

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST	)	
FOR REVIEW BY:	)	CHARGE NO.: <b>2014CF2430</b>
	)	EEOC NO.: <b>21BA41225</b>
<b>Jacqueline Berry</b>	)	ALS NO.: <b>15-0076</b>
	)	
Petitioner	)	

**ORDER**

This matter coming before the Commission by a panel of three, Chair Rose Mary Bombela-Tobias and Commissioners Patricia Bakalis Yadgir and Duke Alden, presiding upon Jacqueline Berry's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")<sup>1</sup> of Charge No. 2014CF2430 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 13, 2014, Petitioner filed a charge with the Respondent alleging that AFSCME Local #31, a labor union ("Union"), discriminated against her when it failed to adequately provide representation based on her sex, female, in violation of Sections 2-102(A) of the Illinois Human Rights Act ("Act").

On December 16, 2014, the Respondent dismissed the Petitioner's charge in its entirety. The Petitioner filed a timely Request for Review on February 14, 2015.

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).

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<sup>1</sup> 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."

On November 6, 2006, Petitioner began employment as a Qualified Mental Retardation Professional at the New Hope Center ("New Hope"), a non-profit organization that provided services to individuals with intellectual and/or age disabilities. In July 2012, Petitioner complained to her supervisor, Wendy Harsh ("Harsh") (female) that her co-workers were following her around, sniffing her. Petitioner stated that she had body odor due to an illness. She also complained that she was being harassed. The Director of Human Resources, Paulette Stark ("Stark") (female) conducted an investigation. On August 2, 2012, Stark sent a letter to Petitioner indicating that there was an investigation into her complaints. However, after interviewing Harsh and 11 witnesses, the results of the investigation suggested that her complaints were unfounded. Petitioner then met Stark on August 3, 2012 to discuss the results of the investigation. On August 16, 2012, Petitioner, Stark, Randy Daniel ("Daniel") (male), Union President, Union Vice President and New Hope's Director of Program Services met to discuss the situation. During the meeting, Petitioner was advised to submit to a fitness for duty exam scheduled for August 21, 2012. Petitioner cancelled the appointment and was later rescheduled for August 27, 2012. Petitioner failed to attend the rescheduled appointment, as well. In September 18, 2012, Stark sent Petitioner another letter reiterating that Petitioner needed to schedule a fitness for duty exam and further informing her that failure to attend the appointment would be considered insubordination and result in termination.

Thereafter, Petitioner filed a complaint with the Union. Petitioner had been a member in good standing with the Union. Her employment was subject to a bargaining agreement between the Union and New Hope. Article X, Section 10.1 of the Agreement states that New Hope may only discipline non-probationary employees for "just cause." Daniel represented Petitioner at a meeting with the Union. Daniels advised Petitioner to comply with her employer's orders. On September 18, 2012, Petitioner again failed to comply with her employer's orders and a pre-disciplinary meeting was set for October 10, 2012 which was cancelled due to Petitioner's absence. Petitioner was then discharged on October 15, 2012. Initially, Thomas Egstrom (male), the Union's Supervising Counsel, filed a grievance related to Petitioner's discharge on November 2012. Petitioner's employer refused to reconsider the discharge. The Union also considered the cost in proceeding with the grievance process, as well as weighing the evidence against the Petitioner. Ultimately, the Union did not contest her charge because Petitioner had disobeyed a direct order from New Hope and did not believe that the Union would prevail if her case was sent to arbitration.

In the instant case, Petitioner is unable to prove that she was discharged due to her gender. To prove a *prima facie* case for gender discrimination, Petitioner must show that: 1) she is a member of the protected class; 2) she was performing her job duties according to Respondent's legitimate expectations; 3) she suffered an adverse employment action; and 4) other individuals not within her 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 fails to meet the second and fourth elements of her *prima facie* case for gender discrimination. As to the second prong, Petitioner failed to perform her job duties according to her employer's legitimate expectations as evidenced by her refusal to submit to a fitness for duty exam on three separate occasions.

As to the fourth prong, Petitioner has not shown that the Union treated males more favorably. For the five years prior to Petitioner's October 15, 2012 discharge, there are no records of any employee in Petitioner's bargaining group having a grievance being taken to arbitration. 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. Being denied representation by the Union was for reasons unrelated to her gender, namely Petitioner disobeyed her employer's explicit order to submit to a fitness for duty exam. The Union articulated a non-discriminatory reason for not proceeding to arbitrate the grievance on behalf of Petitioner. Therefore, Petitioner failed to show substantial evidence that the Union failed to represent her on the basis of sex.

In her 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 AFSCME Local #31 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 12<sup>th</sup> day of December 2018.**

Chair Rose Mary Bombela-Tobias

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden