

IN THE MATTER OF THE
REQUEST FOR REVIEW BY:

Charge No.: 2023SF0969
EECO No.: 21BA39518
ALS No.: 24-0126

This matter coming before the Commission on August 28, 2024, by a panel of three, Chair Selma D’Souza, Commissioner Jacqueline Y. Collins, and Commissioner Janice M. Glenn presiding, upon the Request for Review (“Request”) of Nicholas Murphy (“Petitioner”),¹ of the Notice of Dismissal issued by the Illinois Department of Human Rights (“Respondent”) of Charge No. 2023SF0969, and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the dismissal of Counts A and B of the Petitioner's charge is **SUSTAINED** for **LACK OF SUBSTANTIAL EVIDENCE**, that the dismissal of Count C is **VACATED** and the count **REMANDED** for **FURTHER INVESTIGATION**, and the dismissal of Count D is **VACATED** and the count **REMANDED** for a **FINDING OF SUBSTANTIAL EVIDENCE** and for further proceedings consistent with this Order and the Illinois Human Rights Act ("Act").²

On November 14, 2022, the Petitioner filed a charge of discrimination with the Respondent, perfected on April 3, 2023, alleging that Biaggis Ristorante Italiano LLC (“Biaggis”) harassed him due to his race, Black (Count A), and his disability, speech impediment (Count B); and failed to hire him due to his race (Count C) and disability (Count D); in violation of Section 2-102(A) of the Act. On January 10, 2024, the Respondent dismissed the Petitioner’s charge for lack of substantial evidence. The Petitioner filed a timely Request.

Biaggis operates Italian restaurants in Illinois. The Petitioner said that he submitted a job application for a Sous Chef position at Biaggis's Bloomington, Illinois location in September 2022.

¹ In a request for review proceeding, the party filing the request for review is referred to as the “Petitioner” and the Illinois Department of Human Rights is the “Respondent.”

² This Order is entered pursuant to a 3-0-0 vote by the Commissioners.

The Petitioner stated that he interviewed for the Sous Chef position on September 28, 2022, with Chef/Partner Troy Tomlinson. He said that, during the interview, Tomlinson stated that “the last [B]lack guy that worked here was an issue, you are not going to be like him, are you?” The Petitioner stated that when he attempted to answer he began to stutter. He said that Tomlinson asked him if he stuttered, and he responded, “a little.” The Petitioner stated that Tomlinson commented that “he was concerned whether [the Petitioner] would be able to work well with the Spanish employees.” He said that he did not tell Tomlinson that he had a speech impediment. The Petitioner stated that Tomlinson told him that he was hired and that he would receive onboarding tasks and a start date in the future.

The Petitioner stated that he completed and submitted all the information and documentation that Biaggis requested and understood that his start date was October 2, 2022. He provided copies of emails dated October 2, 2022, confirming that the following documents that he submitted had been received: contact details, address transaction, confidential information, emergency contacts, employee handbook, mediation agreement, and benefit enrollment.

The Petitioner said that he was instructed to call the Bloomington location on his start date for further information. He stated that he called several times on and after October 2, 2022, and was told that Tomlinson was either out or was busy. The Petitioner said that he was finally able to get a hold of Tomlinson approximately two weeks after October 2, 2022. He stated that, when he asked Tomlinson about his start date, Tomlinson told him that he had never been hired.

The Petitioner stated that he believed that he was not hired because Tomlinson viewed him as a “risk of being a problem” due to his race because of Tomlinson’s statement regarding the previous Black employee. He said that he believed that his speech impediment was also an issue because Tomlinson made a comment questioning whether the Petitioner could work with “Spanish employees.”

Managing Partner Derek Roetzer stated that Biaggis received the Petitioner’s resume for both the Cook position and the Sous Chef position on September 27, 2022. Director of Human Resources Robyn Jones said that Biaggis determined that the Petitioner was not qualified for the Sous Chef position, but he was qualified for the Cook position. She stated that the Petitioner was invited to interview for the Cook position, and Tomlinson interviewed the Petitioner for the Cook position on September 28, 2022. Jones said that the Petitioner was offered the Cook position, and he accepted it.

Jones said that Biaggis continued the onboarding process by sending the Petitioner paperwork to complete and giving him a start date of October 2, 2022. She stated that the Petitioner did not complete the paperwork and did not report to work on October 2, even though she held the Petitioner’s position until October 18, 2022.

Jones stated that Biaggis hired Erick Lopez (non-Black, unknown disability status) for the Sous Chef position on January 11, 2023. She said that Lopez was an internal hire that had been employed as a Line Cook since September 19, 2019.

The Commission determines that substantial evidence does not exist as to Counts A and B, that further investigation is needed to determine whether substantial evidence exists as to Count C, and that substantial evidence exists as to Count D. Under the Act, substantial evidence is “evidence which a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance.” 775 ILCS 5/7A-102(D)(2).

Counts A and B

The Petitioner alleged that Biaggis harassed him on September 28, 2022, due to his race (Count A) and disability (Count B) when Tomlinson asked whether he stuttered, when Tomlinson asked whether he was going to have an issue with the Petitioner after mentioning a former Black employee, and when Tomlinson said he did not want to lose his Spanish workers by giving the Petitioner a chance.

When assessing whether alleged acts constitute harassment on the basis of a protected class, the Commission will consider “the severity of the alleged conduct, its frequency, whether it [wa]s physically threatening or humiliating (or merely offensive), and whether it unreasonably interfere[d] with the employee’s work performance” and whether the acts were based on the petitioner’s protected class. *In re Request for Review by: Trovoyum Branson*, IHRC, ALS No. 16-0468, 2019 ILHUM LEXIS 664, *4 (May 1, 2019). “Harassment has been defined to include a steady barrage of opprobrious comments. More than a few isolated incidents of harassment, however, must have occurred; comments that are merely part of the casual conversation, are accidental, or are sporadic do not trigger civil rights protective measures.” *In re Brandon D. Smith and Board of Ed. of the City of Chicago*, IHRC, ALS No. 14-0193, 2023 ILHUM LEXIS 60, *17 (April 14, 2023).

The Commission determines that a *prima facie* case has not been established as to Count A or B. The alleged harassment raised by the Petitioner (Tomlinson asking whether he was going to have an issue with the Petitioner after mentioning a former Black employee and Tomlinson asking the Petitioner whether he had a stutter and questioning whether the Petitioner could work with “Spanish” employees) were isolated incidents that did not constitute a steady barrage of opprobrious comments. Moreover, they were not physically threatening or humiliating. *See In re Request for Review by: Robert C. Jackman*, IHRC, ALS No. 22-0188, 2022 ILHUM LEXIS 212, *6 (Nov. 9, 2022) (noting that racial comments that are merely part of casual conversation, are accidental, or are sporadic do not trigger civil rights protective measures and finding that the petitioner’s co-worker calling him racist did not constitute harassment). Accordingly, the Commission sustains the Respondent’s dismissal of Counts A and B for lack of substantial evidence.³

³ The Commission notes that an analysis of the Petitioner’s alleged disability was not germane to these counts but will be discussed below.

Count C

The Petitioner alleged that Biaggis failed to hire him for the Sous Chef position due to his disability. A *prima facie* case of discrimination in a failure-to-hire claim requires that: (1) the petitioner is a member of a protected class; (2) the petitioner applied for and was qualified for the job in question; (3) despite the petitioner's qualifications, he was rejected; and (4) either the position remained open while the Employer sought applicants or the job was filled by someone from outside the petitioner's protected class. *In re Lisa Hendricks and Bd. of Ed. of the City of Chicago*, IHRC, ALS No. 14-0542, 2019 ILHUM LEXIS 1511, *6 (Feb. 22, 2019). Under the Act, "disability" means "a determinable physical or mental characteristic of a person." 775 ILCS 5/1-103(I)(1). However, "disability" excludes "conditions that are transitory and insubstantial" or "not significantly debilitating or disfiguring." 56 Ill. Admin. Code § 2500.20(b)(1). "Transitory" is defined as "of brief duration," "existing momentarily," or "temporary." *Anderson v. Modern Metal Products*, 305 Ill. App. 3d 91, 98 (2d Dist. 1999).

While the Petitioner alleged that he had a speech impediment that constituted a disability, there is not enough information to determine whether the Petitioner was disabled under the Act. The Petitioner did not specify the nature of his disability and whether it was a permanent and major condition. Moreover, it does not appear from the investigation report that the Respondent inquired into the nature of the Petitioner's alleged disability, such as by asking the Petitioner to complete a Verification of Disability form. Accordingly, the Commission vacates the Respondent's dismissal of Count C and remands the count for further investigation on this issue.

Count D

The Petitioner alleged that Biaggis failed to hire him for the Sous Chef position due to his race. A *prima facie* case of discrimination in a failure-to-hire claim requires that the *Hendricks* standard be met. *Hendricks*, 2019 ILHUM LEXIS 1511 at *6.

The Commission determines that a *prima facie* case has been established. First, the Petitioner is a member of a protected class due to his race. Next, the Petitioner was qualified for the Sous Chef position because he received an offer, start date, and onboarding documents for the position. Though Biaggis stated differently, we could only find that the Petitioner was not qualified and did not receive an offer for the Sous Chef position if we believed Biaggis over the Petitioner, and this would be an improper credibility determination at this stage. See *Cooper v. Salazar*, No. 98 C 2930 (N.D. Ill.), 2001 U.S. Dist. LEXIS 17952, *21 (Nov. 1, 2001). Next, the Petitioner was rejected because, though he attempted to begin work on his start date, he was told approximately two weeks later that he had not been hired. Again, though Biaggis stated differently, the Commission cannot make credibility determinations at this stage. *Id.* Finally, the Sous Chef position was ultimately filled by someone outside of the Petitioner's protected class, Lopez. Accordingly, the Commission vacates the Department's dismissal of Count D and remands the Count for a finding of substantial evidence.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The dismissal of Counts A and B is **SUSTAINED** for lack of substantial evidence.
2. The dismissal of Count C is **VACATED** and the count **REMANDED** for **FURTHER INVESTIGATION** and for further proceedings that are consistent with this Order and the Act.
3. The dismissal of Count D is **VACATED** and the count **REMANDED** for a **FINDING OF SUBSTANTIAL EVIDENCE**.

This Order is not yet final and appealable.

STATE OF ILLINOIS)	
)	Entered this 4th day of SEPTEMBER 2024.
HUMAN RIGHTS COMMISSION)	

Chair Selma D'Souza

Commissioner Jacqueline Y. Collins

Commissioner Janice M. Glenn