

1 Hon. J. Richard Haden (Ret.)
2 JAMS
3 401 "B" Street, Suite 2100
4 San Diego, CA 92101
5 Telephone: (619) 236-1848
6 Fax: (619) 236-9032

7 Arbitrator

8 IN THE MATTER OF THE ARBITRATION
9 BETWEEN

10
11
12 BREEDLOVE, Lisa M.,
13 Claimant,

14 and

15 PACERS, INC., WILLIAMS, John,
16 Respondents.
17

JAMS Ref. No.: 1240019144

FINAL AWARD

18
19 Parties and Counsel. The parties to this arbitration are identified in
20 the caption and are represented as follows:

21 David P. Strauss, Esq.
22 1111 Sixth Avenue, Suite 404
23 San Diego, CA 92101
24 Tel: (619) 237-5300
Fax: (619) 237-5311

25 Terry J. Chapko, Esq.
26 1111 Orange Avenue, Suite A
27 Coronado, CA 92118
28 Tel: (619) 522-2100
Fax: (619) 522-2104
Counsel for Claimant

1 David B. Norris, Esq.
2 Symphony Towers
3 750 "B" Street, Suite 2740
4 San Diego, CA 92101-8129
5 Tel: (619) 232-2690
6 Fax: (619) 232-2699

7 Edith A. Thomas, Esq.
8 214 North Ridge Drive, Suite B
9 Fallbrook, CA 92028
10 Tel: (888) 349-3940
11 Fax: (760) 728-9518
12 *Counsel for Respondents*

13 Arbitrator:

14 Hon. J. Richard Haden (Ret.)
15 JAMS
16 401 B Street, Suite 2100
17 San Diego, CA 92101
18 Tel: (619) 236-1848
19 Fax: (619) 236-9032

20 Case Manager:

21 Jenny Truex
22 JAMS
23 401 B Street, Suite 2100
24 San Diego, CA 92101
25 Tel: (619) 237-0805
26 Fax: (619) 849-4980

27 Place of Arbitration: San Diego, California

28 Date of Interim Award: May 12, 2009

29 The undersigned Arbitrator, having been selected by stipulation of
30 the parties, and having been duly sworn and examined the submissions,
31 proof and allegations of the parties, finds, concludes, and issues this Final
32 Award as follows:

33 ///

1 I. INTRODUCTION AND PROCEDURAL STATEMENT

2 Lisa Breedlove was employed as an at-will bartender at Pacers, a
3 topless cocktail lounge in San Diego, from December 2005 until she was
4 terminated in November 2006. Mr. Williams was the manager at Pacers.
5 Ms. Breedlove claims sexual harassment in the workplace, failure to
6 prevent harassment and retaliation. She has filed this Demand for
7 Arbitration seeking damages for economic loss and emotional distress as
8 well as punitive damages and attorney fees. Pacers and Mr. Williams deny
9 the allegations.

10 The arbitration clause is contained in the Mutual Agreement to
11 Arbitrate dated December 3, 2005. The arbitration was ordered by the
12 Superior Court.

13 The claims are stated in the Second Amended Complaint dated
14 February 16, 2009, and the Answer dated March 18, 2009. The claims are
15 arbitrable. Respondent's demurrer for Déjà Vu Consulting and Luster
16 Consulting was sustained without leave to amend.

17 The substantive law of California and the California Arbitration Act
18 together with applicable JAMS Employment Rules shall apply in this
19 proceeding unless the parties otherwise agree in writing.

20 The evidentiary hearing took place March 30-31, April 1-2, 9-10, and
21 14-15, 2009, in the JAMS offices, 401 "B" Street, Suite 2100, San Diego,
22 California. Each side offered documentary evidence (Exh. 1-2, 4-5, 7-12,
23 14-16, 18-19, 21-29, 31, 33-35, 37, 42-51, 53-57, 59-60, 68-69, 71-72,
24 102, 106, 107, 2000-2004, 2006, 2011-2012, 2014-2015, 2017-2019,
25 2021-2022, 2025, 2030-2031, 2033-2037, 2040, 2042-2043, 2045, 2071,
26 2073-2075, 2077-2078, 2080-2086). Ms. Breedlove presented the
27 testimony of herself, Mikel Bohi, Michael Hunter, Edi Thomas, Jayme
28 Garrison, Charity Ford, Esse Peters, John Williams, Peter Luster, Russell

1 Harmon and Sarah Peterson. Pacers offered the testimony of Hal Zangana,
2 Mike Kimbell, Steve Martin, Dr. Marcella Wilson, Anita Williams, Keith
3 Marland, Richard Danehy, Andrew Jackson, Brooke Middleton, Laila
4 Aliallah, Audrina Brooks, Jose Falante, Any Tulk, Kristen Chapman and
5 Jessica Dodge. Deposition testimony of Sarah Peterson, Lisa Fisher, Dr.
6 Ruben Farris and Dr. Rebecca Zeiner, together with the declaration of Lori
7 Jacobs, was also submitted. The hearing was not reported.

8 At the conclusion of the testimony the matter was argued and
9 submitted on April 15, 2009.

10 II. FACTS

11 The following is a statement of those facts found by the Arbitrator to
12 be true and necessary to the Award. To the extent that this recitation
13 differs from any party's position, that is the result of determinations as to
14 credibility and relevance, burden of proof, and the weighing of evidence.

15 A. Claimant's Case.

16 1. Ms. Breedlove.

17 Lisa Breedlove is a 39-year-old single mother of two. When she
18 separated from her husband about nine years ago she returned to San
19 Diego State to become a civil engineer. Between 2000 and 2004 she was
20 also employed full time at UPS until she was terminated after using a
21 company credit card for personal expenses. (Ex. 2080, p.1678, et seq.)
22 However, when she filed for unemployment she listed conflicts with school
23 and parenting schedule as reasons she was no longer employed there.
24 (Exh. 106.)

25 She then worked part time as a cocktail waitress in Dreamgirls,
26 a bar managed in part by Russell Harmon. In 2006 Mr. Harmon dealt with
27 a complaint Ms. Breedlove was being sexually harassed at Dreamgirls by
28 manager Keith Marland. He promptly interviewed Ms. Breedlove who

1 stated Mr. Marland asked her to dinner during most shifts. Mr. Harmon
2 counseled Mr. Marland and required him to sign an acknowledgment he
3 understood company sexual harassment policy. (Exh. 2014.)

4 In December 2005 Ms. Breedlove also began working at Pacers,
5 an adult entertainment club which offers topless dancing and provocatively
6 dressed waitresses and bartenders. Pacers' management, ownership,
7 corporate counsel, and accounting are the same or similar to Dreamgirls.
8 Several employees work at both establishments, which are located near one
9 another. Ms. Breedlove began as a waitress and soon became a bartender.
10 She had applied there on the recommendation of her father, who was a day
11 assistant manager. In her pre-employment questionnaire, Ms. Breedlove
12 listed the reason she left UPS as "to finish college." She was provided a
13 "new hire package" which included Pacers' sexual harassment policy and
14 an acknowledgment of at-will employment. (Exh. 2000, p.00070.)

15 In April 2006 Ms. Breedlove signed Pacers' "Informed Consent
16 to Exposure to Sexually Explicit Activity During Course of Employment..."
17 That consent form informed employees the company's main business
18 purpose was offering semi-nude erotic dance performances to consenting
19 adults and asked employees to represent they were not offended by being
20 exposed to sexually explicit activity, depictions or language. This document
21 also informed employees Pacers had a sexual harassment policy which is
22 vigorously enforced. Ms. Breedlove also signed Pacers' sexual harassment
23 policy but has no recollection of reading it. (Exh. 2000, p.2.)

