

**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DIVISION OF THE ADMINISTRATIVE HEARING OFFICE
DEPARTMENT OF LABOR**

In the Matter of:)	Labor Case No. 13-1152
Figueroa, Alice B., (108835))	Labor Case No. 13-1153
Cesar L. Abobo, (101632))	
Complainants,)	ADMINISTRATIVE ORDER
)	
v.)	
)	
K.Y.S. Enterprises, Inc.,)	
<i>dba</i> Hot Curry Bar & Restaurant, and)	
KSA Corporation,)	
<i>dba</i> Serene Bar & Grill,)	
Respondents.)	
)	

The above-captioned cases were heard in a consolidated hearing on January 7, 2014, in the Administrative Hearing Office located on Capitol Hill, Saipan. Both complainants appeared without counsel. Respondent K.Y.S., Inc. failed to appear despite being served with the Amended Notice of Hearing. Respondent KSA Corporation appeared through its corporate President, Kim, Il Hwan, its Manager, Linlin Chen, and its legal counsel, Daniel Guidotti. The Department of Labor Enforcement Section was represented by labor investigator Frank Aguon. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

Complainants Alice B. Figueroa and Cesar L. Abobo (“Employees”) began working for K.Y.S. Enterprises, Inc., *dba* Hot Curry Bar & Restaurant (“KYS”), in 2009 as a waitress and cook, respectively. KYS’s business was managed by Ms. Dong, Yun. Employees worked for KYS at the Hot Curry Bar & Restaurant until August, 2013.

Prior to 2013, KYS had obtained CW status for Employees, then renewed that status in 2013. See Hearing Exhibit 5 and 5a (copy of I-797A, Notice of Action

from USCIS, confirming approval of CW1 status for Ms. Figueroa and Mr. Abobo from 5/24/2013 to 5/23/2014).

On June 5, 2013, Employees each signed employment contracts with KYS for the term of “one year commencing upon date of approval of the contract.” [Copies of the employment contracts were entered into evidence as Hearing Exhibits 4 and 4a.]

In June 2013, Ms. Dong informed Employees that she was planning to sell the restaurant and return to China. In early July 2013, Dong told Employees that Linlin Chen had decided to buy the restaurant. Dong assured Employees that the new owner would “take care of them.” Employees interpreted this statement to mean that the new owner would continue to employ them.

On August 25, 2013, in the presence of Ms. Chen, Ms. Dong told Employees that Linlin Chen had bought the restaurant and that she (Dong) would be leaving the CNMI in less than a week. Dong then paid the Employees the wages they had earned up to that date.¹

Linlin Chen then told Employees that she planned to close the restaurant briefly for cleaning and minor renovations, then open under a new name. She asked Employees to assist in the clean-up, but made no statement about long-term employment. [Testimony of Alice Figueroa and Linlin Chen.]

Employee Figueroa worked on the clean-up for only one day; then, Ms. Chen told her to stop working and wait for her call. On August 31, 2013, another worker called Ms. Figueroa and told her to report to work the next day.

Ms. Chen then worked from September 1 through 7, 2013, at the new restaurant as a waitress. On September 7, 2013, Figueroa received a text message from manager Chen, telling her to pick up her salary tomorrow “and find yourself a new job.”

Mr. Abobo worked on the clean-up from August 26 to September 1, then as a cook at the new restaurant from September 1 to September 7, 2013. He was also told on September 7, 2013, that this was his last day.

¹ Cesar Abobo testified that on that last day (August 24, 2013), Dong Yun told him not to worry about his “papers and contract” because he was being transferred to the new company that was taking over the space. [Testimony of Cesar Abobo.]

On September 8, 2013, Ms. Chen walked up to both Employees who were sitting at a table in the restaurant. Ms. Chen reviewed the hours they had worked and paid each of them in cash for those hours (\$280 to Figueroa and \$416 to Abobo). Chen made no attempt to tell Employees why she no longer wanted them to work. Ms. Figueroa attempted to discuss the matter, but in essence, she was dismissed by Linlin Chen. [Testimony of Ms. Figueroa.]

Both employees agreed that Ms. Chen had paid them the wages they had earned in the brief period they worked for her. However, both employees believed they were legally entitled to continued employment with the new owner because of statements made to them by their former manager, Dong Yun.

On September 11, 2013, both Employees came to the Hearing Office and filed complaints against K.Y.S. Enterprises, Inc. and KSA Corporation for breach of contract, wrongful termination, and unfair treatment. They each sought compensation of at least six months' wages. [Copies of Employees' complaints were entered into evidence at Hearing Exhibits 2 and 2a.]

