STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.:	2013CF0012
	)	EEOC.:	21BA22077
JACKIE ROBBINS	)	ALS NO.:	13-0393
Petitioner.	)		

ORDER

This matter coming before the Commission by a panel of three commissioners, Chair Rose Mary Bombela-Tobias and Commissioners Patricia Bakalis Yadgir and Duke Alden presiding upon Jackie Robbins' ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent") of Charge No. 2013CF0012 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 Count A of the Petitioner's charge is **SUSTAINED** for **LACK OF SUBSTANTIAL EVIDENCE**.

DISCUSSION

On July 3, 2012, the Petitioner, Jackie Robbins, filed a charge of discrimination with the Respondent alleging her employer, Wal-Mart Stores, Inc., discriminated by wrongfully discharging her on January 24, 2012 due to her Race (black) and sex (female) in violation of Section 2-102(A) of the Human Rights Act. The Respondent closed Count B on May 29, 2013 at Petitioner's request and it is not before the Commission. On June 21, 2013, the Respondent dismissed Count A for lack of substantial evidence. The Petitioner filed a timely Request for Review on August 1, 2013.

The Commission concludes that the Respondent properly dismissed the Petitioner's charge for lack of substantial evidence. If no substantial evidence exists after the Respondent's investigation of a charge, the charge must be dismissed. 775 ILCS 5/7A-102(D)(3). Section 7A-102(D)(2) states substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion and which consists of more than a mere scintilla but may be somewhat less that a preponderance.

In order to establish a *prima facie* case of wrongful discharge based on Race (black), the Petitioner must show that: (1) she is a member of a protected class; (2) she

was performing her work satisfactorily; (3) she 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 circumstance. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994). Once the Petitioner establishes a *prima facie* case of discrimination, then the burden shifts to the Employer to rebut the presumption of discrimination and articulate a non-discriminatory reason for its employment action. McDonald Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). An Employer is entitled to make employment decisions based on its reasonable belief of the facts surrounding the situation. It is improper for the Respondent to substitute its' judgment for the business judgment of the employer. Sapienza v. Cook County Office of the Public Defender, 128 F.Supp.2d 563 (2001).

Petitioner alleges she was wrongfully discharged due to her race (black). (Count A). The employer alleged it discharged the petitioner for poor attendance. The investigation revealed the Employer began coaching the Petitioner during 2010 for no call no show on July 16, 2010 and issued a verbal warning for too many absences in August 2010.[1] The employer's policy indicates that an employee will go to the second level of coaching and skip the verbal if they have a no call no show.[2] The employer issued a second level of coaching on November 19, 2010 because the Petitioner had a no call/no show on July 16, 2010 and had accumulated 7 absences by November 2010. On March 18, 2011, Petitioner received a third level of coaching (decision day) for attendance and punctuality.[3] Petitioner received a written warning November 19, 2011.[4] Petitioner accumulated eight unapproved absences and 7 unapproved tardies from January 21, 2011 to January 24, 2012.[5] Petitioner also had a no call no show on January 21, 2012. The investigation revealed the Petitioner was discharged on January 24, 2012, because in the employer's judgment, the Petitioner had too many absences. It is improper for the Respondent to substitute its' judgment for the business judgment of the employer. Id.

Petitioner stated two other blacks were terminated the next day or on January 25, 2012. The employer indicated the male Asian referred to by Petitioner was absent five

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[1] The investigation revealed the Employer maintained a progressive disciplinary policy for absenteeism and tardiness. Employer's Exhibit D a sheet indicating Petitioner's unapproved absences between May 10, 2010 and November 9, 2010.

[2] The employer's policy indicates that a no call no show will be subject to disciplinary action beginning at the written level of coaching or the next level of coaching if the individual has active levels of coaching.

[3]The investigation revealed the Petitioner disagreed with the December 10, 2010 absence but agreed with being tardy three days during this time frame and stated she would improve and come to work on time.

[4] The Petitioner allegedly verified she was not required to work on November 16 and 17, 2011. However, she noted a schedule change which required her to work those days on November 19, 2011. On December 26, 2011, the schedule allegedly indicated Petitioner was not scheduled to work December 31, 2011 and January 1, 2012 but she noted a schedule change which required her to work those days on January 3, 2012. The manager stated she would investigate the changes on the schedule.

[5] Employer's Exhibit E, a sheet indicating Petitioner's unapproved absences from July 24, 2011 to January 23, 2012.

times within a 12-month rolling period and was properly issued a coaching for those absences. The female Asian did not warrant a coaching. The employer did not have a white employee with the name given by the Petitioner. The Employer indicated the Hispanic worker referred to by Petitioner was similarly situated, disciplined and terminated on September 6, 2012 for excessive attendance violations. Employer provided documentation that several employees of various races were all discharged for excessive absences between March 3, 2011 and January 31, 2012. As a result, the Petitioner cannot prove that the Employer treated a similarly situated employee outside the Petitioner's protected class more favorably under similar circumstances. The Petitioner cannot prove a nexus between her race and the Employer's actions. The Petitioner failed to establish a *prima facie* case of discrimination and the Respondent's dismissal for lack of substantial evidence was proper.

THEREFORE, IT IS HEREBY ORDERED THAT:

1.The dismissal of the Petitioner's charges 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 Wal-Mart Stores, Inc. as the respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS)
) **Entered this 14 day of Dec. 2018.**
HUMAN RIGHTS COMMISSION)

Chair Rose Mary Bombela-Tobias

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden