

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009CA3609
ALFONSO R. LARA)	EEOC NO.: 21BA92033
)	ALS NO.: 10-0133
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Sakhawat Hussain, M.D., Spencer Leak, Sr., and Diane M. Viverito presiding, upon Alfonso R. Lara’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Department of Human Rights (“Respondent”)^[1] of Charge No. 2009CA3609; 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, **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:

1. On April 13, 2009, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged Safer Foundation (“Employer”) subjected him to unequal job assignments because of his ancestry, Hispanic (Count A), and in retaliation for having filed a previous charge of discrimination (Count B), in violation of Section 2-102(A) of the Illinois Human Rights Act (“Act”). On January 21, 2010, the Respondent dismissed the Petitioner’s charge for Lack of Substantial Evidence. On February 22, 2010, the Petitioner filed this timely Request.
2. The Employer hired the Petitioner on February 20, 2007, as a Correctional Counselor I (“CRC I”).
3. The Petitioner’s work schedule allowed him Sundays and Mondays off.
4. On September 10, 2008, the Petitioner filed a previous charge of discrimination against the Employer.
5. In February 2009, the Employer denied the Petitioner’s request for a “weekend off” time slot, i.e., Saturdays and Sundays off.

^[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.”

6. The Employer stated it denied the Petitioner's request because there were no "weekend off" time slots available at the time, and the employee already holding the desired slot had more seniority than the Petitioner.
7. The Employer stated that its practice regarding scheduling was to award employees shift schedules based on their seniority and the employees' completion of a yearly bid request in August of each year.
8. The employee who was already holding the Petitioner's desired "weekend off" slot was identified by the Petitioner as his non-Hispanic comparable.
9. The non-Hispanic comparable employee was hired by the Employer on June 7, 2004, as a CRC I. The Petitioner was hired February 20, 2007. Therefore, the non-Hispanic comparable was the more senior employee between the two.
10. In February 2009, the Employer assigned the non-Hispanic comparable audit duties as part of his work responsibilities, and changed his schedule so that he had Saturdays and Sundays off. The Employer stated that once the non-Hispanic comparable stopped performing audits, the Employer allowed the non-Hispanic comparable to maintain Saturdays and Sundays off, in part because scheduling preferences were based on seniority.
11. In his charge, the Petitioner alleged that in February 2009, the Employer had a "weekend off" slot available, that the Employer told him there were no weekend slots available, and that the non-Hispanic comparable employee, who also had not engaged in any protected activity, was given the "weekend off" slot.
12. In his Request, the Petitioner argues that his case has been shifted by the Respondent between different investigators. He further states he would like the opportunity to present other evidence in support of his charge, such as memos and witness statements.
13. In its Response, the Respondent requests that the Commission sustain the dismissal of the Petitioner's charge for lack of substantial evidence.

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).

As to Count A, the evidence was insufficient to establish a *prima facie* case of discrimination. Generally, to establish a *prima facie* case of discrimination, the evidence must show: (1) that the Petitioner is a member of a protected class; (2) the Petitioner was performing his work satisfactorily; (3) the Petitioner was subjected to an adverse action; (4) and that the Employer treated a 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). In this case, the Petitioner is not similarly situated to the non-Hispanic employee he identified as his comparable.

The non-Hispanic employee identified by the Petitioner had been employed since June 7, 2004. The Petitioner had been employed since February 20, 2007. The non-Hispanic employee had more seniority than the Petitioner. According to the Employer's policy, employees with greater seniority were given preference in scheduling. Furthermore, in February 2009, the non-Hispanic employee was given Saturdays and Sundays off because of his additional work duties, i.e., auditing. Again, the Petitioner does not allege he also had auditing duties in February of 2009. As such, the Petitioner has not shown that a similarly situated employee outside of his protected class was treated more favorably than him under similar circumstances.

As to Count B, the Commission finds no substantial evidence to support the Petitioner's retaliation claim. There is no evidence of a causal connection between the Petitioner's protected activity in September 2008 and his denial of a "weekend off" slot in February 2009. See Welch v. Hoeh, 314 Ill.App.3d 1027, 1035, 733 N.E.2d 410, 416 (3rd dist. 2000). As already discussed, the evidence demonstrates that a more senior employee than the Petitioner had claimed the "weekend off" slot, and this was consistent with the Employer's scheduling policy.

Furthermore, there is no evidence the Petitioner suffered an adverse action. While the Commission does not find that denial of an employee's requested scheduling preference can never constitute an adverse action, in this case, there has been no evidence presented that the Petitioner's failure to receive the preferred days off caused him to suffer a "materially significant disadvantage" in the terms and conditions of his employment. See Diane Allen and Mundelein Park District, IHRC, ALS No. 9012, 1999 WL 33252953, * 5 (October 20, 1999).

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

Safer Foundation, 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 Sakhawat Hussain, M.D.

Commissioner Spencer Leak, Sr.

Commissioner Diane M. Viverito