

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF: )

ANTHONY ALVARADO, )

Complainant, )

and )

TURN-KEY FORGING & DESIGN, INC., )

Respondent. )

CHARGE NO(S): 2006CA3058  
EEOC NO(S): 21BA61774  
ALS NO(S): 07-678

**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 16<sup>th</sup> day of June 2011

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N. KEITH CHAMBERS  
EXECUTIVE DIRECTOR

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>ANTHONY ALVARADO,</b>	)	
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<b>Complainant,</b>	)	<b>Charge No. 2006CA3058</b>
	)	<b>EEOC No. 21BA61774</b>
<b>and</b>	)	<b>ALS No: 07-678</b>
	)	
<b>TURN-KEY FORGING &amp; DESIGN, INC.,</b>	)	
	)	
<b>Respondent.</b>	)	

**RECOMMENDED ORDER AND DECISION**

This matter is before me on Respondent's motion for summary decision. Respondent filed the motion along with affidavits and exhibits on May 7, 2010. Complainant filed a response to the motion along with an affidavit and exhibits on May 28, 2010, and Respondent filed a reply along with an exhibit on June 10, 2010.

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**

Complainant contends that Respondent subjected him to discriminatory actions based on his age in violation of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.* Respondent contends that summary decision must be granted because no genuine issues of fact exist as to Complainant's age discrimination claims.

**FINDINGS OF FACT**

The following facts were derived from uncontested facts in the record.

1. On May 17, 2006, Complainant filed a *Charge of Discrimination* (Charge) with the Illinois Department of Human Rights (Department). The Department, on behalf of

Complainant, filed a complaint based on the underlying charge with the Illinois Human Rights Commission (Commission) on September 4, 2007.

2. On November 18, 2008, the Department was granted leave to file an amended complaint. Complainant's two-count Amended Complaint alleges that he was employed by Respondent in the position of Material Handler and was 51 years old at the time of the alleged discrimination.
3. Count one alleges that on May 1, 2006, Respondent issued Complainant "a final written reprimand indicating that he committed gross misconduct by miscounting parts and mislabeling a skid" and that "Respondent failed to properly define gross misconduct and had no younger similarly situated employees that it disciplined in the same manner."
4. Count two alleges that on May 9, 2006, Respondent issued Complainant a "three-day suspension indicating that Complainant committed gross misconduct by miscounting parts and mislabeling a skid"; and that "Respondent failed to properly define gross misconduct and had no younger similarly situated employees that it disciplined in the same manner."

#### **CONCLUSIONS OF LAW**

1. Complainant is an *aggrieved party* as defined by section 1-103(B) of the Act and Respondent is an employer as defined by section 2-101(B)(1) of the Act.
2. This record presents no genuine issues of material fact as to Complainant's *prima facie* showing or as to the issue of pretext.
3. Respondent is entitled to a recommended order in its favor as a matter of law.

#### **DETERMINATION**

Respondent is entitled to summary decision in its favor as to Complainant's allegations of age discrimination.

## DISCUSSION

In this two-count Complaint, Complainant alleges that Respondent subjected him to age discrimination when it issued him a final written reprimand on May 1, 2006 and a three-day suspension on May 9, 2006. Although Complainant separates these two disciplinary actions into separate counts in the Amended Complaint, the undisputed evidence shows that both actions were the subject of the May 1, 2006 written *Final Warning* issued to Complainant (marked in Respondent's motion as "James Bigwood Affidavit Exhibit 9" and in Complainant's response as "Exhibit 2"). The undisputed evidence in the record further shows that, contrary to the allegations in the Complaint that Respondent issued the discipline for "gross misconduct," the discipline was issued for "Gross Miscount and Mislabeling of Part Skids." (See, again, Respondent's "James Bigwood Affidavit Exhibit 9" and Complainant's "Exhibit 2".)

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 (1<sup>st</sup> 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. *Strunin and Marshall Field & Co.*, IHRC, ALS No. 536(L), March 3, 1983. The movant's affidavits should be strictly construed, while those of the opponent should be liberally construed. *Kolakowski v. Voris*, 76 Ill.App.3d 453, 395 N.E.2d 6 (1<sup>st</sup> Dist. 1979). The movant's right to summary decision must be clear and free from doubt. *Bennett v. Ragg*, 103 Ill.App.3d 321, 431 N.E.2d 48 (2<sup>nd</sup> Dist. 1982).

A complainant bears the burden of proving discrimination by the preponderance of the evidence. Section 5/8A -102 (l)(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).

Proving age discrimination by direct evidence entails providing evidence which, "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Randle v. LaSalle Telecommunication, Inc.*, 876 F.2d 563, 569 (7<sup>th</sup> Cir. 1989). In the employment discrimination context, direct evidence relates to what an employer did and/or said regarding a particular employment decision. Where there is direct evidence of discrimination, it is unnecessary to use the indirect method as set out in the *Burdine* analysis. *Gregan and Rock Island Housing Authority*, IHRC, ALS No. 3756, June 29, 1992.

The undisputed facts here do not support a direct case of discrimination. Thus, the facts will be analyzed pursuant to the indirect method. Under this 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 action taken against the complainant. 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. *Clyde v. Human Rights Commission*, 206 Ill. App. 3d 283, 546 N.E.2d 265, 151 Ill. Dec. 288 (4<sup>th</sup> Dist. 1991).

A *prima facie* case using indirect evidence may vary somewhat according to the nature of the claim made and the factual situation presented. *Turner v. Human Rights Comm'n*, 177 Ill.App.3d 476, 532 N.E.2d 392 (1<sup>st</sup> Dist. 1988); *Valley Mould & Iron Co. v. Human Rights Comm'n*, 133 Ill.App.3d 273, 478 N.E.2d 449 (1<sup>st</sup> Dist. 1985). Generally, in an age discrimination case, a complainant must show that (1) he is a member of a

protected class, (2) he suffered an adverse employment action, and (3) similarly situated employees outside of the protected class were treated more favorably. *St. Mary of Nazareth Hospital Center v. Curtis*, 163 Ill.App.3d 566, 516 N.E.2d 813 (1<sup>st</sup> Dist. 1987); *Freeman United Coal Mining Co. V. Human Rights Comm'n* 173 Ill. App.3d 965, 527 N.E.2d 1289 (5<sup>th</sup> Dist. 1988), *ISS International Service System, Inc. v. Illinois Human Rights Commission*, 272 Ill.App.3d 969, 651 N.E.2d 592 (1<sup>st</sup> Dist. 1995). However, the Illinois Appellate Court recognized that a *prima facie* case of age discrimination can be shown where the similarly situated comparatives are also members of the protected age group. *Anderson v. County of Cook Oak Forest Hospital*, 314 Ill.App.3d 35, 51, 731 N.E.2d 371 (1<sup>st</sup> Dist. 2000).

Respondent cites to the U.S. Supreme Court decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307 (1996) to support its contention that an appropriate *prima facie* case here merely requires Complainant to demonstrate that a similarly situated, substantially younger employee was treated more favorably.

In *O'Connor*, the court discussed a *prima facie* framework in an age discrimination context under the federal ADEA, which, similar to protection granted by the Illinois Human Rights Act, protects employees age 40 or more from discrimination based on age. The court said that such a *prima facie* case does not necessarily require an employee to show that persons *outside* of the protected class were treated more favorably. The court maintained that the relevant question is whether the employee was treated unfavorably *because* of his age. The court further reasoned that whether one person in the protected class lost out to another in the same protected class was an irrelevant inquiry as long as the facts showed that the unfavorable treatment of the aggrieved employee was because of his age. The court concluded that the results of a comparison of the treatment of the aggrieved employee to that of the treatment of a substantially younger employee would be a far more reliable indicator of age discrimination.

The facts presented here certainly fit the pattern in the *O'Connor* analysis. Following the court's rationale, an appropriate *prima facie* case to apply here requires the Complainant to show that (1) he is a member of a protected class, (2) he suffered an adverse employment action, and (3) similarly situated, substantially younger employees were treated more favorably.

The undisputed facts support the first two elements of Complainant's *prima facie* case. Complainant was hired by Respondent as a Material Handler on September 8, 2003. On May 1, 2006, Respondent issued Complainant a written *Final Warning* indicating that Complainant had committed the offense of "Gross Miscount and Mislabeling of Part Skids." The warning stated that Complainant was being suspended for three days to begin on May 9, 2006. At the time of the discipline, Complainant was 51 years old.

However, Complainant fails to present any evidence to support the third element of his *prima facie* case. While Complainant identifies James Bigwood, Luis Garcia, Ronald Galvan and Clyde Neal as employees who also made mistakes miscounting and mislabeling skids but who were not issued a final written warning or a three-day suspension, Respondent argues that Complainant's identified comparables are not similarly situated to Complainant for a *prima facie* analysis.

#### James Bigwood

In his response to the motion, Complainant contends that Bigwood was similarly situated in that Bigwood made the same erroneous mistake of mislabeling and miscounting a skid on April 12, 2007, yet Bigwood was not subjected to any discipline.

Respondent argues that Bigwood is not similarly situated to Complainant since Bigwood was Complainant's direct supervisor at the relevant time period. Respondent points to federal precedent that supports the proposition that a supervisor is not a legitimate comparable to his subordinate. *Connolly v. Ala Carte Entertainment, Inc.* (N.D. Ill. Oct 7, 2002) ("Supervisors and superiors are not similarly situated to subordinates.");

*Flenaugh v. Airborne Express, Inc.*, (N.D. Ill. Mar 1, 2004) (plaintiff subordinate cannot compare himself to supervisors). The Commission follows this same line of reasoning. See, *Hofmann v. Moloney Coach Builders, Inc.*, IHRC, ALS No. 5124, July 24, 1998 (supervisor who took over some of complainant's job duties was not similarly situated to complainant for *prima facie* analysis).

To demonstrate Bigwood's employment relationship to Complainant, Respondent submits Bigwood's affidavit. Bigwood avers that he directly supervised Complainant at the time he issued Complainant the subject discipline on May 1, 2006. Respondent also presents the affidavit of Ernest Pawelczyk. Pawelczyk avers that he has been serving as Business Unit Manager for Respondent since January, 2004 and that he has supervised Bigwood in Bigwood's position of Operations Supervisor since that time. Pawelczyk states that he was not aware of any incident in which Bigwood miscounted or mislabeled parts in April, 2007 and that he only became aware of this allegation after the onset of this litigation before the Commission.

Complainant submits nothing to refute these averments. Therefore, these statements stand un rebutted and must be accepted as true. Except for his unsupported assertion, Complainant submits no evidence that Bigwood engaged in similar infractions, and the undisputed facts support that Bigwood was Complainant's supervisor at the time of the alleged discriminatory acts. Thus, Bigwood is not similarly situated to Complainant and is not a proper comparison for this analysis.

Luis Garcia.

In his brief in response to this motion, Complainant names Garcia as a younger similarly situated employee who was treated more favorably than he. Here, Complainant points to a December 21, 2006 final warning and 3-day suspension issued to Complainant for "Unacceptable Sorting of Customer Rejected Parts." Complainant argues that Garcia was treated more favorably because Garcia was not issued similar discipline although

Garcia was assisting Complainant with sorting parts at the time of the infraction and, thus, Garcia participated in any performance infraction.

The facts surrounding this December 21, 2006 discipline are not relevant to the alleged discriminatory actions at issue in the Amended Complaint, which include allegations that Respondent issued Complainant a final written reprimand on May 1, 2006 and a three-day suspension on May 9, 2006 for “gross miscount and mislabeling of part skids.” Because the December 21, 2006 discipline was issued for “unacceptable sorting of customer rejected parts,” it is outside the scope of the Complaint and is not being addressed.

Ronald Galvan and Clyde Neal

Complainant also identifies Galvan and Neal as Material Handlers who engaged in mistakes of miscounting and mislabeling, but were not subjected to discipline.

Respondent counters that Galvan and Neal are not proper comparables for two reasons: because neither is substantially younger than Complainant and because Complainant presents no evidence that either engaged in similar conduct.

In support of its argument, Respondent submits the affidavit of Donna Carey. Carey avers that, as the Administrative Manager for Respondent since February 1, 2008, her responsibilities include maintaining personnel records. Carey submits her Exhibit 1 detailing the birth dates of all employees as of June 16, 2006. The exhibit shows Galvan's birth date as June 8, 1960 (45 years old at the time of the May 1, 2006 discipline to Complainant); and the birth date of Neal as April 25, 1961 (45 years old at the time of the May 1, 2006 discipline to Complainant). As Complainant's birthday is March 16, 1955, Respondent points out that Complainant is approximately 5-6 years older than Galvan and Neal. Respondent argues that these differences are simply too insubstantial as a matter of law to create an inference of discrimination in the context of a *prima facie* comparison.

Respondent argues that the minimal difference between the age of Complainant and the two respective comparables is insufficient to show that a substantially younger individual received more favorable treatment. Indeed, the Seventh Circuit, in attempting to define the phrase “significantly younger,” has applied a presumptive “ten-year rule” pertaining to the difference between the ages of an employee and the comparative in order to create a “reasonable inference” of age discrimination. See, for example, *Scott v. Parkview Memorial Hosp.*, 175 F.3d 523, 525 (7<sup>th</sup> Cir. 1999) (age difference considered too “modest” to create inference of age discrimination when age of comparatives ranged from 32-46 while complainant’s age was 46); and *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709 (7<sup>th</sup> Cir. 1999) (eight-year age difference was not significant enough to infer discriminatory intent).

Respondent’s argument is meritorious. In applying the cited case law to the undisputed facts here, the five and six year differences in the ages of the Complainant and the two identified comparables are simply insufficient to establish the third element of Complainant’s *prima facie* case.

Even if the age differences were said to be substantial, Complainant puts forth no evidence to support his allegations that Galvan and Neal also miscounted and mislabeled parts skids. Respondent points to its interrogatory question number 7, which asks Complainant to identify all similarly situated younger employees and describe how they were treated more favorably than Complainant. In his answer (in addition to identifying Bigwood), Complainant identifies Galvan and Neal and states that:

[they] were not forced to work on the trimming machines because they both had ‘excuses’. Ronald claimed his shoulder was hurt and could not work the position all day and Clyde always threatened to quit if he was ever placed to work as a trimming helper. They both were younger than me and therefore their wishes were respected.

Complainant's answer to this direct interrogatory fails to provide relevant evidence demonstrating that Galvan or Neal engaged in miscounting or mislabeling parts skids. Complainant provides nothing in this answer or in his response to this motion to support the allegations that Galvan and Neal miscounted or mislabeled parts skids. Complainant fails to put forth competent, admissible evidence to support the third element of his *prima facie* case.

While failing to prove his *prima facie* case, Complainant also fails to put forth evidence to bring into question Respondent's proffered reason for issuing him the stated discipline for miscounting and mislabeling of parts skids. In his affidavit, Bigwood avers that he discovered errors on shipping tags prepared by Complainant on April 28, 2006 and May 1, 2006. Bigwood states that this discovery led him to issue Complainant the disciplinary warning and three-day suspension which form the basis of this complaint. Complainant submits absolutely nothing to refute these averments. Therefore, no genuine issues of fact remain on the issue of pretext.

The undisputed facts in the record fail to present any issues of material fact as to Complainant's showing of a *prima facie* case or as to the issue of pretext; therefore, summary decision must be granted. Due to this recommended order, all previously scheduled status dates are stricken.

#### **RECOMMENDATION**

Based on the foregoing, I recommend that the Commission dismiss the Complaint and the underlying charge, with prejudice.

**ENTERED: September 9, 2010**

**HUMAN RIGHTS COMMISSION**

**BY: \_\_\_\_\_**  
**SABRINA M. PATCH**  
**ADMINISTRATIVE LAW JUDGE**  
**ADMINISTRATIVE LAW SECTION**