FIRST DIVISION
February 27, 2012

No. 1-11-0389

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LISA MALDONADO, Petitioner-Appellant, v. STATE OF ILLINOIS, ILLINOIS DEPARTMENT OF HUMAN RIGHTS, CHIEF LEGAL COUNSEL of the Illinois Department of Human Rights, and McKISSACK & McKISSACK MIDWEST, Respondents-Appellees.	)	Petition for Review of an Order of the Chief Legal Counsel of the Illinois Department of Human Rights. No. 2007 CN 3917

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

Held: The Illinois Department of Human Rights' finding of lack of substantial evidence of racial discrimination in employment is supported by the record. As a result, we find that the chief legal counsel did not abuse her discretion by sustaining the Department's dismissal of the petitioners' complaint.

¶ 1 This case involves alleged racial discrimination in the employment and subsequent termination of petitioner Lisa Maldonado. Petitioner appeals a decision of the chief legal counsel of the Illinois Department of Human Rights (Department) sustaining the Department's dismissal of her employment discrimination complaint filed against her former employer, McKissack & McKissack Midwest, Inc. (Midwest). In her complaint, petitioner, who is black, alleged that she was unlawfully terminated on the basis of her race in violation of section 2-102(A) of the Illinois Human Rights Act (Act) (775 ILCS 5/2-102(A) (West 2004)). This section of the Act prohibits an employer from discharging an employee on the basis of unlawful discrimination, which is defined in section 1-103(Q) of the Act as including discrimination based on race (775 ILCS 5/1-103(Q) (West 2002)). For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 Midwest is a minority-owned and managed architectural firm. During the time period petitioner was employed by Midwest, slightly over half of the firm's 36 employees were black, including its president Ms. Deryl McKissack, its vice president Mr. Michael C. Jones, and its Human Resources Manager Ms. Christie J. Williams.

¶ 4 On July 1, 2004, Midwest, along with the URS Corporation, The Rise Group, LLC (Rise Group), and O'Donnell, Wicklund, Pigozzi and Peterson, Inc., entered into a joint venture agreement with the Chicago Public School system to manage one of its capital improvement

programs. The joint venture was known as the Partnership for Chicago Schools. The four signatory corporations to the joint venture agreed to operate as an integrated organization with each corporation providing employees to the joint venture.

¶ 5 On December 24, 2004, Midwest hired petitioner to fill an administrative position formerly held by Ms. Jennifer A. Balcazar, an employee with the URS Corporation. Petitioner officially began her employment on January 5, 2005. Petitioner was assigned to provide administrative and secretarial support to Mr. Mark Moroney (project manager with Midwest), Mr. Kenneth Rogers (program manager with the URS Corporation), and Ms. Penelope Varnava (deputy program manager with the Rise Group). Moroney was considered petitioner's direct supervisor.

¶ 6 In September 2005, Rogers rehired Balcazar as a senior administrative assistant/office manager, resulting in her having supervisory authority over petitioner. A few months later, Rogers hired Ms. Shawnna Mulder as an administrative assistant.

¶ 7 A review of the record reveals that petitioner believed she was more qualified for the position of office manager than her fellow coworkers and that she felt she had been wrongly passed over for the position. At the time, petitioner had earned a Bachelor's degree in Business Administration with a concentration in management and was pursuing a Masters of Business Administration and Masters in Human Resource Management at DeVry University, Keller Graduate School of Management in Chicago.

¶ 8 Petitioner began complaining to management about a lack of challenging work assignments and grew increasingly dissatisfied with her position, fearing that her professional

development was being stymied. Petitioner believed she was assigned to perform more menial clerical tasks than the other administrative assistants who were white and she also believed she was unfairly micro-managed.

¶ 9 A review of the record indicates that petitioner's negative attitude toward her job adversely affected her job performance as reflected in her poor performance evaluations. Petitioner's employment with Midwest was eventually terminated on April 24, 2007.

¶ 10 On May 7, 2007, petitioner filed a discrimination charge against Midwest with the Department. In her charge, petitioner alleged that she had been subjected to a racially derogatory comment; that her job performance was not evaluated within 6 months of her employment as agreed when she was hired; and that throughout her employment she was subjected to different terms and conditions of employment. On April 11, 2008, petitioner perfected the charge by signing and notarizing it.

¶ 11 The Department held a fact-finding conference and the investigator prepared a report organizing petitioner's charge into four separate allegations (A-D). Allegation A was based on petitioner's disputed claim that on December 23, 2005, at an office Christmas party she was harassed based on her race when she overheard Mark Moroney refer to her as a "black bitch."

¶ 12 Allegation B was based on petitioner's claim that between June 1, 2005 and October 25, 2006, she was subjected to unequal terms and conditions of employment because of her race. Allegation C was based on petitioner's claim that between October 26, 2006 and April 23, 2007, she was subjected to unequal terms and conditions of employment because of her race in that she was deprived of employment opportunities and advancement. And allegation D was based on

petitioner's claim that she was terminated on April 24, 2007, on account of her race.

