No. 3-09-0366

Order filed February 15, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

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| STELLA HIBBERD,<br><br>Petitioner-Appellant,<br><br>v.<br><br>CHIEF LEGAL COUNSEL, ILLINOIS DEPARTMENT OF HUMAN RIGHTS; ILLINOIS DEPARTMENT OF HUMAN RIGHTS; and MTF TISSUE SERVICES,<br><br>Respondents-Appellees. | ) | Administrative Review of the Chief Legal Counsel of the Illinois Department of Human Rights<br><br>Charge Nos. 2007 SA 1844<br>2007 SA 3810 |

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JUSTICE McDADE delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Schmidt dissented.

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**ORDER**

*Held*: Where the petitioner provided substantial evidence of age discrimination in the form of harassing comments and retaliatory discipline by her employer, the Chief Legal Counsel of the Illinois Department of Human Services abused his discretion in dismissing petitioner's charges.

Petitioner, Stella Hibberd, appeals the decision of respondent, the Chief Legal Counsel of

the Illinois Department of Human Services, dismissing her complaint against respondent, Musculoskeletal Tissue Foundation (MTF), under the Illinois Human Rights Act (Act) and the Age Discrimination in Employment Act (ADEA). For the reasons that follow, we reverse.

BACKGROUND

In January 2005 petitioner, then age 45, began employment with MTF as a tissue recovery technician. Petitioner eventually became a recovery technician team leader. In February 2006, Louis Jares, MTF's education director, informed Gaye Johnson, petitioner's supervisor, that petitioner's branch office had the company's highest surgical error rate in 2005, and that petitioner was the largest contributor to the error rate. Petitioner's branch's error rate was 21% compared with an overall error rate of 8% throughout the company. Jares asked Johnson to work with petitioner to formulate an action plan. That same month, Johnson received a complaint regarding petitioner's team's work. The complaint concerned the condition of an operating room after petitioner's team recovered tissue there.

In June 2006, petitioner filed an internal complaint with her employer against two coordinators, Jennifer Penn and Laurie Bushell, and against Johnson. Petitioner claimed discrimination and a hostile work environment due to a lack of communication, "fairness, consistence, and harassment." Petitioner complained that Bushell improperly disclosed confidential information to her and of intimidation of being fired at a staff meeting. Petitioner's complaint did not explicitly state that any of her complaints resulted from age-discrimination. After petitioner complained to her employer about the two coordinators in June 2006, one, Bushell, commented that "Syracuse, N.Y. won an award and they have all new staff. Maybe we would be better off with all new staff. Maybe that goes to show that you can't teach old dogs

new tricks." Later that June, petitioner and other older employees organized a meeting of the recovery technicians to document their complaints regarding their working environment. The meeting resulted in a list of complaints being presented to MTF's human resources department.

In July 2006, a representative from the human resources department conducted conflict resolution between management and employees. Also in July, petitioner participated in a review of her reports and agreed to make improvements in certain areas of her tissue procurement. In August 2006, petitioner received a congratulatory email regarding her work, but petitioner attributed the success to another employee.

In August 2006 petitioner signed the cover sheet of MTF's anti-harassment policy and watched a videotape on sexual harassment. In September 2006 coordinator Bushell requested that all team leaders, including petitioner, attend a retraining program facilitated by MTF's Education Director, Louis Jares. On September 14, petitioner entered the retraining program. The next day, Bushell reported petitioner for a work violation. On September 18, Bushell and Penn demoted petitioner from her position as a team leader. The reason given for petitioner's demotion was "repeat and multiple errors while performing the role [of] team leader." Petitioner complained to Johnson the next day. Petitioner claims that Bushell and Penn assigned another employee to work petitioner's previous work days. Along with the demotion, Bushell requested petitioner sign a form acknowledging that petitioner required retraining, after which her role as team leader would be reevaluated.

Petitioner was reluctant to accept retraining and submitted a written rebuttal. In her rebuttal letter, petitioner stated that she advocated any type of training, but that she believed her demotion was retaliatory and malicious. Petitioner believed her demotion was in retaliation for

"whistle blowing" to a coordinator regarding the falsification of records in a case in which that coordinator was involved. Petitioner also wrote a letter claiming she had done nothing wrong to merit corrective action. Petitioner claimed that she was asked to submit to retraining as discipline rather than for retraining purposes. Petitioner was suspended from work. The next day, however, on September 19, 2006, MTF reinstated petitioner as a recovery technician team leader. On September 22, petitioner received a form directing her to submit to retraining. This form stated that petitioner would continue to perform her duties as a recovery technician but would not perform as a team leader until she completed retraining and received a reevaluation. In response, petitioner did not sign the September 22 form but instead returned a hand-written response indicating her reluctance to sign the form for retraining as a team leader. The same day, petitioner sent three complaints via certified mail to the human resources director.

