2014 IL App (1st) 131108-U
No. 1-13-1108
July 30, 2014

THIRD DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE ILLINOIS DEPARTMENT OF HUMAN SERVICES, Petitioner-Appellant, v. ANNIE JOHNSON, Complainant-Appellee, and THE ILLINOIS HUMAN RIGHTS COMMISSION, Respondent.	)	Petition for Review of Final and Interlocutory Orders of the Illinois Human Rights Commission. No. 95 CF 1530

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Human Rights Commission did not abuse its discretion when it denied a petition to reopen the evidence, where the petitioner gave no explanation for its failure to produce the evidence at the initial hearing. To show a failure to mitigate damages for wrongful discharge of an employee, the employer must show the availability of substantially

equivalent positions, and the employee's failure to diligently pursue employment in those positions. The evidence supported the Commission's awards of both backpay and front pay to the discharged employee, when the Commission entered its award less than two years before the employee's expected retirement, and the employee had little likelihood of finding comparable employment.

¶ 2 The Illinois Human Rights Commission (Commission) entered a decision awarding Annie Johnson almost $400,000 in damages as compensation for racial discrimination that led an employer to fire Johnson. The Illinois Department of Human Services (Department), the successor of Johnson's former employer, argues on this appeal that the Commission should have permitted the Department to add new evidence after the Commission issued its decision in the case, and the Commission should have awarded Johnson far less back pay and no front pay, because after the employer fired Johnson, she should have found jobs that paid more than the jobs she actually found, and she should have kept the jobs longer. We find that the Commission did not abuse its discretion when it refused to reopen the evidence, and the record supports the awards of both back pay and front pay. Accordingly, we affirm the Commission's decision.

¶ 3 BACKGROUND

¶ 4 Chicago-Read Mental Health Center (Read) hired Johnson in 1989 and trained her for work as a mental health technician. Read fired Johnson in 1995. Johnson sued Read for racial discrimination. After extensive proceedings, including an appeal to this court (*Johnson v. Human Rights Comm'n*, 318 Ill. App. 3d 582 (2000)), the administrative law judge (ALJ) found that Johnson proved unlawful racial discrimination. The ALJ recommended reinstatement, an award of back pay totaling $77,664.78 for the time from the firing through January 1998, plus $608.62 per week from January 1998 until reinstatement.

¶ 5 Read filed exceptions, but it did not challenge the finding of racial discrimination. In an order dated October 28, 2003, the Commission affirmed the unchallenged finding of racial discrimination, but it refused to order Read to reinstate Johnson. The Commission remanded the case to the ALJ for a new hearing on damages, including front pay, noting that the ALJ's recommended order did not include a means of determining what Johnson had earned in other jobs she held since January 1998.

¶ 6 On August 25, 2005, before the ALJ heard the case on remand, Read moved to file a new affirmative defense of failure to mitigate damages. Johnson pointed out in her reply that Read waived the issue, and that allowing the new defense so many years after she lost the job would prejudice her severely. The ALJ decided to permit Read to present evidence on the failure to mitigate damages.

¶ 7 At the hearing on remand, which took place in 2006, Johnson listed all the jobs she held since Read fired her and the total income she earned from each position. She also testified about the income she received from unemployment insurance. She had jobs in telemarketing and insurance sales, and she also found clerical work through an agency that placed workers for temporary employment.

¶ 8 Johnson testified that after Read fired her, she started her job search by applying to hospitals and health care providers, listing her experience with Read on her applications. The prospective employers "would always say they were going to call. They never did." When asked to specify the health care providers and hospitals to which she applied, Johnson said,

> "I just can't remember all of them, but it was a lot. When I was looking in the medical field and the health care field, *** it seemed like they always

> asked me what happened with my other employer ***. *** I concluded that they weren't going to hire me because they never called me back."

Johnson stopped listing Read on her job applications, and she stopped applying for health care jobs.

¶ 9 Johnson compiled information on the hundreds of jobs for which she applied, amassing a stack of documents about three inches thick. She used the information to document her efforts to find employment, as required for her to receive unemployment insurance benefits. However, she discarded the notes years before the 2006 hearing, as she had no indication that she would need them again.

¶ 10 Johnson testified that she took every job offered to her, although most of the jobs did not last long. In 2002, she found a job with Help for Home, a health care agency, which sent her to the homes of elderly persons in need of health care and companionship. She worked all of the hours Help for Home offered her, earning a fraction of the income she earned at Read. In 2004, she accepted a full-time job in telephone sales, which she retained through the hearing on remand in 2006, again earning much less than she earned at Read.

¶ 11 Read presented evidence that at a prior hearing in this case, Johnson testified that Read's training gave her skills equivalent to the skills of a certified nursing assistant (CNA). At the 2006 hearing, Johnson explained that she knew Read had trained her as a certified mental health technician, and she thought that position might count as equivalent to a CNA. Read gave her several certificates for successful completion of various kinds of training, but she had no certificate for training as a CNA. Instead, she had only a certificate for her training as a mental health technician.

¶ 12 Johnson presented testimony from several of the employers who hired her between 1998 and 2004. One telemarketer said the company laid her off due to a lack of business. The office manager of another telemarketer did not know why Johnson left, but usually the company laid off employees for failing to make enough sales. A representative from a third employer emphasized the difficulty of the work, and stressed that Johnson committed no misconduct on the job.

¶ 13 Read countered with evidence that some of the clients of the temporary agency disapproved of Johnson's work. Read then presented Judith Sher, a vocational rehabilitation expert, who said that the Chicago health care market had ample opportunities for CNAs and psychiatric aides in the years Johnson spent lightly employed in other fields. The jobs paid considerably more than Johnson earned in her positions. Sher said that, assuming Johnson had a car and a CNA certificate, she could have found a decent full-time job in health care within 90 days of her discharge from Read. Sher suggested that Johnson should not tell prospective employers about her discharge from Read, but Sher did not explain what job qualifications Johnson could present apart from her training at Read. Sher thought that Read would not inform prospective employers about the lawsuit or the grounds for Johnson's discharge.

¶ 14 In rebuttal, Johnson testified that she did not consistently have access to a car when she needed to look for work.

¶ 15 After prolonged continuances due to the illness and death of Johnson's attorney, the ALJ, in 2009, issued a recommended decision. Johnson filed exceptions. In June 2010, the Commission issued its decision. The Commission held, first, that it erred in its order dated

October 2003, when it refused to direct Read to reinstate Johnson. Due to the extended time since Johnson worked as a mental health technician, and the proximity of her retirement, the Commission added front pay of $608.62 per week from the date of the June 2010 decision to Johnson's expected retirement at age 65 in February 2012, for a total of $51,124.08.

¶ 16 The Commission noted that Read waived the right to argue the failure to mitigate damages by failing to raise it in initial proceedings in the case, but the Commission addressed the evidence of mitigation on its merits. The Commission wrote that Read had the burden of proving "(1) there were substantially equivalent positions available, and (2) the Complainant did not use reasonable care and diligence in seeking those positions." The Commission noted that Sher's opinion had little bearing on the case, because Read failed to prove that Johnson qualified as a CNA. The Commission held that Read did not prove that Johnson failed to mitigate her damages.

¶ 17 To calculate the appropriate award of damages, the Commission totaled the number of weeks from January 1998 up to the date of the 2006 hearing, multiplied by $608.62 per week, and subtracted Johnson's earnings. Then the Commission added an award for the period between the hearing and the date of the award, which is the period from the 2006 hearing to June 2010, and directed the ALJ to rehear the case on remand to determine the amount Johnson earned in that period.

¶ 18 Read petitioned for rehearing. The Commission denied the petition on March 28, 2011. On remand, the parties stipulated to the amount Johnson earned between the 2006 hearing and June 2010. After the ALJ recommended an award using the stipulated figure to decrease the damages, Read filed a petition to reopen the evidence. Read sought to use old materials

to prove that in 1998 and thereafter, Johnson did not need a certificate to obtain a job as a CNA. The Commission denied the petition to reopen the evidence and adopted a final order awarding Johnson $77,664.78 for the period from the firing to January 1998, $240,820.39, plus interest, in back pay for the period from January 1998 through June 2010, and $51,124.08 in front pay, plus benefits and attorney fees. Read's successor, the Department, now appeals.

¶ 19 ANALYSIS

¶ 20 Reopening the Evidence

¶ 21 The Department argues first that the Commission erred when it denied the petition to reopen the evidence. We review the Commission's decision for abuse of discretion. *Heeren Co. v. Illinois Human Rights Comm'n*, 150 Ill. App. 3d 234, 239-40 (1986). The Administrative Code provides that after an ALJ issues a recommended decision, a party may ask for leave to submit additional evidence. 775 ILCS 5/8A-103(D) (West 2012). "The request must include a statement specifying in detail the evidence which the party proposes to present, its relevance, and the reasons why such evidence was not presented at the hearing." *Tate v. American General Life & Accident Insurance Co*., 274 Ill. App. 3d 769, 774 (1995).

¶ 22 Read's petition to reopen the evidence included no explanation for its failure to offer the evidence at the hearing. Read had access to the evidence long before the first hearing in this case. The proffered evidence had conspicuously little bearing on the case, as Read did not show that Johnson's training qualified her for work as a CNA. We find that the Commission

did not abuse its discretion when it decided not to reopen the evidence. See *Perlman v. Time, Inc.*, 133 Ill. App. 3d 348, 352 (1985).

¶ 23 Backpay

¶ 24 Next, the Department challenges the award of backpay. The Department claims that the Commission applied the wrong legal standards, so we should review its decision *de novo*. See *Goodman v. Ward*, 241 Ill. 2d 398, 406 (2011). We find that the Commission applied the correct standard. To show that a wrongfully discharged employee failed to mitigate damages, the employer bears the burden of proving "1) there were substantially equivalent positions which were available; and 2) the claimant failed to use reasonable care and diligence in seeking such positions." *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983); see *Zaderaka v. Human Rights Comm'n*, 131 Ill. 2d 172, 178 (1989); *Heeren*, 150 Ill. App. 3d at 242. We reject the Department's argument that it needed to show the availability of only similar, not substantially equivalent, positions.

¶ 25 The Department disputes the Commission's finding of fact that Read failed to meet its burden of proving that Johnson failed to mitigate her damages. We defer to the Commission's findings of fact, which we must accept as *prima facie* true and correct. *City of Sandwich v. Illinois Labor Relations Board*, 406 Ill. App. 3d 1006, 1008 (2011). However, we may overturn the findings if the manifest weight of the evidence demands different findings. *Sandwich*, 406 Ill. App. 3d at 1008.

¶ 26 The record here amply supports the Commission's finding. Johnson told the ALJ what she could remember about her extensive job search and her efforts, for years, to find permanent employment. The Department chastises Johnson for remembering the names of

only seven potential employers who rejected her applications, but Read bears primary responsibility for the lack of specific names, as it did not raise the affirmative defense of failure to mitigate damages for more than ten years after it illegally fired Johnson. We have no grounds for rejecting the Commission's reliance on Johnson's testimony about her efforts to find a job. We also agree with the Commission that Sher's testimony has little bearing on this case, since she discussed mostly the availability of positions for CNAs, and Read did not prove that Johnson qualified for such positions. Moreover, Johnson credibly testified about the lack of responses when she applied for positions in health care for which her work at Read qualified her, and the lack of responses, in an active job market with a shortage of qualified mental health technicians, entirely justified her conclusion that putting her experience at Read on her job applications eliminated her employment prospects. Read presented no evidence that Johnson could obtain substantially equivalent employment in health care without referring to her training at Read.

¶ 27 The Department further contests the backpay award on grounds that the Commission should have cut off the backpay when Johnson first lost a job as a telemarketer, or when a temporary employment agency told her it would no longer seek to place her in temporary jobs. The Department argues that Read's evidence showed Johnson lost the positions through her own fault. For instance, she failed to arrive at the offices of a client for a temporary work assignment, and she failed to make enough sales to keep one job as a telemarketer. A case the Department cites, *In re Brack and K-Mart Apparel Corp.*, 1995 WL 712068 *8 (IHRC Aug. 8, 1995), states the applicable principle: the Commission should not cut off damages "if the complainant took an interim position that was substantially different from his previous

job in order to mitigate damages and the complainant was terminated because he could not perform the duties as required." Johnson's failure at jobs substantially different from the position she held at Read does not affect her right to recover damages.

¶ 28 "Where the record contains competent evidence to support the decision that [the employee] took reasonable efforts to mitigate his damages, the decision of the Commission must be upheld." *Raintree Health Care Center v. Human Rights Comm'n*, 275 Ill. App. 3d 387, 396 (1995). The Commission's finding that Read did not meet its burden of proving that Johnson failed to mitigate her damages was not against the manifest weight of the evidence. We affirm the award of $318,485.17 in backpay for the period from her discharge to June 2010.

¶ 29 Front Pay

¶ 30 Finally, the Department contests the award of pay for the period from the date of the award, in June 2010, to Johnson's retirement at age 65 in February 2012. The Commission has authority to award front pay, "especially when the plaintiff has no reasonable prospect of obtaining comparable employment." *Chas. A. Stevens & Co. v. Human Rights Comm'n*, 196 Ill. App. 3d 748, 756 (1990). We review the award of front pay for abuse of discretion. *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562, 574 (7th Cir. 1995). In this case, Johnson had turned 63 before the date of the award, and had no real prospect of returning to a position comparable to the position from which Read fired her. We find no abuse of discretion in the award of front pay.

¶ 31 In its reply brief on this appeal, the Department contends that the "lowered-sights doctrine" requires the reversal of the award of front pay. Read forfeited the argument by

failing to raise it before the Commission, and the Department forfeited the argument by failing to raise it in the initial brief on this appeal. See *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 516 (1988); Ill. S. Ct. R. 341 (j) (eff. Feb. 6, 2013). We will not reverse the Commission's decision on the basis of the forfeited argument.

¶ 32 CONCLUSION

¶ 33 The Commission did not abuse its discretion when it decided not to reopen the evidence to permit Read to present evidence it could have presented much earlier, where Read offered no excuse for its failure to present the evidence at the initial hearing. The record adequately supports the Commission's award of backpay and front pay. Accordingly, we affirm the Commission's decision.

¶ 34 Affirmed.