**STATE OF ILLINOIS**
**HUMAN RIGHTS COMMISSION**

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| IN THE MATTER OF THE REQUEST FOR REVIEW BY: | ) | CHARGE NO.: **2011CA0062** |
| | ) | EEOC NO.: **21BA02411** |
| **SANTIAGO BARCENAS,** | ) | ALS NO.: **11-0834** |
| Petitioners. | ) | |

## ORDER

This matter coming before the Commission by a panel of three, Commissioners Nabi R. Fakroddin, Merri Dee[1], and Lauren Beth Gash[2] presiding, upon Santiago Barcenas's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")[3] of Charge No. 2011CA0062; and the Commission having reviewed *de novo* the Respondent's investigation file, including the Investigation Report and the Petitioner's Request, and the Respondent's response to the Petitioner's Request; 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:

### A. PROCEDURAL HISTORY

1. On July 12, 2010, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged Bretford Manufacturing, Inc. ("Employer") laid him off because of his age, 55, in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act")

2. Petitioner alleged that on June 8, 2010, the Employer laid him off due to age. The Petitioner further alleged that similarly situated younger employees were returned to work under similar circumstances.

3. On October 5, 2011, the Respondent dismissed the Petitioner's charge for Lack of Substantial Evidence.

4. On October 21, 2011, the Petitioner filed a timely Request. On January 12, 2012, the Respondent filed its Response to the Petitioner's Request.

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[1] This Order is in accordance with a vote cast by Commissioner Dee prior to the expiration of her term.
[2] This Order is in accordance with a vote cast by Commissioner Gash 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 requesting review of the Department's action shall be referred to as the "Petitioner."

## B. FACTUAL HISTORY, ALLEGATIONS, & ARGUMENTS

1. The Petitioner was employed as an Assembler by the Employer.

2. Article VII, Section 1, subparagraph F, of Employer's Collective Bargaining Agreement ("CBA") between the Employer and District No. 8 International Association of Machinists and Aerospace Workers, AFL-CIO states that an employee's seniority can be lost if an employee fails to return from a leave of absence or vacation, unless the employee can demonstrate to the satisfaction of the Company [Employer] by written excuse, if requested, that the absence was due to injury, death in the family, or other emergency. The CBA further states that if an employee failed to return from a leave of absence and/or vacation for a period of three (3) days without personally reporting to the Company the reason for his/her absence, it shall be treated as a voluntary quit. Every year before the end of February, Ismael Linares ("Linares")(48), Supervisor, and another department supervisor get together and plan out a vacation schedule based on seniority. It is a practice of the Employer to only allot two weeks per year for employee vacations. Amy E. Schuett (52), Director of Human Resources, stated that pursuant to the Employer's call-in procedures, employees calling in an absence need to call in by the beginning of their shift and speak to a supervisor about the situation.

3. The Petitioner was scheduled to start his ten-day vacation on May 17, 2010, which was to end on Friday, May 28, 2010. As Monday, May 31, 2010, was Memorial Day, a holiday, the Petitioner was expected to return to work at 6:30 a.m. on June 1, 2010. Sometime after 8:00 a.m. on June L 2010, Petitioner's niece called the Employer and spoke to Linares advising him that the Petitioner would not return to work on time because Petitioner's brother in Mexico was sick. Linares advised Petitioner's niece that Petitioner was required to call the Employer himself to relay the situation. Linares also notified the Petitioner's niece that it was important that the Petitioner understand the limitations outlined in the CBA regarding non-immediate family member emergencies. Linares advised Petitioner's niece that Petitioner's absence to attend to a personal matter for a non-immediate family member was not covered or protected by the CBA or the Family Medical Leave Act. Linares advised Petitioner's niece that in order for the additional time off to be excused, Petitioner would have to return with proper documents verifying an immediate family member emergency.

4. Petitioner returned to work on Monday June 7, 2010, and presented the Employer with a doctor's note which indicated that his brother was suffering from high blood pressure. Esau Torres ("Torres") (62), Plant Manager, then met with Linares and the Petitioner. Torres reviewed the Petitioner's note and determined that the note was not sufficient to excuse additional time off per the CBA, as Petitioner's brother's high blood pressure did not qualify as a bona fide medical emergency. The absence would have been excusable if a parent, child, or spouse was facing a medical emergency. However, the Petitioner would have

still needed to provide a document stating why Petitioner's presence was necessary. As a consequence, the additional time the Petitioner took off was unexcused and Petitioner was discharged effective June 7, 2010.

5. The Petitioner admitted he did not feel discriminated against due to his age. The Petitioner further stated that he understood that he violated the Employer's policy, but thought he would revive a two week suspension.

6. There was no evidence that a younger employee who violated the Employer's policy was treated more favorably under similar circumstances.

7. In his request the Petitioner argued that the Employer never gave him a second chance and that he never had a bad work record.

8. In its response, the Respondent asks the Commission to sustain its dismissal of the Petitioner's charge for Lack of Substantial Evidence. The Respondent argued that the Petitioner failed to establish a prima facie case of discrimination.

**C. DISCUSSION & DETERMINATION**

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).

In the Petitioner's matter the Commission finds that the evidence was insufficient to establish a *prima facie* case of discrimination. Generally, to establish a *prima facie* case of discrimination, the evidence must show: (1) that the Petitioner is a member of a protected class; (2) that the Petitioner was performing his work satisfactorily; (3) that the Petitioner 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 the Employer treated a younger employee more favorably under similar circumstances.

The Commission further finds that the Association articulated a non-discriminatory business reason for their actions and there was no evidence of pretext. The Petitioner took a ten day vacation and did not return to work as scheduled. Based on his failure to return to work on schedule and his failure to properly call in, the Employer made a good faith business decision to discharge the Petitioner. In his Request, the Petitioner offered no evidence of pretext. In the absence of any evidence that the business consideration relied upon by the Association is a pretext for discrimination, it is improper to substitute judgment for the business judgment of the Association. See *Berry and*

*State of Illinois, Department of Mental Health and Developmental Disabilities*, IHRC, ALS No. S-9146 (December 10, 1997).

## D. CONCLUSION

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show that the Respondent's dismissal of the Charge was not in accordance with the Act. The Petitioners' 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, Bretford Manufacturing, Inc. 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 )** **Entered this 3rd day of December 2018.**

Commissioner Nabi R. Fakroddin

Commissioner Merri Dee

Commissioner Lauren Beth Gash