City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Ellyn Van Dyke
Complainant,
v.

Old Time Tap
Respondent.

Case No.: 04-E-103

Date Mailed: April 24, 2009

TO:
Ellyn Van Dyck
13331 S. Carondolet Ave., #2
Chicago, IL 60633

John S. Wrona
Law Office of John S. Wrona
1333 S. Baltimore Ave.
Chicago, IL 60633

FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on April 15, 2009, the Chicago Commission on Human Relations issued a ruling in favor of Respondent in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(15) and 250.150, Complainant may seek review of this Order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

CHICAGO COMMISSION ON HUMAN RELATIONS
Dana V. Starks, Chair and Commissioner

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FINAL RULING

I. INTRODUCTION

Complainant Ellyn Van Dyck filed a Complaint on June 10, 2004, alleging that she suffered discrimination in violation of the Chicago Human Rights Ordinance based on perceived disability when she was fired from her job as a fill-in bartender at Respondent, Old Time Tap, located at 13501 S. Brandon Avenue in Chicago. Old Time Tap maintains that after Ms. Van Dyck missed work due to a medical condition unrelated to her job, she failed to return to work; then the bartender for whom she was filling in returned to work, so Ms. Van Dyck was no longer needed. Old Time Tap denies that it had knowledge of her medical condition or that her medical condition had anything to do with its decision to replace her.

The Commission on Human Relations found substantial evidence of a violation of the Chicago Human Rights Ordinance and advanced the case to the administrative hearing process. Ms. Van Dyck represented herself *pro se* at the administrative hearing, and Old Time Tap was represented by counsel. The hearing was conducted on September 10, 2008, and post-hearing briefing was completed on December 22, 2008.

II. FACTUAL FINDINGS

A. The Facts

1. Complainant, Ellyn Van Dyck, was hired by Old Time Tap as a fill-in bartender sometime in 2003. (Tr. 13.)

2. Old Time Tap is owned and operated by Don and Christine Jones. (Tr. 93, 127.)

3. The job opening that Van Dyck filled arose when bartender Geri Polozet chose to reduce her shifts to one day a week because of her pregnancy. (Tr. 94-96.)

4. Van Dyck's original shifts were Wednesday and Sunday nights, but as business slowed, she was cut back to just Sundays. (Tr. 12.) Respondent's Exhibit ("RX") 1, which was received into evidence, reflects some if not all of the hours Van Dyck worked at Old Time Tap.

5. The last day Van Dyck worked at Old Time Tap was Sunday, December 7, 2003. (Tr. 16.) A few days later, on December 10, for reasons that had nothing to do with her work, she became dizzy, fell, hit her head, and had to go to the hospital. (Tr. 16, 17.)

6. The parties agree that Old Time Tap bears no responsibility for her injury or hospitalization. (Tr. 75.)

7. She remained in the hospital for four days and remembers little about that experience. (Tr. 17.) In fact, Van Dyck had been suffering dizzy spells since 2002, a condition for which she had been taking medication. (Tr. 19-20.)

8. Although she never shared her medical information with Old Time Tap, she had also suffered a mild stroke in 2002. (Tr. 19-20, 41.)

9. Don Jones had no knowledge of Van Dyck's medical conditions, and he never noticed any medical condition affecting Van Dyck's work in any way. (Tr. 41, 109-110.)

10. On one occasion, Don Jones saw Van Dyck taking some pills, and he asked her about them, but only to ensure that she was not using illegal drugs. (Tr. 115.)

11. Van Dyck was scheduled to work the evening of December 14, 2003. She had been released from the hospital earlier that day and initially thought she was well enough to go to work. But as the day went on she started feeling ill, and so she called to say she couldn't come in because, she said, she had had a dizzy spell, fell, and hit her head. (Tr. 23, 25, 64.) Although she believes she spoke directly with Don Jones, he denies speaking with her; he believes he learned of her absence from the bartender who was on duty earlier that day. (Tr. 23, 50, 103-104.)

