STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
FRANK ROY LEMERY,	)	
	)	
Complainant,	)	
	)	Charge No. 2002CF0170
and	)	ALS No. 11835
	)	
BALMORAL RACING CLUB, INC.,	)	
	)	
Respondent.	)	

ORDER AND DECISION

December 7, 2006

The Commission by a panel of three:
Commissioners Sakhawat Hussain, Rozanne Ronen and Marylee V. Freeman.

On review of the Recommended Liability Determination of Mary Kennedy, Chief Administrative Law Judge and the Recommended Order and Decision of Reva S. Bauch, Deputy Chief Administrative Law Judge.

For Complainant: Randall D. Schmidt, Edwin F. Mandel Legal Aid Clinic

For Respondent: David T. Nani, Kralovec & Marquard, Chtd.

Human Rights Commission: James E. Snyder, General Counsel,
Matthew Z. Hammoudeh, Asst. General Counsel,
Meghan J. Paulas, Coles Fellowship student.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of exceptions.

This order of a three-member panel is a final order of the Commission. The parties may seek review of this order in accordance with procedures indicated in statute and regulation.

On review of the Administrative Law Judges' recommendations and the exceptions and response, the matter is sustained. The findings and recommendations are adopted, as modified herein.

I. Nature of the Case.

Frank Roy Lemery (Complainant) was employed by Balmoral Racing Club, Inc. (Respondent) from August 7, 1998 until July 9, 2001 where his duties included outside maintenance. Keith Larsen (Larsen) was the general manager of the Respondent's facility.

In November 2000 the Complainant was injured at work and was unable to work for some time. On January 15, 2001 he returned to work with a note from his physician releasing him for light duty. He was advised by Mel Slater that there was no light duty available for him.

On January 16, 2001, Larsen called the Complainant "advising him that he could not return to work", Judge Kennedy found. Also on that day the Complainant filed a Charge of Discrimination against Respondent with the Illinois Department of Human Rights (IDHR). The Complainant charged that he had been denied the opportunity to return to light duty work on the basis of disability ("Disability Discrimination Charge").

On January 17, 2001, the Complainant did in fact return to work.

In February 2001, Michael Belmonte (Belmonte), the Respondent's Controller, received the Disability Discrimination Charge. Belmonte called the Complainant to his office. He demanded and explanation and expressed anger about the Charge.

An IDHR fact finding hearing on the Disability Discrimination Charge was set for July 17, 2001.

On July 9, 2001 the Respondent terminated the Complainant's employment. Judge Kennedy made several findings of fact regarding what happened that day and how the Complainant was fired. Those findings are sustained and incorporated by reference.

Following his termination from employment the Complainant filed a second charge (Retaliation Charge). He claimed that the Respondent terminated his employment in retaliation for filing the Disability Discrimination Charge.

After investigation IDHR dismissed the Disability Discrimination Charge on a finding of Lack of Substantial Evidence. That charge was not the subject of proceedings at the Commission. IDHR filed a Complainant of Civil Rights Violation with this Commission on the Retaliation Charge.

II. Proceedings

Following a public hearing on the Retaliation Charge, Judge Kennedy issued a Recommended Liability Determination. Judge Kennedy determined that the Respondent terminated the Complainant in retaliation for having filed the Disability Discrimination Charge.

Judge Kennedy recommended the Commission award the Complainant $16,684.00 plus interest on back pay as well as reinstatement to his employment and reasonable attorney fees.

Deputy Chief Administrative Law Judge Reva S. Bauch considered the Complainant's petition for attorney fees and entered a Recommended Order and Decision. That order incorporation Judge Kennedy's liability findings by reference and recommended the Complainant be awarded $62,770.50 in attorney's fees.

III. Exceptions and Response

The Respondent filed exceptions to the findings and recommendations. The Respondent argued that Judge Kennedy erred in admitting testimony regarding discussions of settlement of the Disability Discrimination Charge and erred in excluding the public hearing testimony of Larsen. They argued that the finding of liability is against the manifest weight of the evidence, and alternatively that the award of attorney's fees is excessive.

