STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 15 ESO 089

Juan F. Alfaro
Complainant

v. **DECISION AND ORDER**

Bukana's Sport Bar, Inc.
Respondent

INTRODUCTION

On October 30, 2014, Juan F. Alfaro (hereafter referred to as "complainant") filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the "Commission") against Bukana's Sport Bar, Inc., Bryan Morales, alias, and Milan "Doe" (hereafter referred to as the "respondents"). The complainant alleged that the respondents had discriminated against him with respect to terms and conditions of employment, sexual harassment, and termination because of his sex and sexual orientation, a violation of R.I. Gen. Laws § 28-5-7. This charge was investigated. On September 16, 2016, Preliminary Investigating Commissioner Iraida Williams assessed the information gathered by a senior compliance officer and ruled that there was probable cause to believe that respondents Bukana's Sport Bar, Inc, and Bryan Morales, alias, had violated the provisions of Section 28-5-7 of the General Laws of Rhode Island as alleged in the charge. The Preliminary Investigative Commissioner ruled that there was no probable cause to believe that respondent Milan "Doe", alias, had violated Section 28-5-7 of the General Laws of Rhode Island, and the portion of complainant's charge with respect to respondent "Doe" was dismissed. On October 19, 2016, the Commission issued a Complaint and notice of hearing which alleged that respondents Morales and Bukana's Sport Bar, Inc. had discriminated against the complainant with respect to terms and conditions of employment, sexual harassment, and termination of employment because of his sex and sexual orientation. On April 17, 2017, a notice was sent administratively closing the case against Bryan Morales based on the Rhode Island Supreme Court's decision in *Mancini v. City of Providence, et al.*, 155 A.3d 159 (R.I. 2017) due to lack of jurisdiction. This administrative closure left Bukana's Sport Bar, Inc. as the only respondent in the case. A hearing on the Complaint was held on June 14, 2017 before Commissioner Rochelle Bates Lee.

JURISDICTION

The respondent employed more than four employees in the State of Rhode Island and thus is an employer within the definition of R.I. Gen. Laws § 28-5-6(7)(i) and is subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The complainant is a male.

2. The complainant's sexual orientation is gay.

3. The respondent does business under the name of Bukana's Sport Bar, Inc.

4. The complainant was employed by the respondent.

5. The owner of respondent asked complainant to work at the bar primarily to "keep an eye on the women because they [were] stealing too much from [the owner]." Tr. p. 9.

6. Respondent used a punch system to track an employee's time, and complainant was paid in cash. Tr. p. 8.

7. The complainant also received two money orders of $1,250.00 each via mail from the respondent. Tr. pp. 5-6, 11-12.

8. The complainant testified that both he and "the girl that used to work for him also had the same problems with [the owner.]" Tr. pp. 5-6.

9. The complainant testified that respondent's owner once told a security guard to hit him, that the owner used to mistreat him, and that the owner would use "bad words" against [the complainant] when he would send him to do work. Tr. p. 6.

CONCLUSIONS OF LAW

The complainant proved that he was a member of two protected classes, being a male and a gay man. He also proved he was an employee of the respondent. The complainant did not prove by a preponderance of the evidence that the respondent discriminated against him with respect to terms and conditions of employment, sexual harassment or termination because of his sex or sexual orientation.

STANDARD OF REVIEW

The Commission utilizes the decisions of the R.I. Supreme Court, the Commission's prior decisions, and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for evaluating evidence of discrimination. The Rhode Island Supreme Court "has adopted the federal legal framework to provide structure to our state employment discrimination statutes." *Bucci v. Hurd Buick Pontiac GMC Truck, LLC*, 85 A.3d 1160, 1169 (R.I. 2014) (quoting *Neri v. Ross-Simons, Inc.*, 897 A.2d 42, 48 (R.I. 2006) (citing *Newport Shipyard, Inc. v. Rhode Island Comm'n for Human Rights*, 484 A.2d 893, 898 (R.I. 1984)). When a complainant makes a claim of employment discrimination, "the now familiar three-part burden shifting framework as outlined by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S.

792, 802-04, 93 S.Ct. 1817 should be employed." *Bucci*, 85 A.3d at 1169 (citing *McGarry v. Pielech*, 47 A.3d 271, 280 (R.I. 2012)).

DISCUSSION

THE COMPLAINANT DID NOT PROVE THAT THE RESPONDENT DISCRIMINATED AGAINST HIM BECAUSE OF HIS SEX OR SEXUAL ORIENTATION WITH RESPECT TO SEXUAL HARASSMENT

The Fair Employment Practices Act prohibits employment discrimination on the basis of sex or sexual orientation. *See* R.I. Gen. Laws § 28-5-7 (1), which provides in relevant part that:

> It shall be an unlawful employment practice:
>
> (1) For any employer:
>
> (i) To refuse to hire any applicant for employment because of his . . . sex, sexual orientation … ;
>
> (ii) Because of those reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment.

Sexual harassment constitutes a form of sex discrimination prohibited by civil rights laws. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *O'Rourke v. City of Providence,* 235 F.3d 713 (1st Cir. 2001).

To establish a hostile environment sexual harassment claim, a complainant must show:

> (1) that she (or he) is a member of a protected class; (2) that she [or he] was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

O'Rourke, 235 F.3d at 728[1] (citing *Faragher*, 524 U.S. at 787-89; *Harris*, 510 U.S. at 20-23; *Meritor*, 477 U.S. at 65-73); *see also Billings v. Town of Grafton*, 515 F.3d 39, 47-48 (1st Cir. 2008).

In the instant case, the complainant proved the first element of a successful hostile environment claims related to sex and sexual orientation, that is, he is a member of a protected class being a gay male.[2] However, there was insufficient evidence produced to satisfy the second, third, fifth, and sixth elements of the claims.

It is beyond dispute that civil rights laws prohibiting sexual harassment apply to both male and female victims. Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)). "'The phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men **and** women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.'" *White v. New Hampshire Dep't of Corr.*, 221 F.3d 254, 259 (1st Cir. 2000) (quoting *Harris* 510 U.S. at 21 (some internal quotation marks omitted) (emphasis added).

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[1] The Commission cites *O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001) for the elements required to establish a hostile work environment sexual harassment claim instead of *DeCamp v. Dollar Tree Stores, Inc.*, 875 A.2d 13, 22 (R.I. 2005), as the *DeCamp* Court misquoted *O'Rourke*, therefore implying that complainants had to meet a *higher evidentiary burden* to prove their claim under Rhode Island law. *See DeCamp*, 875 A.2d at 22. From an inadvertent misquote of *O'Rourke*, the Court held that the fourth element of a hostile work environment sexual harassment claim requires a complainant prove "that the harassment was sufficiently severe **and** pervasive" *DeCamp*, 875 A.2d at 22 (emphasis added), a far more difficult burden for a complainant to establish, especially given that courts have routinely held that even one incident can qualify as sexual harassment under the severe or pervasive prong of the fourth element. *See Gerald v. Univ. of Puerto Rico*, 707 F.3d 7, 18 (1st Cir. 2013) ("On the frequency front . . . a "'single act of harassment may, if egregious enough, suffice to evince a hostile work environment.'") (quoting *Noviello v. City of Boston*, 398 F.3d 76, 84 (1st Cir. 2005)) (citing *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998)) (emphasis added); accord *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 765, 768 (2d Cir. 1998) ("Since the relevant legal standard is "severe or pervasive," an employer's single act may be "sufficiently severe," and may "alter the plaintiff's conditions of employment without repetition," rising to the level of actionable harm.") (emphasis added); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) ("Even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability.") (emphasis added).

[2] Paragraph 4(a) of the Complaint averred that the complainant was a gay male. Respondent failed to deny this allegation in the Complaint, and therefore, pursuant to Super. R. Civ. P., this results in an admission of the alleged fact. *See Martin v. Lilly*, 505 A.2d 1156, 1161 (R.I. 1986) ("Rule 8(b) of the Superior and District Court Rules of Civil Procedure requires a party to 'admit or deny the averments upon which the adverse party relies.' . . . Failure to deny an averment results in a judicial admission of the alleged fact.") Super. R. Civ. P. 8(d); Dist. R. Civ. P. 8(d); 1 Kent, R.I. Civ. Prac. § 8.5 at 86 (1969); McCormick, *Evidence* § 262 at 776 (3d ed. Cleary 1984). A judicially admitted fact is conclusively established, *Bengtson v. Hines,* 457 A.2d 247, 250 (R.I. 1983); *Carter v. Munson*, 452 A.2d 309, 310 (R.I. 1982), that is, removed from the area of controversy, obviating the need of the plaintiff to produce evidence on the fact and precluding the defendant from challenging the fact. *Bengtson*, 457 A.2d at 250; Friedenthal, Kane and Miller, *Civil Procedure* § 5.18 at 283 (1985); Clark, *Code Pleadings* § 91 at 579-80 (2d ed. 1947) (emphasis added). *See also* Commission Rules and Regulations, Rule 8.04.

Regarding the complainant's hostile work environment claim as it related to his sex, as evidenced in the findings of fact, there was no conduct by the respondent that "'required [the complainant] to work in a discriminatorily hostile or abusive environment.'" *Gorski*, 290 F.3d at 471. The complainant did not testify as to any sexual conduct by the respondent. Further, the complainant did not testify that he was treated differently than female employees. In fact, through his own testimony, complainant himself undermined this claim based on sex when he testified that "the girl that used to work for [the owner] also had the same problems with him." (emphasis added). Tr. p.6. Therefore, the complainant failed to prove with competent evidence that he was subjected to sexual harassment because of his sex.

As to the complainant's hostile work environment claim due to his sexual orientation, the complainant presented only vague, general evidence that respondent's owner treated him in a manner he deemed unfair and that he considered discriminatory. The complainant did not testify that either the owner or any employee of the respondent knew about his sexual orientation. The complainant presented no evidence of the owner ever using a slur or injudicious language or ever having made specific or hostile remarks about his sexual orientation.

In the instant case, there is insufficient evidence to satisfy the second, third, fifth and sixth elements of a hostile work environment claim based on complainant's sexual orientation. *See O'Rourke*, 235 F.3d at 728 (citing *Faragher*, 524 U.S. at 787-89; *Harris*, 510 U.S. at 20-23; *Meritor*, 477 U.S. at 65-73). The complainant vaguely testified about general mistreatment he felt he received by respondent's owner. There was no competent evidence presented that would support the conclusion that the complainant was subjected to conduct based on his sexual orientation that was unwanted or sexual in nature. Moreover, a reasonable person would not have found any of the complainant's evidence about his treatment in the workplace to have been offensive, severe or pervasive based on his sexual orientation. Therefore, the complainant did not prove by a preponderance of the evidence that the harassment he alleged he suffered based on sexual orientation constituted a violation of the Fair Employment Practices Act.

After considering all the evidence, the Commission finds that the complainant failed to prove that the respondent discriminated against him because of his sex or sexual orientation with respect to harassment as alleged in the Complaint.

THE COMPLAINANT DID NOT PROVE THAT THE RESPONDENT DISCRIMINATED AGAINST HIM BECAUSE OF HIS SEX OR SEXUAL ORIENTATION WITH RESPECT TO TERMS AND CONDITIONS OF EMPLOYMENT

A Title VII wage discrimination claimant must make a prima facie showing that the employer paid different wages to a member of the opposite sex for substantially equal work. *See Rodriguez v. Smithkline Beecham*, 224 F.3d 1, 8 (1st Cir. 2000). The major allegation in the Complaint regarding the discriminatory terms and conditions of complainant's employment revolved around the owed wages that had not been paid. However, during testimony, complainant did not produce evidence of the amount of owed wages respondent had allegedly failed to pay him. Complainant did not testify about his hourly or daily rate, or the dates and times he had worked for which he was allegedly not paid. Most crucially, complainant failed to produce evidence of any similarly-situated employees, including females and/or heterosexual

employees, that had the same job responsibilities, worked the same hours, or had the same job duties who were paid for their work. The complainant also did not produce evidence that he was denied the alleged wages he was owed due to his sex or his sexual orientation. *See McMillan v. Mass. Soc. for Prevention of Cruelty to Animals*, 140 F.3d 288, 298 (1st Cir. 1998).

Therefore, complainant failed to carry his initial burden of establishing a prima facie showing of discrimination with respect to terms and conditions of employment due to his sex or sexual orientation as it related to his allegations of unpaid wages.

THE COMPLAINANT DID NOT PROVE THAT HE WAS DISCRIMINATED AGAINST WITH RESPECT TO TERMINATION BECAUSE OF HIS SEX OR SEXUAL ORIENTATION

In Title VII cases, "[t]he burden-shifting framework announced in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 . . . allocates burdens of production and orders the presentation of evidence so as 'progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091 (1st Cir. 1995). Under the *McDonnell* analysis, the employee has the initial burden of establishing a prima facie case demonstrating that the employer has discriminated against him or her for a proscribed reason. *See McDonnell Douglas Corp.*, 411 U.S. 792, 802 (1973). The burden placed on the complainant at this stage is not especially onerous and requires that the employee demonstrate:

1. He belonged to a protected class in that he was of a particular sex and sexual orientation;
2. His job performance met the employer's legitimate expectations;
3. His employment was terminated;
4. The employer had a continuing need for the services provided by the position from which the complainant was discharged.

   See id. at 802-04; *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Ctr. For Behavioral Health v. Barros*, 710 A.2d 680, 685 (R.I. 1998).

In this case, the complainant proved he belonged to two protected classes. However, there is no evidence in the record regarding the complainant's job performance or supporting a conclusion that his job performance met the employer's legitimate expectations. Most significantly, complainant failed to produce any evidence that he ever had, in fact, been terminated by the respondent.

Complainant did not allege in the Complaint that he had been subjected to a constructive discharge due to discriminatory working conditions. *See* Complaint. The complainant did not testify that he left respondent's employment due to his treatment by the respondent.

Therefore, the complainant failed to carry his initial burden of establishing a prima facie case of sex and sexual orientation discrimination with respect to termination of employment in this case

and this claim must fail. *See McDonnell Douglas Corp.,* 411 U.S. at 802; *Barros,* 710 A.2d at 685; *Burdine,* 450 U.S. at 254.

ORDER

Having reviewed the evidence presented on June 14, 2017, the Commission, with the authority granted it under R.I. Gen. Laws § 28-5-25, finds that the complainant failed to prove discrimination as alleged in the Complaint and hereby dismisses the Complaint.

Entered this 7th day of June, 2018.

Rochelle Bates Lee
Hearing Officer

I have read the record and concur in the judgment.

John B. Susa
Commissioner

Cynthia M. Hiatt, Esq.
Commissioner