



STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)	
)	
LEONARD R. HORBAS,)	
)	CHARGE: 1987 CF 1067
)	1985 CF 2507
Complainant,)	EEOC: 21B870097
)	ALS NO: 4109
)	5943
and)	
ST. JOE CONTAINER CO. and)	
ST. JOE CORP.,)	

Respondents.

RECOMMENDED ORDER AND DECISION

This matter comes to be heard pursuant to Respondent's, St. Joe Container Co.'s and St. Joe Corporation's (St. Joe) Motion for Summary Decision. Complainant, Leonard R. Horbas, filed a Response and St. Joe filed a Reply. This matter is ready for decision.

Statement of the Case

Complainant filed Charge No. 1987 CF 1067 with the Illinois Department of Human Rights (Department) on October 14, 1986. In that Charge, Complainant alleged that he had been harassed, and denied a transfer by Respondent in retaliation for a previous discrimination charge that he had filed against Respondent. (1985 CF 2507). The Department filed a complaint pursuant to Charge No. 1987 CF 1067 on February 10, 1992. Complainant filed an Amended Complaint was filed on June 21, 1993.

Since that date, various motions were filed by the parties and ruled upon by the Commission. The Motion for Summary Decision in this matter was filed on August 2,

1999. Complainant filed his Response on September 20, 1999 and Respondent filed its Reply on October 18, 1999.

Contentions of the Parties

Retaliation Regarding The Transfer to National Accounts

Complainant contends that Respondent denied him a transfer to St. Joe's National Accounts Office in retaliation for his filing a prior discrimination charge (1985 CF 2507), instead choosing Charles Nobles to fill that position.

In its Motion for Summary Decision, Respondent states that Complainant cannot make a prima facie case that St. Joe denied him a transfer in retaliation for filing a prior discrimination charge, because the person making that transfer decision was unaware of the prior charge.

Also, Respondent states that Complainant cannot establish a causal connection between his filing the prior charge and being denied the transfer; Complainant has no direct evidence of retaliation, evidence that similarly situated individuals were treated more favorably, and no sufficient temporal link between the protected activity and the adverse action.

Further, Respondent states that it chose Charles Nobles for the transfer because of his excellent prior work experience, knowledge of the industry, favorable references and familiarity with St. Joe's Chicago market. Respondent argues that Horbas cannot show that St. Joe's legitimate articulated reasons for choosing Nobles were a pretext for retaliation. Also, Respondent states that Horbas' work performance was less than stellar. He had been demoted, his sales revenue was in decline, and he was having problems with

clients, other salespeople, staff and trainees. Respondent contends that Nobles was clearly the better candidate for the national Accounts position.

In his Response, Horbas states that he was told that St. Joe Regional Vice President Charles Brainen said that Francis Hudson, President of St. Joe, would never approve Complainant's transfer to a position in the National Accounts Office because he had filed a discrimination charge against St. Joe. This, argues Complainant, is direct evidence of discrimination.

Also, Complainant states that there is a question of material fact as to whether Brainen was aware of Horbas' interest in the position at the National Accounts Office; Horbas states that Respondent was aware of his interest, St. Joe states that it was not. Horbas suggests that the fact that St. Joe may not have been truthful regarding its knowledge of Complainant's interest in the position raises an issue concerning its motivation in choosing Nobles.

Additionally, Complainant states that in its answers to interrogatories, St. Joe relates that it did not deny Horbas' transfer request because it did not know of the request. However, Respondent also states that it could not have denied Horbas' transfer request in order to retaliate against him for filing a prior discrimination charge because the person who made the decision regarding the transfer, Jim Sry, was unaware of the prior charge. Complainant argues that these two positions are contradictory and therefore give rise to a question of fact regarding Respondent's articulated reasons for choosing Nobles for the National Accounts Office position.

Next, Complainant states that he is able to make a prima facie case under the indirect method of proving discrimination, pursuant to McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973), as well. Complainant argues that he has shown that: (1) he engaged in a statutorily protected activity; (2) he suffered an adverse action by his employer; and (3) there was a causal link between the protected activity and the adverse action. Complainant states that Respondent concedes the first two prongs. However, Complainant argues that it is not required that the person who made the decision rejecting him for the position in National Accounts be aware of his protected activity.

