

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2012CA1880
JAROSLAW KOSACZ,)	EEOC NO.: 21BA20711
)	ALS NO.: 13-0170
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Robert A Cantone, Hamilton Chang, and Steve Kim presiding, upon Jarolsaw Kosacz’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Department of Human Rights (“Respondent”)¹ of Charge No. 2012CA1880 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 Notice of Dismissal 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 December 11, 2011, the Petitioner filed an unperfected charge of discrimination with the Respondent, which was perfected on January 12, 2012. The Petitioner alleged State of Illinois, Department of Financial and Professional Regulation (“DFPR”), placed him on a corrective action plan because of his age, 64 (Counts A and H), his physical disability, Hypertension (Counts B and I), his mental disability, Stress disorder (Counts C and J), and in retaliation for his opposition to unlawful discrimination (Count K); and suspended him because of his age (Counts D and L), his physical disability (Counts E and M), his mental disabilities (Counts F and N), and in retaliation for his opposition to unlawful discrimination (Counts G and O); in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act (“Act”).
2. In Counts A, B, and C, the Petitioner alleged that on July 1, 2011, DFPR issued him a corrective action plan because of his age, his physical disability, and his mental disability.

¹ 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.”

Complainant further alleges that Respondent did not place similarly situated younger, non-disabled employees on a corrective action plan under similar circumstances.

3. In Counts D, E, and F, the Petitioner alleged that on September 12, 2011, DFPR suspended him because of his age, his physical disability, and his mental disability. The Petitioner further alleged that DFPR did not suspend similarly situated younger, non-disabled employees under similar circumstances.
4. In Count G, the Petitioner alleged that on August 25, 2011, he opposed unlawful discrimination when he complained to DFPR's management that he was being discriminated against because of his age. The Petitioner further alleged that on September 12, 2011, DFPR suspended him in retaliation for his opposition to unlawful discrimination.
5. In Counts H, I, and J, the Petitioner alleged that on September 28, 2011, DFPR placed him on a corrective action plan because of his age, his physical disability, and his mental disability. The Petitioner further alleged that DFPR did not place similarly situated younger, non-disabled employees on a corrective action plan under similar circumstances.
6. In Count K, the Petitioner alleged that on August 25, 2011, he opposed unlawful discrimination when he complained to DFPR's management that he was being discriminated against because of his age. The Petitioner further alleged that on September 28, 2011, DFPR placed him on a corrective action plan in retaliation for his opposition to unlawful discrimination.
7. In Counts L, M, and N, the Petitioner alleged that on November 28, 2011, DFPR suspended him because of his age, his physical disability, his mental disability, and in retaliation for his opposition to unlawful discrimination. The Petitioner further alleged that DFPR did not suspend similarly situated younger, non-disabled employees under similar circumstances.
8. In Count O, the Petitioner alleged that on August 25, 2011, he opposed unlawful discrimination when he complained to DFPR's management that he was being discriminated against because of his age. The Petitioner further alleged that on November 28, 2011, DFPR suspended him in retaliation for his opposition to unlawful discrimination.
9. On January 17, 2013, the Respondent dismissed the Petitioner's charge for Lack of Substantial Evidence.
10. On April 23, 2013, the Petitioner filed her Request. On June 11, 2013, the Respondent filed its Response.

