



This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 7/14/04.

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
IKE EZIFE,)	
)	
Complainant,)	
)	Charge No.: 1998CF2711
and)	EEOC No.: 21B982178
)	ALS No.: 11089
METROPOLITAN WATER)	
RECLAMATION DISTRICT OF)	
GREATER CHICAGO,)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

On November 3, 1999, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Ike Ezife. That complaint alleged that Respondent, Metropolitan Water Reclamation District of Greater Chicago, discriminated against Complainant on the bases of his race and his national origin when it harassed him, unfairly evaluated his work, and suspended him. The complaint further alleged that Respondent unlawfully retaliated against Complainant when he complained of discrimination. Complainant later received leave to file an amended complaint that alleged that Respondent discharged him because of his race and national origin. The amended complaint further alleged that Complainant's discharge was the result of unlawful retaliation.

This matter now comes on to be heard on Respondent's Motion for Summary Decision. Complainant has filed a written response

to the motion, and Respondent has filed a written reply to that response. The matter is ready for decision.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Respondent, Metropolitan Water Reclamation District of Greater Chicago, hired Complainant, Ike Ezife, in April of 1988 as an Engineering Tech III.

2. Complainant's race is black and his national origin is Nigerian.

3. From January of 1989 until February 18, 1999, Complainant worked for Respondent as a Mechanical Engineer II.

4. From May 31, 1995 until February 18, 1999, Complainant's immediate supervisor was Seiji Joji.

5. On or about February 26, 1996, Complainant received a written performance evaluation that gave him an overall rating of "requires improvement."

6. On or about January 28, 1997, Complainant received a written performance evaluation that gave him an overall rating of "requires improvement."

7. On July 7, 1997, Respondent suspended Complainant for

one day for failure to submit an assignment in the proper format and in a timely manner.

8. On or about February 19, 1998, Complainant received a written performance evaluation that gave him an overall rating of "requires improvement."

9. On or about May 19, 1998, Respondent suspended Complainant for thirty days pending termination charges for failure to achieve the "minimum standard of performance" for three consecutive rating periods.

10. Respondent discharged Complainant on or about February 18, 1999.

11. Although Joji recommended Complainant's discharge, Respondent's Civil Service Board made the actual discharge decision. The three-member board reached its decision after an evidentiary hearing in which Complainant was represented by counsel. Complainant was able to present evidence at the hearing.

12. At the hearing, the Civil Service Board heard corroboration of some of Joji's criticisms of Complainant's work. Some of that corroboration came from Joe Zurad who supervised Complainant on one of his projects.

13. Complainant testified at the Civil Service Board hearing that he did not believe that Zurad was prejudiced against him.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 1-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Prosecution of this case is not barred by the doctrine of *res judicata*.

4. Complainant cannot establish a *prima facie* case of race discrimination against him.

5. Complainant cannot establish a *prima facie* case of national origin discrimination against him.

6. Complainant can establish a *prima facie* case of unlawful retaliation against him.

7. Respondent can articulate a legitimate, non-discriminatory reason for its actions.

8. There is no genuine issue of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law on all of the claims raised in the complaint.

9. A summary decision in Respondent's favor is appropriate in this case.

DISCUSSION

This matter is being considered pursuant to Respondent's

Motion for Summary Decision. A summary decision is analogous to a summary judgment in the Circuit Court. **Cano v. Village of Dolton**, 250 Ill. App. 3d 130, 620 N.E.2d 1200 (1st Dist. 1993). Such a motion should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. **Strunin and Marshall Field & Co.**, 8 Ill. HRC Rep. 199 (1983). The movant's affidavits should be strictly construed, while those of the opponent should be liberally construed. **Kolakowski v. Voris**, 76 Ill. App. 3d 453, 395 N.E.2d 6 (1st Dist. 1979). The movant's right to a summary decision must be clear and free from doubt. **Bennett v. Raag**, 103 Ill. App. 3d 321, 431 N.E.2d 48 (2d Dist. 1982).

Before moving to the merits of the case, it is necessary to address two jurisdictional defenses raised by Respondent. First, Respondent argues that the Human Rights Commission has no jurisdiction over the discharge claim because that claim was not timely filed. Next, Respondent argues that, because the Civil Service Board already considered Complainant's discrimination allegations, the Board's rejection of those allegations should have *res judicata* effect in this forum. Those defenses are without merit.

Under section 8A-102(c)(1) of the Act, a complaint pending before the Commission can be amended to "encompass any unlawful discrimination which is like or reasonably related to the charge and growing out of the allegations in such charge, including, but

not limited to, allegations of retaliation." Respondent argues that the amended complaint in this matter does not meet the "like or reasonably related" test. That argument must be rejected.

In support of its argument, Respondent cites **Hyatte and County of Winnebago**, ___ HRC Rep. ___, (1989CF2388, May 6, 1999). **Hyatte**, however, is not on point. In **Hyatte**, the complainant moved to amend her race discrimination complaint to allege retaliation. The motion to amend was brought more than 180 days after the alleged retaliation took place. The motion to amend was denied because the facts supporting the retaliation claim were not sufficiently similar to the earlier allegations of race discrimination. That, however, is not the situation in this case.

At the time of the filing of the initial charge of discrimination, Complainant had been suspended but not yet discharged. As a result, the initial complaint filed before the Commission referred to the suspension but not to the discharge. The events surrounding Complainant's evaluations and suspension are the same as those surrounding the discharge. The discharge is the only material event in the amended complaint that is missing from the initial complaint. In effect, the discharge is a further consequence of the original allegations in the charge. The **Hyatte** decision acknowledged that such consequences justify filing an amended complaint without the need for filing an amended charge. **Hyatte** slip. op. at 25, citing **Bonner and AT&T**,

___ Ill. HRC Rep. ___, (1989CF1673, October 2, 1996). Thus, the amended complaint properly raised the issue of Complainant's discharge and Respondent's argument to the contrary must be rejected.

The other argument that should be addressed up front is Respondent's contention that the Civil Service Board's conclusions regarding Complainant's discrimination claims should be binding in this forum under the doctrine of *res judicata*. At page 16 of its reply brief, Respondent asserts that "there is absolutely no distinction" between its role and that of the Human Rights Commission. That assertion is at the center of Respondent's *res judicata* argument. The assertion, though, is absolutely false.

According to the documentation submitted with Respondent's motion, the district's Civil Service Board made the decision to discharge Complainant. Thus, the Civil Service Board was the actual decision maker. The Human Rights Commission is not in that position in the cases it adjudicates. Instead, the Commission provides a neutral forum for the resolution of disputes.

Even the California cases cited by Respondent involve situations in which the personnel boards were *reviewing* decisions made by management. They were not situations in which the personnel boards were themselves the discipline decision makers. Respondent's argument would make the decision maker the arbiter

of its own potential liability under the Human Rights Act. That interpretation of the law contravenes both the letter and the spirit of the Act. As a result, the findings of the Civil Service Board do not have *res judicata* effect in this case.

With those arguments out of the way, it is possible to consider the merits of Respondent's motion. There are several different theories that need to be addressed, but they all arise out of the same set of facts.

Respondent hired Complainant in or about April of 1988 as an Engineering Tech III. Complainant's race is black and his national origin is Nigerian.

From January of 1989 until February 18, 1999, Complainant worked for Respondent as a Mechanical Engineer II. From May 31, 1995 until February 18, 1999, his immediate supervisor was Seiji Joji.

On or about February 26, 1996, Complainant received a written performance evaluation that gave him an overall rating of "requires improvement." On or about January 28, 1997, he received a written performance evaluation that again gave him an overall rating of "requires improvement." On July 7, 1997, Complainant was suspended for one day for failure to submit an assignment in the proper format and in a timely manner. On or about February 19, 1998, he received yet another written performance evaluation that gave him an overall rating of "requires improvement." On or about May 19, 1998, Respondent

suspended Complainant for thirty days pending termination charges for failure to achieve the "minimum standard of performance" for three consecutive rating periods. Respondent discharged Complainant on or about February 18, 1999.

After being suspended, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent harassed Complainant and subjected him to unequal terms and conditions of employment on the basis of his race and national origin. Those allegations were later expanded when Complainant was given leave to amend his complaint in this forum to allege that his discharge was based upon his race and national origin. The amended complaint also alleged that his discharge was the result of unlawful retaliation.

The method of proving such allegations is well established. First, Complainant must establish a *prima facie* showing of discrimination. If he does so, Respondent must articulate a legitimate, non-discriminatory reason for its actions. For Complainant to prevail, he must then prove that Respondent's articulated reason is pretextual. **Zaderaka v. Human Rights Commission**, 131 Ill. 2d 172, 545 N.E.2d 684 (1989). See also **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 251 (1981).