DISCUSSION

I. CLAIMS AGAINST KSA CORPORATION

A Sale of the Business:

Respondent's witnesses, President Kim and Linlin Chen, both testified regarding KSA Corporation's takeover of the leased premises of Hot Curry Bar & Restaurant. The Hearing Officer finds their testimony to be credible; and, given that the only other negotiating party to that sale (Dong, Yun – General Manager of KYS Enterprises, Inc.), already left the CNMI and did not testify at the Hearing, respondent's testimony is uncontested.²

Ms. Chen testified that President Kim had transferred \$30,000 into Ms. Chen's bank account and instructed her to provide the money to Dong, Yun for the sale of all fixtures and equipment at the Hot Curry Bar and Restaurant. Chen confirmed that she had, in fact, negotiated the deal with Dong, Yun for the purchase of all the equipment of the former Hot Curry Bar & Restaurant.

² It is undisputed that Employees were not involved in the negotiations between KSA Corporation and K.Y.S. Enterprises, Inc. Dong, Yun was the only KYS person involved in the sale and she did not discuss the details of the sale with Employees. [Testimony of Ms. Figueroa.]

Chen stated categorically that the sale concerned only the restaurant and bar equipment - not all assets and liabilities of KYS.

Purchase Agreement: Employee Figueroa testified that she had been asked by KYS's agent, Tony Yen, to deliver a "bill of sale" to Linlin Chen. She produced a copy of the unsigned, one-page document, entitled "Purchase Agreement." [See copy of unsigned Purchase Agreement at Hearing Exhibit 6.] The document discusses the execution of a purchase agreement and states:

Both parties agreed the purchase on entire furniture, fixture and equipment under the name of Hot Curry Restaurant premises located in the Western Garapan, Saipan for the total price of Thirty thousand US Dollars (\$30,000.00).

No signed Purchase Agreement was admitted into evidence. To the extent that this document (Hearing Exhibit 6) may reflect the parties' agreement, it supports respondent KSA's position, and Mr. Kim and Ms. Chen's testimony, that the sale was only for the sale and purchase of equipment and not an assumption the employee contracts between KYS and Employees.

B. Employment of Complainants Figueroa and Abobo by KSA Corporation:

Respondent's witnesses, President Kim and Linlin Chen, testified regarding KSA Corporation's brief employment of complainants Alice Figueroa and Cesar Abobo. The Hearing Officer finds their testimony to be credible.

Ms. Chen testified that she never promised KYS's General Manager, Dong Yun, that KSA would assume KYS's contractual obligations to its Employees. In other words, Chen never promised to employ Employees Figueroa and Abobo for the full term of their written employment contracts with KYS. Although KSA admits that it employed Ms. Figueroa and Mr. Abobo on a "try-out" basis for about one week, President Kim decided not to employ them any longer. Ms. Chen then told the two Employees to stop working and paid them in full for their work.

KSA's legal position is that when KSA employed the two Employees for about one week in September 2013, they were at-will employees who were subject to termination "with" or "without cause." The Hearing Officer finds this position to be legally correct.

Employees' protection against termination "without cause" ended when KYS closed its business, Hot Curry Bar & Restaurant, and its General Manager left the CNMI. When Employees began working for KSA, Employees were employed "at will," meaning that they could be terminated for any reason – or no reason - as long as it was not for an unlawful purpose (e.g., sexual harassment, racial or gender discrimination).

Given the above legal conclusion, it is unnecessary to delve in detail into the reasons for Employee's termination. Nevertheless, in order to establish that the termination was not for an unlawful purpose, I shall review the basic evidence presented about the termination.

Respondent's witnesses gave somewhat confused testimony as to their reasons for deciding not to employ complainants longer than a week. Mr. Kim said he spoke with other business owners in Garapan who told him "they were not good people." Kim also believed that Ms. Figueroa spent too much time on the phone and that Mr. Abobo's cooking was not very good. There was some suggestion that certain employees were coming to work late, but Ms. Chen could not verify that either complainant had arrived late for work.

Based on the above facts, the Hearing Officer finds that each Employee's termination was not done for an unlawful purpose. Therefore, Employees have no valid labor claims against KSA Corporation, including any claims for breach of contract, wrongful termination or unpaid wages.

Food Handler's Certificate: Employees raised an issue regarding a food handler's certificate that Linlin Chen had renewed for Ms. Figueroa. Ms. Chen testified that when she visited the Sanitation Office, a clerk noted that Ms. Figueroa's certificate was "almost expired." The official recommended that the certificate be renewed and Ms. Chen paid for it to be renewed. Later, Chen showed the renewed certificate to Ms. Figueroa. [Testimony of Ms. Chen and Ms. Figueroa.]

The company's renewal of the food handler's certificate appears to show that Ms. Chen intended to employ Ms. Figueroa for a period longer than one week (she was terminated just days after the certificate was renewed). Nevertheless, Chen explained that when President Kim decided to terminate both Employees, he had acted quickly. He approached Ms. Chen and instructed her to terminate both Ms. Figueroa and Mr. Abobo and she followed his instructions promptly.

Finally, the Hearing Officer notes that this employer's conduct does not seem particularly humane to the workers involved, particularly in the curt manner in which Ms. Chen treated the complainants when she terminated them, but such conduct was not illegal or in breach of any contract.

