STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
Ricky Dobson,	)	
	)	
Complainant,	)	CHARGE NO(S): **2021CF0876**
	)	EEOC NO(S): **21BA10380**
and	)	ALS NO(S): **22-0064**
	)	
BrandSafway, LLC,	)	
	)	
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 June 11, 2024

Tracey Fleming
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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RICKY DOBSON,	)	
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Complainant,	)	
	)	**Charge No.: 2021CF0876**
and	)	**EEOC No.: 21BA10380**
	)	**ALS No.: 22-0064**
BRANDSAFWAY, LLC,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes to be heard on Respondent's Motion for Summary Decision. Respondent attached a copy of Complainant's deposition and exhibits, including the complaint and Illinois Department of Human Rights (Department) Investigative Report (Report). Respondent also attached to its motion the Declaration of Alberto Bibian (Bibian), who was Respondent's Site Manager and Complainant's supervisor, and Respondent's Objections and Answers to Complainant's Interrogatories.

Complainant filed his response, which referenced Respondent's exhibits, the complaint, the Report, and portions of Complainant's deposition. Although Complainant references lettered exhibits, none were attached to his response.

Respondent chose not to file a reply. The matter is ready for decision.

Introduction and Contentions of the Parties

On March 4, 2022, Complainant filed a five-count complaint with the Illinois Human Rights Commission (Commission), as follows:

Count One, National Origin (United States) discrimination for an unspecified period, the Site Manager Bibian allegedly prioritized "Spanish speakers for overtime," which then created "disparity in pay and opportunity," as the Complainant "lacks fluency in Spanish."

Count Two, Race (Caucasian - White), and Count Three, National Origin (United States), allege that Respondent discriminated against Complainant because of his race and national origin on March 19, 2020, when he was "laid off" in Respondent's Reduction-In-Force (RIF).

Counts Four and Five allege that the Complainant was not "rehired" after being laid off in the March 19, 2020, RIF, because of his national origin and race.

All counts allege a violation of Section 2-102(A) of the Illinois Human Rights Act (Act).

Respondent contends that Complainant failed to file his "overtime" charge of discrimination with the Department within the statutory jurisdictional 300 days, as required by Section 7A-102 of the Act.

Respondent also argues that Complainant has not produced adequate, admissible evidence to sustain the elements for a *prima facie* "national origin" and "race" causes of action, and in the alternative, contends that Complainant has failed to show pretext with the non-discriminatory reason for Respondent's RIF, as it was based on the economic downturn caused by the Covid pandemic.

Finally, Respondent contends that the Complainant failed to "reapply" for a position so he could be considered for "rehire" after the March 19, 2020, RIF. Further, Complainant's inquiry on July 20, 2020, "Are you going to call me back or should I be looking for another job?" and Babian's response, "At the moment, I don't see calling you back," was based on an assessment considering Complainant's position as a Helper, lack of a business need for such a position at the Morris job site, and given Complainant's demand for an immediate return date.

DETERMINATION

For the reasons discussed below, Respondent's motion for summary decision is GRANTED, and judgment is entered in Respondent's favor as a matter of law.

Preliminary Matter

The Department and Commission are Separate Agencies

Both parties have referenced the Department's Report. The Department is a separate state agency from the Illinois Human Rights Commission (Commission) and its Administrative Law Section (ALS). Both agencies have their own distinct statutory purpose, standard, and procedure. Svenkerud and Flexible Steel Lacing Co., IHRC, ALS No. 8358, August 12, 1996.

The Report is an unsworn document, patently hearsay, and not the competent, admissible evidence required to support a party's position on summary decision. Harris and Rush-Presbyterian-St. Luke's Medical Center, IHRC, ALS No. 9885, August 18, 1998, citing Standard Oil Co. v. Lachenmyer, 6 Ill.App.3d 356, 285 NE.2d 497 (1st Dist.1972); Loveland v. City of Lewis Town, 84 Ill.App.3d 190, 405 N.E.2d 453 (3d Dist. 1980).

Once a complaint is filed with the ALS of the Commission, the parties are provided with the same discovery, cross-examination, and other elements of due process, which are largely unavailable in the Department's investigative process or the Commission's appellate proceedings. Jabbari v. Human Rights Com., 173 Ill. App. 3d 227, 527 N.E. 2d 480 (1st Dist. 1988). Therefore, any reference to the Department's investigative process or Report in either party's brief shall be disregarded.

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 620 N.E.2d 1200 (1st Dist. 1993). A motion for summary decision should be granted when there is no genuine issue of material fact, and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 642 N.E.2d 486 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76

Ill.App.3d 453, 395 N.E.2d 6 (1st Dist.1979). Although not required to prove his case as if at a hearing, the non-moving party must provide some factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 608 N.E.2d 920 (4th Dist. 1993). Only facts supported by evidence, not mere conclusions of law, are considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 567 N.E.2d 629 (2d Dist. 1991). If a respondent supplies uncontroverted sworn facts, it warrants judgment in its favor as a matter of law, and the complainant may not rest on his pleadings to create a genuine issue of material fact. Fitzpatrick, supra. The facts must be accepted as true where the party's affidavits stand uncontroverted. Therefore, a party's failure to file counter-affidavits in response is frequently fatal to his case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 681 N.E.2d 156 (4th Dist.1997). Since a summary decision is a drastic means of resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 489 N.E.2d 867 (1986).

DISCRIMINATION – STANDARD

There are two methods for proving employment discrimination: direct and indirect. Sola v. Human Rights Comm'n, 316 Ill.App.3d 528, 536, 736 N.E.2d 1150 (1st Dist. 2000). Because there is no direct evidence of employment discrimination in this case (*e.g.*, a statement that Complainant was laid off because of his national origin or race, or "rehire" was based on national origin or race, or overtime was based on national origin the indirect analysis is appropriate here.

The analysis for proving employment discrimination through indirect means was described in the U.S. Supreme Court case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and is well established. First, Complainant must make *prima facie* showing of discrimination by Respondent. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If he does, Respondent must articulate a legitimate, nondiscriminatory reason for its actions. Id. If Respondent does so, then Complainant must prove by a preponderance (at the public hearing) (here, "some evidence" – Birck, supra.) of evidence that Respondent's

articulated reason is merely a pretext for unlawful discrimination. Id. This analysis has been adopted by the Commission and approved by the Illinois Supreme Court. See Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172, 545 N.E.2d 684 (1989).

National Origin - Standard

Complainant has pled the protected class of national origin for Counts One, Three, and Five. Generally, a complainant alleging discrimination based on national origin will establish a prima facie case of disparate treatment by showing that 1) he/she is a member of the particular national group, 2) he/she was treated in a particular manner by his/her employer, and 3) that similarly situated individuals who were not a member of the same national origin group were treated differently under similar circumstances. Josef Olejuniczak and E.W. Kneip. Inc., 11 Ill. HRC Rep. (January 30, 1984) Joe Y. Nerio and Ipsen Indus., 10 Ill, HRC Rep. 279, 294-295 (December 23, 1983).

The failure to demonstrate one of the required prima facie elements defeats the Complainant's discrimination claims, and it is not necessary to analyze the articulated reasons advanced by the employer or to determine if the articulated reasons were pretextual. Boston and City of Decatur, et al., 13 Ill. HRC Rep. 25 (1984).

Language is Not a Statutory "Place"

Complainant Misinterpretes the Statutory Definition of National Origin

Complainant pled that "on many occasions," Alberto Vivian (presumedly a misspelling of Bibian) "specifically made requests for overtime in the Spanish language," and "By singling out Spanish-speakers for overtime, the Respondent, by and through its agents ALBERTO VIVIAN (upper case is used in the allegation, including the misspelling of Bibian) and others, created a disparity in pay and opportunity between the Complainant and individuals of other national origins." After a plain reading of the allegation, which continues throughout each of the Counts of the complaint and his response, Complainant attempts of create an *ultra vires* protected class

or attempts to unilaterally redefine the statutorily protected class of “national origin” to mean “language” or to be synonymous with the term “language.”

Complainant alleges that “Spanish speakers” had an advantage for “overtime,” “discharge (layoff),” and for the “rehire” (“recall”) after the Reduction in Force (RIF), and described his claims against Respondent: “I wasn’t offered the same positions or overtime or whatever because I didn’t understand the Spanish language.” Complainant’s deposition:

Q. Are you alleging that any of the people that I just named were treated better than you as a result of their race or national origin regarding their rehiring? [1]

A. Yes. In my thinking, yes. *Because of the language barrier I have because they’re Spanish* [2] *And I don't speak the language to* … (Emphasis Added)

However, in Section 1-103(Q) of the Act, "National origin" is defined as the “*place”* in which a person or one of his or her ancestors was born. Section 1-103(K) of the Act. (Emphasis added) Perez and Valley Candle Manufacturing Company, IHRC, ALS No. 1793, June 30, 1986.

A primary rule of statutory construction is to give effect to the words selected by the General Assembly and its intent. “No word or paragraph should be interpreted to be rendered meaningless.” Boaden v. Illinois Department of Law Enforcement, 171 Ill.2d 230, 664 N.E.2d 61 (1996); Sangamon County Sheriff’s Department v. Illinois Human Rights Commission et al., 233 Ill.2d 125, 908 N.E.2d 39, (2009), citing Wade v. City of North Chicago Police Pension Board, 226 Ill.2d 485, 877 N.E2d 1011 (2008). The best indication of the legislature’s intent is the statute's wording, which *must be given its plain and ordinary meaning*. (Emphasis Added) Id.,

[1] Complainant acknowledged a few “group” members: Michael Diaz, Rubin, and Fernando, but does not identify their positions or date returned to rehiring.

[2] The Complainant does not submit foundational information to show that the person’s national origin is Spain.

citing Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill.2d 200, 886 N.E.2d 1011 (2008).

When the statutory wording is clear and unambiguous, it will be given effect as written without resorting to other principles of statutory interpretations. Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc., 158 Ill. 2d 76, 630 N.E. 2d 820 (1994). Thus, one may not depart from the statute's plain language by reading into it exceptions, limitations, or conditions that the legislature has not expressed. Haage v. Zavala, 2021 IL 125918, 183 N.E.3d 830. A statute is not ambiguous simply because the parties disagree about its meaning—Castro v. Police Board, 2016 IL App (1st) 142050, 57 N.E.3d 527.

Language could be an indicator, a factor, in proving illegal national origin discrimination, just as a surname or an accent. Still, it is not the purview of this administrative court to redefine Section 1-103(K) of the Act. An employee's ability to freely speak their native language in the workplace is precisely what Section 2-102(A-5) of the Act was designed to protect. For example, a workforce or a school may be predominately made up of individuals whose primary language is that other than English. Thus, it would benefit an employer to hire someone with talent in language skills, to be a foreman or teacher, over those work "groups" or classrooms who are not proficient in English. In Lauer v. City of Chi. Bd. Of Educ., 2008 U.S. LEXIS 32526*; 2008 WL 1817242, two school clerks were not returned to their positions once their contract concluded. Based on the new principal's institutional assessment, she believed that the clerk positions required someone bilingual to meet the needs of many students, parents, and guardians who did not speak English. The former clerks did not speak Spanish. The bilingual Spanish-speaking applicants subsequently filled the two clerk positions. The Plaintiffs offered no direct evidence that their contracts' non-renewal were based on their race or national origin. The summary decision was affirmed. In a practical modern setting, many individuals whose national origin is the United States speak other languages fluently besides English.

Therefore, Respondent's motion for issuance of a summary decision concerning national origin discrimination claims can be granted on this basis alone, as language is not a "place," as defined by the statutory definition of national origin, but the analysis shall continue.

