FOURTH DIVISION
June 12, 2014

1-13-2621

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALINE DURBIN, Petitioner-Appellant, v. ILLINOIS HUMAN RIGHTS COMMISSION, and ILLINOIS DEPARTMENT OF HUMAN RIGHTS, Respondents-Appellees, and SEARS, ROEBUCK and CO., Respondent.	)	Petition for Review of the Order of the Illinois Human Rights Commission. Charge No. 2004 CA 1171 No. 07-872C

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Human Rights Commission's order entering summary decision in favor of the employer on the employee's complaint alleging age and national origin discrimination and retaliation is confirmed. The Illinois Department of Human Services found that the employer had good cause for filing its verified response to the employee's discrimination charges late and that finding was not subject to review by the Commission. The employee failed to make a *prima facie* case of discrimination or to raise a genuine issue of fact that the employer's stated reason for terminating her was pretextual.

¶ 2 Petitioner, Aline Durbin, appeals to the appellate court from a final order of the Illinois Human Rights Commission which granted summary decision for respondent, Sears, Roebuck and Company (Sears) on the charges she filed alleging Sears discriminated against her based on her age and national origin when it terminated her employment. Petitioner argues the Commission should have found Sears in default for failing to file its verified response to her charges in the Department within the time allowed by statute and that summary decision in Sears' favor was improper. For the following reasons, we confirm the Commission's order.

¶ 3 BACKGROUND

¶ 4 Petitioner filed charges in the Illinois Department of Human Services (Department) against Sears alleging that her former employer discriminated against her when it terminated her employment based on her age and national origin, or in retaliation for complaining about the treatment she received from her superiors because of her age or national origin. After several dismissals for lack of substantial evidence and reinstatements of petitioner's charges, the Department entered an order finding substantial evidence to support the charges. The Department and petitioner filed separate complaints with the Illinois Human Rights Commission (Commission). Sears moved for summary decision in its favor, and the Commission granted Sears' motion.

¶ 5 Petitioner began working for Sears in October 2000 as a HUB associate and her employment was terminated on May 30, 2003 for alleged violations of company work rules. Petitioner is of French nationality and when she began her employment with Sears, she was 61-years old. As a HUB associate, petitioner's job duties included monitoring a cash box which was secured in the HUB office. The HUB office distributed cash to employees as needed. At the beginning of each day, the HUB office distributed "fund bags." Each fund bag was numbered and each numbered bag was assigned to a specific cash register. HUB employees recorded which numbered bag was assigned to which register on a daily log. At the end of the day, the HUB associate checked the daily log to ensure each bag was returned. If a fund bag had not been returned, the HUB associate was to notify a closing manager, who would then close the register to which the missing bag had been assigned and return the funds to the HUB associate.

¶ 6 For the duration of her employment with Sears, John Pate was the HUB lead associate and Christopher Janes was the assistant general manager of the store where petitioner and Janes worked. Both Pate and Janes had supervisory authority over petitioner. In April 2003, petitioner complained to the store general manager that Pate had made derogatory comments about petitioner's age. As a result of petitioner's complaint Sears disciplined Pate. Sometime in April 2003, petitioner threatened to sue Pate and Sears.

¶ 7 On May 20, 2003, petitioner was working in the HUB office. Pate was on duty as the HUB lead associate. At some point petitioner claims that Pate gave petitioner permission to leave the HUB office to go to the washroom and told petitioner to leave the cash box with him. While petitioner was out of the HUB office, another employee used the cash box, which

was on wheels, as a cart to move a facsimile machine to a different office. The other employee had been directed to move the facsimile machine and petitioner claims he received permission from Pate to use the cash box for that purpose.[1] When petitioner returned to the HUB office, Pate was not present. Petitioner later stated that she did not immediately notice the cash box was missing because with no one present it would normally be locked in a different room. Sometime thereafter, someone discovered the cash box was missing from the HUB office. Janes investigated this incident. As a result of Janes' investigation, petitioner and Pate received written warnings. Petitioner's written warning informed her that another infraction would result in her termination.

¶ 8 On May 23, 2003, another HUB associate found 8 fund bags unsecured in the HUB office. After receiving a report of this incident, Janes and an asset protection associate conducted an investigation. Petitioner had received the bags at the end of her work day. She decided not to account for the returned bags on the daily log and not to secure them to avoid having to work overtime. Petitioner later explained that due to Sears' policy requiring prior approval for overtime, as well as Pate's comments regarding overtime, she felt that if she

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[1] Petitioner received a "final warning" that a subsequent failure to properly manage company resources within her responsibility would result in termination. Petitioner submitted a written response to that final warning. The way petitioner described the events in her written response was as follows: "On May 20, 2003, I asked an MPU Associate to get a cart and take the old fax machine to HR. The fax machine had been put on top of the cash box by John the HUB lead. I proceeded directly on to a bathroom break. John was left in the office." (Emphases omitted.) Petitioner's statement does not make clear whether the fax machine was already on the cash box when she told the other associate to move it. If it was, then based on petitioner's description of events, a reasonable trier of fact could find that she was blameworthy for the cash box being used to transport the fax machine.

worked overtime without prior approval she would be terminated. As a result of this second incident Janes recommended petitioner's termination.

¶ 9 On May 24, 2003, petitioner wrote a letter to human resources in response to the written warning she received regarding the May 20, 2003 incident. In that letter petitioner wrote that she did not ask the other associate to take the cash box to human resources and that she was not in the room when the associate removed the cash box. Petitioner also stated that she was affected by Pate's behavior and comments regarding petitioner's age, including "looking old this morning or young (whatever hits him), my being short, or that I am a back stabber, and he acts it out like a knife in his back with his hands." Petitioner claims that Pate considered her a "back stabber" because she is of French nationality and France did not support the United States' military actions in Iraq. On May 27, 2003, petitioner wrote to a Sears executive and complained about Pate and that Janes condoned Pate's conduct. Petitioner wrote: "Mr. Janes knows he [(Pate)] says things to me like 'you should quit because old people take too long to go to the bathroom' or makes rude hand gestures or comments about my age, height and nationality. I'm French, and Mr. Pate takes it out on me that France did not support the United States in the war with Iraq." In that letter petitioner also complained that Janes looks the other way when Pate discriminates.

¶ 10 On May 30, 2003, the general manager and a human resources consultant made the decision to fire petitioner.

¶ 11 On October 10, 2003, petitioner filed charges of discrimination in the Department. Petitioner charged Sears with discriminating against her by terminating her employment based on her age and national origin. Petitioner also charged Sears with retaliation for

terminating her because she complained to the general manager about discriminatory remarks Pate made about her.

¶ 12 To understand petitioner's argument a brief review of the procedures of the Illinois Human Rights Act (Human Rights Act) (775 ILCS 5/1-101 *et seq.* (West 2004)) is appropriate. Procedurally, the Human Rights Act provides that "[w]ithin 180 days after the date that a civil rights violation allegedly has been committed, a charge in writing under oath or affirmation may be filed with the Department by an aggrieved party." 775 ILCS 5/7A-102(A) (West 2004). The Department is required to serve a copy of the charges on the respondent, who must file a verified response within 60 days of receipt of notice of the charges. 775 ILCS 5/7A-102(B) (West 2004). "All allegations contained in the charge not timely denied by the respondent shall be deemed admitted, unless the respondent states that it is without sufficient information to form a belief with respect to such allegation." *Id.* The Human Rights Act, as it existed when Sears' verified response to petitioner's charges of discrimination was due, stated that "[t]he Department shall issue a notice of default directed to any respondent who fails to file a verified response to a charge within 60 days of receipt of the notice of the charge, unless the respondent can demonstrate good cause as to why such notice should not issue." 775 ILCS 5/7A-102(B) (West 2004)[2]. In this context, "good cause" means that "[r]espondent

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[2] The Human Rights Act has been amended, and currently provides that "[t]he Department may issue a notice of default directed to any respondent who fails to file a verified response to a charge within 60 days of receipt of the notice of the charge, unless the respondent can demonstrate good cause as to why such notice should not issue." 775 ILCS 5/7A-102(B) (West 2012). Because the Department found good cause for Sears' failure to timely file its verified response, this statutory change is irrelevant to this court's resolution of this issue on appeal.

acted with due diligence and was not deliberate or contumacious and did not unwarrantedly disregard the verified response process, as supported by affidavit or other evidence." 56 Ill. Admin. Code 2520.405(c)(4) (2006).

¶ 13 Both parties may file a "position statement" and other materials regarding the charge. 775 ILCS 5/7A-102(B) (West 2004). If the parties do not agree to voluntarily submit the charge to nonbinding mediation (775 ILCS 5/7A-102(B-1) (West 2004)), the Department proceeds to conduct an investigation of the allegations set forth in the charge (775 ILCS 5/7A-102(C) (West 2004)). Each charge becomes the subject of a report to the Director, who reviews the report and must determine whether there is substantial evidence that the alleged civil rights violation has been committed. 775 ILCS 5/7A-102(D)(2) (West 2004). "The determination of substantial evidence is limited to determining the need for further consideration of the charge pursuant to [the] Act and includes, but is not limited to, findings of fact and conclusions, as well as the reasons for the determinations on all material issues and questions of credibility." 775 ILCS 5/7A-102(D)(2) (West 2004).

¶ 14 If the Director of the Department finds no substantial evidence to support the charge the charge is dismissed and the petitioner is notified that he or she may seek review of the dismissal by the chief legal counsel of the Department. 775 ILCS 5/7A-102(D)(2)(a) (West 2004). If, however, the Director finds substantial evidence to support the charge, the Department would first "endeavor to eliminate the effect of the alleged civil rights violation and to prevent its repetition by means of conference and conciliation." 775 ILCS 5/7A-102(D)(2)(b) (West 2004). Failing conciliation, "the Department shall prepare a written complaint, under oath or affirmation, stating the nature of the civil rights violation

substantially as alleged in the charge previously filed and the relief sought on behalf of the aggrieved party" and file the complaint with the Commission. 775 ILCS 5/7A-102(F) (West 2004).

¶ 15 If a petitioner properly files a charge of a civil rights violation, the Department must, "within 365 days thereof or within any extension of that period agreed to in writing by all parties," either dismiss the charge or file a complaint as set forth in section 7A-102 of the Human Rights Act. 775 ILCS 5/7A-102(G)(1) (West 2004). If the Director has not issued the report making the substantial evidence determination at the end of the 365 day period, or any agreed-to extension of that period, the petitioner has 30 days in which to file a complaint with the Commission. 775 ILCS 5/7A-102(G)(2) (West 2004). If the petitioner files a complaint with the Commission in this manner, or if the time for filing a complaint has expired, "the Department shall immediately cease its investigation and dismiss the charge of civil rights violation." 775 ILCS 5/7A-102(G)(3) (West 2004).

¶ 16 The Department served Sears with petitioner's charges on November 17, 2003 and, therefore, pursuant to the Human Rights Act Sears was required to file a verified response to the charges by January 16, 2004. Sears did not file its verified response until May 19, 2004. The Department dismissed petitioner's charges for lack of substantial evidence. Petitioner requested review, and the Department's chief legal counsel vacated the dismissal and remanded the matter to the Department's charge processing division for additional investigation. This happened 3 more times.

