

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

NIKOLAI GRUSHEVSKI, and)
others similarly situated,)

Plaintiffs,)

v.)

TEXAS WINGS, INC.;)
CORPUS CHRISTI WINGS, LTD.;)
TWI XXII, INC.; and HOOTERS)
OF AMERICA, INC.,)

Defendants.)

CIVIL ACTION NO.
2:09-cv-00002

**DEFENDANT HOOTERS OF AMERICA, INC.’S ORIGINAL ANSWER
AND AFFIRMATIVE AND OTHER DEFENSES TO
PLAINTIFF’S ORIGINAL COMPLAINT**

Defendant Hooters of America, Inc. (“Defendant HOA”) hereby submits its Original Answer and Affirmative and Other Defenses to Plaintiff Nikolai Grushevski’s (“Plaintiff”) Original Complaint (“Complaint”).

Defendant HOA responds to the numbered allegations of Plaintiff’s Complaint as follows:

I. PARTIES

1. Answering the first sentence of Paragraph 1 of the Complaint, Defendant HOA admits that Plaintiff is male. Answering further, Defendant HOA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the first sentence of Paragraph 1 of the Complaint and, therefore, denies the same. The remaining allegations in Paragraph 1 of the Complaint assert legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all remaining allegations in Paragraph 1 of the Complaint.

2. Defendant HOA is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of the Complaint and, therefore, denies the same.

3. Defendant HOA is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3 of the Complaint and, therefore, denies the same.

4. Defendant HOA is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of the Complaint and, therefore, denies the same.

5. Defendant HOA denies the first sentence of Paragraph 5 of the Complaint as written. Answering the second sentence of Paragraph 5 of the Complaint, Defendant HOA admits that it is a Georgia corporation with its principal place of business in Atlanta, Georgia, and that its registered agent for service of process is A. J. Block, Jr., 2060 Mount Parran Road, N.W., Atlanta, Georgia 30327. The remaining allegations in the second sentence of Paragraph 5 of the Complaint assert legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all remaining allegations in the second sentence of Paragraph 5 of the Complaint.

6. Paragraph 6 of the Complaint asserts legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations in Paragraph 6 of the Complaint. Answering further, Defendant HOA denies any violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and/or any liability to Plaintiff or others similarly situated.

II. JURISDICTION AND VENUE

7. Answering Paragraph 7 of the Complaint, Defendant HOA admits that the federal district courts have subject matter jurisdiction over claims brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The remaining allegations in

Paragraph 7 of the Complaint assert legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all remaining allegations in Paragraph 7 of the Complaint.

8. Paragraph 8 of the Complaint asserts legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations contained in Paragraph 8 of the Complaint. Answering further, Defendant HOA avers that Plaintiff's Complaint is subject to transfer to United States Magistrate Judge Morton Denlow of the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(n).

9. Answering Paragraph 9 of the Complaint, Defendant HOA admits that Plaintiff filed, on behalf of himself and, upon information and belief, with the assistance of legal counsel, a charge of discrimination, number 451-2008-01626, with the U.S. Equal Employment Opportunity Commission ("EEOC") alleging that a Hooters store in Corpus Christi, Texas had denied him employment as a "waiter" because of his sex. Answering further, Defendant HOA avers that any additional claims in his Complaint are barred to the extent the persons, entities, employment action(s), and/or subject matter generally (including, but not limited to, the relief sought) were not the subject of and/or were otherwise outside the scope of his EEOC charge of discrimination. The remaining allegations in Paragraph 9 of the Complaint assert legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all remaining allegations in Paragraph 9 of the Complaint.

III. FACTUAL BACKGROUND

10. Answering the third sentence in Paragraph 10 of the Complaint, Defendant HOA admits that it operates Hooters stores in fifteen (15) States in the United States, but none in the

State of Texas. Answering further, Defendant HOA denies all remaining allegations in the third sentence of Paragraph 10 of the Complaint. Defendant HOA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 10 of the Complaint and, therefore, denies the same.

11. Defendant HOA is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 11 of the Complaint and, therefore, denies the same. Defendant HOA further avers that it neither owns nor operates that Hooters store at 4551 S. Padre Island Dr., Corpus Christi, Texas, and, thus, specifically denies that Plaintiff applied for employment with Defendant HOA. The second sentence of Paragraph 11 of the Complaint asserts legal arguments and conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations in the second sentence of Paragraph 11 of the Complaint.

12. Paragraph 12 of the Complaint asserts legal arguments and conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations contained in Paragraph 12 of the Complaint. Answering further, Defendant HOA specifically denies that the primary function of a Hooters Girl is to serve food and drinks.

13. Defendant HOA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 13 of the Complaint and, therefore, denies the same. Defendant HOA admits the second sentence of Paragraph 13 of the Complaint. The third sentence of Paragraph 13 of the Complaint asserts legal conclusions and arguments to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations in the third sentence of Paragraph 13 of the Complaint.

14. Paragraph 14 of the Complaint asserts legal arguments and conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations in Paragraph 14 of the Complaint.

15. Paragraph 15 of the Complaint asserts legal arguments and conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations in Paragraph 15 of the Complaint.

16. Answering the first sentence of Paragraph 16 of the Complaint, Defendant denies the factual allegations alleged therein. The remaining allegations in Paragraph 16 of the Complaint assert legal arguments and conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all remaining allegations in Paragraph 16 of the Complaint.

IV. CAUSE OF ACTION/CLASS ACTION

17. Answering the allegations contained in the first clause of the first sentence of Paragraph 17 of the Complaint, Defendant HOA hereby re-alleges and incorporates by this reference each of its responses to the allegations set forth in Paragraph 1 through 16 of the Complaint; unless and except as specifically admitted therein, Defendant HOA denies Paragraph 17 of the Complaint. The remaining allegations of Paragraph 17 of the Complaint assert legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all remaining allegations in Paragraph 17 of the Complaint.

18. Paragraph 18 of the Complaint asserts legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations in Paragraph 18 of the Complaint.

VI.¹ JURY DEMAND

19. Paragraph 19 of the Complaint asserts legal conclusions to which no response is required; however, to the extent any response is required, Defendant HOA denies all allegations in Paragraph 19 of the Complaint.

VII. DAMAGES AND PRAYER

20. Answering the allegations contained in Paragraph 20 of the Complaint, Defendant HOA denies that Plaintiff is entitled to the specific relief requested or to any relief whatsoever.

21. Answering the allegations contained in Paragraph 21 of the Complaint, Defendant HOA denies that Plaintiff is entitled to the injunctive relief requested or to any relief whatsoever.

Except as specifically admitted hereinabove in response to the numbered paragraphs of the Complaint, Defendant HOA denies any and all other claims and/or allegations that are raised, or which could have been raised, by or in the Complaint.

FIRST DEFENSE

Plaintiff's Complaint and the claims of any similarly-situated individuals fail, in whole or in part, to state a claim upon which relief can be granted, and Plaintiff and any similarly-situated individuals are not entitled to recover damages under any facts or theories set forth in the Complaint.

SECOND DEFENSE

Defendant HOA alternatively pleads that neither Plaintiff nor any similarly-situated individuals submitted an application for employment with Defendant HOA and, therefore, Plaintiff and any similarly-situated individuals lack standing under Article III of the United States Constitution to bring their claims against Defendant HOA. Defendant HOA is not a

¹ Plaintiff's Complaint does not include a Section V.

proper party defendant to Plaintiff's Complaint or to the claims of any similarly-situated individuals.

THIRD DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals against Defendant HOA are subject to dismissal for lack of personal jurisdiction.

FOURTH DEFENSE

Defendant HOA alternatively pleads that venue is not properly laid in the United States District Court for the Southern District of Texas and/or Plaintiff's Complaint and the claims of any similarly-situated individuals are subject to transfer to United States Magistrate Judge Morton Denlow of the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(n).