24 In July 2006 Ms. Breedlove claims she complained to Russell
25 Harmon, who had supervisory authority over both Pacers and Dreamgirls
26 on-site managers, that General Manager John Williams took her in a
27 storage room where he attempted to kiss her and put his hands up her
28 skirt so roughly he caused a large grapefruit-sized bruise on the inside of

1 her thigh. She wiggled away, escaping horrified and humiliated. She also
2 told Harmon three other women had suffered similarly at Mr. Williams'
3 hand and that Mr. Williams extorted tip money from them. She gave him
4 each employee's name and phone number and told him they were expecting
5 his call. Mr. Harmon appeared concerned and said he would get back to
6 her. Ms. Breedlove understood her complaint jeopardized her job.

7 Ms. Breedlove also testified Mr. Williams had come up behind
8 her and reached his hand over her shoulder and inside her top to fondle
9 her breasts while making a "disgusting noise." She shoved his hand away
10 and asked him to stop. She also witnessed Mr. Williams do the same to
11 other female employees. Mr. Williams also spanked her hard on multiple
12 occasions, once leaving a welt on her bottom. He also insisted on long
13 unwelcome hugs which made her uncomfortable. Once in his office Mr.
14 Williams pulled her onto his lap. He frequently asked her for sex and
15 promised better shifts if she would comply. Mr. Williams also requested
16 "topless payouts" from Ms. Breedlove and other women. This is a practice
17 in which the women report to the office topless at the end of their shifts for
18 resolution of their pay. Mr. Williams frequently remarked he wanted to
19 "fuck" or "fuck in the ass" particular female employees.

20 Immediately after her complaint to Mr. Harmon, Ms.
21 Breedlove's shifts were reduced. In fact, she was completely removed from
22 the schedule for two weeks. She worked only two shifts the remainder of
23 July and two in August. (Exh. 55, p.0087.) When she returned to work she
24 was assigned the outdoor smoker's patio, a far less lucrative post than the
25 main bar where she previously worked. If another manager called her to
26 cover the main lounge, she would be sent home as soon as Mr. Williams
27 arrived at work. Her November 11, 2006 schedule reflects a 1 hour, 45
28 minute shift. (Exh. 55, p.0087.) Other employees remarked, "You really

1 pissed Williams off." In mid-August Mr. Williams told her he wanted to fire
2 her but was not allowed to do so. However, after her complaint to Mr.
3 Harmon, Mr. Williams stopped harassing her and focused his attention on
4 other female employees.

5 Ms. Breedlove did not complain about her reduced shifts or the
6 conduct directed at other employees because her hours had been reduced
7 after the last complaint and she needed her job. Instead she wrote two
8 memos to Mr. Williams requesting more hours. On August 4, 2006, she
9 wrote to "Master Commander in Chief John from the lowly bar wench Lisa
10 ... I humbly submit my availability for next week. Thank you for allowing
11 me to have this weekend off to develop my relationship with my family."
12 (Exh. 50.) On August 18, 2006, she wrote requesting weekend shifts, "...I
13 will be returning to school on August 28th. This means I will be off my
14 summer internship and I would like to pick back up to two or three shifts
15 each week." (Exh. 51.) During the summer she also worked one to two
16 shifts per month at Dreamgirls.

17 Ms. Breedlove was also employed during the summer of 2006
18 at Ledcor Construction until she was terminated in October because of her
19 reduced availability due to school and job effectiveness. (Exh. 2031.)

20 In Fall 2006 Ms. Breedlove carried sixteen units as a senior
21 engineering student about to graduate from San Diego State. (Exh. 2035,
22 pp.0417-0422.) For about a month in September Ms. Breedlove vacationed
23 with her father in Eastern Europe.

24 On November 12, 2006, Mr. Williams terminated Ms. Breedlove
25 for failure to adhere to company policy. (Exh. 47, 51.) Ms. Breedlove called
26 Mr. Harmon and arranged to meet him for a hike on Cowles Mountain
27 where she told him she had been fired. Beginning with her reduced shifts
28 but especially after her termination, Ms. Breedlove claims she was unable

1 to eat or sleep and lost seventeen pounds. Further, she suffered anxiety
2 attacks and severe headaches of three-day duration. Two weeks after she
3 was fired she took her final exams. She felt powerless and worthless and
4 contemplated suicide. She did not seek medical attention because she
5 lacked health insurance and mentioned these symptoms only to her
6 boyfriend. In August 2007 she saw family practice Dr. Ruben Farris once
7 for migraine and received some Imitrex samples. She did not mention
8 these other symptoms. She never requested a prescription from him. In
9 July 2008 she saw family practice Dr. Rebecca Zeiner for migraine. She
10 similarly did not complain of any of the other previously described
11 symptoms to her. She did mention past use of marijuana and
12 methamphetamine coupled with binge drinking she reported had ceased in
13 June 2008. She reported neither depression nor anxiety.

14 Ms. Breedlove graduated from San Diego State and is currently
15 employed as a civil engineer for the County of San Diego. She seeks about
16 \$1,000 per month in past lost wages, a total of \$29,000. Although she has
17 not sought another part time bartender job since her County employment,
18 she also seeks future lost wages for an additional five years totaling
19 \$62,220. In addition, she seeks damages for emotional distress, punitive
20 damages, and attorney fees.

21 On December 1, 2006, Ms. Breedlove wrote to the California
22 Department of Industrial Relations, Division of Labor Standards
23 Enforcement (DLSE) providing details of her complaints. She stated Mr.
24 Williams "...pressed me against a box reached his hand between my legs
25 under my skirt touched me aggressively while attempting to put his open
26 mouth on my face." She also described Mr. Williams requested sexual
27 favors from a waitress named Lisa and mentioned two other female
28 employees were sexually assaulted by Mr. Williams and were either

1 terminated or quit under duress. The bulk of her complaint, however,
2 concerned Mr. Williams' demands for a portion of the waitress and
3 bartender tips. (Exh. 7.) On December 12, 2006, Ms. Breedlove spoke by
4 telephone with attorney Edi Thomas, Pacers' corporate counsel. She told
5 Ms. Thomas that Mr. Williams had sexually harassed her and others. She
6 recounted the incident in the storage room and explained her hours were
7 reduced after she reported the events to Mr. Harmon. She also recounted
8 the tip extortion allegations. She provided Ms. Thomas with names and, in
9 some instances, phone numbers, of other victims. (Exh. 44.)

10 In May 2007 Ms. Breedlove filed a complaint with the
11 California Department of Fair Employment and Housing (DFEH) in which
12 she claimed, "I was terminated as a retaliation for making a complaint
13 about sexual harassments and other complaints." (Exh. 2034.)

14 2. Other Complaints.

15 Mikel Bohi worked as a bartender at Pacers from 2005-2007
16 part time to help her sister with school and her dying father with medical
17 expenses. She is and was a full time local television news producer. Mr.
18 Williams "spanked" her so hard she suffered a welt and was reduced to
19 tears. He variously pulled her onto his lap, pinned her against a wall,
20 grabbed her breasts and buttocks, and untied her bikini top to expose her
21 breasts. Mr. Williams repeatedly asked, "Can I see your tits?", "Can I see
22 you naked?", "How do you like to get fucked?", and "Will you do a naked
23 payout?" On two occasions he told her, "I'd like to fuck you." She heard
24 Mr. Williams say to other female employees, "come sit on my dick," "I'd like
25 to fuck her," or "I'd like to do her in the ass." She complained to Mr.
26 Harmon at Starbucks but he took no action. After Ms. Breedlove
27 complained, she heard Mr. Williams say, "I want that bitch out of here" and
28 "I don't want that fucking bitch behind my bar." When she tipped Mr.

1 Williams she got better shifts. When her father died, she quit and is now
2 suing Pacers.

3 Michael Hunter worked at Pacers from 2005 until November
4 2006 as a doorman, disc jockey, then assistant manager. He considers Mr.
5 Williams a "sexual predator." He was present in the manager's office when
6 Mr. Williams grabbed Lisa Fisher, pulled her onto his lap, and fondled her
7 breasts. He saw the bruise on Mikel Bohi's buttocks. He heard Mr.
8 Williams ask Ms. Breedlove to bare her breasts. He saw Mr. Williams
9 routinely slap female employees on the buttocks and announced his desire
10 to fuck them. Mr. Williams' comments on "great tits" or his desires to have
11 various forms of sex with the female employees were simply too numerous
12 to count. Mr. Hunter was demoted then terminated for getting 20-30 lap
13 dances during work hours and falling asleep on the job. He, Mr. Williams,
14 and other managers asked for and received "naked payouts." Mr. Hunter
15 understood this violated Pacers' sexual harassment policy, but neither the
16 female employees nor Mr. Hunter complained for fear of losing their jobs.
17 He recalled it was not uncommon for waitresses and bartenders to flash
18 bare breasts at male employees. He has playfully slapped Ms. Breedlove on
19 the buttocks at work on about ten occasions.

20 Jayme Garrison was a Pacers' bartender from January-August
21 2006. She recalled Mr. Williams made numerous unwanted sexual
22 comments to her and other female employees including "nice ass" and
23 "your breasts look great." She was uncomfortable in Mr. Williams' presence
24 and feared being alone with him. She made it clear to him she did not
25 appreciate his comments. She witnessed Mr. Williams try to kiss or touch
26 other female employees. When Ms. Garrison was fired for arriving at work
27 late, Mr. Williams said, "Believe me Jayme, if it was my way I'd fire Lisa
28 (Breedlove)." When Ms. Thomas contacted her in December 2006 she

1 explained Mr. Williams did not like her because she was not a passive
2 female employee. She noted every female employee who had a problem
3 with Mr. Williams was gone. However, she did not personally claim to be a
4 victim of sexual harassment by Williams. She felt Ms. Breedlove "played
5 the daddy card" because her father was a manager. In her opinion Ms.
6 Breedlove did not pull her weight behind the bar.

7 Esse Peters was employed periodically from 2004-2007 as both
8 a waitress and bartender. She testified she was fired because she refused
9 to subject herself to Mr. Williams' sexual abuse. She was rehired by a new
10 manager after Mr. Williams was fired. Mr. Williams attempted long
11 unwanted hugs, tried to grab her buttocks, untied her top exposing her
12 breasts, pinned her against walls, requested both sex and topless payouts,
13 and made numerous lewd remarks. He referred to female employees as
14 "bitches" and "cunts" and told them he would like to "fuck them in the ass."
15 She observed him slap other female employees on the buttocks and undo
16 their tops exposing their breasts. Mr. Williams picked her up one night in
17 the Pacers' parking lot and buried his face in her crotch. She went into the
18 locker room and cried twenty minutes. He offered her up to six shifts per
19 week in exchange for sex. He attempted to pull her onto his lap in the
20 office and said, "Come sit on my dick." While on vacation in Minnesota in
21 July 2006 Mr. Harmon called her about Mr. Williams. She told him Mr.
22 Williams had told her she had "nice titties" and requested sex. As far as
23 she knew Mr. Harmon took no action and she feared Mr. Williams would
24 reduce her hours, fire her, or cause her physical harm. She has filed a
25 claim against Pacers. In January 2007 Mr. Harmon called her again about
26 Mr. Williams. He asked if the sexual harassment was still going on. In her
27 view Ms. Breedlove, Charity Ford, and herself were all fired after
28 complaining about Mr. Williams.

1 Charity Ford was employed at Pacers between January and
2 October 2006 as a waitress. Mr. Williams told her she had a "nice ass" and
3 "nice titties" nearly every day. When she asked for a day off or a particular
4 shift he suggested she "blow him" in exchange. He grabbed her and pulled
5 her onto his lap and requested sex several times. When she was retrieving
6 something from a storage cabinet, Mr. Williams entered, closed the door,
7 grabbed her by the waist, and attempted to kiss her on the mouth. She
8 told Ms. Breedlove what had happened. When Mr. Williams began acting
9 inappropriately about a week later, she confronted him in front of other
10 employees and was soon fired by Mr. Williams. Ms. Ford admits she drank
11 at work and could not recall how many times she was intoxicated while
12 there. She stated waitresses were encouraged to drink on the job.

13 Sarah Peterson was employed as a waitress at Pacers from
14 2004-2005. She quit in October 2005 after Mr. Williams cut her shifts
15 "because he was not getting his way" with her. She returned to Pacers in
16 Spring 2007 because Mr. Williams was no longer employed there. She had
17 been afraid to complain about Mr. Williams because she observed those
18 who did, Ms. Breedlove, Charity Ford and Esse Peters, either had their
19 shifts reduced or lost their jobs. Mr. Williams routinely grabbed her
20 breasts or smacked her on the buttocks. On three or four occasions he
21 came up behind her and fondled her breasts. If she would object, he
22 would reduce her hours. When she would ask him to stop, he would reply,
23 "I'm just playing." Mr. Williams' regular comments to her included: "nice
24 boobs," "Nice ass," "When are we going to have sex," and "How come I
25 haven't seen your boobs yet?" At one point she flashed her bare breasts at
26 him and her work schedule improved. She also heard Mr. Williams make
27 similar comments to other female employees. She observed both Esse
28 Peters and Charity Ford cry because Mr. Williams had smacked them on

1 the buttocks so hard. She observed Audrina Brooks, a dancer whose stage
2 name was Asia, perform topless or nude payouts with Mr. Williams. She
3 saw Mr. Williams grab Charity Ford's breasts three or four times.

4 Lisa Fisher worked periodically at Pacers from 1998 until 2007.
5 When Mr. Williams became manager he confronted her in the liquor storage
6 room, pushing himself against her while groping her breasts. He frequently
7 smacked her hard on the buttocks, and roughly grabbed her breasts. He
8 told her, "If you want to go home early, give me a blow job." His other
9 comments to her included: "nice titties," "nice ass," "When are we going to
10 fuck?" and "Why don't you come over here and sit on my dick?" Ms. Fisher
11 would reply, "John, your wife works here. I'm friends with your wife." Mr.
12 Williams would come up behind her at the bar and unfasten her bikini top,
13 completely exposing her bare breasts. He pulled her onto his lap and
14 fondled her breasts. She also saw him do this to several other female
15 employees. She heard Mr. Williams say of Ms. Breedlove, "I don't want that
16 bitch around my club." He took her shifts away and relegated her to the
17 back patio.

18 Mr. Harmon asked Ms. Fisher about "Mr. Williams'
19 management style" in 2006 in a 30 minute face-to-face meeting during
20 which he took notes. She told him Mr. Williams was a "monster" who
21 should be fired as soon as possible. She was uncomfortable working
22 around him. She related the incident between herself and Mr. Williams in
23 the liquor storage area. She told him Mr. Williams was aggressive, touchy-
24 feely, and talked dirty. He routinely smacked her on the buttocks and
25 grabbed her breasts. He did the same to a lot of girls. He took her tip
26 money. She related the quid pro quo remark involving oral sex and the
27 other lewd comments Mr. Williams made to her. Soon after her interview
28 with Mr. Harmon, Mr. Williams accused her of passing cocaine to a

1 customer and fired her. When she denied it, he claimed to have the act on
2 video from one of the surveillance cameras. When she demanded to see the
3 video, Mr. Williams refused. Ms. Fisher called Mr. Harmon who met with
4 Mr. Williams then told her to return to work, he had not seen anything on
5 the video. Ms. Fisher left Pacers of her own accord in May 2007 and
6 resides in Colorado.

7 3. Mr. Williams.

8 John Williams served in the Marines 11 years where he
9 advanced to E-5 Sergeant. In 2003, while still on active duty, he began
10 working at Pacers as a doorman, advancing to bar back, shift manager, and
11 ultimately general manager in 2005. He attended Pacers' sexual
12 harassment training in October 2005. (Exh. 11.) He reported to Russell
13 Harmon, who spent three to four hours several nights each week at Pacers.
14 About two months after his promotion, in June or July 2006, Mr. Harmon
15 told him his management style was too harsh, he was no longer in the
16 Marines, and he needed to lighten up. Mr. Harmon did not discuss specific
17 employee complaints with him.

