

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2008CA3709
)	EEOC NO.: 21BA82367
NICK R. OWENS,)	ALS NO.: 09-0361
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Marti Baricevic, Robert S. Enriquez, and Gregory Simoncini presiding, upon Nick R. Owens’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Department of Human Rights (“Respondent”)¹ of Charge No. 2008CA3709; and the Commission having reviewed *de novo* the Respondent’s investigation file, including the Investigation Report and the Petitioner’s Request, and the Respondent’s response to the Petitioner’s Request; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the Respondent’s dismissal of the Petitioner’s charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

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

1. On June 26, 2008, the Petitioner filed a six-count (Counts A-F) charge of discrimination with the Respondent in which he alleged that his employer, Exxon Mobile Lubricants and Petroleum Specialties Company (“Employer”), committed violations of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act (the “Act”). Specifically, the Petitioner alleged that from December 28, 2007, through June 25, 2008, the Employer subjected him to unequal terms and conditions of employment because of his race, Black (Count A), his age, 58 (Count B), and in retaliation for having previously filed a charge of discrimination against it on February 2, 2005 (Count C).
2. The Petitioner further alleged the Employer issued him a written reprimand on May 30, 2008, because of his race (Count D), his age (Count E), and in retaliation for having filed the February 2005 charge of discrimination (Count F).
3. On July 1, 2009, the Respondent dismissed all six counts of the charge for lack of substantial evidence. On July 14, 2009, the Petitioner filed this timely Request.

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the “Respondent.” The party to the underlying charge requesting review of the Department’s action shall be referred to as the “Petitioner.”

4. The undisputed evidence in the investigation file shows the Petitioner is employed as a Warehouse Operator. The Petitioner's duties include receiving and shipping packaged products using a forklift. His duties also consist of loading and unloading products to and from trucks and combining various products into a single load for shipment.
5. The Employer stated that load assignments were given out randomly based on the specific loads that were being received or shipped out on a particular day.
6. The Petitioner alleged that from December 28, 2007, through June 25, 2008, his loads contained 30 to 40 different products, while his co-workers were assigned one or two products. However, the Petitioner admitted that sometimes the Employer would assign him fewer products to load, while non-Black and younger co-workers were assigned more difficult loads.
7. On May 30, 2008, the Employer, through its Warehouse Supervisor Angela Roberson, issued the Petitioner a written reprimand for loading incorrect products, taking too much time to process loads, and incorrectly stacking pallets of product.
8. The Petitioner alleged this written reprimand was also motivated by race and age discrimination, as well as by retaliation for having previously filed a charge of discrimination against the Employer. He alleged similarly situated younger, non-Black Warehouse Operators did not receive written reprimands for committing loading errors.
9. The Petitioner identified three comparables: "C.P.," "B.W.," and "E.P."
10. Between May 8, 2007, and May 30, 2008, the Petitioner committed nine loading errors. During that same time period, "C.P." committed three loading errors, "B.W." committed five loading errors, and "E.P." committed one loading error. "C.P." and "E.P." were each issued coaching for their errors. "B.W." was issued written counseling for his loading errors.
11. Furthermore, within the relevant time period alleged by the Petitioner in his charge, December 28, 2007, through June 25, 2008, the Petitioner committed three loading errors. His alleged comparables did not commit any loading errors during the same time period.
12. In his Request, the Petitioner contends the Employer's new computer system, utilized as a component of its warehouse management was malfunctioning, and that he reported this to the Employer. The Petitioner also suggests for the first time in his Request that he is being retaliated against because of the May 12, 2009, fact-finding conference conducted by the Respondent during the course of its investigation of this charge.

13. In its Response, the Respondent argues there is no substantial evidence of discrimination or retaliation, and asks the Commission to sustain its dismissal of all counts of the Petitioner's charge.

Conclusion

The Commission's review of the Respondent's investigation file leads it to conclude that the Respondent properly dismissed all counts of the charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Department's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D).

First, as to Counts A & B, there is no substantial evidence that the Employer subjected the Petitioner to unequal terms and conditions of employment due to his race or age. As the Respondent correctly noted, the Petitioner must first establish a *prima facie* case of discrimination by showing he falls within a protected class, he was performing his work satisfactorily, he was subjected to an adverse action, and that the Employer treated a similarly situated employee outside of his protected classes more favorably under similar circumstances. See Marinelli v. Illinois Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994).

In this case, there is no substantial evidence that younger or non-Black employees were treated more favorably by the Employer regarding load assignment. There is no substantial evidence the Petitioner received more difficult loads from the Employer because of his race or age. In fact, the Petitioner admits that at times non-Black and younger co-workers were assigned heavier, more difficult loads than he. Thus, the Petitioner failed to establish a *prima facie* case of discrimination with respect to Counts A & B.

Second, as to Counts D & E, there is no substantial evidence the Employer issued the Petitioner a reprimand on May 30, 2008, because of his race or his age. Again, the evidence reveals the Petitioner failed to establish a *prima facie* case of discrimination. In particular, the Petitioner's three alleged comparables are not similarly situated to him. The undisputed evidence shows that the alleged comparables had not committed any loading errors in the relevant time period. In contrast, the Petitioner had committed three loading errors in the relevant time period.

Third, as to Counts C & F, there is no substantial evidence of retaliation. A *prima facie* case of retaliation requires substantial evidence that the Petitioner engaged in a protected activity, the Employer committed an adverse action against the Petitioner, and a causal connection existed between the protected and adverse action. See Welch v. Hoeh, 314 Ill.App.3d 1027, 1035, 733 N.E.2d 410, 416 (3rd Dist. 2000). Generally, in order for a causal connection to be inferred, the period of time between the protected activity and the adverse action must be sufficiently short. In previous rulings the Commission has determined that a time period of six months was too remote to give rise

to an inference of a causal connection. See Mitchell and Local Union, 146, 20 Ill. HRC Rep. 101, 110-11 (1985).

In this case, the protected activity took place in February of 2005. The alleged adverse actions took place between December 2007 and June 2008. Over two years elapsed between the protected act and the beginning of the alleged adverse actions. A period of over 24 months between the protected act and the adverse actions is too remote to give rise to an inference of retaliation.

Finally, the Commission cannot consider the Petitioner's new allegation of retaliation that he raised for the first time in his Request. The Commission does not have jurisdiction to review new allegations or charges raised for the first time in a request for review. See 775 ILCS 8-103.

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show that the Respondent's dismissal of his charge was not in accordance with the Act. The Complainant's Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Petitioner's charge is hereby **SUSTAINED**.

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 Exxon Mobile Lubricants and Petroleum Specialties Company, as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS)
)
HUMAN RIGHTS COMMISSION)

Entered this 27th day of January 2010.

Commissioner Marti Baricevic

Commissioner Robert S. Enriquez

Commissioner Gregory Simoncini