STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.: **2012CR3955**
	)	EEOC NO.: **440-2012-04168**
FRANK J. CAMPOBASSO, Petitioner.	)	ALS NO.: **13-0179**

ORDER

This matter coming before the Commission by a panel of three, Commissioners Nabi R. Fakroddin, Hermene Hartman, and Duke Alden presiding, upon Frank J. Campobasso's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")[1] of Charge No. 2012CR3955; 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 June 26, 2012, the Petitioner filed a charge of discrimination with the Equal Opportunity Employment Commission ("EEOC"), alleging that Temperature Service Company, Inc. ("Employer"), subjected him to unequal terms and conditions of employment due to his age, 57 (Count A), physical disability, hearing impairment (Count B), and in retaliation for opposing unlawful discrimination (Count C); and laid him off due to his age (Count D), disability (Count E), and in retaliation for opposing unlawful discrimination (Count F) in violation of Sections 2-102(A) and 6-102(A) of the Illinois Human Rights Act ("Act").

2. In Counts A, B, and C, the Petitioner alleged that from January through March 2012, the Employer subjected him to unequal terms of employment due to his age, disability, and in retaliation for opposing unlawful discrimination. The unequal terms and conditions of employment consisted of being given fewer hours than other employees.

[1] In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent."

3. In Counts D, E, and F, the Petitioner alleged that on March 2012, the Employer laid him off due to his age, disability, and in retaliation for opposing unlawful discrimination.

4. Pursuant to Section 7A-102(A-1)(1) of the Act, the charge filed with the EEOC was deemed filed with the Department on June 28, 2012, and the EEOC informed the Respondent that it would investigate the charge. On June 28, 2012, the EEOC issued a Dismissal and Notice of Rights.

5. On July 5, 2012, the Respondent sent a letter addressed to the Petitioner stating that the Respondent received a copy of the Petitioner's charge and that if the Petitioner wished the Respondent to investigate his charge, at the completion of the EEOC investigation and receipt of findings, the Petitioner had thirty days to mail or personally serve the Respondent with a copy of the EEOC's determination and a request that the Respondent investigate the charge.

6. On July 22, 2012, the Petitioner mailed to the Respondent a copy of the EEOC's determination and a request asking the Respondent to investigate his charge.

7. On February 25, 2013, the Respondent dismissed the Petitioner's Charge for Lack of Substantial Evidence.

8. On April 24, 2013, the Petitioner filed this timely Request. On May 30, 2013, the Respondent filed its Response to the Request.

B. FACTUAL HISTORY, ALLEGATIONS, & ARGUMENTS

1. The Petitioner was employed as a Refrigeration Service Technician.

2. The Petitioner alleged that his protected activity consisted of him filing a workers compensation claim around December/January of 2009 or 2010.

3. The Employer provides Commercial Heating, Air Conditioning, Refrigeration and Food Appliance Service. The Employer assigns Service Technicians to jobs by area, if at all possible. The Service Technicians cover an area from Northern Indiana to Southern Wisconsin. The Employer covers two geographic regions, a North and a South Division. The Employer sends Service Technicians information through the company supplied laptop for their dispatched calls.

4. At the time of the alleged civil rights violation, the Employer employed five Service Technicians, including the Petitioner.

5. On around December/January of 2009 or 2010, the Petitioner settled his workers compensation claim against the Employer for a work related injury.

6. The Petitioner stated that the retaliation he is alleging is based upon him getting injured on the job and he settled his workers compensation claim. He believes the Employer was reducing his hour because of that. He did not complain of discriminatory conduct.

7. Complainant stated there were four other Refrigeration Service Technicians. Daniel Gonzales ("Gonzales") is about 38 or 39 years old. Mark Krause ("Krause") is about 38 or 39 years old. Paul Matousek ("Matousek") is in his 30s. Michael Pettrone ("Pettrone") is in his 20s.

8. The Employer stated that all work that was available while the Petitioner was employed was dispatched based upon the area of need and the appropriate technician that lived in the vicinity was sent to that particular service call.

9. The Employer does not have a layoff policy and as layoffs are issued verbally, there are no layoff notices.

10. At the end of 2011-2012, the Employer began to experience a decline in business. The Employer's spreadsheet of revenues on a monthly basis from January of 2010, to April of 2012, show a decline in business due to losing a very large account that included all the Chicago land TGI Fridays that were on a maintenance agreement with the Employer. As the Employer did not have any work for the Petitioner, the Employer laid off the Petitioner on April 25, 2012.

11. The Employer's documentation indicates that of the five Service Technicians, for the period April 27, 2011, through April 25, 2011, two technicians had more hours than the Petitioner, and two technicians had less than the Petitioner. The two technicians who had more hours were also over 40 and the two technicians that had fewer hours were under 40.

12. From April 27, 2011, through April 25, 2012, Krause (47), Service Technician, worked 1,824.75 hours; Matousek (42), Service Technician, worked 1,782.25 hours; the Petitioner worked 1,441.25 hours; Pettrone (33), Service Technician, worked 1,079.25 hours; and Gonzales (39), Service Technician, worked 734.50 hours (but last recorded hours on September 21, 2011). Both Krause and Matousek, who worked the most hours during this period, lived in the Northwest suburbs where most of the Employer's work is located.

13. The Employer laid off seven employees including the Petitioner, due to lack of work. Of the seven laid off employees, five were over the age of 40 and two were under the age of 40. Further, the Employer retained two Service Technicians who were also over the age of 40.

14. In his Request, the Petitioner argues that the Employer failed to re-call him and that the Employer hired two younger Technicians.

15. In its Response, the Respondent requests that the Commission sustain the dismissal of the Petitioner's charge for Lack of Substantial Evidence. The Respondent argued 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).

As to Counts A, B, D, and E, the Commission finds there is no substantial evidence 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 matter, the fourth element was not established. There was no evidence that the Employer treated Technicians outside the Petitioner's protected class more favorably under similar circumstances. Rather, the evidence showed the Employer reduced the hours of younger non-disabled Technicians as well as laid them off.

As to Counts C and F, the Commission finds there is no substantial evidence to establish a *prima facie* case of retaliation. Generally to establish a *prima facie* case of retaliation the Petitioner must show: (1) he engaged in a protected activity; (2) the Employer 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 case he failed to establish the first element of his prima facie case. The Petitioner has not shown that he engaged in a protected activity. It is uncontested that he filed a worker's compensation claim. However, a worker's compensation claim is not a protected activity under the Act. A protected activity under the Act is when a person opposes what he/she believes is unlawful discrimination, such as discrimination based on, race, gender, age, disability, religion etc. In the absence of a protected activity, the Petitioner has failed to establish his prima facie case.

The Commission further concludes that the Employer articulated a non-discriminatory reason for its actions and there was no evidence of pretext in the articulated non-discriminatory reason. The Employer stated that reason is that it reduced the Petitioner's hours and laid him off was based upon the decline of work available in its refrigeration division and the amount of work available for his area. The Petitioner did not offer any 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 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).

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 and, Temperature Service Company, 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 29th day of October 2018.**
HUMAN RIGHTS COMMISSION)

Commissioner Nabi R. Fakroddin

Commissioner Hermene Hartman

Commissioner Duke Alden