HOLDING: Respondent KSA Corporation is not liable for any labor claims to Employee Figueroa or Abobo. The central legal issue as to KSA is whether KSA was contractually bound by the employment contracts that KYS signed with Employees (Hearing Exhibits 4, 4a). The Hearing Officer finds that KSA was not bound by that contract and that KSA employed complainants on an "at-will" basis; therefore, they could be terminated without cause.

II. CLAIMS AGAINST K.Y.S. ENTERPRISES, INC.

First, K.Y.S. Enterprises, Inc. failed to appear at mediation or hearing, despite being served with legally sufficient notice. (Proofs of Service, entered into evidence at Hearing Exhibit 1, show that the Hearing Office served KYS's Registered Agent with the Notice of Mediation and the Amended Notice of Hearing.) Therefore, respondent KYS is found to be in default. [Employment Rules and Regulations at § 80 – 50.4-760.]

Accordingly, the Hearing Officer shall examine the prima facie case against K.Y.S. Enterprises Inc. Evidence shows that KYS entered into an employment contract with each of Employees, on June 5, 2013. Each contract remained in effect as of August 2013, when the General Manager closed the business and left the Northern Marianas Islands. [See copies of Employment Contracts at Hearing Exhibits 4 and 4a.]

Each of the employment contracts contain a provision, entitled "Termination for Economic Necessity," which states that the contract may be terminated for "business necessity...[i]n the event of business closure by giving the employee...at least thirty (30) days advance written notice...." [*Id.* at ¶ 10.]

The evidence establishes that KYS closed its business; therefore, these Contracts should be deemed terminated due to "economic necessity." The General Manager, Dong Yun, closed KYS's business with no advance written notice to Employees, and left no advance salary or repatriation tickets for these two Employees.

//

The fact that new employment with KSA Corporation was “possible” did not relieve KYS of its obligation to provide a minimum of 30 days’ advance written notice - in essence, 30 days’ salary - to all Employees whose contract was being terminated as a result of the business closure.

HOLDING: This Hearing Officer finds that KYS breached its Contract with each Employee by failing to provide 30 days written notice and an equivalent of 30 days’ salary when it abruptly closed. Such contractual wages amount to 176 hours (4 weeks at 40 hours per week, plus two days) at \$5.55 for a total of \$976.80. This amount should be awarded to each Employee.

Repatriation: Finally, the contract contains a “repatriation” clause that obligates Employer to provide a repatriation ticket in the event that employee is required to leave the Commonwealth. *Id.* at ¶ 12. USCIS Regulations also seem to require an employer to provide a ticket to any employee terminated prior to the end of the contract term.³ [See Final Rule at Federal Register, Volume 7 issue 173 (September 7, 2011), effective 10/07/11, codified at 8 C.F.R. § 214.2]

Given the situation, the Hearing Officer finds that Employer should be held responsible for providing repatriation tickets for the two Employees who were abandoned after Employer closed its business, in the event that those Employees are required to depart the CNMI within the contract term (i.e, prior to June 5, 2014). See Hearing Exhibit 4.

The Department, being fully advised and good cause having been shown, it is hereby ORDERED:

1. Judgment is entered against respondent K.Y.S., Inc. on complainants’ claims for breach of contract in the amount of \$976.80, for the reasons set forth above. Respondent K.Y.S. Enterprises, Inc. is ORDERED to pay damages to each Complainant (Alice B. Figueroa and Cesar L. Abobo) in the amount of \$976.80. Respondent shall pay all damages by cashier’s check or money order, delivered to the Hearing Office on Capitol Hill, Saipan, within 30 days of the date of issuance of this Order.

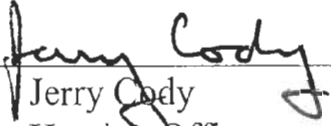
³ The Final Rule on “early termination,” the USCIS states: “The Petitioning employer must pay the reasonable cost of return transportation of the alien to the alien’s last place of foreign residence if the alien is dismissed from employment *for any reason* by the employer before the end of the period of authorized admission. [8 C.F.R. § 214.2.] [Emphasis added.]

2. Respondent K.Y.S. Enterprises, Inc. is adjudged to owe a repatriation ticket to each complainant in the event that the complainant notifies the Hearing Office of his or her intent to depart the CNMI within the initial contract period (i.e., prior to June 5, 2014). If the Hearing Office receives written notification from complainant(s) of his or her intent to depart the CNMI within that period, the Hearing Office will issue and serve notice upon respondent KYS, ordering the respondent to provide the ticket(s) within 30 days thereafter.

3. Judgment is entered in favor of respondent KSA Corporation on all claims of Labor Case No. 13-1152 and Labor Case No. 13-1153.

4. Appeal: Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of this Order. 3 CMC § 4948(a). If no appeal is filed within this time the Order shall be unreviewable administratively or judicially.

DATED: January 29, 2014



Jerry Cody
Hearing Officer