12. In any event, Van Dyck did not work the night of December 14, and someone else covered her shift. (Tr. 25, 103-104.)

13. Van Dyck recalls phoning or visiting the Old Time Tap on several other occasions after December 14. She left messages for Don Jones but got no response. (Tr. 25-26, 43, 44.) She admits, however, that her recollection of how many times she went to the Tap to speak with Don Jones is not good. (Tr. 43-44.) She believes that on December 16, she spoke with Don Jones and he told her he did not want her to return because she was "a risk and a liability." (Tr. 27.) She recalls calling him again and leaving messages, but she never received a return call. (Tr. 26-27.) Don Jones denies this, however, and further denies having had any phone conversations with Van Dyck after her last day of work, December 7, 2003. (Tr. 104-105, 118-119.)

14. According to Don Jones, because he never heard from Van Dyck after December 14, he thought she had simply failed to show up on Sunday, December 21, 2003, and he asked the Tuesday night bartender, Eddie Brummel, to fill in for her. (Tr. 104-105.)

15. The only telephone at the Old Time Tap is a pay phone, which both customers and management use. (Tr. 60.) When Van Dyck was on duty, she answered the phone nine times out

of ten, and it is likely that other bartenders answered the phone when they were on duty. (Tr. 60.) There is no answering machine on this phone. (Tr. 117.)

16. By chance, Van Dyck and Don Jones ran into each other at a local hardware store in January 2004. (Tr. 27, 107, 113.) When Van Dyck asked Jones, "What's up with work?" he told her they had replaced her. (Tr. 27, 108.)

17. Eddie Brummel, who had more seniority than Van Dyck, took the Sunday evening shift during the month of January. (Tr. 119-120.)

18. The bartender whom Van Dyck had replaced, Geri Polozet, returned from her maternity leave on Wednesday, February 4, 2004. (Tr. 109.)

19. Van Dyck was paid $50 per night, and as noted above, at the time of her injury, she was working only one night per week. (Tr. 20, 34.)

20. Van Dyck was out of work for approximately ten months until November 1, 2004, when she took a job as a cashier in Hammond, Indiana. (Tr. 68.)

21. She estimates her lost income for this ten-month period amounts to $2,000 in lost wages, plus tips, which she estimates would have totaled $2,100. (Tr. 68-76.) She admits, however, that she never kept track of tips and the amount may have been significantly lower. (Tr. 71-72.)

22. Because of Polozet's return to work, Van Dyck's job as a fill-in bartender would have ended February 1, 2004, in any event.

23. Although Van Dyck offered medical records showing substantial medical bills related to her December 10, 2003, fall, e.g. Complainant's Exhibits A and B, there was no contention that Old Time Tap was responsible for that injury. Only the last page of Exhibit A was received into evidence. (Tr. 92.)

B. Credibility

24. The hearing officer found Ms. Van Dyck very credible and very precise. In addition to her own testimony, Van Dyck called her boyfriend, Wayde Bleege, to testify. Mr. Bleege was also found very credible; however, he had little if anything to say that was relevant to Ms. Van Dyck's claim.

25. Respondent's witnesses were Don and Christine Jones, the owners of Old Time Tap. They were also found credible.

26. The hearing officer noted that during the course of the hearing, each of the witnesses for both sides appeared to make every effort to testify honestly.

III. CONCLUSIONS OF LAW

This case arises under Section 2-160-030 of the Chicago Human Rights Ordinance, which provides: "No person shall directly or indirectly discriminate against any individual in hiring . . . discharge . . . or any other term or condition of employment because of the individual's . . . disability." It is Complainant's burden to prove, by a preponderance of the evidence, that her disability motivated the Respondent to discharge her. See, e.g., *Luckett v. Chicago Dept. of Aviation*, CCHR No. 97-E-115 (Oct. 18, 2000). A disability is defined under the Regulations implementing the Human Rights Ordinance as "a determinable physical or mental characteristic which may result from disease, injury, congenital condition of birth, or functional disorder." Part 100(11). The definition also includes "the perception of such a characteristic." *Id.* The Commission has held that to be actionable, the medical condition must not be insubstantial or transitory. See, e.g., *Jacobs v. White Cap, Inc.*, CCHR No. 96-E-238/239 (July 29, 1997). Complainant's initial burden is to prove that:

- She is a member of the protected class (a person with a disability or perceived as such);
- She was performing her job to her employer's legitimate expectations;
- She suffered an adverse employment action; and
- Similarly situated employees did not suffer the same adverse employment action.

