

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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VINTON SWABY,	:
	:
Plaintiff,	:
	:
-against-	:
	:
BARRINGTON DAWKINS,	:
dba RIO COBRE RESTAURANT AND LOUNGE,	:
	:
Defendant.	:
-----	X

Index No.: _____

SUMMONS

Place of Trial: Bronx County

The basis of venue is Defendant's place of business.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiffs' attorneys within twenty (20) days after the service of this summons exclusive of the date of service (or within thirty (30) days after the service if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded below.

Dated: December 3, 2013
New York, New York

/s/
David Ureña,
Maia Goodell, of counsel to
Jeanette Zelhof, Esq.,
MFY LEGAL SERVICES, INC.
299 Broadway, 4th Floor
New York, NY 10007
(212) 417-3700

DEFENDANT'S ADDRESS:

RIO COBRE RESTAURANT AND LOUNGE
4852 White Plains Road
Bronx, NY 10470

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----- X
: VINTON SWABY, :
: :
: Plaintiff, : Index No.: _____
: :
: -against- : **COMPLAINT**
: :
: BARRINGTON DAWKINS, :
: dba RIO COBRE RESTAURANT & LOUNGE, : **JURY TRIAL DEMANDED**
: :
: Defendant. :
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Plaintiff Vinton Swaby, by his attorneys MFY Legal Services, Inc., complains of Barrington Dawkins and Rio Cobre Restaurant & Lounge (“defendant”) as follows:

NATURE OF ACTION

1. Plaintiff Swaby (“Swaby” or “plaintiff”) worked over a period of six months as the cook for defendant’s restaurant, laboring long hours by being solely responsible for cooking duties and opening and closing the restaurant, until defendant declared that Swaby could no longer work there because he is a “faggot.”
2. Though Swaby performed the work that defendant tasked to him, defendant did not keep up his end of the bargain—defendant failed to pay Swaby agreed-upon wages of \$350.00 per week. The little that defendant did pay Swaby fell far below the statutory minimum wage and did not cover any due overtime premium pay or spread-of-hours pay.
3. Defendant made wage payments entirely in cash and at no time provided Swaby with any notices or statements concerning his pay, employment, or information about defendant’s business.

4. Swaby brings this proceeding to remedy defendant's willful failure to pay minimum and overtime wages, and spread-of-hours pay, in violation of the New York Minimum Wage Act and/or New York Labor Law § 650, et seq., and 12 NYCRR 146-1.6.

5. Swaby brings this proceeding also to remedy defendant's failure to provide written information about his employment and rate or manner of pay for the work he performed, in violation of New York Labor Law § 195.

6. Swaby also brings this proceeding to remedy defendant's unlawful discrimination against him in violation of the New York City Human Rights Law, Administrative Code of the City of New York § 8-107.

7. For the above violations Swaby is entitled to recover unpaid minimum and overtime wages, spread-of-hours pay, additional equal amounts in liquidated damages, prejudgment interest, notice penalties, compensatory and punitive damages for emotional distress, the costs of this proceeding, and attorney's fees pursuant to the New York Minimum Wage Act and/or New York Labor Law and the New York City Human Rights Law.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to New York State Constitution Art. 6, § 7.

9. Venue is appropriate in this Court pursuant to Civil Practice Law and Rules § 503 because defendant's principal place of business is in Bronx County, New York.

PARTIES

10. Swaby is an adult gay male residing in Westchester County.

11. Upon information and belief, Rio Cobre Restaurant and Lounge is a for-profit, unincorporated business that is not registered to do business in New York, with its principal place of business at 4852 White Plains Road, Bronx, NY 10470.

12. Upon information and belief, defendant Dawkins owns and operates Rio Cobre Restaurant and Lounge and the building property where the business is located.

13. Defendant has and exercises power over personnel decisions and the operation of his business.

14. For example, defendant hired Swaby, set his work hours, assigned duties to Swaby, paid him directly in cash, and terminated his employment, and defendant made decisions about the restaurant menu, set menu prices, and made decisions about how to spend the restaurant's revenues.

15. At all times relevant to this action, defendant employed Swaby within the meanings of the New York Labor Law and the New York City Human Rights Law.

STATEMENT OF FACTS

16. Defendant hired Swaby to work as the cook for the restaurant in or around the second week of August 2012.

17. As cook for defendant's restaurant, Swaby's responsibilities included opening and closing the restaurant, preparing and cooking food, serving food to customers, cleaning the restaurant's dining and kitchen areas, shopping for food and other supplies, and keeping records of the restaurant's sales.