FIFTH DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals are barred, in whole or in part, by the Findings of Fact and Conclusions of Law, Final Order and Judgment Entering Consent Decree, and the Consent Decree entered in the consolidated class actions captioned Gonzalez v. Hooters, Inc., et al., No. 93-CV-07709 (N.D. Ill. Nov. 25, 1997), Ginter & Salisbury v. Hooters, Inc., et al., No. 94-C-6338 (N.D. Ill. Nov. 25, 1997), and Spark v. Hooters of America, Inc., et al., No. 97-CV-2563 (D. Md. Nov. 25, 1997).

SIXTH DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any

similarly-situated individuals fail to satisfy the prerequisites of Rule 23 of the Federal Rules of Civil Procedure and, thus, this action may not be prosecuted as a class action.

SEVENTH DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals for monetary damages predominate and are not incidental.

EIGHTH DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals are barred, in whole or in part, by the applicable limitations period and/or the failure to satisfy all conditions precedent and statutory prerequisites to suit and/or exhaust any and all administrative remedies. Plaintiff's Complaint and the claims of any similarly-situated individuals are barred, in whole or in part, (a) for failure of the claims of Plaintiff or any similarly-situated individuals to be the subject of and/or within the scope of Plaintiff's charge or charges of discrimination filed with the EEOC and/or an appropriate Office of Equal Opportunity, (b) for failure of said charge(s) to name Defendant HOA as a respondent, and/or (c) for failure of said charge(s) to be served upon Defendant HOA or for Defendant HOA to receive notice of and a chance to participate in the administrative processing of said charge(s).

NINTH DEFENSE

Defendant HOA alternatively pleads that, to the extent Plaintiff has failed to institute his action within the time required under the applicable statute of limitations, the respective claims for relief of the purported class are barred.

TENTH DEFENSE

Defendant alternatively pleads that, to the extent Plaintiff has failed to satisfy any and all conditions precedent and statutory prerequisites to suit and/or exhaust any and all administrative

remedies, the respective claims of the purported class are barred.

ELEVENTH DEFENSE

Defendant HOA alternatively pleads that neither Plaintiff nor any similarly-situated individuals submitted an application for employment with Defendant HOA, but to the extent they did, which they did not, their claims pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., are subject to mandatory final and binding arbitration under the Hooters of America, Inc. Agreement to Arbitrate.

TWELFTH DEFENSE

Defendant HOA alternatively pleads that any action taken by Defendant HOA regarding Plaintiff or any similarly-situated individuals was for legitimate, non-discriminatory reasons and, as such, did not violate any legal right possessed by them; however, even if Plaintiff or any similarly-situated individual's sex did play a motivating part in any employment action at issue here, which it did not, Defendant HOA would have taken the same action for legitimate, non-discriminatory reasons.

THIRTEENTH DEFENSE

Defendant HOA alternatively pleads that any action taken by Defendant HOA with respect to Plaintiff or any similarly-situated individuals was privileged under the United States and Texas Constitutions and was within the bona fide occupational qualification ("BFOQ") exception to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and/or other applicable anti-discrimination statute(s) sued upon.

FOURTEENTH DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals are barred, in whole or in part, by the doctrines of after-acquired

evidence, avoidance (or avoidable consequences), bankruptcy (or discharge in bankruptcy), consent, estoppel, laches, license, justification, unclean hands, waiver, and/or the exclusivity provision of the State's worker's compensation statute.

FIFTEENTH DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals fail to state facts demonstrating his or any similarly-situated individual's entitlement to compensatory damages.

SIXTEENTH DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals fail to state facts demonstrating his or any similarly-situated individual's entitlement to punitive damages.

SEVENTEENTH DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals fail to state facts demonstrating his or any similarly-situated individual's entitlement to injunctive or other relief.

EIGHTEENTH DEFENSE

Defendant HOA alternatively pleads that neither Plaintiff nor any similarly-situated individuals are entitled to any of the relief – including, but not limited to, any equitable, declaratory, injunctive, or legal relief – requested against Defendant HOA in the Complaint, including, but not limited to, any award of punitive damages; however, to the extent Plaintiff or any similarly-situated individuals are entitled to any relief, which they are not, such relief is limited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., 42 U.S.C. § 1981a, and/or other applicable provisions of federal law.