Wehbe v. Contacts & Specs, CCHR No. 93-E-232 (Nov. 20, 1996); see also *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973).[1] Respondent contests each of these elements.

Turning to the first element, Complainant must establish by a preponderance of the evidence that she was a person with a disability or that she was perceived as such. The only detail Complainant provided about her disability is that it was "related to [her] head injury." Complaint, ¶11. This vague and non-specific allegation falls short of the "determinable physical or mental characteristic" required by the Regulation. At the hearing, Complainant testified that she told her employer she had gotten dizzy, which adds some specificity. But her dizziness was only a transitory condition, which the Commission has held insufficient to satisfy the Ordinance. *Jacobs*, *supra*. Furthermore, the evidence was overwhelming that Old Time Tap was never aware of any "determinable" medical condition that would meet the definition. There is no evidence that any agent of Old Time Tap learned anything about Van Dyck's December 10 injury other than that she had become dizzy and hurt her head. There is simply no evidence to suggest that Don Jones perceived Van Dyck as someone with a determinable non-temporary medical characteristic of any

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[1] Under the *McDonnell-Douglas* method of proof, if a complainant establishes a *prima facie* case of discrimination, the respondent then has the burden of articulating a non-discriminatory basis for its actions. The burden then shifts back to complainant to prove that the basis offered by the respondent is pretextual. See, e.g., *Prewitt v. John O. Butler Co.*, CCHR No. 97-E-42 (Dec. 6, 2000); *Adams v. Chicago Fire Department*, CCHR No. 92-E-72 (Sept. 20, 1995).

sort. Complainant has not proved the first element of her *prima facie* case, and therefore her complaint must be dismissed.

If we were to address the remaining elements of the *prima facie* case, Complainant would prevail on the second but lose on the third and fourth. Although Respondent presented some testimony suggesting that Van Dyck was not always sufficiently attentive to the customers of Old Time Tap, the hearing officer found that she was performing her job to her employer's reasonable expectations. Thus, she met her burden on the second element of proof of her *prima facie* case.

As for the third element, it is highly disputed whether Complainant suffered an adverse employment action when she was replaced. She testified that she attempted to advise her employer that she was ready to return to work on December 21, but Don Jones recalled receiving no such message. As noted above, both witnesses were very credible. The hearing officer was unable to give the testimony of one witness more weight than the other. While the hearing officer had the distinct impression that Van Dyck sincerely believed she spoke directly with Don Jones on or before December 21, and that he told her she was a "risk and a liability," Don Jones was found equally credible in denying any such conversation. In fact, he denied making any decision to replace Van Dyck and explained that her position was filled first by another bartender with more seniority and then by the bartender who returned from maternity leave. Because the evidence on this point is evenly matched, the Complainant has failed to establish this element by a preponderance of the evidence, as required for her to prevail.

With regard to the fourth element, the treatment of similarly-situated workers, Complainant did not present evidence that any comparable employee at Old Time Tap was treated better than she was in similar circumstances. Again, she failed to prove by a preponderance of the evidence that she was treated differently from employees without a perceived or actual disability.

In summary, the hearing officer concluded that Complainant did not establish by a preponderance of the evidence that she was fired because of a disability or perceived disability, and her complaint should be dismissed. The Commission accepts and adopts the hearing officer's recommended findings of fact as well as her conclusion that Complainant has failed to meet her burden of proof that she was subjected to discrimination based on perceived disability.

IV Conclusion

For these reasons, the Commission adopts the hearing officer's recommendations and finds for Respondent.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: Dana V. Starks

Dana V. Starks, Chair and Commissioner