

Third Division
August 29, 2012

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No. 1-11-2142

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CORPORATE BUSINESS CARDS, LTD.,)	Appeal from the Illinois
)	Human Rights Commission.
Petitioner-Appellant,)	
)	
v.)	
)	2003 CA 2063
ILLINOIS HUMAN RIGHTS COMMISSION,)	
ILLINOIS DEPARTMENT OF HUMAN)	
RIGHTS , and WILLIAM KOSMIEJA,)	
)	
Respondents-Appellees.)	

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *Held:* Where an employer lays off a skilled, experienced, full-time employee in the protected class (over 40 years old), but retains an employee who is not a member of the protected class with less skills and experience, the layoff constitutes a termination of employment. Where the Commission finds that the employer's proffered reason for discharging an employee is inconsistent with its stated business policy, the Commission's finding that the employer's reason for the discharge was pretextual is not contrary to the manifest weight of the evidence.

¶ 2 William Kosmieja (Kosmieja), the complainant, brought this suit against his former employer, Corporate Business Cards, Ltd. (CBC), the respondent, and alleged that the employer engaged in age discrimination in violation of section 2-102(A) of the Illinois Human Rights Act (Act). 775 ILCS 5/2-102 (West 2010).

¶ 3 After a four day hearing, the Administrative Law Judge (ALJ) found that Kosmieja had established that CBC discriminated against him on the basis of his age when it discharged him. On June 8, 2011, the Illinois Human Rights Commission (Commission) affirmed and adopted the ALJ's supplemental recommended order and decision and denied further review.

¶ 4 On appeal, we must decide whether Kosmieja established a *prima facie* case of unlawful age discrimination, and whether the Commission's finding, that the employer's reason for the discharge was a pretext for age discrimination, was contrary to the manifest weight of the evidence. We find that the Commission did not err when it found that the employer discriminated against the complainant on the basis of his age when it laid the complainant off and replaced him with a younger employee not in the protected class. We also find that the Commission's finding that the employer's stated economic reason for laying off the complainant was pretextual was not contrary to the manifest weight of the evidence. Therefore, we affirm the Commission's finding that CBC terminated Kosmieja's employment because of his age.

¶ 5 Background

¶ 6 CBC produces business cards, letterheads, envelopes, and other stationery supplies. Richard

Letarte (Letarte) is the owner and president of CBC. Most of CBC's employees were family members, relatives or friends. Letarte's wife, Patricia Letarte, was CBC's treasurer, secretary, and director of human resources.

¶ 7 In June 1994, CBC hired Kosmieja as a typesetting assistant in its typesetting department. His immediate supervisor was Pamela Taglia. Kosmieja's job at CBC was to operate Penta, a computer based software typesetting system. The Penta software has multiple functions, including data entry and computer coding. Kosmieja became familiar with data entry and computer coding equipment at Vail Printing Company, a previous employer. Kosmieja also received informal training on CBC's Penta system.

¶ 8 In February 1998, CBC hired Justin Sharp on a part-time basis, while he was enrolled in high school. After graduation, CBC hired Sharp full-time. Sharp began his employment at CBC by working in the bindery department. Beginning in 2000, he began working in the typesetting department with Taglia and Kosmieja on an as-needed-basis.

¶ 9 Sometime in 2000, CBC began experiencing financial difficulties. CBC's accountant, Robert Micatka, testified that he recommended to Letarte that CBC implement measures to reduce labor costs in the typesetting, pressroom and administrative departments. He specifically recommended that CBC try to eliminate overtime hours.

¶ 10 On August 22, 2002, at a meeting attended by Letarte, Patricia Letarte, Taglia and Kosmieja, Letarte informed Kosmieja that he could no longer work full-time because business was slow. Letarte offered Kosmieja the option of working part-time for one to twenty hours per week, but without a guarantee that he would work a specific number of hours each week and

without the medical and vacation benefits that he enjoyed in his full-time position with CBC. Letarte informed Kosmieja that the layoff would be in effect until business improved. When Kosmieja informed Letarte that he needed a full-time income, Letarte advised Kosmieja to go home and consider his offer. However, immediately following the meeting, Kosmieja gathered his belongings and left CBC.

¶ 11 After Kosmieja's layoff, Sharp worked in the typesetting department with Taglia. Sharp worked full-time, performing duties both in the typesetting and bindery departments, and he also worked some overtime.

¶ 12 At the time of Kosmieja's layoff, he was 43 years old, and Sharp was 21 years old.

¶ 13 Charge of Discrimination

¶ 14 Kosmieja filed a charge of age discrimination against CBC with the Illinois Department of Human Rights. The Department subsequently filed a complaint with the Commission charging age discrimination in violation of the Illinois Human Rights Act (Act).

¶ 15 Section 2-102(A) of the Act provides that it is a civil rights violation:

"For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, *discharge*, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination *** ." (Emphasis added.)

775 ILCS 5/2-102(A) (West 2010).

¶ 16 The Act defines unlawful discrimination as follows:

"'Unlawful discrimination' means discrimination against a person because of his or her race,

color, religion, national origin, ancestry, age *** ." 775 ILCS 5/1-103(Q) (West 2010).

¶ 17 The Act defines age and explains when age is used in the Act it means "the chronological age of a person who is at least 40 years old." 775 ILCS 5/1-103(A) (West 2010).

¶ 18 In CBC's response to Kosmieja's charge of discrimination, CBC stated "respondent admits that the August 23, 2002 date of layoff was due to lack of work."

¶ 19 The Administrative Hearing

¶ 20 The ALJ held a four day administrative hearing. At the hearing, Letarte testified that Kosmieja was an excellent employee, but he had to reduce Kosmieja's hours or lay him off because the company was experiencing financial problems. He never expected that Kosmieja would leave rather than accept his offer of one to twenty hours per week.

¶ 21 Letarte also testified that CBC's decision regarding which employee to layoff was determined by selecting the employee with the least number of years of service in each department. Letarte testified that he decided to lay off one of his daughters, who worked in the office and was the least senior employee in that department, but his oldest daughter decided to take the layoff instead. Jose Hernandez, who was the least senior in his department, was placed on permanent disability at the end of 2002.

¶ 22 Letarte further testified that after Kosmieja was laid off, Sharp continued to work in the typesetting department on an as-needed-basis performing typing duties or data entry, but because Sharp worked in both the typesetting and the bindery departments, he had no way of knowing the exact number of hours that Sharp worked in each department. Finally, according to Letarte's testimony, he did not object to Kosmieja receiving unemployment

benefits.

¶ 23 Kosmieja testified that he could not accept CBC's offer of part-time work because he lived in Huntley, which was approximately 40 miles from his workplace in Franklin Park, and because CBC did not guarantee him a specific number of hours of work each week. Kosmieja also testified that after he was laid off, he applied for and received unemployment benefits.

¶ 24 The Decisions of the Administrative Agency

¶ 25 On June 28, 2006 , the ALJ issued a recommended liability determination finding that CBC violated the Act, and recommended an award of \$90,029 for back pay and prejudgment interest, and \$6,384 for lost benefits. On review, the Commission held that the ALJ had not made specific findings of fact on the element of pretext. Therefore, the Commission declined to issue a final order and, instead, remanded the matter to the ALJ with instructions to make further findings clarifying whether CBC's decision to layoff Kosmieja was motivated by a legitimate business reason or discriminatory animus.

¶ 26 On remand, the ALJ found that CBC's articulated reason for laying off Kosmieja was a pretext for age discrimination in violation of the Act, and on April 20, 2009, the ALJ issued a supplemental recommended liability determination that incorporated her recommendations from the June 28, 2006, decision.

¶ 27 On December 7, 2010, the ALJ issued a supplemental recommended order and decision recommending that the complaint be sustained and that Kosmieja receive all the relief recommended in her April 20, 2009, supplemental recommended liability determination.

¶ 28 On June 8, 2011, the Commission adopted the ALJ's December 7, 2010, supplemental recommended order and decision and denied further review. CBC appeals from the Commission's order pursuant to section 3-102 of the Code of Civil Procedure (735 ILCS 5/3-102 (West 2010)) and section 8-111(B)(1) of the Illinois Human Rights Act (775 ILCS 5/8-111(B)(1) (West 2010)).

¶ 29 Analysis

¶ 30 I. Standard of Review

¶ 31 In this case, the ALJ heard from witnesses and considered other evidence before finding that Kosmieja had established his *prima facie* case of age discrimination. The Commission's order, which adopted the ALJ's findings, will not be overturned on appeal unless it is against the manifest weight of the evidence. See *Koulegeorge v. State of Illinois Human Rights Comm'n*, 316 Ill. App. 3d 1079, 1087-88 (2000); see also *Evans v. Gurnee Inns, Inc.*, 268 Ill. App. 3d 1098, 1102 (1994).

¶ 32 Second, whether the employer's articulated reason for discharging the employee is pretextual, is a question of fact. *Zaderaka v. The Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 180 (1989). The Act provides that upon judicial review of a final order of the Commission, "the Commission's findings of fact shall be sustained unless the court determines that such findings are contrary to the manifest weight of the evidence." 775 ILCS 5/8-111(B)(2) (West 2010).

¶ 33 II. Age Discrimination Claim

¶ 34 In analyzing employment discrimination actions brought under the Act, Illinois courts have

adopted the analytical framework set forth in United States Supreme Court decisions addressing claims brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000 *et. seq.* (1982)) and the Age Discrimination in Employment Act (29 U.S.C. § 621 *et. seq.* (1982)). *Zaderaka*, 131 Ill. 2d at 178. Using the aforementioned analytical framework, a complainant may try to meet his or her burden by presenting direct or circumstantial evidence that age was a determining factor in the discharge (see *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003)), or the complainant may utilize the indirect burden-shifting method of proof first recognized in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and later adopted by the Illinois supreme court in *Zaderaka*. *Zaderaka*, 131 Ill. 2d at 178; see *Southern Illinois Clinic, Ltd. v. The Human Rights Comm'n*, 274 Ill. App. 3d 840, 847 (1995) (citing *McCoy v. WGN Continental Broadcasting Co.*, 987 F.2d 368, 371 (7th Cir. 1992), citing *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988)).

¶ 35 Here, because we have no direct evidence of discrimination, we will review Kosmieja's claim of unlawful age discrimination under the *McDonnell Douglas* burden-shifting approach. *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009 (2000). Under the *McDonnell Douglas* burden-shifting approach, the plaintiff must first establish a *prima facie* case by a preponderance of the evidence. *Zaderaka*, 131 Ill. 2d at 178-79. If the plaintiff establishes a *prima facie* case, a rebuttable presumption arises that the employer engaged in unlawful discrimination. Second, to rebut the presumption, the employer must articulate, but not prove, a legitimate, nondiscriminatory reason for the decision. *Zaderaka*, 131 Ill. 2d at 179. Finally, if the respondent carries its burden of production, the presumption of unlawful

discrimination falls and the plaintiff must then prove by a preponderance of the evidence that the employer's articulated reason was not its true reason, but was instead a pretext for unlawful discrimination. *Zaderaka*, 131 Ill. 2d at 179.

¶ 36

A. The *Prima Facie* Case

¶ 37

In order to prove a *prima facie* case of age discrimination under the *McDonnell Douglas* burden shifting approach, the plaintiff must establish by a preponderance of the evidence that he was (1) a member of the protected class (age 40 or over); (2) performing according to his employer's legitimate expectations; (3) discharged or demoted; and (4) the employer sought a replacement for him. *Southern Illinois Clinic*, 274 Ill. App. 3d at 847. Federal courts have encountered difficulty applying *McDonnell Douglas'* *prima facie* proof formulation to cases involving reductions in the work force (RIF). *Southern Illinois Clinic*, 274 Ill. App. 3d at 847. A RIF takes place when an employer decides to eliminate certain positions from its workforce. *Bellaver v. Quanex Corp.*, 200 F.3d 485, 494 (2000). A RIF typically involves the layoff of many employees at once. The prototypical RIF involves a company that perhaps once employed 100 engineers, but because of slow business or a change in product lines, it now needs only 20 engineers. The other 80 positions are eliminated from the company, not absorbed by other employees. *Bellaver*, 200 F.3d at 494.

¶ 38

In a prototypical RIF case, the employee cannot satisfy the fourth element, as required by *McDonnell Douglas*, because the employer rarely replaces the employee. *Southern Illinois Clinic*, 274 Ill. App. 3d at 847. In most RIF cases, the position is usually eliminated from

the company all together. *Bellaver*, 200 F.3d at 494.

¶ 39 The United States Court of Appeals for the Seventh Circuit established a modified version of the *prima facie* proof formulation for use specifically in RIF cases. *Oxman*, 846 F.2d at 452-54; see also *Southern Illinois Clinic*, 274 Ill. App. 3d at 847 (citing *Clyde v. Human Rights Comm'n*, 206 Ill. App. 3d 283, 292 (1990)). Under the modified version of the *McDonnell Douglas* test, to establish a *prima facie* case, the employee must show that (1) he is a member of the protected class; (2) he was performing according to his employer's legitimate expectations; (3) he was discharged or demoted; and (4) his employer treated similarly-situated employees who were not members of the protected class more favorably. *Oxman*, 846 F.2d at 452-54; see also *Southern Illinois Clinic*, 274 Ill. App. 3d at 847 (citing *Clyde*, 206 Ill. App. 3d at 292).

¶ 40 However, in a single discharge case like this one, where the terminated employee's duties were not eliminated but absorbed by others not in the protected class, the case is properly referred to as a mini-RIF. *Bellaver*, 200 F.3d at 495. In a mini-RIF, the terminated employee is effectively replaced by others not in the protected class. *Bellaver*, 200 F.3d at 495. As a result, the fourth element in a RIF *prima facie* case, which requires the plaintiff to show that a similarly situated employee was treated more favorably, is replaced with a new element which requires the plaintiff to show that his duties were absorbed by a younger worker who was retained following the mini-RIF. *Filar v. Board of Education of the City of Chicago*, 526 F.3d 1054, 1060 (2008). Therefore, in a mini-RIF, the plaintiff does not need to show that similarly situated employees were treated better because the inference of discrimination

arises from the fact that they were constructively replaced by workers outside of the protected class. *Bellaver*, 200 F.3d at 495.

¶ 41 While neither the Commission nor the parties referred to this case as a mini-RIF, Kosmieja alleged facts in his charge of discrimination and in his complaint consistent with establishing a mini-RIF claim. The charge of discrimination alleged that "I was immediately replaced by a younger employee, Justin Sharp, who is currently performing the job duties that I formerly performed." The complaint alleged that respondent "replaced Complainant with a younger, less qualified employee, Justin Sharp, age, 23." See *Filar*, 526 F.3d at 1060 (noting that in order to argue a mini-RIF case, the complaint must allege facts consistent with a mini-RIF claim). CBC has repeatedly denied Kosmieja's allegations that Sharp replaced him. Therefore, based upon the allegations in the charge of discrimination and the complaint, we find that a mini-RIF claim was properly before the Commission.

¶ 42 We also note that although the Commission analyzed the *prima facie* case using the test for a RIF claim, instead of the test for a mini-RIF claim, the Commission affirmed and adopted the decision of the ALJ, finding that "Sharp consistently worked overtime after complainant was no longer employed by respondent *** to cover the slack left by complainant." Thus, while the Commission might have listed the elements required to establish a RIF claim, it nevertheless concluded that Sharp, a younger employee, was retained to replace and perform Kosmieja's duties. Therefore, although this court may have considered different elements, we agree with the Commission's conclusion which we may affirm on any basis present in the record. *Van Campen v. International Business Machines Corp.*, 326 Ill. App. 3d 963, 970

(2001); *Habinka v. Human Rights Comm'n*, 192 Ill. App. 3d 343, 372 (1989).

¶ 43 In this case, the parties agree that Kosmieja has established the first two elements of his *prima facie* case: Kosmieja, at the age of 43, was in the protected class, and Kosmieja performed his duties in a manner consistent with his employer's legitimate expectations.

¶ 44 The dispute arises over the third and fourth elements of the *prima facie* case. Turning to the third element, whether CBC discharged Kosmieja, CBC contends that a layoff is not a discharge. We disagree. Black's Law Dictionary defines a layoff as the "termination of employment at the employer's instigation; *** either temporary or permanent *** . Also termed *reduction in force*." Black's Law Dictionary 906 (8th ed. 2004). Moreover, cases dealing with employment discrimination hold that a layoff from a job is sufficient to establish a *prima facie* claim of discrimination. See *Interstate Material Corp. v. Human Rights Comm'n*, 274 Ill. App. 3d 1014, 1022-23 (1995); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 660 (9th Cir. 2002).

¶ 45 CBC also argues that it did not discharge Kosmieja because Kosmieja voluntarily terminated his employment. But, Kosmieja argues that his layoff constituted a termination of employment, in spite of CBC's offer of part-time work of 1 to 20 hours of work per week, without benefits.

¶ 46 We note that after CBC laid off Kosmieja, Kosmieja applied for and received, without CBC's objections, unemployment benefits. We also note that unemployment benefits are unavailable to an employee who voluntarily terminates his employment without good cause. See 820 ILCS 405/601 (West 2010). Therefore, because CBC laid Kosmieja off, he was

entitled to unemployment benefits since he was involuntarily terminated from his position as required by the Act. See 820 ILCS 405/601 (West 2010). Thus, we reject Letarte's contention that Kosmieja voluntarily terminated his employment.

¶ 47 Here, the facts establish that Kosmieja's was laid off by CBC. We find that Kosmieja's layoff constituted a termination of employment, in spite of CBC's job offer of part-time employment without benefits. Therefore, we hold that Kosmieja established the third element of a *prima facie* case of unlawful age discrimination by presenting evidence that he was laid off from his job. Accordingly, we hold that the Commission did not err when it found that CBC terminated Kosmieja's employment.

¶ 48 Turning to the fourth element, we must determine whether Kosmieja's duties were eliminated or were absorbed by a younger employee who was not in the protected class. In the event Kosmieja's duties were absorbed, our inquiry is dependent not on the number of employees terminated, but on whether CBC still needed Kosmieja's job responsibilities to be performed. See *Michas v. Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 693-94 (7th Cir. 2000).

¶ 49 During cross examination, Letarte testified that Sharp worked overtime after Kosmieja was laid off because Sharp was needed in the typesetting department to fill the gap that was left by Kosmieja's departure from CBC. He also testified that he had to place Sharp in the typesetting department, otherwise he would risk going out of business or Taglia would be required to work 60 hours each day. Likewise, Patricia Letarte testified during cross examination that CBC needed someone to do Kosmieja's work, so Sharp was helping out

with the work flow in data entry and typesetting so that the work "could flow to the back."

¶ 50 After reviewing the evidence in the record, we find that Kosmieja's duties were not eliminated from the company but were absorbed by Sharp because CBC still needed Kosmieja's job responsibilities to be performed.

¶ 51 The employer's testimony that Sharp absorbed Kosmieja's duties supports Kosmieja's contention that he was discriminated against because of his age when his duties were absorbed by a younger employee not in the protected class, with less skills and experience.

¶ 52 Therefore, we find that there was sufficient evidence in the record to reasonably conclude that Sharp, who was under forty, less skilled and experienced, and not a member of the protected class, effectively replaced Kosmieja, who was over forty, more skilled and experienced, and a member of the protected class. Accordingly, we hold that the Commission's finding that Kosmieja established all four elements of his *prima facie* case of age discrimination by a preponderance of the evidence was not contrary to the manifest weight of the evidence. See *Paluck*, 221 F.3d at 1012 (the court held that testimony that a younger employee took over most of plaintiff's duties was sufficient to support a *prima facie* case).

¶ 53 B. Pretext

¶ 54 CBC attempts to rebut the presumption of unlawful discrimination by arguing that its reason for laying off Kosmieja was due to a decline in sales and its attempt to reduce labor costs. CBC's accountant, Micatka, testified that he recommended that CBC eliminate overtime hours, in order to remedy the financial problem that CBC was facing.

¶ 55 Kosmieja responds by arguing that CBC's proffered reason for laying him off was not its true reason, but was instead a pretext for unlawful age discrimination. A complainant may establish pretext by showing either that (1) the articulated reason had 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 v. Illinois Human Rights Comm'n*, 316 Ill. App. 3d 528, 537 (2000).

¶ 56 Letarte testified that Kosmieja was an excellent employee, with years of experience, who was trained to use the Penta software. Letarte also testified that, unlike Kosmieja, Sharp was not trained to use the Penta software and he was only able to perform typing or data entry tasks. However, despite Kosmieja's superior skills, CBC decided to lay him off and replace him with Sharp, a less skilled employee. In addition, CBC's payroll records show that Sharp consistently worked full-time with overtime hours after Kosmieja was laid off, even though CBC's accountant recommended that CBC eliminate overtime hours. Based on this evidence, the ALJ found that CBC's explanation for laying off Kosmieja was not worthy of belief. According to the ALJ, "it stretches logic for a company, in financial distress, to remove a seasoned employee from its work force while retaining a less skilled employee, untrained on sophisticated equipment. This less skilled, much younger employee, worked overtime on a consistent basis." See *Wal-Mart Stores, Inc. v. Human Rights Comm'n*, 307 Ill. App. 3d 264, 269-70 (1999) (holding that the Commission may infer a discriminatory motive where the employer's decision does not make any rational sense or its actions were inconsistent with its stated business policies). We also note that a fact finder's disbelief of

the reasons put forward by the employer, together with the elements of the *prima facie* case, may suffice to show intentional discrimination. *Wal-Mart Stores*, 307 Ill. App. 3d at 270.

¶ 57 We find that the employer's decision, to layoff the older, more experienced and skilled employee and to retain the younger, less skilled and experienced employee, who worked overtime, did not make any rational sense and was sufficient grounds, together with the proof of the elements of the *prima facie* case, for the Commission to infer a discriminatory motive. Accordingly, we hold that the Commission's finding that the employer's reasons for the discharge were pretextual were not contrary to the manifest weight of the evidence.

¶ 58 Conclusion

¶ 59 CBC's decision to layoff Kosmieja, a skilled, experienced employee in the protected class, but retain Sharp, a less skilled and experienced employee who was not in the protected class, constituted a termination of employment. The Commission's finding, that CBC's economic reason for discharging Kosmieja was inconsistent with its stated business policy, and, therefore, a pretext for age discrimination, was not contrary to the manifest weight of the evidence. Accordingly, we affirm the Commission's order in favor of Kosmieja.

¶ 60 Affirmed.