STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.: **2012CA2794**
	)	EEOC NO.: **21BA21347**
Benny L. Stewart	)	ALS NO.: **13-0269**
Petitioner.	)	

ORDER

This matter coming before the Commission by a panel of three, Chair Rose Mary Bombela-Tobias, Commissioners Patricia Bakalis Yadgir and Duke Alden, presiding upon Benny L. Stewart's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2012CA2794 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 is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

DISCUSSION

On March 30, 2012, the Petitioner filed a perfected charge of discrimination with the Respondent alleging that Theatrical Stage Employees Union Local 2 ("Union"), failed to adequately represent Petitioner on September 30, 2011 due to his race, black (Count A); age, 55 (Count B); sex, male (Count C); military status, veteran (Count D); and in retaliation for filing a prior charge of discrimination (Count E). Further, the Union subjected Petitioner to harassment on October 16, 2011, due to his race (Count F); age, 55 (Count G); sex, male (Count H); military status, veteran (Count I); and in retaliation for filing a previous charge of discrimination (Count J), in violation of Sections 1-103(Q), 2-102 (C) and 6-101(A) of the Illinois Human Rights Act ("Act").

Respondent dismissed the Petitioner's charge in its entirety on February 6, 2013. After being granted an Extension of Time to file a Request for Review that does not exceed 30 pages as provided in 56 Ill. Admin. Code Section 5300.410, the Petitioner filed a timely Request for Review on June 14, 2013.

[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."

The Commission concludes that the Respondent properly dismissed all counts of 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 5/7A102(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).

Since 2007, Petitioner has been a Journeyman member with the Union. He is 1 of 77 members of Local #2. Of the 77 Local #2 members, 29 are race, black; 37 are sex, male. However, Petitioner is not always in good standing because of non-payment of his dues.

On February 24, 2011, Petitioner engaged in protected activity when he filed charge #2011CA9428 for discrimination against the Union with Respondent. The charge was dismissed on June 13, 2012 for lack of substantial evidence. No other members have engaged in protected activity. On September 29, 2011, Petitioner complained via a letter that he did not receive two paychecks from his employers, Live Nation and Program Productions for performances held on July 16, 2011 and August 1 and 2, 2011, respectively. After an investigation was conducted, Bookkeeper Clarinda Corbett ("Corbett") learned that the both checks had been endorsed with Petitioner's name and cashed. She then notified Petitioner of the outcome of the investigation. Petitioner stated that the signatures on the checks in question were forged and cashed by someone else. At the time, there had been no other complaints of missing forged checks. In any event, Petitioner did not pursue a formal grievance against his employer, Live Nation for his wages as per the Union's Collective Bargaining Agreement. Instead, Petitioner filed reports with the Illinois Attorney General's office on November 8, 2011 and the Chicago Police Department on October 4, 2011. Petitioner claimed that the checks were stolen and forged. The Union Petitioner further stated that he took the employer to court and was granted a judgment in his favor.

When a member calls about a missing check, the procedure is to call the employer. If the check was not cashed, then the employer stops payment and issues a new check. Further, the Union's Collective Bargaining Agreement ("Agreement") states that any controversy or unresolved dispute between the parties shall, upon complaint of the aggrieved employee, be subject to review in conference between the parties…" Carlson determines whether grievances are filed and what action is taken.

On October 16, 2011, Petitioner worked for the Harris Theatre. At that time, Petitioner was supposedly harassed by Union member, Mike Yeager ("Yeager"), who said to him, "You ought to stop suing the union because you are just a "N..ger". Petitioner then reported the incident to Union Steward, Andy Principe ("Principe"). On November 23, 2011, Petitioner also informed Thomas Cleary ("Cleary") via correspondence that Yeager used a racial slur against him and also requested a grievance be filed. An initial investigation was conducted by the unions' legal counsel. On December 5, 2011, a meeting was held in which Petitioner was informed that after a thorough investigation the allegations were unfounded. Since the Executive Board wanted a full investigation, the Union had its

legal counsel further investigate Petitioner's allegation regarding Yeager's racial slur. After interviewing seven of the members who were present at the scene, only two actually witnessed the dispute over a newspaper between Petitioner and Yeager. However, no one could corroborate that Yeager actually made the radically derogatory comment. Yeager, during his interview, admitted calling Petitioner an "asshole" during a newspaper altercation, but denied calling him a "N…ger". Note that Petitioner refused to be interviewed at this time.

As to Counts A-E, Petitioner is unable to prove the Union inadequately represented him in his grievance on the basis of race, age, sex and military status discrimination or in retaliation for filing a previous charge. To prove a *prima facie case* of race, age, gender, and military status discrimination, Petitioner must show that: 1) he is a member of the protected class; 2) he was performing his job duties according to Respondent's legitimate expectations; 3) he suffered an adverse employment action; and 4) other individuals not within his protected class were treated more favorably*. Interstate Material Corp. v. Human Rights Comm'n*, 274 Ill. App. 3d 1014, 1022, 654 N.E.2d 713, 718 (1st Dist. 1995); *Marinelli v. HRC*, 262 Ill.App.3d 247, 634 N.E.2d 463 (2d Dist. 1994). The applicable test for *prima facie* gender discrimination is identical to the racial discrimination test above. *See McQueary and Wal-Mart Stores, Inc.*, IHRC, ALS No. 9416, November 20, 1998.

Here, Petitioner is unable to satisfy the fourth prong of his *prima facie case*. Petitioner failed to provide the name of a single similarly situated individual not in his protected class that was treated more favorably than he was under similar circumstances. The Union followed its procedure. Its investigation revealed that Petitioner's check had been endorsed by him and cashed. Petitioner never requested a formal grievance be filed. There was never another situation in which a member notified the Union that someone stole and/or forged a check issued by an employer. The Seventh Circuit has made it clear that an employee's failure to identify a comparator is detrimental to their ability to maintain an action for discrimination. *Erverroad v. Scott Truck Systems, Inc.*, 604 F3d 471, 480-482. Thus, there is no substantial evidence that Petitioner was inadequately represented on September 30, 2011, because of his race, age, sex and military status.

Next, to establish a *prima facie case* for retaliation, the following must be established by Petitioner: 1) he engaged in protected activity; 2) the Union committed an adverse action against him; and 3) a causal connection existed between the protected activity and the adverse action*. Hoffelt v. Ill. Dep't of Human Rights, 367 Ill. App.3d 628*, 867N.E.2d 14 (1st Dist. 2006); *Welch v. Hoeh*, 314 Ill.App.3d 1027, 1035, 733 N.E. 2d 410,416 (3d Dist. 2000).

Petitioner fails to meet the third element of his *prima facie case* for retaliation. As to prong three, Petitioner provided no evidence of a causal connection between the protected activity of filing a prior charge of discrimination and the Union's actions. Without evidence of retaliatory motivation whereby Petitioner was treated differently than similarly situated employees who did engage in protected activity, an inference of connectedness or "rebuttable presumption" of causation can arise if the time period between the protected activity and the adverse action is short enough. In this case, however, seven months time that elapsed between Petitioner's September 30, 2011 complaint

alleging discrimination and the filing of his prior February 24, 2011 charge of discrimination is too long to create an inference of retaliation. The Commission has previously ruled that five months and twenty-three days was too remote. *See Mitchell and Local Union* 146, 20 ILL. HRC Rep.95 (1985). A causal connection will be inferred if the period of time between the protected activity and the adverse action is sufficiently short; *Mims and State of Illinois, Department of Lottery*, ___ Ill. HRC Rep.___, Charge No. 1988SF0171 (July 26, 1991) (nineteen-month time period between protected activity and adverse action to long to create an inference of retaliation). Lastly, Petitioner fails to specify any statements of retaliatory animus. Thus, there is no substantial evidence that the Union failed to adequately represent Petitioner in retaliation for engaging in protected activity.

Note that in an action alleging discrimination and/or unlawful retaliation, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Human Rights Act. *See Thompson and Hoke Construction Co.*, IHRC, ALS No. S9135, June 2, 1998), and *Loyola University of Chicago v. Illinois Human Rights Commission*, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1st Dist., 3rd Div. 1986).

Assuming arguendo that Petitioner established a *prima facie case* of discrimination and retaliation, the Union must articulate a legitimate, nondiscriminatory reason for its actions. If this is done, the Petitioner must prove by a preponderance of the evidence that the articulated reason advanced by the Union is a pretext. *See Clyde and Caterpillar, Inc.*, IHRC, ALS No. 2794, Nov. 13, 1989, *aff'd sub nom Clyde v. Human Rights Com'n*, 206 Ill. App.3d 283, 564 N.E.2d 265 (4th Dist.1990); and *Texas Dep't. of Community Affairs v. Burdine*, 450 US 248, 254-55 (1981).

The Union articulated a legitimate, nondiscriminatory reason for not representing Petitioner further regarding the whereabouts of his missing checks, namely that the matter was considered settled on their end when an investigation was conducted into the matter and Petitioner had not requested a grievance be filed against his employers. Petitioner failed to present any, much less compelling, evidence that the Union's articulated reasons for not representing Petitioner further regarding the whereabouts of the missing checks was a pretext for discrimination and retaliation. In the absence of any evidence that the business consideration relied upon by the Union is a pretext for discrimination, it is improper to substitute judgment for the business judgment of the employer. *See Berry and State of IL, Dept. of Mental Health and Developmental Disabilities*, IHRC, ALS no. S-1946, Charge No. 1994SA0240 (December 10, 1997). Additionally, the Union is entitled to make employment decisions based on its reasonable belief surrounding the situation. "Respondent may take its action for good reason, bad reason, reason based upon erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason…The correctness of the reason is not important as there was good faith belief by Respondent in its decision…" *See Carlin v. Edsal Manufacturing Co.*, 1996 WL 652580, Charge No. 1992CN3428 (Ill.HRC, May 6, 1996). Therefore, no substantial evidence exists that the Union failed to adequately represent Petitioner in a grievance for wages due to his race, age, sex, military status and in retaliation for filing a prior charge of discrimination.

As to Counts F through J, Petitioner is also unable to prove his *prima facie case* for harassment based upon race, age, sex, military status and in retaliation for filing a previous charge of discrimination. Actionable harassment occurs when the workplace is permeated with discriminatory ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *See Harris v. Forklift Systems, Inc.,* 510 U.S. 20, 114 S. Ct. 367, 371, 126 L.Ed.2d 295 (1993). Additionally, "in order to qualify as actionable harassment, the harassing behavior must occur frequent enough to constitute a term or condition of employment. Thus, infrequent or isolated comments of a harassing nature will not constitute a violation of the Human Rights Act." *Lever and Wal-Mart Stores, Inc.*, 2001 WL 474082 (IHRC), Charge No. 1998SF0551 (January 2, 2001), citing *Hill and Peabody Coal Co.*, 1996 WL 378521 (IHRC), Charge No. 1991SF0123 (June 26, 1996). "The alleged conduct cannot be 'sporadic'; instead, there must be substantial evidence of a 'steady barrage' of objectionable conduct motivated by ancestry to arise to the level of actionable harassment. *See Larry Poulos and Olson RC, Inc.*, IHRC, ALS No. S05-152, March 17, 2009 (2009 WL 2382481)"; *In re Alberto Hernandez*, IHRC Req. for Rev, ALS No. 09-375, April 13, 2010. In the instant case, no other member present could confirm that Yeager called Petitioner a "N…ger". Harassment is a *per se* violation, and requires direct evidence of the alleged discriminatory act. *Hill and Peabody Coal Co.*, 1996 WL 378521 (IHRC), Charge No. 1991SF0123 (June 26, 1996). Even if the derogatory comment was made, the isolated comment, without more, does not rise to the level of actionable harassment. While Petitioner demanded that a grievance be filed against Yeager, there was no direct proof to support that he was harassed and otherwise subjected to a hostile environment to move forward with such request. Therefore, no substantial evidence exists that Petitioner was harassed on October 16, 2011 because of his race, age, gender, and military status for filing a prior discrimination charge.

Petitioner similarly fails to meet the third element of his *prima facie case* for retaliation. As to prong three, Petitioner provided no evidence of a causal connection between the protected activity of filing a prior charge of discrimination and the Union's acts. No other members were involved in protected activity. Without evidence of retaliatory motivation whereby Petitioner was treated differently than similarly situated employees who did engage in protected activity, an inference of connectedness or "rebuttable presumption" of causation can arise if the time period between the protected activity and the adverse action is short enough. In this case, however, eight months time that elapsed between Petitioner's October 16, 2011 complaint alleging discrimination and the filing of his prior February 24, 2011 charge of discrimination is too long to create an inference of retaliation. The Commission has previously ruled that five months and twenty-three days was too remote. *See Mitchell and Local Union* 146, 20 ILL. HRC Rep.95 (1985). A causal connection will be inferred if the period of time between the protected activity and the adverse action is sufficiently short; *Mims and State of Illinois, Department of Lottery*, ___ Ill. HRC Rep.___, Charge No. 1988SF0171 (July 26, 1991) (nineteen-month time period between protected activity and adverse action to long to create an inference of retaliation). Thus, there is no substantial evidence that the Petitioner was subjected to harassment and a hostile environment on October 16, 2011 in retaliation for filing a prior charge of discrimination.

In his Request for Review, there is no additional evidence provided by Petitioner that would warrant a reversal of Respondent's original determination.

Accordingly, the Petitioner has not presented substantial 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 Theatrical Stage Employees Union Local 2 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 17st day of December 2018.**
HUMAN RIGHTS COMMISSION)

Chair Rose Mary Bombela-Tobias

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden