

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
KALEB GEBREMARIAM,)	Charge No.: 2004CF3991
)	EEOC No.: 21BA42805
Complainant,)	ALS No.: 06-291
)	
and)	
)	
CENTRAL PARKING SYSTEM, INC.,)	
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

This matter is before me on Respondent's motion for summary decision. Respondent filed its motion, along with exhibits and affidavits, on December 14, 2007; Complainant filed a response along with exhibits and affidavits on January 28, 2008; and Respondent filed a reply on February 13, 2008.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter and is, therefore, named herein as an additional party of record.

CONTENTIONS OF THE PARTIES

Respondent contends that summary decision must be granted because the undisputed facts support that Complainant cannot establish a *prima facie* case of race or national origin discrimination. Complainant contends summary decision should be denied as he can establish a *prima facie* case of discrimination based on race and national origin and that he can prove that Respondent's proffered reason for its adverse actions were pretextual.

FINDINGS OF FACT

The following facts were derived from uncontested facts in the record and were not the result of credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Respondent is a business that manages garage parking facilities (garage).
2. Complainant is black and of African descent.
3. Respondent hired Complainant as a garage manager on April 9, 2001.
4. As garage manager, Complainant was required to manage the day-to-day operations of the garage, ensure the collection and deposit of daily cash receipts, manage employee payroll, engage in marketing activities to promote the garage, and engage in multiple customer and client service related activities.
5. In August 2001, Complainant was assigned to manage the IBM garage. In November 2002, while still assigned to the IBM garage, Complainant reported directly to Diana Alarcon, Sr. Operations Manager.
6. Around December 9, 2002, Alarcon informed Complainant that he was being transferred from the IBM garage to manage two garages in Evanston, Illinois because Respondent's client, the property manager of the IBM garage, no longer wanted Complainant to manage the IBM garage. During this time period, Complainant was aware that the IBM property manager wanted to replace him as the garage manager because she blamed him for failing to stop the vandalism that had occurred at the IBM garage.
7. On January 16, 2003, Alarcon transferred Complainant from the IBM garage and assigned him to manage two garages in Evanston, Illinois (Evanston), referred to respectively as the Sherman Street garage and the Church Street garage.

8. Although Complainant was assigned to manage both garages in Evanston, Patrice Jefferson, black, a union employee who was not a manager, was also charged with overseeing the daily operations and managing the Sherman Street garage.
9. Beginning May, 2003, Complainant began reporting to Frank Mack, Operations Manager. Mack reported to Mike Tepper, General Manager.
10. On August 21, 2003, Alarcon issued Complainant a memorandum memorializing a meeting held with Complainant, Tepper, and Alarcon two days earlier. The memorandum notified Complainant that he was being disciplined for violating company policy when he approved an extended leave for a subordinate. The memorandum indicated that Respondent would monitor Complainant's performance for the next 120 days and that failure to follow and enforce company policies would result in additional disciplinary action up to and including termination.
11. On September 11, 2003, Alarcon issued Complainant an e-mail message regarding Complainant's failure to submit ticket summaries within the required time period. The memo warned Complainant that the next violation would result in a suspension.
12. On the morning of December 8, 2003, Jefferson telephoned Complainant at 7:00 A.M. and informed him that the garage safes at Sherman Street and Church Street had been burglarized. Complainant immediately went to the Sherman Street garage and he and Jefferson contacted police and notified Respondent's management. Evanston police arrived and conducted an investigation. The missing receipts totaled approximately three to four thousand dollars.
13. Ghirmai Gebre was the night manager for the Evanston garages at the relevant time. Gebre is black and his national origin is African. Gebre was a non-managerial union employee.

14. On December 10, 2003, pursuant to Tepper's order, Mack came to the workplace and suspended Complainant, Jefferson and Gebre.
15. Following an e-mail message inquiry from Complainant requesting an explanation as to why he had been suspended, Tepper issued a memorandum to Complainant, dated December 10, 2003, explaining that Complainant, Jefferson and Gebre had been suspended pending the police investigation of missing receipts because each was known by Respondent to have keys to the safes from which the receipts were missing.
16. Tepper ordered Mack to conduct an investigation into the December 8, 2003 missing receipts. Mack conducted an investigation and compiled a report that he forwarded to Tepper and Kathryn Roseen, Respondent's Regional Human Resources Manager, dated December 15, 2003. Following the investigation, Complainant met with Tepper, Mack and Roseen. Tepper informed Complainant that he was being discharged on December 15, 2003.
17. Prior to being promoted to Operation's Manager, Mack's position was garage manager for one of Respondent's parking facilities. Mack's immediate supervisor at that time was Doug Still, General Manager. In December 2001, Still issued Mack a disciplinary warning because the garage Mack was managing sustained two cash shortages, including one for \$980.00 on October 29, 2001, and one for \$4,196.00 on November 12, 2001. The warning indicated that future warnings may result in disciplinary action, suspension or termination. Mack was not suspended pending an investigation into the cash shortages, nor was he suspended or discharged for the shortages. Prior to the November 12, 2001 warning, Mack had received no previous discipline and Mack received no further disciplinary warnings or actions during the course of his employment with Respondent.

