STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF	)		
	)		
BONITA WELCH,	)		
	)	Charge No.	1997CA1141
Complainant,	)	EEOC No.	21B970438
	)	ALS No.	S-10644
v.	)		
	)		
SUPREME COURT OF ILLINOIS, and	)		
APPELLATE COURT OF ILLINOIS,	)		
Third District,	)		
	)		
Respondents.	)		

ORDER AND DECISION

May 19, 2006

The Illinois Human Rights Commission, *en banc*. J. B. Pritzker, Chairman, Marti Baricevic, David Chang, Dolly Hallstrom, Sakhawat Hussain, M.D., Spencer Leak, Sr., Rozanne Ronen, Gregory G. Simoncini, Yonnie Stroger, Diane M. Viverito, Commissioners. Commissioner Marti Baricevic was not present for the oral argument. On review of the documents and transcripts she agreed with the decision.

Commissioner Marylee V. Freeman did not participate in the consideration of this matter.

Illinois Human Rights Commission: James E. Snyder, General Counsel,
Matthew Z. Hammoudeh, Asst. General Counsel.

For Complainant: Bonita Welch, the Complainant, *pro se*.

For Respondents: Attorney General Lisa Madigan,
Terrence L. Corringan, Assistant Attorney General.

Additional Parties of Record: The Illinois Department of Human Rights is an additional statutory agency that has issued state actions 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 this matter.

This matter comes before the Commission pursuant to Rehearing.

On review of the findings and recommendations, the public hearing record and the pleadings and memoranda, and oral argument before the Commission, for the reasons set forth herein, the above-captioned matter is dismissed with prejudice on the merits.

This order is a final order of the Commission. The parties may seek review of this order in an administrative review proceeding with the Illinois Appellate Court in accordance with procedures indicated in statute and regulation.

This order may restate language from our interim orders or the Administrative Law Judge's orders. This order includes our entire findings, to the exclusion of any interim order.

I. Nature of the Case

Bonita Welch (Complainant) filed a Charge of Civil Rights Violation with the Illinois Department of Human Rights (IDHR) against her employer, the Illinois Appellate Court, Third District (Respondent Appellate Court). She also named the Supreme Court of Illinois as a Respondent (Respondent The Supreme Court of Illinois).

The Complaint charged that the Respondents reduced her compensation in violation of the Illinois Human Rights Act, 775 ILCS 5/101, et seq. (IHRA). She charged that she had been the victim of unlawful discrimination on the basis of her age (47) and her sex (female). Welch also charged that her compensation had been reduced in retaliation for her association with a political candidate.

II. Proceedings

Welch filed her original charge with the IDHR on August 12, 1994. The record does not indicate what action IDHR took on her original charge, if any.

Welch filed her charges again on November 22, 1996 and the IDHR conducted an investigation.

IDHR dismissed the charge of sex discrimination for lack of substantial evidence. IDHR dismissed the retaliation charge, as it did not state a claim for relief under the Act.

The IHRA prohibits an employer from retaliating against an employee who opposes what she reasonably believes to be discrimination or for cooperating in the investigation of a discrimination charge. Welch did not claim retaliation for opposition to discrimination. She claimed retaliation based on political activity. Whether or not such a claim could be proved, it is not a type of claim authorized by the IHRA.

On October 28, 1998 the Department filed a Complaint with this Commission. A considerable period of discovery was conducted. Proceedings at the Commission were stayed during the consideration of a civil suit between some of the parties, *Welch v. Illinois Supreme Court and Heiple*, 322 Ill.App.3d 345, 751 N.E.2d 1187 (3d Dist. 2001).

On September 16 to September 19, 2002 a public hearing was held before a Commission hearing officer, William Hall. The hearing officer failed to issue a recommended order prior to leaving employment with the Commission.

In May 2004 Welch and the Respondents moved the Commission to permit a recommended order to be drafted by a substitute hearing officer, on the public hearing record made before ALJ Hall, 775 ILCS 5/8A-102(I)(4).

On September 30, 2004 Administrative Law Judge Michael R. Robinson (ALJ) issued a recommended order and decision, as the substituted hearing officer.

On November 10, 2004 Welch filed exceptions to the recommended order. On December 27, 2004 the Respondents filed a response to Welch's exceptions.

In March 2005 the Commission considered the exceptions by a panel of three Commissioners and accepted the matter for review. On June 22, 2005 the Commission, by the panel, issued an Order and Decision (Commissioners Sakhawat Hussain, M.D., Spencer Leak, Sr., and Yonnie Stroger). The Commission sustained the administrative law judge’s findings of fact, except as noted below, and adopted the administrative law judge’s recommended conclusions of law.

On July 25, 2005 Welch filed a Petition for Rehearing of the June 22, 2005 order. Under the IHRA a petition for rehearing asks the Commission *en banc* to vacate an order issued by a panel of three Commissioners, and to rehear the exceptions *en banc*. The Commission granted the Respondents leave to reply to the petition.

On review of Welch’s petition and the Respondents’ reply the Commission granted rehearing and oral argument. The parties were each granted leave to file a rehearing brief, at their option. The Illinois Department of Human Rights was granted leave to file a rehearing brief and leave to be heard in oral argument.

On December 5, 2005 Welch filed a Brief on Rehearing. The Respondents did not file a rehearing brief. The Illinois Department of Human Rights did not file a brief on rehearing.

On January 25, 2006 Welch and the Respondent were heard before the Commission *en banc* in oral argument. The Illinois Department of Human Rights did not attend the oral argument.

III. Findings of Fact.

On September 16, 1981 Welch began employment with the Respondent Appellate Court, in the Court's Third District. Welch worked as a judicial law clerk assigned to the Hon. Justice Tobias Barry. Witnesses at the public hearing referred to some such employment positions as elbow clerks; that term figuratively meaning, one who works at a judge's side.

Welch lived in Peru, Illinois and worked at J. Barry's office in Ladd, Illinois. The Respondent Appellate Court is located in Ottawa, Illinois. Welch's work included legal research and writing for J. Barry. At the time she began employment she was 35 years old.

Ann Keefe also worked for J. Barry. Keefe was referred to as the senior clerk. In 1986 or 1987, Keefe left employment with the court and Welch became the senior clerk.

The record indicates that "senior clerk", "junior clerk" and "elbow clerk" were common terms of reference. Irrespective of the terms, the employees held the same employment classification, "judicial law clerk".

In 1990 J. Barry was a candidate for the office of Justice of the Supreme Court of Illinois, from the Third Judicial District. The Hon. James D. Heiple, of the Appellate Court, Third District, was also a candidate for that office. J. Heiple was elected.

In February 1994 J. Barry informed Welch and his other judicial law clerk that he intended to retire from the Appellate Court in December of that year.

J. Barry made his retirement known 10 months in advance to allow his clerks time to find new employment, and to allow qualified persons to seek the judicial office that he was vacating.

The ALJ found that at this time it was court practice for an individual Justice to select his or her own judicial law clerks for employment. He found that it was court practice that the Justices of the Third District, as a group, selected research department staff attorneys.

Welch sought a position with the Appellate Court's Third District Research Department in Ottawa.

In February 1994 J. Barry proposed to his colleagues that Welch be hired as a Research Department staff attorney. The Justices decided to offer employment to Welch and discussed the setting of her salary.

Gist Fleshman, Clerk of the Appellate Court, Third District, informed the Justices that the

Supreme Court of Illinois employee compensation and classification manual set a salary range for research department attorneys. The salary range had an annual minimum ($32,571), a midpoint ($39,464), and a maximum ($46,357).

Fleshman advised that the Respondent Appellate Court could set Welch 's salary up to the midpoint of the range on its own authority. Welch had been making more than that as a clerk to J. Barry. She had been paid $40,295; that is $831 more per year. The Justices wanted to match that amount.

Fleshman advised that the Respondent Appellate Court could set Welch's salary above the range midpoint, but only with the approval of J. Heiple, the Justice of the Supreme Court from that Judicial District. It was decided to offer Welch the position at $39,464, the midpoint.

A few days later J. Barry directed Fleshman to verify the midpoint amount with the Administrative Office of the Illinois Courts (AOIC). Fleshman contacted William Smith, the assistant director of AOIC. Smith told Fleshman that he did not believe that paying Welch the higher salary would require involvement by the Supreme Court.

Fleshman relayed this to J. Barry. In turn, J. Barry contacted Smith. Smith indicated that he did not see a problem, but asked J. Barry to make a written request on the matter.

On February 16, 1994 J. Barry wrote a letter to Smith noting the salary difference. He requested that Welch be paid the higher amount in light of her twelve years of good service as his clerk.

Smith advised Robert Davison, director of AOIC, of J. Barry's request. Davison was concerned about setting a salary above the midpoint. He was also concerned because the requested salary was above the amount AOIC had budgeted for the position, $36,000. Davison was not aware that Welch had already begun working in the new position.

Davison advised J. Heiple of J. Barry's request. J. Heiple told him that Welch could have the position at the minimum salary for the position.

J. Heiple indicated that the Hon. Justice Kent Slater could contact him with anything further. J. Slater was the presiding Justice of the Appellate Court, Third District at this time.

On February 21, 1994, J. Slater contacted J. Heiple by telephone to explain why the Appellate Court had offered the midpoint salary. J. Heiple asked J. Slater to put the explanation in writing and indicated that he would respond.

J. Slater wrote to J. Heiple, stating reasons for offering Welch $39,464 for services as a research staff attorney. He indicated that the salary was justified by her twelve years experience as an appellate judicial law clerk, and how it compared to the three other

research staff attorneys. Two of the attorneys were being paid $34,233 and one $36,000. Each had been hired within the last three years.

J. Slater further indicated that, even at the higher salary level for Welch, the average salary for staff attorneys in the Appellate Court's Third District would be lower than the average in the Second, Fourth and Fifth Districts.

On February 23, 1994, J. Heiple wrote a reply. Welch argues that this letter is direct evidence of discrimination. The Respondents argue that it is evidence of a non-discriminatory explanation for their actions. J. Heiple wrote:

> Dear Kent:
>
> Thank you for your letter of February 21, 1994. I will be happy to meet with you at your convenience to discuss the general subject of upgrading salaries in your Research Department. This is a matter of state-wide concern and will involve a comparison of compensation for all research personnel to determine why there is an apparent lack of parity.
>
> The problem, if there is a problem, cannot be remedied by bringing in a new hire at the top salary. There is no justification for doing so. Indeed, so far as research clerks are concerned, beyond the first year there is little or no experience to be gained. A research clerk claiming 12 years' of experience really has but one year of experience repeated 12 times. This carries no merit. The only justification for paying senior clerks more money is to keep good people on the payroll and not go through the hiring and break-in process.
>
> Hence there is no possibility that I would approve the Third District hiring a new research clerk at a salary above the entry level for that position.
>
> Please contact me when you would like to pursue the general topic further.

J. Slater set Welch's salary at the minimum established for the position, $32,571. That is, $6,893 less than the amount the Appellate Court had already offered to Welch.

J. Slater testified he believed that the Respondent Appellate Court had authority to set the salary up to the position midpoint. He also believed that J. Heiple's letter had concluded the issue.

On February 23, 1994, J. Slater advised Welch that her salary would be lowered. He indicated that this was pursuant to J. Heiple's direction.

The ALJ found that the Respondents offered J. Heiple's directions as a nondiscriminatory explanation for its actions and Welch did not prove this explanation to be a pretext for unlawful discrimination.

On August 12, 1994 Welch filed a charge of discrimination with the Illinois Department of Human Rights. There is no record as to what became of this charge. Welch filed a second charge on November 22, 1996.

In December 1996 the Hon. Justice William E. Holdridge spoke with J. Heiple regarding this charge. J. Holdridge was the presiding Justice of the Appellate Court, Third District at that time. J. Holdridge advised J. Heiple that subsequent to Welch's hire, Anita Kopko had been hired at more than the minimum salary.

The ALJ found that this was the first time J. Heiple became aware that any research staff attorney had been hired at more than the minimum salary level.

J. Heiple recommended to J. Holdridge to seek a settlement with Welch. In January 1997 J. Holdridge took on the additional duties of Director of the AOIC.

The parties attempted to settle the case, but were unable.

IV. Recommended Conclusions of Law.

The ALJ recommends that the case be dismissed. He recommends that the Commission find that Welch did not establish a *prima facie* case of discrimination. She did not demonstrate that similarly situated persons were treated more favorably than she.

V. Exceptions to Findings of Fact.

Welch filed exceptions to the recommended order and the Respondents filed a response.

The findings of fact entered by the ALJ in his recommended order are sustained and incorporated herein, except as indicated below.

Welch argues exception to a number of the ALJ's findings of fact. In reviewing an Administrative Law Judge's findings of fact, the Commission will adopt the findings unless they are contrary to the manifest weight of the evidence presented at the hearing, 775 ILCS 5/8A-103(E)(2).

The bulk of Welch's arguments regarding Findings of Fact are arguments as to the style in which the ALJ has stated the findings. To an extent Welch has merged exceptions to Findings of Fact with arguments about what those facts mean to the merits of the case. Welch has not demonstrated the findings to be against the manifest weight of the evidence and the findings are sustained, other than as stated below.

Finding of Fact No. 19.

In finding of fact No. 19 the ALJ found as follows:

> At some point in December 1996, Justice William E. Holdridge, who was at that time a presiding Justice of the Appellate Court, became aware of the Complainant's Charge of Discrimination and spoke to Justice Heiple about the merits of Complainant's discrimination claim. During the discussion, Heiple indicated that he was of the belief that all of the research staff attorneys were being hired at the minimum level. Justice Holdridge, however, informed Justice Heiple that the Appellate Court had hired Anita Kopko at a salary above the minimum in September of 1995...
>
> > *This was the first time that Justice Heiple had become aware that any research staff attorney in the Third District had been hired at more than the minimum salary level...*
>
> Eventually, Justice Heiple told Justice Holdridge to settle the case based on the circumstances of Kopko's beginning salary. (Emphasis added).

Welch argues that one part of finding of fact No. 19 is against the manifest weight of the evidence. Welch argues that J. Slater's communications to J. Heiple, and J. Heiple's letter of February 23, 1994 prove that Heiple was aware of staff hired above the minimum.

This finding is important to Welch, because she argues Heiple had knowledge of comparative employees and desired that she be treated differently than those comparatives.

In testimony J. Heiple acknowledged reading J. Slater's letter. Welch is correct that J. Slater's letter indicates that Lynn Harrington had been hired at $36,000. Welch is correct that $36,000 was above the minimum of the range.

However, neither J. Slater's letter, nor J. Heiple's reply refer to the range or where any of the employees fell on that range. J. Heiple's letter back to J. Slater does not indicate that he knew the minimum. J. Heiple testified that he did not know the amount of the minimum.

The letter refers to hiring "at the top salary". The amount proposed for Welch was not near the top of the range. The letter also refers to "entry level" salary, rather than any reference to the range points; minimum, midpoint, maximum, etc. It supports J. Heiple's testimony that he was acting on a broad viewpoint.

The ALJ found credible J. Heiple's testimony that he did not know that research staff had been hired for greater than the minimum of the salary range. The letters support his testimony. The finding is not inconsistent with the letter indicating individual salaries, as the letter does not place those salaries within the range or indicate the scale of that range. Finding of fact No. 19 is sustained.

Finding of Fact No. 23.

In finding of fact No. 23, the ALJ found:

> At all times pertinent to this Complaint, the Illinois Supreme Court operated under a practice that permitted individual Supreme Court Justices to establish policy for the Appellate Court District from which he or she was elected. Moreover, this practice permitted individual Supreme Court Justices to set the salary of any employee within the individual Appellate Court District from which he or she was elected as long as the salary issue came to the attention of the individual justice.

Welch argues that this finding is against the manifest weight of the evidence in that it does not indicate that Respondent Appellate Court had authority to set compensation for research department staff.

Welch is correct that finding No. 23 does address that point. However, Finding of Fact No. 22 clearly finds that Respondent Appellate Court had authority to set Welch's compensation. Nonetheless, Finding of Fact No. 23 is against the manifest weight of the evidence.

The evidence does not provide a basis to make a broad finding on how Respondent The Supreme Court of Illinois exercises its Constitutional authority. Nor is such a finding necessary to resolution of the dispute between these parties.

