

THIRD DIVISION
July 20, 2011

2011 IL App (1st) 102151-U
No. 1-10-2151

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|----------------------------|
| LEONID SAMOILOVICH, |) | Review of the Order of |
| |) | Chief Legal Counsel of the |
| Petitioner-Appellant, |) | Illinois Department of |
| |) | Human Rights. |
| v. |) | |
| |) | |
| THE DEPARTMENT OF HUMAN |) | |
| RIGHTS; ROCCO CLAPS, Director |) | No. 2008 CA 0647 |
| of the Department of Human Rights; |) | |
| RAY LUNA, Chief Legal Counsel of the |) | |
| Department of Human Rights; and |) | |
| MICHAEL LIEBERMAN, Chief Legal |) | |
| Counsel Designee of the Department of |) | |
| Human Rights, |) | |
| |) | |
| Respondents-Appellees |) | |
| |) | |
| (Village of Northbrook Park District, |) | |
| Village of Northbrook Park District Executive |) | |
| Director/Secretary Edward Harvey, |) | |
| Tony Korzyniewski, Jean Truelsen, and |) | |
| Kathy Affatati, |) | |
| Respondents). |) | |

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

ORDER

HELD: Chief Legal Counsel of the Illinois Department of Human Rights did not abuse his discretion in sustaining the finding of the Department where petitioner failed to establish a *prima facie* case of age discrimination against his former employer, the Village of Northbrook Park District. The Chief Legal Counsel also did not abuse his discretion in sustaining the Department's decision to dismiss petitioner's claim of disability discrimination.

¶ 1 Petitioner, Leonid Samoilovich (Leonid), appeals an order entered by the respondent, Chief Legal Counsel Designee of the Illinois Department of Human Rights (Department). Leonid filed a charge of age and disability discrimination with the Department, which directed a finding in favor of Leonid's former employer, the Village of Northbrook Park District (Park District). After an investigation, the Department dismissed Leonid's charge for lack of evidence and lack of jurisdiction. The Chief Legal Counsel sustained the dismissal. Leonid now appeals, contending the Chief Legal Counsel abused his discretion in dismissing the claim based on factual error, impermissible findings of fact, and findings of fact as to conflicting evidence. We affirm.

¶ 2 BACKGROUND

¶ 3 Leonid worked for the Park District as a part time registration clerk from May 22, 2005, until April 12, 2007. In a memorandum dated March 1, 2007, from Park District recreation manager Tony Korzyniewski, entitled *Approval of Your Leave of Absence Request*, Leonid was granted a six-week leave of absence without pay, beginning March 5, 2007. During this time, Leonid underwent hip replacement surgery. The memorandum restates a portion of the personnel policy, which provides in pertinent part, "the Park District does not guarantee that an employee

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returning from an absence under this section will receive their prior job or prior pay rate.”

¶ 4 Prior to the expiration of Leonid’s medical leave in a letter dated April 12, 2007, from Park District human resources manager Jean Truelsen, Leonid was informed by the Park District that he was discharged because the Park District filled his position. The letter also informed Leonid that the Park District had a business need to fill his position and “it is no longer available at this time.” Korzyniewski wrote in his memorandum, dated March 1, 2007, to Leonid, that it was a busy time of year and he would need to immediately find someone to perform Leonid’s work while he was on leave.

¶ 5 The Park District filled the position with a now 72-year-old employee, after temporarily hiring a younger employee to hold the position.¹ The Park District did not have any other similar positions that were available or vacant at the time of Leonid’s expected return, but encouraged him to apply for other available openings, including camp counselors, life guards, pool attendants, pool cashiers, and batting cage attendants. The Department’s investigation revealed Leonid did not apply for any positions, because he wanted his former job back and was more comfortable

¹The record reflects Stephanie Hall, age 34 (and therefore not a member of the protected class) was hired as a “Registration Clerk” on March 5, 2011, and promoted to “Registration Assistant” on July 2, 2011. Leonid’s position was permanently assumed by Sandra Ratnow, now age 72 (a member of the protected class). Further, Leonid failed to establish from the record when Hall was replaced by Ratnow. We cannot assume when Hall was promoted. In other words, neither side establishes how long Hall worked in Leonid’s position before Sandra Ratnow took over.