18 Mr. Williams categorically denied all allegations of sexual
19 battery and sexual harassment made by Pacers' female employees. He does
20 acknowledge a "feigned spanking" of Kristen Chapman who seemed to enjoy
21 it and participating in fifteen to twenty naked payouts with Audrina
22 Brooks. He did not consider either behavior harassment. He also denies
23 extorting tips from female employees.

24 Mr. Williams considered Ms. Breedlove a below average
25 bartender who did not "project happiness" and only wanted to work the
26 best shifts. She requested reduced hours because of her conflicts with
27 school and her engineering job. Three barbacks complained to him about
28 her performance and she was given ten to twenty verbal warnings for over

1 pouring liquor, giving away tap water instead of selling bottled water, and
2 undercharging for drinks. However, the only written criticism of Ms.
3 Breedlove was drafted about the time he fired her and she was never
4 provided a copy. (Exh. 31.) He fired Ms. Breedlove November 12, 2006.
5 (Exh. 55.)

6 Mr. Williams was fired as general manager in January 2007 by
7 Mr. Harmon and Mr. Luster. Although they asked him about sexual
8 harassment and tip gouging, which he denied, they did not inform him of
9 sexual harassment complaints against him. They told him he lacked
10 control over the club and the financial performance at Pacers flagged under
11 his leadership. The same men rehired him at Showgirls in Fall 2007, where
12 he was once again advanced from doorman to manager.

13 4. The Investigations.

14 Russell Harmon began working at Pacers in 1978 until he
15 became a "Regional Manager" supervising a number of related clubs
16 including Pacers in 2007. In 2006 Pacers had four to five disc jockeys,
17 twelve to fourteen waitresses, six or seven bartenders, seven to eight
18 doormen or security personnel, and fifty to seventy independent contractor
19 entertainers. He described Pacers as a lively sexually charged topless
20 establishment with a party atmosphere. Waitresses are provocatively
21 dressed, and routinely spank one another.

22 In July 2006 Ms. Breedlove complained to him about Mr.
23 Williams. According to Mr. Harmon, Ms. Breedlove claimed Mr. Williams
24 was "militaristic" and a "bully" who did not treat staff well. She said he had
25 placed Lisa Fisher in an uncomfortable position in a back room which was
26 "weird." Mr. Harmon did not seek details but did ask Ms. Fisher if Mr.
27 Williams' behavior toward her was inappropriate. He recalled that she
28 denied it was. He counseled Mr. Williams to take it easier on staff and two

1 weeks later Ms. Fisher told him he was "much better." (Exh. 15.)

2 Also in July 2006 Mr. Harmon received a complaint about
3 Dreamgirls' manager Keith Marland allegedly sexually harassing Ms.
4 Breedlove. He spoke with Ms. Breedlove who said Mr. Marland asked her
5 out nearly every shift. Although Mr. Harmon concluded the events were
6 "mutually playful" and "flirtatious," he nevertheless counseled Mr. Marland
7 and required him to sign a written acknowledgment of company sexual
8 harassment policy on July 18, 2006. (Exh. 2014.) Mr. Harmon testified
9 that if Ms. Breedlove had reported sexual harassment at Pacers in July
10 2006, he would have taken similar steps.

11 Mr. Harmon became friends with Ms. Breedlove. They had
12 coffee at Starbucks three or four times, he visited her at her engineering
13 job, he had her cell phone number, and exchanged e-mail with her. On
14 October 29, 2006, Ms. Breedlove e-mailed him, "It was nice to see you last
15 night. You looked better than ever ... you looked yummy ... I love you ...
16 Call me if you need anything!!!!!!!!!!!" (Exh. 2011.) They discussed her goals
17 and plans for the future after she obtained her degree. She looked forward
18 to work as an engineer and never expressed any intention to continue
19 working nights at Pacers.

20 When Mr. Williams removed Ms. Breedlove from the schedule
21 Mr. Harmon instructed him to put her back on it. He understood Ms.
22 Breedlove and Mr. Williams had a personality conflict. After Ms. Breedlove
23 was fired by Mr. Williams, she informed Mr. Harmon during a hike on
24 Cowles Mountain. She did not provide details. When Ms. Breedlove filed a
25 complaint with DSLE, Peter Luster, his supervisor, instructed him to speak
26 with all current and former bartenders and waitresses at Pacers to ask
27 about sexual harassment or tip extortion by Pacers' management. Esse
28 Peters told him Mr. Williams requested tips from her and sexually harassed

1 her. In early December 2006 he cornered her in the liquor storage room,
2 shut the door, and asked her for sexual favors. He frequently made lewd
3 comments that made her very uncomfortable. However, she had never
4 complained about this to management. (Exh. 12.) Thirteen employees
5 denied knowledge of tipping or sexual harassment problems with Mr.
6 Williams. However, Mikel Bohi said an entertainer had a harassment
7 problem with Mr. Williams. Daiawana Dixon was uncomfortable with Mr.
8 Williams and had heard three or four females had sexual harassment
9 problems with him. Lisa Fisher recounted Mr. Williams' "If you want to go
10 home early, give me a blow job" comment, but said she had no recent
11 problems with him. Charity Ford told him Mr. Williams had tried to kiss
12 her and when she confronted him she was fired. Former manager Mark
13 Bailey related Mr. Williams was "overly playful" or came on too strong with
14 female staff and thought his reasons for terminating Ms. Breedlove were
15 weak at best. (Exh. 8.) Mr. Harmon acknowledged he did not follow up
16 much on the employees' answers. When he spoke with Mr. Williams, he
17 denied the allegations.

18 In his declaration for DLSE, Mr. Harmon stated he investigated
19 the complaints Mr. Williams sexually harassed Lisa Fisher and counseled
20 Mr. Williams that harassing and intimidation would not be tolerated. He
21 denied Ms. Breedlove had informed him of her termination during their
22 Cowles Mountain hike and maintained the DSLE complaint was the first
23 time he learned of Ms. Breedlove's allegations of sexual harassment by Mr.
24 Williams. (Exh. 19.) He acknowledged in testimony he should have been
25 more diligent in preparing his declaration because it contained many
26 errors. He also believes he could have performed a better investigation.

27 Edi Thomas is an attorney who represents 60-80 adult
28 entertainment clubs and provides sexual harassment training. While this

1 industry presents special issues, she agrees the women working in it have
2 not agreed to be sexually harassed. She is also one of the counsel for
3 Respondents in this case. She prepared various versions of Pacers' sexual
4 harassment policy which the employees signed. (Exh. 4.) A sign posted at
5 Pacers states in part: "...If you have been sexually harassed...we request
6 and require you notify the club management. If you are not satisfied with
7 the results, please call Edi Thomas (company counsel) ... You may remain
8 anonymous (*sic*) if you wish." (Exh. 2030.)

9 On December 12, 2006, Ms. Breedlove called Ms. Thomas. She
10 explained when she had complained to Mr. Harmon he told Mr. Williams
11 and Mr. Williams cut her from the work schedule. She was professional
12 but expressed anger and disappointment with Mr. Harmon for not following
13 up on her complaints. She sent Ms. Thomas a copy of her DLSE complaint
14 for sexual harassment, retaliation, and tipping extortion. (Exh. 102.) In
15 February 2008 Ms. Thomas responded to the DSLE with essentially Mr.
16 Harmon's version of the facts. (Exh. 56.) Mr. Harmon insisted to Ms.
17 Thomas that he and Ms. Breedlove were friends and he had never told Mr.
18 Williams about her complaint.

19 Mr. Luster assigned the investigation to Ms. Thomas who
20 referred it to Mr. Harmon, even though Ms. Breedlove and Mr. Harmon had
21 conflicting versions of events. Mr. Luster and Mr. Harmon assured her
22 they were firing Mr. Williams. Mr. Harmon thought Mr. Williams was a
23 "moron" and a dictator" who systematically fired employees who did not
24 agree with him.

