

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2014CA2841
)	EEOC NO.: 21BA41525
Lorraine Cook)	ALS NO.: 15-0094
)	
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 Lorraine Cook’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Illinois Department of Human Rights (“Respondent”)¹ of Charge No. 2014CA2841 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 May 6, 2014, the Petitioner filed a charge of discrimination with the Respondent alleging that Federal Express Corporation, (“Fed Ex”), suspended her based upon her age (Counts A and C); and in retaliation for filing a previous charge of discrimination (Counts B and D); and discharged her based upon her age (Count E); and in retaliation for filing a previous charge of discrimination (Count F), in violation of Sections 2-102 (A) and 6-101(A) of the Illinois Human Rights Act (“Act”).

On December 9, 2014, the Respondent dismissed the Petitioner’s charge in its entirety. After being granted an Extension of Time to file a Request for Review, the Petitioner filed a timely Request for Review on March 16, 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

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 Fed Ex hired Petitioner on or about September 17, 2007 as a part-time Handler (50). On or about May, 21, 2010, Petitioner filed Charge No.: 2010CF3636 against Fed Ex alleging discrimination. On March 21, 2013, Petitioner received a warning letter and 3 day suspension for twice refusing management's directives to work. On November 25, 2013, Petitioner was suspended for three days with pay by Station Manager, Cedric Thomas ("Thomas") (30's) for violation of Fed Ex's Conduct Policy. In particular, Petitioner was suspended for allegedly spreading false statements about Handler, Gertrude Lawson's family ("Lawson") (42). On February 17, 2014, Petitioner filed an internal Complaint with Human Resources Advisor, Michael Rodriguez (58) alleging discrimination and harassment. An investigation was conducted and it did not confirm her allegations or identify any policy violations. Petitioner was suspended for 3 days with pay again on April 2014 for misconduct based on her refusal to work in a different area, the can, due to Fed Ex being shortstaffed on the reload in that area. Thomas told Petitioner that she was being insubordinate and either she had to work in the can or go home. Petitioner decided to go home. Thomas then asked for her identification badge and to leave the building. After reviewing Petitioner's entire employment history, Thomas discharged Petitioner on May 5, 2014, because she was insubordinate and had a history of violating Fed Ex's Conduct Policy a number of times in the five years prior to her suspension and discharge and that such a pattern warranted termination consistent with its policies. Of note, a recurrent pattern of misconduct consisted of at least of two occurrences of the same or similar conduct within a span of five years.

As to Counts A-F, Petitioner is unable to prove that she was placed on two suspensions and discharged due to her age and in retaliation for filing a previous charge of discrimination.

To prove a *prima facie* case of age 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 Supreme Court set out a three-part analysis in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817. Even if Petitioner established a *prima facie* case of discrimination, the burden then shifts to Fed Ex to rebut the presumption of discrimination and articulate a legitimate, nondiscriminatory reason for its employment actions. 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); adopted by the Illinois Supreme Court in *Zaderaka v. HRC*, 131 Ill.2d 172, 179. 545 N.E.2d 684, 687 (1989). If this is done, the Petitioner must then prove by a preponderance of the evidence that the articulated reason advanced by Fed Ex is a pretext. *Id.*

Here, Petitioner fails to meet the second and fourth elements of her *prima facie* case for age discrimination. As to the second prong, Petitioner failed to perform her job duties according to her employer's legitimate expectations as evidenced by her allegedly "openly making or publishing false statements concerning another Handler, Lawson's (42) family to another Handler, Madison (60) which was in violation Fed Ex's Conduct Policy and refusal to work in another area which was short-staffed, as directed. As to the fourth prong, Petitioner has not shown that a similarly situated younger employee, whose job performance was comparable to hers, was not suspended and discharged as she was for having a history of violating Fed Ex's Conduct Policy. The comparators Petitioner identified were age 48 and 71. Petitioner does not point to any unacceptable misconduct. Further, a Courier/Swing Driver, age 40 and a Handler, age 25 were both issued warning letters, but were not discharged because they did not display a pattern of misconduct. 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 suspended and discharged by Fed Ex were for reasons unrelated to her age, namely insubordination and a recurrent pattern of misconduct. Thus, Fed Ex articulated a legitimate, nondiscriminatory reason for terminating Petitioner. Petitioner failed to present any, much less compelling, evidence that Fed Ex's articulated reasons for terminating her were a pretext for age discrimination. In the absence of any evidence that the business consideration relied upon by Fed Ex 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, Fed Ex 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 she was issued a suspension and discharged because of her age.

Next, to prove a *prima facie* case for retaliation, the following must be established by Petitioner: 1) she engaged in protected activity; 2) Fed Ex committed an adverse action against her; and 3) a causal connection existed between the protected activity and the adverse action. *Hoffelt v. Ill. Dep't of Human Rights*, 367 Ill. App.3d 628, 867N.E.2d 14 (1st Dist. 2006); *Welch v. Hoeh*, 314 Ill.App.3d 1027, 1035, 733 N.E. 2d 410,416 (3d Dist. 2000).

Regarding prong two, Petitioner's suspension does not constitute an adverse action as this was not punitive in nature but done for purposes of investigation into the alleged incident. Additionally, Petitioner received paid suspensions. See *In the Matter of: Linda M. Hartman and City of Springfield Police Department*, IHRC, Charge No. 1993SF0365 (October 4, 1999), 1999 WL 33252975 (Ill.Hum.Rts.Com.) (adverse action must be sufficiently severe or pervasive to constitute term or condition of employment). As to prong three, Petitioner provided no evidence of a causal

connection between the protected activity of filing a previous charge of discrimination and her suspensions and ensuing May 5, 2014 termination. While Petitioner's April 14, 2014 suspension and May 5, 2014 discharge followed her participation in a protected activity, more than three years lapsed from the filing of her discrimination charge against Fed Ex in May 2010 to raise an inference of retaliatory motive. The Commission has previously ruled that five months and twenty-three days was too remote. See *Mitchell and Local Union 146*, 20 ILL. HRC Rep.95 (1985). A causal connection will be inferred if the period of time between the protected activity and the adverse action is sufficiently short; *Mims and State of Illinois, Department of Lottery*, ___ Ill. HRC Rep. ___, Charge No. 1988SF0171 (July 26, 1991) (nineteen-month time period between protected activity and adverse action to long to create an inference of retaliation). Fed Ex articulated a legitimate, nondiscriminatory reason that Petitioner was placed on suspension and discharged due to her inability to perform her job duties, specifically for insubordination and misconduct. Additionally, Petitioner failed to present any evidence that these reasons were pretextual. Therefore, Petitioner fails to show substantial evidence that she was placed on a suspension and discharged in retaliation for filing a previous charge of discrimination.

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 Federal Express Corporation as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS)
) **Entered this 17th day of December 2018.**
HUMAN RIGHTS COMMISSION)

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden