This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 5/13/04.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
TIMOTHY HATCH,	)	
	)	
Complainant,	)	
	)	
and	)	CHARGE NO: 2000CF1413
	)	EEOC NO: 21BA00792
	)	ALS NO: 11673
BLOCKBUSTER ENTERTAINMENT, GROUP	)	
	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me on Respondent's Motion for Summary Decision pursuant to 8-106.1 of the Illinois Human Rights Act. (775 ILCS 5/8-106.1) Complainant has filed a response and Respondent has filed a reply. Accordingly, the motion is now ready for a decision.

Contentions of the Parties

In the instant case Respondent contends that it is entitled to a decision as a matter of law because no genuine issue of material fact exists between the parties. Specifically, Respondent argues that Complainant cannot state a *prima facie* case of sex discrimination because: 1) he cannot establish that he performed his job satisfactorily; and 2) he cannot establish that a similarly situated female employee was treated better than he. Further, Respondent asserts that even if Complainant could establish a *prima facie* case his claim would fail on the issue of pretext because Complainant cannot establish that his termination for violating company policy was based on his sex.

Conversely, Complainant argues that the motion for summary decision should be dismissed. Specifically, Complainant claims that he can establish: 1) an all-female

human resources staff terminated him based on a gender biased investigation into allegations that he was dating his subordinates; and 2) a female store manager, who also impeded an internal investigation by claiming she had not dated Respondent, was similarly situated to him. However, she was only given a warning for violating the same company policy prohibiting dating. Thus, Complainant argues, he can establish that he was terminated from his job because of his sex.

Findings of Fact

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

1. At all times pertinent to this Complaint, Complainant, who is male, was employed by Respondent as a District Manager.

2. At some time during his employment, rumors surfaced that he was dating and/or had dated Store Managers under his direct supervision.

3. Respondent had a company policy prohibiting its employees from dating those who reported directly to them.

4. In August of 1999, Respondent conducted a reasonable investigation of the rumors that Complainant was dating and/or had dated Store Manager Chinita Holloman (Holloman) who reported directly to him. During the investigation both Holloman and Complainant denied that they were dating.

5. Again in December of 1999, a reasonable investigation was conducted into Complainant's conduct. This time, Holloman admitted that she and Complainant began dating around the time of the August 1999 investigation.

6. During the investigation, Complainant admitted that in the past he had dated a Store Manager named Robin Spencer, but denied that he had dated Chinita Holloman.

7. As a result of the investigation, Respondent determined Complainant did date Chinita Holloman and terminated him for hindering an internal investigation and violating company policy.

8. Holloman was issued a “final warning” for hindering an internal investigation and violating company policy.

9. On January 3, 2000, Complainant filed a charge of discrimination with the Illinois Department of Human Rights alleging that he was discriminated against on the basis of his race and sex.

10. On December 12, 2001, the Department filed a Complaint on Complainant’s behalf alleging that Respondent discriminated against him on the basis of his sex in violation of section 2-102(A) of the Illinois Human Rights Act. This Motion for Summary Decision followed.

Determination

Complainant’s case should be dismissed because no genuine issue of material fact exists between the parties on the issue of pretext.

Discussion

The Illinois Human Rights Act provides that a party is entitled to a summary decision "if the pleadings and affidavits…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." ***775 ILCS 5/8-106.1.*** That provision of the Act mirrors the well-established procedure followed in the Illinois Circuit Courts. In ruling on a motion for summary decision, it is incumbent on an administrative law judge to consider all of the pleadings, affidavits and exhibits and to strictly construe them against the movant, so as to leave no doubt but that the summary decision is proper. *See*, ***Rios and Terry Farms***, __Ill. HRC Rep.__ (1996CA1659, December 7,1998).

While Complainant need not prove his case to overcome the motion, he must submit sworn evidence to establish a factual basis that would entitle him to a decision under the applicable law. ***Rios*** slip op. at 8. In doing so, Complainant may establish a *prima facie* case of discrimination through the use of direct or indirect evidence. In the instant case, Complainant maintains he can establish that he was discriminated against on the basis of his sex by employing both methods.

To establish his case with direct evidence Complainant must present facts, which taken separately or in combination, raise an inference of discrimination. See, for example, ***Mott and City of Elgin***, ___ Ill. HRC Rep.__ (1986CF3090, June 30, 1992). This can be accomplished by showing "statements by the employer which explain or reveal the employer's discriminatory motive", or by presenting facts that "make it more likely than not that the employer's actions were motivated by unlawful discrimination." ***Hyatte and Quinn and Co. of Winnebago***, __ Ill. HRC Rep. ___ (1989CF2338, March 11, 1999), slip op. at 33.

Here, Complainant attempts to establish facts that reveal Respondent's actions were the result of a discriminatory motive by arguing that an all-female human resource team conducted an investigation of the rumor that he dated employees by interviewing only female witnesses. Complainant claims that this fact alone reveals a discriminatory motive because the human resource manager accepted female employees' versions of events over his own recount during the investigation, simply because of their gender. The absurdity of this argument is that Complainant asks the Commission to find that an all-female investigation is inherently suspect simply because females conducted an investigation of a male employee. (See, for example, ***Sullivan and Centers for New Horizons, Inc.***, __ Ill. HRC. Rep. __ (1999CF1587, October 31, 2002) for the proposition that decisions by a complainant's female supervisor were not per se suspect simply because the supervisor was outside the complainant's demographic group.)

Without other evidence that the investigation was discriminatory, I cannot say that investigators' gender alone is sufficient evidence a discriminatory motive in the investigation. Thus, Complainant cannot establish his claim through the use of direct evidence.

Complainant is now left with establishing unlawful discrimination through the use of indirect evidence. Under this method, Complainant must first establish a *prima facie* case. The burden of production then shifts to Respondent to articulate a legitimate non-discriminatory reason for terminating Complainant. If Respondent is successful in its articulation, then the presumption of discrimination falls and Complainant must prove that Respondent's articulated reason is unworthy of belief and is simply a pretext for unlawful discrimination. See, ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248 (1981); ***Zaderaka v. Illinois Human Rights Comm'n.,*** 131 Ill. 2d 172, 545 N.E.2d 684 (1989).

Although the elements of a *prima face* case may vary from case to case, to establish a *prima facie* case of discrimination, generally a complainant is required to show that 1) he is a member of a protected class, 2) he suffered an adverse act, and 3) similarly situated persons outside of his protected class were treated differently. [1] ***ISS International Service Systems, Inc. v. Illinois Human Rights Comm'n,*** 272 Ill. App. 3d 969, 651 N.E.2d 592 (1995). Elements one and two are undisputed in the record, so Complainant must present some evidence that he could establish the third element of

[1] Both parties misstated the elements that Complainant is required to show to establish a *prima facie* case of discrimination by adding the element of " reasonable job performance." Much time was spent in both the Motion for Summary Decision and the responsive pleadings with respect to whether or not Complainant could establish that he was performing his job up to Respondent's reasonable expectations. However, both the Illinois Appellate Court and the Commission have previously held that the element of job performance is not determinative of a complainant's *prima facie* case of discrimination because there could always be other, less pure, motives behind an employee's termination. See, ***ISS International Service Systems, Inc. v. Illinois Human Rights Comm'n,*** 272 Ill. App. 3d 969, 651 N.E.2d 592 (1995); ***Battieste and C.E. Niehoff & Co.,*** Ill. HRC. Rep (1989CF4075, November 14, 1995).

his *prima facie* case at hearing in order to survive Respondent's Motion for Summary Decision.

Here, Complainant argues that he was treated differently than Chinita Holloman who also initially denied having a relationship with Complainant, but later recanted the denial. Holloman was given a "final warning" rather than the termination that Complainant received. However, Complainant and Holloman are not similarly situated employees because Complainant supervised Holloman. While it is true that they are both members of Respondent's management team, Respondent presumably had greater management responsibility because he served as a district manager over a number of stores, one of which Holloman managed. In order for Holloman and Complainant to be similarly situated for purposes of establishing the third prong of a *prima facie* case, Holloman would also have to be a district manager with the similar job responsibilities as Complainant. See, for example, ***Sola and IBM Corp.,___*** Ill. HRC Rep.___ (1995CA0810, July 24, 1998) where the Commission held that "similarly situated" means "fairly comparable in terms of job description and duties." Slip op. at 7.) That simply is not the case here.

Interestingly though, Complainant, relying on ***Carson v. Bethlehem Steel Corp.***, 82 F3d 157(7th Cir 1996), maintains that he is not required to establish that a similarly situated employee was treated differently in order to prove a *prima facie* case of discrimination. However, reliance on ***Carson*** does not help Complainant further his case. While it is true that the court in ***Carson*** stated that a plaintiff need not prove that he was replaced by an employee outside of his protected class in order to raise an inference of discrimination, the court held that a plaintiff must provide some evidence of "a logical reason to believe that the decision rests on a legally forbidden ground." ***Id*** at 159. In other words, he must provide evidence that the decision was motivated by unlawful discrimination such as sex. Here, Complainant has not provided any evidence

that he was terminated because of his gender. What he has shown is that the discipline for violating company policies was applied differently to a lower level manager, and while that application may be unfair, there is no evidence that it was discriminatory. The court in ***Carson*** also illustrates this point by reminding employees that " [t]he question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [sex]." ***Id.***

Pretext

Even though Complainant cannot establish a *prima facie* case of sex discrimination, he may still overcome the motion for summary decision because Respondent articulated a legitimate, non-discriminatory reason for its actions. Therefore, Complainant's requirement to establish a *prima facie* case is now obviated because of the articulation, and the only decisive factor becomes whether or not Respondent's reasons for its actions were a pretext for discrimination. (See, ***Texas Department of Community Affairs v. Burdine***, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), ***Clyde v. Human Rights Commission***, 206 Ill. App. 3d 283, 564 N.E.2d 265 (4th Dist. 1990)).

In the instant case, Respondent has articulated that it terminated Complainant for violating a number of company policies, one of which was impeding the August 1999 investigation regarding the nature of his relationship with his subordinate, Chinita Holloman. Complainant must present some evidence that the articulation is merely a pretext for unlawful discrimination by one of two methods: either 1) by indirectly proving Respondent's reason is unworthy of belief or 2) by directly showing that Respondent was motivated by discriminatory animus to take action against Complainant. ***Vidal v. Illinois Human Rights Commission, et al.***, 223 Ill. App. 3d 467; 585 N.E.2d 133; 165 Ill. Dec 737 (5th Dist 1991). The record does not reveal Complainant met his burden of proof by either method.

Complainant does not offer any evidence that Respondent was motivated by some discriminatory reason to terminate him, but he submitted his own self-serving affidavit to establish that Respondent's articulated reason was unworthy of belief. In his affidavit, Complainant states that he did not date Chinita Holloman, but agrees he had a prior relationship with an employee who was not his subordinate. Thus, Complainant argues that based on this information, Respondent had no reason to terminate him as a result of its investigation. However, those affirmations do little to establish pretext. Whether or not Complainant dated Respondent's employees is not the issue at this juncture. What is important here is whether Respondent had reason to believe *at the time of its investigation*, that Complainant violated the company dating policy, or that he impeded the August 1999 internal investigation.

Although Complainant disagrees with the thoroughness and manner of the investigation, he offers nothing to show that it was discriminatory. In fact, Complainant even suggests in his affidavit that Holloman's admission to human resources personnel that the two had dated was motivated by a reprimand she received from Complainant regarding the quality of her work. Accepting this statement as true, by its very nature it cannot be viewed as being made on the basis of Complainant's gender. Rather, it establishes that Holloman made the statement during the investigation in retaliation for the discipline she received from Complainant. Unfortunately for Complainant, Respondent accepted Holloman's statement and other allegations as true during the investigation, but nothing in the record shows that Respondent accepted any employee's version of events based on gender.

In this case, while Complainant may believe the investigation and its results were unfair, it does not mean that it was discriminatory. Human Resources Manger Doriann English's affidavit establishes that a reasonable investigation was conducted which resulted in Complainant's termination. It is well established that the Commission cannot

serve as a super-personnel agency to second-guess the business decisions of a respondent. See, ***Rosman and Highland Park Lincoln Mercury***, __Ill. HRC Rep.___ (1991CA3068, March 19, 1996). Much of Complainant's efforts in response to the motion for summary decision focused on the fact that Respondent failed to accept his statement that he did not date Chinita Holloman. However, as previously stated, Complainant has not demonstrated that Respondent's disbelief of him was because he is male. "[I]n order to succeed on a claim, a complainant must show more than a different business decision in [his] favor could have been reasonably justified." ***Hickman and Central Illinois Public Service Co.,*** __ Ill. HRC. Rep.___, slip op. at 21 (1997SA0162, August 7, 2000). Simply put, construing the facts of this record in the light most favorable to Complainant, no genuine issue of material fact exists on the issue of pretext because he has not shown Respondent's investigation was a sham or that its business decision was based solely, or even remotely on his gender.

Recommendation

Based on the above findings of fact and conclusions of law, I recommend that the Commission grant Respondent's Motion for Summary Decision and dismiss with prejudice the Complaint and underlying charge in this matter.

ILLINOIS HUMAN RIGHTS COMMISSION

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KELLI L. GIDCUMB
Administrative Law Judge
Administrative Law Section

ENTERED THE 17TH DAY OF MARCH, 2004