

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST )	
FOR REVIEW BY: )	CHARGE NO.: 2009CA1864
	EEOC NO.: 21BA90730
<b>CARLA TOMINO,</b> )	ALS NO.: 10-0064
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 Carla Tomino's (the "Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")<sup>1</sup> of Charge No. 2009CA1864; 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:

- (A) The Respondent's dismissal of the Petitioner's charge is **VACATED**, and the charge is **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** and for further proceedings consistent with this Order and the Act.

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

1. The Petitioner filed a charge of discrimination with the Respondent on December 16, 2008. The Petitioner alleged her former employer, Northwestern University ("Employer"), discharged her on June 25, 2008 because of her age, 57 (Count A), and in retaliation for having opposed unlawful discrimination (Count B). On November 23, 2009, the Respondent dismissed the Petitioner's charge for Lack of Substantial Evidence. On January 25, 2010, the Petitioner filed this timely Request. Within 30 days thereafter, the Respondent filed a timely Response, and the Petitioner filed a timely Reply to the Response on March 9, 2010.
2. The Petitioner was initially hired by the Employer on March 17, 1997, as a Program Assistant II. In 2007, the Petitioner was a Program Assistant II in the Employer's School of Journalism. On February 15, 2007, the Petitioner began reporting to A. Sullivan, Director of Development.
3. On February 14, 2008, the Petitioner received a written warning from Sullivan. Sullivan cited the Petitioner's "continued" lack of attention to details and errors as the reason for the written warning.

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<sup>1</sup> 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."

4. On March 19, 2008, the Petitioner received a Notice of Improvement document which indicated the Petitioner was meeting the Employer's expectations.
5. However, Sullivan issued the Petitioner a Final Written Warning on April 15, 2008, for poor performance and lack of attention to detail.
6. The Petitioner was given a performance evaluation on May 16, 2008. Sullivan rated the Petitioner as being "below expectations" in two of four criteria.
7. The Petitioner contends that after she received the May 2008 performance evaluation, she complained to one of the Employer's Human Resources Consultant that younger employees had committed mistakes similar to hers, but they were not given written warnings. The Petitioner states she told the Human Resources Consultant that it was her belief that Sullivan wanted to hire a younger person. The Petitioner states the Human Resources Consultant did not address her concerns regarding the alleged age discrimination.
8. The Employer discharged the Petitioner on June 25, 2008. The reason stated for the Petitioner's termination was that Sullivan had previously issued the Petitioner two written warnings and because of the Petitioner's poor job performance.
9. After the Employer had discharged the Petitioner, Sullivan hired a younger individual, age 25, to replace the Petitioner.
10. After investigating the Petitioner's charge of discrimination, the Respondent concluded there was no substantial evidence that the Employer was motivated by age or retaliation when it discharged the Petitioner. Therefore, the Respondent dismissed the Petitioner's charge for lack of substantial evidence.
11. In her Request, the Petitioner argues that the Respondent did not consider pertinent evidence in support of her charge that she had previously submitted to the Respondent's investigator. The Petitioner contends the Respondent erred because it relied solely on the Employer's version of the facts, to the exclusion of the Petitioner's evidence, in order to conclude that there was a valid reason for discharging the Petitioner.
12. The Petitioner states she offered the Respondent evidence of two younger Program Assistant IIs, one in her 20s, the other in her early 40s, who had made similar mistakes as the Petitioner, but who were not issued written warnings for their errors by the Employer.
13. The Petitioner also states the Respondent excluded the Petitioner's evidence regarding certain comments Sullivan had made to her. The Petitioner concluded from these statements that Sullivan wished to have a younger employee working for her. For example, the Petitioner states that Sullivan commented that she wished the Petitioner were ... "more excited about her

job”; that Sullivan told the Petitioner she looked better in fitted clothing; and that Sullivan once told the Petitioner, “You don’t like change, do you?”

