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8 Attorneys for Plaintiff

9 **IN THE UNITED STATES DISTRICT COURT**
 10 **FOR THE DISTRICT OF ARIZONA**

12 Equal Employment Opportunity
 Commission,
 13
 14 **Plaintiff,**
 15 vs.
 16 Scottsdale Wine Café, LLC d/b/a 5th and
 Wine,
 17
 18 **Defendant.**

Case No.:
COMPLAINT
 (JURY TRIAL DEMANDED)

19 **NATURE OF THE ACTION**

20
 21 This is an action under Title VII of the Civil Rights Act of 1964 (“Title VII”)
 22 against Defendant Scottsdale Wine Café, LLC d/b/a 5th and Wine (“5th & Wine” or
 23 “Defendant”) to 1) correct unlawful sex based employment practices, 2) correct unlawful
 24 retaliation against employees for opposing the unlawful employment practices and
 25 threatening to report the practices, and 3) provide appropriate relief to the Charging
 26 Party Wyatt Lupton (“Charging Party” or “Lupton”) and the Aggrieved Individual Jared
 27
 28

1 Bahnick (“Aggrieved Individual” or “Bahnick”). The Equal Employment Opportunity
2 Commission (“EEOC” or “Commission”) alleges that Defendant engaged in unlawful
3 discrimination by subjecting Lupton and Bahnick to a hostile work environment that was
4 severe and pervasive and that was due to their sex (male), because they did not conform
5 to sex- or gender-based assumptions, expectations, norms, or stereotypes of men,
6 because of sexual orientation , and, in the case of Bahnick, because he was associated
7 with gay men including Lupton, and because he himself was perceived to be gay as well.
8 Finally, Defendant violated Title VII by retaliating against Lupton by terminating his
9 employment because he opposed the harassment and because he indicated he was going
10 to file a formal external complaint about the harassment.
11
12

13 **JURISDICTION AND VENUE**

14
15 1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331,
16 1337, 1343 and 1345. This action is authorized and instituted pursuant to Sections
17 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §
18 2000e-5(f)(1) and (3) and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. §
19 1981a.
20

21
22 2. The employment practices alleged to be unlawful were committed within
23 the jurisdiction of the United States District Court for the District of Arizona.
24

25 **PARTIES**

26 3. Plaintiff, the EEOC, is the agency of the United States of America charged
27 with the administration, interpretation, and enforcement of Title VII, and is expressly
28 authorized to bring this action by Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. §

1 2000e-5(f)(1) and (3).

2 4. At all relevant times, Defendant, an Arizona corporation, continuously did
3 business in the State of Arizona, City of Scottsdale, and continuously had at least 15
4 employees.
5

6 **CONDITIONS PRECEDENT**

7 5. More than thirty days prior to the institution of this lawsuit, Lupton filed a
8 charge of discrimination with the Commission alleging violations of Title VII and
9 Retaliation by Defendant.
10

11 6. The EEOC provided Defendant with notice of the charge of
12 discrimination.
13

14 7. The EEOC investigated the charge of discrimination and issued a
15 determination finding reasonable cause to believe that Defendant engaged in unlawful
16 employment practices prohibited by Title VII of the Civil Rights Act of 1964.
17

18 8. The Commission invited Defendant to join it in informal methods of
19 conference, conciliation, and persuasion in an attempt to eliminate and remedy the
20 alleged unlawful employment practices.
21

22 9. Defendant participated with EEOC in conciliation, during which process
23 Defendant and the EEOC communicated regarding the alleged unlawful employment
24 practices and how to eliminate and remedy them.
25

26 10. The Commission was unable to reach agreement acceptable to it through
27 the conciliation process with Defendant.

28 11. The Commission sent notice to the Defendant informing it that

1 conciliation had failed.

2 12. All conditions precedent to the institution of this lawsuit have been
3 fulfilled.

4 **FACTUAL ALLEGATIONS**

5
6 13. Defendant hired Jared Bahnick as a server in approximately June 2012.

7 14. Defendant hired Lupton as a server in October 2012.

8 15. Defendant did not provide an employee handbook to Lupton or Bahnick
9 when they were hired or at any point during their employment.
10

11 16. At all relevant times, Defendant's employees, including Lupton and
12 Bahnick, were not provided with training on how to report sexual harassment or
13 discrimination.
14

15 17. Lupton is a gay man.

16 18. Defendant's employees, including Lupton's supervisors, were aware that
17 Lupton is gay.
18

19 19. Bahnick is not gay. He was, however, perceived to be gay by his
20 coworkers and management officials. Many of Defendant's managers and employees
21 also saw Bahnick associate with Lupton and thus perceived him as gay through his
22 association with Lupton.
23

24 20. During the course of their employment, Defendant's staff regularly
25 subjected Lupton and Bahnick to demeaning and derogatory comments and/or gestures
26 because they were perceived as not conforming to sex- or gender-based assumptions,
27 expectations, norms, or stereotypes of men.
28

1 21. Examples of the demeaning and derogatory comments and gestures
2 experienced by Lupton from October 2012 to March 2013 include, without limitation,
3 the following:

4 a. Comments from Lupton's coworker, Jesse Amster, who said:

5 "Would you like to go to Carabba's? Don't you like Carabba's, or
6 is it because I'm Mexican and my dick isn't big enough? Hey do
7 you want to blow me in the walk-in? Do you have time to blow
8 me?"

9 b. On two to three occasions Lupton's supervisor Scott Yanni referred
10 to Lupton as a "fag."

11 c. On March 10, 2013, while carrying a dish he was about to serve,
12 Lupton approached Yanni and chef Josh Yazzi. Lupton asked Yazzi
13 to hand him a lemon wrap. Yazzi threw two lemon wraps at Lupton,
14 who was unable to catch them because he only had one free hand.
15 Yazzi commented, "Wow, can't even catch a lemon." Yanni
16 laughed and said, "Consider who you were throwing it to." As
17 Lupton was walking away Yazzi said, "Well, I guess we know now
18 that Wyatt isn't a catcher, at least not in the kitchen," and both
19 Yanni and Yazzi laughed at this sexual euphemism.

20 d. Two days later, on March 12, 2013, Lupton again asked someone in
21 the kitchen to hand him something and Yazzi repeated the
22 euphemism, commenting, "Remember, though, Wyatt doesn't
23 catch."

24 e. On March 12, 2013, another employee Jerry (last name unknown),
25 looked threateningly at Lupton and sang in Spanish "No me digas
26 que no," which means "Don't tell me no." Jerry repeatedly made
27 kissing noises to Lupton. Lupton tried to ignore him. On March 12,
28 when Jerry directed kissing noises at Lupton and Lupton ignored
him, Jerry commented "He doesn't like Mexicans because they are
too small." While making a gesture with his hand to indicate he was
referring to penis size. Jerry again said, "Wyatt only likes big
penises; he doesn't like Mexicans because they are too small."

 f. On March 12, 2013, Jerry, while grinding his hips, asked Lupton in
Spanish, "Do you want it fast or slow, hard or soft, or both?" On

1 that same date, Jerry also ran his fingernails down Lupton's spine in
2 front of guests.

- 3 g. On March 12, 2013, Jerry asked Lupton to go with him to Karamba
4 a gay bar in Phoenix and Yazzi responded, "He'll go, it is already
5 his favorite bar."
- 6 h. On March 12, 2013, while Lupton was telling Jerry's sister
7 Esmeralda, who was also one of his coworkers, that Jerry's
8 behavior made him uncomfortable, Jerry approached Lupton and
9 both he and his sister blocked Lupton in a corner. Jerry asked him,
10 "Are you a fucking racist? Is that why you don't want to have sex
11 with me? Or are you cheating on me?" Lupton felt physically
12 threatened.
- 13 i. On at least one other occasion, on March 21, 2013, Jerry again ran
14 his fingernails down Lupton's spine once more making him feel
15 uncomfortable.
- 16 j. Over the course of Lupton's employment with Defendant, Jerry also
17 wolf-whistled and made kissing sounds every time Lupton entered
18 the kitchen. Lupton tried to ignore him, and, when Lupton
19 continued to ignore him, Jerry called Lupton a "fucking racist" in
20 Spanish.
- 21 k. On March 16, 2013, another employee, Richie looked at Lupton and
22 said, "A blow job makes your whole day, but anal sex makes your
23 hole weak."
- 24 l. On March 12, 2013, Lupton's Chef, Josh Yazzi stated that Lupton
25 "only likes big penises."
- 26 m. On March 16, 2013, after one of the kitchen staff finished filling an
27 icing bag with chocolate, he asked if anyone wanted to lick the
28 chocolate off the spoon. Lupton reached for the spoon, but Chef
Yazzi yelled to the employee, "Skeeter, no one wants your shit!"
and "It's ok, though, I am sure Wyatt knows what that tastes like
already."
- n. Yazzi also used terms with Lupton such as "sissy," "faggot," and
"pussy."

22. Examples of the demeaning and derogatory comments and gestures

1 experienced by Bahnick during his employment from June 2012 until October 2013,
2 include, without limitation, the following:

- 3 a. Bahnick's coworkers repeatedly called him "strawberry shortcake"
4 after winking and whistling at him. They also called him "faggot"
5 and "ginger snap."
- 6 b. Some of his coworkers often told him "You make me so hard", and
7 variations of "You're beautiful" or "You would be a really beautiful
8 woman."
- 9 c. His coworkers also often told him he was sexy and made kissing
10 noises around him. They frequently stuck out their tongues at him
11 and licked their lips.
- 12 d. One of Bahnick's coworkers made kissing noises at him and told
13 him that he liked to watch Bahnick walk away.
- 14 e. Bahnick also heard comments directed at him such as "I like your
15 butt and I would like to fuck it."
- 16 f. About a month after he was hired, in or about July 2012, while his
17 coworkers were making comments about his sexuality, Bahnick
18 protested and stated that he was not gay, but his coworkers said
19 "It's ok, we know you're gay."
- 20 g. Bahnick's coworkers also touched him in the buttocks and penis
21 and one of his coworkers hit him in the penis. Bahnick loudly
22 announced in the kitchen that he would "punch the next person who
23 touches my dick or my ass" but rather than alleviating the problem,
24 a coworker named Juan began physically assaulting him by twisting
25 and pinching Bahnick's arms so severely that he caused bruises.
26 Juan thought it was funny and continued to assault Bahnick
27 regularly. Juan pinched and twisted Bahnick's skin until Bahnick
28 screamed loudly. The assaults resulted in many dark bruises on
Bahnick's skin.
- h. Yanni also told Bahnick that he had "nice hair" and asked, "Are you
sure you weren't giving Wyatt [Lupton] some head before you
came to work?"

23. This harassment of Lupton and Bahnick was done in such an open manner

1 that Defendant knew or should have known that the men were being subjected to a
2 hostile work environment because they were perceived as not conforming to sex- or
3 gender-based assumptions, expectations, norms, or stereotypes of men, because of their
4 sex, because of their sexual orientation, and, in Bahnick's case, because he was
5 perceived to be gay and because he was associated with Lupton and/or individuals who
6 were gay.
7

8
9 24. Lupton and Bahnick complained to Defendant's managers and supervisors
10 and others within the workplace on multiple occasions, but Defendant took no remedial
11 action to correct the conduct described in the foregoing paragraphs. These complaints
12 include but are not limited to:
13

- 14 a. In or around December 2012, Lupton complained to Chef BJ Curtis
15 about Jesse Amster's conduct after which the harassment stopped
16 for a few days but then it would restart.
- 17 b. After Lupton complained to BJ, his direct supervisor, assistant
18 manager Barkley took Lupton's tables away from him, negatively
19 affecting his tips.
- 20 c. Lupton attempted to complain to his direct supervisor Barkley but
21 she made him feel like it was his fault.
- 22 d. BJ Curtis told Bahnick not to complain so Bahnick would not get in
23 more trouble.
- 24 e. Bahnick complained multiples times to general manager Yanni,
25 about the harassment he was enduring. However, Yanni was
26 nonchalant about the complaints. He refused to document any of
27 Bahnick's complaints even though Bahnick explicitly asked him to
28 write down his complaints.
- f. Both Bahnick and Lupton complained to a number of their
coworkers about the harassment that they were enduring.

1 g. Lupton informed one of his coworkers that he was planning on
2 reporting Respondent's harassing conduct and that he had already
3 contacted an attorney. This employee warned management, telling
4 them that they should be careful because Lupton was planning on
5 filing discrimination charges.

6 25. Then, on March 21, 2013 Defendant's general manager Yanni sent an
7 email to the entire restaurant staff in which he stated that there was in issue with
8 "attitude" and "quality of service" and, because of the recent number of customer
9 complaints regarding employee service, the email should be considered a verbal warning
10 to all employees. Yanni informed the staff that, if additional infractions occurred,
11 employees would be suspended or terminated.

12 26. The next morning when Lupton arrived for his shift, Yanni and Yazzi
13 pulled Lupton aside and terminated him immediately. Yanni told Lupton that he should
14 consider a career change.

15 27. Jared Bahnick ended his employment in October 2013.

16
17 **STATEMENT OF CLAIMS**

18 **FIRST CLAIM FOR RELIEF**

19 **[Sex-Based Hostile Work Environment – 42 U.S.C. § 2000e-2(a)]**

20 28. The allegations contained in the foregoing paragraphs are hereby
21 incorporated by reference.
22

23 29. From at least June 2012 through at least October 2013, Defendant
24 engaged in unlawful employment practices at its Scottsdale, Arizona facility in violation
25 of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a), by subjecting Wyatt Lupton,
26 and Jared Bahnick to severe or pervasive harassment constituting a hostile work
27
28

1 environment because of sex, including but not limited to, because Lupton and Bahnick
2 were male and/or because they were perceived as not conforming to sex- or gender-
3 based assumptions, expectations, norms, or stereotypes of men. During that time,
4 Defendant also subjected Bahnick to severe or pervasive harassment constituting a
5 hostile work environment because Defendant perceived Bahnick to be gay and
6 associated him with gay men, including Lupton.
7

8 30. As described with more particularity above, Defendant's staff regularly
9 subjected Lupton and Bahnick to sex-based derogatory comments, including but not
10 limited to comments about their gender and/or their perceived nonconformance with
11 sex- or gender-based assumptions, expectations, norms, or stereotypes of men.
12

13 31. Despite repeated complaints about the harassing comments and conduct,
14 Defendant created and tolerated this sex-based hostile work environment and failed to
15 take prompt or effective remedial action to correct it.
16

17 32. Defendant knew or should have known about the harassing comments and
18 conduct described above due to the complaints it received and the open and notorious
19 nature of the conduct.
20

21 33. Despite this knowledge, Defendant failed to stop the harassing conduct.
22

23 34. Defendant failed to take prompt or effective action to prevent, correct, or
24 remedy the hostile work environment.
25

26 35. The effect of the practices complained of in the foregoing paragraphs has
27 been to deprive Lupton and Bahnick of equal employment opportunities and otherwise
28 adversely affect their status as employees because of sex.

PRAYER FOR RELIEF

1
2 Wherefore, the Commission respectfully requests that this Court:

3 A. Grant a permanent injunction enjoining Defendant, its officers, agents,
4 servants, employees, attorneys, and all persons in active concert or participation with
5 them, from engaging in any unlawful practice which discriminates against an employee
6 or applicant because of their sex, including on the basis of employees' failure to conform
7 to sex- or gender-based assumptions, expectations, or stereotypes of men.
8

9
10 B. Grant a permanent injunction enjoining Defendant, its officers, agents,
11 servants, employees, attorneys, and all persons in active concert or participation with
12 them, from engaging in any unlawful practice which retaliates against any employee for
13 participating in federally protected activity, including making an internal complaint of
14 harassment.
15

16 C. Order Defendant to institute and carry out policies, practices, and
17 programs which provide equal employment opportunities regardless of sex (including
18 gender identity), and which eradicates the effects of its past and present unlawful
19 employment practices.
20

21 D. Order Defendant to make Lupton and Bahnick whole by providing
22 compensation for past and future pecuniary losses resulting from the unlawful
23 employment practices described in paragraphs 13 through 27 above, including job
24 search expenses and backpay, in amounts to be determined at trial.
25

26 E. Order Defendants to make Lupton and Bahnick whole by providing
27 compensation for past and future non-pecuniary losses resulting from the unlawful
28

1 employment practices described in paragraphs 13 through 27 above, including emotional
2 pain, suffering, inconvenience, and humiliation, in amounts to be determined at trial.

3 F. Order Defendant to pay Lupton and Bahnick punitive damages for its
4 malicious or recklessly indifferent conduct described in paragraphs 13 through 27 above,
5 in amounts to be determined at trial.
6

7 G. Grant such further relief as this Court deems necessary and proper in the
8 public interest.
9

10 H. Award the EEOC its costs of this action.

11 **JURY TRIAL DEMANDED**

12 The EEOC requests a jury trial on all questions of fact raised by its Complaint.

13 RESPECTFULLY SUBMITTED this 20th day of January, 2017.
14

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