18. At the time of Swaby's hire, defendant stated that he would pay Swaby \$350.00 per week until business picked up, at which point defendant would increase Swaby's pay.

19. However, Swaby never received this amount during his time working for defendant. Instead, Swaby was often paid a fraction of his agreed-upon wages and on one occasion, nothing at all.

20. During the first two months of his employment, Swaby regularly worked from approximately 6 a.m. until between 10 p.m. to 11 p.m., Monday through Saturday. Beginning in November 2012, Swaby started opening the restaurant at 6:30 a.m. or 7 a.m. and would work until close, between 10 p.m. to 11 p.m.

21. Swaby closed the restaurant at approximately 8:30 p.m. once or twice per week, due to the slow pace of business.

22. Each day, Swaby regularly took a ten-minute break for lunch, and a second approximately twenty-minute break.

23. With the exception of two days in or around October 2012, when Swaby could not work due to illness, Swaby worked six days per week throughout his employment with defendant.

24. Consequently, Swaby worked approximately 14 to 16 hours per day, six days per week, or 84-96 hours per week, for defendant.

25. Upon information and belief, defendant did not maintain records of the hours or days that Swaby worked.

26. At the end of each week, defendant paid Swaby directly, in cash. When defendant was unavailable, Swaby contacted him by phone to discuss the restaurant's sales receipts for the week, and defendant would tell Swaby what portion of the receipts to keep as his wages.

27. Defendant always paid Swaby in cash and never provided any notices or statements to Swaby with information pertaining to his date of hire, rate of pay, how the wages defendant paid Swaby were calculated, or about defendant's business.

28. Swaby contemporaneously maintained handwritten records of defendant's wage payments to him. All in all, defendant paid Swaby a total of \$2,711.00, in cash.

29. Swaby's last day of employment with defendant was January 28, 2013, which is when defendant fired Swaby. In the evening on January 28, defendant approached Swaby at the restaurant, demanded that Swaby return the keys to the restaurant, and told Swaby that he could no longer work there because he is a "faggot."

30. Swaby subsequently worked at a catering hall adjacent to defendant's restaurant. He left this job because the catering hall's owners told him that defendant stated to them that Swaby is gay and the owners questioned him about his sexual orientation, and other catering hall employees directed anti-gay slurs toward Swaby.

31. As a consequence of defendant's act, Swaby suffered emotional and psychological distress.

FIRST CLAIM FOR RELIEF

MINIMUM WAGE VIOLATIONS: NEW YORK MINIMUM WAGE ACT

32. Plaintiff realleges and incorporates by reference all preceding paragraphs.

33. At all times relevant to this action, defendant was plaintiff's employer within the meaning of New York Labor Law §§ 2 and 651.

34. At all times relevant to this action, plaintiff was defendant's employee within the meaning of New York Labor Law §§ 2 and 651.

35. Defendant willfully required, suffered, or permitted plaintiff to work for wages below the legal minimum wage, in violation of the New York Minimum Wage Act, New York Labor Law § 652; 12 NYCRR § 146-1.2.

36. As a result of defendant's willful violation of the New York Minimum Wage Act, plaintiff is entitled to recover from defendant for unpaid minimum wages, an equal amount in liquidated damages, prejudgment interest, costs of this proceeding, and reasonable attorney's fees, pursuant to New York Labor Law § 663 (1).

SECOND CLAIM FOR RELIEF

OVERTIME WAGE VIOLATIONS: NEW YORK MINIMUM WAGE ACT

37. Plaintiff realleges and incorporates by reference all preceding paragraphs.

38. Defendant failed to pay plaintiff at a rate of one-and-one-half times plaintiff's regular pay rate for all hours worked in excess of forty in a given workweek.

39. As a result of defendant's willful violation of plaintiff's rights under the New York Minimum Wage Act, Plaintiff is entitled to recover from defendant for unpaid overtime wages, an equal amount in liquidated damages, prejudgment interest, costs of this proceeding, and reasonable attorney's fees, pursuant to New York Labor Law § 663 (1).

THIRD CLAIM FOR RELIEF

FREQUENCY OF PAYMENT VIOLATION: NEW YORK LABOR LAW

40. Plaintiff realleges and incorporates by reference all preceding paragraphs.

41. Defendant failed to pay plaintiff's regular wages on either a weekly or semi-monthly basis, in violation of New York Labor Law § 191.

