2012 IL App (2d) 120098-U
No. 02-12-0098
Order filed March 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BATAVIA PARK DISTRICT, Petitioner-Appellant and Cross-Appellee, v. ILLINOIS HUMAN RIGHTS COMMISSION, ILLINOIS DEPARTMENT OF HUMAN RIGHTS, and MARTIN ANDERSON, Respondents-Appellees and Cross-Appellants.	)	Appeal from the Illinois Human Rights Commission. Nos. 10944 1998CF2363 21BA981757

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held:* The decisions of the Human Rights Commission that petitioner's discharge was racially motivated; that petitioner was entitled to damages for emotional distress; and that petitioner was entitled to back bay in the amount of $5,526.45 are not contrary to the manifest weight of the evidence; the Commission's calculation of the amount of attorney fees due petitioner was proper and it did not err in using petitioner's attorneys' historical fees rather than current hourly rate in calculating fee award.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, Martin Anderson, filed a "Complaint of Civil Rights Violation" with the Illinois Human Rights Commission (Commission) alleging race discrimination on behalf of petitioner, the Batavia Park District (Park District or District). Subsequently, the Department of Human Rights filed a complaint on Anderson's behalf. Ultimately, the Commission awarded Anderson $5,526.45 for back pay and $5,000 for emotional distress. It also found that the Park District was liable for Anderson's attorney fees in the amount of $75,520. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 The following evidence was adduced at a public hearing before an Administrative Law Judge (ALJ) that commenced on October 15, 2002. The hearing was bifurcated on the issues of liability and damages. Anderson, who is African-American, was the first witness to testify. He stated that in 1997, he was working as an account manager for a company called Laser Technologies. He also worked for the Park District. Initially, he was a volunteer at the Park District, but he was later asked to work there on a part-time basis. He had previously worked "as a counselor at Center House Group Home and the Boys Home in St. Charles as a youth counselor." He also worked with third-graders at the Aurora Education Center. While working at the Center House Group Home, Anderson would sometimes take teen-aged children to the Park District's gym. On such occasions, he would help supervise individuals in the gym on a voluntary basis.

¶ 6 In March 1997, he was approached by someone from the Park District (he could not recall who) and offered part-time employment. Anderson testified that he filled out an application and was hired. His supervisors were Cheryl Chidester and Lori Johnson. Anderson's title was "Teen Supervisor," and his salary was $7 per hour. He never received a raise during his employment with the Park District. Anderson testified that things "went great." He was being praised, and "[k]ids were happy [he] was there."

¶ 7 Anderson testified that in July 1997, he met with Lori Johnson. They discussed which individuals could use the gym. Of specific concern was the age of the gym's users. However, there was no written policy regarding the age of those who were permitted to use the gym, nor was there a written policy regarding how to verify the age of such users. They again discussed the issue in November 1997. At this time, users had to sign in, and Anderson had to turn in the sign-in sheet. When Anderson was a volunteer, he would play basketball while he was at the gym. At the November meeting, he was informed that he was no longer allowed to do this. Anderson acknowledged that he had been late for work "a few times." This subject was also addressed in November. Anderson stated that in the entire time he worked for the Park District, he was late three or four times. On one of those occasions, Anderson explained, he was late because he had been given erroneous instructions regarding where he was to be working that day. After the November meeting, no one ever discussed his job performance with him again until the point at which he was discharged.

¶ 8 On January 15, 1998, a meeting was held where the Park District reviewed the rules and regulations of the job with its employees. Johnson, Chidester, Laura Lundgren, and Beverly Kuhn attended the meeting. Among the subject addressed were how to ascertain the age of an individual seeking to use the gym; stopping the gym's users from cursing or roughhousing; and making sure people stayed off the gym's mats. Additionally, employees were not allowed to play basketball while on duty. Some of the rules had been put in writing for the first time. After the meeting, Anderson signed an agreement stating he understood the rules. Prior to this time, Anderson testified, the rules "changed every week."

¶ 9 Anderson explained that the the Park District operated two facilities at the location in Batavia. The location was referred to as the Teen Center. In one building, called Ground Zero

(which was inside a building called the "White House"), were pool tables, a fooz [*sic*] ball table, computers, and a television "where kids can come [to] sit back, relax." Anderson worked in the gym, which was in a separate building. The gym was referred to as the "Drop Zone." The two buildings shared a parking lot.

¶ 10 Chris Cluff, a coworker, also attended the January 15 meeting. Cluff's title was "Lead Teen Supervisor." Cluff had been working at the Ground Zero part of the Teen Center. It was decided that Cluff would began working at the door of the gym, checking identification and ensuring that users were high school students from Batavia. He also was to prevent adults from entering the gym. Anderson's job was to monitor the youth playing basketball.

¶ 11 Anderson reviewed a copy of the job description he had been given. It mentions neither the staff playing basketball nor monitoring the ages of users of the gym. Similarly, a document referred to as a "task list" contained no information regarding these issues.

¶ 12 On January 18, 1998, Anderson and Cluff reported to work. As contemplated, Cluff monitored the door and Anderson monitored the gym. Cluff came to Anderson and told him a situation had developed. Chidester's sons had witnessed a domestic dispute, and Cluff was going to allow them in the gym for a "cooling off period." Anderson pointed out that one of them was too young to use the gym and that this was contrary to the rules he had signed. Cluff stated that he was going to allow it anyway. Cluff told Anderson that he was Anderson's supervisor. Subsequently, the underage youth, who was playing basketball, called another basketball player a name. A confrontation ensued. Anderson made the two individuals sit down for ten minutes and, after they calmed down, allowed them to resume playing basketball. Anderson stated the he did not play basketball in the gym on January 18. Additionally, Anderson testified, Cluff allowed an adult to

enter the gym on that day. Anderson worked the next day, and no one spoke with him about the events that took place the night before.

¶ 13 On January 20, 1998, Anderson received a telephone call from Lundgren, who told him that he was fired. She referenced "the incident that happened on the 18th" and said that she had been told that Anderson was playing basketball and that he allowed individuals to curse. Accordingly, she continued, "they had came [*sic*] to an agreement that [he] was terminated." She did not mention that there had been an under-aged youth in the gym. She further stated that Anderson "wasn't working out." To Anderson's knowledge, Cluff was not disciplined in any way for his role in the events of January 18th.

¶ 14 About two days after he was terminated, Anderson spoke to Diane Dillow, in accordance with the Park District's grievance procedure. Anderson believed that he was being treated unfairly. He told Dillow that Cluff had been responsible for checking identifications on the 18th. As such, Anderson felt "powerless" to do anything when Cluff allowed the under-aged youth to enter the gym. He was not offered his job back and was asked to turn in his keys. Anderson had averaged about 20 hours per week working for the Park District. After being terminated, he found part-time work at Delnor Community Hospital.

¶ 15 Anderson testified that when he was terminated, he became angry. He had grown up in the area. The Teen Center had been "designed for the kids in the community." Anderson would "preach to them" that when a person has a problem, they should not "handle it in a physical term" or do "something stupid." When he was terminated, a lot of kids came to him and asked why he was just giving up. He stated that he had been "sticking up for individuals that *** didn't have a voice and were being turned away and made felt [*sic*] like they didn't belong." He continued, "[I]ndividuals that had individuals in certain positions in the Park District *** got to do what they wanted to do and

when they wanted to do [it]." Anderson felt he had been discriminated against because of his race. It made him feel angry and sad. He was concerned about how the kids that came to the Teen Center would be treated.

¶ 16 At the beginning of cross-examination, petitioner's attorney attempted to lay a foundation for the admission of statements Anderson purportedly made to an investigator from the Department of Human Rights, Mr. Nussbaum. These were allegedly prior inconsistent statements. Anderson's attorney objected, arguing that Nussbaum's report did not contain specific statements made by Anderson. The objection was sustained.

¶ 17 Anderson then testified that he did not recall receiving any training beyond the time he spent working at the gym as a volunteer. Anderson acknowledged that before his employment with the Park District commenced in March 1997, he was told that it was essential that he report to work on time so he could open the gym (Anderson was given the keys to the gym). He further agreed that he was told that only teenagers from Batavia could use the gym during Teen Center hours. However, he denied being told that he could not play basketball or shoot baskets while he was working. Additionally, in March 1997, he was not told that adults were not allowed in the Teen Center, though he was told only teenagers could play basketball. He also was tasked with keeping teenagers from swearing and engaging in horse play. Keeping people off of mats that were stored in the gym was not an issue until near the end of his employment. Anderson testified that during the entire time he worked for the Park District, he was late for work no more than five times. He believed that Cluff was late about as often as he was. He complained to one of his supervisors about Cluff's tardiness, though he could not recall which supervisor. Counsel asked Anderson about an occasion on September 5, 1997. Anderson replied that he was not late that day; rather, he was checking the

perimeter of the gym to make sure all doors were secure, and apparently no one saw him until he completed those checks.

¶ 18 Anderson recalled meeting with Lori Johnson on July 2, 1997, to review his job performance. They discussed who would be allowed to use the gym, and Anderson told Johnson that he believed some individuals were being treated unfairly. He did not recall Johnson stating that she or any other supervisor had a problem with Anderson's job performance, and she did not mention his purported tardiness at this meeting. Anderson further stated that Johnson never told him that his performance was going to be assessed over the next two weeks and if it did not improve, he would be asked to resign. Claimant did not recall meeting with Johnson and Cheryl Chidester on October 14, 1997, and he stated he was not reprimanded on that date.

¶ 19 Anderson did recall meeting with Johnson and Chidester on November 6, 1997. They told him he was no longer allowed to play basketball while he was on duty. Prior to that time, he often played basketball; it was how he interacted with the kids using the gym. His supervisors observed him doing so. According to Anderson, things started to change when he began objecting to the unfair treatment of certain teenagers who were denied access to the gym. Anderson believed he was being "attacked for voicing [his] opinion." Following the November 6 meeting, he was "taken off the schedule" for a week, though Anderson declined to characterize it as a suspension. When asked whether he thought he was being disciplined, Anderson stated he viewed it "more as a cooling off period." Moreover, the requirement that he check the identification card of users of the gym was never expressed to him until the January 2008 meeting. Anderson further testified that a purported incident where Johnson and Chidester ordered him to remove certain adults from the gym, after which Johnson and Chidester had to be escorted to their cars because the adults were in the parking lot, never occurred.

