

**STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS**

RICHR NO. 15 ESO 089

Juan F. Alfaro

Complainant

v.

**DECISION ON MOTION
TO DISMISS**

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 respondent 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 Bukana's and Morales 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. Based on the Rhode Island Supreme Court's decision in *Mancini v. City of Providence, et al.*, 155 A.3d 159 (R.I. 2017), a notice was sent to respondent Bryan Morales on April 17, 2017 informing him that the case against him had been administratively closed based on lack of jurisdiction. This administrative closure left Bukana's as the only remaining respondent in the case.

Respondent filed a motion to dismiss on June 12, 2017, two days prior to the hearing date of June 14, 2017. A hearing on the Complaint was held on June 14, 2017 before Commissioner Rochelle Bates Lee. By filing the motion to dismiss less than ten days before the hearing and failing to properly serve the complainant, as reflected by the lack of notice to the complainant in the certification of service, respondent failed to properly preserve its right to make a motion to dismiss at the hearing pursuant to Commission Rules and Regulations, Rule 9.02. Despite failing to preserve respondent's right to make a motion to dismiss pursuant to Rule 9.02, the Commissioner hearing the case, in her discretion, waived the requirement of the Rule and the Commissioners decided the motion after evidence had been presented.

CONCLUSIONS OF LAW

The Commission cannot hold that it is clear that the complainant would not be entitled to relief under any set of facts that could be proven consistent with the allegations in the Complaint against the respondent.

DISCUSSION

In determining a motion to dismiss, the Commission will view the complainant's allegations in a light most favorable to the complainant. *See, e.g., DiMase v. Fleet Nat'l Bank*, 723 A.2d 765, 768 (R.I. 1999). "[T]he sole function of a motion to dismiss is to test the sufficiency of the complaint." *DiLibero v. Mortg. Elec. Registration Sys., Inc.*, 108 A.3d 1013, 1015 (R.I. 2015) (quoting *Narragansett Elec. Co. v. Minardi*, 21 A.3d 274, 277 (R.I. 2011)). "We thus are confined to the four corners of the complaint and must assume all allegations are true, resolving any doubts in plaintiff's favor." *Id.* (citing *Laurence v. Sollitto*, 788 A.2d 455, 456 (R.I. 2002)). "A motion to dismiss may be granted only 'if it appears beyond a reasonable doubt that a plaintiff would not be entitled to relief under any conceivable set of facts [.]'" *Id.* (quoting *Estate of Sherman v. Almeida*, 747 A.2d 470, 473 (R.I. 2000)).

In its motion to dismiss, the respondent asserts the complainant "has not made any allegations regarding the Corporation [respondent] in this case only an individual and the Corporation [respondent] had no knowledge of these alleged offenses nor did the Corporation show any intent to be involved with this individual therefore the Plaintiff [complainant] has not been able to break the Corporate Veil in this matter." [sic] During the hearing, the respondent also argued "[s]o we're looking at allegations against a corporation which had no involvement or knowledge regarding these issues." Tr. p. 13.

The motion to dismiss fails for two reasons. First, the Commission must assume that the allegations in the Complaint "are true, resolving any doubts in [complainant's] favor." *DiLibero*, 108 A.3d at 1015 (quoting *Minardi*, 21 A.3d at 277). Here, the Complaint states that the complainant was gay, that he was employed by the respondent, and that the complainant was continually subjected to obscene language and gestures of an offensive and sexual nature by the owner of the respondent. The Complaint alleges that soon thereafter the complainant was discharged from his employment, owed wages which were not paid, and that other similarly situated employees that were female and/or not gay were not treated in the manner the complainant

was treated. *See* Complaint. After reviewing the allegations in the Complaint, taken as true, and resolving all doubts in the complainant's favor, the complainant has successfully stated a cause of action for discrimination with respect to terms and conditions of employment, sexual harassment and termination because of his sex and sexual orientation. *See DiLibero*, 108 A.3d at 1015.

Second, the respondent's argument that the complainant failed to make sufficient allegations against the respondent corporation and/or "break the Corporate Veil" is inapplicable to the facts contained in the Complaint. The Complaint does not make any allegations that would lead to a conclusion that the complainant is seeking to pierce the corporate veil. No allegations in the Complaint contend that there existed a parent-subsidary relationship between the respondent and any other entity, that corporate formalities were ignored, or that the respondent was undercapitalized. *See, e.g., Doe v. Gelineau*, 732 A.2d 43 (R.I. 1999); *see also, Miller v. Dixon Indus. Corp.*, 513 A.2d 597, 604 (R.I. 1986).

The respondent's argument that the complainant "failed to make sufficient allegations against the respondent Corporation" also fails. Here, the Complaint states that the complainant was employed by the respondent, maintained a satisfactory employment record during the course of his employment, and was continually subjected to obscene language and gestures of an offensive and sexual nature by the owner of the respondent. The Complaint states that soon thereafter, the complainant was discharged. At this stage, the Commission must take all the allegations in the Complaint, including the allegation that the owner of the respondent corporation was the harasser, as true. *See DiLibero*, 108 A.3d at 1015. Therefore, the respondent is "strictly liable for supervisor harassment that 'culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.'" *DeCamp v. Dollar Tree Stores, Inc.*, 875 A.2d 13, 24 (R.I. 2005), n.11 (quoting *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137 (2004)) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)) (emphasis added); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.").

Therefore, the Commission will not dismiss the Complaint based on failure to state a claim upon which relief could be granted under the circumstances in this case.

ORDER

The respondent's Motion to Dismiss is hereby denied.

Entered this 7th day of June, 2018.

Rochelle Bates Lee

Rochelle Bates Lee

Hearing Officer

I have read the record and concur in the judgment.

John B. Susa

John B. Susa

Commissioner

Cynthia M. Hiatt

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Commissioner