

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
JOHN CROWLEY,)	
)	
Complainant,)	
)	
)	Charge Nos.: 2004CA3010
)	2004CA3011
and)	EEOC No.: N/A
)	ALS No.: 05-164
)	
VILLAGE OF GLEN ELLYN and)	
GLEN ELLYN POLICE DEPARTMENT,)	Judge Lester G. Bovia, Jr.
)	
Respondents.)	

RECOMMENDED ORDER AND DECISION

This matter has come to be heard on Complainant's and Respondents' cross-motions for summary decision. The parties have fully briefed both motions. Accordingly, this matter is now ready for disposition.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings, affidavits, and other documents submitted by the parties. The findings did not require, and were not the result of, credibility determinations. Moreover, all evidence was viewed in the light most favorable to the non-moving party (*i.e.*, Complainant for Respondents' motion and Respondents for Complainant's motion). Facts not discussed were deemed immaterial.

1. Complainant was hired by the Board of Fire and Police Commissioners of the Village of Glen Ellyn ("Board") on August 24, 1978 as a patrol officer.
2. Complainant's date of birth is August 30, 1956.

3. Complainant was promoted to the rank of sergeant in or about February 1996 at the age of 39 years old.
4. Prior to 2000, Complainant's job performance met Respondents' legitimate expectations.
5. From 2000 to 2002, Respondents gave Complainant numerous written reprimands due to poor performance and rule violations. Complainant also received two suspensions during that timeframe.
6. Complainant received a "Not Satisfactory" overall rating on his November 2002 evaluation, the lowest possible rating, and thus did not receive a merit raise in February 2003.
7. In or about June 2003, Respondents assigned two other sergeants, Robert Acton and Joseph Baki, to ride along with Complainant to observe his work performance over an eight-week period. Sergeants Acton and Baki were ordered to provide Complainant with their observations at the end of each shift and obtain a written acknowledgment from Complainant that he received the observations. Sergeants Acton and Baki also were to provide Respondents with a report regarding Complainant's work at the conclusion of the eight-week observation.
8. During the eight-week observation, Sergeants Acton and Baki identified 87 separate incidents during which they believed Complainant exercised poor supervisory judgment and/or otherwise failed to perform his duties to the level expected of a police sergeant.
9. In October 2003, Respondents filed charges against Complainant with the Board. Respondents' charges were based on the incidents observed by Sergeants Acton and Baki, as well as Complainant's prior performance problems. The Board suspended Complainant indefinitely without pay pending a hearing on the charges.
10. On April 1, 2004, Complainant filed charges with the Department, alleging that Respondents brought charges against him with the Board due to his age. Respondents deny Complainant's allegations.

11. The hearing before the Board began on July 14, 2004 and lasted approximately 19 full days over eight months. At the hearing, Complainant offered evidence purporting to prove, *inter alia*, that Respondents' charges were motivated by age discrimination.

12. After the hearing, the Board sustained the charges and determined that Complainant's work performance warranted termination of his employment. Accordingly, the Board terminated Complainant effective June 27, 2005.

13. Complainant appealed the Board's decision to the Circuit Court of DuPage County, which affirmed the Board's decision. Complainant then appealed to the Appellate Court for the Second District of Illinois. By order dated May 4, 2007, the Appellate Court affirmed the Circuit Court's decision. The Appellate Court specifically rejected Complainant's argument that Respondents' charges stemmed from age discrimination.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" and Respondents are "employers" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).

2. Complainant's case must be dismissed on its merits because he has failed to establish a *prima facie* case of age discrimination.

3. Complainant's case also must be dismissed on its merits because Respondents have articulated a legitimate, nondiscriminatory reason for the adverse job action at issue, which Complainant cannot establish is a pretext.

4. Even if Complainant's case could succeed on its merits, the doctrine of collateral estoppel bars Complainant's age discrimination claim.

5. There is no genuine issue of material fact regarding Complainant's claim, and Respondents are entitled to a recommended order in their favor as a matter of law.

6. Respondents' Motion for Summary Decision must be granted.

7. Complainant's Motion for Summary Decision must be denied.

DISCUSSION

I. SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill. App. 3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill. App. 3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist. 1979). Although not required to prove his case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill. App. 3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill. App. 3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on his pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill. App. 3d at 392, 642 N.E.2d at 490. Where the movant's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a complainant's failure to file counter-affidavits in response is frequently fatal to his case. Rotzoll v. Overhead Door Corp., 289 Ill. App. 3d 410, 418, 681 N.E.2d 156, 161 (4th Dist. 1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

II. RESPONDENTS' MOTION FOR SUMMARY DECISION MUST BE GRANTED ON ITS MERITS

A. Standard for Proving Age Discrimination Under the Act

There are two methods for proving employment discrimination, direct and indirect. Sola v. Human Rights Comm'n, 316 Ill. App. 3d 528, 536, 736 N.E.2d 1150, 1157 (1st Dist. 2000). Because there is no direct evidence of employment discrimination in this case (e.g., a statement by Respondents that they brought charges against Complainant because of his age), the indirect analysis is appropriate here.

The analysis for proving a charge of employment discrimination through indirect means was described in the U.S. Supreme Court case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and is well established. First, Complainant must make a *prima facie* showing of discrimination by Respondents. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If he does, then Respondents must articulate a legitimate, nondiscriminatory reason for their actions. Id. If Respondents do so, then Complainant must prove by a preponderance of evidence that Respondents' articulated reason is merely a pretext for unlawful discrimination. Id. This analysis has been adopted by the Commission and approved by the Illinois Supreme Court. See Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172, 178-79 (1989).

To establish a *prima facie* case of age discrimination, Complainant must prove: 1) he was at least 40 years old at the time of the adverse job action; 2) he was meeting Respondents' legitimate performance expectations; 3) he suffered an adverse job action; and 4) similarly situated, younger employees were treated more favorably. Honaker and Rhopac Fabricators, Inc., IHRC, ALS No. 12089, July 10, 2006. As discussed below, Complainant cannot establish a *prima facie* case of age discrimination as a matter of law because he cannot satisfy elements two and four.

B. Complainant Cannot Establish a *Prima Facie* Case of Age Discrimination

Respondents concede that Complainant was 47 years old when they filed charges with the Board against him. Respondents also concede that the filing of charges, which necessitated Complainant's indefinite suspension pending a hearing, qualifies as an adverse job action. However, Respondents vehemently deny that Complainant's performance met their legitimate expectations, and that they treated similarly situated, younger employees more favorably.

Complainant asserts that, prior to his November 2002 evaluation, he received positive performance ratings every year since he joined the police force in 1978. (Complainant's affidavit at 2.) Complainant also asserts that he has been certified in 73 specialty training seminars and has received several commendations for his work. (Id. at 1-2.) Complainant further asserts that he only took six sick days during his entire career with Respondents. (Id. at 2.)

Respondents dismiss Complainant's years of acceptable performance as historic and argue that Complainant's work record near the time they filed charges tells a much different story. From 2000 to 2002, Respondents gave Complainant numerous written reprimands due to poor performance and rule violations. (P. Norton's affidavit at 2-4; W. Holman's affidavit at 2.) Complainant also received two suspensions during that timeframe. (P. Norton's affidavit at 2-4; W. Holman's affidavit at 2.) Complainant received the lowest possible overall rating, "Not Satisfactory," on his November 2002 evaluation. (Complainant's November 2002 Performance Evaluation, Respondents' Motion at Ex. M.) Complainant also did not receive a merit raise in February 2003 due to his bad evaluation. (W. Holman's affidavit at 3.) In short, from 2000 to 2003, Respondents regarded Complainant as one of the lowest performing officers in Glen Ellyn. (P. Norton's affidavit at 2.) For his part, Complainant denies that he deserved the reprimands, suspensions, and poor evaluation, but does not dispute that he received them. (Complainant's Response Brief at 5-10; Complainant's affidavit at 4-5.)

In June 2003, Respondents ordered Sergeants Acton and Baki to ride along with Complainant to observe and record his work performance for eight weeks. (P. Norton's affidavit at 5.) At the end of each shift, Sergeants Acton and Baki shared their observations with Complainant and obtained his written acknowledgement that he had an opportunity to review the observations. (Id.) During the eight-week observation, Sergeants Acton and Baki identified 87 separate incidents in which they believed Complainant exercised poor supervisory judgment and/or otherwise failed to perform his duties to the level expected of a police sergeant. (Board Findings and Order, Respondent's Motion at Ex. O.) Complainant, while not disputing that Sergeants Acton and Baki identified 87 such incidents, argues that most of the incidents: 1) constituted minor infractions not worthy of discipline; or 2) were plausible decisions under the circumstances, contrary to the beliefs of Sergeants Acton and Baki. (Complainant's Response Brief at 18-23.) Respondents filed charges against Complainant in October 2003. (Board Findings and Order, Respondent's Motion at Ex. O.) The Board conducted a full hearing, which commenced on July 14, 2004 and lasted 19 days over eight months. (Id.) After the hearing, the Board sustained the charges and terminated Complainant effective June 27, 2005. (Id.)

As Respondents suggest, the relevant time period for assessing an employee's performance is the time period at or near the adverse job action. Patten and MCI Telecomms. Corp., IHRC, ALS No. 8257, May 19, 1997. Good performance during earlier stages of an employee's career is irrelevant. Id. As evidenced by the numerous reprimands, the suspensions, the poor evaluation, and the 87 incidents identified by Sergeants Acton and Baki, Complainant clearly was not meeting Respondents' legitimate performance expectations at the time Respondents filed charges against him in October 2003. By sustaining the charges and terminating Complainant after a full hearing, the Board concurred. Complainant's self-serving protestations that he did not deserve the numerous negative consequences he received from 2000 to 2003 hold no legal effect. See Hickman and Cent. Ill. Pub. Serv. Co., IHRC, ALS No. 10043, August 7, 2000 (holding complainant cannot create triable issue of fact merely by

asserting that her employer's assessment of her job performance was wrong). Therefore, as a matter of law, Complainant cannot satisfy element two.

To satisfy element four, Complainant proffers Sergeant Jean Harvey and Officers Sherry Bletz and Todd Yates as younger officers with similarly bad evaluation ratings who never faced charges. (Complainant's affidavit at 17.) Officers Bletz and Yates are not similarly situated with Complainant because of their lower rank. See Daugherty and Dewitt Co. Sheriff's Dep't, IHRC, ALS No. 11345, April 3, 2002 (holding sergeant is not similarly situated to sheriff's deputy). With regard to Sergeant Harvey, Complainant offers no evidence regarding how he knows anything about the evaluation rating of Sergeant Harvey (or Officers Bletz and Yates, for that matter). Complainant's bald, conclusory assertion about Sergeant Harvey's evaluation rating, with no supporting evidence, is insufficient to create a question of fact. Chevrie, 208 Ill. App. 3d at 883-84, 567 N.E.2d at 630-31.

Complainant also compares himself to Sergeant Baki who, Complainant claims, was never disciplined for allegedly using an anti-Chinese racial slur. (Complainant's affidavit at 16.) Assuming (without evidence) that Sergeant Baki did use a racial slur, Sergeant Baki's alleged isolated act has nothing in common with Complainant's three years of bad performance, reprimands, and suspensions. In fact, Sergeant Baki was regarded by Respondents as an "extremely high performing sergeant," which Complainant does not dispute. (P. Norton's affidavit at 5.) Indeed, Sergeant Baki's outstanding job performance was the reason why Respondents chose him to ride along with and observe Complainant. (Id.) In short, Sergeant Baki is not similarly situated to Complainant.

Complainant also compares himself to Sergeant Robert Madden, whom Respondents allegedly allowed to serve despite suffering from Lou Gehrig's disease. (Complainant's affidavit at 16.) However, Complainant has not offered any evidence, as he must, that Sergeant Madden is younger than Complainant. Moreover, allowing Sergeant Madden to serve with an illness is completely different from filing charges against Complainant. Assuming (without evidence) that

Sergeant Madden's illness has affected his fitness to serve, his fitness to serve has been affected involuntarily. On the other hand, Complainant's fitness to serve was challenged due to his own poor performance record, a matter certainly within his control. In short, this comparison is misplaced.