¶ 17 On November 13, 2007, after the Department had again dismissed petitioner's charges for lack of substantial evidence in March 2007, upon review the Department issued an order

again vacating the dismissal and remanding the matter for further investigation by the charge processing division into the charges as well as the issue of the timeliness of Sears' response to those charges. In previous orders vacating the dismissal of petitioner's charges for lack of substantial evidence, the chief legal counsel noted that Sears' verified response to the charges was untimely and that Sears had not provided good cause for its failure to file a timely verified response and to serve petitioner with a copy.

¶ 18 The Department's investigations to this point revealed that a Sears representative had stated her belief that its response would be timely if filed any time prior to the fact-finding conference, but the representative could not remember with whom she communicated regarding the Department's practices regarding verified responses. The Department still had not determined whether the representative had requested an extension, and had not obtained a written statement verifying the representative's understanding of the Department's practices in place in January 2004. The matter returned to the charge processing division "to determine whether there is substantial evidence that [Sears] discharged [petitioner] because of her age, her national origin, and in retaliation for opposing unlawful discrimination" as well as the issue of the timeliness of Sears' verified response to the charges.

¶ 19 On November 15, 2007, petitioner filed a complaint with the Commission alleging the same charges she filed in the Department. Petitioner's complaint with the Commission also alleged that Sears had failed to timely file a verified response to her charges in the Department. Petitioner's complaint alleged that the 365 day time period in which the Department had to complete its investigation plus one 30-day extension to which the parties agreed had expired, and petitioner filed her complaint within 30 days of that expiration pursuant to the Human

Rights Act. On December 13, 2007 the Commission ordered petitioner to file a memorandum explaining why the Commission had jurisdiction of petitioner's complaint. In response, petitioner wrote that the parties agreed to only one 30-day extension, therefore the Department had 395 days in which to investigate her claims, and she timely filed her complaint within 30 days of the expiration of that period. Sears responded the parties agreed to two 30-day extensions, petitioner filed her complaint before the period for the Department's investigation expired, therefore the Commission lacked jurisdiction over her complaint.[3]

¶ 20 On February 26, 2008 Sears answered the complaint asserting plaintiff's complaint was premature and the Commission lacked jurisdiction and denying any discriminatory or retaliatory conduct.

¶ 21 On March 10, 2008 the Department found Sears had good cause for filing its verified response late, and it filed a separate complaint with the Commission alleging Sears discriminated and retaliated against petitioner in that Sears' stated reason for terminating petitioner--that she twice violated cash handling policies--was pretext for unlawful discrimination. The Department's complaint alleged that Pate made discriminatory remarks about petitioner's age and national origin, that he was responsible for one of the incidents that allegedly resulted in petitioner's termination, and that Pate participated in the decision to terminate petitioner. The Department's complaint alleged that Sears relied on inaccurate

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[3] "The term 'jurisdiction' does not strictly apply to an administrative body, but may be used to designate the administrative body's authority to act." *Farrar v. City of Rolling Meadows*, 2013 IL App (1st) 130734, ¶ 14.

information from Pate to decide that petitioner violated its policies. The Department also asserted that petitioner's job performance was comparable to another employee's performance, who was not in petitioner's protected classes, and whom Sears did not terminate despite also having violated cash handling policies. The complaint also alleged petitioner complained about Pate, and that when Sears discharged petitioner, Janes had told petitioner that petitioner's complaints had caused him trouble. Sears answered the Department's complaint denying it had discriminated or retaliated against petitioner.

¶ 22 The Commission consolidated the complaints. Following discovery, Sears filed a motion for summary decision. In support of its motion Sears attached an affidavit by Janes describing the events leading up to petitioner's termination and the documents Janes relied on in his affidavit, including witness statements and documentation of Janes' communications with the general manager concerning petitioner's complaints about Pate. Petitioner responded to Sears' motion by arguing that neither incident for which she was allegedly terminated was her fault and even if they were Sears had not terminated other employees who had committed more egregious rules violations who were not members of her protected classes. Petitioner also asked the Commission to enter a default order against Sears for its late verified response. Petitioner argued the Department lacked jurisdiction when it held Sears had shown good cause because by that time she had already filed her complaint.

¶ 23 On February 29, 2012, an administrative law judge (ALJ) for the Commission recommended the Commission grant Sears' motion for summary decision. Petitioner filed exceptions to the ALJ's recommendation. On June 24, 2013, the Commission declined further review and adopted the ALJ's recommendation as its order.

¶ 24 The Commission's order found that petitioner could not establish that Sears terminated her based on her age or national origin, or in retaliation for speaking out against Pate's discriminatory comments, because she could not show that she was meeting Sears' legitimate performance expectations. The Commission's order also found that petitioner failed to show that Sears treated similarly situated employees outside petitioner's protected classes more favorably. The Commission found no causal connection between petitioner's protected activity of speaking out against Pate's inappropriate remarks and her termination. Finally, the Commission found it lacked authority to issue a default for a late verified response in the Department's investigation.

¶ 25 This timely appeal followed.

¶ 26 For the following reasons, we confirm the Commission's order.

¶ 27 ANALYSIS

¶ 28 The Human Rights Act prohibits discrimination against a person on the basis of, *inter alia*, his or her race, color, religion, national origin, ancestry, age, sex, marital status, or handicap. *Owens v. Department of Human Rights*, 403 Ill. App. 3d 899, 916 (2010). It is also a civil rights violation to retaliate against a person because she had opposed that which she reasonably and in good faith believed to be unlawful discrimination. *Id.* When alleging employment discrimination under the Human Rights Act, the petitioner must first establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination. *Owens*, 403 Ill. App. 3d at 918-19.

