

THIRD DIVISION
June 1, 2011

No. 1-10-0001

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

FRANK PARISI,)	Petition for Review
)	of an Order of the
Petitioner-Appellant,)	Illinois Human
)	Rights Commission.
v.)	
)	
THE HUMAN RIGHTS COMMISSION and)	
THE DEPARTMENT OF HUMAN RIGHTS,)	No. 08 CF 3055
)	
Respondents-Appellees)	
)	
(Cintas Corporation, Respondent).)	

JUSTICE STEELE delivered the judgment of the court.

Presiding Justice Quinn and Justice Murphy concurred
in the judgment.

O R D E R

HELD: The Human Rights Commission's administrative decision affirming the dismissal of petitioner's charge of employment discrimination for lack of jurisdiction was not clearly erroneous where petitioner's physical condition did not qualify as a disability under the Illinois Human Rights Act; order affirmed.

Petitioner, Frank Parisi, appeals directly to this court
from a decision of the Illinois Human Rights Commission

(Commission), which upheld the dismissal by the Illinois Department of Human Rights (Department) of petitioner's charge of employment discrimination by his former employer, Cintas Corporation (Cintas).¹ On appeal, petitioner asserts the dismissal order must be reversed where it was based on the erroneous finding that his physical condition was not a legally cognizable disability for purposes of the Illinois Human Rights Act (Act) (775 ILCS 5/1-101 *et seq.*) (West 2008)). We affirm.

In January 2008, petitioner had been employed for five months by Cintas, performing heavy manual labor cleaning restrooms, when he injured his back while lifting a pressure washing machine up a flight of stairs. On April 13, 2008, Cintas terminated petitioner's employment. Subsequently, petitioner filed a charge of unlawful discrimination with the Department, asserting that he was fired from Cintas on the basis of his physical disability (bad back). Cintas contended petitioner's employment was terminated because he had committed three violations of its workplace harassment policy. However, petitioner alleged that the reason Cintas gave for his firing was pretextual.

The Department's investigator made the following findings regarding petitioner's charge. In January 2008, petitioner

¹Cintas filed an appearance in the appeal, but did not file an appellate brief.

sustained a back injury while carrying heavy machinery up a stairway during his employment with Cintas. On February 19, 2008, petitioner's physician, Francisco Espinosa, M.D., Ph.D., diagnosed petitioner with a herniated lumbar disc. Dr. Espinosa stated in a Department medical questionnaire dated June 6, 2008, that petitioner's condition, while not insubstantial, was transitory and that petitioner had recovered and "may return to work at full duty," although he "should avoid bending, lifting or twisting at waist level." The investigator also found no evidence that Cintas perceived petitioner to be handicapped and concluded that petitioner's condition did not meet the definition of a handicap.²

On May 8, 2009, upon the investigator's recommendation, the Department dismissed petitioner's charge for lack of jurisdiction on the basis that petitioner had not sustained a disability as defined by the Act.

On June 3, 2009, petitioner requested a review by the Commission of the Department's ruling. He submitted an extensive number of documents with his request for review. The largest group of documents, consisting of medical records dating from 1997 through 2000, indicated petitioner had sustained a low back

² Pub. Act 95-668, §5 (eff. Oct. 10, 2007), substituted "disability" for "handicap" in section 1-103(I) of the Act. 775 ILCS 5/1-103(I) (West 2006).

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injury in March 1997, while employed by Ameritech when he picked up a 40-pound bag of tools. He underwent three surgeries in 1997 and 1998 resulting from that injury.

A second group of documents covered the interval between petitioner's January 2008 injury and the completion of his medical treatment for that injury in June 2008. In a letter dated April 7, 2008, Raj Khanna, M.D., reported that petitioner was able to work light duty with lifting restrictions up to 15 pounds. On June 2, 2008, Robert W. Mulnar, doctor of osteopathy, noted in a letter to Dr. Espinosa that petitioner was "at maximum medical improvement" and anticipated that he would "continue to improve over time with near resolution of his pain." A letter dated June 6, 2008, from certified physician assistant Brandon Sessler reported: "Mr. Parisi is neurologically stable and may return to work at this time without restrictions. He has reached maximum medical improvement. However, he should avoid bending and twisting at the waist level and should use proper lifting technique utilizing his leg strength. No follow-up appointment is necessary at this time. Mr. Parisi may take Tylenol or NSAIDS as needed for his pain." Also included in the documents submitted to the Commission was Dr. Espinosa's medical questionnaire response of June 6, 2008.

The third group of documents consists of two letters written in 2009. A letter dated April 27, 2009, from Samuel J. Chmell,

M.D., indicated that petitioner related he had suffered a low back injury in 1997, but that his symptomatic low back problems had stabilized, allowing petitioner to return to work at a heavy physical level. The work-related injury to petitioner's back in January 2008 not only worsened his previous low back problems, but also created a new disc herniation that would require further surgery, without which petitioner "has a significant impairment and disability with regard to his low back and his lower extremities. He would not be able to return to the type of work he was performing at the time of his January 2008 work occurrences." The other letter, dated May 18, 2009, was from Dr. Espinosa and stated that since he had last seen petitioner on June 6, 2008, petitioner had recently contacted Dr. Espinosa's office, "indicating that his pain had increased significantly."

On November 24, 2009, the Commission sustained the Department's dismissal of petitioner's charge on the basis of lack of jurisdiction, agreeing with the Department that petitioner had failed to show he had a disability for purposes of the Act.

On appeal, petitioner asserts that his physical condition was a disability under the Act, because it was a serious and pre-existing condition going back a number of years and that his termination by Cintas on the basis of alleged misconduct on the job was a pretext for dismissing him because of his physical

condition. Respondents reply that the basis for petitioner's termination of employment was irrelevant where he failed to establish the threshold requirement of establishing that his physical condition was a disability under the Act.

Our jurisdiction for review of a final order of the Commission is based on section 8-111(B) (1) of the Act. 775 ILCS 5/8-111(B) (1) (West 2008). We first determine the appropriate standard of review. An administrative agency's findings on questions of fact are deemed to be *prima facie* true. 735 ILCS 5/3-110 (West 2008). Consequently, a reviewing court will reverse an agency's factual determinations only if they were contrary to the manifest weight of the evidence. *Illinois Council of Police v. Illinois Labor Relations Board*, 387 Ill. App. 3d 641, 657 (2008). Conclusions of law, however, are not accorded the same deference and, generally, are reviewed *de novo*. *Illinois Council of Police*, 387 Ill. App. 3d at 657. If the question presented for review is one of mixed law and fact, we review the decision to determine whether it was clearly erroneous. *Illinois Council of Police*, 387 Ill. App. 3d at 657. "An administrative decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 273 (2009).

Here, the issue presented to the Department was whether petitioner's physical condition met the legal definition of disability as that term is defined in the Act. The resolution of that issue depended on the facts presented to the Department during its investigation of petitioner's charge and its interpretation of what constituted a "disability" under the Act. As the question upon review is one of mixed law and fact, we apply the "clearly erroneous" standard.

To establish a *prima facie* case of disability discrimination under the Act, petitioner was required to prove: (1) he was disabled within the definition of the Act; (2) his disability was unrelated to his ability to perform the functions of the job he was hired to perform; and (3) an adverse job action was taken against him related to his disability. *Van Campen v. International Business Machines Corp.*, 326 Ill. App. 3d 963, 971 (2001). Our analysis of the facts in the record before us leads us to conclude petitioner failed to establish that he was disabled within the definition of the Act.

Under the Act, the term "disability" in employment "means a determinable physical or mental characteristic *** which may result from disease, injury, congenital condition of birth or functional disorder which *** is unrelated to the person's ability to perform the duties of a particular job or position." 775 ILCS 5/1-103(I) (1) (West 2008). This statutory definition

has been interpreted by the Joint Rules of the Department and the Commission as "not confined to only those physical and mental conditions that are grave or extreme in nature" but as excluding: (1) conditions that are transitory and insubstantial; and (2) conditions that are not significantly debilitating or disfiguring. 56 Ill. Adm. Code 2500.20(b) (2009); see *Anderson v. Modern Metal Products*, 305 Ill. App. 3d 91, 98 (1999).

Petitioner had the burden of establishing that his physical condition qualified as a disability under the Act. 56 Ill. Adm. Code 2500.20(c) (2009). He failed to satisfy his burden. Petitioner suffered a serious work-related injury in 1997 that had required three surgeries between 1997 and 1998, but his treatment had ended in 2000. There is no medical evidence indicating he suffered from or was treated for a continuing affliction in the seven-year period from 2000 and 2007 that was significantly debilitating. When petitioner's employment with Cintas began in 2007, his back condition was not debilitating. As he subsequently stated to Dr. Chmell, his lower back problems had stabilized when he began working for Cintas and he was able to perform the heavy manual labor for which he was hired. When petitioner injured his back in January 2008, the records indicated the injury not only aggravated his prior condition, but also created a new disc herniation. However, petitioner's treating physician after his injury, Dr. Espinosa, responded to a

medical questionnaire dated June 6, 2008, that petitioner's condition, while not insubstantial, was transitory and not significantly debilitating or disfiguring. Dr. Espinosa also responded that petitioner had reached maximum medical improvement and could return to work "at full duty" as of that date. These facts indicate that petitioner's condition was transitory and not significantly debilitating, and thus, support the investigator's conclusion that petitioner's condition did not meet the definition of a disability under the Act.

We are cognizant that the Act protects an individual with a history of disability, even though he or she is not currently afflicted. Thus, in *Kenall Manufacturing Co. v. Illinois Human Rights Comm'n*, 152 Ill. App. 3d 695, 703-04 (1987), we held that an employee, fired after completely recovering from a heart attack and returning to work, was disabled (or handicapped, as the statute then defined the condition) within the meaning of the Act. The instant case is distinguishable where there was a span of many years without medical intervention between the condition resulting from the 1997 injury and the 2008 injury, and the 2008 injury did not merely aggravate his petitioner's injury but caused a new injury (an L3-4 lumbar disc herniation) unrelated to his prior condition.

Petitioner also failed to demonstrate the second prong of his burden of establishing a *prima facie* case of disability

discrimination, namely, that his disability was unrelated to his ability to perform the functions of the job he was hired to perform. Whereas the Act defines "disability" in relevant part as "unrelated to the person's ability to perform the duties of a particular job or position," it is clear that petitioner's physical condition was not such a disability. On the contrary, both petitioner's 1997 back injury during his employment with Ameritech and his January 2008 injury while working for Cintas resulted from lifting heavy tools or machinery as part of his job.

The voluminous medical records petitioner tendered to the Commission establish that treatment for the physical condition resulting from petitioner's 1997 injury substantially ended in January 2000, although he was seen again in February and March 2001 for pain. After that, there are no medical records documenting a re-injury or additional injury for the next seven years. Subsequently, petitioner injured his back in January 2008 while employed by Cintas after lifting heavy machinery in the normal course of his employment. As a result, Cintas gave him "a light duty position with a helper." Clearly, petitioner's physical condition was not unrelated to his ability to perform the duties of the job for which he was hired, but was a direct result of his performing heavy manual labor in the course of his employment at Cintas.

As petitioner failed to establish two prongs required to show a *prima facie* case of disability discrimination (whether he was disabled within the definition of the Act and whether his disability was unrelated to his ability to perform his job), we need not reach the third prong (whether Cintas terminated petitioner's employment for reasons related to his alleged disability). See *Habinka v. Human Rights Commission*, 192 Ill. App. 3d 343, 375 (1989). We conclude that the Department's ruling, that it lacked jurisdiction over petitioner's charge against Cintas, was not clearly erroneous. Consequently, we affirm the final administrative decision of the Commission upholding the Department's dismissal of petitioner's charge.

Affirmed.