



This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 2/04/03.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF)
)
Maria Salas,)
 Complainant)
and)
)
Hickey, Melia, Kurfirst &)
Patterson, Chtd.,)
 Respondent)

CHARGE NO.: 2000CF1818
EEOC NO.: 21BA 01220
ALS NO.: 11547

RECOMMENDED ORDER AND DECISION

This matter is before me for consideration of Respondent’s Motion for Summary Decision (“Motion”) first submitted on December 10, 2001 and entered as amended on December 14, 2001 after it was served on the Illinois Department of Human Rights (“Department”). Complainant’s response was filed on May 28, 2002 and will be accepted as timely although it was supposed to be filed by no later than May 24, 2002 (see discussion below). Respondent’s reply was timely filed on June 7, 2002. The Motion is now ready for decision.

Statement of the Case

The complaint in this case was filed on behalf of Complainant by the Department on June 7, 2001. Respondent was given until August 8, 2001 to file a verified answer to the complaint and it did so on August 7, 2001. A scheduling order was also entered on August 7, 2001. Discovery was to be initiated by September 24, 2001, and neither party filed the required certificates of service for any discovery documents that were duly served. However, on December 10, 2001, Respondent submitted its first Motion for Summary Decision, but failed to serve it on the Department. This submission was stricken with leave to re-serve it properly, which was done on December 14, 2001. Then, on December 17, 2001, Complainant filed a Motion to Compel to which Respondent contended it did not need to respond as it alleged Complainant served her discovery requests after

the date required in the scheduling order. However, on January 10, 2002, the Motion to Compel was granted to the extent that certain requests were relevant to the Motion for Summary Decision. The specific requests were identified at a special hearing on January 15, 2002 and Respondent was given until February 8, 2002 to comply.

On January 22, 2002, Respondent filed a Motion to Have Requests to Admit Deemed Admitted, alleging that Complainant's response was late and was not sworn. This motion was couched in the requirements of Illinois Supreme Court Rule 216(c) regarding requests to admit. Complainant then requested leave to amend her answers to the requests to admit in a motion filed on January 25, 2002 and which was opposed by Respondent in its response filed on February 19, 2002. The parties entered into a protective agreement on March 12, 2002 that was intended to restrict the dissemination of certain records requested by Complainant. On March 12th, the motion to deem the requests to admit was denied, Complainant was given leave to amend her answers to the requests to admit and she was given an extension to file verification of her answers to the requests to admit.

On April 26, 2002, Respondent timely filed a "reply" in support of the Motion even though Complainant had not filed any response before, on or after the then-current due date of April 12, 2002. However, in an order dated May 2, 2002 in which the Commission's decision in Gable and Vandalia Country & Golf Club, Ill. H.R.C. Rep. (1999SF0321, June 27, 2001) was cited, Complainant was given until May 24, 2002 to file a response, more than five months after the original filing of the Motion. The order of May 2nd advised Complainant that this date was final and that any request for an additional extension of time would be granted for good cause only, and only if it were submitted on or before May 24th. In spite of this, Complainant did not file her "Memorandum in Opposition to Respondent's Motion for Summary Decision" until Tuesday, May 28, 2002. However, the "notice of filing" accompanying the Memorandum states that Complainant's counsel "caused a copy of (the Memorandum) to be filed" at the Commission on

May 24th. The “certificate of service” on the same page further indicates that copies were served on opposing counsel by placing it in the U.S. Mail on May 24th. While there is at least the possibility that the Memorandum was not served in the manner stated,¹ it also is not possible to resolve the ambiguities raised by the relevant sequence of events with certainty. Therefore, the Memorandum will be entered and considered in this recommended order. Respondent’s reply was timely filed on June 7, 2002.

Findings of Fact

1. Complainant filed charge No. 2000CF1818 with the Illinois Department of Human Rights on or about February 16, 2000, alleging that she suffered discrimination due to her pregnancy as prohibited by Section 2-102(A) and 1-103(I) of the Illinois Human Rights Act. This complaint was filed by the Department of Human Rights on behalf of Complainant on June 7, 2001.
2. Respondent filed a Motion for Summary Decision, supported by affidavits and other documentary evidence on December 14, 2001.
3. Complainant’s response is not supported by competent evidence that would be admissible at public hearing to refute the properly plead factual assertions of Respondent’s Motion, or that would otherwise create an issue of material fact.

Conclusions of Law

1. Complainant is an “aggrieved party” but Respondent is not an “employer” as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B)(a) respectively.
2. The Commission does not have jurisdiction over the parties of this action.
3. This complaint should be dismissed with prejudice.

¹ Respondent stated in its reply that the copy of the Memorandum received by it carried the Commission’s date stamp of May 28, 2002 and was enclosed in an envelope postmarked May 28, 2002. Copies of the Memorandum and envelope were attached to the reply, but the date on the postmark is illegible. I would note that the Memorial Day Holiday was celebrated on Monday, May 27, 2002 and may have affected the time line regarding this filing.

Discussion

Under Section 8-106.1 of the Illinois Human Rights Act, either party to a complaint before the Commission may move for summary decision and it shall be granted if “there is no genuine issue of material fact and that the moving party is entitled to a recommended order as a matter of law.” The standards used in evaluating motions for summary decision are the same as those employed in the courts of Illinois in determining motions for summary judgment, a principle affirmed by the Illinois Appellate Court in Fitzpatrick v. Illinois Human Rights Comm’n, 267 Ill.App.3d 386, 642 N.E.2d 486, 204 Ill.Dec. 785 (4th Dist. 1994) and Cano v. Village of Dolton, 250 Ill.App.3d 130, 620 N.E.2d 1200, 189 Ill.Dec. 883 (1st Dist. 1993).

In considering a motion for summary decision, as with a motion for summary judgment, reasonable inferences may be drawn from undisputed facts, but must be drawn in favor of the non-moving party where the facts are susceptible to two or more interpretations. Purdy Company of Illinois v. Transportation Insurance Company, Inc., 209 Ill.App.3d 519, 568 N.E.2d 318, 154 Ill.Dec. 318 (1st Dist. 1991). Such inferences cannot be unreasonable, speculative or conjectural. The facts presented by the party opposed to the motion for summary decision do not have to be as conclusive as those presented at a public hearing, but they need only provide a factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 608 N.E.2d 920, 181 Ill.Dec. 669 (4th Dist. 1993). If an analysis of the facts presented by the movant and the non-movant result in a conclusion that there are no issues of material fact remaining for proof at a public hearing, the movant is entitled to dismissal of the complaint with prejudice.

Here, Respondent’s Motion first asserts that it is not an “employer” as that term is defined in the Illinois Human Rights Act. This is a jurisdictional matter and must be proven by a complainant even before reaching the issue of whether a *prima facie* case regarding the substantive allegations in the complaint is present. Paragraph Two of the complaint states that “Respondent ... was an

employer within the meaning of the Section 2-101(B)(1)(a) and was subject to the provisions of the Act.” When it answered the complaint, Respondent denied “the allegations of paragraph two as alleged.” At one time, the Commission’s view of a record in this posture was that a respondent would have to submit proof that it was not an employer before the Complainant was required to come forward with contrary evidence. Allen and Aero Services International, Inc., Ill. H.R.C. Rep. (1987SF0157, January 20, 1995). However, the Illinois Appellate Court reviewed the Allen decision and found that “the definition of employer is a threshold element of the civil rights violation as defined by the (Illinois Human Rights) Act ... (and) (i)t is the complainant who must prove that (a respondent) is an ‘employer.’” Aero Services International, Inc. v. Human Rights Comm’n, 291 Ill.App.3d 740, 748, 684 N.E.2d 446, 225 Ill.Dec. 761 (4th Dist. 1997)(*see also* the court’s holding at 752). This, then, is the standard that must be met by Complainant in this case.

The Human Rights Act provides five separate definitions for “employer,” as well as a listing of entities that are not employers for purposes of the Act. 775 ILCS 5/2-101(B). In Aero Services, as in this case, the section at issue was Section 5/2-101(B)(1)(a), the so-called “15 employee” requirement. The status of a respondent as an “employer” in a given case under Section 5/2-101(B)(1)(a) is a question of law that ultimately will be determined through analysis of the relevant facts available in the case.

In support of its argument that it is not an “employer” under Section 5/2-101(B)(1)(a), Respondent attached the affidavit of Richard J. Hickey, a principal of Respondent, to the Motion. Hickey’s affidavit expresses in some detail the method Respondent pursued in meeting its need for non-lawyer support staff. In summary, Respondent set about to “lease” support employees from Optimum Staffing, Inc., an agency that provides such personnel as required by its clients. Hickey Affidavit, Paragraphs 2-4. The affidavit further asserts that during calendar years 1999 and 2000, Respondent never had more than 10 employees of any kind.

When Complainant's motion to compel was considered on January 10 and 15, 2002, it was done so specifically to determine if material requested from Respondent was needed to enable Complainant to respond to the Motion, including the portion regarding the "employer" issue. The order of January 15, 2002, drafted by Complainant's counsel, specifically provided in part that "Complainant has until January 22, 2002 to serve additional discovery re: Respondent's status as an employer under the Act." However, even with this additional opportunity to obtain relevant information directly from Respondent on this issue, Complainant's memorandum of May 28, 2002 only states that the Department's investigative report asserted jurisdiction on this issue, thereby making further consideration by the Commission moot. The Commission has long held that "the Department's investigation report is not admissible evidence because it is unsworn and is patently hearsay." Taylor and Dominic Fiordirosa Construction Company, Inc., Ill. H.R.C. Rep. (1996CF0400, June 12, 2000) (and cases cited therein). Therefore, the assertions made by Complainant on this issue in the Memorandum are disregarded for the purpose of deciding the Motion.

Complainant has failed to establish that there is a genuine issue of material fact regarding the status of Respondent as an "employer" under the Act. Therefore, in light of Respondent's denial that it is an employer, coupled with the evidentiary support for this contention provided in the Hickey affidavit and Complainant's inability to provide even minimal competent evidence to refute Respondent's claims, it is recommended that the Commission find that it does not have jurisdiction over Respondent and that the complaint should be dismissed with prejudice.

I would note that even though determination of the jurisdictional issue is sufficient to support the recommendation to dismiss this complaint with prejudice, both Complainant and Respondent also have provided argument concerning the substantive issues of this case as well. But here again, Complainant does not provide any affidavits or other evidence that would otherwise be admissible at public hearing to support her positions on these points. Her only support is provided

by ten additional citations to the Department's investigative report. As noted above, the investigative report is not competent to establish the existence of disputed issues of material fact. Thus, even if the jurisdictional issue was not determined as it is here, Complainant would also be unsuccessful in establishing any other grounds to support denial of Respondent's Motion.

Recommendation

It is recommended that the complaint and underlying charge in this matter be dismissed with prejudice.

ENTERED:

November 25, 2002

BY: _____

DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

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