¶ 20 Anderson testified that he felt that he was told he could no longer play basketball while on duty because he had been "too voiceful on what [he] thought was wrongdoing that [he] was witnessing." He noted that another employee had broken a window while playing basketball, yet they allowed him to play. He stated Cluff shot baskets all the time. Further, through "a few conversations," he informed Laura Lundgren of various problems with Cluff's performance, such as tardiness and "leaving his post." Anderson did not recall being late or allowing teenagers to swear on January 12, 1998. During redirect-examination, Anderson testified, *inter alia*, that he was not responsible for checking identification cards on January 18, 1998.

¶ 21 Anderson next called Diane Dillow, who was the director of leisure services for the Park District at the time of Anderson's employment. Part of her duties included supervising the Teen Center, though she did not supervise its day-to-day operations. She was not directly involved in hiring Anderson; however, she did have final say in the matter. She described her role as a "rubber stamp." She had observed Anderson when he was a volunteer. Dillow identified a document she described as a "part-time seasonal employment agreement." Anderson was paid $7 per hour. Dillow also had final say in the hiring of Chris Cluff, who is a Caucasian. Dillow identified Cluff's employment application. He was hired on December 10, 1996, at a salary of $8 per hour. Dillow stated that the Park District's budget had changed between the time Cluff was hired and the time of Anderson's hiring. She did agree, however, that Cluff was given a 50¢ raise in December 1997, which, she noted, was after a year of service. Dillow testified that all new employees hired after Cluff were paid $7 per hour because the Park District had numerous applicants to choose from. Dillow stated that the Teen Center was established in 1996. At the beginning, they had to revise their policies at various times. This included the duties of the employees.

¶ 22 In 1998, Dillow attended a fact-finding conference regarding this case. She does not believe that Anderson was discriminated against. She acknowledged that she was involved in Anderson's termination. Anderson came to see her after his departure in accordance with a grievance policy that was in place. She stated that Anderson "was asking for another chance, basically." She identified a document she prepared connected with Anderson's termination. It cites as reasons "[v]iolation of policies, continued lateness to program." However, a box indicating "substandard performance" was not checked. Lundgren actually informed Anderson—by telephone—of his termination. Dillow spoke to Lundgren, Johnson, and Chidester in the course of investigating Anderson's termination, but Dillow "ultimately signed off on" it.

¶ 23 In February 1998, she became aware that Cluff was leaving early on occasion. She stated she was not aware of any earlier problems with Cluff, explaining that she was not involved in the day-to-day operation of the Teen Center. Pursuant to the Park District's policies, an employee who left early without permission should be reprimanded and the reprimand should be documented in the employee's file. Cluff's file contained no memorandums indicating he was reprimanded prior to January 1998. Dillow was aware of the events of January 18, 1998, though she was not present. She was also aware of a meeting that was held on January 15, 1998, where the Teen Center supervisors (Johnson, Chidester, and Lundgren) were to go over polices with the Teen Center staff. She knew that it was the Teen Center's policy that only teenagers were permitted to use the gym and that the person assigned to watch door was responsible for enforcing this policy.

¶ 24 Dillow identified a memorandum dated February 18, 1998, concerning Cluff's performance. It states that his job performance would be monitored, and, if it did not improve, he would be asked to resign. However, another similar memorandum appears in Cluff's file dated February 24, 1998,

yet Cluff was not terminated or suspended. Cluff subsequently resigned voluntarily on March 7, 1998.

¶ 25 At the time Anderson worked for the Park District, there were eight or nine employees. He was the only African-American employee. After he was fired, the Park District hired Keena Colunga, an African-American female, to replace him. She was given a salary of $7 per hour. Cluff was making $8.50 at that time.

¶ 26 During cross-examination, Dillow testified that though she had signed Anderson's time cards, she was not aware of various discrepancies between the hours on the cards and the hours he actually worked, as she did not become aware of such discrepancies until later. She explained that the difference between Cluff's salary of $8 per hour and Anderson's of $7 per hour resulted from advice that consultants had initially given the Park District to hire at the $8 rate to attract quality people. However, the Park District later found that they were attracting a large number of applicants and that it was not necessary to do so. Accordingly, as their budget was "tight," they reduced their starting salary. This occurred in January 1997. Dillow further testified that a white female, Amy Connell, was hired in 1997 at a rate of $7 per hour, as was a white male, Aaron Stutsman. Moreover, Colunga was also paid $7 per hour. Dillow specifically denied that race had anything to do with the amount its employees were compensated. As for Cluff's 50¢ raise, Dillow explained that "he had more responsibilities at the time" and it coincided with the "one year anniversary of his hiring." Had Anderson stayed through March 1998, he would have "come up for an annual review" as well.

¶ 27 Dillow testified that Anderson's tardiness was a safety issue. Teenagers required supervision. She was concerned about fights, injuries, and vandalism. In a document drafted during her final interview with Anderson, Dillow indicated that the reasons for his termination were "continued late attendance" and "playing basketball with youth." She stated that the Park District had a policy

against supervisors playing with teens, and that Anderson's conduct was a "clear violation of policy." She asserted that this policy was in effect "from the very beginning." She did not know why this policy was not listed specifically in any of the forms describing the position of teen supervisor. She also checked a box on the form indicating Anderson had been counseled on his performance deficiencies. She did not check a box indicating substandard performance because she thought the boxes that she did check were more specific. This final interview occurred on January 20, 1998. According to Dillow, Anderson never said he felt as though he had been discriminated against because of his race. Dillow also interviewed Anderson's supervisors. She explained that Lori Johnson was the supervisor of the Teen Center, while Lundgren and Chidester were "directors underneath her."

¶ 28 Dillow stated that Anderson told her about other staff members–including Cluff–leaving early when they met on January 20, 1998. This was the first time that she had heard this about Cluff. She was not aware of any disciplinary problems on Cluff's part prior to this meeting, as his record reflected. Conversely, she stated that she did have documentation about Anderson being late previously. Dillow testified that Anderson's termination did not arise solely out of the events of January 18, 1998. Rather, according to Dillow, Anderson exhibited "a consistent, repeated pattern of being late and allowing adults to come in and play basketball." She stated that this was a violation of policy upon which he had been counseled several times. Anderson did not deny his "history of lateness" or that he had been playing basketball while on duty during the January 20 meeting.

¶ 29 Dillow testified that Cluff was disciplined in February 1998. She stated he was first disciplined at this time because "that's when he started having problems." Cluff started to have "a bad attitude," and he was "not showing up for work [and] calling in sick." Anderson had not reported anything to the Park District about Cluff's performance before January 20, 1998. Dillow

stated that it was not exclusively Cluff's responsibility to ensure that only Batavia teenagers played basketball when he was watching the door on January 18, 1998. Rather, the Park District operates as a team and everyone is responsible for enforcing its policies.

¶ 30 Dillow stated that it was she who gave ultimate approval over Anderson's discharge. She denied a racial motivation. Instead, she asserted, she relied on his violations of the Park District's various policies and the fact that they impaired the ability of the Teen Center to function. Moreover, they implicated safety issues. Dillow testified that Anderson's supervisors monitored his job performance. This was part of their duties. This is "standard practice," as "the supervisors are supposed to check their programs on a regular basis." It was not "something that was directed solely to Mr. Anderson." Dillow stated that Anderson had been suspended for one week in November 1997. He had also been counseled about his performance in October. Following his suspension, there continued to be problems. Prior to his termination, Anderson never had complained that he had been treated differently because of his race.

¶ 31 During redirect-examination, Dillow testified that Anderson was late from five to eight times during the course of his employment with the Park District, the first time being in March a few weeks after he became employed. Dillow identified four documents stating that Anderson had been late on certain days. Outside of these four occasions, she was not aware of any other instances when Anderson was late. Moreover, she did not know why he was late on any of these occasions. She agreed that all teen supervisors working at any given time were equally responsible for policy violations, at least to the extent they were aware of them. If such a violation occurred while two teen supervisors were working, both would be disciplined. Nevertheless, Cluff, who was working at the door on January 18, was not disciplined when an adult was allowed into the gym that day. During recross-examination, she clarified that a teen supervisor working in the gym would have primary

responsibility over the gym, and one working at the door would have primary responsibility over that area. On redirect, she agreed that the supervisor "in the gym was not supervising what was happening outside the door with" checking identification cards.

¶ 32 Anderson next called Chris Cluff. Cluff testified that he first was employed by the Park District in December 1996. Cluff stated that he had previously worked as a music teacher but had no other jobs working with teenagers. He had completed one-and-one-half years of college at the time. His immediate supervisors were Chidester and Lundgren. Johnson and Dillow were also his supervisors, but they were "more remote supervision." When he was hired, he made $8 per hour, and he later received a 50¢ raise. Cluff did not recall receiving a written job description, but a "task list" looked familiar to him.

¶ 33 The Teen Center had a "very dynamic" atmosphere. As the program grew, "certain things [concerning rules and job duties] had to either change or be modified or just flat out [be] put in place." Sometimes this was done verbally. Cluff described the age of people permitted to use the gym as a "gray area" that changed over time. He stated that though he could not recall specific dates, there were occasions on which he was late for work.

¶ 34 Cluff predominantly worked in the White House (the building that did not house the gymnasium). At some point, he was assigned to check identification cards outside the gym. He understood that no underage or overage individuals were allowed in the gym. On January 18, 1998, Cluff was working outside the gym checking identification cards. Anderson was monitoring the gym. On that evening, Cluff allowed an adult to enter the gym. Chidester's nephew, who was underage, was also allowed to enter. Cluff was not disciplined. Cluff did not recall being advised on February 18, 1998, that he would be asked to resign if his performance did not improve. He also

denied receiving a memorandum on February 24. Ultimately, Cluff was not asked to resign; rather, he left voluntarily.

¶ 35 During cross-examination, Cluff stated that Anderson primarily worked at the gym. Cluff's assignments varied–sometimes he worked in both locations, sometimes primarily at the White House. Timeliness was essential, according to Cluff. Kids could not use the gym if a Teen Supervisor was not there. Though it was not Cluff's responsibility to monitor Anderson's hours, he noted that Anderson was late on "more than three occasions." Cluff reported Anderson's attendance issues to Chidester or Lundgren. He could not say whether he or Anderson were late more often. Cluff testified that it was a rule that Teen Supervisors were not supposed to be "playing or participating in the gym." The policy against adult using the gym was "very informal" and "unenforced by anyone" until "very late in the game," in "the fall of [1997]." On some occasions when Anderson was working, people who were not supposed to be using the gym were permitted to do so and, as a result, teenagers who were entitled to use the gym were unable to use it. During redirect-examination, Cluff agreed that "the rule about playing basketball in the gym was not an enforced policy until late fall."

¶ 36 The Park District next recalled Dillow (at this point, Anderson had not yet rested, but, as he had no other witnesses available at the time, respondent was allowed to call Dillow out of the usual order). Dillow attended a meeting on September 3, 1998, on behalf of the Park District. Anderson was present. During this meeting, Anderson was asked whether he felt he was discriminated against by the Park District. He replied that "[h]e was not sure, or he did not feel he was discriminated against." Anderson also stated he had been tardy between 10 and 15 percent of the time. He agreed that he had been warned about his tardiness in July 1997. Anderson also acknowledged that he had

been warned in October 1997 about playing basketball, kids cursing, and being late. In November 1997, he was told he was being given his "last warning."

¶ 37 On cross-examination, Dillow admitted that she did not have a verbatim recollection of any statements made by Anderson during the meeting on September 3, 1998. She stated she recalled the conversations and "what they meant or what they were." She thought Lundgren was at the meeting, but stated that she actually did not know. Anderson's attorney asked whether Dillow had heard the 10 to 15 percent tardy figure from the Park District's counsel "at any time recently." Dillow acknowledged that she had. She also stated that she recalled it from the September 3 meeting. Dillow further acknowledged that she reviewed a document–which she referred to as a "history"–that was prepared by the Park District's attorney prior to testifying.

¶ 38 The Park District next called Lori Johnson. Johnson testified that she is employed by the Park District on a part-time basis. From 1996 to February 1998, she was the supervisor of the Teen Center. The Teen Center opened in August 1996. A consulting firm was hired in connection with its opening. The Center is comprised of a building called the White House, where kids could congregate in a relaxed atmosphere, and it also had a gym in a second building. The two buildings shared a parking lot. Chidester and Lundgren reported to Johnson, and the Teen Supervisors were below them in the hierarchy. Johnson explained that since "[i]t was a brand new Teen Center; it needed to be watched very closely."

¶ 39 Johnson testified that Cluff was hired in December 1996 at an hourly rate of $8, and Anderson was hired March 1997. She knew Anderson because he had been a volunteer who brought a group of boys to the gym. Chidester approached Anderson about working at the Teen Center. Chidester trained Anderson. Training included that Anderson was to insure users of the gym were of an appropriate age. Only ninth through twelfth grade Batavia students were supposed to use the

gym. Anderson was not supposed to play basketball with teenagers as "there was a liability issue on behalf of the park district." Employees were to show up 15 minutes before their shifts. Because the Center was new, not all job requirements were memorialized in a written document.

¶ 40 At the time Anderson was hired, Johnson was aware that he was an African-American male. His starting rate of pay was $7 per hour. She explained that since Cluff's hiring, they had reduced the starting rate of pay for teen supervisors. They had initially set the rate higher on the advice of the consulting firm. After reviewing their budget, they determined that they "needed to be fiscally responsible."

¶ 41 Johnson was made aware the Anderson was late for work "a couple of weeks after he started." Johnson identified a document in which this transgression was memorialized. She first met with him formally in July 1997. They discussed his tardiness, that he was playing basketball with the teenagers, that he needed to have teenagers sign in before using the gym, and that he was allowing adults to use the gym. She told Anderson that if his performance did not improve, he would be asked to resign. However, she stated, they wanted to work with Anderson because they liked him and the teens liked him. In September 1997, Johnson received a memorandum from another employee, Amy O'Connell, stating that Anderson was 50 minutes late for work. She and Chidester met with Anderson in October, and they discussed similar issues. Anderson was subsequently "put on probation for one week," by which Johnson meant that he did not work for one week as a form of discipline.

¶ 42 On January 15, 1998, an "all staff" meeting was held. Subjects covered included policies regarding using the gym, adults in the gym, and underage kids in the gym. These were not new policies; rather, they had been in effect since the Teen Center opened. Johnson testified that she had informed Anderson of these policies prior to this meeting. Subsequently, Anderson was late for

work. Johnson received a memorandum from Cluff stating that on January 18, "there was an older adult playing in the gym." On January 20, Johnson, Chidester, and Lundgren decided to terminate Anderson's employment. Johnson clarified that they "all decided that it was time for him to go, and [she] approved that decision." Johnson believed Anderson had been given "ample opportunity to improve on his areas that he was not performing, and [she] thought it was enough." She stated that Anderson's race had nothing to do with her decision to approve his termination.

¶ 43 Johnson stated that she "would not work for an institution, nor supervise employees that racially discriminate." She explained, "My husband is African-American." About a month after Anderson was terminated, the Park District hired his replacement, Keena Colunga, an African-American female. Johnson approved her hiring. Colunga's starting rate of pay was $7 per hour. No teen supervisor hired in 1997 was paid more than $7 per hour to start.

¶ 44 During cross-examination, Johnson agreed that one of her duties in 1997 and 1998 was to oversee time records of employees. In the course of her duties, she reviewed Anderson's time sheet on a biweekly basis. She identified a number of his time sheets, all of which bore her initials. She agreed that she had "read and approved those time sheets." Johnson testified that she had observed Anderson on "different occasions." She would walk over from her nearby home to check up on Anderson "to see if he was late or if he was not following policy." She agreed that Anderson was the only African-American employee at the Teen Center. She did not make other "special trips from home to review the performance of any other teen supervisor at the gym." Johnson testified that she was not aware that Anderson was playing basketball with teenagers when he was a volunteer. However, she further stated that this was not an issue until he was hired by the Park District. On January 12, 1998, Johnson and Chidester "walked over" and saw Anderson arrive late for work.

¶ 45 During redirect-examination, Johnson explained that she did not actually verify that Anderson had worked the hours reported on his time sheets when she signed them. Anderson never mentioned racial discrimination in any of his meetings with Johnson.

¶ 46 Anderson then called his final witness, Nathan Keyes. Keyes was a patron of the Teen Center. He knew Anderson, stating he is a friend of the family. Keyes would go the Teen Center to play basketball. Keyes stopped going to the Teen Center on January 18, 1998. On that day, he and four others went to play basketball as a team. Keyes stated, "The guy checked our ID's at the door." The person that checked them in was white. After a couple of games, they got into an argument. Anderson broke it up by having them sit down and cool off. When they first arrived, they were the only people there. A short time later, a group of white kids arrived. The argument was between members of these two groups. Keyes never saw Anderson play basketball on that day.

¶ 47 On cross-examination, Keyes testified that he lived in North Aurora in January 1998. He had known Anderson for "maybe a year, couple years" before this time. Anderson is a friend of Keyes' father. Keyes stated that the person checking identification cards at the door could see into the gym from where he was sitting, though the person was facing away from the gym. Keyes had played basketball with Anderson "a couple times" in the past. He stated, "At the beginning he played when we didn't have enough guys, but then he just quit playing." On January 18, 1998, there were 10 people in the gym. He did not remember whether there were any other adults in the gym besides Anderson. During redirect-examination, Keyes stated that he had lived in Batavia with his father at his grandmother's house. At the time of the hearing, his grandmother still lived in Batavia. Anderson then rested his case, and the Park District made a motion for a directed finding, which was denied.

¶ 48 The Park District then called Cheryl Chidester. She testified that she was currently employed by the Park District and had been for six-and-one-half years. At the time of the hearing, she was the director of the Teen Center. She first met Anderson when she was supervising open gym at the Teen Center. Anderson was working for a youth home, and he would bring kids from the home to the Teen Center. Anderson supervised them, so he remained in the gym while they were there. She saw that the kids he worked with really liked him. Subsequently, Chidester asked Anderson if he wanted to work for the Park District. He applied and started in March 1997. Anderson was provided training after he was hired. He was informed of the requirements of the job, both verbally and in writing. Teen Supervisors were to arrive 15 minutes before their shift. Lundgren, Johnson, and Chidester worked as a team to train Anderson. Part of Chidester's duties included supervising the Teen Supervisor. Chidester testified that Teen Supervisors were not supposed to be playing basketball while working. She explained that if they were playing basketball, they could not be supervising the entire gym area.

¶ 49 "A couple weeks into his job," Chidester received a memorandum from Cluff stating that Anderson had been late for work. She met with Anderson about his tardiness in July 1997. Johnson and Lundgren were also present. They also had concerns about adults using the gym and teenagers failing to sign in. The purpose of the meeting was to inform Anderson of his deficiencies so he could correct them. After informing Anderson of his deficiencies, his performance would be acceptable for "[l]ike a month or so," but eventually, he would start being late again. Chidester and Johnson met with Anderson on November 6, 1997. Chidester thought they were going to terminate his employment at that time due to his tardiness and failure to follow the Teen Center's policies. They did not terminate Anderson at this time. He wanted another chance, and they decided to give

him one. However, they told Anderson that they would not meet with him again and that he would be terminated if the same concerns arose again.

¶ 50 Chidester stated that, since she lived in the same neighborhood as the Teen Center, she would "just drop in to check on the gym to see if [Anderson] had arrived on time or to see if there were adults in the gym or if he was playing basketball himself." On one occasion, she and Johnson stopped by and observed "a bunch of older guys in the gym." On other occasions, she observed kids swearing and noted that Anderson did not address the issue. On January 12, 1998, she spoke to a teenager about swearing in the gym, and the teenager stated that Anderson allowed it.

¶ 51 Chidester recalled a staff meeting that took place on January 15, 1998. They reviewed policies and reminded teen supervisors "about what to watch for." Chidester testified that these were not new polices that were discussed at the meeting. Subsequently, Chidester, Johnson, and Lundgren met and decided to terminate Anderson's employment. Chidester participated in the decision, but the ultimate decision maker was Johnson. They believed that there was nothing else they could do to get Anderson to comply with the Park District's policies. Lundgren notified Anderson of the decision.

¶ 52 Chidester stated that she was familiar with Chris Cluff and his performance as a Teen Supervisor. As of January 18, 1998, she regarded Cluff as a dependable employee. She explained that this is why he had been made the Lead Teen Supervisor. She was not aware of any issues regarding Cluff's attendance. No other employee had ever communicated any problems to her about Cluff. She became aware of some issues in February 1998, including his "sarcasm with some of our kids." She spoke with Cluff. There had been "a change in him." He was calling in sick, which was not normal for him. She told Cluff he needed to improve or he would be terminated. A few weeks after this meeting, Cluff resigned.

¶ 53 Chidester denied that Anderson's race played a role in her decision to support his termination. She also testified that his race played no role in how he was treated while employed by the Park District. Chidester also testified that Anderson's replacement, Keena Colunga, is African-American. Chidester and Johnson interviewed and hired her.

¶ 54 During cross-examination, Chidester stated that she did not see Johnson every day she worked because their offices were in different buildings. She acknowledged that when Anderson was working at the group home, he would play basketball with the boys he brought to the gym. Chidester was aware that Cluff was working at the door checking identification cards on the night of January 18, 1998. She was also aware that her nephew was in the gym that night. She stated that he was a high school student and therefore old enough to be in the gym. Chidester acknowledged that there was no written requirement in the job description for the position of Teen Supervisor requiring the Teen Supervisor to check identification cards or to refrain from playing basketball. These requirements also do not appear in the Teen Supervisor task list.

¶ 55 Chidester agreed that the subject of checking identification cards was addressed during the January 15, 1998, meeting. Failing to check the identification of a user of the gym would be a violation of the Park District's policy. Cluff was responsible for checking identification cards at the door on that day. She received a memorandum indicating that an adult had been in the gym on January 18. Both Cluff and Anderson were responsible for this infraction. Chidester did not discipline Cluff or recommend that he be disciplined. Chidester acknowledged that she had two nephews living in Batavia in January 1998. The younger one was not in high school. Both were in the gym on January 18, 1998.

¶ 56 During redirect-examination, Chidester clarified that neither the job description for Teen Supervisor nor the task list were intended to be "an exhaustive statement of the essential duties."

Chidester explained that they liked Anderson. He had a good relationship with the teenagers that used the Teen Center. They wanted things to work out with him, so they gave him many opportunities to improve. Chidester testified that Cluff resigned on March 7, 1998.

¶ 57 The Park District called Laura Lundgren as its next witness. At the time of the hearing, she was a Park District employee. In 1997 and 1998, she was a co-director of the Teen Center. Her supervisor was Johnson, and the Teen Supervisors were beneath her on the organizational chart. Chidester was the other co-director. Lundgren was one of Anderson's supervisors. She knew Anderson from when he was supervising the teenagers from the group home.

¶ 58 Lundgren testified that she lived close to the Teen Center, so she "would drop in on certain nights." One night in June 1997, she observed "a number of older gentlemen in the gym." This occasion stood out "because of the number of non-teen older gentlemen that were on the floor playing." Anderson was the only Teen Supervisor on duty at the time. She spoke with Anderson, and he asked the gentlemen to leave. She told Anderson that this was "clearly against established rules and that it couldn't continue." He assured her that this would not happen again. She participated in a meeting with Anderson in which they discussed the subjects of his "chronic tardiness," his permitting young adults to use the gym, and his playing basketball while on duty.

¶ 59 On January 20, 1998, she, Johnson, and Chidester met. They decided to terminate Anderson. Lundgren called Anderson to inform him of the decision. She cited tardiness, allowing non-teens to use the gym, and his playing basketball as reasons for their decision. The subject of racial discrimination did not come up during her conversation with Anderson. Lundgren testified that the decision to terminate Anderson was a "consensus decision," though it ultimately belonged to Johnson, as she and Chidester reported to her. Lundgren stated that Anderson's race had nothing to do with her "consent and participation in the meeting to terminate him." She denied that

Anderson's race had anything to do with how she treated him as an employee. She further denied that white employees were treated more favorably than Anderson.

¶ 60 During cross-examination, Lundgren testified that she never disciplined Cluff. She agreed that Anderson objected to his termination. She did not recall him stating that he was being terminated wrongfully.

¶ 61 The Park District then called Anderson as an adverse witness. Anderson denied stating at the September 3, 1998, meeting that he had been late for work between 10 and 15 percent of the time when he worked for the Park District. He further denied stating that he did not know whether he was a victim of racial discrimination. He did not recall stating that no other employee had been tardy as much as he had. Anderson testified that he did not state during the September 1998 meeting that he "was told by [his] supervisors not to play basketball while [he was] working." He agreed, however, that sometime around November 1998, his supervisors did tell him not to play basketball while working. He denied that he played basketball at work between the meetings he had with his supervisors in October and November of 1997. Anderson responded negatively when asked whether he had stated that he did not believe that he had been discriminated against. Anderson spoke with Chidester about what he perceived to be "unfair treatment between [him] and Chris Cluff." He clarified when asked whether he specifically complained of disparate treatment based on race that "[t]he way [he] expressed it, [he] felt [he] did." During cross-examination, Anderson testified that he brought this case because he believed he had been discriminated against.

¶ 62 Anderson then testified for himself as a rebuttal witness. He stated that he did not play basketball while at work on January 18, 1998. Further, he never told teenagers that they were allowed to swear. He also testified that before this hearing, he had not spoken with Nathan Keyes or his mother for "about four years." He acknowledged that they had gone to school together, but

they did not keep in contact after high school until Nathan started using the gym. After the admission of various exhibits, the liability phase of the hearing concluded.

¶ 63 The hearing then moved to the issue of damages. Anderson first testified in his own behalf. He was terminated on January 20, 1998. He worked about 20 hours per two-week pay period. He earned $7 per hour. After leaving the Park District, he obtained a part-time position at Delnor Hospital. He also continued to work at his regular job at Laser Technologies, a position he held since before he worked for the Park District.

¶ 64 Anderson testified he learned of his termination from the Park District when he was at his regular job. Lundgren called him and informed him of the decision to discharge him. Anderson stated that he was "totally shocked." He filed a grievance with Dillow because he felt that he "was terminated for something [he] hadn't done." He was not given his job back. Subsequently, Anderson "felt real bad because the basis of what this center was about was about kids and getting along, no matter what race you are, you can come together." He stated that this was something he "preached all the time." Anderson testified that he felt he was discriminated against because of his race. Being discriminated against made him feel bad both for himself and the kids. It hurt him because it came at the hands of individuals that he thought "had the same goal" that he did. Further, "it just hurt because kids no longer wanted to come to the Teen Center."

¶ 65 During cross-examination, Anderson agreed that he made $10 per hour at Delnor Hospital. He worked there for about two months. Anderson was not sure whether he worked for Delnor in 1998 or 1999. He stated that he left Delnor because he "just had a little baby girl" and he was "moving to Florida." Following Anderson's testimony, the damages phase of the hearing concluded.

¶ 66 On March 20, 2009–about six-and-one-half years after the hearing detailed above–the ALJ issued his Recommended Liability Determination. The ALJ started his analysis of this case by

noting that there was no direct proof of intentional discrimination. Accordingly, this case had to be analyzed using the standards for indirect proof articulated in *McDonald Douglas v. Green*, 411 U.S. 792 (1973). Thus, the ALJ first considered whether Anderson had made out a *prima facie* case of racial discrimination. Cluff was hired approximately nine weeks before Anderson was hired. Cluff's initial rate of pay was $8 per hour, and he later received a 50¢ raise. Cluff resigned on March 7, 1998. The ALJ noted that "[u]ntil the two weeks prior to his resignation, there were no negative entries in Cluff's personnel file."

¶ 67 Anderson was hired on March 5, 1997. His starting salary was $7 per hour. He was terminated on January 28, 1998. The ALJ noted that during the course of Anderson's employment, there were six negative memoranda placed in his personnel file. Four cited tardiness and four cited other violations (two contained references to both categories).

¶ 68 The ALJ noted that the "respective employment histories" of Anderson and Cluff when first compared seem to indicate that "Cluff had a superior record" and that Anderson's termination "was justified based on the negative reports found in his record." However, Cluff acknowledged that he had been late on some occasions. Nevertheless, "[t]wo of the negative notes in [Anderson's] file were written by Cluff even though he had engaged in the same conduct." Moreover, the memorandum about the events of January 18, 1998, fails to mention Cluff's role–as the person who was watching the door–in allowing an adult to enter the gym. In fact, there was no mention of Cluff's conduct on January 18 placed in Cluff's file whatsoever.

¶ 69 The ALJ then determined Anderson had set forth a *prima facie* case of racial discrimination. There was no dispute that Anderson was a member of a protected class or that he suffered an adverse employment action. The ALJ stated that the "meeting expectations" prong of the test is often minimized, which was appropriate in this case, as both Cluff and Anderson "demonstrated a similar

degree of poor performance during the months prior to [Anderson's] discharge." The ALJ found that, in addition to specific instances of poor performance contained in the record, it was "highly likely that Cluff engaged in other behavior that mirrored the behavior for which [Anderson] was criticized." This finding was based on Cluff's admission that up until the January 15, 1998, staff meeting, "the matter of who was eligible to attend teen programs was not in writing and was a 'gray area.' " Further, Cluff acknowledged that it was difficult to enforce "any hard rule concerning who was admitted." Hence, the ALJ concluded, "[i]t is implicit in Cluff's testimony that he also allowed ineligible persons to attend teen center programs." The ALJ further found that "[g]iven the physical proximity within which the staff worked and the small number of personnel involved, it is not credible that the administrators were able to observe violations of these policies by [Anderson] on several occasions while never observing the violations on the part of Cluff." He continued, "This discrepancy in itself creates an inference that the matter of race contributed to the conduct of the administration." Accordingly, the ALJ found that the remaining two elements of the *prima facie* case analysis had been satisfied (*i.e.*, Anderson was meeting his employer's expectations within the meaning of the analysis and a similarly situated person not of the protected class was treated more favorably).

¶ 70 Thus, the burden shifted to the Park District to articulate a nondiscriminatory reason for Anderson's discharge. The ALJ noted that at this stage of the analysis, the Park District was required only to set forth such a reason. That is, the Park District's burden was one of production rather than persuasion. The ALJ determined that the Park District had met this burden by asserting that the reasons for it decision to terminate Anderson were tardiness, allowing ineligible persons to use the gym, and playing basketball with teenagers while on duty.

¶ 71 The burden then returned to Anderson to prove that the Park District's articulated reason was actually a pretext for discrimination. The ALJ noted that Anderson's employment record established that he was tardy on occasion and also that "he was accused of other policy violations." However, "a similarly situated white male, Cluff, was never written up or otherwise disciplined for identical conduct." He continued, "The failure of the administration to even document the transgressions of Cluff while closely observing and documenting the same conduct by [Anderson] shows that the goal of the administration was not to even-handedly supervise their employees, but it was to over-supervise and eventually eliminate the only African-American teen supervisor while retaining the white supervisor." He then concluded that the discrepancy in the manner in which Anderson and Cluff were managed "proves by a preponderance of the evidence" that Anderson's discharge was racially motivated.

¶ 72 The ALJ awarded Anderson $5,526.45 in back pay and $5,000 for emotional distress (the bases for these awards is disputed; however, as these issues are discrete, we will set forth pertinent facts when we address them). The ALJ also ordered the the Park District to pay reasonable attorney fees and costs, which it later determined to be $111,780 (this award is also disputed and we will set forth pertinent facts when we address it).

¶ 73 On December 30, 2011, the Human Rights Commission (Commission) issued an order adopting the decision of the ALJ, with one modification. The Commission reduced the award of attorney fees to $75, 520. It determined that the hourly rate of two of the attorneys used to calculate the award should have been the historic rate that they would have received at the time of the 2002 hearing rather than their current hourly rate. This modification forms the basis of the cross appeal in this case.

¶ 74 III. ANALYSIS

¶ 75 The parties raise a number of issues and subissues on appeal. The Park District first claims that the Commission disregarded both law and fact in concluding that it discriminated against Anderson. To this end, the Park District argues that Anderson did not establish a *prima facie* case of discrimination; that the Commission disregarded the "meeting expectations" prong of the *prima facie* case analysis; that the Commission improperly "merged the traditional elements" of the *prima facie* case analysis and that its decision that Anderson and Cluff were similarly situated is contrary to the manifest weight of the evidence; and that the Commission erred in determining that Anderson's discharge was not motivated by legitimate reasons. The Park District also attacks the Commission's awards of damages and attorney fees, specifically arguing that Anderson did not prove he suffered emotional distress; the award of back pay was not calculated properly, and Anderson's attorneys are not entitled to an award of fees. In his cross appeal, Anderson argues that the Commission erred in reducing the ALJ's award of attorney fees to the historical rate the attorneys would have earned at the time of the public hearing without making any adjustment for the delay his attorneys experienced in receiving payment.

¶ 76 As a preliminary matter, the Park District argues that we should not apply the usual deferential standard of review (see *Pinnacle Ltd. Partnership v. Illinois Human Rights Comm'n*, 354 Ill. App. 3d 819, 828 (2004)) in reviewing the factual finding of the ALJ due to the six-and-one-half year delay between the time the public hearing was conducted and the time the ALJ issued his Recommended Liability Determination. The Park District frames this as a due process issue. See *Magett v. Cook County Sheriff's Merit Board*, 282 Ill. App. 3d 282, 289-292 (1996). Generally, of course, we apply the manifest-weight standard to such factual findings. *Denny's, Inc. v. Department of Human Rights*, 363 Ill. App. 3d 1, 8 (2005). The Park District suggests that we conduct *de novo* review instead.

¶ 77 Putting aside the fact that we review the decision of the Commission rather than the ALJ (*Clark v. Illinois Human Rights Comm'n*, 312 Ill. App. 3d 582, 587 (2000) ("However, we do not pass upon the propriety of the Commission's determination that the findings of the ALJ were contrary to the manifest weight of the evidence. Rather, we review the determination of the Commission as if that body were the original fact finder.")), we do not find the Park District's argument on this point persuasive. Initially, we note that "courts are generally reluctant to find a due process violation based on an unreasonable delay in issuing a decision following a hearing." *Magett,* 282 Ill. App. 3d at 297.

¶ 78 The Park District relies heavily on *Quincy Country Club v. Human Rights Comm'n*, 147 Ill. App. 3d 497 (1986). In that case, an ALJ conducted an evidentiary hearing, made a recommendation regarding a disposition and recorded her general impressions regarding witness credibility. *Id*. at 498. She then left the employ of the Human Rights Commission. *Id*. Another ALJ, relying upon the first ALJ's notes and recommendations, prepared a recommended order, which the Commission subsequently adopted. *Id*. The reviewing court reversed (while remanding for further proceedings) because the ALJ that drafted the recommended order "could not adequately do so on the basis of the cold record." *Id*. at 499. The Park District asserts that *Quincy Country Club* is "legally indistinguishable" from the instant case since the ALJ must have simply relied on a cold record given the lapse of time between the hearing and the issuance of the Recommended Liability Determination.

¶ 79 We disagree. To accept the Park District's position, we would have to assume that the ALJ had no meaningful recollection of anything that occurred during the evidentiary hearing. As nothing in the record substantiates such a notion, making this assumption would amount to mere speculation. Conversely, the record does indicate that the ALJ took contemporaneous notes during the hearing. For example, in ruling on a scope objection during the cross-examination of Laura Lundgren, the

ALJ stated, "[M]y notes don't reflect any significant inquiry along those lines." Thus, the ALJ had notes he could rely on to refresh his memory when he prepared the recommended determination. Cf. *People v. Flores*, 381 Ill. App. 3d 782, 788 (2008), quoting IPI Criminal (4th) No. 1.05 ("Those of you who took notes during the trial may use your notes to refresh you memory during jury deliberations."). While the second ALJ in *Quincy Country Club*, 147 Ill. App. 3d at 498, had the benefit of the notes taken by the first ALJ, he had no memory to refresh, making that case distinguishable. The Park District further asserts that the delay impacted its right to have the case heard by a neutral fact finder. We fail to perceive a nexus between delay and bias. Finally, even if the delay had some impact upon the ALJ's recollection of the evidentiary hearing, it is not apparent to us why we would be in a better position than the ALJ to resolve factual questions such that our judgment should supplant that of the ALJ, or, more importantly, the Commission. To the extent the a finding is erroneous, the Park District's remedy is to show that it is contrary to the manifest weight of the evidence like any other litigant purportedly aggrieved by a decision of a fact finder.

¶ 80 In short, though we believe that the better practice would be to issue decisions in a more timely fashion than occurred in this case, we see no reason to alter the usual standard of review used to resolve cases like this one. Factual issues are reviewed using the manifest-weight standard. *Sangamon County Sheriff's Department v. Illinois Human Rights Comm'n*, 233 Ill. 2d 125, 142-43 (2009) ("The Commission's finding that Yanor committed a variety of sexually harassing acts that cumulatively constituted a hostile work environment was not against the manifest weight of the evidence."). Thus, under the manifest-weight standard, we will disturb such determinations only if an opposite conclusion is clearly apparent. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2012). We review questions of law *de novo*. *Sangamon County Sheriff's Department* 233 Ill. 2d at 136. In accordance with this standard, we owe no deference to a lower

tribunal (*Khan v. BDO Seidman, LLP,* 408 Ill. App. 3d 564, 595 (2011)) and are free to disregard its judgment and substitute our own (*People v. Davis*, 403 Ill. App. 3d 461, 464 (2010)). Finally, as the appellant, the Park District carries the burden of establishing error before this court. *In re Alexander R.*, 377 Ill. App. 3d 553, 557 (2007). With these standards in mind, we now turn to the substance of this appeal.

¶ 81 A. INTENTIONAL DISCRIMINATION

¶ 82 The Park District first takes issue with the Commission's finding that it engaged in discrimination against Anderson based on his race.[1] This case involved the indirect, burden-shifting method of proving intentional discrimination. See *McDonnell Douglas v. Green*, 411 U.S. 792, 801 (1973). Under this approach, a plaintiff must first establish a *prima facie* case of intentional discrimination. *Southern Illinois Clinic, Ltd. v. Human Rights Comm'n*, 274 Ill. App. 3d 840, 847 (1995). To do so, the plaintiff must establish the following elements by a preponderance of the evidence: "(1) he is a member of a protected class; (2) he was meeting his employer's legitimate business expectations; (3) he suffered an adverse employment action; and (4) the employer treated similarly situated employees outside the class more favorably." *Owens v. Department of Human*

[1]Near the beginning of its arguments on this issue, the Park District makes a number of short arguments that are unsupported by authority, save for a general citation regarding due process. As these arguments are not supported by authority, they are forfeited and we will not consider them. *Henry v. Waller*, 2012 IL App (1st) 102068, ¶ 47. For example, in a cursory fashion, the Park District complains that it was not allowed to call a witness to testify about various admissions Anderson purportedly made; however, the Park District acknowledges that it was allowed to present testimony from Dillow on the same subject. Without explanation, the Park District claims that this was an "inadequate substitute." Why this latter proposition is so is not apparent to us.

Rights, 403 Ill. App. 3d 899, 919 (2010). If the plaintiff succeeds, a presumption of unlawful discrimination arises. *Sola v. Illinois Human Rights Comm'n*, 316 Ill. App. 3d 528, 536 (2000). The burden of production–but not persuasion–shifts to the defendant-employer to articulate a legitimate, nondiscriminatory reason for its action. *Chicago Housing Authority v. Human Rights Comm'n*, 325 Ill. App. 3d 1115, 1123 (2001). If the defendant succeeds, the presumption of discrimination disappears and the burden shifts back to the plaintiff to show that the articulated reason is actually a pretext for discrimination. *Sola*, 316 Ill. App. 3d at 536. A plaintiff may show pretext "either through direct evidence that a discriminatory reason more likely motivated the employer, or through indirect evidence showing that the employer's articulated reason is unworthy of belief." *Freeman United Coal Min. Co. v. Human Rights Comm'n*, 173 Ill. App. 3d 965, 973 (1988). The ultimate burden of persuasion always remains with the plaintiff. *Chicago Housing Authority*, 325 Ill. App. 3d at 1123-24. The fact finders' disbelief of an employer's proffered reasons for its action along with the plaintiff's establishment of a *prima facie* case is a sufficient basis for the trier of fact to infer intentional discrimination. *Wal-Mart Stores, Inc. v. Human Rights Comm'n*, 307 Ill. App. 3d 264, 269 (1999). Illinois courts often rely on federal law for guidance on such issues. *Carter Coal Co. v. Human Rights Comm'n*, 261 Ill. App. 3d 1, 14 (1994).

¶ 83 1. *Prima Facie* Case

¶ 84 It is, of course, a plaintiff's burden to set forth evidence to establish each element of a *prima facie* case. *Ambrose v. Thornton Township School Trustees*, 274 Ill. App. 3d 676, 680 (1995). Where a plaintiff fails to meet this burden, the case must be dismissed. *Truger v. Department of Human Rights*, 293 Ill. App. 3d 851, 859 (1997). The Park District initially claims that "the ALJ and then the Commission applied the *prima facie* framework in a cursory fashion and disregarded uncontradicted evidence that Anderson had not established a *prima facie* case of racial

discrimination." We note that we do not review the propriety of the reasoning underlying a decision; rather, we review the decision itself. *Boaden v. Department of Law Enforcement*, 267 Ill. App. 3d 645, 652 (1994) ("Because we review the order entered, not the reasoning underlying it, we may affirm the decision of an administrative agency when justified in law for any reason."); *Department of Mental Health & Developmental Disabilities v. Civil Service Comm'n*, 103 Ill. App. 3d 954, 957 (1982). Hence, the Park District's efforts would be better focused on explaining why the decision was wrong rather than attacking the methodology that produced it. In any event, this argument is undeveloped and will not be considered. See *In re Marriage of Bates,* 212 Ill. 2d 489, 517 (2004) (holding a "reviewing court is entitled to have issues clearly defined with relevant authority cited.").

¶ 85 The Park District next argues that the Commission improperly disregarded the meeting-expectations prong of the *prima facie* case. The ALJ stated that this prong is "often minimized." Putting aside questions regarding the Commission's underlying reasoning, there is ample evidence in the record to support the Commission's determination that Anderson met the meeting-expectations prong, as it has been construed by applicable case law.

¶ 86 It is true that to make out a *prima facie* case, an employee must show that he or she is meeting the legitimate expectations of the employer. See, *e.g.*, *Illinois J. Livingston Co. v. Illinois Human Rights Comm'n*, 302 Ill. App. 3d 141, 153 (1988). However, in cases involving discriminatory discipline, this prong and the fourth prong (that a similarly-situated employee outside the protected class was treated more favorably) typically merge. *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585, 592 (7th Cir. 2008). This is because in cases of discipline, there is no question that an employee has not met his or her employer's expectations. *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 728 (7th Cir. 2004). Nevertheless, punishment may not be meted out in a discriminatory manner. *Id.*; see also *Grayson v. O'Neill*, 308 F.3d 808, 818 (7th Cir. 2002) ("When

a plaintiff produces evidence sufficient to raise an inference that the employer applied its legitimate expectations in a disparate manner, the second and fourth prongs of *McDonnell Douglas* merge, allowing the plaintiff to establish a prima facie case by establishing that similarly situated employees were treated more favorably.").

¶ 87 In this case, there was evidence in the record that Anderson was not meeting the Park District's legitimate expectations in certain respects. For example, Anderson admitted being late four or five times, and Dillow identified four documents memorializing occasions on which Anderson was late. Moreover, Anderson was supervising the gym on the night of January 18, 1998, when an adult and an underage minor were allowed into the gym. The Park District contends that Anderson was "chronically late"; however, there was evidence upon which the Commission could have concluded otherwise, such as Dillow's testimony that outside of the times memorialized in Anderson's employment records, she was unaware of any other occasions upon which he was late. Cluff acknowledged being late on occasion. He testified that Anderson was late on "more than three occasions." Cluff could not say whether he or Anderson were tardy more often, and Anderson believed they were both late about the same amount of times. Furthermore, Cluff was on duty on January 18, 1998, and was responsible for checking identification cards at the door. Nevertheless, Cluff was not disciplined until after Anderson was discharged, while Anderson, as the Park District puts it, was "coached, counseled, reprimanded, and even suspended."

¶ 88 The Park District relies on *Cowan v. Glenbrook Security Services, Inc.*, 123 F. 3d 438 (7th Cir. 1997), and *Luckett v. Illinois Human Rights Comm'n*, 210 Ill. App. 3d 169 (1989), in support of its position. *Luckett* is distinguishable because there was no evidence in that case that a similarly situated employee outside the protected class was treated more favorably. *Luckett*, 210 Ill. App. 3d at 182 ("The administrative record further reflects that Mr. Castro, a non-black was not treated

differently from Luckett, nor was an appropriate comparative."). In this case, there was evidence that Cluff was similarly situated and treated more favorably. *Cowan* is similarly distinguishable. *Cowan*, 123 F.3d at 446 ("Although plaintiff maintains that white officers who were similarly tardy were not dismissed, he has not come forward with any evidence to support this allegation."). As such, these cases provide little guidance here.

¶ 89 The Park District contends that "merging" the similarly-situated prong and the legitimate-expectations prongs are not appropriate in this case. It cites *Herron v. Daimler Chrysler Corp.*, 388 F.3d 293, 300 (7th Cir. 2004), a case that is actually about merging the pretext analysis with the legitimate-expectations prong of the *prima facie* case. Compare *Herron* with *Caskey*, 535 F.3d at 592. Nevertheless, we agree with the the Park District that it was incumbent upon Anderson to show that the District "applied its legitimate expectations in a disparate manner." *Grayson*, 308 F.3d at 818.

¶ 90 Making such a showing was, of course, the point of setting forth evidence that Cluff and Anderson are similarly situated. The Park District contends that the manifest weight of the evidence establishes that they were not. Employees are similarly situated if they are directly comparable in all material aspects. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). Similarly situated employees have "a comparable set of failings." *Burks v. Wisconsin Department of Transportation*, 464 F.3d 744, 751 (7th Cir. 2006). Nevertheless, finding that two employees are similarly situated does not require "near one-to-one mapping between the employees," for "distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions." *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007).

¶ 91 The Park District cites a number of factors that it asserts render Cluff an inappropriate comparable for Anderson. It points out that Cluff was promoted in December 1997 while Anderson

never qualified for a promotion. This assertion amounts to question begging, as it assumes that the Park District's decisions regarding whom to promote were not racially motivated. It could be that Cluff was promoted while Anderson was not because of Cluff's qualifications, or it could just as easily be another manifestation of racial discrimination (see *Jackson v. City of Chicago*, 552 F.3d 619, 622 (7th Cir. 2009) (setting forth elements of a failure-to-promote claim of discrimination)). This evidence is ambiguous at best. There was evidence indicating Anderson played basketball while at work, and Anderson testified Cluff shot baskets all the time. One of the reasons cited by the Park District regarding why it objected to Teen Supervisors playing basketball was that "[i]f they were playing basketball, then they were not supervising the whole gym at that time." This concern would be implicated by shooting baskets as well as playing in a game–either activity would distract the Teen Supervisor from his or her duties. Finally, we also note that both individuals were hired to be Teen Supervisors a few months apart.

¶ 92 The Park District contends that Anderson's tardiness was more problematic because he worked in the gym while Cluff worked at the Ground Zero facility much of the time. Part of Anderson's duties required him to open the gym, and when he was late, teenagers had to wait outside. However, Dillow testified that one of the reasons the Park District was concerned about timeliness was that it was a safety issue–teenagers need to be supervised. Dillow explained that "[t]here could be a number of fights to someone getting injured to–just supervising their behavior to make sure that there's no vandalism." Fights, injuries, and vandalism do not seem to be the sorts of things to which teenagers waiting to get into the gym, as opposed to those unsupervised at Ground Zero, would be uniquely susceptible. As such, that the two teen supervisors supervised different facilities does not appear to be a material difference that would render them inappropriate comparables. Parenthetically, we note that Anderson's testimony that Cluff shot baskets all the

time–even taken figuratively– indicates that Cluff was not at Ground Zero as much as the Park District intimates.

¶ 93 The Park District relies on an unreported decision of the Federal District Court for the Northern District of Illinois in support of this argument. See *Creal v. Springhill Ford, Inc.*, No. 06-C-0174 (N.D. Ill. October 19, 2007). There, the plaintiff claimed his employer had enforced its policy regarding tardiness more harshly against him. The court found the plaintiff and several other employees were not similarly situated because the plaintiff continued to be tardy after being counseled on the subject while no other employee had been counseled on the subject (except one whose performance had improved). The Park District claims that unlike Anderson, Cluff's "tardiness and performance issues [did not] persist after he received warnings." However, Cluff received no warnings or reprimands until after Anderson's discharge, and he resigned shortly thereafter. Like the decision to promote Cluff, refraining from counseling him is ambiguous in itself. It could be because Cluff did not warrant counseling. On the other hand, the difference in the treatment of Cluff and Anderson could result from racial discrimination. As the ALJ characterized it, "The failure of the administration to even document the transgressions of Cluff while closely supervising and documenting the same conduct by [Anderson] shows that the goal of the administration was not to even-handedly supervise their employees."

¶ 94 The Park District suggests that it resulted from the District's alleged ignorance of Cluff's infractions. The Park District asserts that it was not aware of Cluff's transgressions until after Anderson's discharge. The Commission expressly considered and rejected this position, reasoning that "[g]iven the physical proximity within which the staff worked and the small number of personnel involved, it is not credible that the administrators were able to observe violations of these policies by Anderson on several occasions while never observing violations on the part of Cluff."

The Park District asserts that this finding is unwarranted because "the record demonstrates that the Teen Center was divided into two distinct facilities." However, Chidester testified that she did not see Johnson every day she worked because her and Johnson's offices were in different buildings. Thus, it is apparent that there were supervisors based in each building. We also note that the buildings were near each other, as they shared a parking lot. In short, there is ample reason in the record for the Commission to question how three supervisors (four if Dillow is included) could fail to observe any violations on Cluff's part for an entire year. The Park District also points out that Anderson's tardiness was more apparent because he was responsible for opening the gym. We do not disagree with this observation; however, it only explains why the supervisors observed Anderson's tardiness. It does not explain how they could go an entire year without observing a single infraction by Cluff.

¶ 95 The Park District complains of the ALJ's findings that "it is highly likely that Cluff engaged in other behavior that mirrored the behavior for which Anderson was criticized" and that "it is implicit in Cluff's testimony that he also allowed ineligible persons to attend teen center programs due to the difficulty in identifying a firm district policy." These findings were based (at least in part) on Cluff's testimony that "the matter of who was eligible to attend teen programs *** was a 'gray area.' " The Park District claims that the ALJ "misstated the evidence" here because the "gray area" to which Cluff was referring was limited to policies regarding who was allowed to enter the Teen Center. However, read in context, it is clear that the ALJ recognized the scope of Cluff's testimony, for, in the course of this portion of his discussion, the ALJ expressly stated that he was considering "the issue of allowing ineligible persons to be admitted to the teen program." Other evidence, such as Cluff's inability to say whether he or Anderson were tardy more often and Anderson's testimony

that they were both late about the same amount of times, provides insight regarding Anderson's other purported deficiencies.

¶ 96 The Park District makes much out of evidence that its policies on several issues had been in effect since the Teen Center opened. Accepting this as true, such evidence would only serve to show that Anderson had no excuse for violating District policy. It does nothing to explain why those policies were enforced in a disparate manner. After all, they would have applied to Cluff for the entire time as well.

¶ 97 In sum, we recognize that some of the evidence is ambiguous and that some evidence exists supporting the Park District's position. However, there is also evidence in the record upon which the Commission could rely to draw the conclusions that it did. In other words, since we cannot say that an opposite conclusion is clearly apparent, we also cannot say that the Commission's decision is contrary to the manifest weight of the evidence. *Hosteny*, 397 Ill. App. 3d at 675. Having rejected the Park District's arguments on this issue, we will not disturb the Commission's determination that Anderson established a *prima facie* case of discrimination. Accordingly, the burden shifted to the Park District to articulate a nondiscriminatory basis for Anderson's termination. *Chicago Housing Authority*, 325 Ill. App. 3d at 1123.

¶ 98 2. Nondiscriminatory Reason For Discharge

¶ 99 The Park District next argues that Anderson was terminated for legitimate, nondiscriminatory reasons, specifically tardiness and violations of other District policies regarding playing basketball while on duty and allowing ineligible people to use the gym. The Commission recognized, and we agree, that these reasons, if believed, would provide a legitimate basis for terminating Anderson's employment. As such, the Park District fulfilled its burden of articulating a nondiscriminatory basis for its decision to discharge Anderson. The burden thus shifted back to Anderson to prove that the

Park District's reasons were a pretext for discrimination. *Sola*, 316 Ill. App. 3d at 536. The ALJ determined that Anderson had carried that burden, so now, on appeal, the Park District carries the burden of establishing that the ALJ's determination was erroneous. *In re Alexander R.*, 377 Ill. App. 3d at 557. Finally, it must be here remembered that it is not sufficient for a plaintiff to prevail that the proffered reason be shown to be false; rather, an additional factual finding that discrimination is the real reason underlying the discharge is required. *Illinois J. Livingston Co.*, 302 Ill. App. 3d at 154. However, a finding of pretext along with the *prima facie* case is sufficient for the Commission to have made that additional factual finding. *Wal-Mart Stores, Inc.*, 307 Ill. App. 3d at 269.

¶ 100 The Park District claims that it is "entitled to an inference" that its decision to terminate Anderson was not the result of discrimination. It first cites Johnson's "emphatic[]" testimony:

> "I would not work for an institution, nor supervise employees that racially discriminate. My husband is African-American. Obviously, I have that in my family, and I would not support that to happen. Mr. Anderson was let go strictly based on his job performance which has nothing to do with his color."

The Park District also contends that it is entitled to a "same-actor inference," as, it asserts, Johnson is the person who both hired and fired Anderson. The same-actor theory holds that where the same person hires and terminates an employee, it is unlikely that the discharge results from a discriminatory motive. *Harris v. Warrick County Sheriff's Department*, 666 F.3d 444, 449 (7th Cir. 2012). Obviously, a person motivated by prejudice likely would not have hired the employee in the first place. See *Martino v. MCI Communications Services, Inc.*, 574 F.3d 447, 454-55 (7th Cir. 2009).

¶ 101 Initially, we note that the mere fact that Johnson is married to an African-American person does not require a finding that the Park District's motives were not discriminatory. *C.f.*, *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 530 (7th Cir. 2003), quoting *Castaneda v. Partida,* 430 U.S. 482, 499 ("Lucent begins by arguing that there should be a presumption of non-discrimination because Foote, who discharged Haywood, is also African-American. It is wrong; no such presumption exists, nor should one be created. To the contrary, the Supreme Court has explicitly rejected exactly this idea: 'Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.' "). More importantly, while Johnson was involved in both decisions, she was not the only one. Regarding Anderson's termination, Johnson testified that she, Chidester, and Lundgren "all decided that it was time for him to go, and [she] approved that decision." Finally, as for the same-actor inference, it has been observed that it "is unlikely to be dispositive in very many cases." *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 745 (7th Cir. 1999); see also *Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 747 (7th Cir. 2002) ("When the same person hires and later fires the employee who claims that his firing was discriminatory, judges are skeptical, because why would someone who disliked whites, or Germans, or members of some other group to be working for him have hired such a person in the first place? It is misleading to suggest that this skepticism creates a 'presumption' of nondiscrimination, as that would imply that the employee must meet it or lose his case. It is just something for the trier of fact to consider."). Accordingly, these considerations support an inference of nondiscrimination that the fact finder could draw. However, the trier of fact was not required to draw such an inference, and these considerations are not dispositive in themselves.

¶ 102 The Park District also points out that Anderson's replacement, Keena Colunga, was an African-American female. It claims that her hiring "demonstrated that the Park District did not harbor racial animus against Anderson because he was African-American." While such evidence may certainly be considered by the trier of fact, it is only another piece of evidence. It is not, in itself, dispositive on the issue of discriminatory intent. *Cygnar v. City of Chicago*, 865 F.2d 827, 842 (7th Cir. 1989) ("We have previously noted that the replacement of minority employees by individuals of the same race does not preclude a finding of discriminatory intent".). The Park District cites *Board of Education of the City of Chicago v. Cady*, 369 Ill. App. 3d 486, 499 (2006), setting forth the following passage in its brief:

> " '[W]e note that [plaintiff] would not have been able to establish [reverse] racial discrimination [because] *** he was not passed over in favor of a person not having the forbidden characteristic because Nadzius, who was ultimately hired, was also white.' "

The full passage reads:

> "[W]e note that [plaintiff] would not have been able to establish [reverse] racial discrimination under the indirect method of proof set forth in *McDonnell Douglas. He was not qualified for the position, and* he was not passed over in favor of a person not having the forbidden characteristic because Nadzius, who was ultimately hired, was also white.' " (Emphasis added.) *Id*.

The portion of the quote that the Park District chose to omit from its brief significantly undermines the precedential value of *Cady*. As the plaintiff in *Cady* was not otherwise qualified, the fact that "he was not passed over in favor of a person not having the forbidden characteristic" was a collateral consideration at best.

¶ 103 The Park District next argues that the Commission "improperly disregarded uncontradicted evidence for the $1 [per hour] pay difference between Cluff and everyone who was hired after him." It points out that there was uncontradicted testimony that everyone hired after Cluff was paid a starting salary of $7 per hour. The Park District then asserts that "a fact finder cannot arbitrarily or capriciously reject the testimony of an unimpeached witness where the testimony of the witness is ' "neither contradicted, either by positive testimony or by circumstances, nor inherently improbable" ' " *Cady*, 369 Ill. App. 3d at 496. While it is true that a fact finder may not reject such testimony in an arbitrary and capricious manner, the fact finder may nevertheless reject uncontradicted evidence. See *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 47("[T]he trier of fact is always free to disbelieve any witness."). As such, we reject the Park District's argument that the Commission was required to accept this evidence. Moreover, even if the Commission had to accept that the pay differential between Cluff and Anderson was not the result of racial animus, that would not preclude a finding that his discharge was racially motivated, as there was other evidence upon which it could base such an inference (*i.e.*, the disparate treatment of Cluff and Anderson with respect to the violation of various Park District policies). Quite simply, this (and other) of the evidence that the Park District asserts is uncontradicted is only relevant to this case because it provides circumstantial evidence of the Park District's motive in firing Anderson. As such, it actually is contradicted by other circumstantial evidence indicative of discriminatory intent, such as the disparate treatment of Cluff and Anderson. In short, we find none of the Park District's arguments regarding lack of pretext persuasive.

¶ 104 In conclusion, having considered and rejected the Park District's arguments regarding racial discrimination, we must conclude that the Park District failed to carry its burden on appeal of

establishing error (*In re Alexander R.*, 377 Ill. App. 3d at 557). Accordingly, we cannot find that the Commission's decision is contrary to the manifest weight of the evidence.

¶ 105 B. DAMAGES AND ATTORNEY FEES

¶ 106 The Park District advances three arguments pertaining to damages and attorney fees. First, it contends that the Commission's award of damages for emotional distress was error. Second, it contests the Commission's award of back pay to Anderson. Third, it argues that attorney fees should not have been awarded in this case.

¶ 107 1. Emotional Distress

¶ 108 The Commission awarded Anderson $5,000 for emotional distress. Damage awards are reviewed using the manifest-weight standard. See *Lake Point Tower, Ltd. v. Illinois Human Rights Comm'n*, 291 Ill. App. 3d 897, 908 (1997). The Park District argues that this was unwarranted. Section 8B–104(B) of the Illinois Human Rights Act (Act) authorizes the recovery of actual damages in the case of a civil rights violation. 775 ILCS 5/8B–104(B) (West 1996). This provision has been construed to include damages for "emotional harm and mental suffering." *Szkoda v. Illinois Human Rights Comm'n*, 302 Ill. App. 3d 532, 545 (1998).

¶ 109 In *Szkoda*, the Commission awarded damages for "humiliation, embarrassment, and mental distress." *Id.* On appeal, the defendant challenged the award because it was based on a single incident, the plaintiff did not testify to suffering humiliation or embarrassment, and there was no evidence that the defendant had intentionally violated the law. *Id*. The reviewing court agreed that there was no evidence regarding embarrassment, but disagreed as to humiliation. *Id*. at 545-46. Therefore, it reversed and remanded for a recalculation of damages based solely on humiliation, despite the defendant's other arguments that it had not violated the law and that the charge was based on a single incident. *Id*.

¶ 110 The Park District cites *Village of Bellwood Board of Fire & Police Commissioners v. Human Rights Comm'n*, 184 Ill. App. 3d 339, 355 (1989), misstating the holding as "[d]amages for emotional distress in an employment discrimination case can be awarded only where the employer's conduct is opprobrious, continuous, and outrageous." However, that case never says that such factors are a *sine qua non* of an award of damages for mental distress; rather, it states that given the presence of such factors, the particular amount of damages awarded in that case was reasonable. *Id*.

¶ 111 The Park District also cites precedent from the Commission to establish two additional principles. First, it cites *In re Littlejohn & Wal-Mart Stores*, Ill. Hum. Rts. Comm'n Rep. 1996CF2873 (November 4, 2009), for the proposition that there is a presumption that back pay is sufficient to make a petitioner whole unless the petitioner established that he or she experienced more than ordinary suffering. It also cites Commission precedent for the proposition that a party seeking to recover for emotional damages must demonstrate severe symptoms of emotional distress. See, *e.g.*, *In re Garrity & Lockett*, Ill. Hum. Rts. Comm'n Rep. 1985SF0280 (November 24, 1998). Having reviewed these cases, we note that while severe emotional distress was present in all of them, none of them state that it is a necessary condition to a recovery. In fact, one cites a decision of the Chicago Commission on Human Rights approvingly where the Chicago Commission noted that damage awards under $5,000 (in 1990s dollars) were typical in cases where "the discriminatory conduct was not so egregious that one would expect a reasonable person to experience severe emotional distress." *Id*. In short, we agree that a plaintiff must show something more than a civil rights violation in itself to justify an award from emotional damages, but it is not necessary, as the Park District suggests, to show severe emotional distress. Indeed, since the plain language of the Act authorizes recovery for "actual damages," we perceive no basis in the statute for excluding actually occurring emotional damages that do not rise to the level of severe. See 775 ILCS 5/8B-104(B)

(West 1996). Quite simply, if a plaintiff shows actual emotional damages, he or she may recover for them.

¶ 112 Accordingly, we cannot disturb the Commission's decision here. The Commission noted that Anderson was terminated by telephone while he was working at his place of full-time employment. He testified hat he was shocked at the news. The Commission credited Anderson's testimony that "[h]e felt badly for the teens at the center because the center was supposed to be a place where diverse people could come together for a positive common purpose, but his discharge for racial reasons would contradict that message." The Commission then expressly found that Anderson suffered mental distress beyond that which is inherent in a typical case of racial discrimination. Anderson further points out that the record shows that he had "spent a great deal of time sponsoring and mentoring teen-age youth in the community," which "led to his employment with" the Park District. Given the purposes of the Teen Center along with Anderson's long history of working with youth in the community, we cannot say that the Commission's decision to award damages for emotional distress is contrary to the manifest weight of the evidence.

¶ 113 2. Back Pay

¶ 114 The Park District next argues the Commission's award of back pay is against the manifest weight of the evidence. Initially, we note this argument is not supported by any citation to legal authority, so it is forfeited. *Henry*, 2012 IL App (1st) 102068, ¶ 47. Moreover, we note that the Park District bases its calculations on months while Anderson was paid on a bi-weekly basis. As a result, the Park District's calculations fail to account for two pay periods per year. Thus, not only is the Park District's argument forfeited, it is also misplaced.

¶ 115 3. Attorney Fees

¶ 116 The Park District next raises two arguments regarding the Commission's award of attorney fees. First, it asserts that the Commission's use of a $200 hourly rate ignored uncontradicted evidence. Second, it contends that the award in this case was "grossly disproportionate" to the amount awarded for damages. Generally, we will not disturb an award of attorney fees unless the Commission has abused its discretion. *Village of Bellwood Board of Fire & Police Commissioners*, 184 Ill. App. 3d at 355. An abuse of discretion occurs only where no reasonable person could agree with the position taken by the Commission. *Young*, 2012 IL App (1st) 112204, ¶ 33.

¶ 117 The Park District's first argument is that the uncontradicted evidence demonstrated that $175 was the appropriate hourly rate at the time of the hearing conducted in this case. It bases this contention on *Mathur v. Board of Trustees of Southern Illinois University*, 317 F.3d 738, 742 (7th Cir. 2003), where one of Anderson's attorneys in the present case submitted a fee petition setting forth $175 per hour as his hourly rate. Even if we were inclined to give effect to such material from a separate case, we note that the rates addressed in *Mathur*, 317 F.3d at 744-45, were from 2001, a year prior to the evidentiary hearing in this case and many years prior to when some of the work occurred in this case (we recognize some of the work was also performed prior to 2001). Hence, *Mathur's* probative value regarding an appropriate hourly rate in this case is limited–while it provides some evidence that $175 would be an appropriate hourly rate, it is not conclusive. Indeed, we note that a myriad of factors, many of which are case specific, are relevant to determining an appropriate hourly rate for the purpose of awarding attorney fees. For example, relevant factors include the time and labor involved; the novelty or difficulty of the case; the skill required; the fees customarily charged for similar services; the amount involved and the results obtained; and the length and nature of the professional relationship between attorney and client. *Wildman, Harrold,*

Allen & Dixon v. Gaylord, 317 Ill. App. 3d 590, 601 (2000). As such, drawing comparisons between cases as the Park District seeks to do here is a dubious exercise at best.

¶ 118 The Park District next contends that the award of fees is grossly disproportionate to the amount awarded to Anderson for "a single-issue case that did not present novel questions or complex legal strategies." The Park District claims this results in a windfall to Anderson's attorneys, which would be inappropriate. It cites *Akrabawi v. Carnes Co.*, 152 F3d 688, 695-96 (7th Cir. 1998), where the Seventh Circuit held,"The court reached this conclusion because discretionary fees allow a court to offer some consolation to a plaintiff who suffered discrimination, while simultaneously not mandating a windfall for a plaintiff whose own misconduct eclipsed the discriminatory conduct." The Park District then asserts that "Anderson's tardiness and other transgressions far exceeded the Park District's purported conduct."

¶ 119 Initially, we do not find the Park District's characterization of this as a single-issue case entirely persuasive. While there was one overarching issue, this case involved numerous sub-issues both on the issues of liability and damages. Morever, we find incredible the Park District's assertion that Anderson's tardiness and other violations of Park District policy (*i.e.*, who could use the gym and whether Anderson could play basketball while on duty) far exceeded racial discrimination, which is the District's "purported conduct." In sum, we do not find the Park District's argument on this well founded.

¶ 120 C. CROSS-APPEAL–ATTORNEY FEES

¶ 121 Anderson has filed a cross-appeal in this matter. In it, he contends that the Commission improperly reduced the ALJ's award of attorney fees. The ALJ calculated attorney fees using the current hourly rates of Anderson's counsel ($300 per hour), and the Commission reduced it to reflect

the historical rate they earned at the time they performed the majority of the work in this case ($200 per hour). He states that a single question of law is involved, specifically, whether the Commission "was required to make an adjustment in the fee award for the extended delay in receiving payment in order to satisfy the [Act's] statutory requirement that [he] be awarded reasonable attorneys' fees." As such, Anderson asserts, the *de novo* standard of review is applicable. *Sangamon County Sheriff's Department*, 233 Ill. 2d at 136. Parenthetically, we note that despite his initial claim that the cross-appeal presents a pure question of law, Anderson goes on to make a series of arguments pertaining to the particular facts of this case. Thus, to the extent Anderson's arguments implicate factual matters, we will apply the manifest-weight standard. *Denny's, Inc.*, 363 Ill. App. 3d at 8. Moreover, we note that "it is within the discretion of the trier of fact to determine the reasonableness of the attorney fees requested." *Raintree Health Care Center v. Illinois Human Rights Comm'n*, 173 Ill. 2d 469, 494 (1996). Thus, we will disturb the Commission's ultimate decision regarding an appropriate fee award only if no reasonable person could agree with the position it adopted. *Young v. Illinois Human Rights Comm'n*, 2012 IL App (1st) 112204, ¶ 33.[2]

[2]Before proceeding further, we note that at various points during his argument, Anderson sets forth long, string cites of case law with little or no discussion of the actual cases relied upon. Morever, many of these cases are cited solely in a general fashion, with no pinpoint citation to the relevant portion of the cases. It has oft been stated that "[a] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented." *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 29. Such a careless approach to identifying and utilizing authority constitutes neither pertinent citation nor cohesive argument, and we will not consider such submissions.

¶ 122 We first turn to Anderson's argument that, as a matter of law, "a fee award must be adjusted to compensate for [a] delay in receiving payment." (Emphasis omitted.) Section 8A-104 of the Act (775 ILCS 5/8A-104 (West 2010)) states, in pertinent part:

> "Upon finding a civil rights violation, a hearing officer may recommend and the Commission or any three-member panel thereof *may provide for any relief or penalty* identified in this Section, separately or in combination, by entering an order directing the respondent to *** [p]ay to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees and expert witness fees incurred in maintaining this action before the Department, the Commission and in any judicial review and judicial enforcement proceedings." (Emphasis added.)

Despite the italicized language and without citation to authority, Anderson states that this section makes an award of attorney fees mandatory. Anderson's interpretation appears to conflict with the plain language of section 8A-104. See *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 611 (2011) ("[T]he statute uses the permissive verb 'may.' ").

¶ 123 More importantly, Anderson provides no basis for us to conclude that attorney fees must, as a matter of law, be calculated using current hourly rates. He identifies numerous policy reasons regarding why using current rates would be beneficial. See, *e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989). However, Anderson's contention that making an adjustment to account for a significant delay in payment of fees "is *most easily accomplished* by applying the current hourly rates" (emphasis added) is, in fact, an admission that there are other ways–though possibly not as easy--to account for delay. In any event, policy considerations are best addressed by the legislature. See

Board of Trustees of Public School Teachers' Pension & Retirement Fund of Chicago v. Kusper, 72 Ill. App. 3d 653, 657 (1979).

¶ 124 Furthermore, the Commission's decision is not based entirely upon the propriety of utilizing the historical rate rather than the current rate. Ultimately, regarding these rates, the Commission's application of its discretion was appropriate. The Commission noted that in some cases, using the current rate to calculate attorney fees is proper. See *In re Smith & Professional Services Industries, Inc.*, IHRC, ALS No. 3263 (May 7, 1993) ("In other words, where the difference between the historical and the current rate reflects more than the effects of inflation, it may not be appropriate to use the current rate. We are interested in reimbursing attorneys for the present value of the services that they rendered. Where the current rate reflects more than that, it should not be used."). In such cases, the use of current rates is justified by the delay in payment resulting in the loss of the opportunity for the attorney to use the money or the diminution in value of the fees awarded due to inflation. *Id*. It then observed that it was not appropriate to use an attorney's current hourly rate where the difference between the current rate and the historical rate can be attributed to other factors, such as a change in the value of the attorney's services for reasons including the fact that the attorney has become more experienced. *Id*.; see also *In re Raila & Domino's Pizza, Inc.*, IHRC, ALS No. 12016 (September 24, 2007) (holding an attorney is entitled to "the proper rate to be applied to the full fee request, absent an increase in the attorney's standard fee for a reason other than the natural operation of economic forces over time").

¶ 125 The Commission based its decision to use historical fees partially on the fact that "the vast majority of the work performed by [Anderson's attorneys] was done so [*sic*] when they were attorneys with two to seven years experience." On the other hand, the current hourly rate is based on the fact that they are now "attorneys with 14 years experience." In other words, the Commission

found that the difference in the current and historical rates was not simply the result of economic forces like inflation. Because a reasonable person could certainly agree with this position, the Commission did not abuse its discretion in choosing to rely on Anderson's attorneys' historical hourly rate. *Young*, 2012 IL App (1st) 112204, ¶ 33.

¶ 126 Additionally, the Commission's decision to use the historical rate rested on a second consideration. The Commission found that applying the current rate "would result in a fee award [that is] much too high considering the nature of the case." As noted above, a fee award should not result in a windfall to an attorney. *Brewington v. Illinois Department of Corrections*, 161 Ill. App. 3d 54, 70 (1987); see also *Akrabawi v. Carnes Co.*, 152 F3d at 695-96. A reasonable person could agree with the Commission that an award of fees approximately ten times the size of the award in the case would constitute such a windfall and that fees should be reduced accordingly. As such, no abuse of discretion occurred. *Young*, 2012 IL App (1st) 112209, ¶ 33.

¶ 127 IV. CONCLUSION

¶ 128 In light of the foregoing, the decision of the Commission is affirmed in its entirety.

¶ 129 Affirmed.