

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

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

Christopher Galbreath)

Petitioner.)

CHARGE NO.: **2013CN2705**

EEOC NO.: **N/A**

ALS NO.: **14-0367**

ORDER

This matter coming before the Commission by a panel of three, Commissioners Hermene Hartman, Steve Kim, and Cheryl Mainor, presiding upon Christopher Galbreath's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")¹ of Charge No. 2013CN2705 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 June 24, 2013, the Petitioner filed a charge of discrimination with the Respondent alleging that Schwartz Brothers Insurance (SBI) discharged him because of his sexual orientation, homosexual, in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act").

On May 21, 2014, the Respondent dismissed the Petitioner's charge in its entirety. Petitioner filed a timely Request for Review on July 23, 2014.

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 5/7A-102(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).

On October 9, 2009, Petitioner began employment as a team with Sales Producer, Pamela Flaherty (non-homosexual) as an Assistant Vice President for SBI with the primary responsibility to provide customer support until he was terminated for poor performance on August 27, 2012. From May 2012 to August 27, 2012, SBI received several client complaints about Petitioner's failure to

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."

respond to their requests. He had 92 unopened emails going back to January of 2012. SBI was concerned that based upon Petitioner's lack of response, the company was going to lose many of their clients. In July 2012, several members of Petitioner's staff complained that they were unable to reach him while he was working from home and had lost the confidence of his department. Petitioner was not given any notice or placed on a performance improvement plan. Petitioner's employment agreement states that he is an at-will employee and that SBI can discharge him at any time or without cause.

Petitioner is unable to prove that his discharge was because of his sexual orientation. To prove a *prima facie* case of sexual orientation, Petitioner must show that: 1) he is a member of the protected class; 2) he was performing her 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.

Note that in an action alleging discrimination 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, SBI 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 SBI 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).

Petitioner fails to meet the second and fourth elements of his *prima facie* case for sexual orientation discrimination. As to the second prong, Petitioner failed to perform his job responsibilities as evidenced by the lack of his response to customer's requests regarding insurance concerns or members of his staff. As to the fourth prong, Petitioner has not shown that a similarly situated employee whose sexual orientation is non-homosexual had customer and co-worker complaints akin to those of Petitioner and whom SBI did not discharge. While petitioner believes that Flaherty should have been held to the same standard as the two were hired as a team, the positions were different. Flaherty's job role was to focus on outside sales and marketing for new business leads. Petitioner, however, was hired to perform primarily customer support duties and some sales duties for business renewals. 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. *Everroad v. Scott Truck Systems, Inc.*, 604 F3d 471, 480-482.

Being discharged by SBI was for reasons unrelated to his sexual orientation. Thus, SBI articulated a legitimate, nondiscriminatory reason for terminating Petitioner. Petitioner failed to present any compelling evidence that SBI's articulated reasons for terminating him were a pretext for sexual orientation discrimination. In the absence of any evidence that the business consideration relied upon by SBI 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, SJH 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, Petitioner failed to show substantive evidence that he was terminated because of his sexual orientation.

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 SBI as respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS)
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HUMAN RIGHTS COMMISSION)

Entered this 21st day of November 2018.

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Commissioner Cheryl Mainor