Finally, Complainant has offered proof that he was replaced by a younger sergeant (*i.e.*, Sergeant Brian Beck) after the Board terminated him. (Complainant's affidavit at 17.) Proof of replacement by a younger employee can satisfy element four when the adverse job action involves removing the complainant from his position, such as with a demotion or termination. See Warzecha and Wis. Tool and Stamping Co., IHRC, ALS No. 04-238, April 22, 2009. However, Respondents did not demote or terminate Complainant here. They merely brought charges against him. A separate entity, the Board, terminated Complainant after a full hearing. The Board could have determined, of course, that the charges against Complainant were unfounded, or that some discipline short of termination was warranted. Thus, the fact that Complainant was replaced by Sergeant Beck after his ultimate termination does not support his case.

In sum, Complainant cannot establish a *prima facie* case of age discrimination as a matter of law because he cannot prove: 1) his job performance, when viewed at the time Respondents filed charges against him, met Respondents' legitimate expectations; or 2) similarly situated, younger employees received more favorable treatment.

C. Respondents' Proffered Reason for the Adverse Job Action is Legitimate and Nondiscriminatory, and Complainant Cannot Establish Pretext

Assuming *arguendo* that Complainant could establish a *prima facie* case of age discrimination, Complainant's case would fail in any event because Respondents have articulated a legitimate, nondiscriminatory reason for filing charges against Complainant: his bad job performance. As discussed above, Complainant: 1) received numerous reprimands and two suspensions between 2000 and 2002; 2) received a poor evaluation in November 2002; and 3)

committed 87 actions identified by Sergeants Acton and Baki as evidencing poor supervisory judgment and/or a failure to perform his duties to the level expected of a police sergeant.

Again, the fact that Complainant denies that he deserved the consequences outlined above is unimportant; all that matters is Respondents' good-faith belief that Complainant's performance record warranted the filing of charges with the Board. See Green and Chicago Transit Auth., IHRC, ALS No. 2907, July 26, 1991 (holding employer's good-faith belief that discipline was warranted qualified as legitimate and nondiscriminatory, even if that belief later turned out to be false). In short, Respondents' reason for filing charges against Complainant clearly was legitimate and nondiscriminatory.

The issue, then, is whether Complainant can prove that Respondents' proffered reason is pretextual. To prove pretext, Complainant must show: 1) the proffered reason has no basis in fact; 2) the proffered reason did not actually motivate the decision; or 3) the proffered reason is insufficient to motivate the decision. Grohs v. Gold Bond Bldg. Prods., 859 F.2d 1283, 1286 (7th Cir. 1988). In short, a pretext is a lie. Hobbs v. City of Chicago, 573 F.3d 454, 461 (7th Cir. 2009).

As proof on the issue of pretext, Complainant offers the following comments by Glen Ellyn Police Chief Philip Norton: 1) a statement at a staff meeting in October 2002 that he was "enthusiastic for a younger department;" and 2) statements at a staff meeting in November 2003 that "the influx of new people is bringing a lot of new energy, that's a good thing, and eliminating the old was also" and that it was better to have "younger officers do recruiting so they better can relate to new recruits." (Complainant's affidavit at 12.) While Chief Norton's alleged comments might reveal a general preference for a younger police force, there is nothing in his alleged comments that suggests that the reason Respondents gave for filing charges specifically against Complainant is a lie. To the contrary, the considerable evidence outlining Complainant's extensive disciplinary history makes it clear that Complainant's work performance, not his age, actually motivated the charges.

As further proof, Complainant points out that some older officers retired or resigned after Chief Norton was promoted from Deputy Police Chief to Police Chief in January 2002. (Complainant's affidavit at 12-15.) However, the fact that certain officers' retirements or resignations occurred near the same time as another officer's Board charges could be mere coincidence. Complainant offers no evidence to suggest otherwise. Therefore, Complainant offers no proof of pretext sufficient to undercut Respondents' legitimate, nondiscriminatory reason for filing charges against him.

