



**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

<b>IN THE MATTER OF:</b>	)		
	)		
JAMES GATEWOOD,	)		
	)		
<b>Complainant,</b>	)		
	)	<b>CHARGE NO(S):</b>	1996CF2727
<b>and</b>	)	<b>EEOC NO(S):</b>	21B962120
	)	<b>ALS NO(S):</b>	10035
CHICAGO TRANSIT AUTHORITY,	)		
	)		
<b>Respondent.</b>	)		

**RECOMMENDED ORDER AND DECISION**

This matter comes to be heard on Respondent’s Motion for Summary Decision along with Respondent’s Memorandum in Support of Motion for Summary Decision with affidavits and exhibits attached. Complainant filed a written Response to the motion. The Respondent further filed a Reply Memorandum of Law in Support of its Motion for Summary Decision with supplemental affidavits and exhibits attached. No oral argument was requested. The matter is ripe for decision.

**CONTENTIONS OF THE PARTIES**

Respondent contends that a ruling for summary decision should issue in its favor as a matter of law because Complainant cannot provide evidence to establish a *prima facie* case of illegal discrimination. Respondent argues that Complainant cannot show that he was treated differently then similarly situated white employees. Respondent further argues that Complainant cannot prove that Respondent’s articulated reason for its actions was a mere pretext for discrimination, and that there is no evidence that Respondent was motivated by illegal race discrimination.

Complainant objects to summary decision and argues that Respondent treated Complainant differently from other managers who were similarly situated and who were white.

### **FINDINGS OF FACT**

Based on the record in this matter, I make the following findings of fact:

1. Complainant, James Gatewood, is a black male.
2. Complainant was hired by the Chicago Transit Authority (CTA) on November 1, 1974.
3. In May of 1994, Complainant was employed in the position of Rail Manager assigned to the Blue Line for the CTA.
4. That throughout his employment with Respondent, Complainant performed his duties in a manner considered acceptable by Respondent until May of 1994.
5. On May 8, 1994, Complainant was scheduled to work from 2:00 p.m. to 10:30 p.m., at the Des Plaines terminal on the Douglas Branch of the Blue Line.
6. On May 7, 1994, Complainant conspired with another CTA manager to work only four hours of his eight-hour shift, without authorization from the Respondent.
7. Respondent discovered the attempted conspiracy and removed both Rail Managers from service and recommended that they be discharged.
8. In lieu of discharge, the Complainant and the other Rail Manager were offered a last chance, whereby both managers agreed to be placed on a two (2) year probation during which they could not be away from their job location without permission.

9. Both managers signed a written “last-chance” Agreement with the CTA with the understanding that a violation of the agreement would be the basis for discharge.<sup>1</sup>

10. On October 10, 1995, Complainant was assigned to work the rush hour assignment of 8:00 a.m. to 4:30 p.m., as per his request.

11. On October 10, 1995, at approximately 8:45 a.m., forty-five minutes after his scheduled starting time, Complainant telephoned the Respondent and notified them that he would be in after 10:00 a.m., and gave them various reasons for his tardiness.

12. When Complainant arrived at work on October 10, 1995, he was notified by Respondent that he had been randomly selected for a drug-screening test.

13. On October 13, 1995, Complainant’s drug test results were sent to the CTA from an independent lab, which showed a positive reading for cocaine metabolites and marijuana.

14. On October 13, 1995, Complainant was relieved from duty and on October 17, 1995, Complainant was removed from service and suspended.

15. On October 20, 1995, Complainant was interviewed by Respondent, whereupon he admitted to substance abuse and requested a referral to CTA’s Employee Assistance Program (EAP).

16. On November 6, 1995, a report was submitted to the newly formed CTA’s Exempt Discipline Committee (EDC) regarding Complainant’s situation.

17. The report to the EDC cited violations of the following CTA General Rules: Rule 7 (a, b, c); Obedience to Rules, Rule 14 (a, e); Personal Conduct, Rule 18 (a,

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<sup>1</sup> The other Rail Manager involved in the conspiracy is deceased.

b); Reporting to Duty, Rule 24; Use of Best Judgment, Executive Orders 89-08 and 89-20; Prohibitions against the Use of Illegal Drugs, and violation of the FTA Drug and Alcohol Policy.

18. The matter was referred to the EDC for disposition and after reviewing the matter, the EDC concluded that Complainant had violated his last-chance agreement and CTA's drug policy, and decided that Complainant was to be discharged.

19. On November 28, 1995, Complainant was discharged from the employ of the Respondent.

20. After Complainant's discharge from the CTA, Complainant sought reinstatement pursuant to Ill. Comp. Stat., Ch. 70, Sec. 3605/28. A hearing was held on Complainant's Complaint on February 29, May 17, May 23 and May 30, 1996.<sup>2</sup>

21. CTA Managers Andy Bishop and Ralph Black are white males who tested positive for drugs and who were not discharged, but were allowed to enter EAP.

22. CTA Managers Andy Bishop and Ralph Black were not on probation nor were they covered under a last-chance agreement at the time of their positive drug results, and both men entered EAP prior to the creation of EDC.

23. CTA Manager Andy Bishop was placed on probation and entered into a last-chance agreement after completing EAP, and was given a demotion Mr. Bishop was subsequently discharged from the CTA for violating his last-chance agreement by being late for work.

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<sup>2</sup> Because of the present action, the Commission assumes that the Complainant was not granted reinstatement as a result of the Section 3605/28 hearing.

24. Finance Department General Manager Michael Brogan, who is a white male, was arrested for DUI in a CTA vehicle, and was given a suspension and then placed on probation. Mr. Brogan was eventually discharged from the CTA.

### **CONCLUSIONS OF LAW**

1. Complainant is an “aggrieved party” as defined by section 1-103(b) of the Illinois Human Rights Act, 775 ILCS 5-1-101et seq. (1996).
2. Respondent is an “employer” as defined by section 2-101(B) (1) (a) of the Act and is subject to the provisions of the Act.
3. The Commission has jurisdiction over the parties to and the subject matter of this action.
4. The Commission has adopted the standards used by the Illinois courts in considering motions for summary judgment for motions for summary orders.
5. Complainant cannot establish a *prima facie* case of race discrimination.
6. Respondent can articulate a legitimate, nondiscriminatory reason for its actions.
7. There is no genuine issue of material fact on the issue of pretext.
8. There is a no genuine issue of material fact on the issue of racial discrimination.
9. Respondent has filed competent, admissible evidence to show that the reason for terminating the Complainant’s employment was not based on race, but was based upon violations of the Respondent’s General Rules and Drug Policy. All of the evidence in the record shows that Complainant’s race was not a factor in Respondent’s

decision to terminate his employment. There is no evidence in the record from which a fact-finder might draw a reasonable inference of race discrimination.

10. Based on the record in this matter, there is no issue of material fact for decision. Respondent is, therefore entitled to a summary decision in its favor as a matter of law.

11. Respondent is entitled to summary decision as a matter of law.

### **DETERMINATION**

Respondent's Motion for Summary Judgment should be granted because, based upon the admissible evidence in the record, there is no genuine issue of material fact as to Complainant's claim that Respondent discriminated against him on the basis of race.

### **PROCEDURAL BACKGROUND**

Complainant filed Charge No. 1996 CF 2727 with the Department on May 10, 1996, alleging on his own behalf to have been aggrieved by practices prohibited by Section 2-102 (A) of the Human Rights Act. On December 18, 1996, the Department dismissed Complainant's charge, making a finding of lack of substantial evidence. Complainant filed a Request for Review and the Chief Legal Counsel entered an Order on April 11, 1997, vacating the dismissal and remanding the charge to the Department's Charge Processing Division for additional investigation. On July 17, 1997, a Complaint of Civil Rights Violation was filed with the Illinois Human Rights Commission under ALS No. 10035. A motion for Summary Decision was filed in this matter by Respondent on June 2, 1999, which motion is herefore being considered.

## DISCUSSION

Complainant, James Gatewood, was hired by the Chicago Transit Authority (CTA) on November 1, 1974. After having several bargaining unit positions, he was promoted to pool superintendent on December 12, 1989. On April 29, 1990, he was promoted to Superintendent 1, Transportation Personnel. During the period of his hire up to May of 1994, there does not appear to be any record of discipline against Complainant. On May 7, 1994, Complainant conspired with another Rail Manager in attempt to defraud the Respondent by only working four hours out of his eight-hour shift. Respondent ultimately admitted to the scheme. As a result of this incident, Complainant was given a “last-chance” agreement, in lieu of discharge. On October 10, 1995, Complainant violated the last-chance agreement by reporting late to work. Complainant submitted to a random drug test on the same day of the violation and the results were positive for traces of cocaine and marijuana. Complainant was fired from his position on November 28, 1995. Complainant filed for reinstatement with the state, which was presumably denied.

Complainant subsequently filed a charge of discrimination against Respondent. That charge alleged that Respondent discriminated against Complainant on the basis of race when Respondent terminated his employment. Complainant alleged that other white managers who were similarly situated were not fired.

Based on the record in this matter, there is are no issues of material fact as to whether Complainant’s race played a part in Respondent’s decision to dismiss the Complainant. Complainant has not submitted competent, admissible evidence that from which a fact finder may draw an inference of race discrimination.

This matter is being considered pursuant to Respondent's Motion for Summary Judgment, so certain special rules must be followed. A summary decision is analogous to a summary judgment. Cano v. Village of Dolton, 250 Ill. App. 3d 130, 620 N.E.2d 1200 (1st Dist. 1993). A motion for summary decision should be granted where 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, N.E.2d 48 (2d Dist. 1982).

Complainant states in his response to Respondent's Motion for Summary Decision that he has met his burden of proof to withstand a summary decision in Respondent's favor. Complainant states that his work record was exemplary until he was supervised by a white General Manager named Mark Dundovich, whom he claims treated him unfavorably because of his suspicions regarding a totally unrelated matter. The Complainant maintains that the Complainant's two-year probation as part of the last-chance agreement was unprecedented, excessive and discriminatory because other employees were not given the same punishment for the same violation. The Complainant alleges that his firing was based upon the violation of probation and not on the drug test results, which shows that Complainant was treated differently than others who also failed to report to work. In addition, the Complainant refers to the CTA's Section 3605/28 hearing and states that "while the "facts" stated in Respondent's Memorandum in Support o[f] its Motion for Summary Decision are basically true, they are incomplete."

Complainant basically argues that facts related to the differential treatment of the Complainant were not included in the hearing, and therefore the facts in Respondent's Memorandum are incomplete.

The Respondent maintains that the white managers who were disciplined were not similarly situated to Complainant. The Respondent further maintains that the Complainant was fired because of the violation of his last-chance agreement as well as the violation of their drug policy. The Respondent denies that race was a factor in their determination to fire the Complainant. The Respondent points out that in the response to their motion for summary decision the Complainant argues about facts, which are unsupported by affidavit.

Generally speaking, in order to establish a prima facie case of discrimination, complainants need only present facts establishing that 1) they are members of a protected class; 2) they suffered an adverse employment action by the respondent; and 3) similarly situated co-workers not in their protected class were treated differently. Dixon and Borden Chemical, 46 Ill. HRC Rep. 116 (1985)

Complainant has not presented direct evidence of discrimination, so he must, if he can, show that he has presented some indirect evidence of race discrimination, using McDonnell-Douglas v. Green, 411 U.S. 793 (1973). Under McDonnell-Douglas, once a complainant has established a prima facie case with indirect evidence, a rebuttable presumption of discrimination arises and the respondent must articulate a lawful reason for its actions. (Clyde, 564 N.E. 2d at 267). If respondent articulates a lawful reason for its actions, the presumption dissolves. (Id.).

Once a respondent makes an articulation, the emphasis of the case changes and the decisive issue becomes whether the reason articulated by the respondent for its actions is a pretext for discrimination. (Clyde, 564 N.E. 2d at 267). Pretext can be established by showing the proffered reason has no basis in fact, or, that the proffered reason did not actually motivate the respondent, or, that it was insufficient to motivate the respondent. (Kier v. Commercial Union Ins. Co., 808 F. 2d 1254, 1259 (7th Cir. 1987)). A showing of pretext allows that trier of fact to infer discrimination, but does not require the trier of fact to do so. (St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742 (1993)).

The Human Rights Act defines race discrimination in employment as prohibiting discrimination in employment because of a person's race and forbids covered employers to discriminate based on race "with respect to Recruitment, Hiring, Promotion, Renewal of Employment, selection for training or apprenticeship, *discharge*, discipline, tenure or terms, privileges or conditions of employment (775 ILCS 5/2-102(A) (1996)). (Emphasis added).

Complainant has supplied evidence to show that he was performing his job to Respondent's reasonable expectations up until his probation and the violation of probation and subsequent drug results. He has also supplied evidence to show that he is a member of a protected class. The question now arises as to whether the Complainant has shown that the same adverse action was not taken against a similarly situated non-class member. See Loyola University of Chicago v. Human Rights Commission, 149 Ill.App. 3d 8, 500 N.E.2d 639, 102 Ill. Dec. 746 (1st Dist. 1986).

In this instance, the Complainant, a black Rail Manager, alleges that he was discharged under circumstances where white Rail Managers in a similar situation were not discharged. The record shows that two of the named white Rail Managers, Andy Bishop and Ralph Black, were not similarly situated to the Complainant in that neither of them were on probation or under a last-chance agreement at the time of their drug results. The record also shows that at the time the two white Rail Managers entered the EAP for their drug problem, the EDC, which the Complainant's case was referred to, was not yet in existence. In fact, the record shows that Mr. Bishop was placed on probation and a last-chance agreement and was subsequently fired from the CTA for violating his last-chance agreement for being late for work, as was the Complainant.

The other named similarly situated white employee was Michael Brogan from the Finance Department. Mr. Brogan was arrested for a DUI while driving a company vehicle and failed to report the matter to CTA. First, it should be noted that Mr. Brogan's duties as a manager for the Finance Department differ greatly from those of the Complainant's, whose job is to make sure that the CTA trains are running properly. There is a great safety concern when it comes to the duties of the Complainant versus that of Mr. Brogan who works in the Finance Department. Second, Mr. Brogan was not on probation at the time nor was he under a last-chance agreement. Lastly, Mr. Brogan was ultimately given a suspension and then placed on probation and was eventually fired from his position with the CTA.

Complainant argues that his work record was exemplary until he was supervised by a white General Manager who was biased against him for an unrelated matter. This fact is irrelevant in the determination of this case because the alleged bias did not involve

a racial factor. The Complainant further argues that the two-year probation given to him under the last-chance agreement was unprecedented, excessive and discriminatory because other employees were not given the same punishment for the same violation. This fact is also irrelevant to this case because the Complainant's Complaint does not allege that he was treated differently when he was given a two-year probation. The Complaint alleges that he was treated differently from other managers who had violated their probation.

The Complainant also argues that the firing was based solely upon his violation of the probation after he reported late to work. The facts show that the reason given by Respondent for the firing was due to the tardiness as well as the positive drug results. The Complainant admits that the documents and supporting affidavits pertaining to the Section 3605/28 hearing were true, although he argues that the documents were incomplete and the facts relating to the disparate treatment of the Complainant were not made a part of the hearing.

The Complainant has not presented any evidence to contradict the facts set out by Respondent's Memorandum in Support of its Motion for Summary Decision. The evidence in the file supports the Respondent's contention that the Complainant was not treated any different from any other of their employee-managers who were under a last-chance agreement and who violated their agreement as well as CTA's drug policy. The affidavits also support Respondent's contention that the Complainant was fired on the basis of the violation of his probation as well as the violation of its drug policy. As in any motion for summary judgment, well-alleged facts within an affidavit must be taken as true when they are not contradicted by counter-affidavits. Conroy v. Andeck, 81 Year

End Ltd. (1985), 137 Ill. App.3d 375.

In this instance, the alleged facts contained in the respective affidavits are not contradicted by counter-affidavits. Complainant has failed to present any counter-affidavits that would negate taking the ones submitted by the Respondent as being true. In fact, Complainant admits that the testimony taken from the Section 3605/28 hearing were true, although incomplete. The sworn testimony from the Section 3605/28 hearing is presented here as evidence in support of Respondent's Motion for Summary Decision. It is well settled that the testimony of a witness at a prior hearing is admissible in evidence at trial where the witness is unavailable and when ample opportunity to cross-examine existed at the prior hearing. People v. Kevin Rice, 166 Ill.2d 35, 651 N.E.2d 11083, 209 Ill. Dec. 635 (1995, Ill. Sprm. Crt.) However, it is also true that testimony given in another action is admissible as substantive evidence. Doherty v. Kill, 140 Ill. App.3d 158, 488 N.E.2d 629, 94 Ill. Dec. 630 (1986, 1<sup>st</sup> Dist.). In this instance, the individuals who testified in the Sec. 3605/28 hearing were testifying from personal knowledge and under oath. Under the present circumstances, Complainant has not shown any direct or indirect evidence to support a *prima facie* case of racial discrimination.

The uncontested facts in the record show that the Complainant was given a two-year probation through a last-chance agreement, in lieu of a firing, because of the attempted fraud he committed while working for Respondent. The facts show that the other manager who was involved in the attempted fraud was given the exact same punishment as the Complainant. The facts also show that the Complainant violated his last-chance agreement on October 10, 1995, by reporting to work late. This fact in and of

itself was a sufficient basis to fire the Complainant. The Complainant was given a random drug test, which he failed, and the matter was sent to the newly created EDC.

The facts show that the EDC recommended terminating Complainant's employment for violating his probation and for violating their drug policy. The record is void of any evidence that any white CTA managers who were on probation through a last-chance agreement and who violated their probation as well as CTA's drug policy, were not terminated by the Respondent. In fact, the available evidence from the record shows the opposite in that a white manager was subsequently fired for reporting to work late, as was the Complainant. The evidence also shows that another white manager was subsequently fired from his position after violating CTA's alcohol policy.

### **CONCLUSION**

Paragraph 8-106.1 of the Illinois Human Rights Act, 775 ILCS 5/101-1 et. seq., specifically provides that either party may move, with or without supporting affidavits, for a summary order in its favor. If the pleadings and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a recommended order as a matter of law, the motion must be granted. The Commission has adopted the standards used by the Illinois courts in considering motions for summary judgment for motions for summary orders, and the Illinois Appellate Court has affirmed this analogy. Cano v. Village of Dolton, 250 Ill App. 3d 130, 620 N.E.2d 1200, 189 Ill. Dec. 833 (1st Dist. 1993).

There appears to be no direct or indirect evidence in the record to show that the Complainant was treated differently from other non-black managers who were similarly situated. As such, the Complainant has failed to establish a *prima facie* case of illegal

discrimination. Taking the evidence in the record as competent, it appears that there is no genuine issue of material fact on the issue of whether race was a determining factor in CTA's employment action. Therefore, Respondent's Motion for Summary Decision should be granted as a matter of law.

**RECOMMENDATION**

Thus, for all of the above reasons, it is recommend that Respondent's Motion for Summary Decision be granted, and that the instant Complaint and underlying Charge of Discrimination be dismissed with prejudice as against Respondent.

HUMAN RIGHTS COMMISSION

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BY:  
NELSON EDWARD PEREZ  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION

ENTERED: March 30, 2001