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23-P-378 Appeals Court

GARY PETTIFORD vs. BRANDED MANAGEMENT GROUP, LLC, & others.[1]

No. 23-P-378.

Worcester. December 12, 2023. - June 14, 2024.

Present: Green, C.J., Neyman, & Englander, JJ.

Anti-Discrimination Law, Public accommodation. Civil Rights, Coercion. Massachusetts Civil Rights Act. Consumer Protection Act, Responsibility of employer, Unfair act or practice, Vicarious liability. Corporation, Corporate disregard. Agency, Scope of authority or employment. Practice, Civil, Motion to dismiss, Civil rights, Consumer protection case, Amendment of complaint, Waiver. Waiver.

Civil action commenced in the Superior Court Department on May 25, 2022.

A motion to dismiss was heard by J. Gavin Reardon, Jr., J.

Janet R. Ruggieri for the plaintiff.
John M. Wilusz for the defendants.

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[1] Worcester Donuts, Inc., doing business as Dunkin' Donuts at Yankee Gas Station (Worcester Donuts); C&L Donuts, Inc.; JLC Donuts, Inc.; Park Ave Donuts LLC; Main Street Donuts LLC, BCDR Holdings, Inc.; City Donuts, Inc.; Robert Branca, Jr.; and Gregory Califano.

ENGLANDER, J. The plaintiff, Gary Pettiford, appeals from a judgment dismissing his first amended complaint (complaint) for failure to state a claim under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). Pettiford's claims arise from an incident at a Dunkin' Donuts restaurant (Dunkin') in October of 2021. He alleges that an employee at Dunkin' first delayed making his food order, then threw the order at him, and then when the plaintiff objected, called the plaintiff a racial epithet. The plaintiff did not sue the employee but rather sued eight corporations that were or could be affiliated with the Dunkin' Donuts restaurant at issue, as well as two Dunkin' corporate officers. He asserted violations of the public accommodation law, G. L. c. 272, § 98, and the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, §§ 11H-11I; he also brought claims for unfair or deceptive acts or practices under G. L. c. 93A, as well as other statutory violations and common law torts.

The judge's dismissal hinged on his conclusion that the corporate defendants could not be liable on a theory of respondeat superior, ruling as a matter of law that the employee's "specific disturbing conduct alleged . . . could not have been motivated, even in part, by a purpose to serve the employer." The case thus requires us to consider whether and how theories of respondeat superior apply to the plaintiff's various civil claims. As we discuss below, we conclude that the

employer (or employers) of the Dunkin' employee could be vicariously liable, under the facts alleged, as to the claims under the public accommodation law, c. 93A, and the MCRA. We also conclude, based on the facts put before the motion judge in opposition to the motion to dismiss (but not yet pleaded in a complaint), that several of the named corporate defendants might properly be considered as the "employer" for respondeat superior purposes. We accordingly vacate the judgment in part, and remand so that the plaintiff may move forward with certain of his claims. We otherwise affirm.

Background.[2] On October 9, 2021, the plaintiff, who is Black, entered and ordered food at a Dunkin' restaurant located near his residence in the city of Worcester. For fifteen minutes thereafter, the employee tasked with preparing the plaintiff's food (cook) ignored the order while the plaintiff stood waiting. Instead of completing the order, the cook showed another employee something on her cell phone for an extended period of time. The cook also ignored reminders from two separate coworkers that the plaintiff was waiting for his food. On the third reminder from a coworker, the cook looked at the

[2] The following facts are drawn from the complaint. We must, of course, take those allegations as true for the purposes of evaluating the motion to dismiss. See Six Bros., Inc. v. Brookline, 493 Mass. 616, 621 (2024).

plaintiff and said, "He can wait." The cook eventually completed the plaintiff's food order and "proceeded to throw" it at him. The plaintiff responded that the cook did not need to be rude, to which the cook called the plaintiff a "fucking nigger."[3] The plaintiff left the restaurant.

