

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009CA2912
)	EEOC NO.: 21BA91492
BENJAMIN BERG)	ALS NO.: 10-0129
)	
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Marti Baricevic, Robert S. Enriquez, and Gregory Simoncini presiding, upon Benjamin Berg’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Department of Human Rights (“Respondent”)^[1] of Charge No. 2009CA2912; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, WHEREFORE, 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:

1. On February 9, 2009, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged that Cunat Contracting, LLC (“Employer”) discharged him on October 13, 2008, because of his age, 59, in violation of Section 2-102(A) of the Illinois Human Rights Act (“Act”). On January 14, 2010, the Respondent dismissed the Complainant’s charge for Lack of Substantial Evidence. On February 17, 2010, the Petitioner filed this timely Request.
2. The Employer was in the business of developing residential real estate. The Employer first hired the Petitioner in August of 1990.
3. In October 2007, the Petitioner was classified as a Sales Manager for one of the Employer’s residential developments, which consisted of condominium units for sale and apartments for rent. After the condominiums were all sold, the Employer then proceeded to sell the rental units as condominium units.
4. In 2007, the Petitioner sold 32 rental units. From January 2008 through September 2008, the Petitioner sold seven (7) rental units.

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

5. On October 13, 2008, the Employer laid off the Petitioner. In October 2008, the Employer laid off four additional employees, whose ages were 49, 47, 36, and 32.
6. The Employer stated that it discharged the Petitioner because it had experienced a significant drop in sales. There had been an overall decline in the real estate market, and the Employer had converted its unsold condominium units to rental properties, thus negating the need for sales managers.
7. In his charge, the Petitioner alleged the Employer discharged him because of his age, 59.
8. In his Request, the Petitioner argues that the Employer had retained two younger Sales Managers, ages 48 and 43, during the time the Employer laid him off. The Petitioner contends that he was not required to demonstrate that he was replaced by someone under the age of 40 in order to prove the existence of age discrimination. Rather, the Petitioner argues he need only demonstrate that the comparatives were substantially younger than him. Additionally, the Petitioner argues that the evidence presented by the Employer was contradictory and that the Respondent's investigator made improper credibility determinations.
9. In its Response, the Respondent requests that the Commission sustain the dismissal of the Petitioner's charge for lack of substantial evidence. The Respondent argues that the Petitioner failed to establish a *prima facie* case of discrimination because there was no evidence that an employee outside his protected class was treated more favorably under similar circumstances. The Respondent states that the 48 and 43-year-old comparatives identified by the Petitioner were eventually laid off in March and November 2009. Finally, the Respondent argues that even if the Petitioner could establish a *prima facie* case, the Employer articulated a non-discriminatory reason for discharging the Petitioner and there was no substantial evidence this reason was a pretext for unlawful discrimination.

Conclusion

The Commission concludes the Respondent properly dismissed the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

The Commission concludes that the Petitioner failed to establish a *prima facie* case of age discrimination. Generally, in order to establish a *prima facie* case of discrimination, the Petitioner must show: (1) that he falls within a protected class; (2) that he was performing his job satisfactorily; (3) that he was subjected to an adverse action; and (4) that the Employer treated similarly situated employee outside the Petitioner's protected class more favorably under similar circumstances. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994).

The Petitioner failed to establish the fourth element of his *prima facie* case because there was no evidence that the Employer had treated a similarly situated younger employee more favorably under similar circumstances. The evidence shows that the Employer laid off a total of five (5)

employees in October 2008, including the Petitioner. Of those employees, two were in their thirties and outside of the Petitioner's protected class. Thus, there is no substantial evidence the Petitioner was discharged because of his age.

Even if the Petitioner could establish the existence of a *prima facie* case of age discrimination, the Employer articulated a non-discriminatory reason for discharging the Petitioner, and there is no substantial evidence this was a mere pretext for age discrimination. As a result of the Respondent's investigation, the Respondent determined that from 2007 through 2008, the Employer eliminated 67% of all of its employees, some of whom were younger than the Petitioner. The Employer stated these layoffs were based on the decline in the real estate market. An Employer is entitled to make employment decisions based on its reasonable belief of the facts surrounding the situation. See Carlin v. Edsal Manufacturing Company, Charge No. 1992CN3428, ALS No. 7321 (May 6 1996), citing Homes and Board of County Commissioner, Morgan County, 26 Ill HRC Rep. 63 (1986). Absent any evidence of pretext, it would be improper for the Commission to substitute its judgment for the Employer's business judgment. See Berry and State of Illinois, Department of Mental Health and Developmental Disabilities, IHRC, ALS No. S-9146 (December 10, 1997).

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

WHEREFORE, 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 Cunat Contracting, LLC, 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 22nd day of September 2010

Commissioner Marti Baricevic

Commissioner Robert S. Enriquez

Commissioner Gregory Simoncini