In sum, Complainant's age discrimination claim fails as a matter of law on its merits. Therefore, Respondents' motion must be granted.

III. COMPLAINANT'S MOTION FOR SUMMARY DECISION MUST BE DENIED ON ITS MERITS

Complainant cannot prevail on Respondents' motion even when, as the non-moving party, all evidence is viewed in a light most favorable to him. It follows that Complainant cannot prevail on his own motion either, when all evidence is viewed in a light most favorable to Respondents. Accordingly, Complainant's motion must be denied for the same reasons that Respondents' motion must be granted: Complainant cannot establish a *prima facie* case of age discrimination, or that Respondents' legitimate, nondiscriminatory reason for filing charges against him is pretextual.

IV. THE DOCTRINE OF COLLATERAL ESTOPPEL BARS COMPLAINANT'S CLAIM

While this case was pending before the Commission, Complainant appealed the Board's decision to terminate him to the Circuit Court of DuPage County, then to the Appellate Court for the Second District of Illinois. As he has done in this case, Complainant argued in those fora, *inter alia*, that Respondents filed charges against him because of age discrimination. Both courts affirmed the Board's decision.

In its Rule 23 order dated May 4, 2007, the Appellate Court specifically rejected Complainant's "undeveloped assertions that the charges filed against him were motivated by

age discrimination.” (Appellate Court’s Rule 23 Order at 40, Respondents’ Motion for Leave to Supplement the Record at Ex. A.)¹ Having reviewed the complaint filed with the Commission and the evidence from the Board hearing, the Appellate Court stated that it “agree[d] with the Board’s assessment of the evidence and decline[d] to disturb its finding that [Complainant] had failed to prove his claim of age discrimination.” (Id. at 40-41.)

The doctrine of collateral estoppel bars the relitigation of issues decided by a court of competent jurisdiction. Jackson and City of Chicago Fire Dep’t, IHRC, ALS No. 10588, December 1, 2003. Three elements must be present to invoke the doctrine: 1) a final judgment on the merits was entered in a prior action; 2) the issue decided in the prior action is identical to the one presented in the suit in question; and 3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior action. Id.

Complainant cannot, and does not, dispute that: 1) the Appellate Court’s opinion affirming the Board’s decision was a final judgment on the merits; 2) the opinion addressed and decided the identical issue presented here, namely, that Respondents filed charges against Complainant due to age discrimination; and 3) Complainant was a party to the Appellate Court case. Instead, Complainant argues that the Appellate Court is not a court of competent jurisdiction because the Commission, and not the Appellate Court, has exclusive authority over claims arising under the Act. However, the Act provides that Illinois appellate courts are the reviewing courts for the Commission’s final orders. See 775 ILCS 5/8-111(B)(1). As such, the Commission is bound by their decisions. Moore and St. Mary’s Hosp. and Med. Mgmt. Affiliates, Inc., IHRC, ALS No. S-3859, August 21, 2000. It follows, therefore, that the Appellate Court is a court of competent jurisdiction on issues related to age discrimination under the Act.

¹ While not precedential in value generally, Rule 23 orders may be cited on issues related to double jeopardy, *res judicata*, collateral estoppel, and the law of the case. See 166 Ill.2d R. 23(e). Thus, Respondents’ offer of the Appellate Court’s Rule 23 order is proper.

Complainant also argues that the Appellate Court's decision should be ignored because it misapplies Illinois law. Again, the Commission may not do so, even if a party believes that the Appellate Court's application of the law is faulty. Id.

Accordingly, the outcome of this case is the same whether it is based on the merits or collateral estoppel: Respondents' motion must be granted and Complainant's motion must be denied.

RECOMMENDATION

Based on the foregoing, there is no genuine issue of material fact regarding Complainant's claim of age discrimination, and Respondents are entitled to a recommended order in their favor as a matter of law. Accordingly, it is recommended that: 1) Respondents' Motion for Summary Decision be granted; 2) Complainant's Motion for Summary Decision be denied; and 3) the complaints and underlying charges against both Respondents be dismissed in their entirety with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____

**LESTER G. BOVIA, JR.
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION**

ENTERED: December 4, 2009