Complainant has raised several different claims in this matter. To some extent, those claims require different analyses. This discussion will follow the order established in the amended complaint.

The first claim raised in the amended complaint is race discrimination. That claim is rather broadly written and includes allegations of racial slurs as well as unfair performance reviews, suspension, and discharge.

Clearly, the allegation of racial slurs is overstated in the amended complaint. In the documentation submitted in response to Respondent's motion, Complainant has identified only one specific incident in which such slurs allegedly were used. In that instance, Joji told Complainant, "I'll write anything about your black ass and they'll believe it." In that same conversation, Joji allegedly said, "I will bang your black ass any chance I get."

Such statements are clearly offensive, but as a matter of law, they fail to rise to the level of actionable racial harassment. The Human Rights Commission has held that behavior does not rise to the level of harassment unless it occurs frequently enough to constitute a term or condition of employment. *Hill and Peabody Coal Co.*, ___ Ill. HRC Rep. ___, (1991SF0123, June 26, 1996). According to the rationale of *Hill*, infrequent racial slurs are not enough to establish racial harassment. For example, the telling of three racial jokes in a two-month period was found to be insufficient to rise to the level of racial harassment in *Thompson and Hoke Construction Co.*, ___ Ill. HRC Rep. ___, (1995SF0483, June 2, 1998).

In this case, Complainant has identified only two racially

offensive statements and both of them apparently occurred during a single conversation. Those statements simply do not establish racial harassment under existing precedent. Thus, Respondent is entitled to dismissal of the racial harassment allegations.

Complainant's claims regarding unfair work evaluations are essentially claims of unequal terms and conditions of employment. He is arguing that he and his co-workers were held to different standards. To establish a *prima facie* case of discrimination in terms and conditions of employment, Complainant would have to prove three elements. He would have to prove 1) that he is in a protected class, 2) that he was treated in a particular manner by Respondent, and 3) that similarly situated employees outside his protected class were treated more favorably. **Moore and Beatrice Food Co.**, 40 Ill. HRC Rep. 330 (1988).

Complainant would have no trouble establishing the first two elements. It is clear that he is in protected classes on both race and national origin and he can prove how he was treated by Respondent. However, there is nothing in the record to raise a genuine issue of fact on whether similarly situated co-workers outside his protected classes were treated more favorably. In fact, there is virtually nothing but Complainant's personal opinion to suggest such favorable treatment. Complainant cannot establish personal knowledge of his co-workers' job performance. As a result, his opinion of their performance is insufficient to raise a genuine issue of material fact. Therefore, Respondent is

entitled to a decision in its favor on Complainant's claims of unequal terms and conditions of employment.

Complainant should be no more successful on his discharge claim. To establish a *prima facie* case of national origin discrimination in a discharge situation, he would need to show 1) that he is a member of a protected class, 2) that he was satisfying the normal requirements of his job, 3) that he was discharged and replaced by someone outside his protected class or that he was discharged while similarly situated persons outside his protected class were retained. ***Shah and Warshawsky & Co.***, 45 Ill. HRC Rep. 321 (1988), *aff'd sub nom Shah v. Illinois Human Rights Commission*, 192 Ill. App. 3d 263, 548 N.E.2d 695 (1st Dist. 1990).

Similarly, to establish a *prima facie* case of race discrimination in a discharge situation, Complainant would have to prove 1) that he is in a protected class, 2) that he was meeting Respondent's reasonable performance expectations, 3) that he was discharged, and 4) that similarly situated persons outside his protected class were treated more favorably, in that someone outside his protected class replaced him or that those outside his protected class were retained while he was discharged. ***Sheffield and Wilson Sporting Goods Co.***, ___ Ill. HRC Rep. ___, (1990CF1450, May 7, 1993).

Complainant has the same problems with both *prima facie* cases. He can establish his protected class and his discharge.

He can establish at least an issue of fact on the second element, in that he has provided some evidence that certain of his work activities might not have been taken into account when his performance evaluations were prepared. However, he has not provided facts sufficient to raise even a genuine issue of material fact on the treatment of similarly situated co-workers.

Respondent has produced its written evaluations of Complainant's performance. On all of his last three evaluations, Complainant's overall performance rating was "requires improvement." Complainant has not submitted records to demonstrate that his comparatives had similar work records. Instead, he has asserted his own opinions as to the comparables' work performance. There is no indication that those opinions are based upon personal knowledge. As a result, they are of no evidentiary value and they fail to raise a genuine issue of material fact. Accordingly, it appears that Complainant cannot establish an element of his *prima facie* case with regard to his race and national origin discharge claims.

Complainant also asserted a claim of retaliation. To establish a *prima facie* case on that claim, Complainant would have to prove three elements. He would have to prove 1) that he engaged in a protected activity, 2) that Respondent took an adverse action against him, and 3) that there was a causal nexus between the protected activity and Respondent's adverse action. ***Carter Coal Co. v. Human Rights Commission***, 261 Ill. App. 3d 1,

633 N.E.2d 202 (5th Dist. 1994).

According to Complainant, his protected activity was reporting racial slurs to Respondent's management. He claims to have reported those slurs on April 29, 1998. On May 5, 1998, he received a poor written evaluation. On May 19, 1998, he was suspended pending termination.

Reporting racial slurs is certainly a protected activity. A poor evaluation and suspension qualify as adverse actions. The necessary causal nexus between the protected activity and the adverse actions can be established by showing that there was a relatively short time span between those two events. ***Ellis and Brunswick Corp.***, 31 Ill. HRC Rep. 325 (1987). The time span in this case is undoubtedly short enough to provide that causal nexus. Thus, the facts alleged by Complainant are enough to establish a *prima facie* case of retaliation.

In response to that *prima facie* case, Respondent has articulated a legitimate, non-discriminatory reason for its actions. According to Respondent, it gave Complainant poor evaluations, suspended him, and ultimately terminated him because of his poor job performance. The issue then becomes whether Respondent's articulated reason is a pretext.

The pretext issue affects more than simply Complainant's retaliation claim. Under Commission precedent, a complainant can prevail at public hearing even without establishing a *prima facie* case. If, during a hearing, a respondent articulates a

legitimate, non-discriminatory reason for its actions, there is no longer a need for a *prima facie* case. At that point, the decisive issue becomes whether the articulated reason is pretextual. See **Clyde and Caterpillar, Inc.**, 52 Ill. HRC Rep. 8 (1989), *aff'd sub nom Clyde v. Human Rights Commission*, 206 Ill. App. 3d 283, 564 N.E.2d 265 (4th Dist. 1990).

Respondent's articulated reason extends to Complainant's race and national origin claims as well as his retaliation claim. Therefore, if Complainant can demonstrate that Respondent's articulation is pretextual, he can prevail on all three theories. To justify denial of Respondent's motion for summary decision, Complainant needs only to raise a genuine issue of material fact on the issue of pretext. However, he failed to meet even that modest burden of proof.

As noted above, Complainant offers almost nothing beyond his own opinion to support his argument that his job performance was acceptable. Moreover, Complainant's own testimony at his disciplinary hearing undercuts his argument. At that hearing, the Civil Service Board heard corroboration of some of the criticisms of Complainant's work. Some of that corroboration came from Joe Zurad who supervised Complainant on one of his projects. Complainant testified at the hearing that he did not believe that Zurad was prejudiced against him, but Zurad testified that Complainant's job performance failed to meet Respondent's standards. If Zurad's testimony was not influenced

by Complainant's race and national origin, then Complainant's performance arguments become completely unpersuasive.

Furthermore, and more importantly, Complainant has offered nothing to indicate that the real decision maker was in any way influenced by his race or national origin or by any retaliatory motive. As discussed above, the real decision maker in this case was Respondent's Civil Service Board. The board made the discharge decision. Complainant strenuously argues that Joji, his supervisor, harbored an animus against him. There is absolutely no evidence in the record, though, that would attribute any such animus to the Civil Service Board.

When dealing with decisions made by a board or committee, the complainant has the burden of proving that a working majority relied upon a prohibited factor in making its decision. ***Lalvani and Cook County Hospital***, ___ Ill. HRC Rep. ___, (1990CA2502, August 27, 1999). Complainant has failed to offer any evidence that any member of the Civil Service Board, let alone a working majority, relied upon any prohibited factor. As a result, he has failed to raise any genuine issue of material fact on the issue of pretext and Respondent is entitled to a recommended order in its favor as a matter of law. Thus, Respondent's motion for summary decision should be granted in its entirety.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order

in its favor as a matter of law. Accordingly, it is recommended that Respondent's Motion for Summary Decision be granted and that the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: August 15, 2003