* Chef Ziad Mansour, who had previously worked closely with the Complainant at other restaurants and considered himself a personal friend, testified that

Alexander was at the restaurant every day from the day he was hired until the day he was fired, except when he was sick. (*Mansour at 105)* It is unlikely that this is an accurate statement given the testimony of Schwab, Sheridan, and the employees that Schwab asked to keep track of Alexander's attendance.

We know from Respondent's Exhibit 8 (*Plaintiff's Response to Defendant's Request to Admit*) that at some time prior to June 1, 2005, the Complainant advised Respondents that he was sick and temporarily disabled and unable to come to work or work full time. Ken Sheridan testified that he often heard Schwab express his dissatisfaction about Alexander's "tardiness, not being where he was supposed to be." (*Sheridan at 197)* Sheridan stated that after the restaurant opened, Schwab wanted Alexander at the restaurant at a specific time and he rarely showed up at that time. (*Sheridan at 198)*

The factor that contributed the most to Mr. Alexander's termination was the apparent power struggle between him and Ken Sheridan. The Complainant contended that in the line of authority of the restaurant, both he and Sheridan were equals, with Alexander in charge of the front of the house and Sheridan in charge of the back of the house. (*Alexander at 57)* But Sheridan was hired as the General Manager and given more general responsibility over the entire venture. Alexander could not accept a secondary role. Sheridan testified that he and the Complainant had two different views of their respective roles. (*Sheridan at 178)* Sheridan felt that Alexander undermined his authority to the extent that he could not function. (*Sheridan at 182)* Alexander hired staff without Sheridan's knowledge. (*Sheridan at 201)* Alexander changed the table numbering system that Sheridan had set up. (*Sheridan at 179)*

The hearing officer found the following testimony of Sheridan to be compelling:

Q. Basically the thing you couldn't stand was revoking your decisions and ordering people to do something that was contrary?

A. Yes. It was two things. Personally I didn't like him revoking my decisions because, well, personally I didn't like it, and professionally it took my authority or the perception of my authority away from the rest of the staff, made it hard for me to be the leader, and I felt that some of the things he would direct us to do, they were detrimental. Got in the way of us being able to perform, and could be as petty as those table numbers, but it seemed like we were causing ourselves to spend far much more energy on something than we would need to. So, those are the things that got me to the point I couldn't stand him, and I don't think I ever said to Scott, it's him or me, fire me or I quit, but in the end I eventually left because I could not work in the environment, couldn't work with Demetri, couldn't would with Scott Marino and couldn't work with their interruption.

Q. Did there come a point where it was very

open and direct that Demetri needed to go?

A. Yes.

Q. You simply couldn't live with him undermining the job you were trying to do?

A. Right. I really felt I could not do the job I was paid to do, the job I came on board wanting to do. Because of the way he treated my authority and the way he -- it almost seemed at the end that no matter what it was, it was going to be wrong. It was going to be issue.

Sheridan at 180-18

Sheridan came to believe that Alexander should be terminated for cause. In addition to undermining his authority, Sheridan testified that there were substantial performance issues that justified termination. (*Sheridan 212-213)* Sheridan made his views known to Mr. Scalise. (*Scalise at 160)* Sheridan informed Scalise, toward the end of his own employment, that he could not work any longer with Alexander. Scalise tried to get Sheridan to stay, informing him that he would fire Demetri. By that time it was too late. Sheridan had already decided to leave and take a job elsewhere. (*Scalise at 161)*

After Sheridan gave his notice, Scalise called a meeting with Alexander and chef Mansour. Alexander told Scalise "Now that Ken's gone, let's run things my way." (*Scalise at 161)* Scalise told him that he would instead be hiring another General Manager. According to Respondent, Alexander's attendance, after being told he was not going to be in charge, went from bad to worse. (*Scalise at 162)* Schwab and Scalise decided to ask the managers to keep a log of the Complainant's attendance. Then, at the beginning of June, 2005, Alexander "just quit coming to work." (*Scalise 164)*[5]

B. Facts Related to Harassment Based upon Perceived Sexual Orientation

The Complainant contends that from the start of his employment until his termination, the Respondents directed homophobic comments at him that were "absolutely vile and horrible, on a consistent basis." (*Alexander at 60)* The statements made by both Schwab and Scalise were "vile and horrible." Through their words, actions and inaction, the two Respondents created an atmosphere at The State Room so poisoned by anti-gay sentiment that it would have substantially interfered with the most stoic employee's ability to perform his job. Since most all of the statements were directed at Alexander, the fact that other employees did not complain of similar conduct or leave their employment is of no significant import.

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[5]The hearing officer also found, based on the testimony, that much though not all of the Complainant's attendance issues were related to his medical problems. On July 26, 1999, just months after being hired, Alexander's toe was fractured and his foot crushed in a work-related accident. Alexander eventually underwent multiple surgeries related to this injury. At various times over the next year, his mobility was limited. While there was testimony concerning hostility toward the Complainant due to his injury, there is no evidence that this played a role in his termination. It is obvious from the testimony, however, that Mr. Alexander's surgeries and limited mobility were a factor in his work absences.

1. Statements by Schwab

Scott Schwab's daily communications with Demetri Alexander were permeated with vicious, anti-homosexual comments directed at the Complainant. He called Alexander "fag," "homo," "dick sucker," "queer," "sissy," and "Marybeth" almost daily. *(Alexander at 71, 74)* Schwab himself admits calling Alexander names. He admits to using the words "Marybeth" and "cunt", says that he might have used the words "queer or queen", and does not deny using the terms "fag" or "faggot" to refer to Alexander. *(Schwab at 23)* Schwab denies referring to Alexander as a "homo" or "dick sucker" – but the hearing officer found that he was lying. *(Schwab at 24)*

Ken Sheridan, whose testimony the hearing officer credited throughout his recommendation *(infra at 6)*, testified that Schwab referred to Demetri as gay "in most conversations." *(Sheridan at 133)* This corroborates Alexander's testimony that the offensive comments were a regular occurrence. Sheridan testified:

Q. What kind of comments did you hear that you felt were inappropriate?

A. Well, most of them I guess–most of the conversations that really had the most of an issue—where I had the most issue with were ones made directly to Demetri. He was called a pussy. He was called a faggot. He was called a cock sucker. He was asked if he was – when he was with Stephen Gaither and had been with him, he would come back and he was asked if he had been out sucking Gaither's dick. He asked if he takes it in the ass from Gaither.

Q. Were these comments made on a regular basis.

A. Yes.

Q. And who made these comments?

A. Again, I can't recall if it was both, but it was definitely Mr. Schwab.

Q. Did the frequency or intensity of these comments increase over time?

A. Yes.

(Sheridan at 131-132)[6]

Chef Mansour testified that he heard these types of comments emanating from Schwab beginning during the buildout. When asked on direct examination what comments Scott Schwab would make to Demetri, Monsour testified, "I believe it was "'sissy,' 'faggot,' 'suck dick,' stuff like that." *(Monsour at 83)* On cross-examination, however, Monsour admitted that he had previously denied at a deposition having heard Schwab call Alexander a "faggot" or a "homo." Respondents correctly point out in their objections that Monsour's testimony should be given little weight – since it appears to be less than objective. The hearing officer therefore credited

[6] Sheridan could not say with any certainty whom these statements were made in front of. He testified that they were definitely made in front of him, that they may have been made in front of Demetri, and that "I believe they may have been made in front of some of the other managers, but I really don't recall at this point." *Sheridan at 132.*

his testimony only where it was consistent with that of Sheridan, such as the incident below concerning the Stephen Gaither remark.

Alexander testified that Schwab repeatedly made statements to him and to others suggesting that the Complainant was having sex with Steven Gaither, whom Complainant hired to do advertising work for the restaurant. Alexander testified that Schwab would make these references 2-3 times per week. *(Alexander at 79-81)* He would ask him questions like, "Did you finish sucking [Gaither's] dick?" *(Alexander at 81)* These types of statements were made in front of other employees and, at times, in front of customers and non-employees. *(Ingraffia at 35, Alexander at 66)* Sheridan heard Schwab ask the Complainant on a regular basis "if he had been out sucking Gaither's cock" and "if he takes it in the ass from Gaither." *(Sheridan at 131-132)* Chef Ziad Mansour testified about an occasion when Schwab was looking for Alexander and was told that he was with the graphic designer, Gaither. Schwab's comment was, "Maybe he is sucking his dick or something." *(Mansour at 85)*

At hearing, Schwab admitted that he had made graphic remarks about Alexander having sex with Gaither "a few times." *(Schwab at 24)* It would have been hard for him to deny it, since Schwab left offensive voice mail messages for the Complainant, only three of which Alexander retained and introduced into evidence. These messages, in Schwab's voice left on Alexander's home answering machine, sound as follows:

Message #1: "If you can break away from Gaither's cock, give me a call."

Message #2: "Do you eat lunch from [unintelligible] while you are sticking Gaither in the ass, let me know."

Message #3: "Are you fucking Gaither in the ass [unintelligible]"

Schwab contends that the messages were not meant to be offensive. *Schwab at 25-26.* The Commission and the hearing officer find otherwise.

2. Statements by Scalise

Russell Scalise made equally vile remarks concerning the Complainant's perceived sexual orientation *and* was aware that his designee Schwab was making offensive statements to Alexander. Scalise set the tone early in the parties' relationship when he met with Richard Daniels along with Alexander. The meeting took place around July 1999 at a restaurant called "Monday's." On the way to the meeting, Alexander stopped to talk with someone while Scalise and Daniels sat at a table. In Daniels words:

> And when we sat down, Scalise looked to his left and looked at Demetri talking to the guy outside Monday's restaurant and said, this guy is a total fag. And he's probably sucking that guy's dick. *Daniels at 73.*

Respondents argue that Daniels had a motive to lie because he had to relinquish his ownership interest in the restaurant to Scalise for $60,000 and because he was billed for a restaurant tab that he allegedly did not pay. There was no credible evidence in the record that Daniels was biased. He had no prior relationship with Alexander. Apparently, he was able to recoup his investment in the restaurant. To suggest that Daniels was perjuring himself because of

a restaurant tab incurred while he was an investor is pure speculation. The Commission also does not find that Daniels was impeached by his deposition testimony. He explained that he understood the deposition question to be asking if he knew of any man Alexander was having sex with. *Daniels at 96-97.*[7]

On another occasion during the buildout, in the presence of Jeffrey Ingraffia, when Demetri said something about the placement of curtains, Scalise walked over and started yelling at him, calling him a "dick sucking sissy". According to Daniels, this took place about two months before the April 3, 2000, opening. *(Daniels at 74)* Ingraffia recalls hearing Scalise tell Alexander that he was a "cock sucker and fag." *(Ingraffia at 35-37)* Ingraffia also recalled another conversation he had with Scalise in which he asked if Demetri was around because he wanted to congratulate him regarding the opening of the restaurant. Scalise told Ingraffia, "He's in the back sucking somebody's dick." *(Ingraffia at 38)*[8]

Several witnesses testified to an incident that occurred toward the end of April 2000 at the restaurant. The Complainant had been talking to a friend of his, a well-known female impersonator known as "Chili Pepper." Alexander walked into the kitchen and encountered Scalise. Scalise said, "I know that has got to be your honey. You've got to be taking it in the ass from him." *(Alexander at 67)* Chef Mansour corroborated this incident, recalling that Scalise had asked Demetri, "Are you sucking his dick?" *(Mansour at 86)*

Alexander detailed another disturbing incident that took place in mid-April, 2000. The Complainant was sitting down with a group of young female customers when Respondent Scalise came over to them. In front of the customers, and with a full bar, Scalise said, "What are you talking to those girls for, you know you don't like girls, you know you just like to suck dick...." *(Alexander at 66)*

For his part, Scalise denies ever calling Alexander a "fag" or making any statements to him about sexual acts." *(Scalise at 163)* In light of the testimony of Daniels and Sheridan, two witnesses with nothing to gain or lose by their testimony, the Commission does not credit Scalise's denials. It seems clear from the testimony that Russell Scalise bore serious *animus* toward homosexuals. This is borne out by his reaction to the Complainant's attempt to hire a gay employee, Jason Clark, as a *maitre'd.* When Scalise encountered the Complainant talking to Clark, he said to him, "Is your sissy lover helping you? Are you going to go to the washroom now and blow him?" *(Alexander at 69)* When Scalise found out that Alexander was going to hire Clark, he told Alexander that "we don't want any more gays, we've already got you, one dick sucker is enough." *(Alexander at 69)* This testimony is made more credible by the testimony of Ken Sheridan. Sheridan testified that Scalise told him, more than once, that he "didn't want any faggots in the restaurant." *(Sheridan at 144)* Sheridan specifically recalled the situation regarding the hiring of Jason Clark. Scalise told Sheridan he didn't want Clark working

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[7] It is correct that on cross-examination Daniels was confronted with an affidavit in which he stated that rather than saying "I think he's sucking this guy's dick," Daniels stated that the quote was "he was fucking him in the ass." This change of testimony does not really help the Respondents.

[8] Contrary to Respondents' objections, Ingraffia was not impeached by his prior deposition testimony where he denied ever having a "private conversation" with Scalise. He explained at hearing that the comments he heard Scalise make about Alexander were made in the presence of "[a] bar full of people." Ingraffia at 50.

at the restaurant because "he's a faggot and he'll bring faggots here and that's not the environment we want." (*Sheridan at 145*)[9]

In his objections, Scalise argued that he is entitled to a "same actor" inference, citing *Johnson v. Zema Systems Corp.*, 170 F.3d 734 (7th Cir. 1999).[10] Such an inference is generally applied to rebut the allegation of discriminatory *animus* where, within a reasonably short period of time, the same person who hires an employee later fires the employee. The theory is based on a common-sense psychological assumption, that "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them) only to fire them once they are on the job." *Id.* at 745. *Johnson*, however, casts serious doubt on the utility of the same-actor inference and makes clear that the inference is inappropriate where there is sufficient direct evidence of discriminatory *animus*.[11]

Several of Respondents' witnesses testified that they did not hear anti-gay comments made in the restaurant. Scalise's second cousin, Rina Infelise, who worked as a host and then party planner, testified that she never heard Schwab or Scalise say anything about homosexual employees. (*Infelise at 188*) The only names she says she heard Schwab call Complainant were "Greek," "Rod Steward," and "Marybeth". (*Infelise at 185*) Her testimony, which focused on accusing the Complainant of uttering offensive statements regarding other employees, was one-sided and hard to believe, given the overwhelming contradictory evidence. Brittany Milligan, who disliked the Complainant because he kept referring to her as "Bridget," must have worked at a different restaurant. She said that she never heard any anti-gay comments by anybody in the restaurant. (*Milligan at 50*) She also testified that she was higher in the chain of command than Mr. Alexander and that, as far as she knew, Alexander was not a manager. (*Milligan at 59-60*) Neither of these facts was true. Ms. Milligan was hired to be a service trainer. (*Milligan at 31*) Prior to working at The State Room, she had no managerial experience working in a restaurant. (*Milligan at 63*) The Commission has discounted most of Ms. Milligan's testimony as being biased.

Another employee, Mark Robinson, testified that the only name he ever heard either Scalise or Schwab call the Complainant was "buttercup." (*Robinson at 11*) While it is possible that Robinson was somehow sheltered from the deluge of offensive comments being directed at the Complainant, it is unlikely.

The Respondents also presented the testimony of three former employees, Adam Lebin, Malakia Marion and Robert Grotz, who testified that they believed Alexander to be heterosexual and that they did not hear offensive comments made by Schwab or Scalise. The fact that these

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[9] Scalise's testimony regarding Jason Clark was found by the hearing officer to be less than candid, although he does admit being concerned about the fact that Clark was gay. When asked if he had told Sheridan that "one homo is enough", Scalise testified, "I actually asked Ken and Demetri their opinion, because I never had a restaurant, what the effect of having him at the restaurant would be, and Demetri is the one who told me it would probably help. Q. You were concerned, though, about having gay people in the restaurant, right? A. From a business standpoint I wanted to know if it was a plus or a minus, and Demetri answered it for me. Q. Did you ever make hostile comments about gay people to Ken Sheridan? A. I remember discussing Jason with him. Q. Do you remember indicating to Ken Sheridan that you didn't like gay people? A. I don't remember indicating that to him." (*Scalise at 89*) This colloquy comes close to conceding that Sheridan and Alexander's testimony was substantially true.

[10] Respondent erroneously cited *Johnson* as 170 F.3d 74 [sic] (1995) [sic].

[11] "...the same-actor inference is not itself evidence of nondiscrimination. It simply provides a convenient shorthand for cases in which a plaintiff is unable to present sufficient evidence of discrimination." *Johnson*, 170 F.3d at 745. In a hostile environment case, such as this, the doctrine has no applicability.

employees were not witnesses to all of the incidents between Respondents and Complainant does not mean the incidents did not happen.

3. Scalise's Knowledge of Schwab's Statements

Russell Scalise testified that he was aware that Scott Schwab used to call Demetri names while at work. *(Scalise at 83)* He was also aware that the comments were unwelcome. Sheridan testified that he had an hour and a half long conversation with Scalise where he expressed the fact that the insults directed toward the Complainant were not acceptable in the work environment and that they made him, Sheridan, uncomfortable. *(Sheridan at 143-144)* Scalise told Sheridan that he would talk to Schwab and make him stop.[12] The comments did not stop. *(Sheridan at 144)* Sheridan also had a serious conversation with Schwab in which he told him that Schwab was creating an unprofessional environment with the way he spoke with Demetri. *(Sheridan at 142)*

On at least 10 to 20 occasions, Alexander told either Scalise or Schwab that he did not like the comments and that they should stop. *(Alexander at 81)* They never stopped. In June of 1999, Complainant told Schwab that he would appreciate it if Schwab would not speak to him like that. *(Alexander at 82)* In mid-July, Alexander told Scalise that Schwab was calling him all of these names and alluding to his sexuality and making him very uncomfortable. *(Alexander at 84)* Alexander testified that after this conversation the comments actually escalated.

Ziad Mansour heard the Complainant tell Schwab to stop making these offensive comments. *(Mansour at 84)* Mansour also testified that the comments never stopped. *(Id)*

Mansour and Sheridan each testified that the comments were unwelcome. Mansour stated that he observed the Complainant "so bothered, so upset every time he comes to work." *(Mansour at 90)* Sheridan observed that the statements never seemed to be something that the Complainant enjoyed. *(Sheridan at 132)*

At times, Alexander responded to Schwab's references to him as Marybeth by referring to Schwab as "buttercup." This does not suggest that Alexander was inviting the derogatory comments or engaging in sexual banter. Rather, it appears to have been an effort to defuse the impact of the insults by making light of them.

4. Perception of Complainant As Gay or Bisexual

Despite their protestations, the Commission finds that Russell Scalise and Scott Schwab each perceived that the Complainant, Demetri Alexander, was either gay or bisexual. Support for this conclusion flows from the following facts: Scalise revealed himself to be highly homophobic, and his instructions to Sheridan and Alexander regarding not wanting to hire "faggots" show the breadth of this bias. Scalise's statement to Daniels, a fellow investor in the restaurant venture with whom he had not dealt in the past, that "this guy is a total fag" cannot be interpreted merely as an insult; this was conveyed to Daniels as a point of fact.

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[12] When asked whether he recalled Sheridan talking to him about the fact that he was uncomfortable with Schwab calling Demetri names on a regular basis, Scalise said, "It's possible. I don't recall." *(Scalise at 87)*

It is instructive to note that virtually all of the offensive comments directed at Alexander by Scalise and Schwab related to his perceived sexual orientation. Additionally, there was almost no evidence in the record suggesting that the Respondents insulted persons that they believed to be heterosexual by using similar anti-gay language. Finally, the most offensive comments made by both Respondents concerned references to actual sexual acts that they accused Alexander of engaging in with third parties such as Stephen Gaither, Chili Pepper, and Jason Clark, two of whom were also specifically known by Respondents to be homosexual.

Scalise's and Schwab's statements that they did not perceive Alexander to be homosexual ring hollow. (*Scalise at 93, Schwab at 43)* It is unconvincing that merely because they were aware that Alexander had been married, had once had a girlfriend, and now had a daughter, they did not also suspect him of being homosexual or bisexual. Speculation about people's sexual orientation at times appears to be a national pastime. (See. e.g.. *The Intimate World of Abraham Lincoln,"* by The C.A. Tripp Simon & Schuster, 2004, speculating whether Abraham Lincoln was gay) It is more likely true than not that the Respondents' perceived Complainant to be gay or bisexual.[13]

5. The Alleged Racist Statements by Complainant

Sheridan, Scalise and Schwab each testified that Alexander made statements to them indicating that he did not want to hire black people or have too many black people in the restaurant because he didn't want the place to turn into a "nigger joint." (*Sheridan at 209, Scalise at 149, Schwab at 126)* This testimony was elicited to tarnish Alexander's reputation before the Commission, and so it does. Alhough Alexander denies making the statements (*Alexander at 199),* based upon Sheridan's testimony, the Commission believes they were made. This neither adds nor detracts from the gravity of the unlawful conduct complained of by Alexander and found to have existed at The State Room. It does cause the Commission to look more closely, however, at Alexander's credibility.

6. The Complainant's Diary

The fact that the Complainant did not include each and every insult he endured in his January through June 14, 2000, daily calendar is of little consequence. The Commission has also discounted those selective entries made by Alexander that appear to support his claims. The Commission does not find that the testimony regarding the maintenance of the diary imbues it with sufficient indication that it is reliable enough to put much stock in it. Respondents argue that what is "not" in the diary should be considered as evidence that offensive statements were not made. In the absence of testimony establishing that every discriminatory remark made to him would have normally been entered in his diary, the lack of such entries cannot be persuasive proof that the remarks were unsaid. See, e.g., *Easley v. Apollo Detective Agency*, 69 Ill.App.3d 920 (1st Dist. 1979). *Austin v. Harrington*, CCHR No. 94-E-237 (Oct. 22, 1997) does not hold otherwise.

