

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)
FOR REVIEW BY:)

VICTOR SALAZAR,)
Petitioner.)

CHARGE NO.: **2012CF2125**
EEOC NO.: **21BA20895**
ALS NO.: **13-0207**

ORDER

This matter coming before the Commission by a panel of three, Commissioners Nabi R. Fakroddin, Hermene Hartman, and Duke Alden presiding, upon Victor Salazar's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2012CF2125; 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. The Petitioner filed a perfected charge of discrimination with the Respondent on May 2, 2012. The Petitioner alleged that North American Herb and Spice ("Employer") discharged him because of his national origin, El Salvador (Count A), ancestry, Hispanic (Count B), and religion, Catholic (Count C), in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act").
2. In Counts A, B, and C, the Petitioner alleged that on November 11, 2012, the Employer discharged him because of his national origin, his ancestry and his religion in that under similar circumstances, the Employer did not discharge non-El Salvador, non-Hispanic, non-Catholic co-workers.
3. On November 15, 2012, the Respondent dismissed the Petitioner's Charge for Lack of Substantial Evidence.
4. On February 15, 2013, the Petitioner filed this timely Request. On June 13, 2013, the Respondent filed its Response to the Request.

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

5. On June 28, 2013, the Petitioner filed a Reply to the Respondent's Response.

B. FACTUAL HISTORY, ALLEGATIONS, & ARGUMENTS

1. The Petitioner was employed as a Temporary Warehouse Worker by the Employer.
2. Ted Campdesuner ("Campdesuner") stated that he ran the day to day operations at the Employer's facility. Due to a decrease in work in the warehouse the Employer needed to reduce the number of warehouse employees. He selected the Petitioner for layoff because the Petitioner worked the least amount of hours per pay period. He told the Petitioner that he would call him when business picked back up but after the Petitioner applied for unemployment benefits he assumed that the Petitioner didn't want to come back.
3. The Petitioner's attendance records for the period between February 1, 2011 and November 11, 2011, show that the Petitioner was absent on 48 regularly scheduled work days during this period.
4. Attendance records for Arturo Aguilera (Mexico, Hispanic, Catholic), Production Coordinator, for the period between February 1, 2011 and November 11, 2011, show that Aguilera was absent on 12 regularly scheduled work days during this period.
5. Attendance records for Poiter Crawford (U.S.A., non-Hispanic, Christian), Warehouse Technician, for the period between February 1, 2011 and November 11, 2011, show that Crawford was absent on 12 regularly scheduled work day during this period.
6. Attendance records for Sujegi Arevalos (Mexico, Hispanic, Catholic) Production Assistant, for the period between February 1, 2011 and November 11, 2011, show that Arevalos was absent on 7 regularly scheduled work days durin this period.
7. Attendance records for Maria Gallardo (Mexico, Hispanic, Catholic), Production Assistant, for the period between February 1, 2011 and November 11, 2011, show that Gallardo was absent on 11regularly scheduled days during this period.
8. It is uncontested that on the day of the alleged violation, the Petitioner did not report to work at his regularly scheduled start time of 6:00 a.m. but instead called the Employer to see if there was work to do before he came in. The Petitioner stated that he called instead of reporting to work because business was slow.
9. It uncontested that Complainant spoke with Campdesuner who told that the Employer would call the Petitioner when he was needed.
10. The Petitioner stated that nobody ever told him he had been discharged. The Petitioner stated that a few days prior to the date of the alleged violation he asked Campdesuner if the Employer was going to fire him and Campdesuner assured him that the Employer had no such plans.

11. Campdesuner stated that the Petitioner was laid off due to a lack of work in the warehouse. Campdesuner further stated that the Petitioner was selected for layoff because the Petitioner worked fewer hours than any other warehouse employee.
12. No evidence was offered of a similarly situated employee of a different national origin, ancestry or religion being treated differently in a similar situation.
13. There was no evidence of any remarks made by the Employer regarding the Petitioner's national origin, ancestry or religion.
14. In his Request, the Petitioner did not submit an argument or statement.
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. The Respondent further argued that the Employer articulated a non-discriminatory reason for its actions and its investigation uncovered no evidence of pretext.
16. In his Reply the Petitioner contends that he did work and that the Employer hid him during Department of Health and Human Services, Food and Drug Administration inspection of the Employer's facility. The Petitioner further stated that the Employer asked him to read the Qur'an.

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, and C, 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 fellow employee outside the Petitioner's protected class more favorably under similar circumstances.

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 discharged the Petitioner was that it lacked work and that the Petitioner

had more poorer attendance than his co-workers. The Petitioner offered no evidence in his Request to rebut the Employer's business reason. 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, North American Herb and Spice as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 29th day of October 2018.

Commissioner Nabi R. Fakroddin

Commissioner Hermene Hartman

Commissioner Duke Alden