

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009CA1238
CHARLES J. SALERNO)	EEOC NO.: 21BA90232
)	ALS NO.: 10-0171
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Sakhawat Hussain, M.D., Spencer Leak, Sr., and Diane M. Viverito presiding, upon Charles J. Salerno’s (“Petitioner”) Request for Review (“Request”) of the Notice of Dismissal issued by the Department of Human Rights (“Respondent”)^[1] of Charge No. 2009CA1238; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, **THEREFORE**, it is hereby **ORDERED** that the Respondent’s dismissal of the Petitioner’s charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following:

1. On October 7, 2008, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged the Cook County’s State’s Attorney Office (“CCSAO”) discharged him on July 1, 2008, because of his physical disabilities, seizure and traumatic brain injury (Counts A and B), in retaliation for having opposed unlawful discrimination (Count C), and because of his age, 46 (Count D), in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act (“Act”). On January 28, 2010, the Respondent dismissed the Petitioner’s charge for Lack of Substantial Evidence. On March 2, 2010, the Petitioner filed this timely Request.
2. The Petitioner was employed by CCSAO as an Investigator. On October 8, 2003, while on duty, the Petitioner sustained a traumatic head injury. As a result of this injury, the Petitioner did not return to work after October 8, 2003.

^[1] In a Request for Review Proceeding, the Illinois Department of Human Rights is the “Respondent.” The party to the underlying charge who is requesting review of the Department’s action shall be referred to as the “Petitioner.”

3. The Petitioner filed a disability benefits claim with the County Employees' Annuity and Benefit Fund of Cook County on October 20, 2003. He also filed a claim with the workers' compensation commission on May 3, 2004.
4. On July 6, 2006, the CCSAO received a report from a doctor for its workers' compensation carrier which stated the Petitioner was fit to return to work. When the CCSAO notified the Petitioner that he was required to return to work on August 28, 2006, the Petitioner sent the CCSAO a letter from his personal physician stating the Petitioner was unable to return to work because he continued to have seizures. On February 13, 2007, the CCSAO received additional documentation from the Petitioner's physician stating the Petitioner was still unable to return to work.
5. On April 9, 2007, the CCSAO placed the Petitioner on leave pursuant to the Family and Medical Leave Act.
6. On November 14, 2007, the CCSAO notified the Petitioner that he had to return to work by November 26, 2007, or the Petitioner would be construed as having abandoned his job. The Petitioner did not return to work. The CCSAO sent the Petitioner a second notification on January 11, 2008. The CCSAO notified the Petitioner that his failure to return to work by February 4, 2008, may result in his termination.
7. When the Petitioner still did not return to work following the January 11th notification, the CCSAO notified the Petitioner that it would conduct a pre-disciplinary hearing on May 28, 2008. The Petitioner did not attend the hearing.
8. The CCSAO terminated the Petitioner on July 1, 2008. The CCSAO stated it terminated the Petitioner because he failed to return to work after the CCSAO's workers' compensation doctor had cleared the Petitioner to return to work.
9. The Petitioner alleged the CCSAO terminated him because he was physically disabled, because of his age, and in retaliation for having filed claims for workers' compensation and disability benefits.
10. In his Request, the Petitioner argues that the Respondent's findings were against the manifest weight of the evidence. The Petitioner argues he repeatedly informed the CCSAO that he could not return to work because of his medical condition. The Petitioner contends the CCSAO ignored his physicians' recommendations and terminated him for "job abandonment" on July 1, 2008, as a pretext for discrimination and retaliation for his workers' compensation and disability benefits claims. The Petitioner further argues that he did not abandon his job. Rather, he states he did not return to work because his physicians had not released him to return to work.