25 Ms. Thomas spoke with Mike Hunter who explained the "girls"
26 did not complain about Mr. Williams because they were afraid they would
27 be fired. He also stated Mr. Williams had told him in a reference to Ms.
28 Breedlove, "I don't want that bitch behind my bar." (Exh. 10.) She spoke

1 with Jayme Garrison who explained Mr. Williams did not like her because
2 she was not passive. When he fired her he told her he really wanted to fire
3 Ms. Breedlove. She also stated Lisa Fisher had complained about sexual
4 harassment. (Exh. 45.)

5 Ms. Thomas determined Ms. Breedlove's complaint was
6 credible. However, she did not follow up because she had been assured Mr.
7 Williams would be terminated. Termination would protect Pacers'
8 employees from further harassment by him. Pacers admitted initially that
9 Mr. Williams was terminated in part for violating sexual harassment policy.
10 (Exh. 29.) In an amended response, Pacers admitted it received
11 unconfirmed complaints of sexual misconduct by Mr. Williams that was in
12 part a reason for his termination. (Exh. 2081.)

13 Peter Luster has been in the bar and restaurant industry for
14 thirty-one years and serves on the Board of the San Diego Food and
15 Beverage Association. He oversees Pacers and other clubs on behalf of the
16 owners. He recalled that he and Mr. Harmon had decided to fire Mr.
17 Williams in November 2006 because he was not a leader and performed
18 poorly as general manager at Pacers. The sexual harassment allegations
19 accelerated his termination. There are fourteen to sixteen cameras
20 throughout Pacers which are monitored offsite. The monitors are
21 instructed to call any suspicious or inappropriate behavior to his attention.
22 They did not. He has posted the notice about reporting sexual harassment
23 (Exh. 2030) in the dressing/locker room and on the wall outside the
24 manager's office. Pacers has conducted four or five sexual harassment
25 seminars for managers, some of which were led by Ms. Thomas.

26 B. Respondent's Case.

27 1. Percipient Witnesses.

28 Hal Zangana worked with Ms. Breedlove as a barback and bar

1 manager in 2006. He never heard Ms. Breedlove complain about Mr.
2 Williams and never saw Mr. Williams sexually harass anyone. Virtually
3 every waitress and bartender bared their breasts and the entertainers
4 regularly pressed their breast against the window of the manager's office
5 when Mr. Williams was general manager. Topless payouts were common.
6 Ms. Breedlove violated Pacers' policy by free pouring alcohol, giving away
7 water, and under ringing drinks. He reported her to management 15-20
8 times. He was promoted twice by Mr. Williams.

9 Mike "Shark" Kimbell was a Pacers assistant manager in 2006.
10 He never saw Mr. Williams do anything sexually inappropriate and he never
11 saw or heard Mr. Williams request topless payouts, although a few
12 waitresses performed them on their own. He opined Ms. Breedlove had a
13 poor work attitude and counseled her about it. His My Space page
14 contains a photograph of himself and a scantily clad woman on his lap in
15 the Pacers' manager's office. He has his hand on her buttocks. (Exh. 110.)
16 He does not consider this inappropriate in the work place.

17 Steve Martin worked at Pacers with Ms. Breedlove as a
18 barback. He never saw topless payouts or waitresses' or bartenders' bare
19 breasts.

20 Anita Williams, John Williams' wife, was an entertainer at
21 Pacers for ten years. She spoke with Ms. Breedlove two to three times each
22 week when she bartended on the patio. Ms. Breedlove offered her
23 daughters as babysitters for the Williams children. She never heard
24 complaints about her husband from Ms. Breedlove, Esse Peters, Sarah
25 Peterson, Mikel Bohi, or Lisa Fisher. Many of the employees called her
26 "Mom." She does not believe her husband sexually harassed anyone.

27 Keith Marland was the Dreamgirls general manager in 2006
28 who was counseled by Mr. Harmon for sexual harassment of Ms. Breedlove.

1 He recounted how Ms. Breedlove forged the signature of a customer on
2 three charge card receipts after adding a tip for herself. When the
3 customer called to complain, she paid for the charges personally. She
4 transferred to Pacers after the credit card issue and never worked at
5 Dreamgirls again.

6 Andrew Jackson has worked as a part time disc jockey at
7 Pacers for ten years. Mr. Williams was always professional and he never
8 heard any complaints about him. He never observed topless payouts.

9 Brooke Middleton worked as a waitress six years ending in
10 2007. She never observed any untoward behavior by Mr. Williams. Ms.
11 Breedlove told her she was cutting her shifts to pursue her engineering
12 career and planned to quit Pacers when her engineering career was up and
13 running. She was unaware of complaints by Ms. Breedlove, Lisa Fisher,
14 Esse Peters, or Mikel Bohi, and never heard of topless payouts.

15 Laila Aliallah worked as a waitress and bartender four nights a
16 week at Pacers in 2006-2007. She did not get along with Mr. Williams, she
17 considered him a "prick," and called him an "ass" many times. He never
18 sexually harassed her and would not have because she would have gone to
19 Mr. Harmon. In her view Pacers was the sort of strip club where customers
20 came to see "girl on girl action." The female employees spanked one
21 another frequently. She never heard complaints about Mr. Williams from
22 Ms. Breedlove, Lisa Fisher, Mikel Bohi or Esse Peters and never saw topless
23 payouts. She was never interviewed by Mr. Harmon.

24 Audrina Brooks worked at Pacers from 1995 until 2008 first as
25 a dancer, stage name Asia, then as a waitress and bartender. She had no
26 problems with Mr. Williams and was unaware of any complaints about him.
27 She invented the naked payout and performed the same a lot for all
28 managers including Mr. Williams and Mr. Harmon.

1 Amy Tulk was a bartender at Pacers from 2005-2007 and a
2 friend of Ms. Breedlove. Neither Ms. Breedlove nor any female employee
3 ever complained to her about Mr. Williams. She recalled Asia frequently
4 ran around the club naked and performed naked payouts with the
5 managers.

6 Kristen Chapman has been a bartender at Pacers seven years.
7 She never saw or heard about sexual harassment by Mr. Williams and
8 denies Ms. Peters' account that she observed Mr. Williams spank her,
9 causing a welt. Because she and Mikel Bohi were friends, she believes Ms.
10 Bohi would have told her had she been harassed by Mr. Williams.

11 Jessica Dodge has worked at Pacers four years. Although she
12 told Mr. Harmon in 2006 she did not trust Mr. Williams, she believes now
13 that she did trust him. She had no knowledge of sexual harassment at
14 Pacers but did observe Asia perform naked payouts while Mr. Williams was
15 general manager.

16 2. The Experts.

17 Dr. Marcella Wilson is a psychiatrist specializing in women's
18 issues and sexual harassment. (Exh. 2040, pp.792-797.) She reviewed
19 depositions, medical records and documents and interviewed Ms. Breedlove
20 about three hours after administering psychological testing. In her opinion,
21 Ms. Breedlove has no clinical level of disorder causing functional
22 impairment. Many of her subjective symptoms lack corroboration and she
23 lacks credibility. At the time of her termination she was subjected to many
24 stressors including full time school, being a single mom, a new romantic
25 relationship, financial pressure, and medical problems. Her goal of
26 continuing as a part-time bartender is at odds with her goal of an
27 engineering career.

28 Richard Danehy is a consultant on sexual harassment issues

1 and policies. (Exh. 2042.) In his view Pacers handled Ms. Breedlove's
2 complaints in accordance with commonly accepted human relations
3 standards.

4 III. ANALYSIS

5 Based on the facts identified above and additional facts relevant to
6 the analysis, Ms. Breedlove has sustained her burden of proof to
7 demonstrate sexual harassment in the workplace, failure to prevent
8 harassment and retaliation.