After the incident, the plaintiff called the Dunkin' corporate office to complain. That complaint apparently was conveyed to one of the defendant corporate entities in this case, Worcester Donuts, or to its parent company, Branded Management Group, LLC (Branded Management Group), because defendant Robert Branca, Jr., an officer at Branded Management Group, followed up with the plaintiff via telephone. Branca asked the plaintiff to identify the cook, and further told him not to worry "about street code" or being a "snitch." The plaintiff considered Branca's comments to be threatening and racially motivated, and called the Dunkin' corporate office again to make a further complaint. The plaintiff received a follow-up phone call from defendant Gregory Califano, who is an owner of Worcester Donuts, the corporate defendant that allegedly owns the Dunkin' where the incident occurred. The

[3] Following Commonwealth v. Rodriguez, 101 Mass. App. Ct. 439, 440 n.3 (2022), "[w]e use the epithet in full once for clarity, and to ensure that the topic is searchable in legal databases." We otherwise use an abbreviated form of the epithet in this opinion.

plaintiff explained what happened at the Dunkin' and also described his conversation with Branca. Califano offered the plaintiff a beer and a gift card, which the plaintiff declined.

In May of 2022, the plaintiff initiated this action in the Superior Court against Branca, Califano, and Worcester Donuts, as well as seven parent or sister companies of Worcester Donuts. The plaintiff alleged seven counts -- for violations of the public accommodation law, the MCRA, G. L. c. 93A, §§ 2 and 9, and G. L. c. 151B, § 4 (4), as well as claims for intentional and negligent infliction of emotional distress. The defendants moved to dismiss the complaint for failure to state a claim. In allowing the motion, the judge concluded that the defendants could not be held vicariously liable for the cook's conduct because the conduct did not fall within the scope of her employment. The judge also determined that the plaintiff's allegations failed to set forth a basis for direct liability as to any of the defendants. As discussed further below, the judge did not reach the defendants' alternative argument for dismissal of the seven corporate defendants other than Worcester Donuts, which was that the plaintiff had not plausibly alleged why any of those separate corporations would be responsible, either directly or as a result of corporate relationships, for the actions of the cook. Judgment entered dismissing the complaint and this appeal followed.

Discussion. 1. Standard of review. We review the denial of a motion to dismiss de novo. See Six Bros., Inc. v. Brookline, 493 Mass. 616, 621 (2024). In doing so, we "accept[] as true all well-pleaded facts alleged in the complaint," and we "draw all reasonable inferences in the plaintiff['s] favor, and determine whether the allegations plausibly suggest that the plaintiff[is] entitled to relief" (citation omitted). Id.

2. Respondeat superior. We first must address a preliminary question raised with respect to the statutory claims under the public accommodation law, the MCRA, and G. L. c. 93A, which is whether the doctrine of respondeat superior applies to create employer liability under these statutes. Respondeat superior is derived from the law of agency, which establishes rules for when a principal may be held responsible for the acts of its agent. See Merrimack College v. KPMG LLP, 480 Mass. 614, 619-620 (2018). As a general rule, the doctrine applies to hold an employer liable for the tortious or "tort-like conduct," of its employee. See, e.g., id. at 620; Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 238 (2010). See also Ouellette v. Beaupre, 977 F.3d 127, 141 (1st Cir. 2020) (Federal Tort Claims Act in substance adopts respondeat superior liability for Federal government). Such vicarious liability only arises, however, if the employee's tortious acts were "committed within the scope of employment," Berry v. Commerce Ins. Co., 488 Mass.

633, 637 n.3 (2021) -- a concept that has sometimes proved difficult in application, as we discuss further below.

This court has previously held that an employer may be held liable under the doctrine of respondeat superior for an employee's violations of c. 93A, and the MCRA. See Sarvis v. Boston Safe Deposit & Trust Co., 47 Mass. App. Ct. 86, 96-97 (1999). Each of these statutes establishes duties that private persons owe to others, as to which civil penalties may arise for their violation. They are statutory torts -- or "tort-like" -- and an employer can be liable if its employee violates those statutes while acting within the scope of employment. Id.

