

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
NELIA GRILO,

Complainants

v.

DOCKET NO. 11-BEM-01320

CAFÉ RESTAURANTE ALGARVE, INC.
and JOSE A. PEREIRA,

Respondents

Appearances: Gigi D. Tierney, Esq. for Complainant
Walter P. Faria, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 12, 2011, Complainant Nelia Grilo filed a complaint against her former employer, Café Restaurante Algarve, Inc. and its owner, Jose Pereira claiming that she was terminated from her employment at the restaurant based on disability (diabetes) in violation of G.L. c. 151B s. 4(16), after she suffered a workplace injury that resulted in burns to her chest. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. A hearing was held before the undersigned Hearing Officer on June 10, 2014. The following individuals testified at the Hearing: Complainant, Cassandra Souza, Diane Grilo, Respondent Jose A. Pereira, and Nidia Pereira. To the extent the testimony of the witnesses is not in accord with or is irrelevant to the findings

made herein, the testimony is rejected. Based on all the relevant credible evidence in the record and the reasonable inferences drawn therefrom, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Nelia Grilo is a resident of New Bedford, MA. Complainant suffers from diabetes which causes swelling and poor circulation in her feet if she remains standing for long periods of time. (Testimony of Complainant)

2. Respondent Café Restaurante Algarve, Inc. is a Massachusetts corporation engaged in operating a Portuguese restaurant in New Bedford, MA. Respondent restaurant is an employer within the meaning of G.L. c. 151B. (Testimony of Jose Pereira)

3. Respondent Jose A. Pereira is President and a co-owner of Café Restaurante Algarve along with his wife, Nidia Pereira, who is also a co-owner of the restaurant. (Testimony of Jose Pereira) Nidia Pereira is generally responsible for the day to day operations of the restaurant as Jose Pereira is a fisherman, and often not on the premises. Jose Pereira works at the restaurant mostly on weekends when he is not out fishing. (Testimony of Pereira's) Mrs. Pereira is responsible for hiring and firing employees.

4. Complainant had worked at Respondent's restaurant previously for a period of about six months, but had to leave on advice of her doctor because of poor circulation in her feet which became swollen from standing for long periods of time. (Testimony of Complainant) She was rehired by Nidia Pereira and returned to work at the restaurant in August of 2010. Mrs. Pereira rehired Complainant knowing that she was diabetic and testified that she liked Complainant and that she was a good worker. (Testimony of Nidia Pereira)

5. Complainant worked as a dishwasher and kitchen helper. She testified that she worked a split shift six days a week from 8 or 9 a.m. to 3:00 p.m. and from 5:00 p.m. to 10:00 p.m. Contrary to her testimony that she could work up to 60 hours or more a week, a pay stub reflects that she worked approximately 29 hours per week at the rate of \$9 per hour. (Jt. Ex. 2) Complainant enjoyed working at the restaurant. (Testimony of Complainant)

6. On Saturday, February 19, 2011, Complainant was cooking fish fillets in a Fryalator, when Jose Pereira passed behind her, and accidentally bumped into her. The fish Complainant was holding fell into the Fryalator and hot oil splashed on her chest causing her skin to blister. Jose Pereira testified that he was helping Complainant with the fish and that hot oil also splashed on his hand. According to Complainant, Jose Pereira would not allow her to leave the restaurant to seek treatment for the burns and told her if she left, she should not come back. I do not credit this testimony. I find that Complainant worked voluntarily until the end of her shift and left about 3:00 p.m.

7. Jose Pereira testified credibly that Complainant never asked to leave work to go to the hospital, but at the end of her shift the cook told her that she should seek treatment for her burns at the hospital because she is a diabetic. It was only then that Complainant informed Nidia Pereira that she was going to the hospital.

8. Complainant testified that she saw a nurse and doctor at St. Luke's Hospital who treated the burns with cream and advised her not to return to work that evening, but released her to return to work the next day. Complainant then returned to the restaurant with her daughter stating she went to drop off the doctor's note permitting her to return the following day. She testified that Jose Pereira refused to take the note and told her to go home. Complainant stated

that she left the note with Nidia Pereira who acknowledged it was ok for Complainant to go home and return the next day. (Testimony of Complainant; Jt. Ex. 1)

9. Complainant's evening shift began at 5:00 p.m. According to Jose Pereira, Complainant's husband called from the hospital around 6:00 p.m. stating that Complainant planned to return to the restaurant to work the remainder of her shift that evening. Complainant confirmed that her husband notified Mr. Pereira she was still at the hospital at 6:00 p.m., and that she was coming back to work and Pereira stated "ok." He did not tell her husband that she had been fired. Mr. Pereira testified that Complainant returned to the restaurant around 8:00 p.m., that the restaurant was very busy and that he was covering her shift, something he often did. According to both Complainant and Mr. Pereira, the kitchen was very hectic that night and he was agitated. He testified that he told Complainant to go home and return when she was better. Complainant testified that Pereira was angry and told her "don't come back, go home." She interpreted this to mean that she was fired. (Testimony of Complainant) Pereira admitted that he told Complainant to go home that evening, but did not tell her never to come back or that she was fired. He stated they needed her at the restaurant because it is difficult to find good help. Mrs. Pereira testified that they liked Complainant, she was a good worker, and they would not have fired her. I credit this testimony.

10. Complainant's daughter testified that Complainant drove herself from the hospital to the restaurant that evening because she wanted to return to work and finish her shift. (Testimony of Diane Grilo) This testimony comports with Pereira's and contradicts Complainant's testimony that she went to drop off the doctor's note and inform the Pereiras that she would return to work the next day. There was also some suggestion that Complainant returned to the restaurant because it was Nadia Pereira's birthday and Complainant had a

birthday gift for her. In fact Complainant testified that she gave the gift to Nadia Pereira that evening and Pereira hugged her. (Testimony of Complainant) Mrs. Pereira acknowledged that Complainant gave her a gift and a doctor's note and Pereira said, "I'll see you tomorrow," but Complainant was angry and did not respond, other than to state that she was going to find out about her rights. Complainant left the premises quickly, prompting Mrs. Pereira to ask her husband what had transpired. He informed her that he told Complainant to return to work when she was ready. (Testimony of Nadia Pereira)

11. Another witness, who was a friend of Complainant's daughter and who was at the restaurant to have dinner with Complainant's daughter that evening, testified that she heard Mr. Pereira yelling at Complainant that he did not need her that evening and that she could go home. She recalled Complainant emerging from the kitchen and looking upset. (Testimony of Cassandra Souza) Her testimony comports with Mr. Pereira's version of what he said to Complainant. It is undisputed that Complainant never returned to work. I credit Pereira's testimony that he was upset that Complainant returned to the restaurant at 8:00 p.m. after being treated for burns at the hospital and believe that he did yell at her and told her to go home.

12. Complainant did not return to work the next day, February 20th, or on Monday the 21st which she said was a holiday. On February 22nd, Complainant went to her attorney's office and filed a worker's compensation claim. She received worker's compensation benefits of approximately \$3300. She also filed for unemployment compensation and received benefits in the aggregate of \$5,783 for 2011. She received these benefits until September of that year when she began working part time at a cinema. She worked at her sister's restaurant from April 2011 until August 2011, but stated she did not get paid for this work.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, s. 4 (16) prohibits discrimination in employment based on disability. In order for Complainant to establish a prima facie case that she was terminated because of her disability, she must provide credible evidence that she was a member of a protected class, i.e. that she was disabled within the meaning of the statute, that she was qualified to perform the essential functions of the job with or without a reasonable accommodation, was performing her job at an acceptable level, and that she was terminated or otherwise subject to an adverse action by her employer. Dartt v. Browning-Ferris Industries, Inc. 427 Mass. 1 (1998).

If Complainant establishes a prima facie case of disability discrimination, the burden shifts to Respondents to articulate a legitimate, non-discriminatory reason for the termination by producing credible evidence to show that the reasons they advanced were the real reasons for their action. Abramian v. President & Fellows of Harvard College, 432 Mass. 107,116 (2000); Wheelock College v. MCAD, 371 Mass. 130, 138 (1976). Ultimately, the burden of proof remains with Complainant to prove by a preponderance of the evidence that Respondents' articulated non-discriminatory reason was not the real reason for its actions, but that Respondents acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon, 434 Mass.493, 504 (2001).

