





1. Complainant, Deborah Busch, at the time of her employment separation was 52 years old.
2. Complainant was employed as a "Pharmacy Technician I" from March 1999 to her discharge on April 13, 2004.
3. Respondent, Provena St. Joseph Medical Center, is a hospital serving the Joliet, Illinois, area.
4. Respondent maintains Equal Employment Opportunity and Harassment policies, which were distributed to its employees.
5. Mr. Benjamin Muoghalu, was Director of Pharmacy for Respondent from January 31, 2000, to November 14, 2005. He was Complainant's immediate supervisor during the time of her employment with Respondent.
6. In January 2001, Catherine Hennings, Director of Human Resources, her age described as "over 40," consulted with Mr. Muoghalu before they requested Complainant to submit to a drug test. Complainant agreed, and its outcome was found to be negative.
7. After the drug test, Complainant requested a transfer from the Pharmacy. Her request was granted in March 2001. She then worked in Central Supply until April 2001, one month, when she asked to return to the Pharmacy. Her request was granted. Complainant was again supervised by Mr. Muoghalu, who agreed to her return.
8. On September 20, 2002, Complainant wrote to Ms. Hennings about Mr. Muoghalu's internal investigation as to an alleged drug count discrepancy. She described his inquiries as harassment. No mention of age discrimination was written in her letter to Ms. Hennings or in her September 12, 2002, report admitting her role in the alleged discrepancy.

9. On October 18, 2002, Complainant received a Notice of Corrective Action as a result of alleged rude comments made to nurses. She was counseled to improve her interactions with the nursing staff.
10. On August 20, 2003, Complainant received a second Notice of Corrective Action. It was issued to her based on two separate matters. In the first incident, a nurse manager reported that Complainant had thrown outdated medications in the garbage. A second incident occurred on August 19, 2003, in that Complainant left narcotics unattended. In the Corrective Action, an employment warning was written: "Further or future occurrence will lead to further corrective action including termination."
11. On April 3, 2004, Complainant telephoned the Respondent and talked with Oliver Jones and informed him, "I'm calling in a sick day, Ollie, for tomorrow."
12. On April 4, 2004, Complainant was seen by a co-worker, Mia Frattini, in a restaurant at Starved Rock with a friend.
13. On April 7, 2004, Mr. Muoghalu was informed of Complainant's presence in a restaurant with a friend at Starved Rock. She was suspended for misrepresenting her absence.
14. On April 12, 2004, Complainant, while on suspension, contacted Christine Zubric of Human Resources, and referred to her supervisor, Mr. Muoghalu, as "that black man down there." Complainant admits to the comment.
15. A meeting was then held with Diane Hargreaves, Respondent's Vice President of Human Resources, age described as over 40, Mr. Muoghalu and others, to discuss Complainant's employment future with Respondent in light of her history and April 12, 2004, comment.
16. On April 13, 2004, Complainant's employment with Respondent was terminated.
17. In April, 2004, Sarah Wilcox and Russell Funk were hired as Pharmacy Technicians, both under 40 years of age.

18. In her October 4, 2006, Brief, Complainant declared her intent to abandon her claims of race, color and national origin discrimination claims. Comp. Br. p.1.

#### CONCLUSION OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. (hereinafter "the Act").
2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.
3. Complainant's claims of race, color and national origin discrimination has been abandoned. This leaves only her claim of age discrimination.
4. Complainant cannot establish a *prima facie* case of discrimination against her on the basis of her age.
5. Respondent can articulate a legitimate, non-discrimination reason for its actions.
6. There is no genuine issue of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law.
7. A summary decision in Respondent's favor is appropriate in this case.

#### DISCUSSION

##### 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 her 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 her pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill. App. 3d at 392, 642 N.E.2d at 490. Where the party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a party's failure to file counter-affidavits in response is frequently fatal to her 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).

#### STANDARD FOR PROVING AGE DISCRIMINATION UNDER THE ACT

Complainant alleges that Respondent discharged her from his employment due to her age. 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 Respondent that Complainant was being disciplined because of her 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 Respondent. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If she does, then Respondent must articulate a legitimate, nondiscriminatory reason for its actions. Id. If Respondent does so, then Complainant must prove by a preponderance of

evidence that Respondent's 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).

Where, however, the legitimate, non-discriminatory reason for the employment action has been made clear, it is no longer necessary to determine whether a *prima facie* case has been made. Since the only purpose of a *prima facie* case is to determine whether the Respondent has to articulate a legitimate reason for its action, it becomes perfunctory to analyze the matter in terms of a *prima facie* case if the legitimate, non-discriminatory reason for the action has already been articulated. Bush and The Wackenhut Corporation, 33 Ill. HRC Rep. 161,165, (1987) quoting, U.S. Postal Service v. Aikens, 460 U.S. 711, 103 S. Ct. 1478 (1983). (Federal cases which decide analogous questions under Federal law are helpful but not binding on the Commission in making decisions under the Human Rights Act. City of Cairo v. FEPC, 21 Ill.App.3d 358 (1974).)