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[13] Alexander testified that he believed Respondents perceived him to be gay because of his dress, his hairstyle, and his friends. (*Alexander Rebuttal testimony at 42)* Sheridan, who had extensive interactions with Scalise, formed the impression that Scalise believed that Alexander was gay and that at some point one or both of them (referring to Schwab also) believed it. (*Sheridan at 183)*

7. Facts Concerning Emotional Injuries

Alexander testified that he felt completely humiliated, "like a dying dog in the street." (*Alexander at 135)* The constant barrage of offensive comments, according to Alexander, was the most demoralizing, humiliating instance in his life. At times, he suffered from vomiting, diarrhea, and nausea, which he attributes to work related harassment. (*Alexander at 96-97)* As a result of the berating remarks, he believed that he was "subservient to the whole world" and like a "piece of garbage." (*Alexander at 113)*

The Complainant's treating physician, Dr. Lynette M. Rennecker, M.D., confirmed that she had seen Mr. Alexander in early 2000 for complaints of diarrhea and some complaints of chest pain. She concluded that a lot of his diarrhea was stress related. (*Renneker at 94)* She prescribed Xanax to use as needed for his nerves. When asked whether she determined the cause of the Complainant's stress, Dr. Renneker replied, "He just told me that he was having some problems with his business partners at his restaurant." (*Renneker at 94)*

Dr. Renneker was not familiar with the Complainant's medical history. She was unaware of whether he had previously been diagnosed with stress and whether he had prior sleep problems or nausea. (*Renneker at 98)* She opined that some of the symptoms expressed by Alexander could be a side effect of the drug Levothroid, which Complainant took for his thyroid. And she was not aware that the Complainant was taking lithium.

The Commission finds that Dr. Renneker has not sufficiently linked the physical symptoms that the Complainant was suffering between January and June of 2000 to any unlawful conduct on the part of the Respondents. In contrast, the Physician's Progress notes, specifically those entries of December 22, 1999, introduced into evidence without objection as Complainant's Exhibit 5, do reveal that Alexander was having difficulty sleeping, was very stressed, was depressed at times, and had a history of "major depression – bipolar". This lends some credence to the Complainant's subjective testimony regarding the severity of his emotional distress.

IV. CONCLUSIONS OF LAW

Section 2-160-030 of the Chicago Human Rights Ordinance states in relevant part:

> No person shall directly or indirectly discriminate against any individual in hiring, classification, grading, discharge, discipline, compensation, or other term or condition of employment because of the individuals...sexual orientation....
>
> Section 2-160-020(l) defines "sexual orientation" as the "actual or perceived state of heterosexuality, homosexuality or bisexuality."

The Complainant has presented two claims against the Respondents. First, he claims that he was terminated from his employment because of his perceived sexual orientation. Second, he alleges that he was harassed based upon his perceived sexual orientation.

The applicable Regulations regarding harassment are as follows:

> Reg. 345.100 Prohibition of Harassment
>
> Harassment on the basis of actual or perceived membership in a Protected Class is a violation of the HRO....An employer has an affirmative duty to maintain a working environment free of harassment on the basis of membership in any class protected under the HRO.
>
> Reg. 345.110 Definition of Harassment
>
> Slurs and other verbal or physical conduct relating to an individual's membership in a Protected Class....constitute harassment when this conduct:
>
> a) has the purpose or effect of creating an intimidating, hostile or offensive working environment;
>
> b) has the purpose or effect of unreasonably interfering with an individual's work performance; or
>
> c) otherwise adversely affects an individual's employment opportunities.
>
> Reg. 345.120 Liability for Supervisors' Actions
>
> An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of membership in a Protected Class....regardless of whether the specific acts complained of were authorized or forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

A. Discharge from Employment Claim

The Complainant bears the burden of proving, by a preponderance of the evidence, that the Respondents' perception that he was gay or bisexual was a motivating factor in the decision to terminate his employment.[14] This may be accomplished through direct evidence of some policy, statement, or action on the part of the decision maker which, if believed, proves he or she was motivated by the protected characteristic. See *Richardson v. Chicago Area Council of Boy*

[14] Previous decisions of the Commission have articulated the standard as requiring that the Complainant prove the protected characteristic "caused" the termination by having "played a part" in the termination decision. See *Bahena and Adjustable Clamp Company*, CCHR Case No. 99-E-111 (July 28, 2003); *Klimek v. Haymarket/Maryville*, CCHR No. 91-E-117 at 15 (June 16, 1993). The "motivating factor" terminology embraces the same standard while articulating it more succinctly.

Scouts of America, CCHR No. 92-E-80, at 32 (February 21, 1996); *Chimpoulis and Richardson v. J & O Corp. et al.*, CCHR No. 97-E-123/127, at 20 (September 20, 2000). In other words, direct evidence proves the motivation of the decision maker without resort to an inference. It is essentially an admission by the decision maker that his/her actions were based on the prohibited *animus*. See *Troupe v. May Dept. Stores*, 20 F.3d 734, 736 (7th Cir.1994); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000).

Intentional discrimination may also be proved through indirect or circumstantial evidence.[15] Circumstantial evidence, unlike direct evidence, need not directly demonstrate discriminatory intent but rather it "allows a jury to infer intentional discrimination by the decision maker" from suspicious words or actions. See, e.g., *Hossack v. Floor Covering Associates of Joliet, Inc.*, 492 F.3d 853 (7th Cir. 2007).

1. Direct Evidence

The prospect of terminating Alexander's employment was first raised by Ken Sheridan prior to the opening of The State Room in a conversation with Russell Scalise. *(Scalise at 141)* According to Scalise, Sheridan told him that he didn't know how long he would be able to work with Demetri. Scalise asked whether the restaurant could open without Alexander and Sheridan "was horrified. He didn't want to do it. He didn't like the idea." *(Scalise at 141)* Sheridan testified that by the time the restaurant had opened, he was often bringing negative issues or concerns about Alexander to his supervisors, Schwab and Scalise. They asked Sheridan at that time whether they could terminate Alexander and Sheridan initially told them that it would not be a good idea. *(Sheridan at 137)*

By approximately June of 2000, Sheridan was open and direct that Demetri needed to go. *(Sheridan at 181)* He felt that Alexander was undermining his authority to run the restaurant. He was revoking Sheridan's decisions and taking actions that, in Sheridan's views, were detrimental to the restaurant. *(Sheridan at 181)* Sheridan made these views known to Scalise. In his discussions with the Respondents, between four and eight weeks prior to leaving his

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[15] The *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, (1973), burden shifting method for testing the sufficiency of evidence in an employment discrimination case is not utilized once a case has been tried (at least at the federal level). *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 925 (7th Cir. 2000); *Hossack v. Floor Covering Associates of Joliet, Inc.*, 492 F.3d 853 (7th Cir. 2007). Thus it is not strictly necessary to analyze whether the Complainant has presented a *prima facie* case, whether the Respondent has articulated legitimate nondiscriminatory reasons for its actions, and whether the Complainant has proved that each and every such articulated reason was pretextual – although the Commission typically considers the same factors. In this case we concern ourselves with whether the Complainant has proved by a preponderance of the evidence, including all reasonable inferences, that his perceived sexual orientation motivated Russell Scalise to fire him. In analogous employment discrimination cases, the Seventh Circuit Court of Appeals has identified three types of evidence that are of particular relevance when establishing the inference of intentional discrimination:

> The first [and most common] consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn.... Second is evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment. And third is evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination (citations omitted). Each type of circumstantial evidence is sufficient in and of itself to support a judgment for the plaintiff; however, bits of circumstantial evidence may also be used to compose a convincing mosaic of discrimination. *Hossack v. Floor Covering Associates of Joliet, Inc.*, 492 F.3d at 862 (7th Cir. 2007).

employment with the restaurant, Sheridan recalls that Schwab and/or Scalise told him that they would like to get rid of Alexander but for a variety of reasons were not sure they could do it at that time.[16]

In an effort to keep Sheridan from quitting as General Manager, Scalise offered to fire Alexander. (*Scalise at 160)* By then it was too late. Sheridan had already decided to leave. Scalise did not fire Alexander at that time.

Scalise testified that he had "lots of reasons" to fire Alexander "but the main reason was he finally just quit coming to work after I told him we're not going to run this place his way, he just quit showing up. He went from bad attendance to no attendance". (*Scalise at 165)*

The Complainant presented some direct evidence which indicates that Scalise did not want to hire gay employees. The Commission credits the testimony of Sheridan, supported by that of Alexander and Ziad Mansour, that Scalise told them he did not want to hire Jason Clarke "because he's a faggot and that's not the environment we want." (*Sheridan at 14, Mansour at 89)* Scalise further told Sheridan that he did not want any faggots working for the restaurant. (*Scalise at 144)*

Yet Scalise hired Alexander, signed him to a three-year contract, trusted him to be the creative genius of the restaurant, and kept him in his position for over a year in the face of extensive conflict and criticism from Schwab, Sheridan, and much of the staff.

None of the statements introduced into evidence which show that Russell Scalise, the decision maker, was homophobic directly suggest that Alexander's perceived sexual orientation was a factor in his termination. The Commission must therefore turn to whether the circumstantial evidence adduced at hearing satisfies the Complainant's burden of proof.

2. Indirect Evidence

Although it is a close call, the Complainant has not satisfied his burden of proving that Scalise was motivated by his *animus* towards gays when deciding to terminate Alexander. It is beyond dispute that Alexander's relationship with Sheridan had totally deteriorated by the end of his employment and that Scalise was aware of that fact. The conflict between Sheridan and Alexander had been brewing for quite some time. The Complainant's attendance was certainly one of the major issues.

The Respondents went so far as to have the restaurant managers keep a log of Alexander's comings and goings. The Complainant concedes that during the end of May and the first 12 days of June, he was either not present at the restaurant at all or not there full time. He attributes this to medical issues. (*Respondents' Ex. 8*)

Alexander testified that on or about June 5, 2000, he notified Scott Schwab that he was going to require additional surgery on his foot. (*Alexander at 105)* Schwab reacted very negatively, telling Alexander that "we can't have you running around on crutches again. I can't

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[16] Scalise was obviously concerned about the fact that Alexander had a three-year contract that provided he could only be terminated "for cause." He was also concerned about the effect his termination would have upon the restaurant, including the possibility that Chef Mansour would leave and that word of Alexander's leaving the restaurant would adversely affect its reputation. (*Sheridan at 239-241)*

have it...." *(Alexander at 106)* Alexander suggests that this may have precipitated his termination a week later – rather than the fact that he was not showing up for work. However, the medical records of Dr. Kalikian, introduced into evidence without objection, reveal that Complainant saw his orthopedic specialist on June 5, 2000. Dr. Kalikian, while raising the possibility of "an IP fusion of his construct with similar type fixation" (translation: toe surgery) if symptoms persist, merely recommended "a stiff soled shoe and toe taping." There was no suggestion in Dr. Kalikian's notes that the Complainant would be unable to ambulate or work.[17]

The Commission finds it more probable that Complainant's termination on June 12, 2000 was motivated by Ken Sheridan's complaints about Alexander and his prior refusal to work with the Complainant for performance related reasons, along with Alexander's spotty and then non-existent attendance. This, coupled with the prospect that future toe surgery might make Alexander even less a fixture at his place of employment, undoubtedly proved the Complainant's downfall.

One last troubling aspect of the Complainant's termination must be dealt with, however. When Scalise met with Alexander to terminate him, he presented Complainant with a proposed severance agreement and then told him if he did not sign it he would tell everybody and put it in the papers that he was "robbing the joint." *(Alexander at 108)* Ziad Mansour was at this meeting and corroborates this conversation, stating that Scalise said he would "tell people you have been dropping the joint." *(Mansour at 92)* Ken Sheridan testified that prior to the Complainant's termination, he had a conversation with Schwab and Scalise where Scalise told him that if they got rid of Alexander, he could have it released to the papers that he was "fired for stealing from us." *(Sheridan at 139-140)*

The fact that Scalise threatened to lie about the reasons for Alexander's termination is circumstantial evidence that may be used to suggest that he is lying now about the reasons for the Complainant's termination; and well he may be. However, there is insufficient evidence to support a conclusion that if Scalise is lying, it is because he really wanted to fire Complainant because he thought he was gay or bisexual. Perhaps he just wanted to save money and get out of an expensive three-year contract. Perhaps he had extracted Mr. Alexander's creative juices and had no need for his services anymore. Or, as the Commission finds, it was because his former general manager made it clear that Alexander insisted on doing things his own way, did not recognize others' authority, and devoted less than his full time efforts to the restaurant.

B. Harassment Claim

When determining whether harassment in the form of a hostile working environment exists, the Commission has been guided by federal precedent recognizing the existence of such an environment "only if the challenged conduct is 'sufficiently severe or pervasive' to alter the conditions of [the Complainant's] employment and creates an abusive working environment." *Bahena v. Adjustable Clamp Company,* CCHR No. 99-E-111 (July 16, 2003); *Escobedo v. Homak Mfg. Co., Inc.*, CCHR No. 93-E-7, at 6 (May 15, 1996), *quoting Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 533 (7th Cir. 1993); *Osswald v. Cognac Corp. et al.*, CCHR No. 93-E-93, at 11 (July 19, 1995)(citing to *Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)); *Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998).

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[17] Mr. Alexander did return to Dr. Kalikian with a painful ingrown toenail on his right big toe on June 21, 2000.

The Complainant must establish that the conduct in question is both objectively offensive to an employee in the Complainant's situation and that it is subjectively offensive to the Complainant himself. To determine whether an environment is sufficiently hostile or abusive, it is appropriate to consider "all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc., supra.*, at 23. The required level of severity or seriousness "varies inversely with the pervasiveness or frequency of the conduct. "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory charges in the terms and conditions of employment." *Faragher,* supra., at 788.

Further, the "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81 (1998), also noting that the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." See also *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

It is hard to image a workplace more objectively offensive to an employee, more viciously permeated with anti-gay vitriol, than what has been found to have existed at The State Room during Demetri Alexander's employment. From the beginning of his employment through the day he was terminated, Scott Schwab, acting as Russell Scalise's agent, and Respondent Scalise himself assaulted the Complainant with crude, demeaning, and offensive statements meant to publically embarrass him and impugn his character because they believed or suspected that he was homosexual or bisexual.

In *Osswald, supra.,* the Commission found that a waiter who was referred to by his manager as a "faggot," "fucking faggot," and "queen" throughout his employment had proved that the restaurant and its manager were liable under the Chicago Human Rights Ordinance for creating a hostile environment based upon sexual orientation. As in *Osswald*, the derogatory sexual comments directed at Complainant were not directed at persons other than the Complainant. The comments were made in the presence of strangers, customers, investors, and other employees. The fact that *Osswald* was gay and Alexander was perceived as gay does not distinguish the cases, as long as Alexander subjectively found the remarks to be offensive.

That the conduct complained of was both severe and pervasive is evident. Alexander, Sheridan, Daniels, and Mansour all testified that the anti-gay remarks made by Schwab were found in almost every conversation. (*Sheridan at 129, Daniels* at 74, *Alexander at 60*) The voice mail messages introduced into evidence reveal Scott Schwab at his basest level. Any reasonable person subjected to the atmosphere created by Schwab and Scalise would have found it difficult, if not impossible, to come to work on a daily basis.

The conduct directed at Alexander by the Respondents cannot be considered "random and stray remarks" that will not support a hostile environment claim. The frequency of the harassing statements exceeds that found in *Cerros v. Steel Technologies*, 288 F.3d 1040 (7th Cir. 2002), cited by Respondents, where the Court held:

> ...this also is not a case where there were only a few verbal utterances made in the context of office banter, *Logan v. Kautex Textron N. Am.*, 259 F.3d 635, 639; and this case is nothing like *Sanders v. Vill. of Dixmoor,* 178 F.3d 869, 870 (7th Cir.1999), where there was one isolated racial epithet, in response to the plaintiff's already inappropriate conduct. It appears that the epithets at Steel continued for many months, although this is a matter on which greater clarity from the district court is necessary. Adding up all of the derogatory names directed at Cerros as well as all of the graffiti on the bathroom walls, and coupling that with more information about how frequently or how long the abuse endured, the court might well find that both the pervasiveness and the severity measures are high. These are, to a certain degree, inversely related; a sufficiently severe episode may occur as rarely as once, see *Smith v. Sheahan,* 189 F.3d 529, 533-34 (7th Cir.1999), while a relentless pattern of lesser harassment that extends over a long period of time also violates the statute. While there is no "magic number" of slurs that indicate a hostile work environment, we have recognized before that an unambiguously racial epithet falls on the "more severe" end of the spectrum. *See Rodgers,* 12 F.3d at 675 ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.")

The instant case is not remotely similar to *Luckett v. City of Chicago*, CCHR No. 97-E 115 (Oct. 18, 2000). There, the Commission found that

> the only evidence Complainant sought to introduce to support a claim of harassment is a telephone conversation from a third party in which Complainant was told that one of Respondents, ... made a negative comment about Complainant's disability and sexual orientation. This evidence was not accepted as it was an out-of-court statement about another statement from a third party and thus inherently unreliable and inadmissible. However, even if that statement had
>
> been accepted as evidence, Complainant would not have met his burden of proving a *prima facie* case. One statement by a supervisor to another employee about a third employee does not create the kind of severe or pervasive environment which the Commission has found constitutes harassment.

This case is also much more egregious than that presented in *Anderson v. Stavropolous*, CCHR Case No. 98-H-14 (Feb. 16, 2000), where the only evidence that was presented to support a claim of sexual orientation harassment was one single sexual orientation slur allegedly made by the Respondent that he would "kick [Complainant's] faggot ass" if he did not pay his outstanding rent.

Demetri Alexander credibly testified that he, not surprisingly, found the relentless pattern of conduct alleged subjectively offensive. He complained to Schwab and Scalise to no avail. Even Sheridan complained to them to get the Respondents to recognize that the remarks were inappropriate and hurtful. The Complainant has more than satisfied his burden of proving that the Respondents violated the Chicago Human Rights Ordinance by creating and tolerating a hostile environment based upon Alexander's perceived sexual orientation.

C. Who is Liable

Respondent 1212 Restaurant Group, as Alexander's employer, is liable for the acts of both Schwab and Scalise based on Reg. 345.120. Schwab was a supervisory employee with respect to Alexander. The argument that Schwab was merely an "unpaid consultant" and therefore not an employee because he did not work "for monetary or other valuable consideration" is specious. Schwab testified that he was Scalise's designee, spending between 20-30 hours per week at the restaurant during the buildout period. (*Schwab at 9)* In return for his services, Schwab was given valuable consideration, a future ownership interest in the restaurant. The fact that his compensation was deferred does not take away from the fact that he was acting on behalf of the restaurant/employer as Alexander's supervisor. Alexander's employment agreement required that he perform his duties "under the direction of Scott Schwab, as designee of Russell Scalise." (*Exhibit 1*) There is little functional difference between the manager's personal liability in *Osswald, supra.,* and Schwab's personal liability.[18]

The Respondents argue that Russell Scalise cannot be liable for the harassing conduct of Schwab. As an initial matter, the Commission finds that Russell Scalise, irrespective of Schwab's conduct, created and fostered a hostile environment based upon sexual orientation. He did this by personally engaging in repeated offensive conduct directed at Complainant over a one-year period of time. (*See infra. at 13-15)*

In addition, Scalise was put on notice by Alexander and Sheridan that Schwab was creating a hostile environment at the restaurant because of his anti-gay comments. He admitted that he was aware of many of Schwab's comments. And yet he took no action to remedy the situation. As we have seen, he was a willing participant. His failure to maintain a working environment free of harassment also renders the 1212 Restaurant Group liable.

The Respondents argue that Scalise cannot be liable for Schwab's conduct because only an employer has an affirmative duty to maintain a working environment free of harassment. (*Respondents' Post-Hearing Brief at 55)* Respondents argue that because Scalise was not the employer, only the 85% owner of the employer, he should not be liable for anyone else's conduct. It is true that the 1212 Restaurant Group L.L.C. was the Complainant's employer, not Scalise. Unless it can be established that Schwab was the agent of Scalise in his personal capacity, as opposed to his capacity as "Company Manager" (*See Complainant's Exhibit 1),* Scalise cannot be personally liable for the actions of Schwab. However, he is liable for his own actions or inactions.

D. Liability Even If Complainant Not Perceived As Gay or Bi-Sexual

The Respondents testified at the administrative hearing and argue in their briefs that they did not perceive the Complainant to be homosexual and therefore cannot be held liable even if they engaged in harassing conduct that was severe or pervasive and was motivated by anti-gay *animus.*

Cases under Title VII of the Civil Rights Act of 1964 have held that a person who is not a member of a protected class cannot assert a hostile environment claim based upon an employer's

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[18] Section 2-160-030 of the Chicago Human Rights Ordinance makes it clear that "no person" shall discriminate.

harassment of colleagues who happen to be in the protective class – even if that harassment is upsetting to them. In *Bermudez v. TRC Holding, Inc.*, 138 F.3d 1176, (7th Cir. 1998), for example, the Court held that a white employee cannot assert claims based upon discriminatory conduct directed at black employees at the work place. See also *Wimmer v. Suffolk County Police Dep't,* 176 F.3d 125, 134-35 (2d Cir.1999), holding that a complaint of retaliation for opposing discrimination by co-employees against non-employees is not cognizable under Title VII; *Childress v. City of Richmond,* 907 F.Supp. 934, 940 (E.D.Va.1995), *aff'd,* 134 F.2d 1204 (4th Cir.1998), holding that white police officers could not state a claim for hostile work environment based on supervisor's race-biased comments or for retaliation for speaking out against the comments; *Jones v. City of Overland Park,* Nos. 92-2163, 92-2162-KHV, 1994 WL 583153 (D.Kan. Aug. 15, 1994); accord, *Moore v. Total Sleep Diagnostic,* 2001 WL 789231 (D.Kan.)

These cases were decided on standing grounds. The plaintiffs were not asserting that harassing comments were directed at them. They were asserting only the indirect harm of being exposed to harassing conduct directed at others because of their race or sex. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209-10 (1972). Unlike these Title VII cases, the harassing conduct at issue in this case was directed at the Complainant.

There are no similar Article III standing limitations with regard to the Chicago Human Rights Ordinance. The ordinance broadly states in its Declaration of City Policy, Chicago Muni. Code §2-160-010:

> It is the policy of the City of Chicago to assure that all persons within its jurisdiction shall have equal access to public services and shall be protected in the enjoyment of civil rights, and to promote mutual understanding and respect among all who live and work within the city.
>
> The City Council of the City of Chicago hereby declares and affirms:
>
> That prejudice, intolerance, bigotry and discrimination occasioned thereby threaten the rights and proper privileges of the city's inhabitants and menace the institutions and foundation of a free and democratic society; and that behavior which denies equal treatment to any individual because of his or her race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status or source of income undermines civil order and deprives persons of the benefits of a free and open society.

Section 2-167-030 of the ordinance provides *inter alia,* "No person shall directly or indirectly, discriminate against any individual...."

Commission Regulations broadly impose upon an employer an "affirmative duty to maintain a working environment free of harassment on the basis of membership in any class protected under the HRO." Reg. 345.100

Even if the Respondents did not perceive Mr. Alexander to be homosexual or bisexual, they have still violated the Human Rights Ordinance by directing vile, sexually offensive remarks at the Complainant, on a repeated basis, such that it interfered with his ability to perform his job. The anti-gay atmosphere maintained by the Respondents was injurious to homosexuals, bisexuals, and heterosexuals alike, all "because of" their sexual orientation. Most importantly,

however, it was injurious to the Complainant, to whom the conduct was directed. The City of Chicago has a compelling interest in eradicating workplace harassment based upon protected characteristics that can clearly reach the situation presented in this case, regardless of whether Scott Schwab or Russell Scalise really believed Alexander to be gay.[19]

In most instances, harassing conduct directed at a complainant that is based upon a protected characteristic will be actionable under our Ordinance if it is severe or pervasive regardless of whether the Complainant possesses that characteristic. In the case at bar, either the Respondents perceived Alexander to be gay and thought they could upset him by making demeaning references to his sexual orientation, or they perceived him to be heterosexual and, therefore, perceived that he would be particularly humiliated when referred to in demeaning terms that implied he was homosexual. In either case, the harassment was "because of" Alexander's sexual orientation and is actionable.

The same result was reached in another Commission ruling, *Arellano and Alvarez v. Plastic Recovery Technologies, Inc.*, CCHR Nos. 03-E-37 and 03-E-44 (July 21, 2004). Liability for perceived sexual orientation discrimination was found where the respondent company's president harassed two female employees by accusing them of being gay and taunting them about it. That decision did not rely either on findings that the complainants actually were homosexual or that the company president actually believed them to be homosexual. It was sufficient that he had harassed them "because of" their sexual orientation.

V. DAMAGES

A. Emotional Distress

The Complainant is seeking emotional distress damages of "no less than $50,000" to compensate him for his emotional injuries. (*Complainant's Post-Hearing Brief at p. 28*) The Respondents contend that Complainant should be entitled to no more than "nominal damages" if he prevails on his hostile environment claims.

The Commission has repeatedly held that damages for emotional harm can be awarded as part of an award of actual damages. *Houck v. Inner City Horticultural Foundation*, CCHR No. 97-E-93 (Oct. 21, 1998). Humiliation, shame, and mental anguish are elements of actual damages which cannot be precisely measured. *Castro v. Georgeopoulos*, CCHR No. 91-FHO-6-5591 at 13 (Dec. 18, 1991). For the most part, the size of an award is determined by the egregiousness of the respondent's behavior and the complainant's reaction to the discriminatory conduct. *Steward v. Campbell's Cleaning et al.*, CCHR NO. 96-E-170 (June 18, 1997). Factors to be evaluated in arriving at an award include, but are not limited to, "the vulnerability of the complainant, the egregiousness of the discrimination, the severity of the mental distress and whether it was accompanied by physical manifestations and/or medical or psychiatric treatment, and the duration of the discriminatory conduct and the effects of the distress." *Id.* at 13; *Nash/Demby v. Sallas*, CCHR No. 92-H-128 (May 17, 1995).

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[19] A British Employment Appeal Tribunal has found that Regulation 5 of the Sexual Orientation Regulations of 2003, which prohibits harassment based upon sexual orientation in the British Commonwealth, does not apply to a situation where the employer directs homophobic banter toward an employee who is not gay and who, he acknowledges, is not perceived to be gay. Appeal No. UKEAT/0556/07, January 18, 2008, Judgment Delivered on February 20, 2008. However, the Regulation at issue there is vastly different from the Chicago Human Rights Ordinance.

The Complainant has proved that he suffered greatly as a result of the harassing conduct he endured at The State Room. His subjective testimony concerning stress related diarrhea, nausea, and loss of sleep was supported, in part, by the testimony and records of his treating physician.

The unlawful conduct complained of by the Complainant took place over a one-year period and was, according to the credible witnesses, an almost daily occurrence. Although there was no attempted physical harm such as was present in *Sellers v. Outland*, CCHR No. 02-H-73 (Oct. 15, 2001), the conduct was such that one would expect a person of ordinary sensibilities to suffer palpable ill effects. Alexander's description of the severity of his embarrassment, humiliation, and emotional harm (*infra.*, at 19) establishes that he endured a year from hell at the hands of the Respondents based upon his perceived sexual orientation.

The Commission has awarded substantial emotional injury damages in other egregious cases. In *Winter v. Chicago Park District*, CCHR No. 97-PA-55 (Oct. 20, 2000), the Commission awarded $50,000 in emotional injury damages to a mobility-impaired Complainant who suffered severe embarrassment when she was unable to use an inaccessible public restroom. The Commission also entered an emotional injury damage award of $50,000 in *Sheppard v. Jacobs*, CCHR No. 94-H-162 (July 16, 1997). *Jacobs* involved a tenant who was ordered to move after the landlord discovered that she was African-American. The Complainant there testified she felt depressed and angry at the situation. She testified that she felt that her personhood had been attacked and that her Ph.D. thesis had been slowed substantially because of the termination of her tenancy.

In 1995, in *Osswald v. Cognac Corp. et al.*, cited *supra.*, the Commission awarded $10,000 in emotional injury damages (the amount sought by Complainant) for harassing conduct based on sexual orientation. *Brennan v. Zeeman*, CCHR Case 00-H-5 (Feb. 19, 2003), involved a tenant who was referred to as a "faggot" by his landlord. The comments were made over several months and did not cause the Complainant to seek any medical or psychiatric treatment. The Commission found that his damages were "not so extended or egregious as to justify the top measure of damages" and awarded him $5,000 in emotional injury damages. In *Salwierak v. MRI of Chicago, Inc., et al.*, CCHR Case No. 99-E-107 (July 16, 2003), the Commission awarded $30,000 in emotional injury damages to a complainant who was sexually harassed at her place of employment. The Hearing Officer had found that the harassment Ms. Salwierak was subjected to was egregious and continued throughout the duration of her employment despite her pleas that it cease. As here, her emotional distress was accompanied by physical manifestations including weight loss and insomnia.

The Respondents' conduct in the instant case was similar to that found in *Salwierak* but not as debilitating as that found in *Jacobs* or *Winter*. Alexander's testimony concerning his distress was detailed. The harassment was relentless, starting during the buildout period for the restaurant and continuing until Mr. Alexander left his employment approximately one year later. The Commission credits the Complainant's testimony that he suffered physical manifestations of the harassment – and at a time in which he was already experiencing pain and limitations resulting from his work related injury.

The Commission re-examined the emotional injury damage award in light of the Respondents' objections and finds no reason that Alexander's damages should exceed the amount awarded in *Salwierak*. It should be noted, however, that the cumulative rate of inflation

between July of 2003 (the date of the *Salwierek* award) and June 2008 is 18.99% See *http://inflationdata.com/Inflation/Inflation_Calculators/Inflation_Rate_Calculator.*

The Commission therefore adopts the hearing officer's recommendation and awards the Complainant $35,000 in emotional injury damages, imposed jointly and severally against Respondents 1212 Restaurant Group, LLC, Scott Schwab, and Russell Scalise.

B. Punitive Damages

Punitive damages may be awarded "when the Respondent's action is shown to be motivated by evil motives or intent or when it involves a reckless or callous indifference to the protected rights of others." *Collins v. Magdenovski*, CCHR No. 01-FHO-7-5655 at 29 (Sept. 16, 1992). The purpose of punitive damages is to punish and deter respondents who have acted willfully, wantonly, or in reckless disregard for complainant's protected rights. *Figueroa v. Fell*, CCHR No. 97-H-5 (Oct. 21, 1998).

In *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S.408 (2003), the Supreme Court stated:

> "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore, supra*, at 575, 116 S.Ct. 1589. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident. 517 U.S., at 576-577, 116 S.Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.* at 575, 116 S. Ct. 1589.

The Supreme Court in *State Farm* rejected the notion that the amount of punitive damages should be determined by some mathematical formula while recognizing the long-standing jurisprudential practice of setting punitive damages as a multiple of compensatory damages not to exceed single digits.

In *Exxon Shipping Company v. Baker*, 128 S. Ct. 2605 (U.S.S.C. 2008), a maritime case decided under federal common law, the Court examined the treatment of punitive damage awards by the various state and federal courts. The court concluded that under federal common law, in a situation where the conduct at issue was reckless rather than intentional or malicious and where the economic harm is substantial, punitive damage awards should rarely exceed compensatory damages. However, the Court recognized that where the harm being "punished"

is particularly blameworthy and compensatory loss is modest, punitive damages which are a multiple of modest compensatory damages may still be appropriate and are certainly within constitutional limits. *Id.* at 2632.

The conduct on the part of Scott Schwab was intentional and reprehensible. The intended consequence of Schwab's almost daily remarks to Alexander was to humiliate, embarrass, and cause distress.

The purpose of punitive damages under Illinois law is to punish the offender and to deter him and others from the commission of like offenses. See, e.g., Illinois Pattern Jury Instruction (IPI), Civil, No. 35.01 (2d ed. 1971). Where an Illinois court recently determined that a defendant's "reprehensibility" was in the middle range of conduct, and where economic loss damages were modest, it sustained a punitive damage award that was seven times the actual damage award. *Gehrett v. Chrysler Corp*, ____ Ill App. 3d. ____, 882 N.E.2d 1102 (Ill.App. 2 Dist. 2008), awarding $59,695.79 in punitive damages in a deceptive business practices case where actual damages were $8,527. 97.

Schwab's conduct was similarly at the middle end of reprehensibility while actual damages awarded were moderate. A punitive damage award against Schwab less than two (2) times the amount of the actual damages would minimize the wrong.

The conduct on the part of Russell Scalise was equally as intentional, mean spirited, and reprehensible. Scalise volunteered in his direct testimony that his average annual income over the five to six years prior to the hearing was "A million plus." (*Scalise at 77*) It is well settled that under Illinois law, evidence of a Respondent's net worth is relevant where punitive damages are at issue. *Pickering v. Owens-Corning Fiberglass*, 265 Ill. App. 3d 806 (5th Dist. 1994); *Fopay v. Noveroske,* 31 Ill.App.3d 182, 334 N.E.2d 79 (5th Dist. 1975). This is to ensure that any award is sufficiently large to effectuate its purpose but not so large as to create a financial hardship.

Further, as previously noted, the 1212 Restaurant Group, LLC, is responsible for the conduct of both Schwab and Scalise, who were the groups managers and/or agents.

The hearing officer recommended an award of $70,000 in punitive damages against Schwab and the 1212 Restaurant Group, LLC, jointly and severally, plus a second award of punitive damages, also in the amount of $70,000, against Scalise and the 1212 Restaurant Group, LLC. The hearing officer explained that each award represented twice the amount of the emotional injury damages. At the same time, the hearing officer presented legal authority supporting an award of punitive damages up to seven times the amount of the compensatory damages in a case involving a mid-range of reprehensibility of the conduct to be punished and deterred.

The Commission believes the total amount of $140,000 in punitive damages as recommended is appropriate in this case for the reasons set forth by the hearing officer and adopted in this ruling. However, the Commission modifies the allocation of the total amount of punitive damages and instead imposes the $140,000 in punitive damages jointly and severally against all three named Respondents. These Respondents bear equivalent responsibility for the egregious conduct which occurred and they appear to be respondents of substantial economic means operating in a "high end" environment where a sizeable penalty is warranted to achieve the intended punitive and deterrent effects.

The Commission cases cited by the Respondents in their objections as comparable are distinguishable and outdated. In *Houck, supra.,* the Commission considered the fact that the respondent was a not-for-profit corporation that served inner-city children and was not deserving of substantial punishment. In *Castro, supra.,* one of the first cases decided by the Commission, $5,000 in punitive damages was awarded for the refusal to rent an apartment. This was a one-time occurrence; no allegations of any ongoing harassment were involved. And in *Osswald, supra.,* where $10,000 in compensatory damages and $11,000 in punitive damages were awarded, no net worth evidence was introduced concerning the respondents.

C. Fine

Pursuant to Chicago Muni. Code §5-08-130, the Commission may impose a fine up to $500 if a party is found to violate the ordinance. In this case, Respondents have each been found to have violated the ordinance. The Commission adopts the recommendation of the hearing officer and imposed the maximum fine of $500 to be paid to the City of Chicago by each of the Respondents: Schwab, Scalise, and 1212 Restaurant Group, LLC, for total fines of $1,500.

D. Attorneys Fees and Costs

Pursuant to Chicago Muni. Code §2-120-510(l) and Commission Regulation 240.610 *et seq.*, the Commission also awards attorneys' fees and costs to Complainant and against Respondents, jointly and severally.

Pursuant to Reg. 240.630, the Complainant may file and serve a petition for fees and/or costs, supported by argument and affidavit and including the statements and documentation set forth in that regulation. The petition is due no later than 28 days after the date of mailing of this ruling, and any Respondent may file and serve a written response to the petition no later than 14 days from the date of filing. A reply to any response will be allowed only on leave of the hearing officer.

As to the decision process, the Commission will follow Reg. 240.630(b)(3) of its 2001 Regulations, which pursuant to the revised Regulations effective July 1, 2008, still applies to this case (See Application of 2008 Regulations, p. 9 of the Regulations booklet). That is, the hearing officer will issue both first and final recommended decisions on the petition. Parties may file and serve simultaneous objections to the first recommended decision within 30 days from the date of issuance, and shall have 21 days from the filing of such objections to file and serve a reply. After the hearing officer issues his final recommended decision, the Board of Commissioners will rule.

E. Interest

Pre- and post-judgment interest on all damages is awarded to Complainant pursuant to Reg. 240.700, at the bank prime loan rate, adjusted quarterly and compounded annually beginning with the date of the violation. In a harassment case, the determination of this date can be challenging. In Salwierak, supra., due to the lack of specific evidence of when the sexually harassing incidents occurred, interest was awarded from the last day of the month which was the only date identified, because it was clear the harassment was pervasive on that date. In *Fox v. Hinojosa*, CCHR No. 99-H-116 (June 16, 2004) and *Edwards v. Larkin*, CCHR No. 01-H-35 (Feb. 16, 2005) the interest was calculated from the first incident of harassment.

In this case, Complainant entered into an employment contract with the 1212 Restaurant Group, LLC, on May 12, 1999, and he was discharged on June 12, 2000, thirteen months later. Complainant testified that the harassing comments began early in the relationship and that on a number of occasions he told either Scalise or Schwab that he did not like the comments and they should stop. The findings of fact note that such a request was made to Schwab in June of 1999; then in mid-July of 1999, Complainant told Scalise that Schwab's name-calling and allusions regarding his sexuality were making him very uncomfortable. But after this conversation with Scalise the comments actually escalated. Based on these findings, it is clear that the harassment had become severe, pervasive, and willful by the end of July 1999. Accordingly, interest shall be calculated from August 1, 1999.

VI. Conclusion

Accordingly, the Commission finds all three Respondents liable for harassment based on sexual orientation in violation of the Chicago Human Rights Ordinance. The Commission finds in favor of Respondents on Complainant's claims of race discrimination and of sexual orientation discrimination in connection with the termination of his employment; those claims are dismissed. The Commission orders the following relief:

1. Damages in the total amount of $175,000, imposed jointly and severally on the three Respondents and including $35,000 for emotional injury and $140,000 as punitive damages.

2. Pre- and post-judgment interest on the damages from August 1, 1999, calculated pursuant to Reg. 240.700.

3. Payment of Complainant's reasonable attorney fees and costs as determined by further order of the Commission pursuant to the procedures outlined above.

4. A fine of $500 to be paid by each Respondent to the City of Chicago, for a total of $1,500 in fines.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: Dana V. Starks, Chair and Commissioner