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Diane Bilodeau
v.
The Toucan Restaurant,
Michael Hallinan, Individually
and
Kerry Miller, Individually

ES(P) 4119-90
EEOC: 16D900150

DECISION OF THE COMMISSION

Diane Bilodeau filed a complaint of discrimination against the Toucan Restaurant based on her gender, female. The complaint alleged that Michael Hallinan and Kerry Miller had discriminated against her by refusing to reinstate her to her former position after returning from pregnancy leave in violation of RSA 354-A and Title VII of the Civil Rights Act of 1964, as amended. Following an investigation, Commissioner Gail Paine found probable cause to believe that discrimination occurred. Because conciliation was unsuccessful, a public hearing was conducted on May 7, 1996.

Diane Bilodeau appeared for the hearing represented by Attorney Brian McCaffrey. No one appeared representing the Toucan Restaurant. Neither Michael Hallinan nor Kerry Miller appeared.

A. Notice of Hearing

The original complaint filed on June 20, 1990 named the Toucan Restaurant as the respondent and listed Michael Hallinan and Kerry Miller as the individuals who made the discriminatory decisions. During the pendency of the investigation, the Toucan Restaurant was represented by the law firm of Boynton, Waldron, Doleac, Woodman & Scott, P.A. The answer to the complaint filed in 1990 was signed by Michael Hallinan and submitted by Attorney Ralph Woodman. The investigator interviewed both Mr. Hallinan and Mr. Miller.

The notice of public hearing was sent by certified mail to the complainant's attorney, the respondent's attorney and Mr. Hallinan personally. Signed receipts were received for each letter. The notice of public hearing also scheduled a prehearing

conference on April 18, 1996. The Toucan and Mr. Hallinan were represented by Attorney Marcia Kovalik of the Boynton firm. The complainant's attorney indicated that an amendment to the complaint would be filed naming Mr. Hallinan and Mr. Miller as individual respondents. The amendment was filed on April 25, 1996. By letter received on April 23, 1996, Attorney Kovalik withdrew as counsel for the Toucan Restaurant. A copy of the letter was sent to Mr. Hallinan.

The complainant testified that Mr. Miller had received notice of the amendment and hearing. She learned that information through a mutual acquaintance.

B. Testimony

Diane Bilodeau testified that she began working at the Toucan Restaurant in April of 1986 as a waitress with some additional duty as hostess. In approximately January of 1989, she was promoted to assistant manager and given additional responsibilities including scheduling of waitresses, dealing with customer complaints and picking up supplies including liquor and fresh flowers. (Some of the supplies were also for Mr. Hallinan's other restaurant, The Library.)

On or about March 30, 1990, Ms. Bilodeau left on maternity leave. She and Mr. Miller had agreed that she would continue some duties while on maternity leave, including payroll and scheduling. However, when she returned a few days later, Mr. Miller said he forgot about the agreement and had arranged for someone else to perform those functions.

Ms. Bilodeau's physician released her to return to work in the last week of May. She attempted to contact Mr. Miller several times by telephone but her calls were not returned. She also visited the restaurant and on her second visit, was able to meet with Mr. Miller. He informed her that he and Mr. Hallinan had decided to eliminate the assistant manager position. Ms. Bilodeau then asked to be assigned to waitressing or hostessing but was told there were no positions available. She indicated that two waitresses were planning to resign in the near future and asked to be called if any positions became open. She was not contacted. On June 20, 1990, she filed a complaint with the Commission.

Ms. Bilodeau testified that prior to her pregnancy, she had been considered an excellent employee. Although the company did not conduct formal performance evaluations, she had received promotions and was given a cash bonus by Mr. Hallinan.

C. Legal Analysis

Discrimination based on pregnancy violates both state and federal law. The Pregnancy Discrimination Act of 1978, an amendment to Title VII of the Civil Rights Act of 1964, provides the following:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy,

childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.

State law, now codified at RSA 354-A:7, VI, is similar to federal law but provides additional reinstatement protections:

Pregnancy Discrimination Prohibited.

- For the purposes of this chapter, the word "sex" includes pregnancy and medical conditions which result from pregnancy.
- An employer shall permit a female employee to take leave of absence for the period of temporary physical disability resulting from pregnancy, childbirth or related medical conditions. When the employee is physically able to return to work, her original job or a comparable position shall be made available to her by the employer unless business necessity makes this impossible or unreasonable.
- For all other employment related purposes, including receipt of benefits under fringe benefit programs, pregnancy, childbirth, and related medical conditions shall be considered temporary disabilities, and a female employee affected by pregnancy, childbirth, or related medical conditions shall be treated in the same manner as any employee affected by any other temporary disability.

Respondent had no written maternity policy but its unwritten policy is described in its Answer To Charge of Discrimination:

Paragraph 4: "No one in authority at the restaurant ever told Ms. Bilodeau that she could return to work after her pregnancy leave."

Paragraph 12: "Although there are no other instances at The Toucan Restaurant of women who became pregnant who wished to return to work, the owner has several examples of rehiring women employees who became pregnant at his other restaurant, The Rockingham Library Restaurant." (Sworn statements by Michael Hallinan.)

Respondent's policy was further explained by Mr. Miller to Investigator Roxanne Juliano. Mr. Miller stated, "Maternity leave is no different than any other leave. When someone comes back, they come in at the bottom with lunch shifts, etc. and work their way back up." Investigative Report, Paragraph 5.

D. Conclusion

Respondent's practice and policy violate RSA 354-A by failing to return women on pregnancy leave to their original job or a comparable position. Respondent's use of the term "re-hire" indicates that it considers women who leave work for childbirth .

to be terminated. Those fortunate enough to be "rehired" were not placed in the same or comparable jobs but required to work their way back up from the bottom.

Respondent violated Ms. Bilodeau's right to be returned to her original job or a comparable position after she was physically able to return to work. Even if financial problems led to Mr. Miller absorbing some of the duties of assistant manager, the positions of hostess and waitress were still available.

E. Decision

The Commission finds that the Toucan Restaurant, Michael Hallinan and Kerry Miller discriminated against Diane Bilodeau in violation of RSA 354-A and Title VII of the Civil Rights Act of 1964, as amended. Accordingly the Commission enters the following orders:

1. The respondents are ordered to pay to Diane Bilodeau the wages which she lost as a result of the discrimination. The Commission finds that Ms. Bilodeau made a good faith effort to mitigate her damages by obtaining other employment. The earnings from that employment are subtracted from her lost wages. She was terminated on June 5, 1990. The Toucan Restaurant went out of business on February 29, 1992. (Although complainant suggests that she would have been transferred to Mr. Hallinan's other restaurant, the Library; the Commission does not find evidence to support this claim.) During the period between her termination and the business closure, Ms. Bilodeau would have expected to earn \$35,485.45 from the Toucan based on earnings averaging \$389.95 per week. Her actual income from other sources, including unemployment compensation benefits, Poco Diablos and the Old Ferry Landing, was \$12,094.89. Therefore, respondents are ordered to pay the sum of \$23,390.56.

2. The respondents are also ordered to pay interest in the back wages at the rate established by the Superior Court of 7.21%. Therefore, the interest due to complainant is \$1,686.46.

3. The respondents are also ordered to pay the attorneys fees incurred by the complainant of \$5,070.00 as substantiated by the itemized bill and sworn affidavit of complainants counsel.

Therefore, the respondents are ordered to pay the sum of \$30,147.02 to Diane Bilodeau within thirty days of the date of this order.

So ordered.

Commissioner Loren Jean
Commissioner Ralph Brickett
Commissioner Michael Chamberlain

By: Loren Jean

7/25/96
Date