STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
Paula Palmer,	)	
	)	
Complainant,	)	CHARGE NO(S): **2011CN4018**
	)	EEOC NO(S): **440-2011-04097**
and	)	ALS NO(S): **18-0333**
	)	
BIR Training Center,	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above-named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

Entered this October 11, 2023

Tracey Fleming
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
PAULA PALMER,	)	
	)	
Complainant,	)	**Charge No.: 2011CN4017**
	)	**Charge No.: 2011CN4018**
and	)	**EEOC No.: 440-2011-02801**
	)	**EEOC No.: 440-2011-04097**
	)	**ALS Nos.: 18-0329 & 18-0333**
BIR TRAINING CENTER,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing held on August 30, 2022. Both parties appeared and participated in the evidentiary hearing and filed post-hearing briefs. The parties agreed that evidence would be heard on two separate cases simultaneously, ALS. 18-0329 and ALS No. 18-0333, despite not being consolidated as one case.

Introduction

On February 12, 2010, Complainant, Paula Palmer, was hired as a part-time tutor by Respondent, BIR Training Center, an educational center that provided "English as a Second Language" classes to post high school age students. Complainant was first assigned at the Devon location, and later, on March 1, 2010, she was transferred to the Chicago location.

Complainant alleges in her first filed complaint, cited as ALS No.18-0329, that Respondent "harassed" her, because of her sex, female (Count I); age, 45 years old at the time of the pled events (Count II); that she was retaliated against for complaining about illegal harassment (Count III); and she was constructively discharged because of her sex and/or age (Count IV & Count V); and/or constructively discharged because of retaliatory harassment (Count VI).

Complainant alleges in her second filed complaint, cited as ALS No. 18-0333, that from December 11, 2010, through March 1, 2011, she was paid fifty cents per hour (.50) less than a male tutor, Ian Turner, because of her sex and/or age (Count I & Count II).

FINDINGS OF FACT [1]

Analysis

Harassment Standard

To establish a *prima facie* case of sex, age, and/or retaliatory harassment, Complainant must prove: 1) she was subjected to illegal harassment; 2) the illegal harassment was based on her participation in a protected activity (retaliation), and/or because her sex is female, and/or her age was 45 years old; 3) the harassment suffered was severe and pervasive enough to alter the conditions of her employment and to create a hostile and abusive working environment; and 4) there was a basis for employer liability. Lever and Wal-Mart Stores Inc., IHRC, ALS No. S-10697, January 2, 2001.

Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission, 184 Ill.App.3d 339, 541 N.E.2d 1248 (1st Dist. 1989), sets forth an analysis concerning the quality and quantity of the alleged harassment torment: "Harassment has been defined to include a steady barrage of opprobrious comments. More than a few isolated incidents of harassment, however, must have occurred; comments that are merely part of the casual conversation, are accidental, or are sporadic do not trigger civil rights protective measures." A decision must include a review of 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." Id.

[1] The following facts were derived from the record file in this matter, as well as from testimony and exhibits admitted at the public hearing.

The court reminds the employee that "Title VII is not a civility code" and that can also be said for the Illinois Human Rights Act. "If all real, perceived, or contrived work related stress were actionable, then, nearly every employee would have a cause of action." Patton v. Keystone RV Co, 455 F.3d 812, 816 (7th Cir. 2006).

Complainant bears the burden to prove each element of her *prima facie* case by the preponderance of the evidence, but here she has failed to do so. Section 5/8A – 102 (I)(1) of the Illinois Human Rights Act (Act). Complainant is also required to identify precisely the 'unlawful employment practice' of which she objects," but here too, Complainant falls short of adequate foundational specificity. Lee v. Illinois Human Rights Commission, 128 Ill.App.3d 666, 467 N.E.2d 943 (1st Dist. 1984).

The first element is 2/3 undisputed. Complainant is female and was over forty years of age at the time of the events pled, but she failed to prove that she participated in a protected activity. As discussed below, Complainant complained, a lot, and often, but failed to communicate to Joseph Hester (Hester), the Learning Center's Coordinator/Manager or Zinaida Bousson (Bousson), Human Recourses/Business Manager, that her complaints were based on her age or gender. In addition, the credible facts learned during the public hearing prevent Complainant from any ability to prove the remaining elements of her *prima facie* case.

According to Complainant, her litany of workplace grievances, were created by "[A] number of unruly students, remedial students," a couple of counselors, and a tutor:

> A month after being hired, a bunch of students at the Devon location were shaking a soda machine … I (Complainant) asked them what they were doing. I felt I was targeted to be harmed.
>
> A student said, 'I need a pencil.' And I said, I'm sorry, I don't have a pencil, I'm using it right now, but you can use a pen. The student said, 'you better watch yourself, bitch.'
>
> I stopped a non-student from using a computer. Management should do better in enforcing the badge rule. Hester had told [Complainant], "'Don't police the learning center.'"

Complainant also testified about her grievances against Counselors Casha Patek, Victor Peter, and Ensar Sidel:

> Casha Patek told Complainant to stop taking "Highlighters" from the counselor's supply cabinet and cease using their copier, because tutors have their own supplies and copier.
>
> Ensar Sidel, would walk behind Complainant while she was making copies in the counselor's office, and under his breath, whisper, "better watch yourself."
>
> Complainant, while she was using the copier in the counselor's office, was interrupted by a counselor before she completed her task.
>
> After Complainant complained about Victor Peter's objection to her continued use of the resources in the Counselor's office, Peter told Complainant, "Not to turn my (Complainant) sweater inside out, missy." Peter also blocked the entrance to the restroom, "[A] result of my (Complainant) complaint against him."
>
> Complainant demanded computer training from management but did not know whether training was available to the tutors. The basis for Complainant's complaint was because "they (the other tutors) knew more."
>
> Hester stopped Complainant from using British English material to tutor her students.

Unfortunately for Complainant, even assuming her version of events were found to be true, they were "trivial harms" and "petty slights" and "minor annoyances." Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). In addition, "General hostility and comments do not qualify as adverse action unless the hostility is severe and pervasive." Lever, supra. The difficulties Complainant had with students and other faculty members was primarily caused because Complainant did not get her way, or she intervened where and when inappropriate, or contributed, in some way, to generate her own antagonistic environment, including being oversensitive to the human equation, but not because of her age or gender or in retaliation. In fact, when the subjects of age or gender was raised during Complainant's testimony, she responded as if those topics were rehearsed afterthoughts or to a prompted question reminding Complainant to add them into her testimony. There must be adequate evidence that the alleged harassment was motivated by an impermissible intent to discriminate against her age, or gender, or retaliate and those instances must reach the level of being

materially adverse. Canady and Caterpillar, Inc., IHRC, ALS No. S8795, March 17, 1998. "[W]here the adverse impact is mostly 'subjective,' the employment action at issue is not cognizable." Papa and Madison County Sheriff's Department, IHRC, ALS No. 9894(S), June 9, 2000. The subjective perceptions of the employee are also discounted by the court. Id. citing Fortner v. State of Kansas, 934 F.Supp. 1252 (D. Kan. 1996). Thus, the actions testified by Complainant were insufficient to prove illegal harassment.

After taking of all testimony and exhibits into account, Complainant has failed to prove, by the preponderance of the evidence that, because of her sex, female, or age, 45 years old, or retaliation, she was illegally harassed in the workplace.

Retaliation

To establish a prima *facie case* for retaliation, an employee must show the following: 1) she engaged in protected activity; 2) the employer "committed a material adverse act' against her; and 3) there was a "causal nexus …between the protected activity and the adverse act." Hoffelt v. Illinois Dept. of Human Rights, 367 Ill.App.3d 628 (5th Dist. 2006).

As discussed above, Complainant has failed to prove that she objected to discriminatory conduct to management, or management caused or were behind any retaliatory acts. In fact, Complainant admitted, "I don't remember being harassed, stating specifically that someone from management had harassed me. I don't remember stating that. It was employees and students."

Further, Bousson testified credibly: Q. Did you ever come into any knowledge regarding problems that the staff and/or students were having with Ms. Palmer?

A. I had knowledge of it yes. I had knowledge.

Q. What is your recollection of problems that staff was having with Ms. Palmer?

A. It was reported to me. I had emails from various maintenance, management, personnel managers on duty, student services and others that Paula had problems with many people, that she has incidents.

Hester was also asked: Q. "And did you ever receive any complaints regarding Ms. Palmer?

> At some point, it was almost on a weekly basis or even more sometimes. Sometimes Paula would bring things to my attention, so I don't want to say it was all other people complaining about Paula. But it was coworkers and staff like counselors in the office, other instructors. But again, you know, there were times when Paula brought it to my attention, but a lot of times, it was brought to my attention by other staff members.
>
> And every time something happened, I did my best to address it. I tried to talk to both parties and hear both sides and tried by best to resolve it, although you know, its not easy because it was like he-said, you know, Its's really hard. I wasn't there to know who's telling the truth or what exactly happened. But I had been for five years running the tutoring center, and I had never had so many complaints, so many issues all over petty things like copy machines and pencils and supplies that I had with Ms. Palmer.

Bousson and Hester testified credibly that Complainant did not bring up age or gender harassment or discrimination. "Where the employer does not have any knowledge of the opposition to illegal discrimination by the Complainant prior to the adverse action, a nexus does not exist." Erlandson and City of Evanston Police Department, IHRC, ALS No.10373, June 14, 2000. Thus, Complainant failed to prove that she participated in a protected activity and any nexus to any adverse material act.

Despite Hester or Bousson being unaware of any claims of discrimination or being involved in any alleged retaliatory acts, or through named individuals, Complainant has failed to prove that any alleged act cited could have "dissuaded a reasonable worker from making or supporting a charge of discrimination." Hoffelt v. Ill. Dep't of Human Rights, 367 Ill. App. 3d 628, 867 N.E.2d14 (1st Dist. 2006).

Therefore, after taking all testimony and exhibits into account, Complainant has failed to show, by the preponderance of the evidence that she was retaliated against in the workplace, because she has established any of the elements of a *prima facie* case of retaliation.

Constructive Discharge

"Constructive discharge occurs when an employer *deliberately* makes an employee's working conditions so intolerable that the employee is forced to resign involuntarily, and when that happens, the employer is liable for any illegal misconduct as if it had formally discharged the aggrieved employee." (Emphasis added) O'Malley and Metropolitan Water Reclamation

District of Chicago, IHRC, ALS No. 8381, March 20, 1997, citing, Board of Directors, Green Hills Country Club v. IHRC, et. al., 162 Ill.App.3d 216, 514 N.E2d 1227, (5th Dist. 1987). In applying this definition, Illinois courts have adopted the "reasonable person" test to determine whether an employee was constructively discharged. O'Malley, supra, citing, Bernstein v. Consolidated Foods Corp., 622 F.Supp. 1096 (N.D. Ill. 1984).

Because the circumstances here do not rise to the level of illegal harassment or retaliatory conduct, the cause of action for constructive discharge cannot be established. While the working conditions at the Respondent was not as Complaint preferred, the Complainant has not presented any evidence that the respondent *deliberately* created a hostile environment to force the Complainant to resign. Nonetheless, it is credible that Complainant separated from Respondent's employment for the reason given to Bousson and Hester, that is, that she accepted a "better job …a different job."

After taking all testimony and exhibits into account, Complainant has failed to show, by the preponderance of the evidence that she was constructively discharged.

ALS No. 18-0333 – Unequal Pay

On October 17, 2018, a second complaint was filed on behalf of Complainant. It alleged that from December 11, 2010, through March 1, 2011, Respondent's pay was unequal to that of Ian Turner, tutor, by fifty cents (.50) because of her sex and age in violation of Section 2-102(A) of the Act.

However, both Hester and Bousson credibly testified that Turner received a .50 cent raise due to his extra work in the development, initiation, and maintenance of a computer student tracking system for all three Respondent's campuses. At first, Turner simply volunteered at no cost to Respondent, over and above his tutorial duties, but Respondent felt a .50 cent raise per hour was an act of "appreciation" for a computer program that proved to be of great benefit to Respondent's operations.

Under the Act, unequal pay claims are evaluated using the same three-prong test as any other employment discrimination claims. The Complainant must first establish her *prima facie* case of discrimination, at which point the burden shifts to the Employer to articulate a legitimate, non-discriminatory basis for its decision. The burden then shifts back to the Complainant to prove that the Employer's reason is mere pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); adopted by Illinois Supreme Court in Zaderaka v. Human Rights Comm., 131 Ill. 2d 172, 179 (1989). See also Illinois State Bd. of Elections v. Illinois Human Rights Comm'n, 291 Ill. App. 3d 185, 193 (4th Dist. 1997) (applying the three-part test in Zaderaka to unequal pay claims under the Act, rather than the standard set forth under the Equal Pay Act). The elements of the *prima facie* case are as follows: (1) the Complainant is a member of a protected class; (2) she was performing her job satisfactorily; (3) she was subject to an adverse action; and (4) a similarly situated employee outside her protected class was treated more favorably under similar circumstances. Marinelli v. Human Rights Comm'n, 262 Ill. App. 3d 247, 253 (2d Dist. 1994).

"Jobs do not entail equal effort, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which 1) require extra effort; 2) require extra time… 3) are of an economic value commensurate with the pay differential. Illinois State Bd. Of Elections v Illinois Human Rights Commission, 291 Ill.App.3d 185, 683 N.E.2d 1011, appeal denied, 689 N.E. 2d 1139 (1997).

Turner is not a similarly situated employee because he took on "extra work," i.e. the computer programming project which Complainant does not deny. Turner also has a Batchelor's degree, while Complainant does not. Therefore, there is no evidence that Respondent paid Complainant unequally because of her sex or age. [2]

[2] Complainant testified that Turner held the position of "lead tutor," a position denied existed by Respondent. Complainant then testified how she was better for the position and should have been considered for it. Because Complainant has failed to file a claim of discriminatory promotion, her testimony whether a "lead tutor" position exists or whether she

After taking of all testimony and exhibits into account, Complainant has failed to show, by the preponderance of the evidence that she was earning an unequal wage because of her sex or age.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.

2. At the time of the incidents complained of Complainant was an employee as defined by the Illinois Human Rights Act (Act).

3. At the time of the incidents complained of Respondent was an employer as defined in the Act.

4. Complainant has failed to establish a case of sex or age harassment.

5. Complainant has failed to establish a case of retaliation.

6. Complainant has failed to establish that she was constructively discharged.

7. Complainant has failed to establish that her wage was unequal because of sex or age.

RECOMMENDATION

Based on the forgoing analysis, I recommend that the instant complaints and underlying charges be dismissed with prejudice.

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should have been selected for the position, has no bearing on this case. In any respect, one could argue, if Turner was the "lead tutor," such a difference would disqualify him as a comparable outright.

ENTERED: July 24, 2023

HUMAN RIGHTS COMMISSION

BY:

WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION