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**DECISION AND NOTICE OF DECISION
DECISIÓN Y AVISO DE LA DECISIÓN TOMADA**

A.L.J. Case No. 014-10404

Mailed and Filed: May 23, 2014

IN THE MATTER OF:

LARBI OUFKIR
69 40 78 STREET APT 2FLR
MIDDLE VILLAGE NY 11379

LA BOUCHERIE INC
DBA BRASSERIE LES HALLES
411 PARK AVE S # B1
NEW YORK NY 10016-8405

ROBERT V FERRARI
FERRARI & FERRARI LLP
630 THIRD AVE FL 18
NEW YORK NY 10017-0000

Department of Labor Office: 801

Hearing Requested: April 08, 2014

PLEASE TAKE NOTICE that this decision has been duly mailed on the date listed above. If you appeared at the hearing and are not satisfied with this decision, you may appeal within **TWENTY DAYS** from the date this decision was mailed. **READ IMPORTANT INFORMATION ON REVERSE SIDE REGARDING YOUR RIGHT TO APPEAL.** Any party who failed to appear at the hearing has the right to apply to reopen the case. For the application to be granted, the party must apply within a reasonable time and must establish good cause for its failure to appear.

POR FAVOR TOME NOTA: esta decisión ha sido debidamente enviada por correo en la fecha que aparece arriba. Si usted asistió a la audiencia y no está satisfecho con la decisión, puede apelar dentro de **VEINTE DIAS** contados a partir de la fecha en que esta decisión fue enviada por correo. **LEA LA INFORMACIÓN IMPORTANTE AL REVERSO SOBRE SUS DERECHOS DE APELACIÓN.** Cualquiera de las partes que falle en comparecer a la audiencia, tiene el derecho de solicitar que se reabra su caso. Para que dicha solicitud sea otorgada, la parte interesada debe solicitarlo dentro de un periodo de tiempo razonable y debe establecer buena causa por no haber comparecido a la audiencia.

DOCUMENTO IMPORTANTE. PUEDE OBTENER UNA TRADUCCIÓN DEL MISMO LLAMANDO
AL 1-888-209-8124 (FUERA DEL ESTADO DE NUEVA YORK 1-877-358-5306)

ISSUES: Loss of employment through misconduct.
Employer's objection to claimant's entitlement.

The Department of Labor issued the initial determination holding the claimant eligible to receive

benefits, effective January 27, 2014. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer cannot be used to establish a future claim for benefits.

Hearings were held at which testimony was taken. There were appearances by the claimant and on behalf of the employer.

FINDINGS OF FACT: The claimant was employed by a restaurant as a server from May 30, 1997 through January 30, 2014. He was paid at the rate of \$5 per hour, plus gratuities, and was scheduled to work from 4 pm to about 10:30 pm or 12 am, depending on the evening, Wednesday through Sunday. He usually worked about 34 to 36 hours per week. Staff members in the restaurant used obscenities on the dining room floor, but not very frequently.

On or about December 12, 2013, the claimant made a complaint about the maître d' to the general manager wherein he claimed that the maître d' would purposely put his cash out reports next to his genitals and tell the claimant to grab it from him. The maître d' was aware that the claimant had complained to the general manager about him, but he did not know the specifics.

On December 30, 2013, the claimant joined a class action law suit against the employer regarding wages, the maître d' tips, and with specific allegations against the maître d' himself and the general manager, who was formerly a maître d' herself.

On January 2, 2014, the claimant received a write up for the incident that occurred on or about December 12, 2013, because the general manager contended that he had said "f**k you" to her when he was describing the incident that occurred between the maître d' and himself.

On or about January 14, 2014, the owner approached the claimant on the floor of the dining room to inquire why he had joined the lawsuit. The claimant told him that he was loyal to him for a long time, however he felt that there was abuse going on in the restaurant that no one was doing anything about. The owner responded by telling him that he would not get another job in the United States.

On January 16, 2014, the owner of the restaurant held a general meeting with the servers or tipped employees to inquire as to why they had joined the lawsuit. During the meeting, the owner specifically questioned the claimant about his involvement in the lawsuit and he said that it was because he had been harassed, bullied and sexually harassed by the maître d'.

On January 22, 2014, the owner and the director of operations met with the claimant to discuss his involvement in the lawsuit. The claimant told them how the maître d' would purposely put his cash out reports next to his genitals and tell him to grab it from him. He also told them that the maître d' and the general manager were treating him like garbage for years. The claimant told them that he did not sleep at night, that he was anxious and would have nightmares. The owner suggested that he take a vacation, but the claimant stated that he did not have any money to take a vacation and then the owner offered to help him find another job at another restaurant.

On January 30, 2014 at about 7 pm, the maître d' sat two guests in the claimant's section at a table for four because they were friends of the owner, who was planning on joining them later on in the evening. The claimant had to prepare a steak tartar for another table and asked the maître d' to check on the owner's table while he prepared it. The maître d' asked a waiter from another section to check on the owner's table, which he did while the claimant prepared the steak tartar for the other guests. After the claimant finished preparing the steak tartar, he told the other server he was back and would resume service to the owner's guests. At no point, did the claimant refuse to serve the owner's guests.

Later on that same evening, the claimant saw the maître d' and the executive chef talking. However, when the claimant got close to them, they stopped talking and he said if they had something to say about him,

and made a telephone call. Shortly thereafter, the general manager came upstairs and told the claimant that he could not use profanity in the restaurant. Thereafter, the claimant was discharged because the employer believed that the claimant had used obscenities towards the maître d' and was confrontational towards him, and had refused to perform his job duties. The claimant did not use obscenities towards the maître d'.

After the claimant separated from his employment, he filed a claim for unemployment insurance benefits and was found eligible for benefits. The employer objected contending that the claimant should be disqualified from receiving benefits on the basis of misconduct and submitted the following letter of objection to the Department of Labor ("DOL"), which was written by the maître d', *"I was speaking with the chef regarding service, and Larbi approached me in a confrontational manner accusing me of "talking s**t about" him. I assured him I wasn't and he told me to "F**k off," Due to a drop in his service, I feel and talks regarding that, he had become very paranoid and erratic in his behavior in prior day. Earlier in the evening, he had refused to wait on a table because he said he didn't want to "deal with them." Instead of letting me know immediately he never went to the table, and I had to find out because they asked for their waiter. When I mentioned this to him he became agitated. This incident may have precipitated the earlier event."*

OPINION: Pursuant to Labor Law § 593 (3), a claimant is disqualified from receiving benefits after having lost employment through misconduct in connection with that employment. Pursuant to Labor Law § 527, the wages paid in such employment cannot be used to establish a future claim for benefits.

The credible evidence establishes that the claimant was discharged because the employer believed that the claimant had used obscenities towards the maître d' and was confrontational towards the maître d' and had refused to perform his job duties. Under the Labor Law, it is the last incident that causes the separation from employment that determines whether or not a claimant should be disqualified from receiving benefits, and that last incident must be causally connected to his discharge. The only person who had firsthand knowledge about the last incident that caused the claimant's discharge on January 30, 2014, was the claimant and the maître d'; no one else was privy to the discussion or witnessed it. The maître d' admits that no one else witnessed the incident between himself and the claimant.

At the hearing, the maître d' testified that the claimant accused him of "talking s**t about him" and told him that he was not going to get away with it. The maître d' also testified that the claimant told him "F**k You!" and was adamant that the claimant did not say "F**k Off!" when he was questioned at the hearing. However, it is important to note that the maître d' wrote in his letter of objection that he submitted to the DOL that the claimant told him to "F**k Off!".

The maître d' testified that he and the claimant were friends until August 2013, and then he said it was until November 2013. The claimant contends that they were never friends. The maître d' also testified that he believed that the claimant wanted to attack him because of his body language, but he was unable to describe specifically what made him feel that way other than stating that he looked crazy, he was not blinking, and had a furrowed brows and pursed lips.

At the hearing, the maître d' testified that he told the claimant that the owner was going to be joining the two guests seated in his section and the claimant told him that he did not have time for them and the maître d' told him okay, I'll find someone else. The maître d' later changed his testimony and stated that he assumed the claimant would take care of the guests even though he stated that he did not have time for them, which was inconsistent to his prior testimony, when he said he told the claimant he would find someone else. It is also important to note that in his letter of objection which he submitted to the DOL, the maître d' stated that he found out that the claimant was not assisting the guests when the guests asked for their waiter. It is also important to note that the owner did not contend that the claimant refused to serve his guests on the evening at issue. Based upon the foregoing, I accept the claimant's consistent credible testimony over the maître d's testimony, which was rife with inconsistencies and the employer's other witnesses.

The claimant has credibly testified that he did not use profanity towards the maître d' and did not refuse to serve the table where the owner's guests were seated. As such, I conclude that the employer has failed to establish that the claimant separated from his employment due to misconduct.

Notwithstanding the above, it was incumbent upon the maître d' to put the claimant on notice that his refusal to serve the owner's guests would jeopardize his employment before taking such action against him. In the absence of such warning, I conclude that the claimant's actions did not rise to the level of misconduct under the Labor Law. As such, I conclude that the claimant separated from his employment under non-disqualifying conditions.

DECISION: The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer cannot be used to establish a future claim for benefits, is overruled.

The initial determination, holding the claimant eligible to receive benefits, effective January 27, 2014, is sustained.

The claimant is allowed benefits with respect to the issues decided herein.

/s/ Susanna Iafrate

Administrative Law Judge