> "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." *Id.* at 919.

¶ 29 "If a *prima facie* case is established, a rebuttable presumption arises that the employer unlawfully discriminated against the plaintiff. [Citation.] [T]o rebut the presumption, the employer must articulate, not prove, a legitimate, nondiscriminatory reason for its decision. [Citation.] [I]f the employer articulates such a reason, the plaintiff must prove, again by a preponderance of the evidence, that the employer's reason was untrue and was a pretext for discrimination. [Citation.]" *Id.* at 919. "On administrative review, questions of fact are reviewed with deference and subject to a manifest weight of the evidence standard. Conversely, review of questions of law is given no deference and subject to a *de novo* standard of review." *Sola v. Illinois Human Rights Comm'n*, 316 Ill. App. 3d 528, 535-36 (2000).

¶ 30 1. Petitioner's Charges

¶ 31 Petitioner charged Sears with unlawful discrimination in that it fired her based on her age and national origin, or in retaliation for engaging in a protected activity, or both. Sears maintained it fired petitioner for multiple violations of its cash handling policies. Petitioner argues the Commission has the authority to enter a default against Sears for failing to timely file its verified response to petitioner's charges in the Department and that summary decision in favor of respondent was incorrect. A finding that petitioner is entitled to a default order would eliminate the need to address whether the summary decision order is erroneous. Conversely, a finding in petitioner's favor on the summary decision issue still requires us to

resolve the default order question. If Sears was not entitled to summary decision in its favor, then petitioner might still be entitled to default if the Commission is authorized to make that finding. Accordingly, we first address petitioner's default order argument. If petitioner is not entitled to a default order, we will review the Commission's summary decision order.

¶ 32 2. Default Order

¶ 33 A default order results in a determination on the merits of the charge of discrimination in favor of the petitioner and a subsequent hearing on the issue of damages. See *Glassworks, Inc. v. State Human Rights Comm'n*, 164 Ill. App. 3d 842, 846 (1987); 775 ILCS 5/8-103(C) (West 2004)[4]. The Human Rights Act gives the Commission jurisdiction "to hear and determine requests for review of *** (2) notices of default issued by the Department." 775 ILCS 5/8-103(A-1) (West 2004). Although the Human Rights Act currently requires a notice of default to notify the defaulting party that a request for review may be filed with the Commission (775 ILCS 5/7A-102(C)(4) (West 2012)), at the time of Sears' potential default, a notice of default was required to "notify the relevant party that a request for review may be filed in writing with the Chief Legal Counsel of the Department" (775 ILCS 5/7A-102(C)(4) (West 2004)).

¶ 34 Respondents argue these provisions only grant the Commission authority to review default orders when the Department has issued a default order but they do not give the Commission any authority to enter a default when the Department has not done so. In this

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[4] "When a respondent fails to file a timely request for review of a notice of default, or the default is sustained on review, the Commission shall enter a default order and set a hearing on damages." 775 ILCS 5/8-103(C) (West 2004).

case, the Department found, during the investigation period, that Sears had shown good cause for filing its verified response late and did not issue a default order. Respondents argue the Commission does not have the authority to make the initial determination of whether a party had good cause for failing to timely file a verified response. Moreover, in the authorities on which petitioner relies, the Commission has done no more than sustain the Department's determination that a party lacked good cause for failing to file a timely verified response and sustained the Department's default orders in accordance with statutory procedures.

¶ 35 Petitioner argues the Department's order finding Sears had shown good cause for its late verified response is a nullity, because when the Department issued that order, petitioner had already filed her complaint with the Commission and the Department was divested of jurisdiction. Petitioner challenges Sears' affidavits allegedly showing its "good cause" for the late filing as legally insufficient to establish the facts averred therein. Petitioner argues that without a valid good cause finding by the Department, the Commission must have authority to make the finding because, according to petitioner, there must be a mechanism for the good cause issue to be ruled upon. Petitioner cites three instances in which she alleges this was done and asks this court to either issue a default or determine that the Commission is authorized to issue a default and remand for further proceedings on that topic.

¶ 36 The authorities petitioner cites are not helpful to her position. In both *In the Matter of the Request for Review by Curtis Gaylord*, Charge No. 2008CP3584, 2009 WL 4672431 (July 22, 2009), and *In the Matter of the Request for Review by Melvin Collins*, Charge No. 2010CA1274, 2010 WL 8346865 (November 19, 2010), the Department found that the complainant failed to establish good cause for his failure to attend a fact finding conference. *In the Matter of the*

Request for Review by Curtis Gaylord, ¶ 8; *In the Matter of the Request for Review by Melvin Collins*, ¶ 5-6. In both cases the Department dismissed the charge for failure to proceed with the Department's investigation. In *Curtis Gaylord* the Commission sustained the Department's dismissal of the complainant's charge because "the Complainant did not provide any supporting documentation which showed that he had good cause for his failure to attend the fact finding conference." *Curtis Gaylord*, ¶ 10. In *Melvin Collins* the Commission also sustained the determination that the complainant failed to demonstrate good cause for his failure to attend the fact finding conference. *Melvin Collins*, 2010 WL 8346865 at 2-3. The only decision petitioner cites which dealt with failing to file a verified response is *In the Matter of the Request for Review by Subway*, Charge No. 2009CA1887, 2010 WL 5314808 (May 26, 2010). *In the Matter of the Request for Review by Subway* is readily distinguishable. There, the Department did issue the respondent a notice of default for the respondent's failure to file a verified response to a charge. *In the Matter of the Request for Review by Subway*, 2010 WL 53114808 at 2. The Commission sustained the notice of default because the respondent failed to demonstrate good cause for its failure to timely file a verified response to the charge. *Id.* The Commission referred the matter to the administrative law section for a hearing on damages. The Commission noted that its administrative law judges "do not consider arguments as to the merits of the default, or the *** finding of liability as a result of that default." *Id.* The Commission also noted that its order was "not final and may not be appealed at this time." *Id.* at 3.

¶ 37 In this case, on March 10, 2008, the Department found that Sears had shown good cause for its failure to file a verified response to petitioner's charges within the time prescribed

by statute when it entered a finding of substantial evidence as to petitioner's charges. Petitioner's claim that the Department lacked jurisdiction over the matter when it made that finding lacks merit. Petitioner grounded her position on the claim that the Department lacked jurisdiction once the investigation period, with a single agreed-to extension, expired (395 days after she filed her charges in the Department excluding tolling[5]) and she filed her complaint with the Commission within the time allotted. However, as respondents note, in July 2006 the parties agreed to a second 30-day extension in addition to the 30-day extension to which the parties previously agreed. Therefore, the entire investigation period comprised 425 days.

¶ 38 Under the prior tolling provision, the time limitation within which the Department retains jurisdiction to either file a complaint with the Commission or dismiss the charge with prejudice is tolled during the period between issuance of a notice of dismissal or default and entry of the Commission's order sustaining the Department's decision to dismiss or default. 56 Ill. Admin. Code 5300.490 (repealed January 2, 2009); 56 Ill. Admin. Code. 5300.480 (1981). The Department's order finding substantial evidence states that on November 20, 2007, the Department dismissed the charge for lack of substantial evidence and on November 28, 2007, petitioner requested review of that dismissal. Petitioner admitted the Department entered that order in her motion for default or summary decision. When the Department

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[5] 56 Ill. Admin. Code 5300.490 (repealed January 2, 2009). See now 56 Ill. Admin. Code 2520.573 (2008) ("Proceedings on requests for review shall toll the time limitation established in Section 7A-102(G)(1) or Section 7B-102(G) of the Act from the date on which the Director's notice of dismissal or default is issued to the date on which the order of the Chief Legal Counsel of the Department is entered.").

dismissed the charges the extended investigation period of 425 days had not expired and, under the Department's rules as they existed at that time, the limitation period tolled. Neither party cites to a decision by the Commission sustaining the November 20, 2007 order (and restating the limitation period) because by that time, petitioner had filed a complaint with the Commission. On December 13, 2007, the Commission did order petitioner to file a memorandum explaining why the Commission had jurisdiction of petitioner's November 15, 2007 complaint. In that memorandum, petitioner again relied on a 395-day investigation period (accounting for only one extension). Before the Commission could rule on the issue of its jurisdiction over petitioner's complaint, on March 10, 2008, the Department filed its complaint with the Commission. On the same day, the Department issued its order on petitioner's November 28, 2007 request for review of the latest order of dismissal, and made its finding of good cause as to Sears' late verified answer. The Commission ultimately consolidated the two complaints as identical.

¶ 39 Based on the parties' arguments and the record before this court, we find that the Department had jurisdiction to make a finding that Sears had good cause for its failure to timely file a verified response to petitioner's charges in the Department. Petitioner maintains that even if the Department timely ruled on the issue of good cause, the Commission still had authority to review that ruling. On the merits of the good cause issue, petitioner argues Sears presented zero admissible evidence of good cause, therefore the Department's finding is erroneous.

¶ 40 The Commission found that it "has no authority to determine 'good cause' at the Department level." Petitioner asks this court to hold that finding to be erroneous and either

remand the matter to the Commission to make the determination, or to make the determination ourselves and find that Sears failed to demonstrate good cause. However, this court reviews the decision of the Commission, not the Department's decision. *Alcequeire v. Human Rights Comm'n*, 292 Ill. App. 3d 515, 519 (1997). The Commission did not make a good cause determination. Even if the Department's finding of good cause was before this court, we would be required to afford substantial deference to the Department's interpretation of its own regulations. *Weyland v. Manning*, 309 Ill. App. 3d 542, 547 (2000). Regardless, the question presented to this court is the scope of the Commission's authority. If the Commission has authority to review the Department's good cause finding, the proper remedy would be to remand to the Commission to make a finding as to the propriety of the Department's order. Therefore, petitioner's arguments in this court concerning the sufficiency of the evidence before the Department to sustain a finding of good cause are inapposite.

¶ 41 The Commission does not have the authority petitioner proposes it does. "[W]here the authority of an administrative body is in question the determination of the scope of its power and authority is a judicial function; not a question to be finally determined by the administrative agency itself." *People ex rel. Thompson v. Property Tax Appeal Bd.*, 22 Ill. App. 3d 316, 321 (1974); *Board of Education of Community Consolidated School District No. 59 v. Illinois State Board of Education*, 317 Ill. App. 3d 790, 793 (2000). In a given case, by acting or refusing to act, the administrative agency necessarily determines that the subject matter is or is not within the purview of the statute creating the agency. *Id.* "The correctness of that determination, of course, may be raised on review. It is a question of law and not of fact." *Id.*

We review this purely legal issue *de novo*. *Board of Education of Community Consolidated School District No. 59*, 317 Ill. App. 3d at 793.