42. As a result of defendant's willful violation of plaintiff's rights under the N.Y. Lab. Law, plaintiff is entitled to recover from the defendant for all unpaid wages, an equal amount in liquidated damages, prejudgment interest, costs of this proceeding, and reasonable attorney's fees, pursuant to New York Labor Law § 663 (1).

FOURTH CLAIM FOR RELIEF

FAILURE TO PAY AGREED WAGES: NEW YORK LABOR LAW

43. Plaintiff realleges and incorporates by reference all preceding paragraphs.

44. Defendant failed to pay plaintiff the amounts initially agreed upon at the outset of plaintiff's employment, in violation of New York Labor Law § 193.

45. As a result of defendant's willful violation of plaintiff's rights under the N.Y. Lab. Law, plaintiff is entitled to recover from the defendant for all unpaid wages, an equal amount in liquidated damages, prejudgment interest, costs of this proceeding, and reasonable attorney's fees, pursuant to New York Labor Law §§ 198 (1-a) and 653.

FIFTH CLAIM FOR RELIEF

SPREAD-OF-HOURS VIOLATION: NEW YORK LABOR LAW

46. Plaintiff realleges and incorporates by reference all preceding paragraphs.

47. Plaintiff frequently worked ten or more hours per day.

48. Defendant willfully failed to pay plaintiff an extra hour of pay at the statutory minimum wage rate for each day he worked more than ten hours ("spread-of-hours pay"), in violation of New York Labor Law § 650, et seq.; 12 NYCRR § 146-1.6.

49. As a result of defendant's New York Labor Law violations, plaintiff is entitled to recover from defendant for unpaid spread-of-hours pay, an equal amount in liquidated damages,

prejudgment interest, costs of the action, and reasonable attorney's fees, pursuant to New York Labor Law § 663 (1).

SIXTH CLAIM FOR RELIEF

FAILURE TO PROVIDE NOTICE UPON HIRE: NEW YORK LABOR LAW

50. Plaintiff realleges and incorporates by reference all preceding paragraphs.

51. Defendant failed to provide plaintiff at the time of his hire a notice including information about the rate and basis of plaintiff's pay, and defendant's name, address, and telephone number, as required by New York Labor Law § 195 (1) (a).

52. As a result of defendant's violations, plaintiff is entitled to recover from defendant \$100 per week for each week following the start of his employment in which defendant failed to provide the required notice, up to the maximum penalty amount of \$2,500, as well as costs of this action, prejudgment interest, and reasonable attorney's fees pursuant to New York Labor Law § 198 (1-b).

SEVENTH CLAIM FOR RELIEF

FAILURE TO PROVIDE STATEMENTS WITH WEEKLY PAY:

NEW YORK LABOR LAW

53. Plaintiff realleges and incorporates by reference all preceding paragraphs.

54. Defendant failed to provide plaintiff, with each payment of plaintiff's wages, a statement including information such as number of days worked, plaintiff's name, defendant's name, defendant's address, rate of pay, and manner of pay, as required by New York Labor Law § 195 (3).

55. As a result of defendant's violations, plaintiff is entitled to recover from defendant \$50 per week for each week in which defendant failed to provide plaintiff with a

statement accompanying payment of his wages, up to the maximum penalty amount of \$2,500, as well as costs of this action, prejudgment interest, and reasonable attorney's fees, pursuant to New York Labor Law § 198 (1-d).

EIGHTH CLAIM FOR RELIEF

UNLAWFUL SEXUAL ORIENTATION DISCRIMINATION:

NEW YORK CITY HUMAN RIGHTS LAW

56. Plaintiff realleges and incorporates by reference all preceding paragraphs.

57. Defendant unlawfully discriminated against plaintiff by terminating his employment because of his sexual orientation.

58. As a result of defendant's willful violation of plaintiff's rights under the New York City Human Rights Law, plaintiff is entitled to recover from defendant amounts to be determined at trial for emotional distress, punitive damages, costs of this action, and reasonable attorney's fees, pursuant to Administrative Code of the City of New York § 8-502.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court grant the following relief:

a. Award plaintiff unpaid minimum wages and an additional equal amount as liquidated damages, pursuant to New York Labor Law § 663 (1);

b. Award plaintiff unpaid overtime wages and an additional equal amount as liquidated damages, pursuant to New York Labor Law § 663 (1);

c. Award plaintiff unpaid spread-of-hours wages, as well as an equal amount as liquidated damages, pursuant to New York Labor Law § 663 (1);

d. Award plaintiff prejudgment interest, pursuant to New York CPLR §§ 5001 and 5004;

