

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2012CA1377
)	EEOC NO.: 21BA20345
EVERETT BARRY,)	ALS NO.: 13-0054
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Nabi R. Fakroddin, Hermene Hartman, and Eleni Bousis presiding, upon Everett Barry’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Illinois Department of Human Rights (“Respondent”)¹ of Charge No. 2012CA1377 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 for **LACK OF SUBSTANTIAL EVIDENCE** is **SUSTAINED**.

DISCUSSION

On November 15, 2011, the Petitioner filed a charge of discrimination with the Respondent alleging that Blockbuster Video, LLC., Dish Network (“Employer”) subjected him to unequal terms and conditions of his employment (Counts A and B), failed to promote him (Counts C and D), and discharged him (Counts E and F) due to his age and race in violation of Section 2-102(A) of the Illinois Human Rights Act (“Act”). The Petitioner withdrew the allegations in Counts A, B, D, and F, leaving only the allegations that the Employer failed to promote him and discharged him because of his race. On February 5, 2013, the Respondent dismissed these remaining counts for lack of substantial evidence. The Petitioner filed a timely Request.

The Commission concludes that the Respondent properly dismissed 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. 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. In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

In general the *prima facie* elements in a failure to hire case are as follows: (1) the Petitioner is a member of a protected class; (2) he applied for an open position; (3) he was qualified for the position applied for; (4) he was not hired; and (5) thereafter, the position remained open and the

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.”

Employer sought other applicants, or the Employer filled the available position with a person not in Complainant's protected class. In re Luis and Sonia Fragoso and Federal Chicago Corporation, Charge Nos. 1987CF1680; 1987CF1679, 1997 WL 407826, *7 (May 19, 1997).

The Petitioner cannot satisfy all of the elements of his failure to hire charge, as he cannot show that he was qualified for the position he applied for. The Employer specified that it would only consider employees who were store managers or higher, and the Petitioner was working as an assistant store manager at the time he applied for the promotion. The Petitioner stated that he believed he should have been considered for the job because he had previously held the position of store manager, but it is not appropriate for the Commission to second guess the Employer's legitimate business decisions. See Shah v. Illinois Human Rights Comm'n, 192 Ill. App. 3d 263, 273-74 (1st Dist. 1989).

To establish a *prima facie* case of discrimination, the Petitioner must show: 1) he is a member of a protected class; 2) he was performing his job satisfactorily; 3) he was subject to an adverse action; and 4) the Employer treated a similarly situated employee outside his protected class more favorably under similar circumstances. Marinelli v. Human Rights Comm'n, 262 Ill. App. 3d 247, 253 (2d Dist. 1994).

The Petitioner has not demonstrated that his discharge was due to his race. The investigation revealed that the Petitioner was discharged for working off the clock, which was specifically prohibited by the Employer. The Petitioner could not point to, nor did the investigation reveal, any employee who had worked off the clock who was not fired. Rather, the investigation revealed that at least one other employee who was of a different race than the Petitioner was discharged for the same conduct.

Accordingly, the Petitioner has not presented any 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 the Petitioner's charge is hereby **SUSTAINED**.
2. 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 Blockbuster Video, LLC., Dish Network as respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

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)
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Entered this 7th day of December 2018.

Commissioner Nabi R. Fakhroddin

Commissioner Hermene Hartman

Commissioner Eleni Bousis