STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.: **2014CA2109**
	)	EEOC NO.: **21BA40983**
James G. Keck	)	ALS NO.: **15-0095**
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 James G. Keck's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2014CA2109 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 February 21, 2014, the Petitioner filed a charge of discrimination with the Respondent alleging that Gateway Foundation ("Gateway") discharged him because of his sexual orientation, homosexual (Count A); disabilities: diverticulitis, kidney disorder, prostate cancer and panic disorder (Counts B-E); and in retaliation for engaging in protected activity (Count F); and also discriminated against him when it subjected him to unequal terms of employment due to his age, 66 (Count G), 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. Petitioner filed a timely Request for Review on March 16, 2015 and Reply to Respondent's Response on April 29, 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).

As to Counts A-G, the evidence is insufficient to establish a *prima facie case* of discrimination, based upon sexual orientation, disability, and in retaliation for engaging in protected activity. The record shows on September 29, 2009, Gateway hired Petitioner as a Counselor III for its Chicago Northwest Outpatient program at its Aurora and Bloomingdale treatment centers. In August 2012, Petitioner complained to Human Resources about Vice President, Nick Gantes ("Gantes") (nonhomosexual, non-disabled, no protected activity, age 58) use of the term "high maintenance" to describe Petitioner. Petitioner believed Gantes' use of the term constituted a gay slur because it is often used to describe women. There were no other incidences reported to Human Resources. On July 31, 2013, Gateway sent a "Notice if Cessation of Services to the State of Illinois, Department of Human Services, Division of Alcoholism and Substance Abuse, advising that it had decided to close the Bloomingdale program due to low number of clients seeking services, Gateway lost $12,000 in
2013 due to the lack of demand for services at Bloomingdale. Subsequently, Gateway's Human Resource Director, Yolanda Johnson-Davis ("Johnson-Davis") sent Petitioner a letter stating that with the closing of Bloomingdale and the limited need in Aurora for on-call Counselor III position, his last date of employment was on August 19, 2013.

First, to prove a *prima facie case* of sexual orientation and age discrimination, Petitioner must show that:1) he is a member of the protected class; 2) he was performing his 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.

Second, to establish a *prima facie case* of disability discrimination, there must be some evidence: 1) he is disabled within the meaning of the Act; 2) Gateway had knowledge of his disability; 3) he suffered and adverse employment action; and 4) the disability is unrelated to his ability to perform the job with or without an accommodation. *Habinka v. HRC*, 192 Ill.App.3d 343, 373, 548 N.E.2d 702, 139 Ill.Dec. 317 (1st Dist. 1989). *Department of Corrections v. IHRC*, 298 Ill.App.3d 536,540, 699 N.E.2d 143, 145-6 (3rd Dist.1998).

Third, to establish a *prima facie case* of retaliation, Petitioner must show: 1) he engaged in protected activity; 2) Gateway took an adverse action; and 3) a causal connection exists between the protected activity and the adverse action. *See Welch v. Hoeh*, 314 ILL.App.3d 1027, 1035, 733 N.E.2d 410, 416 (3rd Dist. 2000). Under the Act, it is a civil rights violation to retaliate against a person because he opposed that which he reasonably and in good faith believes to be unlawful discrimination. See 775 ILCS 5-601(A).

Note that in an action alleging discrimination and retaliation, 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 sexual orientation, age and disability discrimination, as well as retaliation, Gateway 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 Gateway 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).

As to Counts A and G, Petitioner fails satisfy the fourth element of his *prima facie case* for sexual orientation and age discrimination. Petitioner has not shown that a similarly situated employee whose sexual orientation is non-homosexual or significantly younger employee at the Bloomingdale site had been allowed to retain their position or was provided another position by Gateway in lieu of discharge. Julie Trytek ("Trytek") (non-homosexual, non-disabled, no protected activity, age 43), former Counselor III at Bloomingdale was not offered a similar position in lieu of discharge. Trytek, on her own initiative, submitted an on-line application for another position at a different location, received a job offer, and ultimately declined the offer. Further, allegedly being called "high maintenance" does not rise to the level of discrimination as it is unclear that the comment was directed to Petitioner's sexual orientation and is mere speculation on his part. As to other remarks, Petitioner alleges that Gantes routinely referred to him as a "cocksucker", however there is no indication that Petitioner had first-hand knowledge of these comments, and there were no witness statements to support these allegations. Occasional, isolated, causal or trivial conduct of a sexual nature does not constitute sexual harassment. *See In the Matter of: Karen Tribble and Russell DeBerry*, IHRC No. 1990SN 0544, 1996 WL 652645, *9 (September 9, 1996). Petitioner cannot point to any evidence that Gateway made any statements indicative of discriminatory animus based on age. 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.

As to Counts B-E, the evidence is equally insufficient to establish a *prima facie case* that Petitioner was discriminated based upon his disabilities: diverticulitis, kidney disorder, prostate cancer, and panic disorder. As to Counts B and E, there is no indication from Petitioner's medical provider to indicate that he was disabled within the meaning of the Act or that his disability is unrelated to his ability to perform the essential functions of his job. According to Petitioner's medical provider, his diverticulitis condition was "minor". Section 2500.20(b)(1) of the Respondent's Rules and Regulations further interpret a disability as excluding ... "conditions that are transitory and insubstantial and conditions that are not significantly debilitating or disfiguring." See 56 Ill. Admin. Code, Ch.II, Section 2500.20(b)(1). Additionally, Petitioner's medical provider failed to provide any information concerning Petitioner's panic/anxiety disorder, as it existed at the time of the alleged adverse act. However, as to Counts C and D, Gateway was aware that Petitioner was an individual with a disability as it relates to his kidney

disorder and prostate cancer. As to Petitioner's reference regarding former Director of Community Initiatives, Thomas McCabe's ("McCabe") letter in connection with the number of Family Medical Leave Act cases and the expense it was causing Gateway, the correspondence does not pertain specifically to Petitioner's alleged disabilities/medical leaves, or his worksite at the time of the alleged adverse acts. Since there was no substantial evidence that Petitioner was disabled within the meaning of the Act, Counts B through E should be dismissed for lack of substantial evidence that Petitioner was discharged because of his disabilities. The facility simply was shut down due to business considerations, namely a lack of demand for services and financial concerns.

As to Count F, Petitioner is unable to satisfy prong 3 of his prima facie case of retaliation for engaging in protected activity. Petitioner's separation from employment is unrelated to his engaging in protected activity. Petitioner alleges that during a Human Resources meeting in August of 2012, he engaged in protected activity when he objected to Gantes' degrading remark regarding the use of the term "high maintenance" to describe Petitioner as Gantes' use of the term constituted a gay slur as it is often used to describe women. Even if Petitioner's complaint about Gantes constituted a protected activity, the one-year time that elapsed between his complaint and his discharge is too long to create an inference of retaliation. 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). Thus, there is no substantial evidence that he was discharged in retaliation for engaging in protected activity.

As to Counts A-G, being discharged by Gateway was for reasons unrelated to his sexual orientation, disability, age, or in retaliation for engaging in protected activity, namely Gateway made a business decision to close the worksite where Petitioner worked, due to lack of demand for services at the facility. Thus, Gateway articulated a legitimate, nondiscriminatory reason for terminating Petitioner. Petitioner failed to present any compelling evidence that Gateway's proffered reasons for terminating him were a pretext for discrimination based upon sexual orientation, age, disability and in retaliation for engaging in protected activity. In the absence of any evidence that the business consideration relied upon by Gateway 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, Gateway 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, as to Counts A through G, Petitioner failed to show substantial evidence that he was

terminated because of his sexual orientation, age, disability, or in retaliation for engaging in protected activity and therefore these four counts should be dismissed for lack of substantial evidence.

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 Gateway Foundation, 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)

Chair Rose Mary Bombela-Tobias

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden