2012 IL App (1st) 112408-U

FIRST DIVISION
April 23, 2012

No. 1-11-2408

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TYIASE HASAN, Petitioner-Appellant, v. LON MELTESEN, CHIEF LEGAL COUNSEL OF THE ILLINOIS DEPARTMENT OF HUMAN RIGHTS; ROCCO CLAPS, DIRECTOR OF THE ILLINOIS DEPARTMENT OF HUMAN RIGHTS; and THE VILLAGE OF MATTESON, Respondents-Appellees.	)	Petition for Review of Order of the Chief Legal Counsel of the Illinois Department of Human Rights No. 07 CF 2142

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

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 his discretion by sustaining the department's dismissal of petitioner's charge.

¶ 1 Petitioner, Tyiase Hasan, a probationary maintenance worker for the Village of Matteson's Public Works Department (Village), filed a charge of unlawful employment discrimination with the

Illinois Department of Human Rights (Department) in connection with the Village's decision to indefinitely suspend him. Petitioner claimed his indefinite suspension was racially motivated in violation of section 2-102(A) of the Illinois Human Rights Act (Act) (775 ILCS 5/2-102(A) (West 2006)). Section 2-102(A) prohibits an employer from discharging or disciplining 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 2006)). On three occasions, the Department investigated the charge and dismissed it for lack of substantial evidence and, each time, the chief legal counsel vacated the dismissal and remanded to the Department for further investigation. After the Department dismissed the charge for lack of substantial evidence for a fourth time, the Chief Legal Counsel sustained the dismissal. Petitioner appeals. We affirm.

¶ 2 Petitioner filed a charge of unlawful employment discrimination with the Department on February 6, 2007. In the charge, petitioner, who is African-American, alleged he had been employed by the Village as a maintenance worker with its public works department since March 13, 2006. Petitioner alleged that on or about February 2, 2007, he was placed on indefinite suspension, without any explanation, even though he had been performing his duties satisfactorily. He alleged he was suspended because of his race, and that similarly-situated, non-African-American employees had not been "arbitrarily suspended" in the same manner as he had been.[1]

¶ 3 The Village filed a verified response to the charge in March 2007. The Village denied petitioner had been suspended because of his race, and it also denied he had been performing his

[1]On February 12, 2007, as a result of incidents not a part of this action, the Village discharged petitioner for misconduct. Petitioner's discharge is not before us on this appeal.

duties satisfactorily and that similarly-situated, non-African-American employees were treated more favorably.

¶ 4 In February 2008, petitioner submitted a position statement in support of his charge of unlawful employment discrimination. Petitioner's position statement described how, in March 2006, Michael Murray, the deputy director of the Village's public works department, was standing in the Department parking lot and gestured for petitioner to park in the lot farther away from the office building. Petitioner ignored Mr. Murray and parked in an open spot in the area, which he later determined was where the majority of Caucasian employees parked, while the majority of African-American employees parked in the area in which Mr. Murray had motioned for him to park.

¶ 5 Petitioner further described an incident in April 2006, in which Mr. Murray held up a cookie to petitioner and said, "good boy" in praise of his performance. Plaintiff described another incident in which one work crew that contained an African-American, an Hispanic, and three Caucasian maintenance workers was provided with donuts, hot cocoa, and coffee, while another crew that was mostly, but not entirely, African-American was not offered such refreshments. Petitioner also provided statistics allegedly showing that while the Village is nearly two-thirds African-American, less than 20% of Village employees were African-American.

¶ 6 The Department conducted an initial investigation of the charge and then dismissed it in April 2008 for lack of substantial evidence. Petitioner sought review from the Department's chief legal counsel, who vacated the dismissal and remanded to the Department for further investigation in September 2008. In October 2008, the Department dismissed the charge for a second time for lack of substantial evidence, and petitioner, again, sought review from the chief legal counsel. In

March 2010, the chief legal counsel vacated the October 2008 dismissal and remanded to the Department for further investigation. In April 2010, the Department dismissed the charge for a third time for lack of substantial evidence. In February 2011, the chief legal counsel vacated the April 2010 dismissal and remanded to the Department for further investigation. Finally, in March 2011, the Department dismissed the charge for a fourth time for lack of substantial evidence, and in July 2011, the chief legal counsel sustained the March 2011 dismissal. Petitioner appeals from the July 2011 order sustaining the March 2011 dismissal.

¶ 7 The Department's investigation revealed the following evidence. Petitioner was hired by the Village as a maintenance worker on March 13, 2006. Anyone hired for that position was on probation for the first year of employment. The position's duties included operating equipment in the construction, operation, maintenance, repair and replacement of municipal water, sewer, street and storm drainage facilities and systems; driving trucks of various sizes and weights in the loading, hauling, and unloading of various equipment, gravel and sand; and abiding by all traffic laws and safety practices in the operation of such equipment and vehicles.

¶ 8 The following incidents transpired before petitioner's probationary period ended. On June 16, 2006, a person called the police at 2 p.m. and reported that a red dump truck with a Village logo on the side was driving erratically and fast. The truck was driving westbound on U.S. Route 30 at the Governor's Highway intersection. The witness reported the truck "drove through the First Muffler lot at a fast speed, zipping past a bus and into the Cub food lot." The Village documented the incident, which included a signed statement from petitioner. In the statement, petitioner acknowledged driving a Village vehicle at approximately 2 p.m. on June 16, 2006. The vehicle was

empty as he was returning to a job site to pick up debris. He stated that a black SUV was blocking the right turn lane at the intersection of Lincoln Highway and Governor's Highway. He "felt there was some urgency" in getting to his job site, so he entered an autoshop parking lot and came out the other side in order to turn northbound onto Governor's Highway. He stated there "was no near misses," no collision, and that the maneuver was "without incident." He stated that his supervisor, Bart Gilliam, questioned him about a report that someone had been seen driving a truck through a Cub Foods lot, spilling gravel. Petitioner said he "knew nothing" about that report.

¶ 9 Two months later, on August 8, 2006, while driving a Village payloader into the Village garage, petitioner hit and damaged a Village brush chipper. Mr. Gilliam filled out and signed an accident report stating that while maneuvering the payloader in the south garage, petitioner brushed the payloader against the brush chipper, thereby bending the brush chipper's safety bar. Mr. Gilliam stated that the crowded garage contributed to the accident, and he proposed leaving some of the equipment outside the garage so as to alleviate the "crowded conditions." Petitioner signed an accident report stating he lacked "training in payloader/bucket operation" and that he "should have" lowered the bucket before pulling into the crowded garage.

¶ 10 The following month, on September 27, 2006, petitioner and three other employees abandoned the site of a water main break without notifying or receiving authorization from a supervisor, which resulted in 24 Village residents being left without water. Petitioner was given a verbal reprimand for the incident and was counseled not to leave a work site without first obtaining the approval of a supervisor. The three other employees also were disciplined.

¶ 11 Two months later, on November 30, 2006, while petitioner was at the site of an excavation

to repair a water main break, a suction pump hose became lodged in the mud near the edge of the excavation hole and needed to be freed. Another employee, Edgar Deisch, realized the problem and began trying to free the hose from the mud. Mr. Gilliam noticed petitioner was not working but, instead,0 was standing by with his hands in his pockets. Mr. Gilliam asked petitioner to assist Mr. Deisch in freeing the hose from the mud. In response to Mr. Gilliam's request, petitioner became angry, went to the edge of the excavation hole, and began pulling the hose in such an aggressive and unsafe manner, that he nearly knocked Mr. Deisch into the excavation hole head-first. Mr. Gilliam signed a memorandum, dated December 1, 2006, documenting the incident, and Mr. Murray signed a written statement dated December 4, 2006, indicating that he discussed the incident with petitioner and counseled him to assist his co-workers with whatever job he was on, and to follow the instructions of his supervisor.

¶ 12 Two months later, on January 31, 2007, petitioner was assigned to assist in the repairing of another water main break. Petitioner drove a backhoe to the site. Petitioner was inexperienced in the use of a backhoe, however, and therefore, the senior employee on duty, Gordon Hardin, assigned that particular task to someone else. On learning he would not be the operator of the backhoe, petitioner became visibly angry, jumped in a Village truck, and sped off from the excavation site without obtaining the approval of a supervisor. Petitioner eventually returned to the excavation site but refused to get out of the Village truck, even after the urging of several of his coworkers. Finally, after prolonged coaxing, petitioner rejoined the work efforts around the excavation site. Mr. Gilliam and Mr. Hardin signed memos documenting the incident. The record also contains an unsigned document recommending a two-day suspension, an extension of his probationary period, and a

transfer to a position as a parks maintenance worker as discipline for the January 31, 2007, incident and for another incident not before us on this appeal.

¶ 13 On February 1, 2007, Mr. Murray was driving northbound on Cicero Avenue at approximately 10:55 a.m., when he noticed a Village snow plow truck that was speeding. The speed limit was 45 miles per hour, and Mr. Murray had to drive 60 miles per hour in order to get close enough to the truck to identify its driver. Mr. Murray saw petitioner driving the truck, and then he called petitioner's cell phone and confirmed he was the driver. Mr. Murray documented the incident in an unsigned memorandum dated February 2, 2007. The record also contains an unsigned, written warning for the February 1, 2007, incident.

¶ 14 Daryl DuPree, a maintenance worker for the Village, submitted an affidavit stating he was familiar with the snow plow truck driven by petitioner, that it is an older truck, and he "would be surprised if this truck would be capable of going 60 mph or more."

¶ 15 At approximately 1:15 p.m. on February 1, 2007, petitioner attempted to drive a Village dump truck out of the Village garage while the dump unit was in the fully-raised position. Consequently, the dump unit struck the overhead garage door, causing it to be stuck in the open position. A police report was taken to document the property damage. Mr. Gilliam signed an accident report dated February 1, 2007, documenting the incident and indicating petitioner may have been driving too fast at the time of the accident. Petitioner also signed a report, dated February 1, 2007, in which he admitted hitting the garage door with the dump unit on the truck raised.

¶ 16 On February 2, 2007, petitioner was placed on suspension. On February 28, 2007, petitioner filed his employment discrimination charge with the Department, in which he stated: "I believe that

there have been other, similarly situated, [non-African-American] employees, that have levels of work performance and seniority which is similar to mine, that have not been arbitrarily suspended from Respondent's employ in the same manner as I have been."

¶ 17 In support, petitioner relied on the affidavit of Mr. DuPree, who stated he was aware of three non-African-American employees of the Village public works department–Pat Messex, Cliff Ernhardt, and Phil Gonzalez, who had been involved in workplace accidents, or who had caused workplace property damage without being investigated by police or disciplined.

¶ 18 The record indicates Mr. Messex was hired by the Village on October 24, 2005. On February 12, 2007, after his one-year probationary period had ended, Mr. Messex damaged one panel of the Village garage door with the ram on a snow plow. Mr. Gilliam stated the damage was minor, the repair was completed in-house, and Mr. Messex was not disciplined.

¶ 19 Mr. Ernhardt was hired by the Village on October 15, 1990. In January 2007, after his one-year probationary period had ended, he also damaged one panel of the Village garage door with the ram on a snow plow. Mr. Gilliam stated the accident was "minor," and the damage was repaired with plywood. Mr. Ernhardt was not disciplined.

¶ 20 Mr. Gonzalez was hired on March 13, 2006. On October 11, 2007, after his one-year probationary period had ended, he filled a Village truck with unleaded fuel instead of diesel, resulting in extensive damage to the motor. Mr. Gonzalez received a written warning because this was the second time he had filled a Village truck with the wrong fuel.

¶ 21 In addition to Mr. DuPree's affidavit regarding the Village's alleged failure to discipline non-African-American employees Mr. Messex, Mr. Ernhardt, and Mr. Gonzalez for their workplace

accidents, petitioner also submitted a document entitled "Village of Matteson Employee Appreciation Award," which said it was in "appreciation of your performance as a dedicated and committed employee at the Village of Matteson." It was signed by Village Administrator Lafayette Linear, but not dated.

¶ 22 After the Department's fourth dismissal of petitioner's charge, the chief legal counsel issued a final decision on July 29, 2011, sustaining the dismissal because the Department's investigation did not reveal substantial evidence that the Village suspended petitioner because of his race. Petitioner petitioned this court for direct review of that decision.

¶ 23 Under the Act in effect at the time petitioner filed his unemployment discrimination charge, the Department must conduct a full investigation of the allegations set forth in the charge and provide a written report of the investigation. 775 ILCS 5/7A-102(C)(1), (D)(1) (West 2006). After reviewing the investigation report, the Department's director determines whether there is substantial evidence of the alleged violation. 775 ILCS 5/7A-102(D)(2) (West 2006). Substantial evidence is defined as 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." *Id*. If the Director determines there is no substantial evidence, the charge is dismissed. 775 ILCS 5/7A-102(D)(2)(a) (West 2006). Petitioner then may seek review before the chief legal counsel of the Department. *Id.*

¶ 24 The chief legal counsel's decision reviewing a dismissal is a final and appealable order (775 ILCS 5/7-101.1(A) (West 2006)), and petitioner may seek review of the chief legal counsel's decision in the appellate court (775 ILCS 5/8-111(A)(1) (West 2006)). The standard of review is whether the

decision was arbitrary or capricious or amounted to an abuse of discretion. *Ferrari v. Illinois Department of Human Rights*, 351 Ill. App. 3d 1099, 1103 (2004). " '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.' " *Deen v. Lustig*, 337 Ill. App. 3d 294, 302 (2003) (quoting *La Salle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 786 (2001)). "An abuse of discretion is found when a decision is reached without employing conscientious judgment or when the decision is clearly against logic." *Id*. 3d at 302. We review the chief legal counsel's decision and not the decision of the Department. *Id*.

¶ 25 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*. (1982) when applying the Act).

¶ 26 First, petitioner must establish by a preponderance of the evidence, a *prima facie* case of unlawful discrimination. *Zaderaka*, 131 Ill. 2d at 178-79. If petitioner establishes a *prima facie* case, a rebuttable presumption arises that the employer unlawfully discriminated against him. *Id*. at 179. To rebut the presumption, the employer must articulate, not prove, a legitimate, nondiscriminatory reason for its actions. *Id*. If the employer carries its burden of production, the burden shifts to petitioner to prove by a preponderance of the evidence that the employer's reason was untrue and was a pretext for unlawful discrimination. *Id*.

¶ 27 "To establish a *prima facie* case of employment discrimination, the petitioner must first show that (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*, 403 Ill. App. 3d 899, 919 (2010).

¶ 28 A charge may be dismissed for lack of substantial evidence if the petitioner fails to present substantial evidence of an element of his *prima facie* case. *Truger v. Department of Human Rights*, 293 Ill. App. 3d 851, 859 (1997).

¶ 29 In the present case, petitioner failed to present substantial evidence supporting the second element of a *prima facie* case of racial discrimination in his employment, where he failed to provide evidence that he performed his work competently enough to meet his employer's legitimate business expectations. Specifically, in the span of about eight months, petitioner caused two accidents damaging Village equipment and property, twice drove Village vehicles erratically and/or at excessive speeds, abandoned work sites on two separate occasions without supervisor authorization, and nearly caused a co-worker to tumble into an excavation hole due to his unsafe and overly aggressive manner of working.

¶ 30 Petitioner also failed to present substantial evidence supporting the fourth element of a *prima facie* case of racial discrimination in his employment, where he failed to provide evidence that the Village treated similarly situated employees who were not African-American more favorably. Petitioner argues that Mr. Messex, Mr. Ernhardt, and Mr. Gonzalez were similarly situated, non-African-American employees who were treated more favorably than him where they were not

suspended, despite their workplace accidents and the workplace property damage caused by them. However, unlike petitioner, who was a probationary employee, Mr. Messex and Mr. Ernhardt were not on probation when their workplace accidents occurred, and Mr. Gonzalez also was a non-probationary employee when he received a disciplinary write-up for filling a diesel truck with the wrong fuel for the second time. As aptly noted by the Village, a "probationary employee is essentially doing the job on a trial basis to allow an employer to assess whether to hire the employee permanently. Because none of the [m]aintenance [w]orkers [petitioner] tried to compare himself to were probationary employees, they were not similarly situated to him for that reason alone." Further, unlike petitioner, whose suspension was predicated on seven separate incidents (see our discussion above), the record indicates that neither Mr. Messex, Mr. Ernhardt, nor Mr. Gonzalez had similarly extensive employment histories of misconduct and safety violations. Accordingly, they were not similarly situated to petitioner.

¶ 31 As petitioner failed to present substantial evidence supporting the second and fourth elements of a *prima facie* case of racial discrimination in his employment, the chief legal counsel's decision sustaining the Department's dismissal of petitioner's charge was not arbitrary or capricious or an abuse of discretion.

¶ 32 Petitioner argues, though, that in dismissing his charge of unemployment discrimination based on lack of substantial evidence, the Department made improper credibility determinations that the chief legal counsel adopted. Specifically, petitioner contends the Department credited the evidence that he committed the seven incidents of workplace misconduct described above, but gave no credence to contrary evidence indicating that those incidents did not occur. Petitioner cites

Cooper v. Salazar, 2001 WL 1351121 (N.D. Ill.), which held that the Department may not evaluate witness credibility when deciding whether there was substantial evidence of the alleged civil rights violation. Petitioner contends that by sustaining the dismissal of the unemployment discrimination charge, after the Department made improper credibility determinations, the chief legal counsel acted outside of his authority and therefore his "actions are void."

¶ 33 Contrary to petitioner's argument, the Department did not make any improper credibility determinations, as the relevant evidence regarding petitioner's seven incidents of workplace misconduct was undisputed and no credibility determinations were required to be made. The first incident occurred at about 2 p.m. on June 16, 2006, when a witness reported a Village dump truck was driving erratically and fast, westbound at the U.S. Route 30 and Governor's Highway intersection, and that it drove through a First Muffler lot at a fast speed, "zipping" past a bus and into the Cub Foods lot. Petitioner acknowledged driving his Village vehicle at that time and location with a sense of urgency to get to his job site, that he entered an autoshop parking lot, and came out the other side to turn northbound onto Governor's Highway. Although he could not recall driving through a Cub Foods lot, he did not specifically dispute that he was speeding or that he was "zipping" past a bus.

¶ 34 Petitioner contends the Department made an improper credibility determination by crediting the evidence of his erratic driving on June 16, 2006, but failing to give credence to the fact there was no signed personnel action report showing he was the driver of the truck. However, evidence in the record indicates that pursuant to Village rule, only reports for discipline above a verbal reprimand are required to be documented on personnel action reports. No signed report was required because

petitioner was not disciplined for this incident. Accordingly, contrary to petitioner's argument, the lack of a signed personnel action report does not indicate a dispute as to whether petitioner was the driver of the truck; in the absence of any disputed evidence, no credibility determination was required to be made.

¶ 35 The second incident occurred on August 8, 2006, when petitioner drove the Village payloader into the Village garage without lowering the bucket, thereby damaging a brush chipper. Petitioner did not dispute the occurrence of this incident.

¶ 36 The third incident occurred on September 27, 2006, when petitioner and three other employees abandoned the site of a water main break, without notifying or receiving authorization from a supervisor. Petitioner contends the Department made an improper credibility determination by crediting the evidence that he left the work site, but failing to give credence to contrary evidence, specifically, his employee-appreciation award and Mr. DuPree's statement in his affidavit that petitioner "performed adequately" and "listened to what he was being told." However, the employee-appreciation award was undated and, therefore, it is not clear whether he received it before or after the September 27, 2006, incident. Also, Mr. DuPree was speaking generally when he stated in his affidavit that petitioner "performed adequately" and "listened to what he was being told"; Mr. DuPree made no reference to having any specific knowledge of the September 27, 2006, incident. Accordingly, neither the employee-appreciation award nor Mr. DuPree's affidavit raised any dispute as to the occurrence of the September 27, 2006, incident. Therefore, no credibility determinations were required to be made.

¶ 37 The fourth incident occurred on November 30, 2006, when petitioner became angry at being

asked to assist in freeing a hose from some mud, and then pulled the hose in such an aggressive and unsafe manner that he almost knocked his co-worker into the excavation hole head-first. Petitioner contends the Department made an improper credibility determination by crediting the evidence that he almost knocked his co-worker into the excavation hole, but failing to give credence to his employee appreciation-award or to Mr. DuPree's affidavit. For the reasons discussed above, neither the employee-appreciation award nor Mr. DuPree's affidavit raised any dispute as to the occurrence of the November 30, 2006, incident. Accordingly, no credibility determinations were required to be made. Petitioner also argues that the Department failed to give credence to the fact that there was no signed personnel action report showing that Mr. Murray discussed this incident with him. However, as discussed above, only reports for discipline above a verbal reprimand are required to be documented on personnel action reports. No signed report was required because petitioner received only a verbal reprimand for the November 30, 2006, incident.

¶ 38 The fifth incident occurred on January 31, 2007, when petitioner drove away from a worksite without permission when he learned that he would not be operating the backhoe. Petitioner contends the Department made an improper credibility determination by crediting the evidence that he drove away from the worksite, but failing to give credence to his employee-appreciation award, or to Mr. DuPree's affidavit. For all the reasons cited above, neither the employee-appreciation award, nor Mr. DuPree's affidavit, raised any dispute as to the occurrence of the January 31, 2007, incident. Accordingly, no credibility determinations were required to be made.