¶ 42 An agency's authority to act must arise either from the express language of its enabling statute or by fair implication and intendment from those express provisions as an incident to achieving the objectives for which the agency was created. *Id.* at 794. Administrative agencies have no general or common-law powers. Instead, their powers are strictly limited to those particularly granted by the legislature, and any action taken must be specifically authorized by statute. *Ming Auto Body v. Industrial Comm'n*, 387 Ill. App. 3d 254-55, 244 (2008). "A reviewing court cannot expand the jurisdiction of an administrative tribunal by order of remand." *Board of Education of Rich Township High School District No. 227, Cook County v. Brown*, 311 Ill. App. 3d 478, 491 (1999). We also note that the "party appealing the administrative agency's decision bears the burden of proof ***." *Id.* at 486.

¶ 43 Petitioner has not pointed this court to, nor can we locate, a clear grant of authority to the Commission to review the Department's finding that a respondent had good cause for failing to timely file a verified response. The regulations governing proceedings before the Department express a clear intendment to the contrary. The Department's rules expressly provide that "[w]hether good cause exists is in the sole discretion of the Department." 56 Ill. Admin. Code 2520.405(d) (2006). That express intention is carried through to the rules governing the Commission. "A party may request review by the Commission of a decision by the Department to dismiss or default by filing a request for a review with the Commission ***." 56 Ill. Admin. Code 5300.410 (2010). This provision does not grant the Commission authority to review a decision by the Department not to issue a default order based on a

finding of good cause, and we may not read such a provision into the unambiguous statutory language. *McHenry County Defenders, Inc. v. City of Harvard*, 384 Ill. App. 3d 265, 282 (2008) ("where a statute lists the thing or things to which it refers, the inference is that all omissions are exclusions, even in the absence of limiting language.")

¶ 44 Nor do we find that the authority to review a finding of good cause can be fairly implied from the express provisions of the statute. When a petitioner files a complaint with the Commission because of the Department's failure to issue a report finding substantial evidence or dismissing the charge with prejudice, the petitioner's complaint must state the nature of the alleged civil rights violation "substantially as alleged in the charge previously filed." 775 ILCS 5/7A-102(F), (G)(1) (West 2004). We find no implication or intendment to reopen matters specifically pertaining to the Department's assessment of compliance with its procedures as distinguished from the substance of the petitioner's allegations. This finding is supported by express statutory language making the Department the sole arbiter of compliance with this particular procedure. 56 Ill. Admin. Code 2520.405(d) (2006).

¶ 45 This is not a case where the Department "exceeded its statutory authority by unconditionally accepting [a] verified response notwithstanding the failure to show good cause for failing to file it within the mandatory 60-day period." *Ferrari v. Illinois Department of Human Rights*, 351 Ill. App. 3d 1099, 1108 (2004). Here, the Department found that Sears did show good cause, and the Department fulfilled its duty under section 7A-102(B) of the Human Rights Act. The Department did not deny petitioner a vehicle by which to raise the issue of Sears' untimely verified response. *Ferrari*, 351 Ill. App. 3d at 1106. (because time period for filing a verified response is statutory rather than jurisdictional, the Department must provide

a vehicle by which a petitioner can raise the issue before the Department because the petitioner may forfeit the issue by failing to so inform the Department). The Commission's refusal to review the Department's order is not based on a forfeiture of the issue. Petitioner raised the issue and, in conformance with its statutory duty, the Department addressed the issue. Petitioner disagrees with the outcome of the Department's performance of that duty. Unfortunately, under the statute as currently written, that outcome is not subject to review by the Commission.

¶ 46 3. Summary Decision

¶ 47 Next, we address petitioner's argument that the Commission erred when it entered summary decision in favor of Sears. "A summary decision is the administrative agency procedural analogue to the motion for summary judgment in the Code of Civil Procedure. [Citation.] Because of the similarities of the two, it would seem appropriate to employ the case law which has grown out of the summary judgment motion practice when reviewing the propriety of such an order on direct review ***." *Cano v. Village of Dolton*, 250 Ill. App. 3d 130, 138 (1993). The Commission may render a summary decision in favor of either a complainant or a respondent "if the pleadings and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a recommended order as a matter of law." *Cano*, 250 Ill. App. 3d at 137. "To defeat a summary decision, all that is required is evidence from which a rational trier of fact could reasonably infer that the defendant had fired the plaintiff because the latter was a member of a protected class. [Citation.] In other words, there must be evidence from which the trier of fact could infer that the reason given by the employer was pretextual. [Citation.]" *Id.* at 538-39. "To prove

pretext, the plaintiff must show that the employer's reason was false and that discrimination was the real reason for the action. [Citation.] *** The plaintiff must show: (1) the articulated reason has 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. [Citations.]" *Id.* at 537. A petitioner can also defeat a summary decision with evidence of suspicious timing, ambiguous statements--oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. *Id.* at 538.

¶ 48 Petitioner argues the Commission applied an incorrect legal standard and incorrect legal principles in reaching its decision, and that construing the facts in a light most favorable to her, a dispute exists as to whether she was meeting her employer's legitimate business expectations and whether similarly situated employees who are not members of her protected group were treated differently. Specifically, petitioner argues the Commission did not find that the material facts are undisputed, drew inferences to resolve disputed matters rather than determining whether reasonable persons might draw different inferences from the facts, and failed to strictly construe the evidence against Sears. We will give deference to the Commission's findings of fact and apply the manifest weight of the evidence standard of review to those findings, but the summary decision determination is reviewed *de novo*. *Sola*, 316 Ill. App. 3d at 535-36.

¶ 49 An administrative agency's findings are against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Swanson v. Board of Trustees of Flossmoor Police Pension Fund*, 2014 IL App (1st) 130561, ¶ 30. Petitioner takes issue with the Commission's

finding as fact that she was responsible for keeping the cash box in her possession at all times and that she was responsible for the fund bags at closing time on the date at issue. Petitioner is conflating responsibility for those job functions with fault for the lapses in Sears' policies. We do not construe the Commission's fact findings in that manner. Rather, we construe the Commission's findings as a statement of petitioner's duties on the dates at issue. Petitioner has pointed to no facts that would make the opposite conclusion--that these were not her job duties--clearly evident. Petitioner's arguments focus on the incidents not being her fault because she was not in the HUB office when the cash box was removed and she could not log in the fund bags because to do so would have required forbidden overtime. Accordingly, we hold that the Commission's findings of fact are not against the manifest weight of the evidence.

¶ 50 The Commission found that petitioner received a warning because the cash box was taken from the HUB office at a time when petitioner "was responsible for keeping the cash box in her possession at all times." The Commission did not make a finding of fact regarding petitioner's claim that she was not in the office when the other employee removed the cash box or that she entrusted the cash box to her supervisor Pate when she left the office, with permission, to use the washroom. The Commission found as fact that petitioner "admitted leaving the eight [fund] bags unaccounted for and unsecured," but did not make any findings regarding petitioner's proffered reason for doing so.

¶ 51 Petitioner argues that in light of the evidence she presented but which is not reflected in the Commission's findings of fact, there is evidence that she is not responsible for the acts which caused her to be terminated. Nonetheless, petitioner failed to establish a *prima facie*

case of discrimination because she did not establish that Sears treated similarly situated employees outside her protected classes more favorably. If a court determines that the co-worker identified by the plaintiff, while similarly situated, was not treated in a more favorable manner, it need not address any of the underlying allegations of disparate treatment. *Peele v. Country Mutual Insurance Co.*, 288 F.3d 319, 331 (7th Cir. 2002).

> "[I]n disciplinary cases--in which a plaintiff claims that [she] was disciplined by [her] employer more harshly than a similarly situated employee based on some prohibited reason--a plaintiff must show that [she] is similarly situated with respect to performance, qualifications, and conduct. [Citation.] This normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." (Emphasis and internal quotation marks omitted.) *Peele*, 288 F.3d at 330.

¶ 52 Petitioner cannot show that she is similarly situated to her supervisor Pate or her coworker Caminata. Pate is not similarly situated because he is petitioner's supervisor. The fact that both were disciplined for the cash box incident does not equate to evidence that they were subject to the same standards. Petitioner's arguments notwithstanding, she is not similarly situated with Caminata with regard to their conduct. As respondents note, petitioner committed multiple errors handling valuable assets (cash). While petitioner notes

Caminata received one similar warning, petitioner admits that Caminata's subsequent discipline, unlike her own, did not result from cash handling, but from failure to comport herself in a reasonable and businesslike manner.

¶ 53 Moreover, petitioner has failed to demonstrate to this court that she will be able to show that the articulated reason for her discharge has no basis in fact, that the articulated reason did not actually motivate the employer's decision, or that the articulated reason was insufficient to motivate the employer's decision. *Sola*, 316 Ill. App. 3d at 537. "An inquiry into pretext requires that we evaluate the honesty of the employer's explanation, rather than its validity or reasonableness." *Hill v. Tangherlini*, 724 F.3d 965, 968 (7th Cir. 2013). Petitioner challenges the reasonableness of holding her responsible for something that was done while she was not in the room or of punishing petitioner for her conscious decision to forego her duties for fear of greater repercussions. Those assertions are not part of this court's inquiry. Our inquiry is whether Sears' stated reason for firing petitioner was a lie, completely unreasonable, or simply so ludicrous that it is not to be believed. *Hobgood v. Illinois Gaming Board*, 731 F.3d 635, 645-46 (7th Cir. 2013) (and cases cited therein). "We do not second guess an employer's business decision, but neither do we abandon good reason and common sense in assessing an employer's actions. [Citation.] Where an employer's reason for a termination is without factual basis or is completely unreasonable, that is evidence that an employer might be lying about its true motivation." (Internal quotation marks omitted.) *Id.* at 646.

¶ 54 Petitioner has not demonstrated that this is a case where the employer's justification for termination is unworthy of credence. The failures of compliance with Sears' cash handling procedures have a basis in fact. Petitioner does not dispute that those failures did

occur. She only asserts that they were not her fault. As to whether the articulated reason actually motivated the employer's decision, petitioner agrees that the actual termination decision was based on two lapses in cash handling policy. Although she asserted that Pate attempted to shift blame to petitioner for the cash box incident, her only argument concerning the fund bag incident is her own fear of reprisal for working overtime. But petitioner never asserts that she sought guidance on this issue or notified anyone of her dilemma before another employee discovered the fund bags the next day, or that doing so was not an option. There is scant evidence of her employer's role in causing the incident that actually resulted in the termination (a second offense), thus we cannot say that the articulated reason did not actually motivate Sears' decision. Finally, the evidence petitioner provided supports finding that the articulated reason was sufficient to motivate the decision to fire petitioner. Petitioner admits that she received the warning that should she again fail to properly manage company resources within the scope of her responsibility she would be terminated.

¶ 55 Petitioner failed to establish a *prima facie* case of discrimination. Petitioner also failed to demonstrate that she will be able to demonstrate that the employer's stated reason for her termination was pretextual. The Commission's order with regard to petitioner's claim of age and national origin discrimination is, therefore, confirmed.

¶ 56 Finally, we agree with the Commission that there is no genuine issue of material fact as to a causal connection between petitioner's protected activity and her termination.

Retaliatory conduct can be demonstrated using either the direct or indirect[6] method of proof. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 703 F.3d 966, 972 (2012); *Hoffelt v. Illinois Department of Human Rights*, 367 Ill. App. 3d 628, 633 (2006).

> "To establish a *prima facie* case of retaliation under the direct method, [the petitioner] must show: (1) that he engaged in protected expression; (2) that he suffered an adverse employment action; and (3) that a causal link existed between the protected expression and the adverse action. [Citation.] To show causation under the direct method, [the petitioner] may rely on either direct evidence of a causal link, or 'circumstantial evidence that is relevant and probative on any of the elements of a direct case of retaliation.' [Citation.] In other words, [the petitioner] must show 'that he engaged in protected activity *** and as a result suffered the adverse employment action of which he complains' through the use of direct and/or circumstantial

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[6] Petitioner does not argue that she can establish a *prima facie* case of retaliation under the indirect method of proof, but we would find that she could not. "The indirect method applies the familiar *McDonnell Douglas* framework to create a presumption of discrimination or retaliation in the absence of any direct or circumstantial evidence. [Citation.] The plaintiff must establish that 1) she is a member of a protected class (or performed the protected act of filing a complaint), 2) she *** has met the [employer's] legitimate work expectations, 3) the [employer] took adverse employment action against her and 4) the [employer] treated similarly situated employees outside of the protected class (or who did not complain) more favorably." *Volovsek v. Wisconsin Department of Agriculture, Trade and Consumer Protection*, 344 F.3d 680, 692 (7th Cir. 2003). Petitioner has not argued that Sears treated similarly situated employees who did not complain more favorably and, as discussed above, petitioner cannot establish that she was meeting Sears' legitimate work expectations.

> evidence. [Citation.] Direct evidence is evidence, which 'if believed by the finder of fact, "will prove the particular fact in question without reliance upon inference or presumption." ' [Citations.] Circumstantial evidence, which allows a jury to infer retaliation, may include: (1) suspicious timing, ambiguous statements or behaviors; (2) evidence that similarly situated employees were treated differently; or (3) a pretextual reason for adverse employment action." *Kasten*, 703 F.3d at 972-73.

¶ 57 We have already found that Sears' stated reason for discharging petitioner was not pretextual. Sears did not offer "inconsistent explanations for taking [the] adverse employment action" and we have found that petitioner failed to demonstrate that her termination resulted from an improper motive or anything other than Sears' stated reasons. Compare *Kasten*, 703 F.3d at 974. In the context of petitioner's retaliation claim, she has not argued that similarly situated employees were treated differently. That is, petitioner has not argued that employees who did not complain were treated more fairly. In support of her argument on her retaliation claim, petitioner did assert that "others who 'did' equal or worse things did not get terminated;" but as discussed above, the employees to whom petitioner refers were not similarly situated in responsibility or in their conduct.

¶ 58 Petitioner does assert facts which can be construed as suspicious timing and ambiguous behavior. Specifically, petitioner argued in support of her retaliation claim that she "was terminated days after complaining (and after being told by Pate that she was going to be terminated even before a single violation) about both Pate and Janes." She also noted that

Janes "told her she was getting him in trouble" and that both Pate and Janes were involved in her termination. However, Janes allegedly told petitioner that she was a "troublemaker" on May 26, 2003, after petitioner sent an email to a human resources employee (Albinanati) in which petitioner stated she heard from other employees that she had been terminated. Janes made the allegedly ambiguous statements after both incidents that resulted in her termination. No reasonable trier of fact could construe Janes statements as "a warning that [petitioner] was at risk of termination if [she] didn't cease [her] protected complaints" when the events that led to her termination preceded the ambiguous remark. Compare *Kasten*, 703 F.3d at 974 (finding triable issue of fact as to meaning behind ambiguous statement). Although Janes did not sign the documentation of performance issues recommending petitioner's termination until May 30, 2003, it would be unreasonable to construe Janes' comment as an indication that Janes already intended to cause petitioner's termination as a result of her complaint on May 24th, when Sears had already informed petitioner she would be terminated if she mishandled company resources again, and petitioner did mishandle company resources a second time before Janes made the statement. The same is true of petitioner's subsequent complaint about Janes on May 27, in whch she complained that Janes "looks the other was when Mr. Pate harasses me and the other HUB associates."

¶ 59 We also find that Pate's alleged "ambiguous statement" that he was going to terminate petitioner is too vague to allow a reasonable trier of fact to infer retaliation. Petitioner relies primarily on an email in which she related to human resources that Pate threatened all of the HUB employees that he " 'was going to clean the office and fired [*sic*] everyone' every since he started his position with Sears." Similarly, on May 27, petitioner complained that Pate

harassed all of the HUB associates. These statements are not directed solely at petitioner and cannot support a claim of retaliation. The statements petitioner alleged against Pate show that Pate did not treat similarly situated employees who were not in petitioner's protected classes differently. That same email stated that Pate "was chanting in the presence of all the MPU Associates that this is it 'she is finally out of here. I am getting her fired." Petitioner complained about that statement in conjunction with her complaint that she learned she had been terminated from other employees as a result of the second incident of mishandling of resources. As with Janes' statement, this statement could not reasonably be construed as a statement of warning or intention when the acts that resulted in termination had already been completed and the employer had already stated that the act (a second error by petitioner) would cause her to be terminated.

¶ 60 Because Pate and Jane's statements are not probative of retaliation, we are left with "mere temporal proximity" between petitioner's protected activity and the "action alleged to have been taken in retaliation for that" activity, which "will rarely be sufficient in and of itself to create a triable issue." *Kasten*, 703 F.3d at 974. Petitioner has failed to point to sufficient circumstantial evidence to raise a genuine dispute of material fact as to causation between petitioner's protected act and her termination. Accordingly, the Commission's finding as to petitioner's claim of retaliation is confirmed.

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons, the Commission's order entering summary decision in favor of the employer is confirmed.

¶ 63 Confirmed.