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performing in that position. He stated he was not willing to accept any other position that would be offered to him. Leonid stated the only way he would go back to work for the Park District is if he could get his old job back at the same rate of pay.

¶ 6 On October 1, 2007, Leonid filed a charge of discrimination with the Department, alleging his termination based on his age and his handicap. In a two-part complaint filed with the Department, he first alleged he was discharged because of his age (68 years old at the time), his job performance met the Park District's legitimate expectations, and similarly situated younger employees whose leave expired were not discharged like he was. The second part of the complaint alleged: he was discharged because of a hip disorder; he is a handicapped individual as defined by the Illinois Human Rights Act (Act) (775 ILCS 5/1-102 (West 2004)); that the Park District was aware of his handicap status; that his job performance met legitimate expectations; and that his handicap was unrelated to his ability to perform the essential functions of his job.

¶ 7 The Department conducted an investigation, which included a questionnaire sent to Leonid's physician, Dr. Jorge Prieto. Dr. Prieto indicated Leonid's condition was not significantly debilitating or disfiguring by checking a "no" box and writing next to the box, "you need to give defined criteria." Dr. Prieto also indicated in the same questionnaire that petitioner's condition is not transitory (that is, temporary or of brief duration) by checking a "no" box.

¶ 8 After investigation, the Department concluded, that there was a lack of substantial evidence to support count A (age discrimination), finding that there was a business need to replace Leonid, that he had been replaced with an older employee, and that the Park District offered Leonid alternate positions which he refused. The Department also concluded that it lacked

jurisdiction over count B (disability discrimination) and dismissed the charge. Leonid appealed to the chief legal counsel designee, who sustained the Department's findings. Leonid then filed a timely notice of review of the Chief legal counsel's decision with this court.

¶ 9

DISCUSSION

¶ 10

I. Age Discrimination

¶ 11 On appeal, Leonid argues the order of the chief legal counsel erroneously sustained the dismissal of his age discrimination charge. "Our standard of review is 'whether the finding of no substantial evidence was arbitrary or capricious or amounted to an abuse of discretion.'" *Deen v. Lustig*, 337 Ill. App. 3d 294, 302 (2003) (quoting *Willis v. Department of Human Rights*, 307 Ill. App. 3d 317, 326-27 (1999)). "Agency action is arbitrary and capricious only if the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an explanation which is so implausible that it runs contrary to agency expertise." *Id.* (quoting *La Salle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 786 (2001)). An abuse of discretion exists "when a decision is reached without employing conscientious judgment or when the decision clearly defies logic." *Id.* (citing *Bodine Electric of Champaign v. City of Champaign*, 305 Ill. App. 3d 431, 435 (1999)). "Our review is limited to the Chief Legal Counsel's decision, *not* the decision of the Department of Human Rights, and the Chief Legal Counsel's findings are entitled to deference." (Emphasis in original.) *Id.* (citing *Willis*, 307 Ill. App. 3d at 327).

¶ 12 The Illinois Human Rights Act (Act) grants freedom from unlawful discrimination on the basis of race, color, religion, sex, national origin, ancestry, age, *inter alia*, physical or mental disability. 775 ILCS 5/1–102 (West 2004). Further, the Act precludes an employer from, *inter*

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alia, refusing to hire, renew employment, or discharge an employee on the basis of unlawful discrimination. 775 ILCS 5/2–102(A) (West 2004); *Owens v. Department of Human Rights*, 403 Ill. App. 3d 899, 916 (2010).