By definition, proof of a *prima facie* case raises an inference that there was discrimination. By articulating a reason for the employment action in issue, the Respondent destroys the inference. At that point, the question becomes whether the reason which was articulated by the Respondent was true, or merely a pretext for discrimination. Id.

## PRELIMINARY MATTERS

### 2001 DRUG TEST OF COMPLAINANT

Complainant, Deborah Busch, claims that the drug test of January 2001, which was directed by her supervisor, Mr. Muoghalu, is one example of discrimination and harassment. Complainant did not file her Charge with the Illinois Department of Human Rights until June 7, 2004, and Respondent contends this incident is time-barred under the 180 day limitation period. 775 ILCS 5/7A-102(A)(1). Resp. Br. p.13.

Complainant's drug test event can not be dismissed that easily. In construing the Illinois Human Rights Act, the Illinois Courts adopted the "continuing violation" analysis of harassment.

Zaderaka, supra. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). The Court qualified the linking of harassing acts that fall out of the 180 day period by looking to the relationship of the earlier act, or if the act was no longer part of the same hostile claim. Gusciara v. Lustig, 346 Ill.App.3d 1012, 806 N.E.2d 746, 282 Ill.Dec.449 (2<sup>nd</sup> Dist. 2004). There is no "seriousness" requirement, as long as that act contributes to the hostile work environment." Gusciara, supra.

The next alleged harassment event Complainant cites took place on September 20, 2002, nine months after the drug test incident. Complainant wrote to Ms. Hennings about Mr. Muoghalu's internal investigation as to an alleged drug court discrepancy. In her letter and also in her report she described his inquiries as harassment. However, in her report she also admitted to some role in the discrepancy. Resp. Exh. 1B.

Gusciara cites Lively, where there was a time gap of six months beyond the statute of limitation period of one year. The supervisors "greatly moderated their improprieties, directing no harassing comments or actions toward the plaintiff specifically" during this time before they resumed their past behavior. Gusciara, quoting, Lively, 830 A.2d at 896, quoting Morgan, 536 U.S. at 118, 122 S.Ct. at 2075, 153 L.Ed.2d at 125.

The two alleged harassing acts are only similar in that Complainant was investigated for two alleged wrong doings. For the former, she was cleared. For the latter one, she admitted some culpability. However, there is no "seriousness" requirement. Gusciara, supra. For the sake of this motion, the events will be viewed in light of her charge of age discrimination.

ILLINOIS APPELLATE COURT DECISION DOES NOT HAVE COLLATERAL ESTOPPEL  
EFFECT

Complainant submits that her favorable decision rendered by the Illinois Appellate Court, where it ruled she was not discharged for "misconduct" under the unemployment compensation statutes, should be entitled to "...some deference... at least for the purpose of casting more than the proverbial 'metaphysical doubt' as to the real reasons of Busch's termination." Comp.

Br. p 10. Complainant argues collateral estoppel. Respondent's authority is correct. "...while claim preclusion and the doctrine of res judicata arising from unemployment determinations may apply in Tort Cases for Wrongful Termination, it should not apply to discrimination cases as the ultimate issue and ultimate burden of proof differs greatly." Vance and Illinois Department of Corrections, IHRC, ALS No. 3806, (October 5, 1992).

Respondent has articulated its reason for its decision to terminate Complainant's employment. It reviewed her employment disciplinary history cited above, up to and including the event of calling her supervisor of four years, "that black man down there." This comment was made during a telephone call to Human Resources while Complainant was still on suspension for giving a misleading reason for her absence on April 4, 2004. Notice was given to her as early as August 20, 2003, that any future corrective action could include employment termination.

Respondent has articulated a legitimate non-discriminatory reason for Complainant's discharge; she must respond with some factual evidence that the Respondent's reason is merely a pretext for illegal age discrimination.

Complainant admitted to referring to her supervisor as "that back man down there" (or "that large black man") during a telephone conversation with Human Resources. Busch Dep., pp. 250-251. She also admitted receiving notice of the other disciplinary actions taken against her as outlined above. Busch Dep., pp. 153-154; pp. 235-236.

As early as January 2001, Complainant made it clear she was irritated at Mr. Muoghalu's investigatory skills, which she described as harassment, but failed to make a nexus to illegal discrimination. Complainant also offers her explanation for each of the cited disciplinary events describe above, but her factual evidence of age discrimination is lacking both during the time of the events and later at her May 12, 2005 deposition. Finally, Complainant falls short of presenting adequate evidence that similarly situated employees not in her protected class were treated differently. Id.

Complainant alleges and Respondent admits that it hired two Pharmacy Technicians after April 2004 who were both under the age of 40. (Res. R. p.2). However, the issue is not one of proving a *prima facie* case, but whether the reason which was articulated by the Respondent was true, or merely a pretext for discrimination. Bush, supra.

Complainant fails to present some factual basis that would create a triable issue on the question of whether Respondent's articulated reason for its decision to terminate Complainant Busch was a pretext for age discrimination.

#### RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the Complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY: \_\_\_\_\_  
WILLIAM J. BORAH  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION

Entered: November 19, 2009