**STATE OF ILLINOIS**
**HUMAN RIGHTS COMMISSION**

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| IN THE MATTER OF THE REQUEST | ) | |
| FOR REVIEW BY: | ) | CHARGE NO.: 2008CF2576 |
| | ) | EEOC NO.: 21BA81480 |
| **MICHAEL J. PESEK,** | ) | ALS NO.: 09-0530 |
| Petitioner. | ) | |

## ORDER

This matter coming before the Commission by a panel of three, Commissioners Sakhawat Hussain, M.D., Spencer Leak, Sr. and Rozanne Ronen, presiding, upon the Petitioner's Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")[1] of Charge No. 2008CF2576, Michael J. Pesek ("Petitioner"); and the Commission having reviewed *de novo* the Respondent's investigation file, including the Investigation Report and the Petitioner's Request and supporting materials, 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:

(1) The Respondent's dismissal of the Petitioner's Charge is **VACATED,** and the Charge shall be **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** as to all Counts A-E of the charge, and for further processing in accordance with this Order and the Act.

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

1. On March 20, 2008, the Petitioner filed a charge of discrimination with the Respondent in which he alleged his former employer, Caterpillar, Inc. ("Employer"), through his Supervisor Charity Klimkiewicz, harassed him in retaliation for having opposed unlawful discrimination (Count A), suspended him on November 29, 2007, in retaliation for having opposed unlawful discrimination (Count B) and due to his perceived sexual orientation, homosexual (Count C), and discharged him on February 28, 2008, in retaliation for having opposed unlawful discrimination (Count D) and due to his perceived sexual orientation, homosexual (Count E), in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act (the "Act"). On August 25, 2009, the Respondent dismissed the Complainant's charge for Lack of Substantial Evidence. On September 21, 2009, the Petitioner filed this timely Request.

2. The undisputed evidence in the investigation file shows that the Petitioner was hired by the Employer on January 17, 1995, as an Industrial Apprentice. On September 1, 1997, he was

[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."

moved to an Assembly and Test Specialist position, which was his position at the time of his discharge.

3. In August 2006, the Petitioner filed an internal complaint against some of his co-workers and supervisors, whom he alleged were harassing him because they perceived him to be homosexual. One of the individuals he complained about was Klimkiewicz, who at the time was a co-worker without any supervisory authority over him. Klimkiewicz and the others continuously harassed the Petitioner. The Petitioner again complained to the Employer on October 2006. Klimkiewicz was aware that she was one of the individuals about whom the Petitioner had complained.

4. In August 2007, Klimkiewicz became the Petitioner's supervisor.

5. Thereafter, the Petitioner alleges in his charge, from September 2007 to February 25, 2008, Klimkiewicz continued to harass him due to her belief that he was homosexual. Klimkiewicz required the Petitioner to follow certain rules that similarly situated employees were not required to follow, and she used pink and purple ink to write notes to him, and she made false allegations against him. During this same time the Petitioner alleges the Employer, and specifically his supervisor Klimkiewicz, harassed him, suspended him on November 29, 2007, and discharged him on February 28, 2008, in retaliation for having engaged in protected activity. Finally, the Petitioner alleged he was discharged on February 28, 2008, because of his perceived sexual orientation, homosexual.

6. The Petitioner argues in his Request that there is a causal connection between his having engaged in the protected activity in 2006 and the adverse actions subsequently taken against him by the Employer. He argues he was subjected to a continuing course of discriminatory and retaliatory conduct that established a nexus between his complaints and the adverse actions taken against him by the Employer.

7. In its response, the Respondent asks the Commission to sustain its dismissal of Counts A, B and D of charge, which allege retaliatory harassment, suspension, and discharge, respectively, for lack of substantial evidence. The Respondent argues there is no causal connection between the protected activity and the adverse actions because too much time elapsed between the Petitioner's complaints in August and October 2006, and the commencement of the adverse actions in September 2007.

8. However, the Respondent asks the Commission to vacate its dismissal of Counts C and E, which allege the Employer suspended and discharged the Petitioner, respectively, based on his perceived sexual orientation, homosexual. The Respondent agrees with the Petitioner that there is substantial evidence to support those allegations. The Respondent asks the Commission to make a finding of substantial evidence as to Counts C and E, and remand those counts to the Respondent for further action.

***Conclusion***

The Commission's review of the Respondent's investigation file leads it to conclude that the Respondent's dismissal of all counts in the charge should be vacated because the Commission finds there is substantial evidence of both discrimination and retaliation on all counts.

The Respondent argues the Petitioner's retaliation claim must fail because he cannot establish a *prima facie* case. In particular, the Respondent argues that too much time passed between the protected activity and the adverse actions to give rise to an inference of a retaliatory motive. It is true that generally, the time between the protected activity and adverse action must be sufficiently short to give rise to an inference of retaliation. *See* Mitchell and Local Union, 146, 20 Ill. HRC rep. 101, at 110-11 (1985).

However, in this case, the Respondent failed to consider the fact that it was Klimkiewicz, the Petitioner's manager, who was specifically alleged to have engaged in the retaliatory conduct. Klimkiewicz was aware that the Petitioner had previously complained to the Employer about her harassment, when she was merely his co-worker. At that time in 2006, Klimkiewick lacked any authority over the Petitioner, so she was incapable of subjecting the Petitioner to the retaliatory acts alleged in the charge.

The evidence in the file shows that within one month after Klimkiewicz became the Petitioner's supervisor in August 2007, the alleged retaliatory conduct commenced. Under these facts, the Commission finds there is substantial evidence of a causal connection between the Petitioner's protected activity and the adverse actions, which were perpetrated primarily by Klimkiewicz soon after she gained a position of authority over the Petitioner.

Of course the Employer asserts that there was no harassment, and it states facially legitimate reasons for suspending and discharging the Petitioner. The Commission finds substantial evidence that these stated reasons are pretextual. The file is replete with evidence that Klimkiewicz substantially contributed to the pervasive atmosphere of hostility, harassment and mockery perpetrated against the Petitioner in the workplace based upon her belief that the Petitioner was homosexual. Further, as is pointed out by the Respondent in its response, there is too much conflicting evidence in the file concerning the veracity of the Employer's stated reason for suspending and discharging the Petitioner. There is no evidence in the file that the Employer had a "good faith belief" that the Petitioner had in fact engaged in the misconduct for which the Employer suspended and discharged him.

Therefore, the Commission herein vacates the dismissal of Counts A, B and D of the charge based on its determination that there is substantial evidence of retaliation.

In its Response to the Petitioner's Request, the Respondent does not oppose the Petitioner's Request as to Counts C and E. The Respondent recommends the Commission vacate the dismissal of Counts C and E and make a finding of substantial evidence as to those Counts.

Therefore, the Commission also herein vacates the Respondent's dismissal of Counts C and E of the charge based on the determination there is substantial evidence of employment discrimination based on perceived sexual orientation, homosexual.

Accordingly, the Commission finds the Petitioner's Request is persuasive as all Counts A-E of the charge. The dismissal of the Petitioner's charge shall be vacated and the entire charge shall be remanded to the Respondent for entry of a finding of substantial evidence on all Counts and for further action as herein instructed.

**THEREFORE, IT IS HEREBY ORDERED THAT:**

(1) The Respondent's dismissal of the Petitioner's charge is **VACATED**, and the charge in its entirety shall be **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** and for further processing in accordance with this Order and the Act.

**This Order is Not Yet Final and Appealable.**

**STATE OF ILLINOIS** )
) **Entered this 24th day of March 2010.**
**HUMAN RIGHTS COMMISSION** )

Commissioner Sakhawat Hussain

Commissioner Spencer Leak, Sr.

Commissioner Rozanne Ronen