

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2010CA3627
)	EEOC NO.: 21BA02004
MICHAEL C. COOK,)	ALS NO.: 11-0502
)	
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Rozanne Ronen¹, Nabi Fakroddin, and Merri Dee², presiding, upon Michael C. Cook’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Department of Human Rights (“Respondent”)³ of Charge No. 2010CA3627; 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 the Petitioner’s charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following findings of fact and reasons:

1. On May 10, 2009, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged Nestle Waters Na-Suite 2/Ice Mountain Water (“Employer”) harassed him because of his age, 53 (Count A) and in retaliation for opposing unlawful discrimination (Count B); and discharged the Complainant because of his age (Count C) and in retaliation for opposing unlawful discrimination (Count D), in violation of Section 2-102(A) and 6-101(A) of the Illinois Human Rights Act (“Act”). On May 5, 2011, the Respondent

¹ This Order is in accordance with a vote cast by Commissioner Ronan prior to the expiration of her term.

² This Order is in accordance with a vote cast by Commissioner Dee prior to the expiration of her term.

³ In a Request for Review Proceeding, the Illinois Department of Human Rights is the “Respondent.” The party to the underlying charge who is requesting review of the Department’s action shall be referred to as the “Petitioner.”

dismissed the Petitioner's charge for Lack of Substantial Evidence. On August 5, 2011, the Petitioner filed a Request for Review.

2. The Petitioner was employed as a Route Sale Representative ("RSR") by the Employer. The Petitioner alleged that on or about October 9, 2010, he engaged in a protected activity when he complained to the Employer Human Resources Officer of harassment, and a hostile and intimidating work environment
3. In Counts A and B, the Petitioner alleged that from January 2009, continuing until November 12, 2009, he was harassed by Paul Vitullo (39, no complaints), Unit Leader. The Petitioner alleged that the harassment consist of Vitullo approaching him closely while yelling during January 2009, giving him short answers, closing the door when he would see him approaching, and turned his back to him when he was talking. The Petitioner alleged this harassment increased after he reported being harassed by Vitullo on October.9, 2009. The Petitioner alleged that he was being harassed by two co-workers who continually told him he should and should not report Vitullo. The Petitioner alleged that the harassment was due to his age and in retaliation for complaining of unlawful discrimination. Complainant further alleged in Counts A and B that the harassment created a hostile intimidating working environment and that similarly situated younger individual were not harassed as he was.
4. In Counts C and D, the petitioner alleged that that on November 12, 2009, he was discharged by Vitullo, and Timothy Steele ("Steele"), Unit Leader. The Petitioner alleged that the reason given for the discharge was for giving out too much gratis. The Petitioner alleged that the discharge occurred shortly after making his complaint of harassment on October 9, 2009. The Petitioner further alleged in Counts C and D he performed his job duties in a satisfactory manner and that similarly situated younger individuals and individuals who have not complained of unlawful discrimination were not discharged as he was.
5. As to Counts A and B, the Employer denied that it subjected the Petitioner to harassment because of his age or in retaliation for opposing unlawful discrimination.
6. As to Counts C and D, the Employer denied that it discharged the Petitioner because of his age or in retaliation for opposing unlawful discrimination. Rather, the Employer stated that it discharged the Petitioner because the Petitioner had a history of discipline and gave away excessive product without authorization or notifying the Employer.

7. The Respondent's investigation revealed that the alleged harassment consisted of Vitullo approaching the Petitioner closely while yelling during January 2009, giving him short answers, closing the door when he would see him approaching, and turned his back to him when he was talking.
8. The Petitioner admitted during the Respondent's investigation that no one at the Employers has ever made any comments or done anything pertaining to his age, 53. The Petitioner admitted that he never complained about being harassed for a discriminatory reason and nothing discriminatory took place with him.
9. The Respondent's investigation revealed that the Employer has a practice of allowing RSR's to give gratis, a free case of half-liter bottles of water, to new customers or when customers have complaints. Either prior to giving gratis or at the end of the day, RSR's are required to report to Vitullo or a Service Coordinator any gratis that they provide during the day.
10. The Respondent's investigation revealed that on December 29, 2008, the Employer issued the Respondent a verbal counseling for failing to make a delivery to eight customers. On July 23, 2009, the Employer issued the Petitioner a Written Reminder for kicking chairs and being sarcastic toward staff. On September 14, 2009, the Employer issued the Petitioner a Written Warning for failing to service a stop on his delivery route. The warning stated that the Petitioner failure to improve could lead to disciplinary action, up to and including discharge.
11. The Respondent's investigation revealed that the Employer reviewed the gratis records for the Petitioner and its other RSR's August 2009 until October 2009 and that the Petitioner gave out more substantially more gratis than other co-workers, did not notify the Employer's staff of the gratis he was giving out daily, and gave out more expensive product which is not generally used for gratis.
12. The Respondent's investigation did not reveal evidence of a younger comparative that had a comparable disciplinary history, who gave away comparable amounts of gratis, and whom the Employer did not discharge.
13. In his Request for Review, the Petitioner argues the Employer did not file a timely verified answer as required by the Act. Second, the Petitioner argues that the Respondent did not conduct a thorough investigation of the charge because the Respondent ignored important witnesses and failed to investigate the Employer's

policy on giving away its products.

14. In its response, the Respondent argues that the evidence was insufficient to establish a *prima facie* case of harassment and discrimination. The Respondent further argued that the Employer articulated a non-discriminatory reason for discharging the Petitioner and that there was no evidence that the articulated business reason was pretext for unlawful discrimination.

Conclusion

The Commission concludes that the Respondent properly dismissed all counts of the 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. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

Counts A and B, Harassment due to age and in retaliation

The Commission finds that the evidence was insufficient to establish a *prima facie* case of harassment. Generally to establish a *prima facie* case of harassment, the alleged misconduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. Harris v. Forklift Systems, Inc., 510 U.S. 20, 114 S.Ct. 367, 371, 126 L.Ed.2d 295. In the Petitioner's case the alleged harassment was work-related and did not rise to the level of actionable harassment. Furthermore as to Counts A and B, the Respondent found no evidence that the Petitioner had ever opposed unlawful discrimination because the Petitioner never provided specific dates and circumstance as to when he allegedly opposed unlawful discrimination.

Counts C and D, Discharged due to age and in retaliation

The Commission finds there is a Lack of Substantial Evidence in the Petitioner's case. Specifically, the evidence was insufficient to establish a *prima facie* case of discrimination. Generally, to establish a *prima facie* case of discrimination, the Petitioner must show: (1) that he is a member of a protected class; (2) that he was performing his work satisfactorily; (3) that he was subject to an adverse action; (4) and that the Employer treated a similarly situated employee outside the Petitioner's protected class

more favorably under similar circumstances. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994).

In the Petitioner's case there was no evidence that Employer treated a similarly situated employee outside the Petitioner's protected class more favorably under similar circumstances.

The Commission further finds that the Employer articulated a non-discriminatory reason for discharging the Petitioner and that there was no evidence that the articulated business reason was pretext for unlawful discrimination. The Employer discharged the Petitioner for giving away an excessive amount of the product without authorization. In the absence of any evidence that the business consideration relied upon by the Employer is a pretext for discrimination, it is improper to substitute judgment for the business judgment of the employer. See Berry and State of Illinois, Department of Mental Health and Developmental Disabilities, IHRC, ALS No. S-9146 (December 10, 1997).

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show the Respondent's dismissal of her charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of Petitioner's charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Nestle Waters Na-Suite 2/Ice Mountain Water, as respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS

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HUMAN RIGHTS COMMISSION

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Entered this 4th day of December 2018.

Commissioner Rozanne Ronen

Commissioner Nabi Fakroddin

Commissioner Merri Dee