

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

9 KEN SHIRLEY and AMPARO LARA,) 1:08-cv-1274 OWW SMS
10 Plaintiffs,) SCHEDULING CONFERENCE ORDER
11 v.) Discovery Cut-Off: 3/5/10
12 LONG JOHN SILVER'S, INC., and) Non-Dispositive Motion
13 DOES 1-100 inclusive,) Filing Deadline: 3/19/10
14 Defendants.) Dispositive Motion Filing
15) Deadline: 4/5/10
16) Settlement Conference Date:
17) 3/17/10 10:00 Ctrm. 7
18) Pre-Trial Conference Date:
) 7/12/10 11:00 Ctrm. 3
) Trial Date: 8/21/10 9:00
) Ctrm. 3 (JT-10 days)

I. Date of Scheduling Conference.

February 4, 2009.

23 || II. Appearances Of Counsel.

24 The Law Office of Dean B. Gordon by Dean B. Gordon, Esq.

25 | appeared on behalf of Plaintiffs.

26 Phillips, Spallas & Angstadt LLP by Gregory L. Spallas,

27 Esq., and Burleson Cooke LLP by Andrea M. Johnson, Esq., appeared
28 on behalf of Defendant Long John Silver's, Inc.

1 III. Summary of Pleadings.

2 Plaintiffs' Summary

3 1. Ken Shirley worked for LJS for approximately 23 years,
4 working his way up from cook to Area Coach/Area District Manager
5 in charge of fourteen stores between Modesto and Bakersfield.
6 Just prior to his termination, Plaintiff Ken Shirley was on
7 approved leave while recovering from knee surgery due to a non-
8 work related injury. While off work, Plaintiff Ken Shirley's
9 supervisor, Region Coach, Darren McGilbray, and the managers of
10 two stores within Plaintiff Ken Shirley's district, shared his
11 duties and responsibilities.

12 2. Amparo Lara worked for LJS for almost 10 years, working
13 her way up from cook to Store Manager. Plaintiff Ken Shirley
14 promoted her to manager of the Porterville store in 2004. In
15 late April 2006, Plaintiff Amparo Lara became ill and needed some
16 time off from work to recover. During Plaintiff Amparo Lara's
17 absence, Ken Shirley placed Team Leader, Noemi Ledesma, in charge
18 of the Porterville store because of her previous performance as
19 Acting Manager.

20 3. Both Plaintiff Ken Shirley and Plaintiff Amparo Lara
21 were superior performers; rising through the ranks and turning
22 around their stores.

23 4. Prior to Plaintiff Amparo Lara's illness, she and
24 Plaintiff Ken Shirley had identified difficulties with the way
25 the bank processed the Porterville store's deposits. Plaintiff
26 Amparo Lara and Plaintiff Ken Shirley had requested, but had not
27 yet been granted permission to change banks because of these
28 difficulties.

1 5. While both Plaintiff Ken Shirley and Plaintiff Amparo
2 Lara were off work, the acting manager of the Porterville store
3 (#5245), Noemi Ledesma, began embezzling money. Although both of
4 the people covering for Plaintiff Ken Shirley received multiple
5 e-mails from the Cash Handling Department indicating that
6 deposits may not have been made by the Porterville store, neither
7 of them acted upon this information. After receiving the e-mails
8 from the Cash Handling Department for several days, and while
9 still off work, Plaintiff Ken Shirley, who had also been
10 receiving the e-mails at home, began forwarding the e-mails to
11 the Porterville store. Each time, Plaintiff Ken Shirley received
12 credible assurance that the difficulty was the same problem
13 identified by Plaintiff Ken Shirley and Plaintiff Amparo Lara
14 before they took their leaves. While still off work, Plaintiff
15 Ken Shirley even directed one of the people covering for him to
16 go to the Porterville store. That person did not discover any
17 embezzlement or other wrongdoing.

18 6. On his first day back to work, Plaintiff Ken Shirley
19 went to the Porterville store himself, and discovered that the
20 daily deposit log had not been completed for the previous two
21 weeks. Plaintiff Ken Shirley reviewed the proper procedure for
22 completion of the deposit log with Ms. Ledesma and instructed her
23 to have the log updated by the time Plaintiff Amparo Lara was to
24 returned to work eight days later.

25 7. On Plaintiff Amparo Lara's first day back to work, Ms.
26 Ledesma still had not updated the deposit log. Therefore,
27 Plaintiff Ken Shirley and Plaintiff Amparo Lara reconstructed the
28 Bank Deposit Log and were able to account for all deposits except

1 for seven missing deposits totaling \$9,792.99. They quickly
2 determined that Ms. Ledesma had stolen the missing money.
3 Immediately after Ms. Ledesma was terminated, LJS turned on
4 Plaintiffs over things that took place while they were off work
5 on approved leave and others were supposed to be covering their
6 responsibilities.

7 Facts for Plaintiff Ken Shirley

8 8. Ken Shirley worked for LJS for approximately 23 years,
9 working his way up from cook to Area Coach/Area District Manager
10 in charge of fourteen stores between Modesto and Bakersfield.
11 Just prior to his termination, Plaintiff Ken Shirley was on
12 approved leave while recovering from knee surgery due to a non-
13 work related injury. While off work, Plaintiff Ken Shirley's
14 supervisor, Region Coach, Darren McGilbray, and the managers of
15 two stores within Plaintiff Ken Shirley's district shared his
16 duties and responsibilities.

17 9. Plaintiff Ken Shirley was originally hired by LJS in
18 about March 1983 as a cook for the Clovis and Kings Canyon
19 Avenues restaurant in Fresno, California. Because of his
20 superior work performance, he advanced through the ranks, and in
21 about May 1995, LJS promoted him to Area Coach/Area District
22 Manager in charge of fourteen stores between Modesto and
23 Bakersfield. Altogether, Plaintiff Ken Shirley worked for LJS
24 for approximately 23 years and 5 months until LJS unlawfully
25 terminated him. At all relevant times, Plaintiff Ken Shirley's
26 home base restaurant was in the County of Fresno, California.
27 LJS terminated Plaintiff Ken Shirley in the County of Fresno and
28 approximately one quarter of the restaurants he was responsible

1 for were in the County of Fresno.

2 10. On or about November 26, 2005, Plaintiff Ken Shirley
3 was involved in a non-work related motorcycle accident in which
4 he injured one of his anterior cruciate ligaments (ACL).
5 Approximately one week after the accident, Plaintiff Ken
6 Shirley's doctor told him that he needed surgery, but that he
7 could postpone surgery until it was convenient for work.

8 11. One of the LJS' business innovations is multi-brand
9 stores including various combinations of Taco Bell, LJS, A&W,
10 Pizza Hut, and Kentucky Fried Chicken. The concept encourages
11 family or group dining because it offers a greater variety of
12 food than a single restaurant. Although LJS staked its future on
13 this concept, Plaintiffs are informed and believe that many of
14 LJS' multi-brand stores were losing money.

15 12. None of the management staff at any of the multi-brand
16 stores for which Plaintiff Ken Shirley was responsible had any
17 experience in opening a new store, and there was no store where
18 the staff could be trained because the nearest multi-brand LJS
19 and A&W store was in Bakersfield. At about the time of Plaintiff
20 Ken Shirley's accident, LJS was planning to open its first multi-
21 brand store (LJS and A&W) in the Fresno area at Peach and Shaw
22 Avenues in Clovis, California. It was very important to LJS that
23 Plaintiff Ken Shirley be present for the preparation of and the
24 opening of this store. Therefore, for the convenience of his
25 employer, Plaintiff Ken Shirley agreed to postpone his surgery
26 until after the new store opened.

27 13. On or about January 15, 2006, Store #5245 in
28 Porterville began having difficulties with the bank it was using

1 for cash deposits. These difficulties revolved around the
2 specific way this bank processed deposits. After investigating,
3 Plaintiff Ken Shirley determined that the most expedient solution
4 was to have this store change banks to another bank that would
5 process the deposits in a way that was compatible with LJS cash
6 management procedures.

7 14. On or about March 22, 2006, Plaintiff Ken Shirley
8 requested approval to allow the Porterville store (#5245) to
9 change banks. As of May 12, 2006, when Plaintiff Ken Shirley
10 took medical leave for his surgery, LJS still had not authorized
11 the change of banks for the Porterville store (#5245).

12 15. On or about May 3, 2006, shortly after one of the most
13 successful openings in LJS history at the Clovis LJS-A&W store,
14 Plaintiff Ken Shirley's Region Coach, Darren McGilbray, granted
15 Plaintiff Ken Shirley permission to use vacation time for his ACL
16 surgery. They agreed that Plaintiff Ken Shirley would be off
17 work from the day of surgery, May 12, 2006, through June 4, 2006,
18 and he would return to work on Monday, June 5, 2006.

19 16. They also agreed that while Plaintiff Ken Shirley was
20 off work, Mike Olson, General Manager of the Bakersfield Rosedale
21 Highway store, and Robert Alcala, the General Manager of the
22 Fresno Cedar and Ventura store would assume Plaintiff Ken
23 Shirley's oversight responsibilities, and Mr. McGilbray would
24 oversee Mr. Olson and Mr. Alcala.

25 17. LJS cash handling policies provided that all Cash
26 Discrepancy Notices for each store in the region (including
27 Porterville Store #5245) were simultaneously e-mailed by the bank
28 each day to three people: (1) Plaintiff Ken Shirley, the Area

1 Coach responsible for the store in question; (2) Mr. McGilbray,
2 the Region Coach responsible for the store in question; and (3)
3 Kevin Rice, LJS Loss Prevention Manager.

4 18. Plaintiff Ken Shirley's surgery took place as scheduled
5 on May 12, 2006. Since Plaintiff Ken Shirley was on approved
6 medical leave, he was not supposed to have any work
7 responsibilities, and he was confident that Mr. McGilbray, Mr.
8 Rice, Mr. Olson, and Mr. Alcala could handle his job duties while
9 he was on leave.

10 19. Plaintiff Ken Shirley did not have any contact with
11 work for about one week after surgery. Even though Plaintiff Ken
12 Shirley did not believe that he was required to check in or
13 monitor his e-mail since other LJS management were also receiving
14 them, he nonetheless looked at his e-mails on about May 22, 2006,
15 out of a sense of duty to his employer.

16 20. Approximately one week after Plaintiff Ken Shirley
17 resumed monitoring his e-mail (beginning approximately May 29,
18 2006), he noticed that the cash department was sending Cash
19 Discrepancy Notices regarding Store #5245 in Porterville.
20 Plaintiff Ken Shirley knew that Mr. McGilbray and Loss Prevention
21 Manager Kevin Rice were also receiving the Cash Discrepancy
22 Notices for Store #5245.

23 21. At that time, the Restaurant General Manager, Amparo
24 Lara, was also off work on disability leave. She did not have
25 access to any company e-mails while she was off. This store had
26 a history of receiving Cash Discrepancy Notices due to the way
27 the particular bank that store used, was validating the store's
28 deposits. Therefore, Plaintiff Ken Shirley initially assumed

1 that these Cash Discrepancy Notices were a continuation of the
2 same difficulty with the bank, and not a cause for concern that
3 some employee might be embezzling cash. Plaintiff Ken Shirley
4 also believed that Mr. McGilbray and/or Mr. Rice would take care
5 of any discrepancy, and correct any problems regarding Store
6 #5245 and/or the bank, since they both were receiving the same e-
7 mails and they both knew that Plaintiff Ken Shirley was out on
8 medical leave.

9 22. After receiving Cash Discrepancy Notices for this same
10 store for approximately three days in a row, Plaintiff Ken
11 Shirley began forwarding the cash discrepancy notice e-mails to
12 that store. Each time he forwarded one of these cash discrepancy
13 notice e-mails to Store #5245, the acting manager of that store
14 responded by advising him that there were no discrepancies, and
15 that the cash deposits were being made on time and in the proper
16 manner.

17 23. Because of the number of Cash Discrepancy Notices
18 Plaintiff Ken Shirley had received regarding Store #5245 and that
19 Plaintiff Amparo Lara was off work at the same time, Plaintiff
20 Ken Shirley telephoned that store on about May 30, 2006, and
21 again on about June 2, 2006. On each occasion, he was reassured
22 by the acting manager, Noemi Ledesma, that all was well with the
23 banking deposits and that the Cash Discrepancy Notices were due
24 to the manner in which the bank, that that particular store used,
25 validated cash deposits.

26 24. Although Plaintiff Ken Shirley had no solid reason to
27 doubt Ms. Ledesma's response, out of an abundance of caution, on
28 about May 30, 2006, he telephoned Mike Olson, the Rosedale

1 Highway restaurant General Manager, (one of the two individuals
2 covering his responsibilities while he was gone) and asked Mr.
3 Olson to perform a site visit to see if he could determine what,
4 if anything, was wrong at Store #5245. Plaintiff Ken Shirley
5 believes that Mr. Olson performed the requested visit while
6 Plaintiff Ken Shirley was on leave but that Mr. Olson did not
7 ascertain anything wrong with the cash bank deposits at that
8 store.

9 25. Because of the continuing Cash Discrepancy Notices,
10 Plaintiff Ken Shirley had received regarding Store #5245, and
11 that Plaintiff Amparo Lara was still off work, on Plaintiff Ken
12 Shirley's first day back to work, on or about June 5, 2006, he
13 personally went to Store #5245 in Porterville. During his visit,
14 all three lead personnel then running the store assured him that
15 the deposits were made correctly on time, and that there were no
16 known discrepancies with the bank deposits.

17 26. However, because the deposit log had not been properly
18 filled out for the previous two weeks or so, it was impossible
19 for him to verify the accuracy of the bank cash deposits.
20 Plaintiff Ken Shirley reviewed the proper procedure for
21 completion of the Deposit Log with Ms. Ledesma and instructed her
22 to have the Deposit Log up to date by the time the Restaurant
23 General Manager, Amparo Lara, returned to work on June 13, 2006,
24 eight days later. Plaintiff Ken Shirley further notified Ms.
25 Ledesma that she, Plaintiff Ken Shirley, and Plaintiff Amparo
26 Lara, would review the updated deposit log on Plaintiff Amparo
27 Lara's first day back to work, June 13, 2006.

28 27. On or about June 12, 2006, one day prior to Plaintiff

1 Ken Shirley's scheduled meeting with Ms. Amparo and Ms. Ledesma
2 of Store #5245, Plaintiff Ken Shirley received a telephone call
3 from Region Coach/Regional V.P. Darren McGilbray regarding the
4 Cash Discrepancy Notices at Store #5245. Plaintiff Ken Shirley
5 notified Mr. McGilbray of his earlier efforts to resolve this
6 situation and of his meeting scheduled for the following day with
7 Acting Manager Ledesma and returning restaurant General Manager
8 Lara. Mr. McGilbray expressed satisfaction with Plaintiff Ken
9 Shirley's efforts to resolve this situation.

10 28. Also on June 12, 2006, Plaintiff Ken Shirley spoke with
11 Human Resources Manager, Ipo Hoops, regarding the missing
12 deposits from Store #5245. Mrs. Hoops indicated that she had
13 heard of the missing deposits from McGilbray and was glad
14 Plaintiff Ken Shirley had called her before she called him.
15 Plaintiff Ken Shirley told her he did not think there was an
16 issue, and would notify her of the results of the visit he had
17 scheduled the following day. She was confident in Plaintiff Ken
18 Shirley's abilities and said to let her know if he needed
19 anything from her. Mrs. Hoops and Plaintiff Ken Shirley stayed
20 in contact, weekly at minimum, from this day forward, but she
21 never visited the restaurant herself. Prior to this incident,
22 they had only communicated on a monthly basis. Later that day,
23 Plaintiff Ken Shirley spoke with Loss Prevention Manager, Kevin
24 Rice, about the Cash Discrepancy Notices regarding Store #5245.
25 He too seemed confident in Plaintiff Ken Shirley's approach to
26 the situation.

27 29. The next day, on or about June 13, 2006, Plaintiff Ken
28 Shirley returned to Store #5245 and discovered that Acting

1 Manager Ledesma had not updated the bank deposit logs as
2 instructed. Therefore, Restaurant General Manager Lara and
3 Plaintiff Ken Shirley reconstructed the Bank Deposit Log and were
4 able to account for all deposits except for seven missing
5 deposits totaling \$9,792.99. Throughout the previous day,
6 Plaintiff Ken Shirley had also been in discussion with Loss
7 Prevention Manager, Kevin Rice, regarding this situation. On the
8 same day, while Plaintiff Amparo Lara and Plaintiff Ken Shirley
9 were reconstructing the Bank Deposit Log, Mr. Rice visited Store
10 #5245. Plaintiff Ken Shirley showed Mr. Rice what Plaintiff
11 Amparo Lara and Plaintiff Ken Shirley were doing to resolve the
12 situation. Mr. Rice was comfortable with their efforts.

13 30. The following day, June 14, 2006, Plaintiff Amparo Lara
14 and Plaintiff Ken Shirley went to the bank to investigate whether
15 they had any record of receiving deposits on the seven days in
16 question. The bank did not. Therefore, Plaintiff Amparo Lara
17 and Plaintiff Ken Shirley began interviewing the three Team
18 Leaders who were responsible for running that store in Plaintiff
19 Amparo Lara's absence. It quickly became apparent that Ms.
20 Ledesma had assumed full responsibility for all bank deposits
21 during Plaintiff Amparo Lara's absence. Ms. Ledesma had
22 instructed the other two Team Leaders not to worry about the bank
23 deposits, saying she would take care of them, or words to that
24 effect.

25 31. Further, Plaintiff Ken Shirley also telephoned the
26 corporate cash department on several occasions in an effort to
27 ensure that these deposits inadvertently had not been posted to a
28 different restaurant or account. Ultimately, the corporate cash

1 department, Plaintiff Amparo Lara and Plaintiff Ken Shirley were
2 unable to account for any of the seven missing deposits totaling
3 \$9,792.99, and it became increasingly likely that Acting Manager
4 Ledesma had embezzled these funds.

5 32. On or about June 15, 2006, Plaintiff Ken Shirley
6 contacted Loss Prevention Manager, Kevin Rice, and his
7 supervisor, Mr. McGilbray and informed them of his suspicion that
8 Acting Manager Ledesma had taken the missing deposits.

9 33. Since the first day Plaintiff Ken Shirley spoke with
10 Mr. McGilbray about this issue (June 12, 2006) Plaintiff Ken
11 Shirley was also communicating with the Regional Human Resources
12 Manager, Mrs. Ipo Hoops, about this issue. In confidence and
13 specifically "off the record," Mrs. Hoops repeatedly stated that
14 this issue was not over and that Plaintiff Ken Shirley should not
15 be at all comfortable because his job was in jeopardy because of
16 the missing deposits no matter what Mr. McGilbray told Plaintiff
17 Ken Shirley. Because Mrs. Hoops repeated this warning, Plaintiff
18 Ken Shirley addressed the matter several times with Mr. McGilbray
19 over the remainder of his employment with Yum Brands/Long John
20 Silver's.

21 34. On June 19, 2006, Plaintiff Ken Shirley's supervisor,
22 Mr. McGilbray, was in the Sacramento, California, office for
23 meetings unrelated to the missing deposits. On that same day,
24 Plaintiff Ken Shirley was also in the Sacramento, California,
25 office for a meeting unrelated to the missing deposits.
26 Plaintiff Ken Shirley approached Mr. McGilbray between meetings.
27 He did not raise the missing deposits from Store #5245. When
28 Plaintiff Ken Shirley raised the issue of the missing deposits,

1 Mr. McGilbray assured Plaintiff Ken Shirley that based on
2 Plaintiff Ken Shirley's actions and thorough follow-through on
3 this matter, that Plaintiff Ken Shirley was fine and not in
4 jeopardy of termination over this issue. Mr. McGilbray returned
5 to Kansas with no further investigation or discussion of this
6 issue.

7 35. As a regular part of Plaintiff Ken Shirley's weekly
8 routine, he had one-on-one telephone conversations with Mr.
9 McGilbray on Tuesdays. During these weekly conversations, Mr.
10 McGilbray never brought up the issue of the missing deposits from
11 Store #5245. Therefore, Plaintiff Ken Shirley regularly brought
12 up the issue of the missing deposits, as the warnings from Mrs.
13 Hoops continued. Mr. McGilbray assured Plaintiff Ken Shirley
14 that this issue was not a threat to Plaintiff Ken Shirley's job
15 security.

16 36. On or about June 26, 2007, Loss Prevention Manager,
17 Kevin Rice, called a meeting to meet in Porterville to terminate
18 Noemi Ledesma for failure to secure company funds. On June 27,
19 2007, with the approval of Human Resources Manager, Ipo Hoops,
20 Mr. Rice and Plaintiff Ken Shirley terminated Ms. Ledesma. After
21 terminating Ms. Ledesma, Mr. Rice turned his interrogation toward
22 Plaintiff Ken Shirley and his business practices. It was
23 apparent he was not going to take the matter to the police as
24 they had previously discussed. He asked Plaintiff Ken Shirley
25 questions regarding how Plaintiff Ken Shirley trained his team on
26 cash procedures, how he followed up on their training, and what
27 they could do as a region to ensure this would not recur, as
28 Plaintiff Ken Shirley was the second of three Area Coaches that

1 had multiple deposits disappear while Mr. McGilbray was their
2 Region Coach. Plaintiff Ken Shirley was concerned about cash
3 handling from the initial training of all members of management
4 and the commitment to daily follow-up.

5 37. On or about July 13, 2006, Plaintiff Ken Shirley drove
6 to Las Vegas, Nevada, for his mid-year review with Mr. McGilbray.
7 Since Plaintiff Ken Shirley had been receiving conflicting
8 messages from his immediate supervisor and human resources for
9 several months, Plaintiff Ken Shirley looked forward to the
10 opportunity to discuss his performance and to obtain a written
11 performance evaluation.

12 38. LJS uses a Balanced Score Card (BSC) to grade the
13 performance of all operations staff from Assistant Restaurant
14 Managers to the President of LJS. Plaintiff Ken Shirley received
15 a rating of 3.3 out of 5.0, which is "On Target." Mr.
16 McGilbray's Region BSC rating was 2.1 or "Below Target." LJS's
17 BSC rating was 2.5. Significantly, Mr. McGilbray awarded
18 Plaintiff Ken Shirley 4.15 out of 5.0 for leadership and he
19 indicated that Plaintiff Ken Shirley had no significant areas in
20 need of improvement. As the conversation around Plaintiff Ken
21 Shirley's evaluation began to wrap-up he changed gears and began
22 to speak of his up coming two week vacation to Switzerland. Mr.
23 McGilbray was planning to leave Monday, July 17, 2006, and return
24 on Monday, July 31, 2006.