As a matter of law, it is beyond argument that:

> Pursuant to the Illinois Constitution of 1970 the Supreme Court of Illinois has authority over the lower courts of the State of Illinois. Illinois Const., Art VI § 4 (2005).

Finding of Fact No. 23 is modified to read as follows:

> At all times pertinent to this matter, the Appellate Court, Third District received supervision on administrative matters through the Justice of the Supreme Court elected from that appellate district, the Hon. James D. Heiple.

Finding of Fact No. 13, which is adopted, indicates how that authority was exercised in this employment decision.

VI. Exceptions to Conclusions of Law

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. Motion to Amend Complaint.

The public hearing in this matter concluded September 19, 2002. On September 19, 2002, Welch moved to add an additional charge and an additional party. She moved that J. Heiple be added as a party, he be charged with aiding and abetting a civil rights violation, and based on the evidence produced at the public hearing, he be found liable.

The ALJ denied this motion. Welch argues that this was error.

The record indicates earlier efforts to add J. Heiple as a party. Welch has only filed exception to the ruling to deny that he be added post-hearing.

The Act permits a Complainant to amend charges, and in some circumstances add additional parties. The circumstances under which a party can be added are stated in 56 Ill. Admin. Code, Ch XI, §5300.660.

Without doubt, J. Heiple has long been aware of this case. He is a central actor in the employment decision that is the subject of the complaint. As Welch notes, J. Heiple attended the hearing. None of that means he can be added to the litigation after the evidence is closed.

How or when J. Heiple first learned of Welch's charge, why the Illinois Department of Human Rights had difficulty processing the initial charge, or what J. Heiple did or did not discuss with other judicial officials: These questions are unnecessary to the issue of whether he can be added to the case post-hearing.

J. Heiple has never been a party to this litigation. Welch's assertion that Heiple "has had the benefit of the free services of the Illinois Attorney General" in this matter is simply not accurate. The Attorney General appears on behalf of the Respondents, not J. Heiple.

J. Heiple has not been served with any charge. He was not served with Welch's motion to add him as a party. He was not served with Welch's exceptions that also sought to add him, or with the petition for rehearing. One cannot be found liable on evidence from a hearing that has already concluded, from a proceeding in which one was not a party, on a charge that has not been made.

B. Proof of Discrimination.

Welch argues that she had put forward both direct and indirect evidence of discrimination on the basis of her age. The ALJ recommends that the case be dismissed, as a *prima facie* case has not been established.

The Illinois Supreme Court has held that employment discrimination actions brought under the Illinois Human Rights Act shall be analyzed under the framework set forth in

United States Supreme Court decisions addressing claims under Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act, *Zaderaka v. Human Rights Comm'n.*, 131 Ill.2d 172, 137 Ill.Dec. 31, 545 N.E.2d 684 (1989). Illinois courts of review frequently instruct us to look to Title VII and ADEA cases in applying the IHRA, *Lalvani v. Human Rights Comm'n.*, 324 Ill.App.3d 774, 775 N.E.2d 51 (1st Dist. 2001). Federal authority is instructive rather than controlling, and there are frequent distinctions.

Welch may prove discrimination by presenting direct evidence that age was a determining factor in the employment decision, or she may use the indirect method of proof for Title VII cases set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), *Lalvani*, 324 Ill.App.3d at 790, 755 N.E.2d at 65.

i. Direct Evidence.

A Complainant may establish discrimination by direct evidence that the employer took an adverse action in substantial reliance on a prohibited factor such as age. As the ALJ indicated, in order to qualify as direct evidence, the evidence would have to prove this, "without reliance on inference or presumption", *Lalvani*, 324 Ill.App.3d at 790, 755 N.E.2d at 65. *See also Miller v. Borden Inc.*, 168 F.3d 312 (7th Cir. 1999).

Welch argues that J. Heiple's letter to J. Slater constitutes direct evidence of age discrimination. The letter referred to Welch as a "research clerk claiming 12 years of experience" and as one of the "senior clerks". Welch argues these state "age-based reasons ... for reducing complainant's salary".

Welch notes that the Respondent Appellate Court had legal authority to set her salary without following J. Heiple. She argues that the Respondent Appellate Court ignored that authority to accommodate J. Heiple's age bias, and therefore adopted it.

Whether administrative procedure required J. Slater to defer to J. Heiple’s judgment or not is an academic issue. J. Slater testified that having received J. Heiple’s letter, the Respondent Appellate Court acted on that letter.

We agree that the letter is evidence of the employment action and the motivation for that action. But it is not direct evidence of a discriminatory motive.

The use of the term “senior clerk” is not direct evidence that Welch’s age was a motivation for the salary decision. The term is not unique to Welch, J. Heiple’s letter or this employment action. Like any workplace, the Respondents used all kinds of job titles.

There is no evidence that terms “senior clerk”, “junior clerk”, or for that matter “elbow clerk” carry any connotation of age. Only unwarranted inference would make use of a job title like “senior clerk” directly equal to age discrimination.

Welch argues that J. Heiple’s evaluation of a “research clerk claiming 12 years of experience” is direct evidence of an “age-based reason” for his decision. The letter indicates that J. Heiple believed that a new hire to the research attorney position should start at the lowest salary. He believed that experience in another court position was not a reason to go above that general position. Giving little compensation credit for earlier professional experience when determining salary is not the same as discrimination on the basis of age.

ii. Indirect Evidence.

To establish a *prima facie* case by indirect evidence Welch is required to show that: (1) she was over 40 years of age: (2) she experienced an adverse employment act, and (3) younger, similarly situated co-workers were treated more favorably, *Clyde v. Human Rights Comm'n*, 206 Ill.App.3d 283, 564 N.E.2d 265, 151 Ill.Dec. 288 (4th Dist. 1990).

If a Complainant has presented a *prima facie* case of discrimination, the Respondent must articulate a non-discriminatory reason for its actions. *Zaderaka.*, 131 Ill.2d at 179, 137 Ill.Dec. at 34. Welch is required to prove that this reason is not the true reason, but is a pretext for discrimination.

Where a Respondent has "done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." *Clyde* at 293, citing *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 715, 103 S.Ct.1482, 75 L.Ed.2d 410. The heart of the case becomes whether the rationale put forward by the Respondent is true or is a pretext for discrimination.

The ALJ found that Welch failed to present a *prima facie* case. The ALJ also made findings and recommendations on the issue of pretext. This is done to assist the parties in the event that we do not accept the ALJ's conclusion on the *prima facie* case.
Welch argues that she has established a *prima facie* case. As well she argues that the Respondent's explanation for the decision is a pretext for discrimination.

a) *Prima Facie*.

It is not contested that Welch was over the age of 40, and that she suffered an adverse employment action when her salary was reduced. It is not contested that two other employees were hired for the same position at higher than the minimum salary.

The ALJ found that Welch has not offered comparative employees. J. Heiple was not involved in setting the salary for the employees she puts forward. In order for an employee to be a comparative, for purposes of establishing a *prima facie* case of discrimination, Welch must show that the same person made the relevant employment decisions.

Welch argues that other employees are comparative. By the record and her own argument she is unique: J. Heiple was the decision maker in her case and in no one else's. "(D)ifferent decisions, concerning different employees, made by different supervisors ... sufficiently account for any disparity in treatment, thereby preventing an inference of discrimination", *Snipes v. Illinois Department of Correction*, 291 F.3d 460, 463 (7th Cir. 2002). Welch has not proved a *prima facie* case.

b) Pretext.

The Respondent offered a nondiscriminatory explanation for the employment decision: The two business judgments stated in J. Heiple's letter. Welch argues that this explanation is a pretext for age discrimination.

Pretext is a question of fact, *Sola v. Human Rights Comm'n*, 316 Ill.App.3d 528, 736 N.E.2d 1150 (1st Dist. 2000). An ALJ finds that a complainant either has proved or has not proved that the proffered reasons is a pretext for discrimination. In this case the ALJ found that Welch did not prove pretext.

The Commission sustains an ALJ's finding of fact unless we find that it is contrary to the manifest weight of the evidence. On administrative review, the Illinois Appellate Court reviews the Commission's findings of fact under a manifest weight standard. *Pinnacle Ltd. Partnership v. Illinois Human Rights Comm'n*, 354 Ill.App. 3d 819, 820 N.E. 2d 1206 (4th. Dist. 2004).