¶ 13 The Department dismissed allegations A and B on the ground that pursuant to section 7A-102(A)(1) of the Act (775 ILCS 5/7A-102(A)(1) (West 2002)), it lacked jurisdiction over these allegations because they were filed more than 180 days after the purported civil rights violations were allegedly committed. The Department dismissed allegations C and D on the ground that there was a lack of substantial evidence supporting these allegations.

¶ 14 Petitioner filed a request for review. The chief legal counsel subsequently sustained the Department's dismissal of the allegations.

¶ 15 ANALYSIS

¶ 16 The chief legal counsel's decision reviewing a dismissal is a final and appealable order. 775 ILCS 5/7-101.1(A) (West 2004). The standard of review is whether the decision was arbitrary and capricious or an abuse of discretion. *Anderson v. Chief Legal Counsel, Illinois Dept. of Human Rights*, 334 Ill. App. 3d 630, 634 (2002).

¶ 17 A decision is arbitrary and capricious if it 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. *Deen v. Lustig*, 337 Ill. App. 3d 294, 302 (2003); *Owens v. Dept. of Human Rights*, 403 Ill. App. 3d 899, 917 (2010). An abuse of discretion is found when a decision is reached without employing conscientious judgment or when the decision is clearly against logic. *Lustig*, 337 Ill. App. 3d at 302. We review the chief legal counsel's decision and not the decision of the Department. *Lustig*, 337 Ill. App. 3d at 302.

¶ 18 In analyzing employment discrimination actions brought under the Act, reviewing courts

utilize the three-part analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, __ (1973), and adopted by our supreme court in *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178-79 (1989) (adopting the same framework as claims brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. when applying the Illinois Human Rights Act).

¶ 19 First, the employee must establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination. If the employee succeeds, a rebuttable presumption arises that the employer unlawfully discriminated against the employee. To rebut the presumption, the employer must articulate , not prove, a legitimate, nondiscriminatory reason for its actions. If the employer carries its burden of production, the burden then shifts to the employee to show by a preponderance of the evidence that the employer's articulated reason for its actions was not the true reason, but was instead a pretext for unlawful discrimination. *Zaderaka*, 131 Ill. 2d at 178-79; *Lake Point Tower, Ltd. v. Illinois Human Rights Comm'n*, 291 Ill. App. 3d 897, 902-03 (1997).

¶ 20 To establish a *prima facie* case of employment discrimination, the petitioner must show that (1) she is a member of a protected class; (2) she was meeting her employer's legitimate business expectations; (3) she suffered an adverse employment action; and (4) the employer treated similarly situated employees outside of the protected class more favorably. *Owens*, 403 Ill. App. 3d at 919.

¶ 21 A charge may be dismissed for lack of substantial evidence if the petitioner fails to present substantial evidence of an element of a *prima facie* case. *Truger v. Department of Human*

Rights, 293 Ill. App. 3d 851, 859 (1997), citing *Parham v. Macomb Unit School District No. 185*, 231 Ill. App. 3d 764, 772 (1992). "Substantial evidence is evidence which a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance." 775 ILCS 5/7A-102(D)(2) (West 2002); *Owens v. Department of Human Rights*, 356 Ill. App. 3d 46, 51 (2005).

¶ 22 In this case, the chief legal counsel reviewed the Department's factual findings and agreed with the Department's determination that petitioner failed to present substantial evidence supporting a *prima facie* case of racial discrimination in her employment, where she failed to provide evidence that she performed her work competently enough to meet her employer's legitimate business expectations and she failed to show that Midwest treated similarly situated employees who were not Black more favorably. We do not believe the chief legal counsel abused her discretion in this regard.

¶ 23 The evidence reviewed by the chief legal counsel showed that Midwest discharged petitioner due to her ongoing job performance problems. The evidence also showed that Midwest discharged two non-Black employees around the same time that petitioner's employment was terminated. Petitioner therefore failed to establish the second and fourth elements of her *prima facie* case.

¶ 24 In support of her contention that she was harassed and treated differently at her workplace on account of her race, petitioner points to a comment she allegedly overheard Mark Moroney make at an office Christmas party on December 23, 2005, referring to her as a "black bitch." Petitioner claimed that while she was sitting at a table with Moroney and another employee, Mr.

Harrison Staley (Black), the conversation turned to "people bringing their frustration from home to work and vice versa," and that Moroney said, "yeah that black bitch Lisa got on my nerve today." Petitioner claimed that upon seeing the expression on her face, Moroney "turned it around," and made it seem like he was referring to his wife. Petitioner maintained that she did not make a "big deal" out of the incident because she knew that Moroney was "dealing with a lot with his wife."

¶ 25 Ms. Williams, the Human Resources Manager, stated that she only learned of the alleged incident in September 2006, when petitioner sent an email to Ms. McKissack. Williams stated that if she had known of the alleged incident around the time it occurred she would have conducted an investigation because the company was a minority-owned employer.