9 A. Sexual Harassment.

10 The FEHA expressly prohibits sexual harassment in the
11 workplace. Miller v. Department of Corrections (2005) 36 Cal.4th 446, 457.
12 Sexual harassment includes "verbal, physical, or sexual behavior directed
13 at an individual because of...gender." Peralta Community College Dist. V.
14 FEHC (1990) 52 Cal.3d 40, 45. Employees are protected "from a broad
15 range of conduct, ranging from expressly or impliedly conditioning
16 employment benefits on submission to or tolerance of unwelcome sexual
17 advances, to the creation of a work environment that is hostile or abusive
18 on the basis of sex." Miller, supra, at 458-459.

19 To establish a hostile work environment sexual harassment
20 claim, a plaintiff must show she was (i) subjected to conduct of a sexual
21 nature, (ii) the conduct was unwelcome, and (iii) the conduct was
22 sufficiently ***severe or pervasive*** to alter the conditions of her employment.
23 Sheffield v. Los Angeles County (2003) 109 Cal.App.4th 153, 162 (emphasis
24 added).

25 In evaluating whether the conduct complained of was
26 sufficiently severe or pervasive to create a hostile work environment,
27 California courts look to the totality of the circumstances (such as the type,
28 frequency, and severity of the harassing conduct) giving rise to the claim.

1 Herberg v. California Institute of the Arts (2002) 101 Cal.App.4th 142, 149-
2 150. Thus, rather than viewing multiple incidents of alleged sexual
3 conduct separately and in isolation from one another, a court should
4 inquire into the overall composite effect of all the incidents on the working
5 environment. Claimant may be subjected to a hostile environment for
6 conduct directed at others, because “a reasonable person may be affected
7 by knowledge that other workers are being sexually harassed in the
8 workplace, even if he or she does not personally witness that conduct.”
9 Beyda v. City of Los Angeles (1998) 65 Cal.App.4th 511, 519. Where, as
10 here, the Claimant has personally been subjected to sexual harassment,
11 she may also “introduce evidence of the harasser’s misconduct toward
12 others, of which she becomes aware during her employment, even if the
13 other acts occurred outside of [her] presence.” Weeks v. Baker & McKenzie
14 (1998) 643 Cal.App.4th 1128, 1160-63.

15 The evidence here, in the words of two independent witnesses,
16 is that after Mr. Williams was promoted as Pacers’ General Manager, he
17 became a “monster” and “sexual predator” in his relationships with female
18 employees. He followed Ms. Breedlove, Ms. Peters, Ms. Ford, and Ms.
19 Fisher into storage areas where he sexually assaulted them. Ms. Breedlove
20 was aware of some of the assaults on other employees. He fondled Ms.
21 Breedlove’s breasts while making a “disgusting noise.” Ms. Bohi and Ms.
22 Fisher were subjected to similar breast fondling which Ms. Breedlove
23 witnessed. He regularly spanked Ms. Breedlove, as well as Ms. Bohi, Ms.
24 Peters, Ms. Peterson and Ms. Fisher. On numerous occasions these
25 “spankings” were so rough they left red welts on their victims. He insisted
26 on long unwelcome hugs from Ms. Breedlove and others. He pulled Ms.
27 Breedlove onto his lap and demanded sex. Ms. Bohi, Ms. Peters, Ms. Ford
28 and Ms. Fisher complained of similar behavior.

1 Sexual assault is among the most severe forms of sexual
2 harassment and even a single incident that involves conduct akin to a
3 physical assault or the threat of physical assault is sufficient to establish a
4 hostile work environment. Weeks v. Baker & McKenzie (1998) 63
5 Cal.App.4th 1128, upheld a jury's finding of a hostile work environment
6 against both the attorney-individual defendant and the defendant law firm
7 based on evidence showing the attorney "reached into [the plaintiff's] breast
8 pocket, gestured as if to cup her breasts in his hands, touched her
9 buttocks, and quizzed her about the wildest things she had ever done."
10 Weeks, supra, at p.1147.

11 Mr. Williams frequently requested sexual favors from Ms.
12 Breedlove, Ms. Peters and Ms. Ford in exchange for promises of better
13 shifts or more hours. Requests "for sexual favors may, if linked to the
14 granting or denial of job benefits...give rise to a claim for hostile work
15 environment sexual harassment, whether or not the sexual advances are
16 implicitly or explicitly tied to employment benefits." Myers v. Trendwest
17 Resorts, Inc. (2007) 148 Cal.App.4th 1403, 1421.

18 Mr. Williams requested "topless payouts" from Ms. Breedlove
19 and other employees. He frequently remarked in front of Ms. Breedlove,
20 Ms. Bohi, Ms. Peters and Ms. Peterson that he wanted to "fuck" or "fuck in
21 the ass" particular female employees. He made countless other lewd sexual
22 remarks too numerous to list here.

23 "Verbal harassment may consist of either offensive sexual
24 remarks or offensive nonsexual statements of a discriminatory nature ...
25 [and they] need not be directed at plaintiff specifically." Chin, et al.,
26 *California Practice Guide-Employment Litigation*, The Rutter Group, at
27 ¶10:226 at p.10-46. The record already reveals overwhelming evidence of
28 vulgarities that Mr. Williams directed at Ms. Breedlove and other female

1 employees on a daily basis. This evidence establishes Ms. Breedlove
2 worked in a pervasively hostile environment.

3 Finally, it is important to note the FEHA makes an employer
4 strictly liable where the harassment is committed by a supervisor. State
5 Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026, 1041-42,
6 and Myers v. Trendwest Resorts, Inc., 148 Cal.App.4th (2007) 1403, 1419-
7 1420. Mr. Williams was clearly a supervisor and managing agent with
8 authority to hire and fire employees. White v. Ultramar (1999) Cal.4th 563.

9 B. Failure to Prevent Harassment.

10 It is an unlawful employment practice in California for an
11 employer "to fail to take all reasonable steps necessary to prevent
12 discrimination and harassment from occurring." Cal.Govt. Code §12940(k).
13 This requirement creates a statutory tort action with the usual tort
14 elements, duty of care to plaintiff, breach of duty, causation and damages.
15 Trujillo v. North County Transit Dist. (1998) 63 Cal.App.4th 280, 286.

16 In July 2006 Ms. Breedlove complained to Mr. Harmon about
17 Mr. Williams' behavior and further explained other women had suffered
18 similarly at Mr. Williams' hand. Mr. Harmon appeared concerned and said
19 he would get back to her. She understood her complaint jeopardized her
20 job. After she had been fired by Mr. Williams in November 2006, she
21 complained once again to Mr. Harmon.

22 Mr. Harmon asked Ms. Fisher about Mr. Williams'
23 management style in a 30-minute face-to-face meeting. She told him Mr.
24 Williams was a "monster" who should be fired as soon as possible. She was
25 uncomfortable working around him. She related the incident between
26 herself and Mr. Williams in the storage area and explained he was
27 aggressive, touchy-feely, and talked dirty. He routinely smacked her on the
28 buttocks and grabbed her breasts and did the same to a lot of girls. She

1 related the quid pro quo remark involving oral sex and other lewd
2 comments Mr. Williams made to her. Mikel Bohi also complained to Mr.
3 Harmon at a meeting over coffee at a nearby Starbucks, but in her view he
4 took no action. Mr. Harmon called Esse Peters about Mr. Williams while
5 she was on vacation in Minnesota in July 2006. She told him Mr. Williams
6 told her she had "nice titties" and requested sex. As far as she knew Mr.
7 Harmon took no action.

8 Mr. Harmon's actions in investigating multiple egregious
9 complaints about Mr. Williams were completely inadequate. He failed to
10 seek details from the complainants, took no notes, and obtained no
11 statements. He took no meaningful action. He merely counseled Mr.
12 Williams on his management style, reminded him he was no longer in the
13 Marines, and advised him to lighten up. Mr. Williams continued to abuse
14 female employees with impunity. It was not until after Mr. Williams had
15 fired Ms. Breedlove and she had filed her initial complaint with DSLE that
16 Mr. Harmon and Mr. Luster terminated Mr. Williams, at least temporarily.