25 39. Plaintiff Ken Shirley was one of ten Area Coaches who
26 reported directly to Mr. McGilbray. Because of Plaintiff Ken
27 Shirley's superior performance, LJS selected Plaintiff Ken
28 Shirley to run the region while Mr. McGilbray was out of the

1 country in July 2006. Plaintiff Ken Shirley believes Mr.
2 McGilbray selected him to run the region in his absence, and that
3 he did so with the approval of at least one level of management
4 above him. Between the time LJS selected Plaintiff Ken Shirley
5 to fill in for Mr. McGilbray and the time of Mr. McGilbray's
6 departure, Plaintiff Ken Shirley spoke with LJS President, Andy
7 Rosen, who confirmed that he was aware of the fact that Plaintiff
8 Ken Shirley was filling-in for Mr. McGilbray during McGilbray's
9 vacation.

10 40. Plaintiff Ken Shirley's additional responsibilities
11 included, but were not limited to: running the region conference
12 calls for Mr. McGilbray's nine other Area Coaches and 66
13 restaurants; leading the weekly multi-brand conference calls (a
14 duty that Mr. McGilbray and Plaintiff Ken Shirley had shared for
15 some months); presenting the region profit and loss statement for
16 period 7 to LJS Head Coach (Vice President) and seven other
17 Region Coaches; and handle whatever daily issues that arose.

18 41. After a lengthy conversation about Mr. McGilbray's
19 vacation plans, Plaintiff Ken Shirley turned the conversation
20 back toward the issue of the missing deposits from Store #5245 as
21 it had yet to be resolved. Mr. McGilbray telephoned Loss
22 Prevention Manager, Kevin Rice, and put him on speakerphone to
23 discuss the matter. In this telephone conversation, Plaintiff
24 Ken Shirley learned that nothing had been done or even discussed
25 since the day of Ms. Ledesma's termination June 26, 2006.

26 42. Significantly, Mr. Rice had not given any of the
27 evidence to the Porterville Police Department as he indicated he
28 would prior to Ms. Ledesma's termination. Further, Mr. Rice told

1 Mr. McGilbray that Store #5245 was following the security
2 procedures to the letter, and had no further issues with late
3 deposits. Immediately after hanging up the phone, Mr. McGilbray
4 stood and paced about the room saying that he would have liked
5 Plaintiff Ken Shirley to have done things differently, but never
6 stated what he would have had Plaintiff Ken Shirley do. He again
7 assured Plaintiff Ken Shirley that his future with LJS was
8 "fine."

9 43. On Saturday, July 29, 2006, Mr. McGilbray phoned
10 Plaintiff Ken Shirley about 2:00 p.m., asking about the state of
11 the region during his vacation. Plaintiff Ken Shirley told him
12 that one store in Plaintiff Ken Shirley's area had burned due to
13 fryer crumbs left overnight in a garbage can inside the
14 restaurant (exactly in accordance with company security policy)
15 and another store, not in Plaintiff Ken Shirley's area, had to be
16 permanently closed due to neglect of the air conditioners and
17 coolers.

18 44. Seemingly uninterested by these two major items, and
19 after months of being disinterested in the stolen deposits from
20 Store #5245, Mr. McGilbray quickly turned the conversation to the
21 stolen deposits. Mr. McGilbray informed Plaintiff Ken Shirley
22 that he would fly to California on Monday, July 31, 2006, or
23 Tuesday, August 1, 2006, to meet with terminated Team Leader
24 Ledesma. Plaintiff Ken Shirley asked Mr. McGilbray if he wanted
25 him to arrange a meeting since Ms. Ledesma had been terminated
26 and it would be difficult to arrange a meeting with a previously
27 terminated employee at the last minute. Mr. McGilbray stated
28 that that would not be necessary.

1 45. On Sunday, July 30, 2006, Plaintiff Ken Shirley
2 received an e-mail from Mr. McGilbray stating that he would fly
3 into Fresno on Monday, July 31, 2006, in the afternoon but was
4 not specific as to his arrival time.

5 46. On Monday, July 31, 2006, at approximately 4:00 p.m.,
6 Plaintiff Ken Shirley received a telephone call from Mr.
7 McGilbray saying he wanted to meet at the burned restaurant at
8 the corner of Blackstone and Herndon, in Fresno, California.
9 Plaintiff Ken Shirley informed Mr. McGilbray that Plaintiff Ken
10 Shirley would meet him there in 20 minutes. Plaintiff Ken
11 Shirley arrived to find Mr. McGilbray and Human Resource Manager,
12 Mrs. Hoops. Plaintiff Ken Shirley asked Mrs. Hoops why she was
13 there and her eyes began to water as she turned away from
14 Plaintiff Ken Shirley.

15 47. After some small talk, Mr. McGilbray handed Plaintiff
16 Ken Shirley a document stating that Plaintiff Ken Shirley was
17 being placed on administrative leave pending completion of Mr.
18 McGilbray's and Mrs. Hoops' investigation into the stolen
19 deposits at Store #5245 in Porterville, California. Plaintiff
20 Ken Shirley believes that Mr. McGilbray and Mrs. Hoops proceeded
21 directly to Store #5245 in Porterville where they placed
22 Plaintiff Amparo Lara (the store manager who had been on medical
23 leave at the time of the embezzlement) on administrative leave
24 pending completion of the same investigation.

25 48. The next day, Tuesday, August 1, 2006, Mr. McGilbray
26 and Mrs. Hoops terminated Plaintiff Ken Shirley's employment.
27 Their stated reason for Plaintiff Ken Shirley's termination was
28 "it was discovered that there were several Cash and Security

1 violations that occurred and that Plaintiff Ken Shirley was
2 negligent in failing to stop or correct these discrepancies in an
3 effective manner. These violations include proper, prompt and
4 effective response to Cash Discrepancy Notices and failure to
5 correct Cash handling practices in management at 5245."

6 49. Also, on August 1, 2006, Mr. McGilbray and Mrs. Hoops
7 terminated Plaintiff Amparo Lara. The stated reason for
8 Plaintiff Amparo Lara's termination was as follows:

9 Shirley, your Area Coach. During this investigation,
10 you and he assumed that the late deposit trend was
because of a banking issue. On and around June 12,
11 2006, Kevin Rice, your Loss Prevention Manager,
conducted and [sic] investigation in regards to missing
12 deposits in the amount of \$9,792.99 that occurred at
your restaurant from May 16-May 25. It was revealed in
13 this investigation that there were several Cash Policy
violations in [sic] which you did not prevent from
happening. Documents like the deposit log were not
14 kept up per standard and deposits were not consistently
being taken to the bank every day before open [sic].
It was determined that this was the cause of frequent
15 late postings of the funds and the frequent CDNs. You
failed to enforce Long John Silver's Cash Handling
16 policy in your restaurant. This ultimately resulted in
17 the amount of \$9,792.99 to be unaccounted for."

