



**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
FRED E. SVALDI,)	
)	
Complainant,)	
)	Charge No.: 1999CN1301
and)	EEOC No.: N/A
)	ALS No.: 11098
KEMPER NATIONAL INSURANCE)	
COMPANY,)	
Respondent.)	

SUPPLEMENTAL RECOMMENDED ORDER AND DECISION

On November 16, 1999, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Fred E. Svaldi. That complaint alleged that Respondent, Kemper National Insurance Company, discriminated against Complainant on the basis of his arrest record when it discharged him.

On January 27, 2003, Administrative Law Judge William H. Hall entered a Recommended Order and Decision (ROD) in which he recommended that Respondent's Motion for Summary Decision be granted and that the complaint in this matter be dismissed with prejudice. On May 10, 2004, a three-member panel of the Human Rights Commission reversed Judge Hall's ROD and remanded the matter to the Administrative Law Section for further proceedings.

This matter now comes on to be heard on Respondent's second 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. On or about March 16, 1987, Respondent, Kemper National Insurance Company, hired Complainant, Fred E. Svaldi. Complainant was hired as an Industrial Hygienist.

2. On or about February 21, 1998, Complainant was arrested.

3. Respondent learned about Complainant's arrest from an article in the *Chicago Tribune*. That article appeared on or about February 25, 1998.

4. On or about February 25, 1998, Joan Whiteside, an employee in Complainant's department, telephoned Joe Fater, Respondent's Director of Environmental Health Services, and told him about the *Chicago Tribune* article which described Complainant's arrest. Fater was Complainant's supervisor. Fater then went to a library in Lake Zurich, Illinois to look up the article for himself. Fater made a copy of the article and gave it to Marilyn Clark and Vicky Laures of Respondent's Human Resource Department. Ms. Laures gave the article to her supervisor, Robert Davis.

5. On February 26, 1998, Vincent Inserra, Respondent's Director of Internal Security, received a copy of the *Chicago Tribune* article that described Complainant's arrest. On or about that same day, Robert Davis asked Inserra to follow the matter with local authorities.

6. Inserra contacted the Mundelein Police Department. He spoke to Officer Donovan Hansen, the officer who had arrested Complainant. Officer Hansen told Inserra that Complainant had "readily confessed" to the charges against him. Officer Hansen told Inserra that Complainant had admitted exposing his genitals in front of two women on two separate occasions. He further told Inserra that Complainant had claimed that he was under pressure from the stress of his job and that he exposed himself to get a cheap thrill.

7. On or about April 13, 1998, Inserra prepared a memorandum that he sent to Robert Davis. In that memorandum, Inserra quoted the original *Chicago Tribune* article that

described Complainant's arrest. Inserra also wrote that he had contacted the arresting officer and that Complainant had admitted to the two charges and that he had claimed to be under pressure from his job and that he had exposed himself to get a cheap thrill.

8. In April of 1998, Frederic McCullough, Respondent's Senior Vice President of Administration, was informed of Complainant's arrest and his written confession.

9. Inserra had sent a copy of his April 13 memorandum to McCullough.

10. Respondent discharged Complainant on June 22, 1998.

11. Frederic McCullough made the decision to discharge Complainant. That decision was made after McCullough became aware of Complainant's confession.

12. Vicky Laures informed Complainant of his discharge.

13. Respondent did not take any adverse action against Complainant until after McCullough became aware of Complainant's confession.

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 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Respondent can articulate a legitimate, non-discriminatory reason for discharging Complainant.

4. Respondent does not have to prove that a business justification defense.

5. 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.

6. 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).

On or about March 16, 1987, Respondent, Kemper National Insurance Company, hired Complainant, Fred E. Svaldi. Complainant was hired as an Industrial Hygienist.

On or about February 21, 1998, Complainant was arrested. Respondent learned about Complainant's arrest from an article in the *Chicago Tribune*. That article appeared on or about February 25, 1998. Respondent discharged Complainant on June 22, 1998.

Subsequently, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent discriminated against Complainant on the basis of his arrest record when it discharged him.