14. The Petitioner also points out that in the Employer’s position statement, which the Employer submitted to the Respondent in response to the Petitioner’s charge, the Employer appeared to justify the Petitioner’s discharge in part by characterizing the Petitioner’s work performance throughout her entire employment as “fair to marginal at best.” However, the Petitioner states she did not begin receiving poor performance evaluations until Sullivan became her supervisor. The Petitioner supports her position with two previous performance evaluations, one dated July 3, 2001, and one dated May 20, 2006, which was the last evaluation the Petitioner received just prior to Sullivan becoming her supervisor.
15. In the 2001 evaluation, the Petitioner was given an overall rating of 4 out of 5, and her ratings in various categories ranged from 3 (Satisfactory Performance) to 5 (Exceptional Performance).
16. In the 2006 evaluation, the Petitioner was rated as “exceeds expectations” on three of four criteria, and “meets expectations” on the fourth criteria. The Petitioner’s supervisor in the 2006 evaluation praised the Petitioner’s ability to . . . “ensure mail merges and data sets are thorough and accurate” . . . This supervisor further stated the Petitioner had accomplished many tasks that helped to strengthen donor relationships, that the Petitioner . . . “is a full participant in building and strengthening donors’ affinity”. . . to the Employer, and stated the Petitioner’s . . . “writing and editing skills are exceptional” . . .
17. The Petitioner also states the Employer did not follow its discipline policy when it issued her the two written warnings. The Petitioner argues that while the Employer’s discipline policy states there are certain violations warranting immediate discharge, such as gross dereliction of duty and professional misconduct, her errors did not fall within either category. Rather, the Petitioner argues her errors fell within a category of mistakes described in the discipline policy as “Violations requiring correction.” Such errors were defined as “less serious” and the Employer’s discipline policy stated these less serious errors . . . “should be addressed through steps of correcting performance and generally do not call for immediate dismissal” . . . The discipline policy further stated that employees should be advised of the performance issues, counseled on needed improvement, and given additional training if appropriate. The Petitioner states that prior to the February 14, 2008, written warning, Sullivan never advised the Petitioner of any performance issues nor counseled the Petitioner.
18. In her Reply the Petitioner argues the Respondent’s Response to the Request is deficient because it does not address the evidence the Petitioner put forth which rebuts the Employer’s characterization of the Petitioner’s work history. The Petitioner contends the Respondent also relied on Sullivan’s statement that one of the errors the Petitioner had committed prior to her discharge was that the Petitioner had made a mistake logging RSVPs to an Employer event. The Petitioner states this allegation was not raised during the fact finding conference held by

the Respondent, and that the Petitioner never had an opportunity to rebut this statement since Sullivan did not appear at the fact finding conference. The Petitioner further denies having committed any such error.

19. The Respondent asks the Commission to sustain its dismissal of the Petitioner's charge for lack of substantial evidence, and the Petitioner asks that the dismissal be vacated.

### **Conclusion**

The Commission concludes the Respondent's dismissal of the Petitioner's charge shall be vacated and the matter shall be remanded to the Respondent for entry of a finding of substantial evidence. 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 (March 7, 1995), 1995 WL 793258 (Ill.Hum.Rts.Com.)

In this case, the Employer did put forth a legitimate, non-discriminatory and non-retaliatory reason for its adverse action. Therefore, the Commission looked to see if there was some substantial evidence the Employer's stated reason for this adverse action was pretextual. The Commission finds the Petitioner has put forth such evidence.

First, the Petitioner has stated that Sullivan made statements to her which were suggestive of a preference for a younger employee. The Petitioner has also put forth evidence that the Petitioner did not find the Petitioner's work performance to be unsatisfactory until Sullivan became the Petitioner's supervisor. Further, it is undisputed that once the Petitioner was discharged by Sullivan, Sullivan hired a younger employee to replace the Petitioner.

Second, although the Employer described the Petitioner's history of work performance as "fair to marginal," the Petitioner has put forth evidence which appears to refute the Employer's characterization of the Petitioner's work history. The Employer states in its position statement dated September 14, 2009, that the Petitioner continued to perform poorly and contentiously while under Sullivan's supervision. This clearly gives rise to an inference that the Petitioner was simply a historically mediocre employee who was finally terminated in June 2008 because she could not meet the Employer's standards. However, the Petitioner put forth evidence that supervisors prior to Sullivan considered the Petitioner to be an employee of very good to high caliber, and that her performance ranged from satisfactory to exceptional.

Third, the Commission finds the Petitioner put forth some evidence that the Employer may have deviated from its disciplinary policy when addressing the Petitioner's alleged mistakes, and treated her less favorably than similarly situated younger employees. The Petitioner has put forth evidence the Employer did not discipline younger employees as severely as it did the Petitioner for similar errors; specifically, while the Petitioner was given written warnings for errors that the Employer

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contends could have cast the Employer in a poor light, younger employees were verbally admonished, but were given no written warnings.

Finally, as to the issue of pretext, there is substantial evidence that the Petitioner engaged in protected activity May 2008; that the Employer thereafter took an adverse action against the Petitioner when it discharged her in June 2008, and that there is a causal connection between the two because of the short period of time that lapsed between the protected activity and the adverse action. See Pace and State of Illinois, Department of Transportation, \_\_\_ Ill.HRC Rep. \_\_\_ (1989SF0588, February 27, 2995)(Slip op. at 13). While the Employer articulated a non-retaliatory reason for its actions, as already fully discussed in this Order, the Commission finds there is substantial evidence of pretext on the part of the Employer.

Therefore, in light of the substantial evidence that the Employer's stated reason for discharging the Petitioner was a pretext for age discrimination and for retaliation, the Commission herein vacates the Respondent's dismissal of the Petitioner's charge and remands the charge to the Respondent for further action as herein stated.

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

- (1) The Respondent's dismissal of the Petitioner's charge is **VACATED**, and the charge is **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** and for further proceedings consistent with this Order and the Act.

*This Order is not yet final and appealable.*

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 25<sup>th</sup> day of August 2010.

Commissioner Sakhawat Hussain

Commissioner Spencer Leak, Sr.

Commissioner Rozanne Ronen