¶ 39 The sixth incident occurred on February 1, 2007, when Mr. Murray observed petitioner driving a snow plow 60 miles per hour. The speed limit was only 45 miles per hour. Petitioner

contends the Department made an improper credibility determination by crediting the evidence that he was speeding, but failing to give credence to Mr. DuPree's statement in his affidavit that he "would be surprised" if petitioner's snow plow would be capable of going 60 miles per hour. However, as aptly noted by the Department, "[t]hat DuPree would be 'surprised' the truck could go that fast does not mean it could not go that fast, that [petitioner] was not speeding, or that [petitioner] denied he was speeding." Mr. DuPree's vague statement regarding the capabilities of petitioner's snow plow does not conflict with Mr. Murray's observation that petitioner was violating the 45 miles per hour speed limit. Again, no credibility determination was required to be made. Petitioner also repeats his arguments regarding his employee appreciation award and regarding Mr. DuPree's affidavit stating petitioner performed his job adequately. Those arguments fail for the reasons cited above.

¶ 40 Petitioner further contends the Department made an improper credibility determination by failing to give credence to the lack of a signed personnel action report for the January 31, 2007, and February 1, 2007, incidents. Petitioner contends such a report was required because he received discipline above a verbal reprimand for those incidents (*i.e.*, a recommended suspension for the January 31 incident and a written warning for the February 1 incident.) However, the Department explained in its appellate brief that petitioner was discharged in February 2007 before any personnel action report could be signed for the January 31, 2007, and February 1, 2007, incidents. Accordingly, the lack of a signed personnel action report for the January 31, 2007, and February 1, 2007, incidents does not indicate that those incidents did not occur.

¶ 41 The seventh incident occurred later on February 1, 2007, when petitioner attempted to drive

a Village dump truck out of the Village garage with the dump unit in the fully-raised position, thereby striking the overhead garage door, causing it to be stuck in the open position. Petitioner did not dispute the occurrence of this incident. Petitioner contends the Department made a credibility determination that he was driving too fast at the time of the incident. However, the accident report signed by Mr. Gilliam stated: "it was reported that [petitioner] drove out of the garage too fast." No witness disputed the report that petitioner was driving too fast at the time of the incident; accordingly, no credibility determination was required to be made.

¶ 42 Thus, the undisputed evidence supported the findings that petitioner committed the seven incidents of workplace misconduct described above, and that he failed to perform his work competently enough to meet the Village's legitimate business expectations as required to make a *prima facie* case of employment discrimination.

¶ 43 Also, with respect to petitioner's argument that the Village treated similarly-situated employees Mr. Messex, Mr. Ernhardt, and Mr. Gonzalez more favorably than him, there is no dispute that Mr. Messex and Mr. Ernhardt were non-probationary employees when they damaged the Village garage, and Mr. Gonzalez was a non-probationary employee when he received a warning for putting the wrong fuel in the Village truck for a second time. There is also no dispute that neither Mr. Messex, Mr. Ernhardt, nor Mr. Gonzalez had as many incidents of workplace misconduct as petitioner. Accordingly, the undisputed evidence supported the finding that Mr. Messex, Mr. Ernhardt, and Mr. Gonzalez were not similarly situated to petitioner as required to make a *prima facie* case of employment discrimination.

¶ 44 In sum, all the relevant evidence was undisputed, and no improper credibility determinations

were made by the Department that would have voided the chief legal counsel's order sustaining its dismissal of petitioner's charge.

¶ 45 Next, petitioner argues that the Village's articulated reason for suspending him was a pretext, and he cites in support the alleged evidence of the Village's racial animus. Specifically, petitioner cites the racially segregated parking system, Mr. Murray's holding a cookie to his face and saying "good boy," Mr. Murray's providing donuts, coffee and hot cocoa to a predominately Caucasian work group, but not to a predominately African-American work group, and the racial disparity between the number of African-American Village workers and the largely African-American resident population of the Village. However, as discussed above, before we may consider whether the Village's articulated reason for suspending him was pretextual, petitioner first must establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination. See *Zaderaka*, 131 Ill. 2d at 178-79. As discussed above, petitioner has failed to make a *prima facie* case. Accordingly, we may not address petitioner's pretext argument.

¶ 46 Finally, petitioner contends the chief legal counsel should have subpoenaed witnesses before issuing a final decision, citing in support section 7-101.1(B) of the Act (775 ILCS 5/7-101.1(B) (West 2006)). Petitioner's contention is without merit, as section 7-101.1(B) does not authorize the chief legal counsel to subpoena witnesses. Also, petitioner has not identified who he wanted subpoenaed or what they would have said to support his charge of discrimination. The issue is waived. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 47 For the foregoing reasons, we affirm the chief legal counsel's July 2011 order sustaining the Department's March 2011 dismissal of petitioner's charge.

¶ 48 Affirmed.