Complainant disputes Respondent's claim that no causation exists because Sry, the decisionmaker regarding the transfer, knew nothing of Complainant's prior discrimination charge against St. Joe. In addition to claiming that it is not necessary that Respondent be aware of his protected activity, Complainant contends that Sry's knowledge of Complainant's prior discrimination charge is irrelevant. To support his contention, Complainant points to Respondent's interrogatory answers which suggest that Respondent did not know that Horbas was interested in the position at National Accounts. (*St. Joe's responses to Interrogatory Nos. 22, 24 and 26*). Complainant argues that because of this alleged lack of knowledge, Respondent did not actually make a decision regarding Horbas. Therefore, whether the decisionmaker was aware of Horbas' prior discrimination charge is irrelevant.

Complainant argues that Respondent's argument, that causation has not been established, is not well founded. Therefore, Complainant's prima facie case has been established and questions of fact exist, requiring a hearing.

Next, Complainant states that there was no formal application process for the position at National Accounts. Complainant argues that even if Respondent did not know

of his interest in the National Accounts position, it had a duty to notify him of its existence and consider hiring him for it.

Finally, Complainant states that Respondent's legitimate business reason for awarding the National Accounts position to Nobles is unworthy of belief. Complainant bases this assertion on his claim that Respondent changed its position regarding whether it was aware of Complainant's interest in the transfer, and that Respondent changed its position regarding whether Complainant was considered for the position at all.

In its Reply, Respondent disputes Complainant's claim that Brainen's statement that Horbas would never get the National Accounts position because of his prior discrimination charge, constitutes direct evidence of discrimination. Respondent states that Brainen had nothing to do with the National Accounts decision. That decision was made by James Sry, Marketing Manager at Respondent. Respondent argues that comments by non-decisionmakers do not constitute direct evidence of discrimination. Also, Respondent states that despite Complainant's claim to the contrary, St. Joe's President, Fran Hudson, was not involved in the National Accounts decision. Further, Respondent argues that the statement Complainant alleges was made by Brainen is hearsay, and therefore should not be considered by this tribunal.

Next, Respondent states that Complainant's claim that it changed its position regarding whether it was aware of Horbas' interest in the National Accounts position is irrelevant. Respondent states that Sry's unrefuted testimony that he knew nothing of Horbas' prior age claim dooms Complainant's retaliation allegation. Sry could not have retaliated against Complainant based upon his filing the prior charge if Sry was unaware of it.

Regarding its legitimate, articulated reason for hiring Nobles rather than Complainant, Respondent states that Horbas has failed to demonstrate that he was a better candidate than Nobles. Respondent contends that this showing is required to demonstrate that Respondent's reasons for hiring Nobles are unworthy of belief. Respondent states that Complainant's subpar job performance belies any argument that Horbas was a superior candidate.

Retaliatory Harassment Regarding Questioning About The Note

Respondent became aware of a note addressed to Complainant from a former St. Joe employee seeking Respondent's confidential tax information. St. Joe's Regional Vice President, Howard Brainen and St. Joe's Counsel John McDonald questioned Horbas about the note and subsequently suspended Horbas for an indefinite period of time. However, the next day, Brainen reconsidered, invited Horbas back to work and Horbas accepted. Respondent states that the fact that Horbas had filed a prior discrimination charge played no part in the suspension decision.

Respondent argues that there is no evidence of retaliation here because it took no adverse action against Horbas. Respondent states that Horbas returned to work the day after he was suspended and lost no pay. Complainant's contention that he was humiliated by the incident is not enough to sustain a prima facie case of retaliation.

Further, Respondent states that its conduct does not rise to the level of harassment under the Act because it did not make the work environment so hostile and abusive that it constituted a different term and condition of employment, based upon a discriminatory factor. Respondent states that Complainant was questioned fairly; he was

only questioned about the note. No questions were asked regarding his prior discrimination charge. Respondent states that it was within its rights to question Complainant about a note addressed to him requesting confidential information about St. Joe. Further, Respondent argues that it was a single, isolated incident and there was no physical touching, yelling or abusive remarks made toward Complainant. In sum, Respondent argues that the questioning was not serious and pervasive enough to constitute harassment.

In his Response, Complainant disputes Respondent's contention that an adverse action was not taken against him. Complainant states that he was humiliated and unsure of whether he would be allowed to return to work. Complainant contends that he was subjected to a "grilling" about the note and that Respondent's conduct constituted severe and pervasive harassment. Horbas contends that this is sufficient to show that he suffered adversity at the hands of Respondent.

In its Reply, Respondent again asserts that it had a right and responsibility to question Horbas about the note. The questioning had nothing to do with the fact that Horbas had filed a discrimination charge against St. Joe, one year earlier.

Findings of Fact

1. Complainant, Leonard Horbas, was hired as a salesman for Respondent, St. Joe, in 1971.
2. Horbas was promoted to sales manager in July of 1983.
3. Beginning in March of 1984, Complainant's sales volume and acquisition of new accounts, declined.

4. Also, Complainant's supervision and direction of subordinates was poor.
5. Complainant was notified of these performance deficiencies.
6. Horbas was demoted to salesman in January, 1985.
7. Horbas filed an age discrimination charge against Respondent on October 14, 1986.
8. Throughout 1985, Complainant's sales figures and job performance were poor.
9. During the same time period, Complainant's customers lodged complaints against him regarding his performance.
10. Complainant was notified of these performance deficiencies.
11. Horbas told James Sry, Marketing Manager of St. Joe, that he (Horbas) was interested in a position in the National Accounts Office.
12. Subsequently, Complainant was denied a position in St. Joe's National Accounts Office.
13. Charles Nobles was hired to fill that position.
14. Hudson played no part in the hiring decision at the National Accounts Office. Hudson only approved Nobles' salary.
15. James Sry, Marketing Manager at St. Joe, made the decision to hire Nobles for the National Accounts position.
16. Sry was unaware that Complainant had filed an age discrimination charge against St. Joe.
17. On April 23, 1986, Respondent questioned Horbas about a note that was in his possession. The note contained references to St. Joe's tax information.

18. Howard Brainen and John McDonald, St. Joe's Counsel, met with Complainant and questioned him, regarding why he was in possession of a note requesting confidential information about St. Joe.
19. As a result of that meeting, Horbas was suspended by Brainen.
20. The following day, Brainen reconsidered his decision and invited Horbas back to work. Horbas accepted.
21. Horbas lost no pay as a result of this suspension.
22. Horbas retired from St. Joe in 1990.

Preliminary Matters

Complainant objects to the following paragraphs in Respondent's Motion for Summary Decision on the basis that they are hearsay, irrelevant and that there is no indication that the decisionmaker relied upon the information in denying Horbas the transfer to National Accounts: ¶ 7, 9-15, 17, 23, 25-33. Also, Complainant makes the same objection to ¶ 5 and Exhibit 5 of Robert Hall's affidavit, and ¶ 2 and Exhibits 1 and 2 of John Wesley Moulter's affidavit.

Generally, hearsay evidence is not allowed due to its unreliability. However, when evidence is not offered to prove the truth of the matter asserted, but only to show the bases upon which the adverse decision was made, that evidence is admissible pursuant to an exception to that hearsay rule. Kindred v. Human Rights Commission, 180 Ill.App.3d 766, 536 N.E.2d 447, 129 Ill.Dec. 607 (3rd District 1989). In the case at bar, Robert Hall's affidavit indicates that Complainant's poor work history was the reason for his demotion in 1985. Complainant's work history is illustrated in the above

cited paragraphs, therefore they are relevant. James Sry indicates that Complainant's work history was one of the reasons that Horbas was not chosen for the position at National Accounts. (*Affidavit of James Sry*, ¶ 2-3). The paragraphs to which Complainant objects clearly are admissible to show the basis on which the demotion and National Accounts decisions were made.

Complainant also objects to Exhibits 1 and 2 (graphs) of Robert Hall's affidavit on the basis that the graphs are not official company records and do not contain information upon which they are based. He objects to Exhibit 3 of Hall's affidavit (chart) on the basis that it is not authenticated and that it is hearsay.

Despite Respondent's objections, graphs and charts are allowed if they aid in the understanding of a witness' testimony. Their admission or exclusion rests within the discretion of the administrative law judge. See, Burke v. Toledo, Peoria & Western Railway, 148 Ill.App.3d 208, 101 Ill.Dec. 358, 498 N.E.2d 682 (1986). In the instant case, Hall testifies that Horbas' sales revenue was in decline. He provides two graphs and a chart to illustrate his testimony. The exhibits do aid in the understanding of Hall's testimony and are therefore admissible.

Complainant objects to Exhibits 1 and 2 of John Wesley Moulter's affidavit on the grounds that they are not business records and are therefore hearsay. The exhibits are inter-office correspondence, directed to Moulter, documenting incidents that occurred involving Complainant in the fall of 1984. The memoranda were written in January, when Moulter found out that the incidents occurred. Pursuant to Illinois Supreme Court Rule 236, any writing or record of any act, occurrence or event is admissible as evidence of the act, occurrence or event if made in the regular course of business and made within

a reasonable time thereafter. Moulter states that these records are kept in the ordinary course of business at St. Joe in ¶ 2 of his affidavit. The exhibits are admissible.

Complainant objects to ¶ 23 of Respondent's Motion for Summary Decision on the grounds that Respondent has not disclosed any authentic records of St. Joe that support the contentions in that paragraph. The fact that documents are not submitted in support of testimony may affect its weight but not its admissibility.

Next, Complainant objects to ¶ 46 of Respondent's Motion for Summary Decision. That paragraph refers to the questioning of Horbas about the note. Complainant objects to this on the grounds of relevance. The complaint in the case at bar alleges that the questioning amounted to retaliatory harassment, and seeks appropriate relief. Clearly ¶ 46 is relevant.

Next, Respondent requests that Exhibit 10, attached to Complainant's Response, be stricken because it is unsworn. Exhibit 10 is indeed unsworn, and therefore fails to qualify as a counteraffidavit pursuant to Supreme Court Rule 191(a). It cannot be considered by this tribunal. Olaf v. Christie Clinic, 200 Ill. App. 3d 191, 558 N.E.2d 610, 146 Ill. Dec. 647 (Fourth District, 1990).

Finally, Respondent requests that this tribunal disregard Complainant's allegation that Moulter told him that Brainen said that Fran Hudson, St. Joe's President, would not allow Complainant's transfer to National Accounts because Complainant had filed a discrimination charge against Respondent. Respondent states that this statement is hearsay. Hearsay evidence will not be allowed when considering a Motion for Summary Decision unless it falls within an exception to the hearsay rule (*see above*). Clearly, a statement made by a third party, told to and relayed by Complainant, is hearsay.

Brainen's statements, told to Complainant by Moulter do not fall within a hearsay exception. As such, they will not be considered in this tribunal's decision on the instant Motion for Summary Decision.

Discussion

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 of 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 standards used by 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.App3d 130, 620 N.E.2d 1200, 189 Ill.Dec. 833 (1st District 1993).

Retaliation Regarding The Transfer to National Accounts

In order to establish a prima facie case of retaliation for having filed a prior charge of discrimination, complainants must present facts establishing that (1) the complainant engaged in a protected activity that was known by the alleged retaliator; (2) the respondent subsequently took an adverse action against complainant; (3) there was a causal connection between the protected activity and the adverse action. Jones and Commonwealth Edison Company, Ill.HRC Rep. (1987CF1778, 1988CF3261, 9/11/95), Donald Witty and Illinois Department of Public Health, 1995 ILHUM LEXIS 575, (September 26, 1995).

The method of proving a charge of discrimination through indirect means is also well established. First, complainant must establish a prima facie showing of discrimination. If (s)he does so, respondent must articulate a legitimate, non-discriminatory reason for its actions. In order for complainant to prevail, (s)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).

There is no issue of material fact as to the allegations of the complaint. Complainant fails to fulfill the first and third prong of his prima facie case. It is unrefuted that James Sry made the decision regarding filling the position at National Accounts. Complainant has not shown that the decisionmaker, James Sry, knew that Horbas had filed a prior discrimination charge against St. Joe. Clearly, if the person making the decision regarding filling the position at National Accounts was unaware of the prior charge, (s)he could not retaliate because of it.

Complainant makes much of his contention that St. Joe did not consider him for the position. If he was not considered for the position, Complainant argues, a decision was not made regarding him. So, whether Sry knew of his prior discrimination charge is irrelevant. Complainant is simply incorrect. None of his arguments on that front can pierce a simple truth -- one cannot be retaliated against if the retaliator is unaware of the alleged basis of the retaliation.

Next, Complainant fails to show that there is a causal connection between his protected activity and the adverse action. Complainant alleges that when Horbas was being questioned about the note and Horbas asked Howard Brainen why he was being questioned, Brainen replied, "Well, Len [Horbas], you did file a claim against the

company”. Complainant alleges that this is direct evidence that satisfies the causation element of his prima facie case of retaliation.

Respondent denies that this statement was made. But, more importantly, the statement is not direct evidence because it was not made by the person responsible for rejecting Complainant for the National Accounts position. Such comments, when made by a non-decisionmaker, are not probative because there is no clear nexus between the protected activity and the employer’s action. Rozalind Hopgood and State Farm Fire and Casualty Co., 1996 ILHUM LEXIS 1172, (July 15, 1996). Respondent has produced unrefuted, sworn affidavits, stating that neither Brainen nor Hudson had input into the decision regarding the position at National Accounts. Consequently, the statements alleged by Complainant do not provide a clear nexus between Complainant’s filing the discrimination charge and his rejection for the National Accounts position.

Further, more than 1 year had elapsed between Complainant filing the discrimination charge and his rejection for the National Accounts position. Based upon this fact, Complainant’s attempt to establish a temporal connection fails as well. See, O’Connor v. CTA, 985 F.2d 1362, (7th Cir. 1993), Reams and Santa Fe Railroad, 16 Ill. HRC Rep. 95 (1985).

Complainant’s contention that, since Respondent’s argument, that causation has not been established, is not well founded, it follows that Complainant’s prima facie case has been established or that questions of material fact exist, is incorrect. Complainant bears the burden of establishing the causal connection. He has not, therefore his prima facie case of retaliation fails.

Next, Complainant correctly states that when, as here, there is no formal notice of the job's availability, complainants may have no means of showing whether they had been considered for the job. Therefore, when an employer uses such informal methods, it has a duty to consider all those who might reasonably be interested, as well as those who have learned of the job opening and expressed an interest. A complainant makes out a prima facie case -- that is, he creates a presumption of discrimination and forces the employer to articulate legitimate reasons for his rejection -- as long as he establishes that the company had some reason or duty to consider him for the post. Ben Jones, et al. v. Firestone Tire and Rubber Co., Inc., 977 F.2d 527 (11th Cir. 1992).

In the instant case, even if we assume that Horbas established that St. Joe had a reason or duty to consider him for the position in National Accounts – that is, that St. Joe was aware of his interest in the position, and that the position was available -- Respondent's legitimate reasons for rejecting him are sufficient to warrant summary decision.

Even if Horbas had established a prima facie case of retaliation, Respondent has articulated legitimate reasons justifying its rejection of Complainant for the National Accounts position. St. Joe describes several incidents regarding Complainant's poor job performance. (*Respondent's Memorandum in Support of its Motion for Summary Decision*, pg. 6-10).

Complainant has not shown Respondent's reasons to be unbelievable. Respondent asserts that it had no knowledge of Horbas' interest in the National Accounts position. Complainant produced evidence showing that St. Joe knew he was interested in

the position. Complainant argues that this is sufficient to show that Respondent's reason for rejecting Horbas for the position is pretextual. I disagree.

In order to show that the selection of Charles Nobles for the National Accounts position was pretextual, Complainant must at least show that his qualifications and prior job performance equaled or surpassed Nobles'. This is not even addressed by Complainant. The Illinois Appellate Court has stated:

It must appear from the evidence that the credentials of the successful candidate were so inferior to those of the complainant that the statement by respondent that it selected the person with the better credentials could be considered unworthy of credence.

Kindred v. Illinois Human Rights Commission, 180 Ill.App3d 766 (3rd Dist. 1989).

Clearly, that is not the case here.

Retaliatory Harassment Regarding Questioning About The Note

In order to demonstrate harassment, Complainant must establish that the behavior complained of was so pervasive that it constitutes a different term and condition of employment based upon the retaliatory factor. See, Rennison and Amax Coal Co., 31 Ill.HRC Rep. 178 (1987). A single, isolated incident, unless extremely serious, will not constitute a different term and condition of employment. Farragher v. City of Boca Raton, 524 U.S. 775 (1998), Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

The questioning to which Complainant was subjected was not pervasive. It was reasonable for Respondent to do so given the contents of the note. The questioning did not constitute a different term and condition of employment. Also, it was a single

incident. Clearly, Respondent's questioning Complainant about the note did not constitute harassment.

Again, in order to establish a prima facie case of retaliation, Complainant must show, *inter alia*, that he was subjected to an adverse action and that there was a causal connection between his filing the prior discrimination charge and the adverse action. Horbas has shown neither.

Complainant was suspended on one day and the suspension was rescinded the next. Horbas suffered no adverse action. Although "adverse action" should be defined broadly, complainants must still suffer some adversity, such as suspension or discharge. Arpad Zsiros and Furnas Electric Company, 1997 ILHUM LEXIS 61, (March 11, 1997). A 1 day suspension where Complainant suffered no financial repercussions does not rise to the level of an adverse action. Further, 1 year had elapsed between Complainant's filing his prior discrimination charge and the questioning. Also, Complainant was questioned about the note, not his prior charge. Complainant has not established the causation prong of his prima facie case.

Conclusion of Law

On the basis of the controlling precedent, statutory authority, the findings of fact and the discussion, I conclude that no material issues fact exist and that Respondent Chicago Corp. is entitled to a judgment as a matter of law.

Recommended Order

For the foregoing reasons, I recommend that Respondent's Motion for Summary Decision be GRANTED, and the complaint be DISMISSED in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:
WILLIAM H. HALL
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: April 23, 2001