¶ 13 We review only the Chief Legal Counsel’s decision, and not the decision of the Illinois Department of Human Rights. We will overturn the counsel’s decision only if the decision was arbitrary, capricious or an abuse of discretion. *Deen*, 337 Ill. App. 3d at 302. “Generally, when an employee alleges a violation of the Human Rights Act based on unlawful discrimination by an employer, Illinois courts apply a three-part analysis.” *Deen*, 337 Ill. App. 3d at 302 (citing *Raintree Health Care Center v. Illinois Human Rights Comm’n*, 173 Ill. 2d 469, 480-81 (1996)). Initially, the burden is on the petitioner to establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *Id.* at 481. To establish a *prima facie* case of employment discrimination, the petitioner must show: (1) he is a member of a protected class; (2) he was meeting his employer's legitimate business expectations; (3) he suffered an adverse employment action; and (4) the employer treated similarly situated employees outside the class more favorably. *Owens v. Department of Human Rights*, 356 Ill. App. 3d 46, 52 (2005).

¶ 14 If the petitioner succeeds in establishing a *prima facie* case, a rebuttable presumption of unlawful discrimination by the employer against the employee is created. *Raintree*, 173 Ill. 2d at 481. The employer may rebut the presumption by articulating a legitimate, nondiscriminatory reason for its decision. *Id.* If the employer is able to articulate a legitimate, nondiscriminatory reason, the burden shifts back to the petitioner to prove the employer's articulated reason was a mere pretext for unlawful discrimination. *Id.*

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¶ 15 In support of his claim, Leonid raises two points. First, he maintains the Chief legal Counsel erroneously found Leonid was not replaced by a younger employee. Second, Leonid argues the Park District's claim that he was replaced for a business necessity was a pretext for illegal discrimination and the Chief Legal Counsel improperly resolved conflicting evidence in sustaining the dismissal. We address each point in turn.

¶ 16 Here, Leonid failed to state a *prima facie* case for age discrimination. There is no indication the Park District treated similarly situated employees outside the class more favorably. Leonid was permanently replaced by a now 72-year-old employee, who is older than Leonid. Being older leaves no doubt the replacement was in the same protected class as Leonid. Leonid argues Stephanie Hall, a 35-year-old employee, was actually hired to replace him, and not as a temporary hire. Leonid fails to show Hall's employment agreement indicates she was a temporary hire. Similarly, Leonid fails to show where any temporary hires were indicated as such in their employment agreements. Further, Leonid fails to establish when Sandra Ratnow assumed his job permanently from Hall. The Department's investigation revealed Hall was a temporary hire, and the chief legal counsel did not abuse its discretion in affirming the finding. Leonid contends the chief legal counsel's decision to sustain the dismissal of his age discrimination charge because he did not make out a *prima facie* case should be reversed because it is based on factual error (that he was replaced by an older employee when they agreed he was replaced with a younger one).

¶ 17 Leonid's claim in his brief that the parties agreed he was replaced by a younger employee cites to an appendix page containing a response to question AA8 of a questionnaire, and cites to an employment agreement in the record. However, the employment agreement in the record does

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not state the parties agree Hall was hired to permanently replace Leonid. The document is simply a one-page employment contract for his temporary replacement, which contains no hiring intentions, other than “part time” and “registration clerk.” The response to question AA8 of a questionnaire Leonid cites to, similarly, does not show the parties agreed that Leonid was replaced with a younger employee. The response simply claims Hall replaced him and the record reflects she was his temporary replacement. However, even if Hall were not hired temporarily, we are not in a position to take question AA8 of the questionnaire into consideration. The law is clear that attaching a document that was not admitted into evidence as an appendix to the defendant's brief is an improper means of supplementing the appellate record; only evidence appearing in the trial record may be considered on appeal. *People v. Gacho*, 122 Ill. 2d 221, 254 (1988). Thus we cannot consider facts outside of the record.

¶ 18 Further, neither side cites any case law about whether Hall’s temporary hire as Leonid’s replacement impacts our legal analysis where Hall was not a member of the protected class.

¶ 19 Even assuming *arguendo*, that the temporary hiring of the 35-year-old sufficed as substantial evidence of a *prima facie* case of age discrimination, the Department produced evidence Leonid was replaced due to the business requirements of the office. Accordingly, the burden fell upon Leonid to produce substantial evidence that his discharge was a pretext for illegal discrimination.