B. FACTUAL HISTORY, ALLEGATIONS, & ARGUMENTS

1. The Petitioner, an attorney, was hired in October 1999.
2. At the time of the alleged violations, the Petitioner's title was Technical Advisor Advanced Program Specialist (TAAPS) and he was assigned to DFPR's Medical Prosecutions Unit. He reported to Laura Forester (46, not disabled), Chief of Medical Prosecutions.
3. The Petitioner was one of five attorneys assigned to DFPR's medical prosecutions unit at the time of the alleged violation. The other attorneys assigned to medical prosecutions were David Igasaki (59, disabled), TAAPS, Susan Link (64, not disabled), TAAPS, Vladimir Lozovskiy (37, not disabled), TAAPS, and Jennifer Wilson (31, not disabled), Tech Advisor II.
4. Respondent has a progressive disciplinary policy wherein employees who violate Respondent's policies are issued an oral reprimand, followed by a written reprimand, suspension, and ultimately discharged. 1
5. On April 7, 2010, DFPR issued the Petitioner an oral reprimand because the Petitioner was not meeting deadlines or getting his work done.
6. On May 6, 2010, DFPR's Acting Chief of Medical Prosecutions, Gertrude Kelly ("Kelly"), reviewed the Gupta case file and instructed the Petitioner to file a formal complaint by May 11, 2010, and prepare a consent order for indefinite probation. As Kelly was waiting outside the Petitioner's cubicle to discuss their case review meeting, she observed that the Petitioner had an open magazine in front of him while seated at his desk. Kelly discussed the Gupta case with the Petitioner and instructed him what to do on the file. Later that same day, Kelly went to the Petitioner's cubicle and observed the Petitioner reading a soccer magazine.
7. On August 19, 2010, DFPR issued the Petitioner a written reprimand for insubordination because the Petitioner failed to carry out a lawful instruction from management and refused to perform assigned duties. The written reprimand stated that the Petitioner was instructed to follow all lawful instructions by a supervisor and to complete assigned duties in a timely manner. Further, the written reprimand stated that further conduct of a similar nature by the Petitioner could result in discipline up to and including discharge.
8. On December 31, 2010, DFPR issued the Petitioner an annual performance evaluation which stated that the Petitioner exceeded expectations in the area of human relations and needed improvement in the seven other categories of his job duties that he was evaluated on. The comments section of the Petitioner's evaluation stated that the Petitioner failed to meet his

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supervisor's deadlines, failed to meet internal and court filing deadlines, failed to properly analyze orders, failed to meet court and supervisor deadlines to serve discovery, and failed to keep his supervisor informed of case issues and developments as they arose.

9. On January 13, 2011, DFPR placed the Petitioner on a Performance Improvement Plan due to deficiencies in his work performance. Per the Plan, the Petitioner was required to meet all deadlines, seek approval to schedule informal conferences on all cases where formal complaints were filed, and meet with his Chief to discuss assignment of a partner for all cases set for hearing.
10. On July 1, 2011, DFPR issued the Petitioner a Performance Improvement Plan ("PIP")/Corrective Action Plan which stated that the Petitioner's PIP initiated on January 13, 2011, was being extended for three months because the Petitioner failed to meet the objectives of his January 13, 2011, PIP.
11. August 18, 2011, Respondent held a pre-disciplinary meeting because Respondent determined that Complainant failed to meet Respondent's standards on at least twelve of his cases and failed to improve his performance as outlined in his corrective action plan. Based on the foregoing, Respondent determined that Complainant was incompetent and inefficient in the performance of his duties and on September 12, 2011, suspended Complainant for five days.
12. On September 28, 2011, Respondent again extended Complainant's corrective action plan for another three months because Complainant failed to meet Respondent's standards and improve his performance as outlined in his corrective action plan.
13. On November 28, 2011, Respondent determined that Complainant's performance failed to improve and as a result Respondent suspended Complainant.
14. At the time of the alleged harm, DFPR employed four TAAPS attorneys who were similarly situated to the Petitioner, George Igasaki ("Igasaki") (age 59); Vladimir Lozovskiy ("Lozovskiy") (age 37); Susan Link (age 64); and Norman Lasko ("Lasko") (age 63).
15. On December 31, 2010, DFPR evaluated Igasaki and gave him a performance rating of "meeting expectations" in four areas of his duties and "exceeds expectation" in the other four areas of the performance of his duties. On January 31, 2011, DFPR evaluated Lozovskiy and gave him a performance rating of "exceeds expectations" in all areas in the performance of his duties. On April 10, 2011, DFPR evaluated Link and gave her a performance rating of "meeting expectations" in all areas of her duties and "needs improvement" in the area of follow-up. Lastly, on May 1, 2011, DFPR evaluated Lasko and gave him a performance

rating of "meeting expectations" in all areas except for quality wherein he was rated as "needs improvement."

16. The evidence did not reveal that Petitioner's TAAPS co-workers' performance was similar to the Petitioner's and DFPR failed to place them on a corrective action plan.
17. On October 15, 2011, the Petitioner's doctor, Dan Vatev (Dr. Vatev") diagnosed the Petitioner with Hypertension. At the time DFPR placed the Petitioner on the corrective action plan and suspended him (July 1, 2011, September 12, 2011, and September 28, 2011), the Petitioner had not been diagnosed with Hypertension. There is no evidence that DFPR was aware of the Petitioner's alleged disability, Hypertension, at the time of the alleged harm.
18. During the Respondent's investigation of the charge, the Petitioner did not provide any evidence that he was diagnosed with Stress Disorder. Moreover, during the Respondent's investigation, the Petitioner stated that at no time ever was he diagnosed with the condition of Stress Disorder.
19. In his Request, the Petitioner argued that the Respondent failed to adequately address and investigate his charge. The Petitioner further argued that he the evidence he submitted was sufficient to find substantial evidence. Lastly, the Petitioner argued that there is conflicting evidence that should be resolved before the Commission.
20. In its Response, the Respondent requests that the Commission sustain the dismissal of the Petitioner's charge for Lack of Substantial Evidence. The Respondent argues the evidence was insufficient to establish a *prima facie* case of discrimination and retaliation. The Respondent further argued that the Employer articulated a non-discriminatory reason for its actions and its investigation uncovered no evidence of pretext.

C. DISCUSSION & DETERMINATION

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. 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, D, H, K, and L, age discrimination

The Commission finds there is no substantial evidence to establish a *prima facie* case of age discrimination. Generally, to establish a *prima facie* case of age 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 matter, the second and fourth elements were not established. First, the evidence showed that the Petitioner was not performing her work satisfactorily. The Petitioner had a history of performance issues. Therefore, she was not performing his work satisfactorily. Additionally, there was no evidence that the DFPR treated a similarly situated employee outside the Petitioner's protected class more favorably under similar circumstances.

Counts B, C, E, F, I, J, and N, disability discrimination

The Commission finds there is no substantial evidence to establish a *prima facie* case of disability discrimination. In the Petitioner's matter the first element of a *prima facie* case was not established. First, the Petitioner was diagnosed with hypertension after the alleged civil rights violation on October 15, 2011. In his Request, the Petitioner does not dispute or addresses this issue. As such, the Petitioner was not a disabled person within the meaning of the Act at the time of the alleged civil rights violation. Second, during the Respondent's investigation, the Petitioner admitted that at no time ever was he diagnosed with the condition of Stress Disorder. Therefore, he was not a disabled person within the meaning of the Act as to his mental disability.

Counts G, K, and O, retaliation

The Commission finds there is no substantial evidence to establish a *prima facie* case of disability retaliation. Generally to establish a *prima facie* case of retaliation the Petitioner must show: (1) he engaged in a protected activity; (2) the DFPR committed an adverse action against him; and (3) a causal connection existed between the protected activity and the adverse action. See Welch v. Hoeh, 314 Ill.App.3d 1027, 1035, 733 N.E.2d 410, 416 (3rd dist. 2000). In the Petitioner's matter, the third element was not established; the Petitioner in his Request offered no evidence of a causal connection between the protected activity and the adverse action.

Additionally, the DFPR articulated a non-discriminatory reason for its actions and there was no evidence of pretext. The DFPR stated that the Petitioner had a history of poor performance. The Petitioner was given a chance to improve his performance but failed to do so. The DFPR followed its progressive discipline policy in counseling the Petitioner and suspending him. Additionally, the Petitioner offered no evidence of pretext in his Request. In the absence of any evidence that the business consideration relied upon by the Employer is a pretext for discrimination, it is improper for the Commission to substitute its 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 his charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

WHEREFORE, 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, I State of Illinois, Department of Financial and Professional Regulation 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 2nd day of October 2018**
HUMAN RIGHTS COMMISSION)

Commissioner Robert A Cantone

Commissioner Hamilton Chang

Commissioner Steve Kim