¶ 26 Mr. Jones, the vice president of the firm, stated that once he learned of the alleged incident, he conducted an investigation and personally spoke with all parties involved. Mr. Jones stated that after discussing the matter with all three parties and factoring in that petitioner had not reported the alleged incident until almost a year later, he was convinced that the incident did not occur as petitioner alleged.

¶ 27 In the instant case, the chief legal counsel properly determined that the Department lacked jurisdiction to investigate the alleged racial slur because the charge was not filed within 180 days of the date of the alleged discriminatory act as required by section 7A-102(A)(1) of the Act. See 775 ILCS 5/7A-102(A)(1) (West 2004) (a charge must be filed within 180 days of the date an alleged civil rights violation has been committed).

¶ 28 Petitioner next contends there was abundant evidence that the Department ignored, which

cast doubt on Midwest's articulated reason for terminating her employment. Petitioner relies on the following evidence: she was the only Black person in her six-person office; her work assignments were not commensurate with her experience, credentials, and education; she was assigned to perform more menial clerical tasks than the other administrative assistants who were white; the firm failed to give her a job performance evaluation within 6 months of her employment as agreed when she was hired; the firm did not discipline her prior to terminating her employment; and the firm offered her two weeks severance pay and unemployment compensation which were signs of its guilt.

¶ 29 In the context of this case, none of the cited evidence, considered individually or collectively, supports an inference that petitioner was terminated on account of her race. The fact that petitioner was the only Black person in her office, without more, is insufficient to establish pretext. See, *e.g.*, *Ghent v. Moore*, 519 F. Supp. 2d 328, 338-39 (W.D.N.Y. 2007). In relation to the performance evaluation, a review of the record shows that petitioner was not formally given a performance evaluation within six months of being hired because she was not being considered for a pay increase.

¶ 30 Petitioner was discharged due to ongoing job performance problems pursuant to section 3.1.4 of the joint-venture agreement. None of the sections in the agreement required Midwest to progressively discipline petitioner prior to terminating her employment.

¶ 31 In regard to work assignments, an employee's allegations of undesirable work assignments do not constitute an adverse employment action where there are no quantitative or qualitative changes in the terms or conditions of employment. See *Johnson v. Cambridge*

Industries, Inc., 325 F. 3d 892, 901 (7th Cir. 2003). Moreover, petitioner produced no evidence showing she was similarly situated to the other administrative assistants who allegedly received more challenging work assignments.

¶ 32 In order to be similarly situated, employees must be similar with "respect to performance, qualifications, and conduct." *Radue v. Kimberly-Clark Corp.*, 219 F. 3d 612, 617 (7th Cir. 2000). A review of the record indicates that petitioner was not similarly situated to the other administrative assistants when it came to job performance.

¶ 33 Petitioner stated that on November 10, 2006, she approached Mr. Jones about the possibility of being given more challenging work assignments. According to petitioner, Jones responded that Mr. Rogers, Ms. Varnava, and Ms. Balcazar, were unhappy with her work and that he was not confident in her ability to take on more challenging responsibilities. Furthermore, petitioner was hired to fill the administrative position formerly held by Ms. Balcazar. When Mr. Rogers rehired Balcazar, she was rehired as a senior administrative assistant/office manager, resulting in her having supervisory authority over petitioner and the other administrative assistants in the office. This tends to undercut petitioner's allegation that she and Ms. Balcazar were similarly situated in terms of relevant work experience for the position of senior administrative assistant/office manager.

¶ 34 Next, we must reject petitioner's suggestion that Midwest's attempts to settle the case should be viewed as evidence of the firm's guilt. One of the legislative purposes behind the Act is to promote the settlement of discrimination charges, prior to formal proceedings. *Board of Education of Hawthorne School District v. Eckmann*, 103 Ill. App. 3d 1127, 1133-34 (1982).

The Act provides for conciliation and settlement of discrimination charges (775 ILCS 5/7A-102(E), 7A-103 (West 2009)), and the Department is authorized to dismiss a charge when a complainant refuses to accept a reasonable settlement offer (775 ILCS 5/7A103(D) (West 2009)). There is no suggestion that petitioner's case should have been dismissed on this ground, but the fact that the firm attempted to settle the case is not a factor that helps her cause.

¶ 35 Finally, we find that the chief legal counsel properly rejected petitioner's attempts to raise new claims of defamation, retaliation and a negative employment reference, in her request for review. The chief legal counsel would not have had jurisdiction over these new assertions because they were not timely raised in petitioner's charged filed with the Department. See section 7A-102(A)(1) of the Act (775 ILCS 5/7A-102(A)(1) (West 2004)); *Kalush v. Illinois Department of Human Rights Chief Legal Counsel*, 298 Ill. App. 3d 980, 991 (1998).

¶ 36 For the foregoing reasons, we affirm the chief legal counsel's decision affirming the Department's dismissal of petitioner's charge.

¶ 37 Affirmed.