¶ 20 Leonid first asserts that the chief legal counsel's decision on this point was in error because it was based on credibility determinations made by the chief legal counsel in violation of the Seventh Circuit's decision in *Cooper v. Salazar*, 196 F.3d 809 (7th Cir. 1999). In *Cooper*,

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plaintiffs filed a class action suit asserting a due process challenge to the then-new amendments to the Act (775 ILCS 5/2–101 *et seq.* (West 1996)), which permitted the Department to make credibility determinations at the investigatory stage of the proceedings. *Cooper*, 196 F.3d at 814. The district court entered an injunction against the Department prohibiting it from making credibility determinations in the course of its investigations. The Seventh Circuit upheld the injunction. *Cooper*, 196 F.3d at 814–15, 818. In doing so, the Seventh Circuit clarified that it was not making any determinations about whether the procedures of the Department violated due process. Rather, the court found that because it was unclear whether the Department had a solely investigatory or an adjudicatory function, there were concerns regarding due process that vitiated a preliminary injunction. *Cooper*, 196 F.3d at 815.

¶ 21 Leonid notes that he presented testimony that conflicted with the Department's evidence on the question of whether the time he left his position was a busy time of year for the office. However, as the Department correctly notes, regardless of how busy the office was at the time, the evidence showed the Department needed to place someone in Leonid's position once he was absent. Thus, the record shows the Chief Legal Counsel's decision was not based on credibility determinations on this point.

¶ 22 Leonid argues that since the Park District never offered him alternate positions, but instead only suggested he apply for positions, is proof of discrimination. However, the Park District's absence without pay policy states, "leaves without pay shall only be granted when it will not unduly interfere with the best interests of the Park District. Employees granted leave of absence will be considered for a vacant position for which they are qualified upon return, although it may

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be a different position than held previous to the leave. The Park District does not guarantee that an employee returning from an absence under this section will receive their prior job or prior pay rate.” Leonid does not cite any case law in support of his assertion that an offer to consider one for employment is a mandate to employ the individual.

¶ 23 Leonid also fails to show any younger employees in similar situations were treated differently in that they were offered positions as opposed to having to apply for them. Nor did the investigation reveal any such discrepancy in treatment (we can not assume the Park District failed to consider Leonid for positions which he was qualified). In fact, Leonid testifies in his affidavit that he did not want any position different from the one that he was terminated from and no longer was available upon the time of his expected return. Therefore, we conclude the chief legal counsel did not abuse his discretion in sustaining the dismissal of Leonid’s age discrimination claim for lack of substantial evidence.

¶ 24 II. Disability Discrimination

¶ 25 Leonid also contends the chief legal counsel erred in sustaining the dismissal of his charge of disability discrimination. The chief legal counsel's conclusion that the Department lacked jurisdiction over this claim requires further examination, as it potentially affects the standard of review. Whether the Department had jurisdiction is a question of law subject to *de novo* review. See *Board of Education v. Cady*, 369 Ill. App. 3d 486, 493 (2006); *Ferrari v. Department of Human Rights*, 351 Ill. App. 3d 1099, 1103 (2004).

¶ 26 The Illinois Supreme Court has stated, “[t]he term ‘jurisdiction,’ while not strictly applicable to an administrative body, may be employed to designate the authority of the

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administrative body to act * * *.” *Board of Educ. of City of Chicago v. Board of Trustees of Public Schools Teachers’ Pension & Retirement Fund of Chicago*, 395 Ill. App. 3d 735, 740 (2009) (quoting *Business & Professional People for the Public Interest v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 243-45 (1989)).

¶ 27 The actions of an administrative agency must be authorized by statute. *Alvarado v. Industrial Comm’n*, 216 Ill. 2d 547, 553 (2005). The Act authorizes investigations of charges filed in conformity with the Act. 775 ILCS 5/7-101(B) (West 2006). Violations of the Act include making employment decisions based upon unlawful discrimination. 775 ILCS 5/2-102(A) (West 2006). The Act defines unlawful discrimination as:

“[d]iscrimination against a person because of his or her race, color, religion, national origin, ancestry, *age*, sex, marital status, order of protection status, *disability*, military status, sexual orientation, or unfavorable discharge from military service as those terms are defined in this Section.” (Emphases added.) 775 ILCS 5/1-103(Q) (West 2006).

Thus, the Department clearly has jurisdiction to investigate claims of disability discrimination. A reading of the Chief Legal Counsel's decision shows that his comment about jurisdiction is better read as a finding that Leonid failed to make a *prima facie* case in part because he was not a member of the protected class, *i.e.*, disabled.

¶ 28 The Act defines “disability” as a “determinable physical or mental characteristic of a person***.” 775 ILCS 5/103(I) (West 2006). Determinable or mental characteristic is “interpreted as excluding: A) conditions which are transitory and insubstantial, and B) conditions which are not significantly debilitating or disfiguring.” 56 Ill. Adm. Code 2500.20(b)(1)(A), (B)

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(2010). The Department relied on Leonid's physician's (Dr. Jorge Prieto) answers to the Department questionnaire in determining whether Leonid's condition was significantly debilitating. Using the doctor's answers, the investigation revealed Leonid did not have a medical condition constituting a disability within the meaning of the Act.

¶ 29 Leonid argues that the Chief Legal Counsel overlooked the doctor's comments on the Department medical questionnaire, which asked whether Leonid's hip disorder was "significantly debilitating," and that the finding was based on conflicting evidence. The questionnaire provides two boxes in which the doctor may check "yes," to indicate the hip disorder is significantly debilitating; or, "no," to indicate the hip disorder is not significantly debilitating. The doctor checked "no," indicating the hip disorder is not significantly debilitating, however, he wrote, "you need to define criteria" adjacent to the boxes.

¶ 30 Leonid argues that the Park District had substantial evidence that he was disabled when he requested leave in February 2007, because he requested an accommodation for a hip disorder seventeen months earlier. We do not find this argument persuasive, as the doctor's assessment is not self-contradictory. The presence of an injury or infirmity 15 months prior to his leave for surgery alone does not mean it rose to the level of significantly debilitating to render Leonid disabled. Further, the doctor indicated the hip disorder was not significantly debilitating by checking "no," despite his request for criteria. Further clarifying his position, Dr. Prieto indicated, by checking "no," that Leonid's condition was not transitory. Dr. Prieto's writing "Ambulation was limited prior to surgery" does not signify the limitation rose to that of substantially debilitating. As the doctor clearly indicated the condition is not transitory and not substantially

debilitating, the Chief Legal Counsel did not abuse his discretion in dismissing Leonid's claim.

¶ 31 III. Retaliation

¶ 32 Finally, we find Leonid's ultimate assertion that the Chief Legal Counsel's refusal to order an investigation of an alleged retaliation claim was an abuse of discretion lacks merit. The record fails to show Leonid filed a claim of retaliation with the Department or attempted to establish a *prima facie* case of retaliation. Leonid first argues the Park District subjected him to retaliation in his request for review of the Department's findings by the chief legal counsel. The chief legal counsel cannot review claims that were not raised in the initial charge with the Department. *Deen*, 337 Ill. App. 3d at 305. Even if he could, Leonid fails to establish a *prima facie* case for retaliation. To establish a *prima facie* case for retaliation, Leonid must show: (1) that he engaged in a protected activity; (2) that the Park District took an adverse action against him; and (3) that there was a nexus between the protected activity and adverse action. *Maye v. Human Rights Comm'n*, 224 Ill. App. 3d 353, 360 (1991). Therefore, we conclude the Chief Legal Counsel did not abuse his discretion in refusing to review the purported claim.

¶ 33 CONCLUSION

¶ 34 In sum, the Chief Legal Counsel's ruling to sustain the dismissal of Leonid's age discrimination claim for lack of substantial evidence was not arbitrary or capricious and did not constitute an abuse of discretion where the investigation revealed Leonid failed to establish a *prima facie* case. Additionally, the Chief Legal Counsel's ruling to uphold the dismissal of Leonid's disability discrimination claim was not arbitrary, capricious, or an abuse of discretion. Finally, because Leonid failed to bring a claim of retaliation before the Department's

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investigation, the Chief Legal Counsel was within his discretion to refuse to review the claim.

¶ 35 Affirmed.