11. In its Response, the Respondent asks the Commission to sustain the dismissal of the Petitioner's charge for lack of substantial evidence. As to Counts A and B, the Respondent argues the Petitioner was not disabled within the meaning of the Act because his alleged disabling conditions rendered him unable to perform his duties as an Investigator. As to Count C, the Respondent argues the retaliation claim fails because the Petitioner did not engage in protected activity as defined by the Act. Finally, the Respondent argues no substantial evidence supports the Petitioner's age discrimination claim alleged in Count D because there was no evidence of a similarly situated younger employee whom the CCSAO had not discharged under similar circumstances.

Conclusion

The Commission concludes the Respondent properly dismissed all counts of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

Counts A and B: Disability Discrimination

Counts A and B of the charge were properly dismissed for lack of substantial evidence because the Petitioner is not disabled within the meaning of the Act.

Generally in order to establish a *prima facie* case of disability discrimination in employment, there must be evidence (1) that the Petitioner was disabled within the meaning of the Act; (2) the CCSAO had knowledge of the disability; (3) the Petitioner suffered an adverse employment action; and (4) the disability was unrelated to Petitioner's ability to perform the job with or without an accommodation. Habinka v. Human Rights Commission, 192 Ill.App.3d 343, 373, 548 N.E.2d 702, 139 Ill.Dec 317 (1st Dist. 1989).

Section 1-103(I)(1) of the Act defines "disability" as a "determinable physical or mental characteristic of a person..." which is "unrelated to a person's ability to perform the duties of a particular job..." 775 ILCS § 5/1-103(I)(1). If the Petitioner's alleged disabling conditions, seizure and traumatic brain injury, were related to the Petitioner's ability to perform his job and no reasonable accommodation would have permitted the Petitioner to perform his job functions, then the Petitioner was not disabled within the meaning of the Act. See Georgia Deasel and Electric Energy, Inc., IHRC, ALS No. 4525(S), 1994WL843680 (September 29, 1994).

Following the Petitioner's injury on October 8, 2003, the Petitioner never returned to work up until the day he was discharged on July 1, 2008. By the Petitioner's own admission, the Petitioner's

physicians never released him to return to work after October 8th, and the Petitioner was unable to perform his duties as an Investigator throughout this time period because of his alleged disabling conditions.

The evidence shows that the Petitioner's seizure and traumatic brain injury were related to his ability to perform his job as an Investigator, and there is no evidence that a reasonable accommodation would have permitted the Petitioner to perform his job. Therefore, Counts A and B were properly dismissed for lack of substantial evidence because the evidence is insufficient to establish a *prima facie* case of disability discrimination.

Count C: Retaliatory Discharge

The Commission concludes the Petitioner's retaliation claim was properly dismissed for lack of substantial evidence.

Generally a *prima facie* case of retaliation is established by showing: (1) the Petitioner engaged in a protected activity; (2) the employer committed an adverse action against him; and (3) a causal connection existed between the protected activity and the adverse action. See Welch v. Hoeh, 314 Ill.App.3d 1027, 1035, 733 N.E.2d 410, 416 (3rd dist. 2000).

"Protected activity" is defined in § 6-101(A) of the Act. Pursuant to § 6-101(A), an employer is forbidden from retaliating against an employee because the employee either ... "has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination ... [or] because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act." 775 ILCS § 5/6-101(A).

In Count C, the Petitioner alleged he engaged in protected activity when he filed claims for workers' compensation and disability. However, the filing of such benefits claims clearly do not constitute a "protected activity" as defined in § 6-101(A). Therefore, Count C was properly dismissed for lack of substantial evidence because the evidence was insufficient to establish a *prima facie* case of retaliation.

Count D: Age Discrimination

Finally Count D was properly dismissed for lack of substantial evidence because the evidence was insufficient to establish a *prima facie* case of age discrimination. There was no evidence the CCSAO had treated a similarly situated employee outside the Petitioner's protected class more favorably under similar circumstances. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994).

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

WHEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Petitioner'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 Cook County's State's Attorney Office as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS

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HUMAN RIGHTS COMMISSION

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Entered this 27th day of October 2010

Commissioner Sakhawat Hussain, M.D.

Commissioner Spencer Leak, Sr.

Commissioner Diane M. Viverito