



**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

<b>IN THE MATTER OF:</b>	)		
	)		
<b>NYLDA L. PEREZ,</b>	)		
	)		
<b>Complainant,</b>	)	<b>IDHR Charge No.</b>	<b>2006CA2975</b>
	)	<b>EEOC No.</b>	<b>21BA61718</b>
<b>and</b>	)	<b>ALS No.</b>	<b>07-358</b>
	)		
<b>DISCOVERY CLOTHING COMPANY,</b>	)		
	)		
<b>Respondent.</b>	)		
	)		<b>Judge Reva S. Bauch</b>

**RECOMMENDED ORDER AND DECISION**

This matter comes before the Commission on Respondent Discovery Clothing Company's Motion for Summary Decision ("Motion"). Complainant filed a Response. Respondent filed a Reply. In addition, on April 9, 2009, Complainant's attorney filed a Motion to Withdraw as Counsel. In my April 9, 2009 Order, I entered and continued the Motion to Withdraw until I ruled on the Motion for Summary Decision. Accordingly, these matters are now ripe for a decision.

It should also be noted that a Recommended Order and Decision was released without my signature on or around August 28, 2009. As such, that Order is not the final Recommended Order and Decision in this case.

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 or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was

viewed in the light most favorable to Complainant. Facts not stated herein are not deemed material.

1. Complainant filed her initial charge of discrimination with the Department on May 9, 2006, alleging employment discrimination based on age (47 at the time of filing) and national origin (Puerto Rico).
2. On May 21, 2007, Complainant filed her Complaint with the Commission, alleging employment discrimination based on age and national origin, in violation of the Illinois Human Rights Act ("Act").
3. Respondent was a high volume retail clothing store with a location in Villa Park, Illinois, during all relevant time periods.
4. Complainant worked at Respondent's Villa Park, Illinois, location from October 4, 2004, until she resigned on May 9, 2006.
5. Complainant alleges in her Complaint that she was born in Puerto Rico and is a citizen of the United States.
6. Complainant worked as a retail stock clerk ("stocker"), an entry-level job that entailed opening cartons and crates of merchandise, checking tickets against the items received, tagging merchandise, and cleaning, among other things.
7. Respondent reported to the store manager and assistant store manager.
8. The next highest position in Respondent's store after stocker is cashier.
9. Complainant's supervisors observed that she was a slow worker who often made tagging errors and had great difficulty utilizing the store's computerized time clock system.
10. Complainant was told by the store manager that she took an unusually long amount of time to unpack boxes, tag merchandise and place it on the sales floor.
11. Complainant was counseled not to bring her children to work and not to let them run freely in the stock area.

12. Complainant's supervisor, Deysi Reynoso, believed Complainant's performance as a stocker was below average.

13. Complainant's supervisors, Carmella Sanchez and Deysi Reynoso, were unaware of Complainant's age, citizenship status or national origin.

14. Reynoso was aware that Complainant spoke Spanish and usually communicated with her in Spanish.

15. Heather Schultz, the area supervisor, was aware that Complainant spoke Spanish, but she always spoke English with Complainant.

16. Schultz believed Complainant's work performance was below standards.

17. In early 2006, Complainant informed Schulz that she wanted to be a cashier but that the store manager, Heather Sanchez, had not given her that job because her English is not good.

18. When Schultz asked Sanchez whether Complainant should be considered for the cashier position, Sanchez told her that Complainant had trouble with the computer, she was slow, and she often made tagging errors.

19. Sanchez did not mention anything to Schultz about Complainant's communication skills.

20. Schultz was aware that Complainant was from Puerto Rico because Complainant told her that information, but she was not aware of Complainant's age or citizenship status.

21. Schultz did not decide promotions from stocker to cashier.

22. Complainant never reported or complained about harassment or discrimination to any of her supervisors.

23. Respondent uses computerized cash registers. .

24. Cashiers are trained to handle sales transactions and must understand and operate the computer cash registers quickly and correctly.

25. Cashiers must be able to perform certain mathematical skills.

26. Cashiers are also expected to compute bills, lists and receipts; make change and issue receipts; record amounts received and prepare electronic transaction reports; read and record

totals shown on cash register tape; verify amounts of cash on hand; quote prices and count numbers of items for which money is received.

27. The store manager, Sanchez, decides whom to promote and/or hire for cashier positions.

28. Complainant did not apply to Sanchez for a cashier position.

29. The only individual promoted from stocker to cashier in February-March 2006 was Nancy Mendoza.

30. Sanchez was not aware of Mendoza's date of birth, national origin or citizenship status when she promoted her to cashier.

31. Mendoza was promoted from stocker to cashier because of her good skills and performance, including her ability to handle computerized tasks.

32. Sanchez believed that Mendoza had better performance, and was significantly more qualified for the cashier position, than Complainant.

33. Respondent did not promote any employee named "Brittany" from stocker to cashier.

34. Complainant did not apply for merchandiser or authorizer.

35. Merchandisers display and present merchandise according to planned specifications.

36. Only cashiers or accessory persons may be promoted to merchandiser.

37. Stockers with no other relevant experience are not qualified for a merchandiser position.

38. Neither the assistant store manager, store manager nor the area supervisor promotes or hires merchandisers.

39. Only the district manager promotes or hires merchandisers.

40. An authorizer is a supervisory level position with responsibilities including receiving payments and processing refunds and exchanges.

41. Stockers are not qualified to be authorizers.

42. Only the district manager can promote or hire an authorizer.

43. Complainant did not have the qualifications or experience for the merchandiser or authorizer positions.
44. Evelia Casas was a cashier promoted to authorizer in April 2006.
45. Casas was not promoted to merchandiser.
46. None of Respondent's employees are guaranteed 40 hours per week and most work about 30-35 hours per week.
47. Complainant requested to work specific hours and was accommodated as much as possible.
48. Complainant was almost always scheduled to work more hours per week than the other stockers.
49. From November 6, 2005 to May 14, 2006, Complainant worked an average of 63.15 hours per pay period, which is more than other stockers and co-workers.
50. Throughout her employment, Complainant did not complain or report unfair treatment or harassment based on national origin, age or citizenship status.
51. Complainant was scheduled to work 12:00 – 5:00 P.M. on May 9, 2006.
52. Complainant did not report to work on May 9, 2006.
53. Complainant telephoned Respondent's store and said she quit.
54. Complainant had never been formally disciplined regarding her work performance.
55. On April 9, 2009, Complainant's counsel filed a Motion to Withdraw as counsel.
56. Complainant's counsel properly served Complainant with the Motion to Withdraw.
57. Complainant appeared before me on April 9, 2009 at my motion call, at which time the Motion to Withdraw was filed with the Commission.

#### **Conclusions of Law**

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Act, 775 ILCS 5/1-103(B) and 5/2-101(B).
2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Complainant failed to establish a *prima facie* case for failure to promote to cashier and failure to promote to merchandiser/authorizer based on age and national origin discrimination.
4. Complainant failed to establish a *prima facie* case for unequal treatment of work hours and scheduling based on age and national origin discrimination.
5. Complainant failed to establish a *prima facie* case for harassment based on age and national origin.
6. Complainant failed to establish a *prima facie* case for constructive discharge.
7. Respondent has articulated legitimate, non-discriminatory reasons for its decisions.
8. Complainant failed to show that Respondent's reasons are pretextual for discrimination.
9. Complainant's counsel has provided good cause to withdraw as counsel.

## DISCUSSION

### *1. Standards for Summary Decision*

Under Section 8-106.1 of the Act, either party to a complaint may move for summary decision. **775 ILCS 5/8-106.1. See also 86 Ill. Admin. Code §5300.735.** A summary decision is the administrative agency procedural analog to the motion for summary judgment in the Code of Civil Procedure. **Cano v. Village of Dolton, 250 Ill. App.3d 130 (1993).** Such a motion should be granted when there is no genuine issue of material fact and the undisputed facts entitle the moving party to a recommended order in its favor as a matter of law. **Fitzpatrick v. Human Rights Comm'n, 267 Ill. App.3d 386 (1994).** The purpose of a summary judgment is not to be a substitute for trial but, rather, to determine whether a triable issue of fact exists. **Herschner v. Xttrium Lab. Inc., 26 Ill. App.3d 686 (1969).** All pleadings, depositions, affidavits, interrogatories and admissions must be strictly construed against the moving party and liberally construed against the nonmoving party. **Kolakowski v. Voris, 76 Ill. App.3d 453 (1979).** If the facts are not in dispute, inferences may be drawn from undisputed facts to determine if the movant is entitled to judgment as a matter of law. **Turner v. Roesner, 193 Ill. App.3d 482 (1990).** Where the facts are susceptible to two or more inferences, reasonable

inferences must be drawn in favor of the nonmoving party. **Purdy County of Illinois v. Transportation Insurance Co., Inc., 209 Ill. App.3d 519 (1991)**. Although not required to prove his/her case as if at hearing, a nonmoving party must provide *some* factual basis for denying the motion. **Birck v. City of Quincy, 241 Ill. App.3d 119 (1993)**. Only evidentiary facts, and not mere conclusions of law, should be considered. **Chevrie v. Gruesen, 208 Ill. App.3d 881 (1991)**. If a respondent supplies sworn facts that, if uncontradicted, warrant judgment in its favor as a matter of law, a complainant may not rest on his/her pleadings to create a genuine issue of material fact. **Fitzpatrick at 392**. Where the moving party's affidavits stand uncontradicted, the facts contained therein must be accepted as true and, therefore, the failure to oppose a summary judgment motion supported by affidavits by filing counter-affidavits in response is frequently fatal. **Rotzoll v. Overhead Door Corp., 289 Ill. App.3d 410 (1997)**. Summary decision is a drastic means of resolving litigation and should be granted only if the right of the movant to judgment is clear and free from doubt. **Purtill v. Hess, 111 Ill.2d 229 (1986)**.

## *II. Analysis*

There are two main methods to prove an employment discrimination case, direct and indirect. Either one or both may be used. **Sola v. Human Rights Comm'n, 316 Ill. App.3d 528 (2000)**. Since there is no direct evidence in this case, the indirect analysis will be used. The method of proving a charge of 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, the Complainant must establish a *prima facie* showing of discrimination against her by Respondent. If she does, Respondent must articulate a legitimate, non-discriminatory reason for its actions. If this is done, the Complainant must prove by a preponderance of the evidence that the articulated reason advanced by the Respondent is a pretext. **See Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981)**. This method of proof

has been adopted by the Commission and approved by the Illinois Supreme Court. **Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172 (1989).**

The issues in this case revolve around failure to promote to a cashier position due to national origin and age, failure to promote to a merchandiser position due to national origin and age, unequal treatment of job assignments due to nation origin, citizenship and age, harassment due to national origin and age, and constructive discharge due to national origin citizenship and age.

In general, to establish a *prima facie* case for discrimination in the context of a failure to promote, Complainant must prove: (1) she is in a protected class; (2) she applied for an available position; (3) she was qualified for the position but was not selected; and (4) another individual outside Complainant's protected class and with lesser or equal qualifications was selected in lieu of the Complainant. **Morrow and Cook County Forest Preserve, IHRC, ALS No. 10169, Oct. 20, 1999.**

I find Complainant has not demonstrated that she can establish a *prima facie* case for her failure to promote claims. For one thing, there is no evidence that Complainant was qualified for the jobs. There is also no evidence that Respondent treated similarly situated applicants outside the protected classes more favorably. As for the cashier and merchandiser positions, there is no evidence to show Complainant even applied for these positions.

Complainant alleges that she was denied 40 hours of work per week and her schedule was changed, while similarly situated employees outside the protected classes were treated more favorably. I find that Complaint has failed to demonstrate that she can establish a *prima facie* case for unequal treatment. For example, Complainant has failed to provide any evidence that similarly situated stockers outside the protected classes were scheduled to work 40 hours or more per week and that their schedules did not change. In fact, there is evidence that supports that Complainant may have been treated even more favorably than her co-workers regarding scheduling.

Whether or not Complainant has demonstrated that she can establish a *prima facie* case for her claims, however, is not fatal. In its submissions, Respondent articulated a legitimate, non-discriminatory reason for its actions. Once such a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual. ***Clyde and Caterpillar, Inc.*, 52 Ill. H.R.C. Rep. 8 (1989)**, *aff'd sub nom Clyde v. Human Rights Comm'n*, 206 Ill. App.3d 283 (1990).

Respondent has articulated that Complainant was not promoted to cashier because Nancy Mendoza, the person promoted, had better performance, skills and qualifications than Complainant. As for its failure to promote Complainant to merchandiser, Respondent asserts that she lacked qualifications and experience. In addition, Respondent has stated a nondiscriminatory basis for the work schedules. Work schedules were prepared based on store hours and needs, available staff and employee requests for time off, as well as the expected number of boxes each day.

Once Respondent has articulated a reason, the burden then shifts back to Complainant to prove that the reason was a pretext for discrimination. ***Clyde at 293***. Complainant has failed to dispute Respondent's legitimate, non-discriminatory reasons. Although not required to prove her case as if at hearing, Complainant must provide *some* factual basis for denying the motion. ***Supra, Birck at 123***. In her response, Complainant repeats her claims set forth in her Complaint. She offers mere conclusions of law and provides no evidentiary facts for the Commission to consider. ***Supra, Chevie at 885***. Respondent submitted several affidavits to support its position. Complainant failed to contradict these facts by supplying counter-affidavits or other evidence. Failure to submit counter-affidavits can be fatal. ***Supra, Rotzoll at 417***. Complainant may not rest on her pleadings once Respondent supplies sworn facts warranting a decision in its favor. Because Respondent's affidavits stand uncontradicted, I must accept, as true, the facts contained therein. ***Id. at 416***. Thus, as to the failure to promote and unequal treatment claims, I find Respondent is entitled to a summary decision in its favor.

Regarding the harassment claim, Complainant needs to show that she was harassed on the basis of her national origin or age and that the harassment was so severe or pervasive that it altered the conditions of her employment and created a hostile environment. **Tapia and Genlyte Thomas Group, IHRC, ALS No. S-11357, April 14, 2004.** A hostile environment is one in which a complainant is subjected to egregious conduct motivated by national origin or age in the workplace, or an environment in which a complainant is subjected to a pattern of incidents motivated by her age or national origin, such as slurs, in the workplace. **Jackson and College of Lake County Dist. No. 532, IHRC, ALS No. 11325, Aug. 12, 2002.**

I find that Complainant has failed to show she could establish a *prima facie* case for harassment. Complainant alleges that her supervisor was rude to her, that she was reprimanded in front of her co-workers, and that she was forced to punch-out while correcting her tagging errors (while others with errors were not forced to punch-out). However, there is no evidence to support these claims.

In any event, assuming these claims are true, there is certainly no evidence to show severe or pervasive conduct, or that a pattern of national origin or age motivated incidents occurred that would show a hostile environment. **See, e.g., Ezife and Metro. Water Reclamation Dist. of Greater Chicago, IHRC, ALS No. 11089, July 14, 2004** (two racially offensive statements in a single conversation do not establish racial harassment); **Hill and Peabody Coal Co., IHRS, ALS No. 6895(S), Jun. 26, 1996** (infrequent racial slurs are not enough to establish racial harassment; **Thompson and Hoke Construction Co., IHRC, ALS No. S-0135, Jun. 2, 1998** (three racial jokes in a two-month period insufficient to rise to level of racial harassment).

As to the constructive discharge claim, a constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to resign involuntarily. **Steele v. Illinois Human Rights Comm'n, 160 Ill. App.3d 577 (1987).** When alleging constructive discharge due to national origin and age discrimination,

Complainant must prove that she was compelled to resign because her working conditions were made intolerable in a discriminatory way. **Hill and Wal-Mart Stores, IHRC, ALS No. 6247(S), Mar. 1, 1996.** Thus, to successfully connect a constructive discharge claim to national origin or age discrimination, Complainant must first establish a *prima facie* case for national origin or age discrimination.

Since I find Complainant has failed to demonstrate a *prima facie* case for national origin or age discrimination, she cannot establish a constructive discharge case. In addition, I find that Complainant has provided no evidence to suggest that the work environment was so intolerable as to warrant a reasonable person to quit.

Moreover, Complainant's counsel has provided good cause to withdraw as counsel for Complainant. Since the briefing on the Motion is complete, this is an appropriate time to permit withdrawal.

#### **Recommendation**

Based on the foregoing, Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, I recommend that the Complaint be dismissed, with prejudice. In addition, Complainant's counsel should be permitted to withdraw.

#### **HUMAN RIGHTS COMMISSION**

**BY:** \_\_\_\_\_

**REVA S. BAUCH  
DEPUTY ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION**

**ENTERED: September 9, 2009**