CONCLUSIONS OF LAW

1. The Illinois Human Rights Commission has jurisdiction over the parties and subject matter of this Complaint.
2. Respondent is an employer as defined by section 5/2-101(B)(1) and Complainant is an aggrieved party as defined by section 5/1-103(B) of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*
3. This record presents no genuine issues of fact as to whether Respondent's proffered reasons for discharging Complainant were pretext.

DETERMINATION

Respondent is entitled to summary decision in its favor.

DISCUSSION

This matter is being considered pursuant to Respondent's motion for summary decision. A summary decision is analogous to a summary judgment in the Circuit Court. *Cano v. Village of Dolton*, 250 Ill.App.3d 130, 620 N.E.2d 1200 (1st Dist. 1993). A motion for summary decision is to be granted when the pleadings, depositions, exhibits and affidavits on file reveal that no genuine issue of material fact exists and establish that the moving party is entitled to judgment as a matter of law. See, Section 5/8-106.1 of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*, and *Young v. Lemons*, 266 Ill. App.3d 49, 51,639 N.E.2d 610 (1st Dist.1994). In determining whether a genuine issue of material fact exists, the record is construed in the light most favorable to the non-moving party, and strictly against the moving party. *Gatlin v. Ruder*, 137 Ill.2d 284, 293, 560 N.E.2d 586 (1990); *Soderlund Brothers, Inc., v. Carrier Corp.*, 278 Ill.App.3d 606, 614, 663 N.E.2d 1 (1st Dist.1995). A summary order is a drastic method of disposing of a case and should be granted only if the right of the moving party is clear and free from doubt. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill.2d 263, 271, 586 N.E.2d

1211 (1992); *McCullough v. Gallaher & Speck*, 254 Ill.App.3d 941, 948, 627 N.E.2d 202 (1st Dist. 1993).

Although Complainant is not required to prove his case to defeat the motion, he is required to present some factual basis that would arguably entitle him to a judgment under the law. *Birck v. City of Quincy*, 241 Ill.App.3d 119, 608 N.E.2d 920 (4th Dist 1993) citing, *inter alia*, *West v. Deere & Co.*, 145 Ill.2d 177, 182, 582 N.E.2d 685, 687 (1991).

A Complainant bears the burden of proving discrimination by the preponderance of the evidence. Section 5/8A -102 (I) (1) of the Act. That burden may be satisfied by direct evidence that adverse action was taken for impermissible reasons or through indirect evidence in accordance with the method set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, 93 S.Ct 1817 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct 1089 (1981). This method of proof has been approved by the Illinois Supreme Court and adopted by the Commission in *Zaderaka v. Illinois Human Rights Commission*, 131 Ill.2d 172, 545 N.E.2d 684 (1989).

Under this three-step approach, a complainant must first establish a *prima facie* case of unlawful discrimination. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action. Once the respondent successfully makes this articulation, the presumption of unlawful discrimination drops and the complainant is required to prove, by a preponderance of the evidence, that the respondent's articulated reason is a pretext for unlawful discrimination.

Suspension and discharge based on race and national origin

Complainant's Counts I and II allege that he was suspended by Respondent on December 10, 2003, based on his race and national origin, pending the police investigation of simultaneous robberies at two facilities managed by Complainant; and

that Respondent failed to suspend Frank Mack, whom Complainant identifies as a similarly situated employee not in Complainant's protected classes.

Complainant's Counts III and IV allege that he was discharged on December 15, 2003, based on his race and national origin because two robberies occurred at two facilities managed by Complainant; and that Respondent failed to discharge Frank Mack, whom Complainant identifies as a similarly situated employee not in Complainant's protected classes.

In order to prove a *prima facie* case of unequal terms and conditions of employment based on race and national origin, Complainant must show that: (1) he is a member of one or more protected classes; (2) he was performing his job according to Respondent's legitimate expectations; (3) he suffered an adverse employment action; and (4) other individuals not within his protected classes were treated more favorably. *Muhammad and Walsh/Traylor/McHugh*, IHRC, ALS No. 9466, March 13, 2002.

The first and third elements are not disputed. Complainant is black and of African descent and was suspended on December 10, 2003, and discharged on December 15, 2003.

Here, the analysis of the second element can be merged with the analysis of the fourth element. As to the second element, the undisputed facts demonstrate that Complainant was not performing his job duties to Respondent's expectations. However, to demonstrate the fourth element of his *prima facie* case, Complainant maintains that a similarly situated co-worker engaged in similar job performance deficiencies as he, but was treated more favorably. Complainant points to Mack as a similarly situated non-African, Caucasian garage manager who managed a garage at the time funds went missing and who was not suspended or discharged. The undisputed facts show that Mack, too, had once held the job of garage manager for Respondent. Mack was the

manager of a garage at the Sears Tower in Chicago when company funds were determined to be missing on two occasions — \$980.00 on October 29, 2001, and \$4,196.00 on November 12, 2001. In December, 2001, Doug Still, who was General Manager and Mack's immediate supervisor at the time, issued Mack a disciplinary warning for the missing funds. The warning indicated that future warnings may result in disciplinary action, suspension or termination. Mack was not suspended pending an investigation into the missing funds and was not otherwise suspended or discharged.

Respondent argues that Mack is not similarly situated for a comparison under the Act. Respondent first maintains that the occurrences of missing funds under Mack's management were more than two years ago and that the incidences occurred too long ago to be relevant comparisons. Next, Respondent argues that Complainant and Mack were supervised by two different supervisors at the operative time periods.

The undisputed facts show that Mack was supervised by Still, who was General Manager and Mack's immediate supervisor, during the time the funds went missing on two occasions from the garage managed by Mack. Complainant was supervised by Mack, Operations Manager, at the time the funds went missing from the garage Complainant managed. At that time, Mack reported directly to Tepper, General Manager, who made the decision to discharge Complainant based on the investigative report he received from Mack.

Respondent argues that in order to be similarly situated, a comparable must have been disciplined by the same supervisor, subject to the same standards and engaged in the same conduct without the existence of differentiating or mitigating circumstances. Respondent points to the Commission decision in *Albert v. Ring Can Corp*, IHRC, ALS No. S10410, Jan 4, 2002, (the Commission granted summary decision in favor of employer in a sex discrimination case when complainant failed to show her identified

comparables shared the same supervisor) and the federal decision in *Radue v Kimberly Clark Corp*, 219 F.3d 612 (7th Cir 2000) (the court said that a demonstration of similarly situated requires a showing that a common supervisor made the alleged discriminatory decision) in support of its argument that Complainant's identified comparable does not meet this test.

Respondent's position is well supported. The Commission has held that in order for an employee to be a comparative, complainant must show that the same person made the relevant employment decision. *Welch v. Supreme Court of Illinois and Appellate Court of Illinois*, IHRC, ALS No. S-10644, May 19, 2006. A proffered comparative subject to the authority of a different decision maker is not sufficiently similar. *Mayhew and St. of Ill. Dept. of Public Aid*, IHRC, ALS No. 5318, May 28, 1996. Different employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a *prima facie* case of discrimination for the simple reason that different supervisors may exercise their discretion differently. *Radue, supra*. Different decisions, concerning different employees, made by different supervisors, sufficiently account for any disparity in treatment, thereby preventing an inference of discrimination. *Snipes v Illinois Dept. of Corrections*, 291 F3d 463 (7th Cir. 2002).

Here, the undisputed facts show that Mack and Complainant had different supervisors at the time they each were disciplined because of missing funds. The undisputed facts further show that, although Mack was Complainant's immediate supervisor, Tepper made the disciplinary decision to suspend and ultimately terminate Complainant. Complainant presents nothing to tie his discipline to any management personnel connected with the discipline meted out to Mack two years ago. On these

undisputed facts, Respondent successfully argues that Mack is not a proper comparative. For these reasons, Complainant's *prima facie* case here fails.

However, once Respondent articulates a legitimate, non-discriminatory reason for its actions, Complainant need not prove a *prima facie* case of discrimination, but is still required to prove Respondent's articulated reasons were merely a pretext for discrimination. *Johnson v. Human Rights Commission*, 318 Ill.App.3d 582, 588, 742 N.E.2d 793 (1st Dist. 2000), citing *Clyde v. Human Rights Commission*, 206 Ill.App.3d 283, 293, 564 N.E.2d 265 (4th Dist. 1990).

Respondent explains that it suspended and discharged Complainant for poor work performance, which included the following. (1) Around December 9, 2002, Complainant was notified that he was being transferred from the IBM garage to manage two garages in Evanston, Illinois, because Respondent's customer, the property manager of the IBM garage, no longer wanted Complainant to manage the IBM garage. (2) On August 21, 2003, Respondent issued Complainant a memo disciplining him for violating company policy when he approved an extended leave for a subordinate. The memo indicated that Respondent would monitor Complainant's performance for the next 120 days and that failure to follow and enforce company policies would result in additional disciplinary action up to and including termination. (3) On September 11, 2003, Respondent issued Complainant a memo regarding Complainant's failure to submit ticket summaries within the required time period. The memo warned Complainant that the next violation would result in a suspension. (4) On December 10, 2003, Respondent suspended Complainant pending the completion of a police investigation of burglaries at two of the parking garages managed by Complainant. The two burglaries resulted in a loss of approximately three to four thousand dollars. Respondent also conducted its own

internal investigation of the burglaries and compiled a report. Following the completion of the investigation and report, Complainant was discharged on December 15, 2003.

Complainant submits nothing to dispute these facts related to his performance. Moreover, Complainant presents absolutely no evidence from which to reasonably infer that Respondent's proffered reasons for suspending and discharging him were not the true reasons or that Respondent's adverse actions were motivated by race or national origin animus.

Taking this evidence in the light most favorable to Complainant, there remain no issues of fact as to the issue of pretext.

RECOMMENDATION

Accordingly, it is recommended that Respondent's motion for summary decision be granted and that the complaint in this matter be dismissed in its entirety with prejudice.

HUMAN RIGHTS COMMISSION

September 30, 2009

SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section