

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST
FOR REVIEW BY:

CHARGE NO.: 2008SF2750

JOANN MCDONALD,

ALS NO.: 09-0320

Complainant.

ORDER

This matter coming before the Commission by a panel of three, Commissioners David Chang, Marylee Freeman and Yonnie Stroger, presiding, upon the Complainant's Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Department") of Charge No. 2008SF2750, JoAnn McDonald, Complainant, and Canterbury Manor Nursing Center, Inc., Respondent; and the Commission having reviewed *de novo* the Department's investigation file, including the Investigation Report and the Complainant's Request and supporting materials, and the Department's response to the Complainant's Request; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby ORDERED that the Department's dismissal of the Complainant's charge is SUSTAINED on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following findings of fact and reasons:

1. The Complainant filed an unperfected charge of discrimination with the Department, on February 19, 2008, perfected on April 3, 2008, alleging that the Respondent discharged her based on a perceived disability, cancer, in violation of Section 2-102(A) of the Illinois Human Rights Act (the "Act"). The Department dismissed the Complainant's charge on May 21, 2009, for lack of substantial evidence. The Complainant thereafter filed a timely Request on June 22, 2009.
2. The Complainant worked for the Respondent as a Laundry Supervisor. The Complainant's duties were to assist in supervising the day-to-day activities of the Laundry Department in accordance with the current federal, state, and local standards, guidelines and regulations that governed the Respondent's facility in order to assure that the facility was maintained in a clean, safe, and sanitary manner.

3. The Complainant underwent cancer surgery in 1993. Between 1983 and January 2008, the Complainant's cancer remained dormant. On January 18, 2008, the Complainant requested sick leave and used the time in order to undergo a biopsy to determine whether her cancer had returned.

4. Prior to January 2008, the Complainant had accumulated a history of being absent from work for a variety of reasons, including illness (her own and her grandson's), other family-related issues, and transportation problems. In 2006, the Complainant used 24 sick days. In 2007, the Complainant used 44 sick days. Prior to January 23, 2008, the Complainant had already used 8 sick days out of 16 work days for that month.

5. On January 21, 2008 and January 22, 2008, the Complainant used two sick days because of her grandson's illness.

6. On January 23, 2008, in light of her excessive absences, the Respondent offered Complainant the option to reduce her work schedule in order for the Complainant to address the issues with her grandson and any other problems. However, the Complainant refused the Respondent's offer.

7. On January 23, 2008, the Respondent discharged the Complainant because of her excessive absenteeism.

8. The Commission's review of the investigation file leads it to conclude that the Department properly dismissed the Complainant's charge for lack of substantial evidence.

9. Section 1-1030) of the Act defines "disability" as including "the perception of such characteristic ... 775 ILCS 5/1-1030) "The 'perception' of a handicapping condition may occur with regard to an individual who has be misdiagnosed, misclassified, or erroneously viewed as one who is or has be so afflicted... Such a perception may also occur in connection with a person whose current non-disabling condition... is viewed as creating the potential for future disability." See III. Admin. Code, Ch. II, Section 2500.30(b).

10. There is no evidence in the file that the Respondent discharged the Complainant because it perceived her as being disabled. Rather the Complainant had a lengthy history of absenteeism which directly affected the Complainant's duties and the Respondent's staffing needs. The Complainant did not provide any evidence that the Respondent viewed the Complainant's biopsy as creating the potential for future disability. Further, the evidence in the file shows that the Complainant had a history of being absent from work not only because of her illness, but also because of the illness of her grandson, and other personal issues. In the absence of any evidence that the business consideration relied upon by the Respondent was a pretext for discrimination, it is improper to substitute judgment for the business judgment of the employer. See Berry and State of Illinois Department of Mental Health and Developmental Disabilities Charge No. 1994SA0240 (December 10, 1997).

11. The Complainant has not provided with her Request any new or additional evidence which would warrant a reversal of the Department's original determination.

12. Accordingly, it is the Commission's decision that the Complainant has not presented any evidence to show that the Department's dismissal of her charge was not in accordance with the Act. The Complainant's Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of Complainant's charge is hereby SUSTAINED.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and the Respondent Canterbury Manor Nursing Center, Inc., as appellees, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION)

Entered this 4th day of November 2009.

Commissioner David Chang

Commissioner Marylee Freeman

Commissioner Yonnie Stroger