2014 IL App (1st) 132952-U

FIRST DIVISION
Filed: June 16, 2014

No. 1-13-2952

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MAJOR R. PURNELL, Petitioner, v. THE HUMAN RIGHTS COMMISSION, MARTIN R. CASTRO, as Chairman of the Human Rights Commission; THE DEPARTMENT OF HUMAN RIGHTS, ROCCO J. CLAPS, as Director of the Department of Human Rights, LON MELTESEN, as Chief Legal Counsel Of the Department of Human Rights, and UNITED PARCEL SERVICE, INC., Respondents.	)	Petition for Review of Order of the Human Rights Commission. Charge No. 2005-CA-1959

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

Held: The decision of the Human Rights Commission granting a summary decision in favor of the respondents was confirmed where: no genuine issue of material fact existed as to the petitioner's employment discrimination claims; the Commission did not abuse its discretion in entering discovery orders; and the petitioner's due process rights were not violated.

¶ 1 The *pro se* petitioner, Major R. Purnell, seeks direct administrative review of a summary decision disposing of his employment discrimination claims against United Parcel Service, Inc. (UPS) entered by the Human Rights Commission (Commission); Martin R. Castro, as Chairman of the Commission; the Department of Human Rights (the Department); Rocco J. Claps, as Director of the Department; and, Lon Meltesen, as Chief Legal Counsel for the Department. For the reasons that follow, we confirm the Commission's decision.

¶ 2 Purnell, who is of African-American descent and was born in 1958, began working for UPS in 1981 in its Addison facility and later as a delivery driver. As a UPS delivery driver, Purnell is a member of the Teamsters Union (the Union) and the terms of his employment are outlined in the collective bargaining agreement (the CBA) between UPS and the Union. UPS drivers are expected to be honest and trustworthy in the performance of their duties, including tracking package deliveries and attempted deliveries using the company's Delivery Information Acquisition Device (DIAD) system. UPS employees are required to sign an "Honesty in Employment Policy" document upon hiring, acknowledging UPS's expectations of employee honesty; Purnell signed the document at the time he was hired. The CBA further acknowledged the importance of driver honesty by providing for immediate discharge, without prior warning, of a driver who engages in dishonest conduct.

¶ 3 On February 26, 2003, UPS determined that Purnell violated its honesty policy when he allegedly forged customers' signatures on deliveries, and he was suspended for three days. Shortly thereafter, in May 2003, UPS determined that Purnell had falsified delivery records by entering multiple customer stops into the DIAD system for single-stop deliveries, making his

performance appear better than it was. UPS terminated Purnell for this conduct, but he was later reinstated in August 2003, following the completion of the Union's grievance process. Between September 2003 and December 2004, Purnell was warned several times that he needed to improve his efficiency.

¶ 4 On January 3, 2005, UPS determined that Purnell had again falsified delivery records and terminated him. On January 5, 2005, Purnell filed a race and age discrimination charge with the Department, which, pursuant to its procedures, investigated the allegations and filed a complaint with the Commission on his behalf on June 26, 2007. The complaint alleged that UPS terminated Purnell because of his race (count I) and his age (count II) in violation of section 2-102(A) of the Human Rights Act (Act) (775 ILCS 5/2-102(A) (West 2004)). In addition to seeking relief under the Act, Purnell also challenged his termination under the grievance procedures outlined by the CBA, arguing that his conduct did not constitute "dishonesty" as defined under that agreement.

¶ 5 On January 14, 2008, Purnell served UPS with a discovery request containing 148 requests to admit facts, many of which related to another UPS employee, Kathryn Lakeberg, and the facts surrounding her employment. Purnell believed that UPS treated Lakeberg, a 50-year-old Caucasian, more favorably than him after she violated UPS's honesty policies. On that same date, the arbitrator handling Purnell's union grievance ordered UPS to reinstate him with back pay, the amount of which remained in dispute. The arbitrator agreed with Purnell that his conduct did not rise to the level of "dishonesty" under the CBA which would result in immediate termination, and therefore, UPS's termination of Purnell was "without cause."

¶ 6 On January 24, 2008, the ALJ granted UPS's motion to stay Purnell's requests for admission of facts until after it filed its dispositive motion and the ALJ ruled upon it. UPS

subsequently sought to stay the proceedings until the arbitrator determined the amount of Purnell's back pay, asserting that the back pay award might eliminate any damages in the pending discrimination suit. The ALJ granted UPS's motion.

¶ 7 On December 1, 2008, Purnell moved to compel UPS to answer his requests to admit, stating that the pending back pay dispute had been settled in an arbitration agreement. A copy of that agreement, dated October 27, 2008, indicates that the parties settled for $127,764.74 in back pay and that UPS agreed to pay back contributions for Purnell's pension. On December 10, 2008, the ALJ issued an order stating that all damages issues in the complaint had been resolved through the arbitration agreement, except for Purnell's claim of emotional distress. The ALJ further ordered that UPS respond to Purnell's requests to admit facts, but only to those pertaining to his emotional distress damages. UPS timely served Purnell with its responses to only those requests the ALJ required it to answer.

¶ 8 On January 9, 2009, Purnell moved the ALJ to reconsider her December 10 order, asking that all of his requests to admit be deemed admitted if not answered within 28 days. Purnell also sought leave to file an amended complaint to add factual assertions regarding the CBA, the union grievance process, and the arbitrator's finding that his termination was without good cause and to request relief pursuant to section 8A-104 of the Act (775 ILCS 5/8A-104 (West 2008)) for actual damages occurring outside of the employment context but as a direct result of UPS's discrimination.

¶ 9 On June 15, 2009, the ALJ denied both of Purnell's motions, reasoning that the arbitrator's back pay award barred a damages award for back pay in the discrimination case and that Purnell's request to amend the complaint was untimely. The ALJ also noted that the arbitrator's finding that Purnell's termination was "without cause" was not relevant as that finding

pertained to whether UPS's actions violated the terms of the CBA and not the Act. However, she made no comment regarding her denial of Purnell's motion to reconsider her limitation on his requests to admit facts. On July 10, 2009, Purnell moved to vacate the June 15 order, which the ALJ denied on August 12, 2009.

¶ 10 On October 29, 2009, UPS filed a motion for a summary decision pursuant to section 8-106.1 of the Act (775 ILCS 5/8-106.1 (West 2008)), which included the affidavit of UPS manager Tom Haefke. Haefke relayed facts regarding UPS's business, Purnell's employment history, the arbitration proceedings, and Lakeberg's employment history. In his affidavit, Haefke averred that, unlike Purnell, Lakeberg was never accused of dishonesty or falsifying delivery records, but rather she was terminated in March 2005 after numerous customer complaints about her rude and unprofessional behavior. According to Haefke, Purnell was terminated because of his history of dishonest conduct in his delivery recordkeeping, and not for any racial or age reason. He asserted that, in the arbitration proceedings, Purnell did not make any racial or age discrimination claims and admitted to the improper delivery recordkeeping acts that resulted in his termination. Haefke admitted that, in the end, the arbitrator agreed with Purnell that his conduct did not constitute the immediately terminable offense of "dishonesty" as defined in the CBA, and that this was the basis for his reinstatement with back pay.

¶ 11 In this matter, UPS argued that there was no direct or indirect evidence of racial or age discrimination and that Purnell could not succeed on his claims, namely because he failed to meet two *prima facie* requirements. First, UPS contended that there was no dispute that Purnell was not meeting its legitimate business expectations of honest conduct at the time of his termination, and second, that there was no evidence that it treated non-African-American and younger employees more favorably than Purnell under similar circumstances. Moreover, UPS

contended that it had established a legitimate business reason for terminating Purnell and that there was no evidence the reason was pretextual.

¶ 12 In Purnell's response to UPS's motion, he argued that he was not dishonest in his performance and was terminated without cause. He referred to Lakeberg as an example of how UPS was "flexible" in its enforcement of its honesty policies against non-African-American employees, but he admitted that he and Lakeberg were the same age. Purnell contended that Lakeberg was not terminated after she knowingly falsified delivery documents. Purnell also attached the affidavit of John Abbott, a Caucasian UPS employee, who averred that, "on many occasions," he "scanned packages back at UPS" when he "was given more deliveries" than he could deliver before "D.O.T. time" and that he was never disciplined or terminated for such conduct. Purnell contended that UPS's legitimate business reason for his termination based on his violation of the honesty policy had to be pretextual because UPS had to know that the CBA barred his termination for such conduct.

¶ 13 Purnell attached several documents to his response, including a copy of a 2004 letter sent to Lakeberg by UPS management, which advised her of her failure to pick up packages on time and warned her that she would be subject to further disciplinary action, including termination, should she continue to fail to perform. He also attached a copy of a 2001 letter from Glenn Thrush, a UPS supervisor, to Wayne Zimmerman, presumably another UPS manager, stating that he received a customer complaint about Lakeberg's failure to deliver a package. Additionally, Purnell included several customer letters in support of his continued employment with UPS and the arbitrator's decision in the Union grievance proceeding, which explained that Purnell's conduct of improperly coding packages was not intentionally dishonest as meant by the CBA.

The arbitrator interpreted the applicable "dishonesty" provision in the CBA to imply "theft or fraud or deceit toward some end of personal gain or benefit."

¶ 14 On May 12, 2011, Purnell filed another motion for the ALJ to deem admitted all factual allegations contained in his 148 requests to admit facts and to issue a decision on UPS's motion for a summary decision.

¶ 15 On June 8, 2011, the ALJ granted UPS's motion for a summary decision on both of Purnell's counts, determining that there were no genuine issues of material fact as to Purnell's age and race claims and that he failed to present a genuine issue of material fact that UPS's articulated reason for its actions was pretextual. In its decision, the ALJ did not deem all of Purnell's requests to admit facts admitted.

¶ 16 On July 11, 2011, Purnell filed exceptions to the ALJ's recommended decision with the Commission. On May 10, 2013, the Commission, in a unanimous decision, declined to further review Purnell's claims and adopted the June 8, 2011, order and decision of the ALJ. On June 12, 2013, Purnell filed a motion for reconsideration, which the Commission denied on August 22, 2013. On September 23, 2013, Purnell timely filed for direct review of the Commission's decision pursuant to Illinois Supreme Court Rule 335 (eff. Feb. 1, 1994).

¶ 17 The Act prohibits unlawful discrimination against a person on the basis of, *inter alia*, race and age. 775 ILCS 5/1-102 (West 2008); *Owens v. Dep't of Human Rights*, 403 Ill. App. 3d 899, 916 (2010). Our court follows the three-prong test followed by federal courts in determining whether an employer has unlawfully discriminated. See *Owens*, 403 Ill. App. 3d at 918. Under the three-prong test, the petitioner must first establish, by the preponderance of the evidence, a *prima facie* case of unlawful discrimination. *Id.* at 918-19. To establish a *prima facie* case, the petitioner must 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.

¶ 18 If a *prima facie* case is established, a rebuttable presumption arises that the employer unlawfully discriminated against the petitioner, and the employer may rebut the presumption by articulating a legitimate, nondiscriminatory reason for its employment decision. *Id.* at 919. If the employer articulates such a reason, the petitioner must prove, by the preponderance of the evidence, that the employer's reason was untrue and was a pretext for discrimination. *Id.* "One method of showing pretext is to demonstrate that employees involved in misconduct of comparable seriousness were retained while the complainant was discharged." *Loyola University of Chicago v. Human Rights Comm'n*, 149 Ill. App. 3d 8, 19 (1986).

¶ 19 The summary decision section of the Act (775 ILCS 5/8-106.1 (West 2010)), like the provision for summary judgment in the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2014), requires a decision be entered in favor of the moving party if there is no genuine issue as to any material fact and if the moving party is entitled to a decision in its favor as a matter of law. *Tate v. American General Life and Accident Insurance Co.*, 274 Ill. App. 3d 769, 774 (1995). Thus, like a grant of a motion for summary judgment, we review *de novo* a grant of a motion for a summary decision as the determination involves a question of law. *Id.*

¶ 20 Purnell first argues that the Commission erred in finding in favor of the respondents when it failed to properly consider facts deemed admitted after UPS did not timely answer his requests to admit facts. He contends that UPS's admissions establish pretext. We disagree as our review of the record demonstrates that UPS was never required to answer all 148 requests and, therefore, those facts were not, and should not have been, deemed admitted. As stated, the ALJ

granted UPS's motion to stay his discovery request and later required UPS to answer only those requests pertaining to emotional distress damages. Thus, none of the unanswered requests would have been deemed admitted as a result of UPS's failure to respond and the Commission did not err in failing to consider them as admissions.

¶ 21 In a related argument, Purnell contends that the Commission, or more accurately, the ALJ, abused her discretion when she denied his motions to compel UPS to answer his request to admit facts or to deem all facts admitted. However, like a trial court judge who has discretion in limiting discovery requests (*Continental Ill. Nat. Bank and Trust Co. of Chicago v. E. Ill. Water Co.*, 31 Ill. App. 3d 148, 154 (1975)), the ALJ has discretion in "denying, limiting, conditioning or regulating discovery" under the Administrative Law Code (Ill. Admin. Code 56, § 5300.720 (2008)). Here, we cannot say that the ALJ abused her discretion in refusing to compel UPS to answer all 148 factual assertions submitted by Purnell in his discovery request. Moreover, "[w]hen a trial court errs by failing to compel discovery, such an error is harmless where it did not affect the outcome in the trial court." *Hadley v. Snyder*, 335 Ill. App. 3d 347, 351 (2002). In this case, we cannot find that the outcome of Purnell's case would have been different where UPS submitted Haefke's affidavit which addressed the assertions contained in his requests to admit facts. Thus, despite the ALJ's refusal to compel UPS to answer the requests, UPS ultimately submitted the information Purnell was seeking when it submitted Haefke's affidavit.

¶ 22 Next, Purnell contends that the Commission's procedural errors violated his right to due process under the Fourteenth Amendment (U.S. Const., amend. XIV). Specifically, Purnell takes issue with the ALJ's entry of the January 24, 2008, order staying his requests to admit until UPS filed its dispositive motion and the February 5, 2008, order staying the proceedings until the arbitrator determined the amount of his back pay award in the Union grievance proceeding. He

also argues that the ALJ's December 10, 2008, and subsequent June 15, 2009, orders refusing to compel UPS to answer all of his requests to admit violated his right to due process, rendering those orders void. According to Purnell, the series of adverse rulings by the ALJ demonstrated her manifest bias against him in the proceedings. We disagree with all of these contentions.

¶ 23 An administrative proceeding comports with due process where the parties: have the opportunity to be heard; have the right to cross-examine adverse witnesses; and receive impartiality in rulings upon the evidence. *All Am. Title Agency, LLC v. Dep't of Fin. and Prof'l Regulation*, 2013 IL App (1st) 113400, ¶ 36; *Gonzalez v. Pollution Control Bd.*, 2011 IL App (1st) 093021, ¶ 42. Further, a court will find a due process violation only if the party raising the claim establishes that he was prejudiced by the alleged violation. *Id.*

¶ 24 Here, Purnell does not claim that he was not afforded the opportunity to be heard, or that he was denied his right to cross-examine witnesses. The record would refute such a claim regardless as the parties thoroughly briefed each issue, and Purnell was never denied an opportunity to be heard or submit evidence. Rather, he claims only that the ALJ was biased against him in her rulings. However, other than pointing out all the adverse rulings he received, Purnell has failed to identify any evidence of bias or impartiality and failed to raise any such claim before the ALJ or the Commission. See *Levitt v. Hammonds*, 256 Ill. App. 3d 62, 67 (1993) (finding that there is no due process right to a particular ruling by a judge and, thus, no due process violation even where a judge makes an erroneous ruling); *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶ 60 (stating that 1) to show bias or prejudice, the petitioner must show that a disinterested observer might conclude that the board, or its members, had prejudged the facts or law of the case; and 2) a claim of bias or prejudice is forfeited when not raised promptly in the original proceeding, because it would be improper to

allow the petitioner to knowingly withhold such a claim and then raise it after obtaining an unfavorable ruling); *Waste Management of Ill., Inc. v. Pollution Control Bd.*, 175 Ill. App. 3d 1023, 1039-40 (1988). Thus, we reject Purnell's claim that his due process rights were violated during the proceedings before the Commission.

¶ 25 Finally, to the extent Purnell generally argues that the Commission erred in granting UPS's motion for a summary decision because he established that UPS's reason for terminating him was pretextual, we disagree.

¶ 26 Regarding his age discrimination claim, we note that Purnell submitted no evidence to support a *prima facie* case; namely, he submitted no evidence that UPS treated younger employees more favorably. Therefore, a summary decision in favor of UPS's favor as to Purnell's age discrimination claim may be affirmed solely on this basis. See *N. Illinois Emergency Physicians v. Landau, Omahana and Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005) (reviewing court may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower courts relied upon that ground).

¶ 27 Regarding Purnell's race discrimination claim, we similarly find that there are no disputed facts as to the *prima facie* element requiring him to submit evidence that UPS treated similarly situated employees of other races more favorably. While Purnell argues that UPS treated Lakeberg more favorably, he did not support this claim with any evidence that her employment infractions and history were similar to his, and he did not refute the facts averred by Haefke, who stated that Lakeberg was never accused of similar dishonest conduct and was terminated for other unprofessional conduct. Likewise, Purnell's inclusion of the affidavit of Abbott, a Caucasian employee, did not contain any evidence that Abbott had prior employment infractions like Purnell or even that UPS management had knowledge of Abbott's conduct. Further, there is

no evidence that Abbott's conduct was the same as Purnell's as there are few details provided in the affidavit describing his conduct. See, *Kraft, Inc., Dairy Grp. v. City of Peoria*, 177 Ill. App. 3d 197, 205 (1988) (noting that Kraft's performance requirements were not different for employees of different races, but that the facts and circumstances surrounding the petitioner's infractions were different from those employees who were not disciplined in the same manner). Moreover, Purnell failed to put forth any evidence establishing that UPS's legitimate, nondiscriminatory reason for its decision to terminate him because of his dishonest conduct in his package delivery recordkeeping was pretextual as he failed to demonstrate that other employees involved in misconduct of comparable seriousness were retained. See *Alcequeire v. Human Rights Comm'n*, 292 Ill. App. 3d 515, 521 (finding no pretext established where the petitioner's personnel file was filled with examples of his improper conduct). For these reasons, we agree with the Commission that the respondents were entitled, as a matter of law, to a summary decision in their favor on counts I and II of Purnell's complaint.

¶ 28 For the reasons stated, we confirm the decision of the Commission.

¶ 29 Confirmed.