The Complainant filed a response and argued against each of the Respondent's exceptions.

IV. Oral Argument

On review of the exceptions this panel of the Commission issued an order granting oral argument. We asked the parties to focus argument on the following questions:

1. Did the Administrative Law Judge correctly allow the testimony concerning settlement of an earlier claim?

2. Did the Administrative Law Judge correctly exclude the testimony of Mr. Larsen?

V. Findings

In reviewing an Administrative Law Judge's findings of fact, the Commission will adopt the Judge's findings unless they are contrary to the manifest weight of the evidence presented at the hearing, 775 ILCS 5/8A-103(E)(2). The Commission reviews a question of law *de novo* and is empowered to modify, reverse, or sustain the Judge's recommendations, in whole or in part, 775 ILCS 5/8A-103(E).

a) Testimony Regarding Settlement Negotiations

During the public hearing of the Retaliation Charge, Judge Kennedy permitted the Complainant to question the Respondent's witness about negotiations to settle the Disability Discrimination Charge.

The Respondent argues that this admission was in error because the general rule in Illinois is strongly against inclusion of any evidence concerning settlement negotiations. The Complainant contends that this testimony regarding settlement negotiation was properly admitted because it was not offered to the merits of the Disability Discrimination Charge. Rather, it was offered to demonstrate a causal link between the settlement discussion and the Complainant's termination.

The Respondent correctly argues that the principle against admission of testimony regarding settlement negotiations is long established in Illinois law. *Paulin v. Howser,* 63 Ill. 312 (Ill. 1872). Such testimony is generally barred for two reasons: testimony regarding settlement negotiations tends to be viewed as admissions of guilt and public policy encourages settlement and admissions of evidence concerning settlements could dissuade litigants from negotiating out of court. *Plooy v. Paryani,* 275 Ill.App.3d 1074, 657 N.E.2d 12 (1st Dist. 1995).

There are, however, exceptions to this general rule, such as when the evidence is proffered to prove bias or prejudice of a witness. *Batteast v. Wyeth Labs.,* 137 Ill.2d 175, 184, 560 N.E.2d 315, 319 (1990). Even if an exception applies, the evidence may be inadmissible if the probative value of the evidence is outweighed by the evidence's capacity to mislead or unfairly prejudice a party. *Barkei v. Delnor Hospital,* 176 Ill.App.3d 681, 531 N.E.2d 431, 421-3 (2d Dist. 1988).

Here, the Complainant wished to enter evidence of settlement negotiations and the termination of those settlement negotiations. The Complainant asserts that the Respondent fired him after the end of settlement negotiations because they were unable to reach an agreement. Judge Kennedy appears to have reasoned that the

retaliation was for failure to settle the claim, as much as it was for filing it in the first instance.

The purpose for which the testimony was admitted walks a narrow line with proof of an admission of guilt. This is a narrow line that we are not prepared to expand. The public policy benefits of exclusion far outweigh the testimony's probative value.

Without admitting the discussions themselves, the record still indicates: the existence of the Disability Discrimination Charge, the fact that settlement was attempted, the fact that the case did not settle, the fact that, following this, the Complainant's employment was terminated, and the Respondent's assertion of a nondiscriminatory explanation for ending his employment. We conclude that Judge Kennedy erred in admitting this testimony.

While we find that that the testimony should have been excluded, we adopt the recommendation of liability. A judgment will stand when an error does not affect the outcome and review of the record indicates that no injury has been done. *Niehuss v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 143 Ill.App.3d 444, 492 N.E.2d 1356, 1360-2 (1st Dist. 1986). In *Niehuss*, the court found that while the testimony regarding settlement offers was inadmissible, the error of admission did not affect the outcome. *Id.*

Judge Kennedy did not use the settlement testimony as the basis of her decision. She found that the Respondent articulated a non-discriminatory reason for the termination. When a respondent "has articulated a reason for its actions, the sole question is whether the plaintiff can show that the given reason is a pretext for unlawful discrimination". *Clyde v. Human Rights Comm'n*, 206 Ill. App. 3d 283, 293, 564 N.E.2d 265, 151 Ill. Dec. 288 (1990), *Johnson v. Human Rights Comm'n*, 318 Ill. App. 3d 582, 252 Ill. Dec. 255 (2000), *Bonita Welch and Supreme Court of Illinois, et al*, Illinois Human Rights Commission *en banc*, ALS No. S-10644, May 19, 2006. Based on other evidence provided by the Complainant, the Judge then properly concluded that the articulated non-discriminatory reason was pretext for discrimination.

Judge Kennedy's decision that the articulated non-discriminatory reason was a pretext did not rely upon the testimony regarding settlement negotiations. The decision was based on the totality of the circumstances surrounding the Complainant's discharge.

Judge Kennedy determined the credibility of witnesses on the events of the day the Complainant was discharged from employment. She examined evidence relating to

similarly situated employees that retained their employment with the Respondent. The Respondent has not shown her assessment of credibility or findings to be against the manifest weight of the evidence. The finding of liability is sustained.

b) Exclusion of the Testimony of Witness Keith Larsen.

Judge Kennedy excluded the testimony of witness Keith Larsen (Larsen). Judge Kennedy reasoned that the Respondent was attempting to surprise the Complainant by calling Larsen without listing him in the Prehearing Memorandum or disclosing Larsen's last known address and telephone number.

The Respondent argues that exclusion of this testimony was an abuse of discretion, we disagree.

It is entirely proper for the court to exclude witness testimony if the defendant fails to disclose the identity of a witness in advance of trial and the court finds that the omission was willful and motivated by a desire to obtain a tactical advantage. *People v. White*, 257 Ill.App.3d 405, 628 N.E.2d 1102 (1993). However, it is an abuse of discretion to exclude a witness because the defendant unintentionally fails to list the witness's name. *People v. Flores*, 168 Ill.App.3d 284, 522 N.E.2d 708 (1988).

The Respondent argues that the Complainant did not ask for Larsen's address. The record indicates that the Complainant requested Larsen's address in his interrogatories. Even if he had not asked, both parties were ordered by the administrative law judge to provide such information.

The Commission's Standing Order issued in this matter relating to the Joint Prehearing Memoranda specifically required both parties to provide a list of all names and addresses of all witnesses who "will be" called and who "may be" called.

The Joint Prehearing Memoranda was signed and filed by both parties on April 14, 2004; the public hearing in this matter began on May 17, 2004. The Complainant listed on its "may call' witness list "D. Keith Larson, Address unknown, investigation continues". The Respondent did not list Larsen as a possible witness but rather reserved the right to call any witness on the Complainant's list and thereby incorporated without supplementation, "D. Keith Larson, Address unknown, investigation continues".

At the public hearing Judge Kennedy noted that the Standing Order specifically requires each party to identify who they are going to call and to provide contact

information in order to prevent surprise at the hearings. Judge Kennedy ruled that it was too much of a surprise to allow Larsen to testify since the Respondent did not list Larsen as a witness in the Joint Prehearing Memoranda. Further, the Respondent did not supplement the Joint Prehearing Memoranda with Larsen's contact information or provide the Complainant with Larsen's contact information through any other means.

It was therefore proper for Judge Kennedy to exclude the testimony of Larsen by finding that the Respondent was attempting to surprise the Complainant. We find that Judge Kennedy did not abuse her discretion and properly excluded the testimony.

IT IS HEREBY ORDERED THAT:

> The Recommended Order and Decision issued in this matter is adopted as modified herein. This is a final order of the Illinois Human Rights Commission.

STATE OF ILLINOIS)
) Entered this 7th Day of December 2006
HUMAN RIGHTS COMMISSION)

Commissioner Sakhawat Hussain, M.D.

Commissioner Rozanne Ronen

Commissioner Marylee V. Freeman