

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:	)		
	)		
NORA A. HESS,	)		
	)		
	)		
Complainant,	)	CHARGE NO(S):	2004SF0194
	)	EEOC NO(S):	21BA32800
and	)	ALS NO(S):	S07-479
	)		
STATE OF ILLINOIS, DEPARTMENT OF	)		
CORRECTIONS,	)		
	)		
	)		
Respondent.	)		

**NOTICE**

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS	)	
HUMAN RIGHTS COMMISSION	)	Entered this 17 <sup>th</sup> day of March 2009

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N. KEITH CHAMBERS  
EXECUTIVE DIRECTOR

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

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Complainant,	)	CHARGE NO: 2004SF0194
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OF CORRECTIONS,	)	
	)	
Respondent.	)	

**RECOMMENDED ORDER AND DECISION**

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). On February 15, 2008, Respondent filed a motion for issuance of a summary decision pursuant to section 8-106.1 of the Human Rights Act (775 ILCS 5/8-106 1). Complainant has not filed a response, although the time for doing so has expired.

**Contentions of the Parties**

In the instant Complaint, Complainant contends that she was subjected to harassment because of her race when a supervisor directed her to correct a medical record. She also submits that she was the victim of race discrimination and retaliation for having previously filed a charge of discrimination when Respondent: (1) placed her on a paid administrative leave and then suspended her for making medication errors, failing to properly account for needles and copying and removing confidential medical records; and (2) subjected her to an employee review hearing. In its motion for summary decision, Respondent submits that: (1) Complainant's allegations of racial harassment do not rise to the level of actionable conduct under the Human Rights Act;

(2) Complainant cannot establish any similarly situated comparables to support her various race discrimination claims; and (3) Complainant cannot establish the requisite causal link between the filing her charge of discrimination and any alleged adverse act to support any retaliation claim.

### **Findings of Fact**

Based on the record in this matter, I make the following Findings of Fact:

1. In April of 2000, Complainant, an African-American, transferred to Respondent's Decatur Correctional Center, which at all times pertinent to the instant Complaint was a facility housing prison inmates

2. At the time of her transfer, Complainant was promoted to the position of Nurse II.

3. At all times pertinent to the instant Complaint, Complainant was supervised by Connie Meyer, who periodically issued performance reviews from April of 2001 through June of 2003.

4. In April of 2001, Meyer issued Complainant a performance evaluation which indicated that Complainant was not meeting expectations and needed improvement with respect to her overall quality of work in terms of the correctness, completeness, accuracy and economy of her work performance. Meyer also indicated that Complainant appeared to be "overwhelmed with the pace of correctional nursing and being able to handle a volume of work accurately."

5. On May 17, 2001, Complainant received a 10-day suspension for failing to account for ten medical needles. Complainant subsequently filed a grievance and her suspension was reduced to a one-day suspension.

6. On March 25, 2002, Complainant received a five-day suspension for failing to administer a medication to an inmate as a result of a paperwork error.

Complainant subsequently filed a grievance, and her suspension was reduced to a one-day suspension.

7. In April of 2002, Meyer issued a performance evaluation which indicated that Complainant continued to need improvement with regard to her overall quality and correctness of her work, and that Complainant consistently presented documents that were incomplete and inaccurate

8. On June 23, 2002, Meyer issued Complainant a job performance evaluation in which she indicated that Complainant had failed to meet expectations with respect to completeness and accuracy of her work, use of time, and maintaining control of workloads

9. On July 18, 2002, Complainant filed a charge of discrimination (No 2003SF0226) with the Department of Human Rights. The record is silent as to the basis of the charge.

10. On May 6, 2003, Meyer directed Complainant to correct an error that Complainant had made on an inmate's medical chart and to write an incident report regarding the error. The mistake concerned Complainant writing Tylenol #3 instead of Tylenol when describing an overdose. At all times pertinent to the instant Complaint, Respondent's Correctional employees, including its nurses, were required to prepare an incident report anytime anything out of the ordinary had occurred, including errors contained in an inmate's medical records.

11. At all times pertinent to the instant Complaint, Tylenol #3, unlike Tylenol, was a controlled substance that can only be disbursed by a nurse such that if an inmate had overdosed on Tylenol #3, a nurse would have been responsible for giving the inmate more than the recommended dosage.

12. After Complainant received the instruction to prepare an incident report regarding the charting error mentioned in Finding of Fact No. 10, Complainant prepared

a report in which she admitted that she had mistakenly written Tylenol #3 rather than Tylenol because she was rushing to finish the end of her shift.

13 Complainant received no discipline as a result of the charting error outside of having to correct the chart and provide an incident report.

14 The record is silent as to Meyer's treatment of any other Nurse II employee committing a similar charting error.

15 On June 10, 2003, Complainant was placed on a paid administrative leave of absence pending investigation into a charge that Complainant had photocopied certain medical records of inmates and had taken said records outside the prison facility without permission.

16. On July 8, 2003, Complainant received a three-day suspension for making medication errors on December 5, 2002, December 21, 2002, and December 23, 2002. The December 5, 2002 error concerned an incident in which Complainant failed to profile in the inmate's Medication Administration Record (MAR) a doctor's order for the psychotropic drug Depakote, which resulted in the inmate not receiving the drug in a timely manner. The December 21, 2002 error concerned an incident in which Complainant failed to profile in an inmate's MAR the appropriate time for taking a medication, which resulted in the inmate taking the drug at the wrong time during the day. The December 23, 2002 error concerned an incident in which Complainant failed to note in an inmate's MAR that the inmate was to discontinue receiving the drug Darvocet N, which resulted in the inmate taking two more dosages than what was directed by a physician.

17. On July 8, 2003, Complainant received a three-day suspension for failure to sign out two needles on December 12, 2002. Complainant had admitted that she mistakenly forgotten to sign out one of the needles and had improperly signed out the other needle.

18. On July 8, 2003, Complainant received a three-day suspension for making photocopies of inmate medical files and removing said files from the prison facility without permission. Complainant admitted to copying and removing said medical files, but argued that she was unaware that she could not copy and remove said files. Complainant filed a grievance and her three-day suspension was reduced to a one-day suspension.

19. On November 16, 2003, an Employee Review Hearing was held on a charge that Complainant had allowed an unauthorized employee access to the prison facility's medication room. The hearing was conducted to determine whether Complainant had violated any of Respondent's directives. A finding was made that Complainant had allowed an unauthorized employee access to the medication room on October 16, 2003, and Complainant was ultimately given an oral reprimand for her conduct.

**Complainant's alleged comparables.**

20. In the instant Complaint, Complainant identified two Caucasian co-workers (Connie Colcord and Kim Earl) as similarly situated individuals who received more lenient treatment by Respondent with respect to Respondent's placement of Complainant on an administrative leave during an investigation regarding Complainant's copying and removal of an inmate's medical records.

21. There is no record of either Colcord or Earl copying or removing confidential inmate files from Respondent's prison facility.

22. In the instant Complaint, Complainant identified Earl as a suitable comparable regarding Complainant's suspensions for making medical errors and for failing to properly sign out and account for needles.

23. In December of 2002, a claim was made that Earl had made a medication error. After an investigation, Meyer determined that no error had been made, and that

the inmate had received medication within the required time frame. Respondent's records contained no other instance of a medication error committed by Earl.

24. In February of 2003, a discrepancy was discovered during a needle count in which it was determined that Earl had removed a needle from inventory without having signed out for said needle. Earl did not receive any discipline for the incident because the needle was eventually discovered during the same needle count, thereby reconciling the initial needle count. Earl had no other instances of failing to properly sign out a needle.

25. Meyer drafted Earl's job evaluations from April of 2001 through June 25, 2003. During this time, Earl met or exceeded all job expectations.

26. Complainant has not identified any non-African-American co-worker who received more favorable treatment with respect to copying or removing confidential inmate medical records.

27. Complainant has not identified any non-African-American co-worker who was accused of making an error in an inmate's medical chart and yet was not required to correct the error and prepare an incident report with respect to said error.

28. Complainant has failed to identify any non-African-American co-worker who was not subjected to an employee review hearing where the co-worker was accused of permitting an unauthorized individual access into the facility's medication room.

#### **Conclusions of Law**

1. Complainant is an individual claimed to be aggrieved by a violation of the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.).

2. Complainant has failed to provide sufficient evidence to establish a *prima facie* case of racial harassment with respect to her supervisor's directive to correct a charting error and to draft an incident report regarding the charting error.

3. Complainant has failed to provide sufficient evidence to establish a *prima facie* case of racial discrimination with respect to the imposition of three separate suspensions for making medication errors, failing to account for needles and for copying and removing confidential inmate files, or with respect to the placement of Complainant on an administrative leave of absence.

4. Complainant has failed to provide sufficient evidence to create a *prima facie* case of retaliation.

#### **Determination**

Complainant has failed to present sufficient evidence to establish a material question of fact as to the existence of a *prima facie* case of either racial harassment, racial discrimination, or retaliation.

#### **Discussion**

As with all motions for summary decision pending before the Commission, a motion for summary decision shall be granted if the record indicates that there is no genuine issue as to any material fact, and the moving party is entitled to a recommended order as a matter of law. (See, section 8-106.1 of the Human Rights Act (775 ILCS 5/8-106.1), and *Bolias and Millard Maintenance Service Company*, 41 Ill HRC Rep 3 (1988).) Moreover, in determining whether there is any genuine issue of material fact, the record is construed most strictly against the moving party and most liberally in favor of the opponent. (See, for example, *Armagast v Medici Gallery and Coffee House*, 47 IllApp3d 892, 365 NE2d 446, 8 IllDec 208 (1<sup>st</sup> Dist, 5<sup>th</sup> Div 1977).) Inasmuch as a summary order is a drastic method for the disposing of cases, it should only be allowed when the right of the moving party is clear and free from doubt. See, *Susmano v Associated Internists of Chicago*, 97 IllApp3d 215, 422 NE2d 879, 52 IllDec 670 (1<sup>st</sup> Dist 1981).

Furthermore, although there is no requirement that a complainant prove her case to overcome a motion for summary decision, a complainant is still required to present

some factual basis that would arguably entitle her to a judgment under the applicable law. (See, *Schoondyke v Heil, Heil, Smart & Golee, Inc.*, 89 IllApp3d 640, 411 NE2d 1168, 44 IllDec 802 (1<sup>st</sup> Dist, 2<sup>nd</sup> Div 1980) ) Admittedly, that is difficult for our Complainant to do in the instant case since she has failed to file any response to the instant motion for summary decision. As a result, the sworn facts as contained in Respondent's motion for summary decision must be taken as true, even if Complainant has asserted contrary facts in her Complaint (see, *Fitzpatrick v Human Rights Commission*, 267 IllApp3d 386, 642 NE2d 486, 204 IllDec 785 (4<sup>th</sup> Dist 1994)), and thus the only remaining task is to determine whether Respondent's facts are sufficient to entitle it to a judgment as a matter of law.

With respect to Complainant's harassment claim, Complainant asserted in her Complaint that she was the victim of harassment on May of 2003 when, on account of her race, her supervisor "falsely" accused her of making an error in an inmate's Medical Administration Record and forced her to prepare an incident report without seeking her explanation of the situation. She further asserted that non-African-American co-workers were not treated comparably. In its motion for summary decision, Respondent included a sworn affidavit from Complainant's supervisor (Connie Meyer) indicating that: (1) in May of 2003, Meyer required Complainant to correct a progress note made by Complainant in an inmate's medical chart that reflected the wrong drug given to the inmate; (2) Complainant admitted that she mistakenly wrote that the inmate was given Tylenol #3 instead of Tylenol; and (3) Meyer's direction to Complainant to make a progress report about the mistake was consistent with Respondent's policy.

In reviewing the record, I agree with Respondent that there is no triable issue with respect to Complainant's racial harassment claim. Specifically, the unrebutted, sworn affidavit of Complainant's supervisor indicates that Complainant made an error on an inmate's chart, that Complainant admitted to the error, and that Complainant was

directed to correct the error and to write an incident report regarding the situation. Moreover, Complainant has not explained in any counter-statement how Meyer's direction to correct the error in the inmate's medical chart could ever qualify as "harassment" as contemplated under the Illinois Human Rights Act. In any event, I agree with Respondent that Complainant has failed to establish any racial character to Meyer's actions, where, as here, there is an absence in the record of any evidence demonstrating that Meyer did not require non-African-American co-workers who made similar errors on inmate's charts to correct the chart and prepare an incident report. Accordingly, Respondent's motion for summary decision will be granted as to Complainant's racial harassment claim.

With respect to her race discrimination claim, Complainant contends that she was the victim of race discrimination when she was given three separate suspensions for: (1) making certain medication errors; (2) failing to account for certain medical instruments, (i. e. , needles); and (3) copying and taking certain medical documents out of the facility. As to the needles and medication error incidents, Complainant asserted in the Complaint that a non-African-American co-worker named Kim Earl was treated more favorably. Complainant, however, failed to identify a comparative non-African-American coworker who received more favorable treatment with respect to the medical records incident. Given that a *prima facie* case of race discrimination requires, in the absence of any direct evidence of discrimination, that Complainant submit evidence that non-members of the protected class received more favorable treatment, I can grant the portion of Respondent's motion for summary decision as it pertains to Complainant's suspension for copying and taking an inmate's medical records on this basis alone. True enough, Complainant asserted in her Complaint that "white employees" were not treated comparably to her with respect to the medical records incident. However, when faced with sworn allegations in the motion for summary decision that no disparate

treatment occurred in the issuance of her suspension, it was incumbent on Complainant to identify the co-worker(s) who received more favorable treatment

Moreover, *prima facie* case considerations aside, Steven Spaide, an administrative assistant for Respondent, gave a sworn statement in the motion for summary decision indicating that Complainant's suspension for copying and removing inmate medical records was warranted because her actions compromised the confidentiality of the inmate's medical records and quite possibly violated HIPPA requirements that also seek to safeguard the confidentiality of patient files. Complainant has not filed anything to dispute Spaide's statements in this regard. As such, I find that this portion of Complainant's Complaint can be dismissed on the alternative ground that Complainant has not presented any evidence indicating that Respondent's non-discriminatory reason for suspending Complainant for unauthorized copying and removing an inmate's medical records was a pretext for race discrimination.

Complainant's suspensions for making medication errors and for failing to properly sign out needles potentially stand on firmer ground for purposes of her race discrimination claim since Complainant at least identified Kim Earl as a potential comparative in her Complaint. However, as noted above, Complainant cannot rest on the allegations of her Complaint to stave off a summary decision motion especially where, as here, Complainant's supervisor indicated in her sworn affidavit that Earl did not receive more favorable treatment *vis a vis* Complainant. Specifically Meyer asserted that: (1) unlike Complainant, Earl was subject to only one investigation for one medication error which proved to be unfounded; and (2) unlike Complainant, Earl was involved in only one incident where she had improperly removed one needle from the inventory without signing for it and was able to return the needle during the same inventory count that discovered the discrepancy. After reviewing the pleadings, I agree with Respondent that Earl is not similarly situated to Complainant for purposes of

establishing a *prima facie* case of race discrimination since Earl's infractions, if any, were not as severe as Complainant, and since Earl, who had not been previously disciplined for making medication errors and/or improperly removing needles, did not share the same disciplinary and/or work history as Complainant, who had prior discipline imposed for both offenses. As such, I find that Respondent is entitled to a summary decision as to Complainant's race discrimination claim under the instant record.

Finally, with respect to Complainant's retaliation claim, Complainant asserts that she was the victim of unlawful retaliation when, subsequent to her filing of a charge of discrimination in July of 2002: (1) Meyer accused her of a medical charting error in May of 2003 and required that she prepare an incident report; (2) Respondent placed her on an administrative leave on June 10, 2003 while it investigated the charge that she improperly copied and removed an inmate's medical record; (3) Respondent gave her three separate suspensions on July 8, 2003 for copying and removing an inmate's medical record, for making three medications errors, and for improperly removing medical needles; and (4) Respondent subjected her to an employee review hearing on November 13, 2003 on a charge that she allowed an unauthorized employee access to the prison's medication room. In its motion for summary decision, Respondent argues that the ten to sixteen month delays between the filing of Complainant's charge of discrimination in July of 2002 and the various alleged adverse acts are too long to support a *prima facie* case of retaliation. It also submits that the May 2003 incident in which Meyer required that Complainant to correct Complainant's error the inmate's medical chart and draft an incident report regarding the incident did not qualify as an adverse act since Complainant was not disciplined for the incident.

After reviewing the pleadings, as well as the federal cases cited by Respondent indicating that delays as short as four months between the protected activity and the adverse act are insufficient to establish a causal connection in retaliation claims (see, for

example, *Filipovic v K & R Express Systems, Inc.*, 176 F3d 390 (7<sup>th</sup> Cir 1999)), I find that the instant gaps of ten to sixteen months between the filing of Complainant's charge of discrimination and the alleged adverse acts do not raise an inference of a retaliatory motive. (See, also *Thakkar and Warshawsky & Company*, IHRC, 5784, September 20, 1996, where the Commission also found that similar gaps of approximately eleven and fourteen months between the protected activity and the adverse acts were too long to establish the requisite causal connection for purposes of establishing a *prima facie* case of retaliation.) Accordingly, Respondent's motion for summary decision as it pertains to Complainant's retaliation claims can be granted in this basis alone.

Moreover, for the sake of completeness, I note that Complainant's supervisor provided sworn testimony regarding the legitimate, work-related reasons as to why Complainant received her suspensions, why Complainant was directed to correct her charting error, and why Complainant was placed on administrative leave and/or was required to participate in an employee review hearing. As to the latter issue, Complainant has not identified any co-worker who was treated more favorably with respect to Respondent's decision to convene an employee review hearing. Too, as to her placement on an administrative leave, Complainant has offered nothing to rebut Meyer's statement in her affidavit that neither Kim Earl nor Connie Colcord, who were identified in the Complaint as individuals receiving more favorable treatment, were ever accused of copying or removing inmate medical files. Additionally, I agree with Respondent that Complainant cannot establish the existence of a material adverse act with respect to the May, 2003 incident in which Meyer directed Complainant to correct an error in an inmate's medical chart, since Complainant did not receive any discipline as a result of the incident. Thus, with nothing else to go on, I find that Respondent is entitled to issuance of a summary decision on the retaliation claims in the instant Complaint as well.

**Recommendation**

Based on the above discussion, it is recommended that Respondent's motion for summary decision be granted, and that the Complaint, as well as the underlying Charge of Discrimination be dismissed with prejudice

HUMAN RIGHTS COMMISSION

BY:  
MICHAEL R. ROBINSON  
Administrative Law Judge  
Administrative Law Section

ENTERED THE 10TH DAY OF SEPTEMBER, 2008