FINDINGS OF FACT AND ANALYSIS [3]

Complainant Ricky Dobson was hired by Respondent Brandsafway, LLC, on January 15, 2017, as a "Helper" for the job site in Morris, Illinois. As a Helper, Complainant assisted the craftsman and was assigned tools, safety, or any other pertinent duties assigned by the craftsman or supervisor. Complainant reported to Site Manager Alberto Bibian. [4] Armando Gomez (Gomez) was the foreman at the job site in Morris, Illinois. Complainant's work performance is not an issue in this case.

Employees typically worked overtime each pay period. Bibian averred that he would decide on the hours of overtime based on business needs. No evidence was introduced concerning Gomez's role in determining, scheduling or communicating overtime opportunities to the workgroups.

Complainant represented that he consistently worked two hours of overtime each day, creating a ten-hour day for a five-day week, and "occasionally, we had to work on a Saturday because we needed it to do the job. There was like a thing called turnaround. That's what we … extra hours. Bibian would make verbal requests to everybody as a group." Complainant admitted that Bibian "verbally" "offered" him overtime. Complainant also said in his deposition that on five or six occasions, Bibian requested overtime in Spanish at a workgroup, normally comprised of four employees.

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[3] The following findings are based on the record file in this matter. No credibility determinations were made.

[4] Complainant pleads that Bibian is "Hispanic." However, Hispanic is a response to the separate and distinct protected class of "Ancestry," which was not pled by Complainant. See, Section 1-102(A) of the Act. Orozco and Dycast, inc., IHRC, ALS No. 7178R, January 23, 2003. Pacheco and Pactiv, LLC, IHRC, ALS No. 19-0058, November 29, 2022.

Ambiguity of Complainant's Factual Allegations

Complainant is not specific with many facts that should be included in his discrimination claims, including the calculation of damages and discussion of similarly situated employees. A complainant's response to a summary decision motion is not required to prove his case as if at a trial to refute the motion. However, he must provide some specific factual basis to support his claim and "may not resist the motion by merely arguing." Evans and Coming Revere, Inc., IHRC, ALS No. S-10699, July 31, 2000, quoting West v. Deere & Co., 145 Ill.2d 177, 608 N.E.2d 920 (1991).

Further, a party responding to a motion for summary decision must not hide behind "equivocations" and chameleonic concepts. There must be present "*bona fide* specific evidence, that is, specific with relevant facts, and admissible at trial to defeat the motion." Koukoulomatis v. Disco Wheels, Inc., 127 Ill.App.3d 95, 468 N.E. 2d 477 (1st Dist. 1984). Affidavits in opposition to a motion for summary decision "shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; . . . [and] shall not consist of conclusions but facts admissible in evidence . . . . [Such affidavits and deponent testimony] shall affirmatively show that the affiant/deponent, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191. Merely alleging the existence of a genuine issue of material fact without presenting any sworn facts to contradict the sworn evidence that one's opponent has submitted does not create a genuine issue of material fact. Carruthers v. Christopher & Co., 57 Ill.2d 376, 313 N.E.2d 457 (1974); Peltz v. Chicago Transit Authority, 31 Ill.App. 3d 948, 335 N.E.2d 74 (1st Dist. 1975).

In Robinson v. Village of Oak Park, 2013 IL App (1st) 121220, 990 N.E. 2nd 251 (1st Dist. 2013), The Illinois Appellate Court held that plaintiffs could not rest on the accusations written in their pleadings to counter a summary judgment motion, by stating follows:

> At the summary judgment stage, there must be a demonstration of more than a mere scintilla of evidence to support the elements of the plaintiff's claims. There must be *admissible evidence* on which a factfinder could reasonably find for the plaintiff. (Emphasis added)

Even though the Court's advice is harsh, its words are worth heeding: "Summary judgment requires the responding party to come forward with the evidence that it has—it is the put up or shut up moment in a lawsuit." (Internal quotation marks omitted.) Parkway Bank & Trust Co. v. Korzen, 2013 IL App (1st) 130380, 377 Ill.Dec. 771, 2 N.E. 3d 1052.

Complainant has largely cast a broad net of indeterminate assertions in his complaint and later in his response. However, they cover an unspecified period and are short on specificity, even after the close of discovery. Then, he attempts to argue from the created ambiguity. Koukoulomatis, 127 Ill.App.3rd at 95.

The time for the Complainant to discover similarly situated individuals and gather the evidence he needs to prove his case ended with the close of discovery. Based on the plain reading and meaning of the pleadings and response, there is a lack of specific information about the countries of national origin of the principals and coworkers, the identity of the employees who benefited, the type of overtime work, and whether it was “Helper” or “Craftsman’s” work. Complainant also failed to cite the relevant pay periods and the unattainable hours because of the alleged illegal discrimination. In fact, after three years of employment, when asked at his deposition whether he knew “any other helpers who were assigned to the Morris job site while you were there?” Complainant answered, “I don’t recall their names, no.” The Complainant merely recalled that there were craftsmen: carpenters (Milo), insulators (Rubin - Mexico), and painters (Gustavo - Mexico) there, all Craftsmen, not Helpers.

Finally, Complainant vaguely implied the doctrine of “continuing violation” by pleading that the overtime issue occurred throughout his employment, above that of being assigned overtime 10 hours per week throughout his employment. However, he did not plead a “cause of action” for continuing violation. Even if it was pleaded, the Complainant did not establish the doctrine because of a lack of specificity. “To state a *cause of action* under the continuing violation doctrine, it was not enough to allege a present effect of past discrimination. As in all cases concerning the jurisdiction of the Commission under Section 7A-102, the Commission

must identify *precisely* the 'unlawful employment practice' of which the Complainant objects." Lee v. Illinois Human Rights Commission, 128 Ill.App.3d 666, 467 N.E.2d 943 (1st Dist. 1984) (emphasis added); Jacqueline Spann and Wal-Mart Stores, Inc., IHRC, ALS No. 5666(S), March 7, 1995. Complainant fails to identify any such practice with particularity in the instant case.

Thus, for the above reasons, the Respondent's motion to issue a summary decision is granted with respect to Complainant's lack of specificity for the claims of race, national origin, damages steeming from adverse acts, and lack of named similarly situated employees.

Counts Two (Race) and Count Three (National Origin) Discharge [5]

Despite a bar on Complainant's Race and National Origin claims, the analysis continues: In Counts Two and Three, the Complainant alleges that on March 19, 2020, Bibian informed him that he and many other employees were being laid off and that the Respondent intended to rehire many of them as more work became available. Thus, Respondent has advanced a legitimate, non-discriminatory reason for its actions. Complainant must then present some evidentiary facts that show that the basis or method for the RIF is not worthy of belief but merely a pretext for discrimination. Clyde v. Illinois Human Rights Commission, 206 Ill. App. 3d 283, 564 N.E. 2d 265 (4h Dist. 1990).

In Complainant's deposition, he recalled that his employment at Respondent ended "when the COVID thing started."

Q. 2020?

[5] In a reduction-in-force case such as this one where the Complainant is alleging that he was laid off because of race and national origin, a *prima facie* case of discrimination may be established where a complainant shows by a preponderance of the evidence: 1) he is a member of a protected class; 2) he was qualified to assume the duties of another post-reduction-in-force position; 3) respondent retained another employee not in the protected group; and 4) the preference for the employee cannot be justified on the basis of comparative qualifications or relative value to the employer. Lee and Kropp Forge, Div. of Anadite Corp., 21 Ill. HRC Rep. 150 (986); Castleman and Freeman United Coal Mining Co., 34 Ill. HRC Rep. 110 (1987); Infantino and Stewart-Warner Co., 34 Ill. HRC 158 (1987); Krous and Associate Truck Lines, 40 Ill. HRC Rep. 294 (1988).

