STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	
	)	CHARGE NO.: **2021SN1672**
	)	ALS NO.: **22-0127**
CARL DAVID WYANT,	)	
Petitioner.	)	

ORDER

This matter coming before the Commission on August 3, 2022 by a panel of three, Panel Chair Barbara R. Barreno-Paschall, Chair Mona Noriega and Commissioner Stephen A. Kouri II presiding, upon the Request for Review ("Request") of Carl David Wyant ("Petitioner"), of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2021SN1672, 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 Respondent's dismissal of Petitioner's charge for **LACK OF SUBSTANTIAL EVIDENCE** is **SUSTAINED**.[2]

DISCUSSION

On February 25, 2021, Petitioner filed a charge of discrimination with the Respondent, perfected May 11, 2021, alleging that Classic Plumbing Systems, Inc. ("Employer") discharged him because of his arrest record, in violation of Section 2-103(A) of the Illinois Human Rights Act ("Act"). On January 26, 2022, the Respondent dismissed Petitioner's charge for lack of substantial evidence. Petitioner filed a timely Request.

Factual Background

In mid-January 2021, Petitioner met with Tim Culver (no arrest record), Employer's president/owner, to discuss the possibility of Petitioner working as a plumber for Employer. During that meeting, Petitioner informed Culver that he had been arrested and convicted of a DUI in 1997, but he had been allowed to drive company vehicles for four other employers since his conviction. Petitioner also showed Culver his driver's license.

Petitioner accepted the position on February 1, 2021, and he began working on February 17, 2021. A risk advisor with Employer's insurer emailed Culver on February 22, 2021 saying that the insurer flagged Petitioner as an excluded driver who it may not be able to cover. The email stated,

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[1] In a request for review proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Illinois Department of Human Rights's action shall be referred to as the "Petitioner."

[2] This order is entered pursuant to a 3-0-0 vote by the Commissioners.)

"there must be a little more than a DUI 10 years ago. This alone would not have caused an exclusion. I am checking into what I can find out." Petitioner alleged that on that day Culver called him into his office, informed Petitioner of the email, and told Petitioner that he shouldn't worry about it. The following day Culver received another email that stated the Petitioner would not be covered under Employer's insurance policy. Culver stated that he was never given an explanation as to why Petitioner was not eligible. Petitioner stated that he offered to drive his personal vehicle for work travel but Employer told him that he could not do that.

That same day, Employer alleged a plumber apprentice, Jacob Shaw (no arrest record) told Culver that he had found an empty vodka bottle among Petitioner's work equipment. Culver stated that this was evidence that Petitioner was drinking alcohol on the job. Petitioner denied that the bottle of vodka was his and believes that it was Shaw's bottle who then tried to put the blame on Petitioner. When Employer fired Petitioner on February 23, 2021, Culver stated that he made no mention of the vodka bottle and that the primary reason he fired Petitioner was because he could not fulfill his job responsibilities after being listed as an excluded driver.

Finally, Employer proffered Victor Wells as a comparative to show that it did not discriminate based on arrest record. Wells is a plumber who has a DUI conviction. However, because the insurance carrier agreed to insure Wells, Employer continued to employ Wells.

Analysis

The Commission concludes that the Respondent properly dismissed Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. 775 ILCS 5/7A-102(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).

Count A: Discriminatory Discharge Based on Arrest Record

The fact that Petitioner was not merely arrested but also convicted of the DUI undercuts his claim for relief.[3] An employer may defeat a charge of discrimination based on arrest record by showing that it "obtain[ed] or us[ed] other information which indicates that a person actually engaged in the conduct for which he or she was arrested." 775 ILCS 5/2-103(B). In prohibiting discrimination because of arrest record, "the intent of the legislature was to prevent inquiry into mere charges or allegations of criminal behavior but to allow inquiry where criminal conduct has been proven." *Beard v. Sprint Spectrum, LP*, 359 Ill. App. 3d 315, 320 (3d Dist. 2005). Even if Employer had used Petitioner's DUI as

[3] Shortly after Petitioner filed the charge of discrimination, the legislature passed an amendment to the Act adding section 2-103.1. *See* P.A. 101-656 (eff. Mar. 23, 2021). The new section prohibits the use of a conviction record in certain employment decisions. However, because this amendment was not effective until March 23, 2021, it is inapplicable to this case.

a basis for firing him, the conviction would count as "information which indicates that [Petitioner] actually engaged in the conduct for which" he was arrested, 775 ILCS 5/2-103(B), and would not be unlawful under the Act.

Even without this statutory barrier, Petitioner's claim still fails. To establish his *prima facie* case of discrimination based on arrest record, Petitioner must show: (1) he had been arrested; (2) he performed his job satisfactorily; (3) the employer took an adverse action against him; and (4) a similarly situated employee, who did not have an arrest record, was treated more favorably. *See In re Request for Review by: Francisco Mosqueda*, IHRC, ALS No. 15-0155, 2019 ILHUM LEXIS 328, *2–3 (February 28, 2019) (citing *Anderson v. Chief Legal Counsel, Ill. Dep't of Human Rights*, 334 Ill. App. 3d 630, 634 (3d Dist. 2002)). If Petitioner establishes his *prima facie* case, Employer can rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for its actions. *Id.* at *3. Then, to prevail, Petitioner must prove that Employer's proffered reason is a pretext for unlawful discrimination. *Id.*

Even if we view the facts in the light most favorable to Petitioner, he has failed to prove the fourth element of his *prima facie* case. Petitioner has not offered any person who does not have an arrest record and has been allowed to work at Employer despite being excluded from Employer's insurance coverage. On the other hand, Employer has provided an employee who has a DUI just like Petitioner and has been allowed to keep working because the insurance company agreed to cover him. Without a similarly situated employee who does not have an arrest record and was treated more favorably than Petitioner, this claim must fail.

Nevertheless, Employer has articulated a legitimate, non-discriminatory reason that has not been rebutted as pretextual. Culver said he discharged Petitioner because Employer's insurance company would not cover him. The burden then shifts back to Petitioner to present evidence that this is pretextual. To prove pretext, the Petitioner must establish either that it is more likely that the Employer's actions were motivated by discrimination or that the Employer's explanation is not worthy of belief. *In re Dewberry and Kraft Foods, Inc.*, IHRC, ALS No. 10135, 2001 ILHUM LEXIS 147, *54–55 (Aug. 29, 2001) (citing *In re Robinson and Olin Corp.*, IHRC, ALS No. 5688(S), 1997 ILHUM LEXIS 804 (Sept. 29, 1997)). The only evidence that Petitioner provides of pretext is that Employer has given different explanations for Petitioner's discharge and thus, according to his Request, "is clearly hiding something." However, Employer's proffered insurance explanation has been largely unchallenged by Petitioner. Petitioner did not refute that the insurance company excluded him, did not contest that driving a company vehicle to clients' houses is an essential duty of the job, and acknowledged that no employees used their personal vehicles for Employer's business.

Moreover, Petitioner asserted that Employer knew about his arrest record when it chose to hire Petitioner weeks before it fired him. When a person is hired while in a protected class and then fired a short time later by the same person, that tends to undermine an inference of discriminatory animus. *Rand v. CF Indus.*, 42 F.3d 1139, 1147 (7th Cir. 1994). In *Rand*, the Seventh Circuit found two years was a short period of time. *Id.* When, as here, the time frame is a mere couple of weeks and the

Employer has continued to employ another person with the same criminal record as Petitioner, a finding of discriminatory motive is vanishingly implausible.

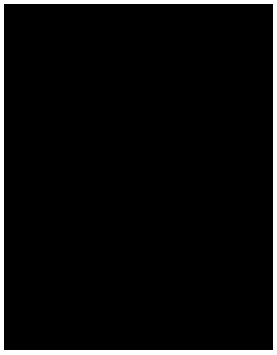
Accordingly, Petitioner has not presented sufficient evidence to show that the Respondent's dismissal of the charge was not in accordance with the Act.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The dismissal of Petitioner's charge for lack of substantial evidence is hereby **SUSTAINED.**

2. This is a final Order. A final Order may be appealed to the Illinois Appellate Court by filing a Petition for Review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Classic Plumbing Systems, Inc. as respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS)
) **Entered this 9th day of August, 2022.**
HUMAN RIGHTS COMMISSION)



Commissioner Barbara R. Barreno-Paschall

Commissioner Stephen A. Kouri II

Chair Mona Noriega