While no court has yet addressed whether respondeat superior liability can arise under the public accommodation statute, G. L. c. 272, § 98 (§ 98), we conclude that the doctrine of respondeat superior also applies to violations of that statute, given the "tort-like" aspects of the statutory claim. The public accommodation statute "prohibit[s] discrimination on the basis of [race], among other factors, in relation to the admission of or treatment of any person in a place of public accommodation." Donaldson v. Farrakhan, 436 Mass. 94, 97 (2002).[4] The statute thus is directed at regulating

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[4] General Laws c. 272, § 98, imposes punishments and liability for "[w]hoever makes any distinction, discrimination or restriction on account of race . . . relative to the

the conduct of employees of businesses that engage directly with the general public. Given the nature and purposes of the statute, we see no sound reason why the general rules of agency liability would not apply to make the employer -- the place of public accommodation -- responsible for discriminatory actions of its employees, provided the employees were acting within the scope of their employment. See Dalis v. Buyer Advertising, Inc., 418 Mass. 220, 224 (1994), quoting Curtis v. Loether, 415 U.S. 189, 195-196 n.10 (1974) (claims seeking to redress racial discrimination may be "likened to an action for defamation or intentional infliction of mental distress"). Cf. Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 560 (2004), cert. denied sub nom. Wilfert Bros. Realty Co. v. Massachusetts Comm'n Against Discrimination, 543 U.S. 979 (2004) (discrimination claim under G. L. c. 151B is "not a tort, [but has] tort-like aspects").[5] Indeed, one need

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admission of any person to, or his treatment in any place of public accommodation." Civil damages for violations of the statute are awarded under the framework set forth in G. L. c. 151B, § 5. See G. L. c. 272, § 98.

[5] The public accommodation statute previously provided that a person aggrieved by a violation of the statute could recover "in an action of tort." St. 1895, c. 461, § 1. Although that language has since been removed, it is nevertheless clear that the statutory claim is tort-like, as it contains the elements of duty, breach, and damages arising from a breach. See Ankiewicz v. Kinder, 408 Mass. 792, 795 (1990).

not delve deeply into history before encountering numerous examples of places of public accommodation that, acting through their employees, overtly engaged in a policy of racial discrimination. Eliminating such discrimination was a goal of the statute, and its Federal counterpart, Title II of the Civil Rights Act of 1964, and employer liability under respondeat superior principles appropriately furthers that goal. See Currier v. National Bd. of Med. Examiners, 462 Mass. 1, 18 (2012). See also Daniel v. Paul, 395 U.S. 298, 301, 306-307 (1969).[6]

a. Public accommodation statute. That brings us to the question whether the specific allegations in the complaint were sufficient to state a claim against any of the employer-defendants in this case. The complaint of course contains sufficient allegations that the cook violated § 98. She delayed completing the plaintiff's order (inferably, based upon his race), threw the food at him, and called him a racial epithet while the plaintiff was a customer at a place of public

[6] This conclusion is consistent with the rulings of the Massachusetts Commission Against Discrimination (MCAD), which "has repeatedly enforced section 98 on a vicarious liability theory," see Brooks v. Martha's Vineyard Transit Auth., 433 F. Supp. 3d 65, 73 (D. Mass. 2020) (collecting cases). We are not bound to reach the same result, but the MCAD's construction is a useful guide for our interpretation. See Currier, 462 Mass. at 18. Cf. United States Jaycees v. Massachusetts Comm'n Against Discrimination, 391 Mass. 594, 607-608 (1984) (rejecting MCAD's interpretation of term "place of public accommodation").

accommodation. See G. L. c. 272, § 92A, second par. (defining place of public accommodation).

Under the doctrine of respondeat superior, the cook's employer is liable for the cook's violation if the cook was acting within the scope of her employment at the time of the violation. As the Supreme Judicial Court recently explained, "not all tortious conduct committed by an employee in connection with his or her work is within the scope of that employee's employment." Berry, 488 Mass. at 637. Rather,

> "we determine whether it falls within the scope of the employee's employment by considering three factors, each of which must be met to sustain the conclusion that the employee's conduct fell within the scope of the employment: (1) 'whether the conduct in question is of the kind the employee is hired to perform'; (2) 'whether it occurs within authorized time and space limits'; and (3) 'whether it is motivated, at least in part, by a purpose to serve the employer.'"

Id., quoting Clickner v. Lowell, 422 Mass. 539, 542 (1996).[7]

The allegations here plainly satisfy the first two factors. As to the first factor, the cook was carrying out the tasks she was hired to perform -- namely, preparing food orders and serving customers. As to the second factor, the plaintiff's

[7] Ordinarily, whether an employee acted within the scope of employment presents a question of fact, see Sunrise Props., Inc. v. Bacon, Wilson, Ratner, Cohen, Salvage, Fialky & Fitzgerald, P.C., 425 Mass. 63, 67 n.7 (1997), although (as in Berry) the question of course may be resolved as a matter of law when the material facts are not disputed.

entire interaction with the cook took place inside the Dunkin', while the cook was at her workstation.

The third factor -- whether the cook's conduct was motivated, at least in part, by a purpose to serve the employer -- is pivotal here. As to this factor, the motion judge concluded that the cook's conduct could not be motivated by a purpose to serve her employer because the cook was not hired to delay a customer's order, throw food at the customer, or call him a racial epithet. This analysis, however, adopts too narrow a view of the facts alleged and the scope of respondeat superior liability. To begin, if we were to focus only on the cook's conduct, the case law makes clear that her conduct need not be solely or even predominantly motivated by a purpose to serve the employer. See Wang Lab., Inc. v. Business Incentives, Inc., 398 Mass. 854, 859-860 (1986) (Wang). Moreover, an employee's conduct may be motivated in part by a purpose to serve the employer where an employee performs her employer's work, even if she at the same time is accomplishing her own objectives, and even if the employee's objectives conflict with those of the employer. The Restatement (Second) of Agency § 236 comment b (1958), cited in Wang, supra at 860, is instructive on this point:

> "The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose

> of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service."[8]

Here, the cook's actions plausibly encompassed a motive to serve her employer; indeed, she ultimately completed the plaintiff's food order. That she did so in a discriminatory manner -- even if purely for her own purposes -- does not mean that her conduct necessarily fell outside the scope of her employment.[9] Ultimately, what actions the cook actually took and

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[8] The Restatement (Third) of Agency states the principle somewhat differently, although we think it not a substantive change for our purposes:

> "An employee acts within the scope of employment when performing work assigned by the employer . . . An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."

Restatement (Third) Of Agency § 7.07(2) (2006).

[9] Intentional torts can fall within the scope of employment for respondeat superior purposes. See Galvin v. New York, N.H. & H.R.R., 341 Mass. 293, 296 (1960) (employer subject to liability under doctrine of respondeat superior for defamatory statements made by employee in course of employment); Davric Me. Corp. v. United States Postal Serv., 238 F.3d 58, 60, 67 (1st Cir. 2001) (applying Maine law) (plant manager of postal service center's defamatory statements to postal service employees during site selection meetings within scope of employment). Cf. Restatement (Second) of Agency, supra at § 236 illustration 1 (employee acting within scope of employment where "in order to get to his destination ahead of a rival coach driver, and also to revenge a personal insult from him, strikes the horses of the rival in passing him upon the road, causing the horses to run away"). Contrast Timpson v. Transamerica Ins. Co., 41 Mass. App. Ct. 344, 349 (1996) (football player required to "cooperate

what her motives were cannot be resolved at the pleadings stage. See Pinshaw v. Metropolitan Dist. Comm'n, 402 Mass. 687, 694-696 (1988).

Of perhaps equal importance, however, in evaluating respondeat superior liability in this case we think it incorrect to focus only on the actions of the cook. The Dunkin' in question is a place of public accommodation that is required to serve its customers without regard to race. The allegations state that several other employees were present when the incident occurred, and that these employees were aware that the plaintiff was not being served. Taking these allegations as true, as we must, the inference from the complaint is that the plaintiff was being singled out. Yet no one stepped in, over what is alleged to be a fifteen-minute wait, to serve the plaintiff. Where was the cook's supervisor, presumably responsible for serving customers on a timely basis? On the facts alleged, the failure to timely serve the plaintiff was within the scope of employment of not just the cook but of other employees of the Dunkin', and the allegations are sufficient to make out a "plausible" claim that the failure to serve the plaintiff was based upon his race. See Six Bros., Inc., 493

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with members of the media" not acting in scope of employment by encouraging other players to sexually harass reporter in locker room).