On September 27, 2006, MTF discharged petitioner from employment. In January 2007 petitioner filed three charges against MTF with the Illinois Department of Human Services (Department). She later added a fourth charge. Charge I alleged age-based harassment, charge II alleged that MTF subjected her to unequal terms and conditions of employment due to her age, charge III alleged that MTF discharged her because of her age, and charge IV alleged that MTF demoted her because of her age. In support of her charges, petitioner claimed that she was harassed at a meeting where Bushell alluded to a new staff and stated that you cannot "teach an old dog new tricks" (charge I). Petitioner also complained that MTF did not use its progressive disciplinary scheme, but summarily discharged her for misplacing a blood sample, and hired younger individuals immediately following her discharge. In comparison, MTF did not summarily discharge younger employees for more egregious errors (charge II). Petitioner claims

the real reason MTF discharged her was retaliation for her submission of grievances and MTF's age discrimination (charge III). Petitioner stated that she was well qualified for her former position and that she had performed her duties in a manner consistent with policy. Following her demotion, MTF replaced her as team leader with a younger employee whom she alleges committed the same quality and quantity of errors that allegedly lead to her demotion (charge IV).

The Department informed petitioner that her alleged whistle blowing did not provide grounds for a claim of retaliation. To support a claim for retaliation with the Department, the employer must have allegedly retaliated for an employee's opposition to discriminatory employment practices, and petitioner's whistle blowing was not opposition to a discriminatory practice.

MTF filed a verified response to petitioner's charges. It denied petitioner's specific charges and denied generally that petitioner was well qualified and performed consistently within policy. MTF stated that it demoted petitioner because of procedural errors in petitioner's paperwork, as well as other unspecified "violations of Company policy and procedure, and numerous other performance deficiencies." MTF stated that it discharged petitioner because she allegedly misplaced a blood sample and also because of other unspecified violations. Andrea Gonzalez, MTF's Assistant Director of Human Resources, signed the verified response.

The Department conducted an investigation into petitioner's charges. Penn, Bushell, and Johnson provided testimony at the fact-finding conference.

"When an employee files a discrimination charge against the employer pursuant to the Illinois Human Rights Act with the

> Department of Human Rights, the Department must conduct a full investigation of the allegations set forth in the charge and provide a written report of such an investigation. 775 ILCS 5/7A-102(C)(1), (D)(1) (West 2004). After reviewing the investigation report, the Department must determine whether there is substantial evidence that the alleged civil rights violation has been committed. 775 ILCS 5/7A-102(D)(2) (West 2004). Under the Act, substantial evidence is defined as evidence 'which a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance.' 775 ILCS 5/7A-102(D)(2) (West 2004). If the Department of Human Rights determines that there is no substantial evidence, the charge is dismissed. 775 ILCS 5/7A-102(D)(2)(a) (West 2004)." *Owens v. Department of Human Rights*, 403 Ill. App. 3d 899, 916 (2010).

In August 2008, following the investigation, the Department issued a notice dismissing petitioner's original three charges and her fourth charge regarding her demotion, all due to a lack of substantial evidence. The report concluded that charge I was based on ten instances of derogatory comments directed against petitioner or another recovery technician, Carol Unes, age 62. The report concluded that petitioner had complained about the derogatory comments but management did not respond. After petitioner complained about the derogatory comments, she and another employee filed their list of grievances. The list of grievance did not specifically list

age-based harassment. The grievance list did complain of harassment and intimidation.

The Department found a lack of substantial evidence of age-related harassment (charge I). The Department based its conclusion on its determination that two of the comments at issue were not directed at petitioner and five were not specifically age-related. Of the comments that were specifically age-related, the Department concluded that two were not sufficiently severe and pervasive to rise to the level of age-related harassment. The Department found that the comment about teaching "an old dog new tricks" was made at a meeting attended by all staff, not just petitioner and not just staff over 40 years old. The Department also found that petitioner failed to make a *prima facie* case of age-related harassment because the evidence proved that Bushell actually favored petitioner by sharing confidential information about other staff with her, and by calling petitioner in to work extra hours before younger staff.

The Department found a lack of substantial evidence that MTF subjected her to unequal terms and conditions of employment due to her age, or that MTF discharged petitioner because of her age (charge II, III). The Department found that MTF presented evidence of petitioner's performance deficiencies, complaints against petitioner by her team, and complaints from outside sources. MTF presented evidence that petitioner had a higher-than-average contamination record. MTF provided evidence that petitioner was subject to immediate discharge for disregarding policy and procedures in refusing to submit to retraining. The younger employee who replaced petitioner had a "much lower" error rate than petitioner. The Department also based its decision in part on the fact that in July 2006 petitioner admitted that she needed improvement, that MTF counseled petitioner with regard to her performance in compliance with its progressive discipline policy, but petitioner refused MTF's offer of retraining. The

Department found that it could not compare petitioner with other employees she alleged committed more egregious errors. One such employee did submit to retraining, and the other two, Bushell and Penn, were management.

The Department found a lack of substantial evidence that petitioner's demotion resulted from age discrimination (charge IV). The Department found that "[r]espondent followed its Progressive Discipline policy by demoting Complainant from Team Leader due to her error rate, counseling her, and giving her the opportunity to re-train in order to improve her performance."

Petitioner requested the Department's Chief Legal Counsel review the decision. Petitioner claimed error in the fact that the investigator who issued the findings was not the same investigator who interviewed her. Rather, the investigator issuing the report relied on the interviewer's notes. Petitioner further alleged error in that misinformation from the Department caused her not to file a claim of retaliation whereas the evidence supported finding that MTF had retaliated against her for reporting discriminatory wrongdoing by Bushell and Penn.

Petitioner noted additional evidence and discrepancies in the findings by the investigator. Petitioner alleged that Bushell and Penn were comparable employees because they shared her duties. She also noted that Johnson admitted she did not know when petitioner lost a blood sample. Petitioner pointed out that no one questioned her work until September 15, 2006, and that she had previously been unaware of any alleged performance deficiencies. Further, the outside complaint was not brought to her attention.

Petitioner also questioned the Department's reliance on contamination rates since she was allegedly demoted for paperwork errors as a team leader, not her performance as a recovery technician. Additionally, petitioner noted that MTF terminated Unes and replaced her with a

younger employee. Petitioner alleged this fact demonstrates a pattern of age discrimination. However, respondents argue to this court that Unes's discharge was not in evidence before the Chief Legal Counsel and petitioner cites no authority for this court to take Unes's discharge into consideration in reviewing its determinations. Petitioner specified other employee's actions which she claims also violate MTF's safety policy but did not result in discharge. Petitioner noted those facts in support of her claim that MTF discharged her because of her age and not because of her policy violations. Petitioner asserts that she did not receive training as a team leader before being demoted for unsatisfactory performance as a team leader. Petitioner also denied Bushell or Penn counseled her or gave her an opportunity to improve as team leader before demoting her.

In April 2009, the Chief Legal Counsel issued two orders upholding the Department's dismissal due to a lack of substantial evidence of (1) petitioner's original charges and (2) petitioner's additional charge stemming from her demotion as team leader. This appeal followed.

ANALYSIS

The Chief Legal Counsel found that petitioner (a) failed to present a *prima facie* case of (1) age-related harassment (2) unequal terms and conditions of employment related to discipline due to age, or (3) discharge due to age; (b) failed to show that MTF's stated reason of poor work performance as grounds for demoting petitioner was pretextual; and (c) failed to show that MTF's stated reason of petitioner's violating safety rules by refusing to be retrained as grounds for her discharge was pretextual.

> "[I]n evaluating charges of discriminatory hiring practices brought under this Act ([citation]), the Department of Human

> Rights and the Illinois appellate courts have adopted the three-part test employed by the federal courts in actions for employment discrimination brought under title VII of the Civil Rights Act ([citation]), as articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973).
>
> Under this three-prong test, the petitioner must first establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination. [Citation.] If a *prima facie* case is established, a rebuttable presumption arises that the employer unlawfully discriminated against the plaintiff. [Citation.] Second, to rebut the presumption, the employer must articulate, not prove, a legitimate, nondiscriminatory reason for its decision. [Citation.] Third, if the employer articulates such a reason, the plaintiff must prove, again by a preponderance of the evidence, that the employer's reason was untrue and was pretext for discrimination. [Citation.] Under this test, the ultimate burden of persuasion remains on the plaintiff throughout the proceedings." *Budzileni v. Department of Human Rights*, 392 Ill. App. 3d 422, 443 (2009).

The standard of review on appeal is whether the Department's Chief Legal Counsel abused his discretion, or the decision is arbitrary or capricious. *Budzileni*, 392 Ill. App. 3d at 442.

> "A decision is arbitrary and capricious only if it

> ‘contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an impossible explanation contrary to agency expertise.’ [Citations.]” *Budzileni*, 392 Ill. App. 3d at 442.

Petitioner argues that she provided substantial evidence of a work environment that was hostile to older workers, that she suffered supervisor harassment due to her age, and that her employer engaged in acts of retaliation based on her age and due to her complaints opposing age-discrimination. Respondents argue that this court should affirm the Chief Legal Counsel’s finding that petitioner failed to establish a *prima facie* case to support her charges.

> "A *prima facie* case for unlawful age discrimination is established by showing by a preponderance of the evidence that: (1) the complainant is a member of a protected class (age 40 or over); (2) the complainant was doing the job well enough to meet his employer's legitimate expectations; (3) he was discharged or demoted; and (4) similarly-situated younger employees were treated materially better." *Koulegeorge v. State of Illinois Human Rights Comm'n*, 316 Ill. App. 3d 1079, 1092 (2000).

Alternatively, respondents argue, if petitioner did establish a *prima facie* case, MTF proved nondiscriminatory reasons for its actions that were not pretextual.

HOSTILE WORK ENVIRONMENT (CHARGE I)

We first note that, to determine whether conduct violates the Act, examination of Federal law for guidance is appropriate. See *Sangamon County Sheriff's Department v. Illinois Human*

*Rights Comm'n*, 233 Ill. 2d 125, 138 (2009) ("Illinois courts have found it appropriate to examine federal decisions when construing the Act"); *Trayling v. Board of Fire and Police Comm'rs of Village of Bensenville*, 273 Ill. App. 3d 1, 11 (1995) (" the prohibition of sexual harassment found in the Act closely parallels that found in Title VII, and therefore examination of Federal law is appropriate").