18 50. Plaintiff Ken Shirley is informed, believes, and
19 alleges that because less than 24 hours passed between the time
20 Plaintiff Amparo Lara and Plaintiff Ken Shirley were placed on
21 administrative leave pending an investigation into the cash
22 losses; placing him on administrative leave was a pretext and
23 that the real reason(s) for placing him on administration leave
24 and for terminating him were that:

- 25 a. LJS perceived and/or regarded Plaintiff Ken
26 Shirley to be at least temporarily disabled;
- 27 b. Cash handling discrepancies arose at Store #5245
28 during Plaintiff Ken Shirley's temporary disability leave, and

1 Mr. McGilbray and/or Mr. Rice failed and refused to perform
2 Plaintiff Ken Shirley's cash oversight duties during Plaintiff
3 Ken Shirley's temporary disability leave, as LJS was required and
4 agreed to do;

5 c. Because of McGilbray's and/or Mr. Rice's failure
6 and refusal to perform the cash oversight functions normally
7 assigned to Plaintiff Ken Shirley (but which were temporarily
8 assigned to them during Plaintiff Ken Shirley's disability leave)
9 that LJS suffered a much greater financial loss than it would
10 have been if Mr. McGilbray and/or Mr. Rice had performed the
11 duties temporarily assigned to them in a diligent, competent, and
12 professional manner;

13 d. Retaliation for Plaintiff Ken Shirley's
14 complaining about being held responsible for activities that took
15 place while he was on temporary disability leave; and to cover
16 Mr. McGilbray's negligent failures and refusals to act when given
17 multiple notices that the cash handling problem at Store #5245
18 existed during the period of time when it was Mr. McGilbray's
19 direct responsibility (and not Plaintiff Ken Shirley's) to
20 investigate the cash handling discrepancies at Store #5245 in
21 Porterville, California; and

22 e. Because Plaintiff Ken Shirley is over 40 years old
23 and LJS wanted to replace him with a younger less experienced
24 person that it could pay less.

25 51. Following Plaintiff Ken Shirley's termination, the
26 parent company, Yum Brands, sold its LJS division to one of its
27 franchisees, Apex Management Company. In recognition of
28 Plaintiff Ken Shirley's long-time superior performance and

1 knowledge of the business and this specific territory, the owner,
2 Tabbassum Mumtaz, sought out Plaintiff Ken Shirley and hired him
3 as its Director of Operations for the 23 California restaurants
4 Apex/Mr. Mumtaz had just purchased.

5 52. In effect, Plaintiff Ken Shirley now has his former
6 boss's job. Since Apex Management Company hired Plaintiff Ken
7 Shirley, he has continued to perform at his usual excellent
8 level.

9 Facts for Plaintiff Amparo Lara

10 53. Amparo Lara is a Hispanic female. LJS hired her on or
11 about December 5, 1996, as a cook for the LJS restaurant located
12 at 3200 South Mooney Boulevard, in Visalia, California. Because
13 of her superior work performance, she advanced through the ranks
14 until, on about December 9, 2004, her Area Coach, Plaintiff Ken
15 Shirley, promoted her to the position of Store Manager, assigning
16 her to the store located at 596 West Olive Avenue in Porterville,
17 California, where she worked until she was unlawfully terminated.

18 54. Plaintiff Amparo Lara performed her duties in a
19 diligent, competent and professional manner and always acted in
20 the best interest of her employer. In Plaintiff Amparo Lara's
21 first year as Manager of Store 5245, she turned the store around.
22 The year before Plaintiff Amparo Lara took over Store 5245 lost
23 approximately \$18,000.

24 55. In Plaintiff Amparo Lara's first year, Store 5245 made
25 a small profit. Further, Plaintiff Amparo Lara received at least
26 two written performance evaluations during her tenure as manager
27 of Store #5245. Plaintiff Amparo Lara believes that she was
28 rated as being "On Target" on both her written performance

1 evaluations.

2 56. Plaintiff Amparo Lara believes that many of the
3 managerial decisions regarding her employment, specifically
4 including but not limited to: her promotion to store manager,
5 direct supervisory oversight of the operation of the Porterville
6 store; supervisory oversight regarding the bank deposits at
7 issue, and possibly the decision to terminate her employment took
8 place in the City and County of Fresno, California.

9 57. On about January 15, 2006, store #5245 in Porterville
10 began having difficulties with the bank it was using for cash
11 deposits. After investigating, Plaintiff Amparo Lara and her
12 Supervisor, Ken Shirley, determined that this store should change
13 banks to one that would process the deposits in a way that was
14 compatible with LJS cash handling procedures.

15 58. On or about March 22, 2006, Plaintiff Amparo Lara and
16 her immediate supervisor, Ken Shirley, requested approval from
17 the corporate office to allow store #5245 to change banks. LJS
18 corporate had not yet approved the change of banks for store
19 #5245 by the time that Plaintiff Amparo Lara became ill in late
20 April 2006.

21 59. During the week of April 20, 2006, Plaintiff Amparo
22 Lara began feeling ill and had difficulty speaking. Plaintiff
23 Amparo Lara's doctor ordered her to take a week off from work to
24 rest and recover from her illness.

25 60. Plaintiff Amparo Lara's physician scheduled a follow-up
26 appointment for May 5, 2006, and told Plaintiff Amparo Lara that
27 if she were not better by her May 5, 2006 appointment, that she
28 would have to take additional time off to recover from her

1 illness. Plaintiff Amparo Lara immediately notified her
2 supervisor, Ken Shirley, and arranged to cover her
3 responsibilities at Store #5245 and to use her accrued vacation
4 time for the week off work.

5 61. Plaintiff Amparo Lara returned to work after her
6 initial time off due to illness and everything was fine. Ms.
7 Noemi Ledesma had handled the daily cash deposits properly, and
8 no major issues had arisen during Plaintiff Amparo Lara's
9 absence.

10 62. In light of the above warning by Plaintiff Amparo
11 Lara's doctor, it became apparent that Plaintiff Amparo Lara's
12 doctor might require her to take additional time off work
13 starting at about the time of her follow-up appointment scheduled
14 for May 5, 2006. Plaintiff Amparo Lara notified her supervisor,
15 Plaintiff Ken Shirley of this likelihood. Therefore, on or about
16 May 1, 2006, Plaintiff Ken Shirley, called a meeting to prepare
17 the Team Leaders of Store #5245 for Plaintiff Amparo Lara's
18 anticipated time off due to her illness.

19 63. Ms. Ledesma had worked at Store #5245 prior to
20 Plaintiff Amparo Lara's arrival. During that time, Ms. Ledesma
21 had covered for her previous manager. Plaintiff Amparo Lara
22 believes that during that time, Ms. Ledesma had done a good job
23 of covering for her then-manager. Because Ms. Ledesma was
24 attending school in the evenings, she had been regularly
25 scheduled to work mornings. Ms. Ledesma regularly handled the
26 bank deposits, which were made each morning. Therefore, Ms.
27 Ledesma had significant experience with preparing the bank
28 deposits and the associated paperwork and Ms. Ledesma had shown

1 herself to be competent and trustworthy with the cash handling
2 procedures.

3 64. During her time off work during her illness, Plaintiff
4 Amparo Lara took it upon herself to communicate with Ms. Ledesma
5 in an attempt to ensure that Store #5245 was managed properly in
6 Plaintiff Amparo Lara's absence. Every time Plaintiff Amparo
7 Lara spoke with Ms. Ledesma, Ms. Ledesma had questions but
8 reasonably appeared to have things under control in Plaintiff
9 Amparo Lara's absence.

10 65. After Plaintiff Ken Shirley injured his knee while off
11 duty, which required surgery that had previously been scheduled
12 for the same time as Plaintiff Amparo Lara's second illness-
13 related time off (May 5-June 13, 2006).

14 66. Plaintiff Amparo Lara believes that Plaintiff Ken
15 Shirley had assigned his oversight responsibilities to Mike
16 Olson, General Manager of the Rosedale Highway store in
17 Bakersfield and Robert Alcala, the General Manager of the store
18 at Cedar and Ventura in Fresno. Both were very experienced
19 managers, more than capable of handling any question or
20 difficulty that Ms. Ledesma might have encountered during
21 Plaintiff Amparo Lara's approximately five weeks off work.