17 Attorney Edi Thomas is counsel for Pacers and is listed as
18 someone to whom employees may take sexual harassment complaints if
19 they are not satisfied with the results of their required complaint to
20 management. (Exh. 2030.) Ms. Breedlove called Ms. Thomas on December
21 12, 2006. Mr. Luster assigned the investigation of Ms. Breedlove's
22 complaints to Ms. Thomas who referred it to Mr. Harmon, even though she
23 understood Mr. Harmon and Ms. Breedlove had conflicting versions of
24 events. According to the dancer who invented "naked payouts," Mr.
25 Harmon participated in those personally. Eventually Ms. Thomas wrote to
26 Ms. Breedlove offering her a job and \$8,500 in lost wages. Although Ms.
27 Thomas determined Ms. Breedlove's claim was credible, she did not follow
28 up because she had been assured Mr. Williams would be terminated.

1 Pacers admitted initially Mr. Williams was terminated for violating sexual
2 harassment policy. (Exh. 29.)

3 Here, Pacers had a legal obligation, under Govt. Code §12950
4 et seq., to distribute to Claimant and all of its other employees an
5 "information sheet on sexual harassment" that included, among other
6 things, information detailing (i) "the legal remedies and complaint process
7 available" to California employees through the DFEH and the FEHC, (ii)
8 how to contact the DFEH and the FEHC, and (iii) the protections against
9 retaliation for reporting sexual harassment provided by California law.
10 Pacers did not comply with these legal requirements and instead directed
11 employees to make their complaints to Pacers' attorney, in this case after
12 they complained first to management. The requirement that employers
13 inform their employees they have the right to complain to a neutral state
14 agency is specifically designed to prevent what occurred here: an employee
15 making a good faith sexual harassment complaint to a party she
16 reasonably believed would initiate a good faith investigation into her
17 complaint but who instead immediately began protecting Pacers' interests
18 while allowing harassment to continue.

19 In sum, Pacers failed to take all necessary steps to prevent
20 harassment, conducted an inadequate investigation when multiple
21 harassment complaints were brought to management's attention, and failed
22 to stop the harassment and prevent it from occurring in the future.

23 C. Retaliation.

24 The FEHA makes it unlawful for an employer to discharge or
25 otherwise discriminate against any person because the person has
26 complained about sexual harassment. Govt. Code §12940(h). To establish
27 her retaliation claim, Ms. Breedlove must show (1) she engaged in protected
28 activity, (2) she experienced adverse employment actions, e.g., reduced

1 hours of work and was terminated thereafter, and (3) her protected activity
2 was a "motivating reason" for the adverse actions. Yanowitz v. L'Oreal USA,
3 Inc. (2005) 36 Cal.4th 1028, 1044.

4 Ms. Breedlove's complaints to Mr. Harmon and Mr. Williams
5 constitute protected activity. After her initial complaint to Mr. Harmon, Mr.
6 Williams cut her hours then relegated her to shifts to the less lucrative
7 back patio. Ultimately he fired her. These acts are clearly adverse
8 employment actions. Yanowitz, supra, at p.1050-1052.

9 Ms. Breedlove has established her complaints were the
10 motivating factor for these adverse employment actions through the
11 testimony of independent witnesses. After Ms. Breedlove complained to Mr.
12 Harmon, Mr. Williams told both Ms. Bohi and Ms. Fisher, "I want that bitch
13 out of here," "I don't want that fucking bitch behind my bar," and "I don't
14 want that bitch around my club." When he fired Ms. Garrison, Mr.
15 Williams told her, "Believe me, Jayme, if it was my way I'd fire Lisa
16 (Breedlove)." Further, the proximity in time between Ms. Breedlove's initial
17 complaint and the reduction in her work hours provides a strong inference
18 that her complaints were the motivating factor for these adverse
19 employment actions. See California Fair Employment and Housing
20 Commission v. Gemini Aluminum Corp. (2004) 122 Cal.App.4th 1004,
21 1023.

22 Moreover, Ms. Breedlove is not the only woman at Pacers to
23 testify she was fired for complaining about Mr. Williams' harassment. Mr.
24 Williams concocted a story about Ms. Fisher passing cocaine to a customer
25 in the club and fired her on that basis a couple of months after Ms. Fisher
26 told Mr. Harmon about Mr. Williams' harassing conduct. Ms. Ford
27 similarly testified that, "About one week after Mr. Williams attempted to
28 assault me in the closet, he was once again acting inappropriately at work

1 and I confronted him about his conduct in front of other Pacers' employees.
2 He became angry and I responded by saying, 'What are you going to do,
3 John? Try to kiss me again?' I was fired just a few days later." (Exh. 35,
4 ¶9.) Ms. Peters also believes she was fired because of her complaints.

5 D. Defenses.

6 Pacers contends it had valid grounds to terminate Ms.
7 Breedlove because she over poured liquor, refused to sell bottled water,
8 under rang bar tabs, and generally had a poor attitude. However, Mr.
9 Harmon considered her an excellent bartender and a friend. Pacers never
10 documented these alleged shortcomings until the day she was terminated.

11 Pacers also argues they would have never hired Ms. Breedlove
12 had they known about her expense report problems at UPS. However, they
13 did know she forged a customer's signature on credit card receipts at
14 Dreamgirls and still transferred her to Pacers. Apparently, this behavior
15 would not preclude employment there. In sum, these defenses are
16 unconvincing if not pretextual.

17 E. Compensatory Damages.

18 Ms. Breedlove is entitled to the \$8,500 lost wages she sought in
19 her initial complaint. She has not met her burden on her claim she would
20 have continued to work part time at Pacers for an additional five years
21 because she is now a college graduate employed full time by the County as
22 an engineer. Given she seeks advancement in that profession, it is unlikely
23 she would continue at Pacers. Further, she has not sought other similar
24 part time bartender work elsewhere.

25 As previously discussed, Ms. Breedlove was subjected to
26 months of severe and pervasive sexual harassment at Pacers by Mr.
27 Williams which Pacers took no steps either to prevent or to stop. She is
28 entitled to \$100,000 emotional distress damages.

1 F. Punitive Damages.

2 Civil Code §3294 provides that punitive damages may be
3 awarded in a case like this one if Ms. Breedlove proves by clear and
4 convincing evidence that Mr. Williams and Pacers are guilty of oppression
5 and malice. The clear and convincing standard requires a finding of high
6 probability so clear as to leave no substantial doubt and sufficiently strong
7 as to command the unhesitating assent of every reasonable mind. Lackner
8 v. North (2006) 135 Cal.App.4th 1188, 1211-1212. Malice is conduct
9 intended to cause injury or despicable conduct carried on with a willful and
10 conscious disregard of the rights and safety of others. Civil Code
11 §3294(c)(1). Oppression is despicable conduct that subjects a person to
12 cruel and unjust hardships in conscious disregard of that person's rights.
13 Civil Code §3294(c)(2). Despicable conduct is so vile, base, contemptible,
14 miserable, wretched or loathsome that it would be looked down upon and
15 despised by ordinary decent people.

16 The conduct by both Mr. Williams and Pacers previously
17 described in this Award demonstrates by clear and convincing evidence
18 both Respondents have committed acts of oppression and malice against
19 Ms. Breedlove which justify an award of punitive damages. Managers, even
20 in the adult entertainment industry, have an obligation to treat their
21 employees with respect. Employment in that industry itself is not an
22 invitation to repeated sexual assault or an endless barrage of unwelcome
23 sexual propositions and remarks by Managers. When Ms. Breedlove finally
24 mustered the courage to complain about Mr. Williams, she was entitled to a
25 professional response and prompt corrective action, not retaliation and
26 eventual termination. In fact, Pacers turned a blind eye to her complaints
27 while Mr. Williams continued to abuse Ms. Breedlove and other employees.
28 Clearly punitive damages are appropriate here.

