STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST	)	
FOR REVIEW BY:	)	CHARGE NO.: 2008CA2241
	)	EEOC NO.: 21BA81200
JACQUELINE McCARTY,	)	ALS NO.: 09-0016
	)	
Complainant.	)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Munir Muhammad, Rozanne Ronen and Diane Viverito, presiding, upon the Complainant's Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Department") of Charge No. 2008CA2241, Jacqueline McCarty, Complainant, and Six Corners Same Day Surgery, LLC, Respondent; and the Commission having reviewed *de novo* the Department's investigation file, including the Investigation Report and the Complainant's Request and supporting materials, and the Department's response to the Complainant's Request; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that:

(1) The Department's dismissal of Count A Complainant's charge is **SUSTAINED** on the following ground: **LACK OF SUBSTANTIAL EVIDENCE,** and

(2) The Department's dismissal of Count B of the Complainant's charge is **VACATED,** and Count B of the Charge is **REINSTATED** and **REMANDED** to the Department for further Processing and Proceedings, consistent with this Order;

In support of which determination the Commission states the following findings of fact and reasons:

1. The Complainant filed a two-count charge of discrimination with the Department on February 21, 2008. In Count A of the charge, the Complainant, who is 42 years old, alleged that her supervisor and a co-worker engaged in age discrimination by harassing her via e-mail. In Count B of the charge, the Complainant alleged that the Respondent terminated her from employment because of her age. The Complainant contends that the allegations in Count A and Count B both constitute violations of Section 2-102(A) of

the Illinois Human Rights Act ("the Act"). After an investigation, the Department dismissed both counts of the Complainant's charge on January 2, 2009, for Lack of Substantial Evidence. The Complainant thereafter filed a timely request for review on January 22, 2009.

2. The undisputed evidence in the investigation file shows that the Complainant was hired by the Respondent on September 4, 2007 as a collector. The file reflects that her supervisor, Tracy Shea, was 36 years old. The Complainant alleged that beginning in January of 2008, her supervisor and Andy Barriga (age undisclosed by the Respondent)[1] began harassing her via e-mail by asking the Complainant about her work status reports. While the Complainant initially alleged in her charge that Barriga was also her supervisor, in her Request, the Complainant admits that Barriga was not her supervisor, but rather that she and Barriga held the same position.

3. The Complainant argues in her Request that neither party submitted these e-mails to the Department in the course of its investigation. However, the Commission's review of the investigation file reveals that the e-mails in question were in fact submitted to the Department and are in the file. The e-mails reflect numerous communications between the Complainant and her supervisor from January 2008 through February 2008 regarding the Complainant's work performance and other work-related matters. Barriga is cc'd on most of these e-mails. Barriga was not the author and/or sender of any of the e-mails. This finding is in accordance with what the Complainant admitted during the course of the investigation, which is that Barriga never sent her any e-mails.

4. On February 12, 2008, the Complainant was discharged by the Respondent for poor performance.

5. Thereafter, the Complainant filed her charge of discrimination with the Department. In Count A of the charge, the Complainant alleges that the e-mails from her supervisor were intended to harass her and discriminate against her based on her age. In Count B of the charge, the Complainant alleges that she met the Respondent's legitimate expectations and that her work performance was satisfactory. She contends that she was terminated because of her age and that similarly situated younger employees were not discharged under similar circumstances. In the course of the investigation, the Complainant identified one employee in particular, Harvey Woods, whom she contended had a similar performance record as hers but was not terminated.[2]

6. The Respondent denied creating a hostile work environment or that the Complainant was harassed because of her age. The Respondent further contended that Woods was not similarly situated to the Complainant because he allegedly brought in more money than the Complainant.[3]

7. At the conclusion of its investigation, the Department determined that there was

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[1] The Department investigator indicates in a footnote in her report that, "Respondent failed to provide Andy Barriga's date of birth as requested."
[2] The Department investigator notes in her report that the Department requested Woods' age from the Respondent, but that the Respondent failed to provide this information as well.
[3] When requested by the Department investigator to submit copies of the daily log sheets, the Respondent declined to respond to the request, and instead decided to "stand on the record."

a Lack of Substantial Evidence as to both counts of the charge, and dismissed both counts of the charge for that reason.

8. In her Request, the Complainant argues that the dismissal as to both counts of the charge should be vacated based on her belief that the Department investigator drew inappropriate credibility determinations regarding material issues. As to Count A, the Complainant argues that the Department investigator merely believed the Respondent's characterization of the e-mails as legitimate reviews and corrections of the Complainant's work without benefit of having reviewed the e-mails. As to Count B, the Complainant argues that the Respondent's refusal to submit relevant evidence, in particular the daily logs, should have resulted in a negative inference being drawn against the Respondent. The Complainant asks that on review, the dismissal of the charge be vacated, and that a finding of substantial evidence be entered on both counts of the charge.

9. In its Response to the Complainant's Request, the Department recommends that the Commission sustain its dismissal of Count A of the charge. However, as to Count B, the Department is in agreement with the Complainant's position, and recommends that the Commission vacate the Department's dismissal of Count B of the charge, enter a finding of substantial evidence as to Count B of the charge, and remand Count B of the charge to the Department for further processing.

Count A: Age-based Harassment

10. The Commission's review of the Department's investigation file leads it to conclude that the Department properly dismissed Count A of the Complainant's charge for Lack of Substantial Evidence.

11. As stated earlier in this Order, the Complainant is incorrect in her assertion that the alleged harassing e-mails were not a part of the investigation file. In fact, the e-mails are listed as exhibits to the investigator's report. Hence, there is no evidence that the Department investigator did not have the e-mails before her when she determined that the e-mails were legitimate critiques of the Complainant's work performance. There is no evidence in the file that the Department merely relied on the Respondent's characterization of the e-mails or made any improper credibility determinations regarding the nature of the e-mails.

12. Since the e-mails were in the file, the Commission was also able to independently review the e-mails, and based on that review, it agrees with the Department's findings and determinations relative to Count A. The e-mails show no indication of age-based bias. They relate solely to the Complainant's work performance and other work-related issues. The mere fact that a person under 40 years of age critiqued the Complainant's work performance raises no inference of age-based bias or animus. There is no other evidence in the file that would tend to indicate that the e-mails were motivated by the Complainant's age.

13. Further, the absence of evidence in the file concerning Barriga's age does not alter the Commission's analysis of this issue because the Complainant admits, and the investigation file establishes, that Barriga never sent the Complainant any e-mails. The

file shows that Barriga was at best a passive co-recipient and additional reader of the e-mails between the Complainant and her supervisor. However, this finding should not be construed as approving of the Respondent's decision to withhold potentially relevant information that was sought in the course of an investigation initiated pursuant to the Act.

14. Accordingly, it is the Commission's decision that the Complainant has not presented any evidence to show that the Department's dismissal of Count A of the charge was not in accordance with the Act. The Complainant's Request as to Count A of the charge is not persuasive.

Count B: Termination from Employment

15. As to Count B of the charge, in its Response to the Complainant's Request, the Department does not oppose the Request as to Count B. Both the Complainant and the Department request that the Commission vacate the Department's dismissal of Count B of the charge. Therefore, the Commission hereby vacates the Department's dismissal of Count B of the charge, and reinstates and remands Count B of the charge to the Department for further processing consistent with this Order and the Act.

THEREFORE, IT IS HEREBY ORDERED THAT:

(1) The dismissal of Count A of the Complainant's charge is **SUSTAINED;** and

(2) The dismissal of Count B of the Complainant's charge is **VACATED**, and Count B of the charge is **REINSTATED** and **REMANDED** to the Department for further processing consistent with this Order and the Act.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and the Respondent, Six Corners Same Day Surgery, LLC, as appellees, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS)
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HUMAN RIGHTS COMMISSION)

Entered this 8th day of April 2009.

Commissioner Munir Muhammad

Commissioner Rozanne Ronen

Commissioner Diane Viverito