As a threshold matter, Complainant must prove that she is a "handicapped person" within the meaning of the statute. G.L. c. 151B, s.1 (17). The statute defines a "handicapped person" as one who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such impairment.

Complainant has established that she is a handicapped person within the meaning of the statute by virtue of her having diabetes which causes her to be unable to stand for long periods of time and which may exacerbate otherwise non-serious wounds or injuries. The Commission has long recognized diabetes as a disabling condition, despite the fact that the disease may be controlled or managed with medication. D'Ambrosio v. MBTA, 23 MDLR 81, 85 (2001). Complainant also has demonstrated that she was capable of performing her job despite her diabetic condition. Complainant alleges that she was forbidden to leave her job to seek treatment for burns she sustained in a workplace accident, an injury that could be exacerbated by her diabetes, and that her employment was terminated because she sought treatment and could not return to work to complete her shift. Respondent denies both allegations.

There is a fundamental dispute in this case regarding whether Complainant was subjected to an adverse action or indeed was terminated from her employment with Respondent. This dispute centers on two allegations: first, that Mr. Pereira told Complainant if she left in the middle of her shift to seek treatment for the burn she sustained, she should not return; and second, Mr. Pereira told her to leave the restaurant and not return when she sought to resume her shift later that evening after seeking treatment at the hospital.

I do not credit Complainant's testimony that she sought to leave the restaurant before her shift had ended to seek treatment for burns she sustained, or that Mr. Pereira forbade her to do so. Instead I credit Mr. Pereira's testimony that Complainant decided to seek treatment at the end of the day-time portion of her shift only after the cook advised her to do so, because she is diabetic. The fact that Complainant sought to return to work that evening after seeking treatment for her injury, contrary to medical advice, supports this view. Although Complainant would

dispute that she sought to return to work, that conclusion is supported by the testimony of her daughter and Mr. Pereira.

I also conclude that Complainant was not terminated from her employment with Respondent. Her testimony that Mr. Pereira told her to leave the restaurant and to never come back is a mischaracterization of what actually occurred. I credit Mr. Pereira's testimony that when Complainant showed up at the restaurant several hours into her evening shift after having just sought treatment for her injury, he did not allow Complainant to work that evening and told her to go home. While Mr. Pereira may have become agitated and angry because the kitchen was extremely busy, and yelled at Complainant to leave, I do not believe that he fired her. It is apparent that this interchange occurred in the heat of the moment. At worst, there was a miscommunication or misunderstanding about what he meant when he told Complainant to go. Complainant became angry after this interchange, perhaps because she was losing a night's salary, when she believed she was able to work; however, there is insufficient evidence that her employment was terminated. The only other witness for Complainant, who claims to have overheard the conversation, did not hear Mr. Pereira tell Complainant she was fired.

I credit Mrs. Pereira's testimony that when Complainant gave her the doctor's note, she hugged Complainant and told her she would see her the next day. Complainant acknowledged the Mrs. Pereira told her it was ok for her to go home and to return to work the next day. Moreover, I credit the testimony that Mr. Pereira was not engaged in the hiring and firing of employees and his wife controlled the daily operations of the restaurant, including decisions about staff. Mrs. Pereira testified credibly that Complainant was a good worker and that she liked her. She had rehired Complainant knowing Complainant suffered from diabetes and had some limitations. All of this suggests that Respondent had no reason to fire Complainant.

Perhaps due to a misunderstanding or Complainant's anger at Mr. Pereira for yelling and not allowing her to finish her shift, Complainant decided she would not return to work at the restaurant, and instead filed claims for worker's compensation and unemployment benefits.

Given that Complainant has failed to prove that her employment was terminated by Respondent, she cannot establish a prima facie case of disability discrimination. Respondent is relieved of the burden to produce evidence of a non-discriminatory reason for Complainant's separation, where it asserts credibly that there was no adverse action and no termination. Given all of the above, I conclude that Complainant was not the victim of discrimination based on her disability and no violation of G.L. c. 151B occurred.

IV. ORDER

The complaint in this matter is hereby dismissed. This decision represents the final Order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission, pursuant to 804 CMR 1.23 (1). A party must file a Notice of Appeal with the Clerk of the Commission within ten (10) days after receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 20th day of February, 2015

Eugenia M. Guastaferr
Hearing Officer