We review an ALJ's recommendations of law *de novo*. The Illinois Appellate Court reviews our ruling on questions of law *de novo*.

In her initial exceptions Welch argues that the finding of pretext is erroneous and asks us to review it *de novo*. She misunderstood this in her initial exceptions, and appears to continue this misunderstanding in her argument on rehearing.

First, Heiple stated that hiring Welch at a higher pay rate than the minimum was not a proper way to address the policy issue of a disparity between Third District pay rates and other districts. The ALJ noted that Welch did not ask him to find this rational to be a pretext. The ALJ found that this reason was not a pretext for discrimination. Welch does not argue now that this reason was a pretext.

Second, J. Heiple indicated that Welch's salary was not merited by her experience. Welch argues that this decision is a pretext for discrimination.

To prove that the Respondent's proffered nondiscriminatory reason was a pretext for unlawful discrimination Welch must show: (1) the articulated reason has no basis in fact; (2) the articulated reason did not actually motivate the employer's decision; or (3) the articulated reason was insufficient to motivate the employer's decision, *Sola*, 316 Ill.App.3d at 537, 736 N.E.2d at 1158. She must also demonstrate that the ALJ's finding on this point is against the manifest weight of the evidence.

Welch has not met these burdens. Nor has she addressed her argument to these standards. Welch has presented evidence that other employees and public officials in the Respondents did not share J. Heiple's point of view on the compensation issue. It is accurate that some other officials had wanted to pay her more. That is why the request was brought to J. Heiple in the first place. That does not prove pretext under any aspect of the standard, *Sola*.

Welch argues that "it stands to reason that (her) 12 years of experience as a judicial law clerk, handling the more difficult cases, made her the ideal candidate for the research attorney position". No doubt Welch and all of the Respondents' staff are qualified for their positions. The difference of business judgment with J. Heiple regards the monetary value of her qualifications.

The Commission does not determine whether the employer's decision is a wise business judgment. We determine whether or not the proffered reason is the true reason. Welch has not demonstrated that this explanation is unworthy of belief. The finding of no pretext is sustained as it is supported by the manifest weight of the evidence.

VII. Issues on Rehearing.

On March 30, 2005 the United States Supreme Court issued its opinion in *Smith v. City of Jackson, Mississippi*, 125 S.Ct. 1536, 161 L. Ed. 410 (2005). Welch argues that *Smith* requires a finding of liability in this case.

The United States Supreme Court issued its ruling in *Smith* after the public hearing, the ALJ’s recommendations and our panel’s consideration of Welch’s exceptions to those recommendations. Welch asked for rehearing to consider the affect of *Smith* on her case.

Most of Welch’s rehearing argument is based on misunderstanding of the law or misunderstanding of the record. Welch appeared *pro se* at the rehearing.

We are reluctant to characterize her argument, or make it for her. Much of it is too muddled to address in detail. One error is the basis for the next.

We have taken effort to genuinely understand Welch's argument, and give it every consideration. We believe her argument is along these lines.

A. Prior to *Smith*, the 7th Circuit's rulings under the federal ADEA prohibited a plaintiff under that Act from arguing age discrimination on the basis of disparate impact, *EEOC v. Francis W. Parker School*. 41 F. 3d 1073 (7th Cir. 1994).

B. Those federal court decisions also prohibited complainants from arguing discrimination on the basis of disparate impact, under the IHRA. She states, *Francis Parker* was "the death knell of disparate impact" under the IHRA.

   That prohibition operated regardless of what the Illinois General Assembly may have enacted or how the Illinois courts of review may have interpreted the Illinois legislation.

C. Prior to *Smith*, rulings of the Illinois Appellate Court interpreting the IHRA also prohibited her from arguing discrimination on the basis of disparate impact, under the IHRA, by virtue of *Sola*.

D. The administrative law judge and the Commission panel did not consider proof of discrimination by disparate impact because Welch did not argue the theory.

E. She chose not raise the argument because she determined that is was prohibited based on her understanding of *Francis Parker* and other federal cases.

F. *Smith* overturned the prohibition, under the federal ADEA.

G. *Smith* also overturned the prohibition under the IHRA, as she finds it in *Sola*, and did so instanter.

H. The public hearing record allows a finding of liability against the Respondent Courts in that Welch has proved unlawful discrimination on the basis of age by disparate impact.