1 Factors relevant to the assessment of punitive damages
2 include: 1) the degree of reprehensibility of the act; 2) the amount of
3 compensatory damages awarded; and 3) the wealth of the party on whom
4 the damages will be imposed. Lorne v. Hughes Aircraft (2000) 22 Cal.4th
5 405, 417. Punitive damages serve to punish the tortfeasor whose acts were
6 malicious, to deter him and others from similar conduct, and to make an
7 example which will serve societal interests. Ferguson v. Luff, Cabraser
8 (2003) 30 Cal.4th 1037, 1046.

9 The degree of reprehensibility and amount of compensatory
10 damages have been explained elsewhere in this Award. In the second
11 phase of the hearing counsel have presented evidence and argued the
12 wealth or financial condition of each Respondent. Based on that evidence,
13 it is uncontested Mr. Williams is a person virtually without assets who lives
14 from pay day to pay day working with his spouse to support their family.

15 Pacers' financial condition, however, is in dispute. Mr.
16 Shindel, the CPA designated person most knowledgeable by Pacers on its
17 finances, has testified Pacers has a negative net worth and spends more
18 than it makes because it pays \$45,000 per month rental on an adjacent
19 parking lot to a corporation owned by Pacers' owner's father and it has set
20 aside assets of \$1,358,000 for litigation expenses for this and four other
21 similar pending cases in early stages of litigation. In contrast, appraiser
22 Mr. Martin found fair market rent for the parking lot is between \$16,050-
23 \$21,400 per month. Ms. Spoon, CPA for Ms. Breedlove, has opined the
24 actual rents paid represent an overpayment which has reduced the net
25 assets of Pacers by \$2,280,670 from September 1999-April 2009. Further,
26 if future litigation expenses are not appropriate liabilities, Pacers' net worth
27 should be increased \$1,250,000. To the extent litigation expenses are
28 related to this case and have been paid, they are appropriate liabilities.

1 However, future expenses for other cases in early stages are too speculative
2 to be expensed now. Potential future awards in other cases need not be
3 dispositive on ability to pay. See, Grimshaw v. Ford Motor Co. (1981) 119
4 Cal.App.3d 757, 812. Hence, Ms. Spoon's opinion that Pacers' true net
5 worth is \$2,780,031 is persuasive and reasonable.

6 Punitive damages must not exceed the tortfeasor's ability to
7 pay. Adams v. Murakami (1991) 54 Cal.3d 105. While net worth is a
8 common measure of ability to pay, it is not the only factor. Financial
9 condition and prospects to gain future wealth are also considerations. Rufo
10 v. Simpson (2001) 86 Cal.App.4th 573.

11 Here, Ms. Breedlove seeks a ratio of six to one punitive
12 damages to compensatory damages while Pacers argues for no punitive
13 damages. Having considered reprehensibility, the compensatory damage
14 award and ability to pay, the Arbitrator finds an appropriate ratio is four to
15 one. Hence, \$400,000 punitive damages are awarded against Pacers.
16 Appropriate punitive damages against Mr. Williams are \$5,000.

17 IV. CONCLUSION AND FURTHER PROCEEDINGS

18 1. Ms. Breedlove has sustained her burden of proof to
19 demonstrate sexual harassment in the workplace, failure to prevent
20 harassment, and retaliation. By clear and convincing evidence she has
21 proven oppression and malice for punitive damages.

22 2. Ms. Breedlove is entitled to \$8,500 economic damages and
23 \$100,000 emotional distress damages. She is further entitled to punitive
24 damages of \$400,000 from Pacers and \$5,000 from Mr. Williams.

25 3. Ms. Breedlove is the prevailing party entitled to reasonable
26 attorney fees and costs under Government Code §12965(b).

27 Ms. Breedlove's counsel seek \$449,981.50 in attorney fees
28 which they argue should be increased by a multiplier of 2.0 to reflect the

1 risk and complexity inherent in the case for a total fee award of \$899,963.
2 This proposed award includes 690.7 hours for Mr. Chapko at \$425 per
3 hour and 287.2 hours for Mr. Strauss at \$525 per hour. Pacers argues this
4 request is "grossly excessive" and suggests rates between \$250-\$350 for
5 Mr. Strauss and \$200 for Mr. Chapko. Counsel have extensively briefed
6 this issue and provided numerous declarations from distinguished
7 attorneys familiar with comparable fee awards. Ms. Breedlove's counsel
8 candidly acknowledge they have never been awarded the hourly rates for
9 fees which they seek here.

10 Reasonable attorney fees are within the sound discretion of the
11 Arbitrator. Among the factors to be considered in determining reasonable
12 fees are the nature of the litigation, its difficulty, the amount in
13 controversy, the skill required and employed, the attention given, the
14 results achieved, the learning and experience of counsel, and time
15 consumed. Anthony v. Anthony (1968) 259 Cal.App.2d 156, 157.

16 In applying all the relevant factors, the Arbitrator finds the
17 hours expended are reasonable given the length of the hearing, the number
18 of depositions, and the extensive pre-hearing matters. Mr. Strauss is
19 entitled to a reasonable hourly rate of \$450 and Mr. Chapko is entitled to a
20 reasonable hourly rate of \$350 (which he was tentatively awarded in
21 another case). Hence, the lodestar is as summarized below:

	<u>RATE</u>	<u>HOURS</u>	<u>TOTAL</u>
23 Mr. Chapko	\$ 350	690.7	\$ 241,745
24 Mr. Strauss	450	287.2	129,240
25 Ms. Rider	110	51.4	<u>5,654</u>
26		TOTAL:	\$ 376,639

27 Once the Arbitrator has fixed the lodestar, he may increase or
28 decrease that amount by applying a multiplier to take into account the

1 quality of representation, the novelty and complexity of the issues, the
2 results obtained, and the contingent risk presented. Thus, a multiplier is
3 appropriate for exceptional representation only when that representation
4 far exceeds that which would have been provided by an attorney of
5 comparable skill billing at the hourly rate used in the lodestar calculation.
6 Otherwise, the fee may result in unfair double billing. Ketchum v. Moses
7 (2001) 24 Cal.4th 1122, 1132-1139.

8 Here there is no question all counsel did an outstanding job
9 representing their clients. However, the case was only novel in that Ms.
10 Breedlove was employed in the adult entertainment industry. There were
11 no cutting edge legal issues. Similarly, the case was complex only to the
12 extent there were twenty depositions and many witnesses. Essentially
13 there was a contest of credibility among the witnesses and questions of fact
14 regarding numerous events. Counsel obtained excellent results for Ms.
15 Breedlove given her personal resilience which minimized the physical or
16 mental harm to her. Further, all hours sought have been awarded, not
17 withstanding both counsel appeared throughout the hearing. In sum,
18 based on an analysis of the Ketchum factors as applied to this case, the
19 Arbitrator declines to award a multiplier.

20 Costs as set out in Mr. Strauss' July 16, 2009 Memorandum of
21 Costs totaling \$21,042 are also awarded.

22 4. This Final Award resolves all pending disputes between the
23 parties.

24
25 Dated: July 20, 2009.

26 
27 Hon. J. RICHARD HADEN (Ret.),
28 Arbitrator

PROOF OF SERVICE BY U.S. MAIL

Re: Breedlove, Lisa M. vs. Pacers, Inc., et al.
Reference No. 1240019144

I, Jenny Truex, not a party to the within action, hereby declare that on July 20, 2009 I served the attached FINAL AWARD on the parties in the within action by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, San Diego, CALIFORNIA, addressed as follows:


David P. Strauss Esq.
L/O David P. Strauss
1111 6th Ave.
Suite 404
San Diego, CA 92101

David B. Norris Esq.
L/O David B. Norris
750 B Street
Suite 2740
San Diego, CA 92101 USA

Terry J. Chapko Esq.
L/O Terry J. Chapko
1111 Orange Ave.
Suite A
Coronado, CA 92118 USA

Edith Thomas Esq.
L/O Edith S. Thomas
214 North Ridge Drive
Suite B
Fallbrook, AB 92028 USA

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Diego, CALIFORNIA, on July 20, 2009.



Jenny Truex