As a general rule, allegations of discrimination are analyzed using a three-part method. First, the complainant must establish a *prima facie* showing of discrimination. If he does so, the respondent must articulate a legitimate, non-discriminatory reason for its actions. For the complainant to prevail, he must then prove that the 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).

In this case, neither party has raised arguments relating to a *prima facie* case. Instead, the arguments have been directed toward Respondent's articulated reason. That fact simplifies the issues.

Once a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual.

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 is fairly simple. Respondent maintains that it discharged Complainant because he confessed to exposing himself to two women. To prevail against Respondent's motion for summary decision, Complainant had to demonstrate that there is a genuine issue of material fact in the record or had to establish that Respondent is not entitled to a recommended order in its favor as a matter of law. He accomplished neither of those goals.

There are no genuine issues of material fact. Complainant tries to establish issues of fact, but none of the issues he raises are material. A quick review of the undisputed facts is helpful at this point.

On or about February 25, 1998, Joan Whiteside, an employee in Complainant's department, telephoned Joe Fater, Respondent's Director of Environmental Health Services, and told him about the *Chicago Tribune* article which described Complainant's arrest. Fater was Complainant's supervisor. Fater then went to a library in Lake Zurich, Illinois to look up the article for himself. Fater made a copy of the article and gave it to Marilyn Clark and Vicky Laures of Respondent's Human Resource Department. Ms. Laures gave the article to her supervisor, Robert Davis.

Davis, in turn, asked Vincent Inserra, Respondent's Director of Internal Security, to follow the matter with local authorities. Inserra contacted the Mundelein Police Department. He spoke to Officer Donovan Hansen, the officer who had arrested Complainant. Officer Hansen told Inserra that Complainant had "readily confessed" to the charges against him. Officer Hansen told Inserra that Complainant had admitted exposing his genitals in front of two women on two separate occasions. He further told Inserra that Complainant had claimed that he was under pressure from the stress of his job and that he exposed himself to get a cheap thrill.

On or about April 13, 1998, Inserra prepared a memorandum that he sent to Robert

Davis. Inserra also sent a copy of his memorandum to Frederic McCullough, Respondent's Senior Vice President of Administration. In that memorandum, Inserra quoted the original *Chicago Tribune* article that described Complainant's arrest. Inserra wrote that he had contacted the arresting officer and that Complainant had admitted to the two charges and that he had claimed to be under pressure from his job and that he had exposed himself to get a cheap thrill.

McCullough made the decision to discharge Complainant. That decision was made after he became aware of Complainant's confession. Respondent discharged Complainant on June 22, 1998.

Complainant has offered no affidavits or other documentation to contradict any of the above facts. Because they stand un rebutted, they must be accepted as true. See ***Koukoulomatis v. Disco Wheels***, 127 Ill. App. 3d 95, 468 N.E.2d 477 (1st Dist. 1984).

Instead of directly rebutting Respondent's claimed facts, Complainant has tried to argue that Respondent has been inconsistent in its factual assertions in this litigation. Complainant's arguments are not persuasive.

For example, Complainant notes that facts admitted in a pleading amount to judicial admissions. He then cites facts contained in Respondent's response to his initial charge and claims those facts as judicial admissions. However, contrary to Complainant's argument, the response to a charge before the Illinois Department of Human Rights (IDHR) is not a pleading before the Human Rights Commission.

Moreover, the claimed contradictory facts are not contradictory. In its initial response to the IDHR charge, Respondent stated that it was "without knowledge or information to form a belief" about Complainant's allegation that he had "an arrest record." As Respondent notes in its reply memorandum, that response is neither an admission nor a denial and is not inconsistent with its later statements. Furthermore, "arrest record" is a term of art. Thus, whether Complainant had "an arrest record" is a question of law, not a question of fact. In the

answer to the complaint in this matter, in response to a factual allegation, Respondent *agrees with Complainant that he was arrested*. Thus, there is no genuine issue of material fact on that point.

Similarly, Complainant notes that Respondent did not use the exact same language in its response to the complaint that it used in its memorandum in support of the motion for summary decision. In the answer to the complaint, Respondent denied the “stated reason” alleged in the complaint. The complaint’s, in paragraph 8, alleged that Respondent’s “stated reason” was because of “the underlying conduct *with which Complainant was charged*” (emphasis added). Answering further, however, Respondent alleged that it discharged Complainant “only after Respondent became aware that *he had confessed*” to certain behavior (emphasis added). In other words, Respondent’s answer was consistent with its current position that it acted because of Complainant’s confession and not because of conduct that was simply alleged by others. Again, there is no genuine factual issue.

Complainant raises another red herring when he notes that, in its initial response to the IDHR charge, Respondent denied that Complainant “was performing [his] job duties in a satisfactory manner” while admitting in the answer to the complaint that he “performed his duties in a manner considered acceptable.” That is arguably a genuine issue of fact, but it is not a material fact.

An issue of fact is not necessarily enough to defeat a motion for summary decision. The disputed fact must be material. ***Macmer Mortgage Co. v. Exchange Nat’l Bk. of Chicago***, 30 Ill. App. 3d 734, 332 N.E.2d 740 (1st Dist. 1985). The behavior which resulted in Complainant’s arrest happened outside of work and there is no allegation that Complainant’s work performance in any way influenced Respondent’s decision to discharge him. Therefore, any dispute about work performance has nothing to do with the relevant issues in the case. That is essentially the definition of immaterial. As a result, Complainant’s job performance is not a material issue.

In addition to trying to establish an issue of material fact, Complainant tries to argue that Respondent is not entitled to a decision in its favor as a matter of law. That argument also is doomed to failure.

Complainant cites the case of *Johnson v. Champaign County Sheriff's Dep't*, ___ Ill. HRC Rep. ___, (1994SF0573, November 24, 1997), for the proposition that an employer has to establish the truth of allegations against an employee and cannot rely simply upon the arrest report. However, *Johnson* is inapposite to this case.

Johnson construed the 1992 version of the Human Rights Act. That version prohibited the use of "arrest information" in making employment decisions. "Arrest information" was construed to encompass the information included in arrest reports. In 1995, though, the Act was amended to prohibit an employer from using "the fact of an arrest" in making employment decisions. The 1995 amendment specifically permits an employer to use "other information which indicates that a person actually engaged in the conduct for which he or she was arrested." Complainant's confession would appear to fall into the category of "other information." Thus, Respondent should have been able to use it.

Furthermore, unlike the *Johnson* decision, in this case, there is no dispute as to the complainant's actual guilt. Complainant has not offered any affidavit or other documentation to suggest that he did not confess. Simply put, he has not denied the allegations. There is no genuine issue of material fact as to his guilt. The *Johnson* decision does not require denial of Respondent's motion.

Complainant also points to a "script" that was to be used by the human resources representative who notified Complainant of his discharge. That script does not mention the confession. However, the script was merely a rough draft. It was written by Vicky Laures, who was not the decision maker, and there is no proof that the script was used at the discharge meeting. In short, the script argument is simply not material to any of the key issues in the case.

Complainant next argues that Respondent needs to prove that there was a business necessity for his discharge. That is simply untrue. Complainant appears to have been an employee at will. Unless Complainant can prove that Respondent discharged him for a reason set forth in the Human Rights Act, the company has no liability under the statute. There is no need for Respondent to prove a business necessity.

Finally, Complainant raises allegations about another employee who was not discharged until after he had engaged in months of harassment against another employee. In essence, Complainant is using that other employee as a comparative and suggesting that he should have been treated as leniently as that other employee. The problem with that argument is that Complainant did not establish that the decision maker was the same in both cases. It is not evidence of disparate treatment that two different decision makers did not behave in the same manner.

In sum, the parties have not raised issues regarding Complainant's ability to establish a *prima facie* case or Respondent's ability to articulate a reason for its actions. The only remaining question is whether Respondent's articulated reason is pretextual. There are no genuine issues of material fact regarding pretext. As a result, Respondent's motion for summary decision should be granted.

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 the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

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

ENTERED: March 27, 2006