I. The record proves the Respondents had no business necessity for their actions.

J. If the Respondents had evidence of a business necessity, they ought to have offered it at the public hearing since they ought to have known she might argue disparate impact at some time in the future. Therefore, they are not prejudiced if we find that they have not met their burden of proof on that defense.

Welch was somewhat clear on one point. She did not attempt to prove discrimination based on a showing of disparate impact because she chose not to do so. She concluded

based on her understanding of the law that she could not prevail on this theory.

In light of *Smith* Welch has changed her mind. She argues that she is entitled to do so because, prior to *Smith*, she would not have been allowed to make the argument in the first place. She would have been "tossed out on her ear", as she puts it.

Her claim is not that, she raised disparate impact, and the Commission found that the theory was unavailable. Rather she claims that she concluded that she would not have prevailed if she had raised the argument, and therefore decided not to raise it.

Welch is correct that before *Smith* one could not argue that disparate impact was available in proceedings under the ADEA in the 7th Circuit, *Francis Parker*. Following *Smith* the theory is available. But neither *Francis Parker*, nor *Smith*, nor any opinion of the Illinois courts of review include a blanket prohibition of disparate impact under the IHRA.

Welch argues that the Illinois Appellate Court ruled that disparate impact was unavailable in *Sola v. Illinois Human Rights Commission*. To the contrary, the Illinois Appellate Court was asked to rule on the issue and found it unnecessary to do so. The court indicated:

> However, even assuming either disparate treatment or disparate impact evidence would be admissible to establish that an employer favored younger employees, which in turn could buttress a plaintiff's claim that his employer's articulated reason was due to age (*Diettrich*, 168 F.3d at 966; *Gehring*, 43 F.3d at 342; *EEOC*, 41 F.3d at 1078), such evidence does not support Sola …

Whether *Sola*, in the time before *Smith*, lent support for or against the introduction of disparate impact, would have been an arguable proposition if it had been raised.

Welch does not point to a ruling in her case where *Sola* was held to control this issue. She does not identify an erroneous ruling by a decision maker, such as the Commission panel. After all, Mr. Smith, et al. argued disparate impact before a Federal District Court and lost by dismissal. That led them to prevail in the United States Supreme Court.

Certainly *Smith* will be important authority to future proceedings under the IHRA in determining whether disparate impact is available. But Welch was not barred from raising disparate impact prior to *Smith*.

There is no point in speculating how the ALJ or the Commission panel would have viewed *Francis Parker* or *Sola* if that argument had been made, since it was not. For the same reason, we do not need to rule on disparate impact under the IHRA or how *Smith* affects that issue.

We note also that Welch has given no real answer to our concern that the Respondent Courts cannot be find liable on this record for a claim they did not face. They cannot be found to have waived defenses, since they had no reason to make them. How can we know what they would have argued? Welch's answer, does not address the concern:

> They should have known since 1999 when I gave them my discovery that disparate impact was where I was headed…Oral Argument transcript, pg. 17.

VII. Conclusion.

After a number of years of employment as a judicial law clerk Welch sought a different position as a research attorney. The Respondents set her compensation based on her existing salary. Then the Respondents reduced her salary at the direction of J. Heiple.

The Illinois Human Rights Act does not require the Respondents to hire Welch at any certain level, maintain her pay at any level, or to offer her a job at all. It requires that employment actions not be based on discriminatory factors, such as age.

The Respondents reduced her salary because J. Heiple believed that all persons entering that position should be brought in at the bottom of the pay scale. He believed that experience in a different court position was not sufficient reason to pay her more than the minimum. Welch has not proved that rationale to be a pretext for age discrimination. Welch disagrees with that rationale for reducing her salary, but she has not proved that the decision had anything to do with her age.

IT IS HEREBY ORDERED THAT:

The Complaint and underlying Charge of Discrimination by Bonita Welch are dismissed with prejudice on the merits.

STATE OF ILLINOIS)
) ENTERED this 19th day of May 2006.
HUMAN RIGHTS COMMISSION)

J. B. Pritzker, Chairman