

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2012CR4085
)	EEOC NO.: N/A
Michael Kowalski)	ALS NO.: 13-0307
)	
Petitioner)	

ORDER

This matter coming before the Commission by a panel of three, Chair Rose Mary BombelaTobias and Commissioners Patricia Bakalis Yadgir and Duke Alden, presiding upon Michael Kowalski's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")¹ of Charge No. 2012CR4085 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** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

DISCUSSION

On February 21, 2012, the Petitioner filed an unperfected charge of discrimination with Respondent, perfected on August 2, 2012, alleging that the AAA Galvanizing-Joliet, Inc. ("AAA") subjected him to unequal wages because of his race, white (Count A); discharged him because of his race (Count B); and in retaliation for opposing unlawful discrimination (Count C), in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act ("Act").

On December 13, 2012, pursuant to Petitioner's request administratively closed Counts A and B of his charge. Therefore, Counts A and B of Petitioner's charge are not before the Commission on Request for Review. On April 2, 2013, Respondent dismissed Count C of Petitioner's charge for lack of substantial evidence. The Petitioner filed a timely Request for Review as to Count C on July 12, 2013.

The Commission concludes that the Respondent properly dismissed Count C 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

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."

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).

The record shows that Petitioner began working for AAA on or about September 8, 2009 as a forklift driver. His most recent position held was Customer Service/Shipper. Petitioner alleges that during his employment, he was earning less wages than black employees. Thus, on or about October 27, 2011, Petitioner complained to AAA about the difference in his wages as compared to new hires and sought an explanation of this. It is unclear, however, if Petitioner ever really presented racial discrimination or any form of discrimination in support of his wage disparity issue as Plant Manager, Rodolpho Navarro (“Navarro”); Vice President of Human resources, Trey Quinn (“Quinn”); Human Resources of Northern Operations, Tacy Hodgson (“Hodgson”); and Office Manager, Lydia Jordan (“Jordan”) all indicate otherwise. On January 27, 2012, Petitioner and another forklift driver, Dave Kuriger (“Kuriger”) (no prior opposition to unlawful discrimination), had a verbal altercation which resulted in a 3-day suspension without pay for both individuals. Navarro instructed both Petitioner and Kuriger to leave the facility. Instead, Petitioner refused to go home and threatened Kuriger, thereby violating AAA’s General Standards of Conduct which could warrant discipline up to and including discharge. Petitioner further attempted to get another employee to be a witness on his behalf.

After Navarro’s discussions with the Regional Manager for the Midwest Region, Phil Burner (“Burner”) and Hodgson, Petitioner was discharged on January 30, 2012 for making threats to another co-worker and for failing to leave the facility as instructed. On the other hand, Kuriger was not discharged because he left the premises as directed to do so.

Generally, to establish a *prima facie* case of retaliation, Petitioner must show: 1) he engaged in protected activity; 2) AAA took an adverse action; and 3) a causal connection exists 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).

Note that in an action alleging 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 for retaliation, AAA 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 AAA 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).

Here, the evidence is insufficient to establish a *prima facie case* of retaliation for opposing unlawful discrimination in October of 2011. Petitioner did not satisfy the third prong of his *prima facie* case in that there is no nexus between the discharge and Petitioner's supposed opposition to unlawful discrimination. Petitioner was discharged for threatening another employee and insubordination, in violation of AAA's General Standards of Conduct. Although there are conflicting statements as to whether Petitioner complained or wanted to file a complaint about racial discrimination concerning his pay, there is no evidence that he filed an internal discrimination complaint with AAA. Lastly, Navarro also recommended discharge for Qualitative Representative, Christopher Emery for poor performance and General Laborer, Daniel Jones for insubordination.

Next, AAA articulated a legitimate, nondiscriminatory reason for discharging Petitioner, namely the threat to a co-worker and Petitioner's refusal to go home pursuant to his supervisor's instructions. Petitioner has failed to present any compelling evidence that AAA's proffered reason for termination was a pretext in retaliation for opposing unlawful discrimination. In the absence of any evidence that the business consideration relied upon by AAA 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, AAA 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 Petitioner was discharged in retaliation for opposing unlawful 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 AAA Galvanizing-Joliet, Inc, 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) **Entered this 17th day of December 2018.**

Chair Rose Mary Bombela-Tobias

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden