

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2013CF2356
)	EEOC NO.: 21BA31138
)	ALS NO.: 14-0472
RAFAEL GARCIA,)	
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Hermene Hartman, Steve Kim, and Cheryl Mainor presiding, upon Rafael Garcia’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Illinois Department of Human Rights (“Respondent”)¹ of Charge No. 2013CF2356, 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 for **LACK OF SUBSTANTIAL EVIDENCE** is **SUSTAINED**.

DISCUSSION

On March 5, 2013, the Petitioner filed a charge of discrimination with the Respondent, alleging that MT Food Service, Inc. (“Employer”) harassed him because of his race, black (Count A), discharged him because of his race (Count B) and ancestry, Hispanic (Count C), and discharged him in retaliation for opposing unlawful discrimination (Count D), in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act (“Act”). On April 14, 2014, the Respondent dismissed the Petitioner’s charge for lack of substantial evidence. The Petitioner filed a timely Request.

The Petitioner, who is half black and half Hispanic, worked as a truck driver for the Employer. The Petitioner’s charge alleges that his non-black co-workers repeatedly called him names like “prieto” (a derogatory term for a black person in Spanish), “nigger,” and “crack head.” The Petitioner complained of the harassment to Steve Miller, Dock Manager, at various times between December 2011 and February 2012, but ceased reporting the harassment to Mr. Miller at that time.

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 Petitioner also states that he complained of the harassment by noting it on daily route sheets that he submitted to Melissa Keller, who the Petitioner identifies as a secretary responsible for paperwork. In addition, at some point before his discharge, the Petitioner told Ms. Keller that he was going to see an attorney about his claims. Ms. Keller is not considered a management employee by the Employer.

The Respondent gathered the Petitioner's daily route sheets from the Employer for the period between February 8, 2012 and February 7, 2013, which show no evidence of complaints of harassment. The Petitioner was not able to identify specific individuals who made such comments or particular dates they were made.

On February 5, 2013, Mr. Miller confronted the Petitioner about a report that the Petitioner was selling pallets used to hold the merchandise in his truck. Mr. Miller stated that the Petitioner admitted to the theft, and was thus terminated. The Petitioner denied that he ever admitted to theft.

For the reasons that follow, the Commission concludes that the Respondent properly dismissed the Petitioner's claims for lack of substantial evidence. Substantial evidence is that which "a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance." 775 ILCS 5/7A-102(D); Owens v. Dep't of Human Rights, 403 Ill. App. 3d 899, 917, 936 N.E.2d 623, 638 (1st Dist. 2010). If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. Id.

Count A

In Count A, the Petitioner alleges that he was subject to harassment because of his race. Racial harassment has been defined to include a pattern of conduct severe and pervasive enough such that it alters the employee's working conditions and creates a hostile environment. Village of Bellwood Bd. of Fire and Police Com'rs v. Human Rights Com'n, 184 Ill. App. 3d 339, 350; 541 N.E.2d 1248, 1255-56 (1st Dist. 1989). A steady barrage of "opprobrious racial comment" will meet this standard. Id. An employer must accept responsibility when its supervisors fail to respond to reports of harassment. Id. However, the employer must first be on sufficient notice of the alleged conduct. See id.

Here, the Respondent's investigation did not turn up substantial evidence that the Employer was actually on notice of the harassment the Petitioner experienced. The Petitioner indicates that he initially reported his co-workers' slurs to Mr. Miller, but that he stopped doing so in February 2012. That is well beyond the 180-day jurisdictional period for an actionable claim under the Act. The Petitioner further stated that he noted harassment on his daily logs provided to Ms. Keller, but those records do not show such notes, and the Petitioner was unable to cite any specific incidents. Moreover, even assuming that Ms. Keller was made aware of harassing comments, the evidence does not support that Ms. Keller was in a supervisory or management position, such that the Employer can be held responsible for her failure to act on the Petitioner's complaints.

Counts B and C

In Counts B and C, the Petitioner alleges that the Employer fired him because he is black and Hispanic. The Petitioner may establish these claims by one of two methods: either with direct evidence that discriminatory animus was a determining factor, or indirectly through the burden-shifting method of proof. Schnitker v. Springfield Urban League, Inc., 2016 IL App (4th) 150991, 67 N.E.3d 583, 591-92 (4th Dist. 2016). To establish a *prima facie* case of discrimination under the indirect method, the Petitioner must show: (1) he is a member of a protected class; (2) he was performing his work satisfactorily; (3) he was subject to an adverse employment action; and (4) the Employer treated a similarly situated employee or employees outside his protected class more favorably under similar circumstances. Marinelli v. Human Rights Comm'n, 262 Ill. App. 3d 247, 634 N.E.2d 463 (2d Dist. 1994).

The evidence here does not support a claim under the direct method, as the Petitioner did not indicate that any management or supervisory employees participated in the harassment he experienced or otherwise demonstrated overt racial animus. Nor does the evidence satisfy the elements of a *prima facie* case under the indirect method, as the Petitioner has provided no evidence that would raise the inference that his race or ancestry was a motivating factor in the Employer's decision. The Petitioner did not identify, and the Respondent's investigation did not show, any similarly situated employees who were treated more favorably under similar circumstances.

In his Request for Review, the Petitioner argues that the Respondent's determination improperly rested on credibility determinations of whether the Petitioner was actually guilty of the theft of the pallets, and whether the Employer had a good faith basis to believe that he was. However, the Commission need not delve too deeply into

this question, when the Petitioner has not been able to meet the threshold requirement of showing an inference of discriminatory intent.

Count D

In Count D, the Petitioner states that he was essentially fired for continuing to complain about racial harassment to Mr. Miller and Ms. Keller, and for stating to Ms. Keller that he was seeking the assistance of an attorney. To prove a *prima facie* case of retaliation under the Act, the Petitioner must establish that: (1) he engaged in a protected activity; (2) the Employer took an adverse action against him; and (3) a causal nexus between the protected activity and the adverse action. See Carter Coal Co. v. Human Rights Commission, 261 Ill. App. 3d 1, 633 N.E.2d 202 (5th Dist. 1994).

The Commission finds no substantial evidence to satisfy the required causal nexus between the protected activity and the adverse action. First, the Petitioner's complaints to Mr. Miller, which admittedly ended around February 2012, are too far removed to give rise to the inference that they caused Mr. Miller to terminate him a year later. Second, there is no evidence tending to show that any information the Petitioner provided to Ms. Keller, a non-management employee, formed the basis for Mr. Miller's decision.

Accordingly, the Petitioner has not presented enough 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 MT Food Service, 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 21st day of November 2018

Commissioner Hermene Hartman

Commissioner Steve Kim

Commissioner Cheryl Mainor