

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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M.C.A.D. &  
PHYLLIS MIRABELLO,  
Complainants

v.

DOCKET NO. 02-BEM-03496

NINETY-NINE RESTAURANT &  
PUB,  
Respondent

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Appearances:

John W. Davis, Esquire for Phyllis Mirabello  
Leonard J. Kesten, Esquire & Deborah I. Ecker, Esquire  
For Ninety-Nine Restaurant & Pub

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 17, 2002, Complainant Phyllis Mirabello filed a complaint with this Commission charging Respondent Ninety-Nine Restaurant & Pub with discrimination on the basis of her age and her perceived handicap, in violation of M.G.L.c.151B§4. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified to public hearing. A public hearing was held before me on December 4 and 5, 2006. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

## II. FINDINGS OF FACT

1. Complainant Phyllis Mirabello was born on May 8, 1949. She resides in Somerville, Massachusetts.

2. Respondent operates a Ninety-Nine Restaurant located in Somerville, Massachusetts, that opened in December 2001.

3. Complainant was hired by Respondent to work as a waitress at the Somerville location on November 20, 2001. At the time of her hire, Complainant was 51 years old and was an experienced waitress.

4. Joan Baldassari was the General Managing Partner of the Somerville Restaurant and is responsible for the financial success of the restaurant and oversees its daily operations. (Tr. 122) Baldassari interviewed and hired Complainant. She testified that she hired Complainant because of her great personality and her waitressing experience. (Tr. 125)

5. By all accounts, Complainant was friendly and very well liked by customers. She testified that she got along well with Baldassari. I credit her testimony.

6. Complainant testified that she has suffered from migraine headaches for over 20 years. When she gets a migraine, she feels nauseous and sometimes vomits; she cannot tolerate light or noise; she has to lie on a bed in the dark with a cold compress on her head. Complainant testifies that she is unable to work as a waitress when she has a migraine headache, unless she takes a medication called Fiorinal, which she takes when she feels an "aura," and knows a headache is coming on.

7. According to Complainant, other than relieving the symptoms of a migraine headache, Fiorinal has no side effects and she is able to work after taking the medication. (Tr. 32-33)

8. In January 2002, Complainant fell down the stairs at her home and injured her ankle. She was out of work from January 19, 2002 to February 14, 2002.

9. On March 6, 2002, an assistant manager named Frank Cancelliere wrote a document entitled "Pep Talk"<sup>1</sup> which stated:

Phyllis has decided that she will not be drinking any longer. It's effecting (sic) her work and she's aware that her job here is based on her ability to serve the guests efficiently. Her drinking will not be effecting (sic) her work any longer. Have seen much improvement since she has made this decision.

(Exh. R-4).

Complainant acknowledged having had such a discussion about drinking with Cancelliere, who did not testify at the public hearing. (Tr. 81-82) There was no other testimony regarding the events leading up to the "Pep Talk."

10. David Logue has worked for the Ninety-Nine Restaurant for eight years. He currently works at Respondent's Woburn location. Logue worked as an Assistant Manager at the Respondent's Somerville location during Complainant's tenure. He testified that Complainant had a friendly personality, was terrific with customers, but was somewhat less efficient with respect to company policy.

11. Logue testified that on Friday, March 15, 2002, a server approached him and told him that Complainant had dropped a tray of drinks at one of the tables. He went to the table and helped clean up, apologized to the guests, and then spoke with Complainant, who appeared slightly upset.

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<sup>1</sup> Described by Baldassari as a tool used by Respondent to discuss issues with employees. It is not considered disciplinary in nature.

12. Logue testified that approximately 30 minutes later, a server approached him and told him that Complainant had dropped another tray of drinks at a table. He stated that once again this created a mess, and he decided to take Complainant off the floor and told her to go home for the evening. (Tr.203-4)

13. Logue testified that Complainant was visibly upset and apologized; she told Logue that she was suffering from a migraine headaches and had taken Fiorinal. He testified that, at the time, he knew nothing of the effects of Fiorinal, other than what Complainant had told him. Logue wrote in Respondent's log that night, "Phyllis was a mess tonight-on Fiorinal for migraines, she might have been waiting tables on Mars she was that out of it. Dropped not one but two trays of drinks on two different parties." (Exh. R-4) I credit Logue's testimony in its entirety. I believe that Complainant initiated the discussion with Logue about Fiorinal, in order to explain her conduct.

14. The following day, Saturday, March 16, 2002, Logue noted, "Phyllis still appears to be in her own little world." Logue arranged for Complainant to meet with Baldassari on Sunday, March 17, 2002, to discuss this issue.

15. On Sunday, March 17, 2002, Complainant met with Baldassari at 3:00 p.m., before beginning her shift. At the meeting, Baldassari told Complainant that she could not come to work under the influence of medication. She told Complainant that, in the future, if she got a migraine she was to call in sick and should she get a migraine at work, she was to tell Respondent and she would be sent home for the day. Complainant assured Baldassari that she had not taken any Fiorinal that day.

16. Complainant testified that on March 17, 2002, the Restaurant was very busy and understaffed, and she begged for assistance with waiting tables and taking orders. At

7:30 that same night, Complainant dropped a tray of drinks and food on a customer. She stated that it was because the restaurant was so busy and understaffed that she dropped the tray, but she also acknowledged that she took Fiorinal that day.

17. Baldassari testified that on March 17, after dealing with the customer on whom Complainant had dropped the drink, she observed that Complainant's awareness of her surroundings had diminished and that she had become groggy and glassy-eyed. Baldassari testified that Complainant appeared very disoriented and did not seem to understand what was happening. Baldassari directed Complainant to speak with her in the restaurant's back room. Baldassari informed Complainant that the situation had become unacceptable as Complainant had become a danger to herself and the customers. She then terminated Complainant's employment. I credit Baldassari's testimony.

18. Complainant acknowledged dropping trays of food and drinks on customers; however she denied ever telling anyone at Respondent that she took Fiorinal. She stated that Respondent learned about the Fiorinal because at one point a manager saw the medication in her pocket and asked her about it. I do not credit Complainant's testimony and believe she told her managers that it was Fiorinal that caused her to drop the trays of drinks. I find it implausible that her managers would invent the conversation about Fiorinal and I find that Complainant told Respondent she was taking the drug. I believe that, given her history of drinking, Complainant may have been under the influence of alcohol at the time of her termination, but she did not state this to Respondent and Respondent never asserted that this was the reason for her poor performance or her termination. (Exh. R-4)

19. Baldassari testified credibly although she knew Complainant suffered from migraine headaches, she did not know about Complainant's use of Fiorinal until the weekend of her termination, and that all of her information about Fiorinal and its effect on Complainant was provided by Complainant.<sup>2</sup> I credit her testimony.

20. Respondent replaced Complainant with a woman who was approximately 20 years younger than Complainant.

21. Complainant offered into evidence an evaluation dated February 21, 2005 by Bernice Kelly, Psy.D., R.N. stating, in essence, that Complainant was able to perform her daily activities after ingesting one tablet of a generic form of Fiorinal. (Exh. C-6) I assign little weight to this evaluation. Notwithstanding the obvious difficulties with this test, (i.e. that it occurred nearly three years after Complainant's termination, that it involved testing of Complainant's mental acuity and not the motor skills required for waitressing, and involved an unknown dose of medication) I find the test to be irrelevant to this case, in view of my findings that Complainant told her supervisors that the Fiorinal caused her symptoms and resulted in her accidents on the job. Whether true or not, her supervisors believed her and based their actions on what Complainant had told them regarding her performance problems.

### III. CONCLUSIONS OF LAW

#### A. AGE DISCRIMINATION

M.G.L. c. 151B, sec. 4(1B) makes it unlawful to discriminate in employment on the basis of age. The statute protects persons of age forty and over. In order to establish a

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<sup>2</sup> Complainant provided no medical evidence whatsoever about the properties, approved uses and possible side effects of Fiorinal.

prima facie case of employment discrimination, Complainant must demonstrate that she is a member of a protected class who was adequately performing the responsibilities of her position, was terminated, and was replaced by someone substantially younger. See Knigh t v. Avon Products, 438 Mass 413 (2003) (Complainant must show she was replaced by someone at least five years younger or present other evidence that the termination occurred under circumstances that would raise a reasonable inference of unlawful age discrimination); Abramian v. President and Fellows of Harvard College, 432 Mass 107 (2000); Murphy v. Pub Ventures, 15 MDLR 1098, 110-11 (1993).

Complainant is a member of a protected class in that she was fifty-one years old at the time of her termination. She was replaced by someone 20 years younger. However, Complainant has failed to establish that she was satisfactorily performing her job. In the days preceding her termination, she had dropped several trays of drinks and food on customers, and appeared “out of it,” and “unaware of her surroundings.” I credit Respondent’s assertion that she was a danger to herself and to customers and was counseled to remain at home if she was suffering from a migraine for which she required Fiorinal. I conclude that she was terminated for that reason, as suggested by the credible testimony of her manager.<sup>3</sup> Therefore, I conclude that Complainant has failed to establish a prima facie case of age discrimination.

#### B. HANDICAP DISCRIMINATION

In order to establish a prima facie case of unlawful employment discrimination on the basis of handicap under G. L. c. 151B, s. 4 (16), Complainant must present credible evidence that (1) she is handicapped within the meaning of the statute; (2) she is

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<sup>3</sup> Notably, Complainant was hired at the age of 51 by the same manager who terminated her employment four months later, making it highly implausible that the manager would harbor age animus.

qualified to perform the essential functions of the job with or without reasonable accommodation; (3) she was terminated or otherwise subject to an adverse action by her employer, and (4) the position she had occupied remained open and the employer sought to fill it. Dartt v. Browning-Ferris Industries, Inc. 427 Mass 1 (1998); Massachusetts General Laws, Chapter 151B, s. 1(17) defines "handicapped person" as one who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such impairment. The Complainant in this case gets migraine headaches for which she takes the medication Fiorinal. These headaches cause nausea and vomiting and require Complainant to lie down in a dark room. The Respondent became aware of her use of this medication only after Complainant dropped several trays of food and drinks over a two-day period and appeared to be "out of it." Complainant explained to her managers that her condition was due to her migraine medication. Respondent told Complainant that if Fiorinal caused her to be impaired, she should not come to work after taking the medication. When Complainant appeared at work in the same impaired condition on March 17, 2002, Respondent terminated her employment. This was after Respondent had been assured that Complainant had not taken her medication that day and her subsequent admission to her manager that she had in fact taken Fiorinal. Complainant did not inform Respondent that she had been drinking in the days leading up to her termination and Respondent did not raise this as a reason for her termination.

Complainant did not assert that she was a qualified handicapped individual, who was entitled to a reasonable accommodation. She did assert that she was terminated

because Respondent perceived her to be handicapped.<sup>4</sup> She also asserted that she was not impaired on the day of her termination; but, rather she was under an unusual amount of stress because the restaurant was understaffed and very busy on that day.<sup>5</sup> But she also admitted to taking Fiorinal on that day and I find it much more likely that she was impaired from the medication. Complainant testified that she is capable of performing the essential functions of her job, even after having taken her medication. In light of the facts proving otherwise, I do not find Complainant's testimony to be credible. I did find credible the testimony of Complainant's managers, who relied on Complainant's word that her impaired condition was caused by her medication. Having taken at face value Complainant's statements that her medication was causing her to be unable to successfully perform her job and making her a danger to herself and her customers, her manager first offered Complainant a solution; to call out sick or leave work if she needed to take her medication and Respondent would find someone else to take her shift.<sup>6</sup> After receiving Complainant's assurances that she had not taken any medication on the day of her termination, Complainant was permitted to begin her shift. She again dropped a tray and appeared as though "she did not know what was going on." Contrary to Complainant's assertion, Respondent did not draw conclusions about Complainant's medical condition based on a perceived handicap. Respondent's perception that Complainant was impaired by her medication and unable to perform the essential

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<sup>4</sup> It is not clear whether Complainant contends that she was perceived to be impaired because of her migraine headaches or the effects of her medication.

<sup>5</sup> Complainant offered into evidence the report of a health professional who purportedly tested her skills both before and after taking the generic equivalent of Fiorinal and finding that the medication did not affect Complainant's performance. Putting aside that this testing was administered long after the events in this case, this report sheds no light on this matter, as I have found that Complainant told Respondent that the Fiorinal impaired her.

<sup>6</sup> If Complainant had established an actual handicap, I find this would have been a reasonable accommodation.

functions of her job was borne out by her accidents on the job and does not constitute a perception by Respondent that she was handicapped within the meaning of the statute. Respondent relied on Complainant's assertion that she had not taken Fiorinal on her final day of work and only after another accident, found out she had lied. Respondent relied on Complainant's assertion that the medication caused her to be unable to perform the essential functions of the job and its own observations in this regard. I find that Respondent was justified in terminating Complainant after she lied about not taking medication and caused another incident in the restaurant.

It is a fundamental requirement of any job that employees not engage in destructive behavior, and not endanger the health or safety of other employees. Wilber v. Brady, 780 F. Supp. 837, 840(D.D.C.1992). Mazzarella v. U.S.Postal Service, 849 F. Supp. 89 (D.Mass. 1994). Here, Complainant engaged in conduct that was destructive and dangerous. Respondent's decision to terminate Complainant's employment was based on her inability to perform her job at the time of her termination and the fact that she lied about taking medications and came to work impaired. Complainant has failed to establish a prima facie case of handicap discrimination under M. G. L. c. 151B, s. 4(16). Therefore, I conclude that this matter must be dismissed.

IV. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that this matter be dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 17th day of April, 2007

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JUDITH E. KAPLAN  
Hearing Officer