22 67. Further, Plaintiff Ken Shirley's supervisor, Darren
23 McGilbray, was aware of and had approved all of the above
24 arrangements and decisions regarding Plaintiff Amparo Lara's
25 second absence due to illness and Mr. McGilbray was aware of and
26 had approved all of the above arrangements and decisions
27 regarding Plaintiff Ken Shirley's medically related absence.

28 68. Beginning on about May 16, 2006, eleven days after

1 Plaintiff Amparo Lara and her Immediate Supervisor, Ken Shirley
2 were both off work, bank deposits at Store #5245 started missing.

3 69. The first missing bank deposit was from May 16, 2006.
4 Plaintiff Amparo Lara believes that Company policy required the
5 Cash Handling Department to send an e-mail to the Loss Prevention
6 Department, the Area Coach, and the Region Coach of any store
7 with a bank deposit that could not be verified within the time
8 allotted by Company policy. Plaintiff Amparo Lara is informed,
9 believes, and alleges that the Cash Handling Department began
10 sending e-mails regarding the missing deposits for Store #5245 on
11 or about May 17, 2006.

12 70. Plaintiff Amparo Lara is informed, believes, and
13 alleges that Plaintiff Ken Shirley began forwarding the e-mails
14 from the Cash Handling Department to Ms. Ledesma on approximately
15 May 31, 2006. Plaintiff Amparo Lara is informed, believes, and
16 alleges that, on or about May 31, Plaintiff Ken Shirley began
17 telephoning Ms. Ledesma and inquiring about the missing bank
18 deposits. Apparently, Ken Shirley was initially satisfied with
19 Ms. Ledesma's initial explanation regarding the missing bank
20 deposits.

21 71. On or about June 12, 2006, in one of their twice-daily
22 telephone calls, Ms. Ledesma first told Plaintiff Amparo Lara
23 that bank deposits were missing and that Ms. Ledesma had been
24 receiving e-mails forwarded from Plaintiff Ken Shirley from the
25 Cash Handling Department to that effect.

26 72. At that time, Ms. Ledesma was aware of approximately
27 seven missing bank deposits. However, this was the first time
28 that Plaintiff Amparo Lara became aware of the missing bank

1 deposits, as Plaintiff Amparo Lara did not receive any e-mails
2 while she was off because she did not have a computer at home.

3 73. When Plaintiff Amparo Lara became aware of the missing
4 bank deposits, she immediately insisted upon returning to work
5 the next day despite her doctor's refusal to release her. Left
6 with no choice, Plaintiff Ken Shirley agreed to meet with
7 Plaintiff Amparo Lara at Store #5245 on June 13, 2006.

8 74. On her first day back to work, on or about June 13,
9 2006, Plaintiff Amparo Lara met with Plaintiff Ken Shirley at
10 Store #5245 in an effort to resolve the mystery of the missing
11 bank deposits. After being initially unable to locate the
12 missing deposits, Plaintiff Amparo Lara telephoned Ms. Ledesma
13 and requested that Ms. Ledesma meet Plaintiffs at Store #5245.

14 75. When Ms. Ledesma arrived at Store #5245, it was
15 apparent that Ms. Ledesma had not been: (1) properly filling out
16 the Daily Deposit Log; (2) properly filling out the Daily Red
17 Book; (3) storing the original bank deposit slips in the proper
18 location within Store #5245; and (4) sending copies of the bank
19 deposit slips to the corporate Cash Handling Department.

20 76. On or about June 14, 2006, Plaintiff Amparo Lara and
21 Plaintiff Ken Shirley went to the bank to investigate whether
22 they had any record of receiving deposits on the seven days in
23 question. The bank did not.

24 77. After returning from the bank, Plaintiff Amparo Lara
25 and Plaintiff Ken Shirley began interviewing the four Team
26 Leaders who were responsible for running that store in Plaintiff
27 Amparo Lara's absence. It quickly became apparent that Ms.
28 Ledesma had assumed full responsibility for all bank deposits

1 during Plaintiff Amparo Lara's absence. Ms. Ledesma had
2 instructed the other two day time Team Leaders not to worry about
3 the bank deposits, saying she would take care of them or words to
4 that effect.

5 78. Substantial evidence developed that Ms. Ledesma had
6 embezzled the cash instead of depositing it into the appropriate
7 bank account, including that Ms. Ledesma had insisted on assuming
8 control of the bank deposits, the condition of the Daily Deposit
9 Log; the condition of the Daily Red Book; and the condition of
10 the original bank deposit slips coupled with the information
11 obtained in the interviews of the other Team Leaders.

12 79. Later that same day, on or about June 14, 2006, the
13 Loss Prevention Manager, Kevin Rice, visited Store #5245 and met
14 with Plaintiff Amparo Lara and Plaintiff Ken Shirley. Plaintiff
15 Ken Shirley showed Mr. Rice what he and Plaintiff Amparo Lara
16 were doing to resolve the situation. Mr. Rice was comfortable
17 with their efforts and left the task to Plaintiff Ken Shirley and
18 Plaintiff Amparo Lara for the moment.

19 80. After the meeting with Mr. Rice, Plaintiffs
20 communicated almost daily with each other regarding the missing
21 bank deposits. However, Amparo Lara heard nothing more from
22 anyone from the corporate office or the Loss Prevention
23 Department about this issue.

24 81. Plaintiff Amparo Lara is informed, believes, and
25 alleges that on or about June 26, 2006, Mr. Rice and Plaintiff
26 Ken Shirley placed Ms. Ledesma on administrative leave.
27 Plaintiff Amparo Lara believes that Ms. Ledesma was terminated on
28 or about July 10, 2006.

1 82. On or about July 31, 2006, Region Coach/Regional V.P.,
2 Darren McGilbray and Human Resources Manager, Ipo Hoops, placed
3 Plaintiff Amparo Lara on administrative leave, pending completion
4 of the investigation.

5 83. On or about August 1, 2006, Plaintiff Amparo Lara
6 received a telephone call from Mrs. Hoops requesting that
7 Plaintiff Amparo Lara meet Mrs. Hoops and Mr. McGilbray at a
8 local restaurant. When Plaintiff Amparo Lara arrived, Mrs. Hoops
9 began crying. Both Mrs. Hoops and Mr. McGilbray stated that
10 Plaintiff Amparo Lara had done a good job and that they wished
11 they did not have to fire her, but that they said they had no
12 choice in the matter.

13 84. The year before Plaintiff Amparo Lara took over the
14 Porterville store, it lost approximately \$18,000. In the first
15 year after Plaintiff Amparo Lara took over the Porterville store,
16 it made money. Further, at the time of her termination,
17 Plaintiff Amparo Lara was on track to make the Porterville store
18 even more profitable.

19 85. Additionally, the Porterville store was still having
20 difficulties more than a year after Plaintiff Amparo Lara's
21 termination when Apex Management Company bought the local LJS
22 stores from Yum Brands. Mike Olson, the Apex District Manager
23 for the district, including the Porterville store, recognized the
24 difficulties the Porterville store was having and heard the
25 stories of Plaintiff Amparo Lara turning that store around;
26 therefore, Mr. Olsen re-hired Plaintiff Amparo Lara and returned
27 her to her former position as manager of the Porterville store,
28 where she continues to excel.

1 IV. Orders Re Amendments To Pleadings.

2 1. Defendant has moved to dismiss. Plaintiffs have no
3 objection to Defendant's motion to dismiss Darren McGilbray,
4 therefore Darren McGilbray is ORDERED DISMISSED as a party from
5 this lawsuit by this scheduling order.

6 2. Plaintiffs do not intend to add any additional parties
7 at this time. However, discovery is just beginning and
8 additional individual employees of defendants may be added as
9 parties to this action when their identity is revealed through
10 discovery.

11 V. Factual Summary.

12 A. Admitted Facts Which Are Deemed Proven Without Further
13 Proceedings.

14 1. Plaintiffs are individual residents of the Eastern
15 District of California, Fresno Division.

16 2. Long John Silver's Inc., is a corporation with its
17 principal place of business in the State of Kentucky and is
18 incorporated in a state other than California.

19 3. The Defendant has invoked the diversity
20 jurisdiction of the Court.

21 4. Ken Shirley was employed by Long John Silver's in
22 various capacities over the period of time alleged in the
23 complaint.

24 5. Plaintiff, Amparo Lara, was also employed by Long
25 John Silver's at various times alleged in the complaint.

26 6. Both Plaintiffs were terminated from their
27 employment with Long John Silver's August 1, 2006.

28 7. At the time of termination. Mr. Shirley was an

1 Area Coach for Long John Silver's.

2 8. At the time of her termination, Ms. Lara was a
3 restaurant manager at the Porterville Long John Silver's
4 restaurant.

5 B. Contested Facts.

6 1. Defendant denies the allegations of Plaintiffs.
7 LJS terminated the employment relationship with Plaintiffs as a
8 result of cash handling problems that arose at the Porterville
9 restaurant, which Plaintiff Lara managed. Cash handling is
10 critical to LJS' business, a matter these Plaintiffs were well
11 aware of. Cash handling concerns had been an on-going, unabated
12 issue at the Porterville restaurant for many months. Plaintiff
13 Lara, the restaurant manager, and her supervisor, Plaintiff
14 Shirley, had direct responsibility for cash handling at the
15 Porterville restaurant. In particular, Plaintiff Shirley had
16 responsibility for training and overseeing that restaurant
17 (including its cash handling processes) and its employees and, in
18 particular, Plaintiff Lara, who was his direct report. In short,
19 the Plaintiffs jointly bore responsibility for the Porterville
20 restaurant's cash handling problems, and thus these terminations
21 followed. These employment terminations occurred in accordance
22 with company policy and practice, applied across the board, and
23 the terminations took place after lengthy investigation and were
24 in no way related to any leave or other time off that Plaintiffs
25 may have taken in 2006. In short, the terminations were not
26 motivated by illegal discriminatory motive.

27 ///

28 ///

1 VI. Legal Issues.

2 A. Uncontested.

3 1. Jurisdiction exists under 28 U.S.C. § 1332, based
4 on the diverse citizenship of the parties and the amount in
5 controversy. The supplemental jurisdiction of the Court is
6 invoked under 28 U.S.C. § 1337.

7 2. Venue is proper under 28 U.S.C. § 1331.

8 3. The parties agree that the substantive law of the
9 State of California provides the rule of decision in this
10 diversity action.

11 4. The parties are not in agreement as to whether an
12 arbitration agreement between them compels arbitration as a
13 matter of law.

14 B. Contested.

15 Plaintiff asserts the following claims:

16 1. This complaint contains a first cause of action
17 for age discrimination in violation of the California Fair
18 Employment and Housing Act, California Government Code §§ 12900,
19 12921, 12926, 12940, 12941, and 12965 as to Defendant Long John
20 Silver's.

21 2. A second cause of action for gender, race, color,
22 national origin discrimination in violation of the California
23 Fair Employment and Housing Act, California Government Code
24 §§ 12900, 12921, 12926, 12940, 12941, and 12965 as to Defendant
25 Long John Silver's.

26 3. A third cause of action for disability
27 discrimination in violation of the California Fair Employment and
28 Housing Act, California Government Code §§ 12900, 12921, 12926,

1 12940, 12941, and 12965, as to all defendants.

2 4. A fourth cause of action for violation of the
3 California Family Rights Act portion of the California Fair
4 Employment and Housing Act, California Government Code §§ 12900,
5 12921, 12926, 12940, 12941, 12945, 12945.2 and 12965, as to all
6 defendants.

7 5. A fifth cause of action for failure to engage in
8 interactive process portion of the California Fair Employment and
9 Housing Act, California Government Code §§ 12900, 12921, 12926,
10 12940, 12941, and 12965, as to Defendant Long John Silvers.

11 6. A sixth cause of action for failure to provide
12 reasonable accommodations in violation of the California Fair
13 Employment and Housing Act, California Government Code §§ 12900,
14 12921, 12926, 12940, 12941, and 12965, as to Defendant Long John
15 Silver's.

16 7. A seventh cause of action for racial/color/
17 gender/disability/age harassment in violation of the California
18 Fair Employment and Housing Act, California Government Code
19 §§ 12900, 12921, 12926, 12940, 12941, and 12965, as to all
20 defendants.

21 8. An eighth cause of action for failure to take all
22 reasonable steps to prevent discrimination and retaliation in
23 violation of the California Fair Employment and Housing Act,
24 California Government Code §§ 12900, 12921, 12926, 12940, 12941,
25 and 12965, as to defendant Long John Silver's.

26 9. A ninth cause of action for retaliation for
27 complaints and protestation of discrimination in violation of the
28 California Fair Employment and Housing Act, California Government

1 Code §§ 12900, 12921, 12926, 12940, 12941, and 12965, as to
2 defendant Long John Silver's.

3 10. A tenth cause of action for retaliation under the
4 California Family Rights Act portion of the California Fair
5 Employment and Housing Act, California Government Code §§ 12900,
6 12921, 12926, 12940, 12941, and 12965, as to defendant Long John
7 Silver's.

8 Defendant's

9 1. Defendant denies all the charging allegations by
10 Plaintiffs. Defendant specifically notes that Mr. McGilbray has
11 never been served with this lawsuit, to Defendant LJS's
12 knowledge. Accordingly, the only known Defendant that is a
13 served party is LJS, which is represented by Ms. Johnson and Mr.
14 Spallas. Additionally, Defendant notes that Plaintiffs are
15 subject to mandatory arbitration, and Defendant will file a
16 motion to compel arbitration. Defendant asserts that it acted in
17 good faith, without malice or intentional discrimination at all
18 times, and that certain of Plaintiff's claims are subject to
19 dismissal for failure to state a claim upon which relief may be
20 granted (for example, Plaintiff's harassment and retaliation
21 claims). Defendant further asserts that Plaintiffs failed to
22 mitigate their damages.

23 VII. Consent to Magistrate Judge Jurisdiction.

24 1. The parties have not consented to transfer the
25 case to the Magistrate Judge for all purposes, including trial.

26 VIII. Corporate Identification Statement.

27 1. Any nongovernmental corporate party to any action in
28 this court shall file a statement identifying all its parent

1 corporations and listing any entity that owns 10% or more of the
2 party's equity securities. A party shall file the statement with
3 its initial pleading filed in this court and shall supplement the
4 statement within a reasonable time of any change in the
5 information.

6 IX. Discovery Plan and Cut-Off Date.

7 1. The parties agree that the disclosures required under
8 Fed. R. Civ. P. 26(a) will be provided to each other no later
9 than 28 days after the Scheduling Conference, or March 4, 2009.

10 2. No changes are currently proposed as to limitations on
11 discovery imposed under Fed. R. Civ. P. 30, 31, and/or 33.

12 3. The parties believe that discovery will be needed on
13 the nature and extent of plaintiffs' damages. Discovery will
14 also be needed concerning the facts that gave rise to the lawsuit
15 including, but not limited to, testimony from employees of
16 defendants who have percipient knowledge as to the policy and
17 procedure of Long John Silver's banking and cash handling
18 procedures, and supervision regarding these policies.

19 4. The parties are ordered to complete all non-expert
20 discovery on or before March 5, 2010.

21 5. The parties are directed to disclose all expert
22 witnesses, in writing, on or before December 1, 2009. Any
23 rebuttal or supplemental expert disclosures will be made on or
24 before January 15, 2010. The parties will comply with the
25 provisions of Federal Rule of Civil Procedure 26(a)(2) regarding
26 their expert designations. Local Rule 16-240(a) notwithstanding,
27 the written designation of experts shall be made pursuant to F.
28 R. Civ. P. Rule 26(a)(2), (A) and (B) and shall include all

1 information required thereunder. Failure to designate experts in
2 compliance with this order may result in the Court excluding the
3 testimony or other evidence offered through such experts that are
4 not disclosed pursuant to this order.

5 6. The parties are ordered to complete all discovery,
6 including experts, on or before March 5, 2010.

7 7. The provisions of F. R. Civ. P. 26(b)(4) shall
8 apply to all discovery relating to experts and their opinions.
9 Experts may be fully prepared to be examined on all subjects and
10 opinions included in the designation. Failure to comply will
11 result in the imposition of sanctions.

12 X. Pre-Trial Motion Schedule.

13 1. All Non-Dispositive Pre-Trial Motions, including any
14 discovery motions, will be filed on or before March 19, 2010, and
15 heard on April 23, 2010, at 9:00 a.m. before Magistrate Judge
16 Sandra M. Snyder in Courtroom 7.

17 2. In scheduling such motions, the Magistrate
18 Judge may grant applications for an order shortening time
19 pursuant to Local Rule 142(d). However, if counsel does not
20 obtain an order shortening time, the notice of motion must comply
21 with Local Rule 251.

22 3. All Dispositive Pre-Trial Motions are to be
23 filed no later than April 5, 2010. Plaintiffs shall have thirty
24 (30) days to respond, through and including May 5, 2009, and
25 those motions will be heard on June 7, 2010, at 10:00 a.m. before
26 the Honorable Oliver W. Wanger, United States District Judge, in
27 Courtroom 3, 7th Floor. In scheduling such motions, counsel
28 shall comply with Local Rule 230.

1 XI. Pre-Trial Conference Date.

2 1. July 12, 2010, at 11:00 a.m. in Courtroom 3, 7th Floor,
3 before the Honorable Oliver W. Wanger, United States District
4 Judge.

5 2. The parties are ordered to file a Joint Pre-
6 Trial Statement pursuant to Local Rule 281(a)(2).

7 3. Counsel's attention is directed to Rules 281
8 and 282 of the Local Rules of Practice for the Eastern District
9 of California, as to the obligations of counsel in preparing for
10 the pre-trial conference. The Court will insist upon strict
11 compliance with those rules.

12 XII. Motions - Hard Copy.

13 1. The parties shall submit one (1) courtesy paper copy to
14 the Court of any motions filed that exceed ten pages and any
15 motions that have exhibits attached. Exhibits shall be marked
16 with protruding numbered or lettered tabs so that the Court can
17 easily identify such exhibits.

18 XIII. Trial Date.

19 1. August 24, 2010, at the hour of 9:00 a.m. in Courtroom
20 3, 7th Floor, before the Honorable Oliver W. Wanger, United
21 States District Judge.

22 2. This is a jury trial.

23 3. Counsels' Estimate Of Trial Time:

24 a. 7-10 days.

25 4. Counsels' attention is directed to Local Rules
26 of Practice for the Eastern District of California, Rule 285.

27 XIV. Settlement Conference.

28 1. A Settlement Conference is scheduled for March 17,

1 2010, at 10:00 a.m. in Courtroom 7 before the Honorable Sandra M.
2 Snyder, United States Magistrate Judge.

3 2. Unless otherwise permitted in advance by the
4 Court, the attorneys who will try the case shall appear at the
5 Settlement Conference with the parties and the person or persons
6 having full authority to negotiate and settle the case on any
7 terms at the conference.

8 3. Permission for a party [not attorney] to attend
9 by telephone may be granted upon request, by letter, with a copy
10 to the other parties, if the party [not attorney] lives and works
11 outside the Eastern District of California, and attendance in
12 person would constitute a hardship. If telephone attendance is
13 allowed, the party must be immediately available throughout the
14 conference until excused regardless of time zone differences.
15 Any other special arrangements desired in cases where settlement
16 authority rests with a governing body, shall also be proposed in
17 advance by letter copied to all other parties.

18 4. Confidential Settlement Conference Statement.
19 At least five (5) days prior to the Settlement Conference the
20 parties shall submit, directly to the Magistrate Judge's
21 chambers, a confidential settlement conference statement. The
22 statement should not be filed with the Clerk of the Court nor
23 served on any other party. Each statement shall be clearly
24 marked "confidential" with the date and time of the Settlement
25 Conference indicated prominently thereon. Counsel are urged to
26 request the return of their statements if settlement is not
27 achieved and if such a request is not made the Court will dispose
28 of the statement.

1 5. The Confidential Settlement Conference
2 Statement shall include the following:

3 a. A brief statement of the facts of the
4 case.
5 b. A brief statement of the claims and
6 defenses, i.e., statutory or other grounds upon which the claims
7 are founded; a forthright evaluation of the parties' likelihood
8 of prevailing on the claims and defenses; and a description of
9 the major issues in dispute.

10 c. A summary of the proceedings to date.
11 d. An estimate of the cost and time to be
12 expended for further discovery, pre-trial and trial.

13 e. The relief sought.
14 f. The parties' position on settlement,
15 including present demands and offers and a history of past
16 settlement discussions, offers and demands.

17 XV. Request For Bifurcation, Appointment Of Special Master,
18 Or Other Techniques To Shorten Trial.

19 1. Any requests shall be addressed by non-dispositive
20 motion. In the event punitive damages are sought, the amount of
21 punitive damages, if any, shall be tried in a second phase in a
22 continuous trial before the same jury after liability and the
23 entitlement to punitive damages has been established in the first
24 phase.

25 XVI. Related Matters Pending.

26 1. There are no related matters.

27 XVII. Compliance With Federal Procedure.

28 1. The Court requires compliance with the Federal

1 Rules of Civil Procedure and the Local Rules of Practice for the
2 Eastern District of California. To aid the court in the
3 efficient administration of this case, all counsel are directed
4 to familiarize themselves with the Federal Rules of Civil
5 Procedure and the Local Rules of Practice of the Eastern District
6 of California, and keep abreast of any amendments thereto.

7 XVIII. Effect Of This Order.

8 1. The foregoing order represents the best
9 estimate of the court and counsel as to the agenda most suitable
10 to bring this case to resolution. The trial date reserved is
11 specifically reserved for this case. If the parties determine at
12 any time that the schedule outlined in this order cannot be met,
13 counsel are ordered to notify the court immediately of that fact
14 so that adjustments may be made, either by stipulation or by
15 subsequent scheduling conference.

16 2. Stipulations extending the deadlines contained
17 herein will not be considered unless they are accompanied by
18 affidavits or declarations, and where appropriate attached
19 exhibits, which establish good cause for granting the relief
20 requested.

21 3. Failure to comply with this order may result in
22 the imposition of sanctions.

23

24

25 IT IS SO ORDERED.

26 Dated: February 5, 2009

/s/ Oliver W. Wanger
27 UNITED STATES DISTRICT JUDGE

28