Mass. at 621. The complaint thus sufficiently alleged that the employer or employers could be liable for the alleged violation of § 98.

b. Chapter 93A, § 9. The plaintiff's respondeat superior claim under G. L. c. 93A is equally viable. Chapter 93A, of course, provides a remedy for "any individual injured by the 'unfair or deceptive acts or practices' of a business operating in the consumer marketplace" (citation omitted). UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 410 (2019). Further, "[a] corporation may be held vicariously liable under G. L. c. 93A for the conduct of an agent within the scope of employment," as determined using the same three-factor test described above. Sarvis, 47 Mass. App. Ct. at 96. See Wang, 398 Mass. at 859.

The violation of the public accommodation law alleged here, involving racial discrimination, would qualify as an unfair or deceptive practice under c. 93A, § 2. Our courts have said that "[a] practice is unfair if it is 'within . . . the penumbra of some common-law, statutory, or other established concept of unfairness; . . . is immoral, unethical, oppressive, or unscrupulous; [and] . . . causes substantial injury to [consumers]" (citation omitted). Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 27, cert. denied, 522 U.S. 1015 (1997). See H1 Lincoln, Inc. v. South Washington St., LLC, 489

Mass. 1, 14 (2022). Previously, in the context of racial harassment perpetrated in the course of an insurance claim investigation, this court explained that "[r]acial harassment in the course of doing business is conduct fairly described as immoral, unethical, or oppressive for the purposes of G. L. c. 93A." Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 640 (1996). Moreover, for the same reasons described above, the plaintiff has adequately alleged that the cook and her coworkers were acting within the scope of their employment when the alleged unfair or deceptive acts occurred, such that the employer or employers may be liable for any violation of c. 93A.

c. Massachusetts Civil Rights Act. The plaintiff's MCRA claim against the employer or employers stands on somewhat different footing than his public accommodation and c. 93A claims. To establish a claim under the MCRA, "a plaintiff must prove that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." Currier, 462 Mass. at 12. "The MCRA creates no substantive civil rights; rather, it provides a mechanism for obtaining relief from the interference, or attempted interference, with rights conferred by Federal or Massachusetts law." Howcroft v. Peabody, 51 Mass. App. Ct. 573, 593 (2001).

We have already concluded that the complaint adequately alleges elements (1) and (2) -- a statutory civil right (under the public accommodation statute), with which the defendants interfered. See G. L. c. 272, § 98 (declaring "the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation," as civil right). The third element -- the requirement of threats, intimidation, or coercion -- presents an additional and more difficult issue. It is likely that the cook's alleged conduct could qualify as, for example, "coercion" under the statute. "Coercion" has been defined as "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done" (citation omitted). Glovsky v. Roche Bros. Supermkts., Inc., 469 Mass. 752, 763 (2014). The cook's conduct in delaying service, and then "throwing" the food and using a racial epithet, might be found to be coercion under the above standard; indeed, the complaint plausibly suggests that the cook's intent may have been to cause the plaintiff to leave the premises (against his will), or at least, not to come back. See Buster v. George W. Moore, Inc., 438 Mass. 635, 647 (2003) (concluding economic coercion, standing alone, actionable under MCRA). Cf. Jones v. Boston, 738 F. Supp. 604, 605 (D. Mass. 1990)

(bartender's use of "N-word" directed at patron sufficient to state claim under MCRA).

But assuming the cook's conduct qualified as threats, intimidation, or coercion, it is less clear that the cook's employer should be responsible, in respondeat superior, for the cook's coercive acts. As set forth above, for respondeat superior to apply to the MCRA claim, the cook's acts which constituted the MCRA violation must have been performed, in material part, from a motive to serve the employer's interests. See Berry, 488 Mass. at 637. The additional MCRA requirement of threats, intimidation, or coercion thus raises a question, in evaluating respondeat superior liability, that is not raised by the public accommodation or c. 93A claims -- to wit, assuming the cook engaged in threats, intimidation, or coercion, were those actions (in particular, the use of the racial epithet after throwing the food) an "independent course of conduct" not intended to serve any purpose of the employer? See Restatement (Third) of Agency § 7.07(2) (2006). See Berry, supra at 640, quoting Restatement (Second) of Agency, supra at § 235 comment c ("The fact that an act is done in an outrageous or abnormal

manner has value in indicating that the servant is not actuated by an intent to perform the employer's business").[10]

Ultimately, we are satisfied that the complaint plausibly alleges that the cook's employer or employers can be liable under the MCRA. The rule 12 (b) (6) standard is not a high bar, see Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008), and the complaint plausibly alleges facts that, taken in the light most favorable to the plaintiff, could support a reasonable inference that despite their outrageous nature, the cook's alleged actions that are sufficient for MCRA liability were done within the scope of her employment. In so ruling, we of course express no view of the merits of the claim, but only that, accepting the allegations of the complaint as true under the rule 12 standard, the plaintiff's case survives a motion to dismiss.

3. Direct liability of the principals, Branca and Califano. The plaintiff's remaining claims do not fare as well. The plaintiff has attempted to assert direct claims against the

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[10] For instance, in Berry, 488 Mass. at 640-641, the court concluded on the summary judgment record that a police officer, who was conducting a firearms training on town property, was not acting within the scope of his employment, given "[t]he egregious nature of [his] misconduct [that] had no employment-based purpose" -- i.e., "driving fast toward the picnic table, behind the storage container where officers were present, slamming on his brakes, and skidding toward the officers," id. at 640.

two corporate officers, Branca and Califano, based on the theory that each of them engaged in conduct that constituted aiding and inciting a violation of the public accommodation law, and retaliation under G. L. c. 151B, § 4 (4). Notably, the plaintiff does not allege that either Branca or Califano was present at the Dunkin' during the incident; rather, the plaintiff's claims are based on the individual defendants' responses to the complaints that the plaintiff made after the incident. Those allegations do not support a plausible claim that either individual defendant committed a separate statutory violation.

According to the complaint, when the plaintiff spoke to Branca, Branca "told [the plaintiff] to point out the individual perpetrator and not to worry 'about the street code' or being a 'snitch.'" The plaintiff, who feared that the cook might retaliate against him if she lost her job, considered Branca's statements "threatening and racially motivated." However, Branca's conduct does not support an aiding and inciting claim because it does not constitute a "wholly individual and distinct wrong . . . separate and distinct from the claim in main" (citation omitted). Lopez v. Commonwealth, 463 Mass. 696, 713

(2012).[11] In essence, the plaintiff told Branca of how the cook treated him, and Branca asked the plaintiff to identify who had done this. While the plaintiff alleges that he considered Branca's statements to be threatening and offensive, the statements as set forth in the complaint do not support a plausible claim that Branca intended to violate the plaintiff's rights under the public accommodation law. And as to the retaliation claim, even assuming the plaintiff has such a claim under c. 151B, § 4 (4), the claim would fail because the plaintiff has not alleged that any adverse action resulted from his protected conduct (i.e., his complaints to the Dunkin' corporate office). See Mole v. University of Mass., 442 Mass. 582, 591-592 (2004) (prima facie case of retaliation under § 4 [4] requires that plaintiff "suffered some adverse action . . . [from] the protected conduct" [footnote and citation omitted]).

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[11] The public accommodation law also imposes liability for "whoever aids or incites such distinction [or] discrimination." G. L. c. 272, § 98. Although no Massachusetts case directly construes that language, the plaintiff cites Lopez, 463 Mass. at 713, which construes similar language in G. L. c. 151B, § 4 (5), and states the elements of such a claim:

> "(1) that the defendant committed 'a wholly individual and distinct wrong . . . separate and distinct from the claim in main'; (2) 'that the aider or abetter shared an intent to discriminate not unlike that of the alleged principal offender'; and (3) that 'the aider or abetter knew of his or her supporting role in an enterprise designed to deprive [the plaintiff] of a right guaranteed him or her under G. L. c. 151B'" (citation omitted).

To the extent that the plaintiff now argues that Branca attempted to get the plaintiff to "drop his complaint," the facts as alleged in the complaint do not support that inference.

The allegations against Califano are even more limited. In response to the plaintiff's complaint about both the cook and Branca, Califano offered the plaintiff a beer and gift card, which the plaintiff declined. This conduct does not support a plausible claim for either statutory violation. Indeed, the plaintiff does not make an argument regarding his claims against Califano in his brief, and so those claims are waived.[12] See Barron v. Kolenda, 491 Mass. 408, 414 n.6 (2023).

4. The seven other corporate defendants. That brings us to the defendants' alternate ground for affirmance of the dismissal, which applies to seven of the eight corporate defendants. The gist of the alternative argument is that even if respondeat superior liability could arise as to the cook's employer, the complaint would state a claim only as to Worcester Donuts, allegedly the owner ("alter ego") of the Dunkin' in which the incident occurred. The defendants contend that there

[12] The plaintiff appears to have asserted other statutory claims against Branca and Califano in his complaint, but makes no separate argument in his brief. Those claims are waived, and fail in any event for the reasons already stated. With respect to the plaintiff's claims for intentional and negligent infliction of emotional distress, the plaintiff also advanced no specific argument in his brief, and these claims are waived as well. See Barron v. Kolenda, 491 Mass. 408, 414 n.6 (2023).

are insufficient allegations as to the other seven corporate defendants named in the complaint.

Because the motion judge dismissed the complaint on other grounds, he did not reach this alternate ground. The issues it raises, however, are certainly nontrivial. To be responsible in respondeat superior, a defendant would have to be an employer of the cook and her coworkers. The defendants argue that even if Worcester Donuts may be held liable for the employees' conduct, the plaintiff has failed to allege facts necessary to disregard corporate formalities and to permit the claims to proceed against the remaining defendants. The plaintiff, on the other hand, argues that the various corporate defendants are "joint employers," or that they are so interrelated that they form a "single enterprise" for tort liability purposes, or perhaps, that there is a basis for a claim to "pierce the corporate veil."

In his complaint, the plaintiff's allegations as to the other seven corporate defendants are very spare. Several defendants are alleged to be a "parent" of Worcester Donuts, while others are alleged to be a "parent or sister company." Branca and Califano are alleged to have an "interest" in each. As a matter of law, those allegations, standing alone, are insufficient to state a claim that any of the remaining defendants could be liable for the cook's actions. See Gurry v.

Cumberland Farms, Inc., 406 Mass. 615, 624 (1990) ("mere fact of common management and shareholders among related corporate entities has repeatedly been held not to . . . render[] . . . corporations a 'single employer'"); Westcott Constr. Corp. v. Cumberland Constr. Co., 3 Mass. App. Ct. 294, 297 (1975). However, in his opposition to the defendants' motion to dismiss in the trial court, the plaintiff provided additional facts about the corporate defendants, which the plaintiff gleaned from a position statement that the defendants filed with the Massachusetts Commission Against Discrimination.[13] Those additional facts, if alleged in an amended complaint, may well be sufficient to support a claim under a joint employer theory at least as to some of the remaining corporate defendants. See Commodore v. Genesis Health Ventures, Inc., 63 Mass. App. Ct. 57, 62 (2005) (applying joint employer analysis to G. L. c. 151B claim).[14]

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[13] The plaintiff filed a charge with the MCAD arising from the same underlying incident against the same defendants.

[14] Contrary to the defendants' contention, the plaintiff did not "waive" his claims as to the liability of the additional corporate defendants by not separately addressing the basis for their liability in his opening brief on appeal. The motion judge dismissed the case in its entirety without reaching the separate question raised as to liability of the other seven corporate defendants, and the plaintiff's opening brief was appropriately directed to arguing that the motion judge's reason for dismissal was error.

As the issue is likely to arise again on remand, and has been briefed before us, we offer some further observations on the matter.[15] The joint employer doctrine allows separate legal entities to be treated as "joint employers" if they "handle certain aspects of their employer-employee relationship jointly" (citation omitted). Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005). See Commodore, 63 Mass. App. Ct. at 61, quoting Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964) (joint employer defined as "a company possessing 'sufficient control over the work of the employees' of another company"). "The basis of [a joint employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."

We further note that in their appellees' brief, the defendants argued, as an alternative ground for (partial) affirmance, that the allegations were insufficient as to the other seven corporate defendants. The plaintiff then briefed the issue in his reply brief, and the defendants filed a surreply brief.

[15] Because the plaintiff did not submit a proposed amended complaint, detailing the precise contours of his allegations, we decline to resolve the question whether a motion to amend should be allowed, and leave the question for consideration by the Superior Court on remand, on the basis of a proposed amended complaint.

Commodore, supra at 62, quoting Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993 n.4 (6th Cir. 1997).[16]

Here, the plaintiff stated in his opposition in the trial court (and reasserts in his reply brief) several specific facts that, if true, might give rise to joint employer liability for at least some of the other corporate defendants. The plaintiff asserts that the Dunkin' at issue is owned and operated by Worcester Donuts, but that the cook was actually an employee of defendant JLC Donuts, Inc. Further, the plaintiff asserts that Worcester Donuts is owned by defendant BCDR Holdings, Inc., and that defendant Branded Management Group provides management services to defendant BCDR Holdings, Inc. Branca is the president of each corporate defendant and Califano is a shareholder and officer of each corporate defendant; both Branca and Califano also are directors of Branded Management Group. If these facts were asserted in an amended complaint -- in

[16] The Supreme Judicial Court recently announced a four-factor framework, adopted from Federal case law interpreting the Fair Labor Standards Act, to determine whether an entity is a joint employer under Massachusetts wage laws. See Jinks v. Credico (USA) LLC, 488 Mass. 691, 703 (2021). We note that Federal courts interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., have applied various and different tests to determine whether an entity exercises the requisite amount of control over the terms and conditions of employment to be considered a joint employer. See, e.g., Felder v. United States Tennis Ass'n, 27 F.4th 834, 842-844 (2d Cir. 2022); United States Equal Employment Opportunity Comm'n v. Global Horizons, Inc., 915 F.3d 631, 637-639 (9th Cir. 2019) and cases cited.

particular, the fact that the cook was working at Worcester Donuts but employed by yet another of the corporations, as well as the common ownership and management -- such allegations might well be sufficient for the plaintiff to move forward with a joint employer theory at least as to some of these additional defendants. Whether and what other corporations ultimately may be liable as joint employers will depend upon their particular facts. See Commodore, 63 Mass. App. Ct. at 61-62.[17]

Conclusion. So much of the judgment as dismissed the plaintiff's respondeat superior claims against Worcester Donuts under the public accommodation statute, G. L. c. 93A, and the MCRA is vacated. The case is remanded to the Superior Court, with instructions that the plaintiff be granted leave to amend his complaint, if the plaintiff believes he can state facts sufficient to support his respondeat superior claims against

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[17] Apart from the joint employer analysis described above, the plaintiff also has argued that he can satisfy the "integrated-enterprise test" described by the United States Court of Appeals for the First Circuit to determine whether two or more entities may be considered a "single employer" for the purposes of imposing liability. See Torres-Negron v. Merck & Co., 488 F.3d 34, 42 (1st Cir. 2007). We express no opinion on whether such a theory is a viable basis for liability, but that theory may also be pursued on remand, as might the doctrine of corporate disregard or piercing of the corporate veil. See Attorney Gen. v. M.C.K., Inc., 432 Mass. 546, 555 & n.19 (2000). Of course, the plaintiff has not yet had the opportunity to engage in discovery.

some or all of the defendants other than Worcester Donuts. The judgment is otherwise affirmed.

So ordered.