

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)
FOR REVIEW BY:)
VICTOR L. DE LA CRUZ,)
)
Petitioner.)

CHARGE NO.: **2012CR4066**
EEOC NO.: **440-2012-00452**
ALS NO.: **13-0189**

ORDER

This matter coming before the Commission by a panel of three, Commissioners Robert A. Cantone, Hamilton Chang, and Steve Kim presiding, to correct a typographical error in the Commission's October 2, 2018 Order in this matter.

IT IS SO ORDERED:

- 1) The following language is stricken from the October 2, 2018 Order: "This Order is not yet final and appealable."
- 2) The stricken language is replaced with the following language: "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 Jewel Food Stores as respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order."
- 3) All other provisions in the October 2, 2018 Order remain in full force and effect.

STATE OF ILLINOIS)
)
HUMAN RIGHTS COMMISSION)

Entered this 3rd day of October 2018.

Commissioner Robert A. Cantone

Commissioner Hamilton Chang

Commissioner Steve Kim

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ORDER

This matter coming before the Commission by a panel of three, Commissioners Hamilton Chang, Steve Kim, and Robert A. Cantone presiding, upon Victor De La Cruz's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Respondent of Human Rights ("Respondent")¹ of Charge No. 2012CR4066; 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, **WHEREFORE**, it is hereby **ORDERED** that:

*The Respondent's dismissal of the Petitioner's charge is **SUSTAINED** for **LACK OF SUBSTANTIAL EVIDENCE**.*

In support of which determination, the Commission states the following:

A. PROCEDURAL HISTORY

1. Petitioner filed a charge of discrimination with the Respondent on October 28, 2011, perfected February 27, 2012, amended December 28, 2012, alleging that Employer, Jewel Food Stores, Inc., discharged him in retaliation for filing a previous charge of discrimination (Count A), and based on his age, 56 (Count B), in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act.
2. In his charge, the Petitioner alleges that on September 30, 2011, he engaged in a protected activity when he filed a charge of discrimination (Charge No. 440-2011-06159) against Employer with the Equal Employment Opportunity Commission ("EEOC"). Petitioner further alleges that on October 27, 2011, Employer discharged Petitioner in retaliation for filing previous discrimination charges. As to Count B, Petitioner alleges that on October 27, 2011, Employer discharged him based on his age.

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

3. On January 23, 2013, the Respondent dismissed Petitioner's charge for Lack of Substantial Evidence.
4. On April 26, 2013, Petitioner filed this timely Request.

B. FACTUAL HISTORY, ALLEGATIONS, & ARGUMENTS

1. Petitioner was hired by Employer as a Deli Clerk or around December 8, 2007 at store #3278.
2. Petitioner had a second job with Garda, a provider of armored transportation, as a guard. The schedules between Employer and Garda often conflicted.
3. Petitioner insists that he never told anyone at Employer about his employment with Garda.
4. Petitioner requested a change of schedule twice. The first request, on September 3, 2010, under reason for request in change of availability, Petitioner wrote, "Job availability — due to other job." This request was denied by the prior store manager. The second request, on August 22, 2011, under reason for request in change of availability, Petitioner wrote, "other job." This request was denied by Tim Cesario ("Cesario"), store manager.
5. Petitioner alleged that Garda and Employer were intentionally scheduling him at times that would conflict in order to get him in trouble and justify a discharge, and the union was assisting so they would not have to represent him.
6. Petitioner has filed prior charges of discrimination against Employer, most recently being charge #440-2011-06159 filed with the EEOC on September 30, 2011.
7. Employer's Associate Policy Handbook, in addressing outside employment states, "[prior to agreeing to serve in any capacity in which compensation is expected outside of work (except for charitable work), each Associate must report this information to his or her immediate supervisor and a Human Resources manager in order to request permission to enter into any other work relationship."
8. The Respondent's investigation revealed that on February 5, 2011, Employer issued Petitioner a verbal warning for excessive absences due to his being absent on February 4, 2011, October 23, 2010, through December 30, 2010, September 10, 2010, September 12, 2010, through October 9, 2010, July 9, 2010, through August 29, 2010, and June 18, 2010;
9. On August 20, 2011, Employer issued Petitioner a written warning for excessive absences due to his being absent on May 13, 2011, May 14, 2011, May 20, 2011, through August 1, 2011, August 5, 2011, August 6, 2011, August 12, 2011, August 19, 2011, including prior dates.

10. On August 27, 2011, Employer issued Petitioner a written warning for excessive absences and a 20% suspension (one day without pay) due to his being absent on August 26, 2011, as well as prior dates.
11. On September 3, 2011, Employer issued Petitioner a written warning and a 60% suspension for excessive absences due to his being absent on September 2, 2011, as well as prior dates.
12. On September 25, 2011, Employer issued Petitioner a written warning and a three-day suspension without pay for excessive absences due to his being absent on September 24, 2011, as well as prior dates.
13. On October 9, 2011, Employer issued Petitioner a dismissal pending investigation for excessive absences due to his being absent on October 8, 2011, as well as prior dates.
14. On October 12, 2011, Employer reduced its corrective action of October 9, 2011, to a 5-day suspension.
15. On October 23, 2011, Petitioner was discharged pending investigation due to his being absent on October 22, 2011, October 23, 2010, as well as prior dates. The discharge was confirmed via a phone call from store manager Cesario on October 27, 2011.
16. Employer's stated reason for discharging Petitioner was for excessive tardiness and absenteeism.
17. Employer's written policy shows absences are tracked over a 12-month rolling period. After the fifth absence, an employee is issued a verbal warning. For each additional absence thereafter, an employee is issued (in order), a written warning, a 1- day suspension, a 3-day suspension, a 5-day suspension, and then finally discharge with the tenth absence. While all earlier levels of discipline may be authorized by management at the local store level, Associate Relations must authorize any disciplinary discharges.
18. Petitioner indicates a younger co-worker, Diane ("Diane" last name unknown by Petitioner and withheld by Employer) missed significant time with health issues, but was not disciplined.
19. Documentation provided by Employer shows Diane was on a work-related leave of absence (workmen's compensation) starting on October 8, 2010 through October 12, 2011. Tim O'Connor, Associate Relations Manager, indicates Diane was not disciplined because the leave was approved as it was related to workmen's compensation.
20. In his Request, Petitioner alleges that Roxaime Kuhlman ("Kuhlman") is an employee who was younger than Petitioner and who also had a great number of absences. The Petitioner makes no additional substantive arguments and attaches no supporting documentation.

21. In its Response, the Respondent asks the Commission to sustain its dismissal of Counts A and B of the Petitioner's charge for Lack of Substantial Evidence. The Respondent argues that its investigation does not reveal that the Employer discharged the Petitioner in retaliation for filing previous charges with the EEOC or because of his age. The Respondent further argues that its investigation revealed the Employer articulated a nondiscriminatory reason for discharging the Petitioner and it found no evidence of pretext. The Employer discharged the Petitioner due to his repeated instances of being tardy or absent from work.

C. DISCUSSION & DETERMINATION

The Commission sustains the dismissal of the 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 775ILCS 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 Count A, the Commission finds that the evidence was insufficient to establish a case of retaliation. To establish a *prima facie* case of retaliation, the Petitioner must show: (1) that he engaged in a protected activity; (2) that the Employer committed an adverse action against him; and (3) that 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). A causal connection will be inferred if the period of time between the protected activity and the adverse action is sufficiently short. See Mitchell and Local Union, 146, 20 Ill. HRC Rep. 101, 110-11 (1985) (six months was too remote to establish connectedness); Lynell Mims and State of Illinois, Illinois Department of Lottery, Charge No. 1989CF1141, 1998 WL 937898 (December 17, 1998). (nineteen-month time period between protected activity and adverse action too long to create an inference of retaliation).

In this case, the evidence shows that Petitioner's protected activities on March 10, 2010, June 24, 2010, and February 24, 2011 were too far removed from Employer's discharge of Petitioner to create an inference of retaliatory motivation. Therefore, the time period between Petitioner's protected activities and the adverse action on October 27, 2011, is not short enough to establish an inference of connectedness. Regarding Petitioner's protected activity on September 30, 2011, the Respondent's investigation did not reveal that Employer's articulated reason for discharging Petitioner on October 27, 2011, is pretext for retaliatory discrimination. Rather, the evidence shows that Petitioner had violated Employer's Tardiness and Absenteeism Policy on numerous occasions prior to his September 30, 2011, filing of a charge with the EEOC.

As to Count B, the Commission finds that the evidence was insufficient to establish a *prima facie* case of age discrimination. Generally, to establish a *prima facie* case of discrimination, the