NINETEENTH DEFENSE

Defendant HOA alternatively pleads that any unlawful or other wrongful act attributed to any persons employed by Defendant Texas Wings, Inc., Defendant Corpus Christi Wings, Ltd., and/or Defendant TWI XXI, Inc. were not authorized, ratified, or condoned by Defendant HOA, and Defendant HOA did not know or have reason to be aware of any such alleged conduct.

TWENTIETH DEFENSE

Defendant HOA alternatively pleads that any injuries or damages alleged by Plaintiff or any similarly-situated individuals were the result of new, independent, intervening, or superseding causes unrelated to any conduct of or actions by Defendant HOA. As a result, any conduct or action on the part of Defendant HOA was not the proximate or producing cause of any alleged injuries or damages Plaintiff or any similarly-situated individuals claim to have suffered.

TWENTY-FIRST DEFENSE

Defendant HOA alternatively pleads that any damages suffered by Plaintiff or any similarly-situated individuals were the direct and proximate result of their own actions or inaction, or resulted from the acts or omissions of others for whom Defendant HOA is not liable. More specifically, at no time did Defendant HOA employ Plaintiff or any similarly-situated individuals, and/or the discrimination alleged in the Complaint did not result from the conduct of or actions taken by agents or employees of Defendant HOA.

TWENTY-SECOND DEFENSE

Defendant HOA alternatively pleads that Plaintiff's Complaint and the claims of any similarly-situated individuals are barred, in whole or in part, by the failure of Plaintiff or any

such similarly-situated individuals to notify Defendant HOA of any conduct that they allegedly found objectionable.

TWENTY-THIRD DEFENSE

Defendant HOA alternatively pleads that Plaintiff and any similarly-situated individuals have failed to mitigate their alleged damages as required by law.

TWENTY-FOURTH DEFENSE

Defendant HOA alternatively pleads that it is entitled to appropriate offset amounts of any alleged damages sustained by Plaintiff or any similarly-situated individuals.

TWENTY-FIFTH DEFENSE

Defendant HOA alternatively pleads that it has at all times acted in accordance and good-faith compliance with any and all applicable federal and state laws; however, even if Plaintiff or any similarly-situated individuals' sex did play a motivating part in any employment action at issue here, which it did not, Defendant HOA did not violate their rights maliciously or with reckless disregard, and Defendant HOA is not vicariously liable for punitive damages for the employment decisions of its managerial agents if (or when) such decisions were contrary to Defendant HOA's good-faith efforts to comply with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Therefore, neither Plaintiff nor any similarly-situated individuals are entitled to any award of punitive damages.

TWENTY-SIXTH DEFENSE

Defendant HOA alternatively pleads that any award of punitive damages to Plaintiff and/or any similarly-situated individuals would be violative of due process and other constitutional safeguards due Defendant HOA under the Constitution of the United States.

TWENTY-SEVENTH DEFENSE

Defendant HOA hereby reserves the right to amend its Answer and/or add additional defenses, or to withdraw defenses, after reasonable opportunity for appropriate discovery.

WHEREFORE, having fully answered the allegations in Plaintiff's Complaint, Defendant HOA respectfully requests that the Court enter an Order dismissing the Complaint in its entirety, with prejudice; award Defendant HOA its costs and expenses, including reasonable attorney's fees; and award Defendant HOA any and all other relief that the Court deems just and proper.

Respectfully submitted this 16th day of March, 2009.

s/Stanford G. Wilson
Stanford G. Wilson
Attorney-in-Charge
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(*admitted pro hac vice*)

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TWI XXII, INC., and HOOTERS)	
OF AMERICA, INC.,)	
)	
Defendants.)	

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2009, I electronically filed the foregoing **DEFENDANT HOOTERS OF AMERICA, INC.'S ORIGINAL ANSWER AND AFFIRMATIVE AND OTHER DEFENSES TO PLAINTIFF'S ORIGINAL COMPLAINT** with the Clerk of Court using the CM/ECF System, which will automatically send notification of such filing to the following:

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[SIGNATURE ON FOLLOWING PAGE]

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