Our court has found that "title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment. [Citations.]" *O'Sullivan v. Board of Comm'rs of Cook County Board*, 293 Ill. App. 3d 1, 11 (1997). The court has held that "there must be an objectively hostile or abusive environment and the victim must also subjectively perceive the environment as hostile or abusive. [Citation.]" *O'Sullivan*, 293 Ill. App. 3d at 11. "In determining whether the environment is objectively hostile, the totality of the circumstances should be analyzed. [Citation.]" *O'Sullivan*, 293 Ill. App. 3d at 11. The following factors are to be considered, but no single factor is required: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *O'Sullivan*, 293 Ill. App. 3d at 11.

Respondents argue that the majority of the complained-of comments--allegedly leading to a hostile work environment--were not related to petitioner's age and thus the evidence failed to establish a *prima facie* case of conduct "so pervasive that it constitute[d] a different term and condition of employment based upon a discriminatory factor" or a pattern of discriminatorily motivated incidents. Notably, the investigator did not find that comment about teaching "an old

dog new tricks" does not rise to the level of age-related harassment but discounted that statement because it was widely disseminated. The comments that the Department found were not age-related were that "you look stupid with those sunglasses and reading glasses on," "you are blind as a bat," "just lie down and go to sleep" (when the team lost directions on a case), "if I had the choice of taking you or [a 31-year-old-male Recovery Technician] on a case with me, who do you think that I would take," and a comment that MTF needed to "hire younger, stronger guys to carry supplies."

The Chief Legal Counsel found that the comments admittedly related to age were too trivial in number and egregiousness to rise to the level of creating a hostile work environment. In support of the Chief Legal Counsel's finding, respondents note that petitioner's list of grievances did not list age-based harassment or discrimination, and that all of the recovery technicians, regardless of age, joined in presenting the grievances.

Petitioner, appearing before this court *pro se*, argues that even if each individual complained-of statement is not actionable, taken as a whole, those statements support a charge of harassment and hostile work environment. Petitioner argues that her documented complaints provide objective evidence of her claim, whereas MTF lacks any evidence other than its denials. Petitioner argues that the overall evidence with regard to her charges is conflicting and the charge should proceed.

We find that petitioner stated a *prima facie* case for the existence of a hostile work environment toward older employees. The Chief Legal Counsel abused his discretion in failing to find "more than a mere scintilla but *** somewhat less than a preponderance" (see *Moren v. Illinois Dept. of Human Rights*, 338 Ill. App. 3d 906, 911 (2003), citing 775 ILCS 5/7A-

102(D)(2) (West 2002) (Frossard, J., dissenting)) of evidence of an objectively hostile or abusive environment that petitioner subjectively perceived as hostile or abusive (see *O'Sullivan*, 293 Ill. App. 3d at 11). The fact that the comments were allegedly trivial in number is not dispositive. Although the frequency of the discriminatory conduct is a factor, frequency of conduct is not required to find that the environment is objectively hostile. *O'Sullivan*, 293 Ill. App. 3d at 11.

The Chief Legal agreed with the investigator that the "new tricks comment" related to experience rather than age, and was not directed at petitioner but was made at a meeting with all staff. Counsel also found that the comment concerning petitioner's glasses, sleeping, and Penn's preference to work with a younger male employee did not appear age-related. We disagree with the Chief Legal Counsel's characterization and find that all of the aforementioned comments are age-related.

Moreover, the Chief Legal Counsel's attempt to excuse the "old-dogs" comment by calling it a reference to experience does not remove the perception of age-bias. Regardless, the Chief Legal Counsel's characterization of that comment is so contrary to human experience as to constitute an abuse of discretion. The Chief Legal Counsel may have meant that more experienced technicians, regardless of their age, are more reluctant to adopt new practices. However, the more-experienced technicians are more likely to be the older technicians. Thus, objectively, the taint of age bias remains in the comment.

The Chief Legal Counsel also abused his discretion because he erroneously relied on some of the comments rather than the cumulative effect of all of the comments and their context with regard to the work environment. "[A] hostile work environment results from the cumulative effect of individual acts." *Jenkins v. Lustig*, 354 Ill. App. 3d 193, 196 (2004). In this case, the

cumulative effect of the complained of comments was "to create a discriminatorily hostile or abusive working environment. [Citations.]" *O'Sullivan*, 293 Ill. App. 3d at 11. Individually, calling someone "blind as a bat" arguably might not be a reference to that person's age. However, that same comment, when judged next to a comment that younger employees are needed, even if not for their visual acuity, the comments "you are blind as a bat" and "just lie down and go to sleep" are revealed to be references to age.

The comments were not merely offensive, they were of a humiliating nature. The comments were not only meant to humiliate petitioner, the cumulative effect of the comments in their proper context constituted an objective threat to her continued employment when a supervisor stated explicitly her belief that the company should hire "younger, stronger" employees. There is no evidence to excuse this comment as a desire for more staff. Therefore, it can only reasonably be perceived, objectively, as hostility toward "older, weaker" employees' continued employment. Similarly, the suggestion in the "old-dogs" comment is not only that older, or more-experienced, technicians are unable or unwilling to adopt new procedures; but that, due to that fact (*i.e.*, due to their age), they should be replaced. The persistent implicit threat of replacing older, more-experienced technicians is hostile to their working conditions. These comments are not "trivial" and demonstrate a pattern of hostility toward older employees.

The Chief Legal Counsel abused his discretion in finding that the employer's comments were too trivial in number or egregiousness to state a *prima facie* case of a hostile work environment.

RETRAINING AND DEMOTION (CHARGE II and IV)

Petitioner argues that MTF discriminated against her when it demoted her, and when it

requested she submit to retraining before MTF eventually discharged her. Petitioner argues that her demotion, and the request to submit to retaining, were both adverse employment actions attributable to her age and her complaints of a age-hostile work environment. The Chief Legal Counsel found that MTF's stated reasons for demoting petitioner were errors in reporting and recovering donated tissue resulting in an inability to use recovered tissue. Counsel relied on the fact that in September 2006 a blood sample error occurred, petitioner took responsibility for the error as team leader, MTF ordered her to undergo retraining, and petitioner refused. The Chief Legal Counsel agreed that petitioner's contamination rate had improved, but noted that she acknowledged that she still needed improvement in that area. Her replacement as team leader had a lower contamination rate than petitioner. The Chief Legal Counsel found no evidence that MTF had failed to demote younger employees under similar circumstances.

The Chief Legal Counsel abused his discretion in finding that petitioner failed to state a *prima facie* case that her discipline (in being asked to submit to retraining) and demotion (from team leader) were not due to her age. Counsel abused his discretion because the decision "fails to consider a crucial aspect of the problem." See *Owens*, 403 Ill. App. 3d at 917. The crucial aspect of the problem in this case is petitioner's claim that she was only asked to submit to retaining because of her age.

First, reliance on petitioner's admission that she needs improvement was erroneous. The evidence establishes that many employees need improvement because there was evidence that petitioner's error rate was comparable to other employees, and that no employee had a perfect record. Second, respondents misdirect the inquiry by giving great weight to petitioner's refusal to submit to retraining as an independent ground to find that petitioner failed to establish a *prima*

*face* case, and as grounds to refuse to consider her evidence concerning other employees because those employees did submit to retraining. The question should have been whether the only distinguishing characteristic between petitioner and those other employees, with regard to the request petitioner submit to retraining and her demotion, is petitioner's age, and whether that characteristic was the basis of the employer's action.

Those employees who did submit to retraining may have done so because, regardless whether they objectively needed retraining or not, they did not perceive the request itself to be discriminatory and thus objectionable. We have already found the evidence sufficient to support finding a work environment that was hostile to older employees. Petitioner, therefore, could reasonably perceive the request to submit to retraining as objectionable regardless whether she objectively needed retraining. Petitioner's refusal to submit to what she reasonably perceived to be discriminatory conduct does not objectively refute a finding that she was discriminated against. Rather, absent an adverse credibility finding, petitioner's allegation that her refusal was on the grounds that MTF's request she submit to retraining was based on her age actually supports her claim.

Further, her assertion is supported by objective evidence, conceded by respondents, that "younger co-workers [also] had poor work performance." There is evidence that MTF treated younger employees with similar error rates better than petitioner. The final order found that:

> "[d]uring the course of [petitioner's] employment, 14.74% of the tissue [she] recovered could not be used due to [her] errors. This error rate was the 2nd highest out of 12, and exceeded [her younger replacement's] error rate of 10.06% (9th highest out of 12).

> Similarly, [petitioner] had reporting errors in at least ten different cases during her employment, whereas [her younger replacement] had reporting errors in seven different cases during his employment."

Petitioner's replacement as team leader's error rate is lower than her own but, within the context of all employees' error rates, it may be comparable. Petitioner argued that the younger replacement's error rates are comparable and provided circumstantial evidence to support that claim.

> "Circumstantial evidence that a petitioner could utilize to satisfy his burden of proof [includes]: *** (2) evidence 'whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic *** on which an employer is forbidden to base a difference in treatment received systematically better treatment' [Citation.]" *Koulegeorge*, 316 Ill. App. 3d at 1092-93.

The error rate of similarly situated employees in petitioner's branch office, combined with the environment Bushell and Penn fostered, is circumstantial evidence that their attempts to force petitioner to submit to training was not motivated by an effort to retrain her and to reduce her error rate, but to harass and ultimately to obtain grounds for her dismissal.

Although petitioner is required to show, by a preponderance of the evidence, that similarly situated younger employees were treated materially better, by expressly relying only on the static data, the Chief Legal Counsel discounted petitioner's circumstantial evidence that her

error rate lies within the employer's implicit acceptance level. In so doing, "the Department strayed radically from its proper role within the Illinois statutory scheme under the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.* (West 2002)) and functioned more like an adjudicative body than an investigative body." *Hoffelt v. Illinois Department of Human Rights*, 367 Ill. App. 3d 628, 638-639 (2006). Therefore, the Chief Legal Counsel abused its discretion.

PRETEXT FOR DISCRIMINATION

Respondents argue that the reasons for petitioner's demotion were not demonstrated to be pretexts for age discrimination. Specifically, they contend that a causal link between petitioner's formal complaints and the alleged act of age discrimination is missing because of the lapse of time between her submission of her written grievance list in July 2006 and her September 2006 demotion. The *pro se* petitioner argues to this court that "[t]he circumstantial evidence–that MTF was aware of the protected activity and that adverse employment actions followed the protected activity so closely in time as to justify an inference of retaliatory motive–is sufficient to establish the requisite causal connection between the protected activity and the adverse employment actions."

The Chief Legal Counsel abused its discretion in concluding that because petitioner in fact had a higher error rate than most other recovery technicians there was a lack of substantial evidence that MTF's stated reasons for demoting petitioner was a pretext for age discrimination. The evidence cited shows that, across the company, petitioner "was tied for eighth place out of twelve for contamination" in some cases, and "tied for tenth place" in others. We find that it is clearly against logic to find these facts are evidence that petitioner had a higher rate than "most other recovery technicians." See *Owens*, 403 Ill. App. 3d at 916 (" '[a]n abuse of discretion is

found when a decision is reached without employing conscientious judgment or when the decision is clearly against logic' "). Regardless whether petitioner's own safety errors negate her claim of age-based discrimination, her claims are sufficient to rebut the employer's claimed nondiscriminatory bases for its actions. We find evidence of pretext in (a) the fact that other employees had similar safety issues and (b) petitioner's reasonable belief as supported by circumstantial evidence that her retraining was based on age discrimination rather than a real desire to retrain.

This court has found that "pursuant to the *Morgan* doctrine, the entire pattern of harassment should [be] considered." *Hoffelt*, 367 Ill. App. 3d at 639, citing *National RR Passenger Corp. v. Morgan,* 536 U.S. 101 (2002). Based on the entire pattern of MTF's treatment of petitioner, including the fact that discriminatory comments by petitioner's supervisors provide a separate claim of a hostile work environment, we find that petitioner established a *prima facie* case of discrimination based on the request she submit to retraining and in her demotion from team leader. We further find that petitioner produced a preponderance of evidence that the employer's stated reasons for taking those actions were untrue and were in fact a pretext for discrimination. Thus, we find that petitioner has met her burden of persuasion.

DISCHARGE (CHARGE III)

Petitioner maintains that MTF discharged her as a result of age discrimination, and in retaliation for her submission of grievances and protests against age discrimination. Respondents argue that, absent evidence of a similarly situated worker being treated more favorably, *i.e.*, absent evidence of an employee refusing to be retrained and not being discharged, petitioner cannot establish a case of age-based discrimination. Respondents argue that, regardless of any

showing of age discrimination in her employment, with regard to the specific charge stemming from her discharge, the Chief Legal Counsel found a lack of substantial evidence that MTF's motivation for discharging petitioner was her age rather than her refusal to be retrained.

> "[T]o establish a case of retaliation under the Human Rights Act, petitioner must show that: (1) she was engaged in a protected activity; (2) her employer committed a material adverse act against her; and (3) a causal nexus existed between the protected activity and the adverse act." *Hoffelt*, 367 Ill. App. 3d at 634.

The Chief Legal Counsel found that petitioner failed to state a *prima facie* case of discrimination based on her discharge due to a lack of substantial evidence that MTF's motivation for discharging petitioner was her age rather than her refusal to be retrained. The Chief Legal Counsel found that petitioner failed to provide evidence that a younger employee had refused to be retrained and was not discharged. Thus there was no evidence that the basis of her discharge was her age rather than her refusal to be retrained.

The Chief Legal Counsel abused its discretion in basing its decision on MTF's claim to have discharged petitioner because of her refusal to submit to retraining and on a finding that because petitioner failed to produce evidence that a younger employee refused to be re-trained and was not discharged petitioner failed to show that a similarly situated younger employee was treated materially better. The Chief Legal Counsel's rationale is flawed in that it again fails to take into consideration a critical element of petitioner's claims: that MTF attempted to force her into retraining because of her age and not her performance, and in retaliation for petitioner's

stated opposition to the employer's age discrimination and the hostile working environment it engendered.

We have already found that petitioner's claims are supported by a preponderance of the evidence. We now find that those claims provide sufficient grounds to find that petitioner has shown by a preponderance of the evidence that her discharge stemmed from her employer's discrimination, and that, in this particular case, any evidence of whether similarly situated younger employees were treated materially better is inapposite. The Chief Legal Counsel viewed and applied MTF's request to submit to retraining objectively, but failed to adequately consider petitioner's assertion that the request to retrain was allegedly discriminatory in itself. Under those conditions, no younger employees were unjustly asked to submit to retraining and, consequently, no younger employees were unfairly placed in a position to refuse retraining.

Absent the evidence that MTF failed to apply its policies in a neutral manner, evidence of whether similarly situated younger employees were treated differently is relevant and, under *Koulegeorge*, is dispositive. There, for example, the petitioner argued that he presented sufficient evidence of direct discrimination through circumstantial evidence of systemic age discrimination. The court affirmed the dismissal of the charges of age-based discrimination based, in part, on finding that age was not a motivating factor in the company's conduct. The company had recently come under new management which initiated a reorganization. *Koulegeorge*, 316 Ill. App. 3d at 1094-1095.

However, in the context of petitioner's complaint, similarly situated younger employees provide no basis of comparison. Such an employee would not have been asked to submit to a discriminatory retraining request and would never be placed in a position to have to either submit

to discriminatory conduct or refuse the employer's request. As to whether petitioner's discharge was itself discriminatory, the dispositive question is not simply whether petitioner refused the request. The proper inquiry is whether the request was itself discriminatory and thus the discharge based on petitioner's refusal was also discriminatory. *Cf. Koulegeorge*, 316 Ill. App. 3d at 1094-1095 (" 'When an employer's decision is *wholly* motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears.' (Emphasis added.) [Citation.]").

Again, we have already found a preponderance of evidence that MTF's request was discriminatory. Her refusal to submit to discrimination should not be grounds for finding she was not discriminated against, but that is precisely what the Chief Legal Counsel has found. We refuse to accept such a draconian outcome.

Respondents also argue that the Department properly rejected petitioner's claim of retaliatory discharge because there is no evidence that petitioner engaged in a protected activity and no evidence of a causal link between any protected activity and her discharge. Respondents admit that if petitioner had complained about age discrimination and could demonstrate a causal link between those complaints and her discharge, she could state a charge of retaliatory discharge because complaining about age discrimination is a protected activity. See, *e.g.*, *Hoffelt*, 367 Ill. App. 3d at 638) ("she was engaged in a protected activity. It was uncontested that petitioner filed an internal complaint about [sexual] harassment").

However, respondents argue, the evidence is that petitioner was not complaining about age discrimination. Respondents rely on the fact that petitioner's grievance list "did not indicate that the harassment was age-related, her discharge occurred several months after she submitted

the list ***, and her rebuttal letters concerning retraining indicated that she believed its was her 'whistle blowing' *** that prompted her demotion and retaining requirement ***, which in turn resulted in her dismissal after she refused retraining." Further, the reasons for her demotion and discharge were not demonstrated to be pretexts for age discrimination. Regardless, petitioner would still be unable to demonstrate a causal link between her complaints and her demotion, the request she submit to retraining, or her discharge, because of the lapse of time between her submission of her written grievance list in July 2006 and her September 2006 discharge.

The June 2006 complaint to human resources resulted from a meeting of older workers and followed the supervisors' humiliating comments directed at older workers. We find that there is sufficient evidence that the substance of petitioner's complaints was age discrimination and, therefore, that petitioner was engaged in a protected activity. Petitioner's complaints preceded and in all likelihood precipitated materially adverse actions against petitioner. Respondents' argument about the lapse of time between petitioner's submission of those grievances, from July to September, and the allegedly discriminatory conduct, is unpersuasive. "[T]emporal proximity between a protected activity and an adverse action has been considered. A case of retaliatory discharge can be established by showing a short time span between the filing of a discrimination charge and the employer's adverse action." *Hoffelt*, 367 Ill. App. 3d at 638.

In *Hoffelt*, the time span between the protected activity, in that case complaints of sexual harassment, and the start of the alleged acts of retaliation was three months. See *Hoffelt*, 367 Ill. App. 3d at 638. In *Maye v. Human Rights Comm'n*, 224 Ill. App. 3d 353 (1991), cited by *Hoffelt*, the court similarly found that a "three month time period between the filing of [a] discrimination

charge and [the retaliatory act was] sufficiently suspect to establish a case of retaliatory discrimination when reviewed in the context of all the facts ***." *Maye*, 224 Ill. App. 3d at 362. We find, under the aforementioned authorities, that the conduct by the employer forming the basis of petitioner's charges occurred so close in time to petitioner's protected conduct to infer retaliatory motive and to establish a causal connection between petitioner's protected conduct of complaining of age discrimination and the employer's adverse employment actions.

The Chief Legal Counsel found that the charges properly do not include a charge of retaliation because petitioner had the opportunity to amend her charge to include her retaliation allegation but failed to do so. The Chief Legal Counsel found no evidence in the record that petitioner requested that the Department amend her charge to include her retaliation allegation. But the Chief Legal Counsel also found that "[t]he Department's intake investigator informed Complainant that her retaliation allegation would not be included in her charge because the Act only covered acts of retaliation for opposing unlawful discrimination." The evidence is sufficient to state a *prima facie* case of retaliation for opposing unlawful discrimination. *Hoffelt*, 367 Ill. App. 3d at 634. The intake investigator mistakenly prevented petitioner from asserting all of her rights under the Act. Accordingly, on remand, petitioner may amend her charge to include retaliation. See *Weatherly v. Illinois Human Rights Comm'n*, 338 Ill. App. 3d 433, 439 (2003).

PROCEDURAL DUE PROCESS CLAIMS

Finally, petitioner argues that she was denied due process because Andrea Gonzalez, MTF's Assistant Director of Human Resources, appeared at the fact finding conference to deny the charges. Petitioner also argues that the Department denied her right to due process because Jares failed to appear, Gonzalez denied the charges, and because a second investigator completed

the investigation and issued the recommendation to dismiss the charges. Petitioner argues that MTF should have been found in default and to have admitted the charges based on Jares's failure to appear at the fact-finding conference and the fact that Gonzales was "an individual unknown [to her] and with no prior approval to appear." Petitioner argues MTF should have been found in default because, as a result, the "[c]harges were not read and denied by those individual directly responsible ***," and MTF failed to appear.

Respondents argue that the same person who verified the response to the charges denied the charges at the fact finding conference. Respondents argue that the director of human resources's appearance and denial of the charges comports with due process. Due process did not require Johnson, Penn, and Bushell to each read MTF's denial of petitioner's charges. More importantly, Johnson, Penn, and Bushell, the parties petitioner claims to be directly responsible for the discrimination, addressed her charges and denied them at the fact-finding conference. Respondents also argue that petitioner failed to argue that she was prejudiced and failed to object at the conference.

We find that petitioner received due process in the investigation and review procedure. First, petitioner lacks authority for her position that a second investigator may not conclude an investigation begun by the person who started the investigation. Nor can we find that any prejudice resulted from the fact that a second investigator completed the investigation report. Petitioner was not denied due process by Jares's failure to appear at the hearing or by the fact that Gonzalez entered the denial of the charges. Neither occurrence constitutes a failure to appear or, consequently, an admission of the charges.

In *Chicago Transit Authority v. Illinois Dept. of Human Rights*, 169 Ill. App. 3d 749, 754

(1988), the court found that the respondent "chose to be represented exclusively through an attorney who had no first-hand knowledge of the facts which ultimately led to [the] discharge." Section 4.4(c) of the Department's rules and regulations states that a party who appears at the conference exclusively through an attorney or other representative unfamiliar with the events at issue shall be deemed to have failed to attend. Thus, in that case the Department gave the respondent an opportunity to show good cause for their statutory "non-attendance." The Department determined that the C.T.A.'s reasons were insufficient to show good cause for its failure to attend. Accordingly, the Department found the C.T.A. in default of the charge and determined the allegations in favor of the petitioner. *Chicago Transit Authority*, 169 Ill. App. 3d at 752.

The court affirmed, finding that:

> "As the Commission aptly observed:
>
> > 'Since the Respondent's attorney could not give direct evidence of what occurred, the Department's investigator would not be in a position to find out what the Respondent actually knew about the instant case. Instead, all the investigator would be left with would be a second hand account of the Respondent's official version of

the facts ***." *Chicago Transit Authority*, 169 Ill. App. 3d at 752.

In this case, petitioner can not point to what relevant and material first-hand information Jares possessed that Johnson, Penn, and Bushell did not. Petitioner only mentioned Jares in her request for review of the Department's dismissal of her charge that MTF demoted her due to age because its stated reason–petitioner's poor performance–was pretextual. Here, the employer attended the fact finding conference in the form of several witnesses with firsthand knowledge of events, including Bushell and Penn. Petitioner alleges that it was Bushell and Penn who attempted to cajole her into accepting the retraining that Jares simply would have administered. There is no evidence to suggest that Jares had a role in suggesting training based on anything other than the error rates.

Moreover, the court found that

> "[t]he rule defines what will be deemed as a 'failure to attend' the fact finding conference for purposes of dismissal or default. The rule directs that only those parties familiar with the events at issue will be deemed to have appeared at a fact finding conference. Refusal to produce witnesses at the fact finding conference who are familiar with the events hampers the Department's investigation, is an unnecessary expenditure of time and money, and is tantamount to no appearance whatsoever." *Chicago Transit Authority*, 169 Ill. App. 3d at 754.

In this case the parties most familiar with the events at issue appeared at the fact finding

conference. We find that the initial investigation and the review by the Chief Legal Counsel comported with due process. Nonetheless, because we find that the Chief Legal Counsel abused his discretion in dismissing petitioner's complaint, that decision is reversed and the cause remanded for further proceedings.

CONCLUSION

The decision of the Chief Legal Counsel is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

JUSTICE SCHMIDT, dissenting:

The majority acknowledges that our review is deferential as we review this matter under the abuse of discretion standard. Slip op. at 10. However, the majority shows the chief legal counsel of the Illinois Department of Human Rights (the Department) no deference whatsoever.

The chief legal counsel to the Department found petitioner failed to state a *prima facie* case of age-related harassment or discharge due to age. The majority acknowledges that to state her *prima facie* case, petitioner bore the burden of persuasion to show she "was doing the job well enough to meet [her] employer's legitimate expectations." Slip op. at 11. It is undisputed, and again the majority acknowledges, that "petitioner's branch's error rate was 21% compared with an overall error rate of 8% throughout the company." Slip op. at 2.

Petitioner's branch's error rate was closer to three times the company average than twice the company average. Clearly, this provided the chief legal counsel with a sufficient basis to determine that she failed to meet her burden of showing she was doing her job well enough to meet her employer's legitimate expectations. "An abuse of discretion is found when a decision is

reached without employing conscientious judgment or when the decision is clearly against logic." *Budzileni*, 392 Ill. App. 3d 422, 442, citing *Bodine Electric of Champaign v. City of Champaign*, 305 Ill. App. 3d 431, 435 (1999). I cannot say that the chief legal counsel's decision was arbitrary and capricious or an abuse of discretion. It is not "clearly against logic" to think that an employee with an error rate of more than twice the company average cannot prove she was adequately performing her duties. "[W]e may not reweigh the evidence or substitute our judgment for that of the Department. [Citation.] Our review is limited to deciding whether the chief legal counsel's *** decision dismissing the claim *** is 'arbitrary and capricious or an abuse of discretion.'" *Welch v. Hoeh*, 314 Ill. App. 3d 1027, 1034 (2000). In proper deference to the chief legal counsel, I find the decision to dismiss petitioner's complaint was not an abuse of discretion.