A. Is that when it started? That would be it. I just know that it comes down from the place I was working at saying that -- because they downsized a lot of their people, so – everybody downsized in the whole place."

Complainant did not have any independent knowledge of the decision-making process with respect to his lay-off or RIF.

"Q. Now, Alberto Bibian is the one who informed you that you were being terminated, correct?

A. Laid off, yes.

Q. Did he tell you why you were being laid off?

A. Because of the pandemic, they had to downsize to as few people as possible.

Q. Do you have any evidence that this was not the real reason for your termination?

A. No.

Pretext is shown where the articulated reason for the employer's action is established to be implausible or unreasonable under the evidence. Seno and Chicago Transit Authority, Ill. HRC Rep. (Ch. No. 1984 CF 1923 February 5, 1990). Here, Complainant does not challenge the basis for Respondent's business decision to lay off a large portion of the workforce as a legitimate, nondiscriminatory reason for its Reduction In Force in March 2020 and Complainant's layoff. It is well established that a reduction-in-force undertaken for economic reasons is a legitimate, non-discriminatory reason for terminating an employee. Kindred v. Illinois Human Rights Commission, et al., 180 Ill. App. 3d 766, 536 N.E. 2d 447 (3rd Dist. 1989).

Based upon the preceding, there is no genuine issue of material fact in the matter of pretext, and the Respondent is entitled to a recommended order in its favor on the race and national origin discharge claims as a matter of law.

Count Four (Race) [6] and Five (National Origin): Failure to Recall after RIF

In this portion of the case, the critical question is whether Respondent is entitled to a summary decision in its favor because it relied on its business priorities when it decided who was to be recalled after the RIF. Complainant challenges neither the need for the RIF nor the business method used to accomplish the RIF, but objects to the recall because the number of employees recalled was "disproportionate" in race (White) [7] and national origin. [8] Complainant also submits that he had "learned that less experienced and less senior employees had been rehired." [9] However, the Complainant failed to submit any authority that supports his argument that proportionality of race and national origin in a recall is a legal measure or that an employee's seniority is an obligatory gauge. (*i.e.*, Handbook or collective bargaining agreement.) In the instant case, Respondent had no such agreement. As stated earlier, the Respondent is not obligated to make its RIF or Recall decisions based on seniority or any other factor. The only concern is whether the Respondent made its decision based on the complainant's race or national origin, as defined by the Act. The evidence indicates that the

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[6] The general elements of a *prima facie* case of race discrimination are as Follows: (1) Complainant is a member of a protected class (race); (2) Complainant was performing her job consistent with Respondent's legitimate expectations; (3) Complainant suffered an adverse employment action; (4) Similarly situated persons who are not members of the Complainant's protected class was not treated in the same manner. Shah v. Illinois Human Rights Commission, 192 Ill.App.3d 263, 548 N.E. 2d 695 (1st Dist. 1990).

[7] "They didn't hire only but a few white people." – Complainant.

[8] Complainant pled: "As Respondent rehired its employees, it rehired a disproportionate amount of employees whose race was not Caucasian (white) and whose national origin was not American (United States)."

[9] Complainant's statements about proportionality and seniority in his deposition are nothing more than self-serving conclusions and hearsay statements "learned" that he was the victim of discrimination. Admissible facts did not support his conclusions, and the conclusions in and of themselves are insufficient to establish pretext. Fitzpatrick v. Illinois Human Rights Comm'n, 267 Ill. App. 3d 386, 642 N.E.2d 486 (4th Dist. 1994); Cano v. Village of Dolton, 250 Ill.App.3d 130, 620 N.E.2d 1200(1st Dist. 1993).

Respondent made its decision based on the relevant skills of its employees to the work orders received from customers. The Complainant generally describes the Respondent's articulated reasons for recalling employees as selective but does not dispute with any specificity that the Respondent's reasons for selecting this group for recall were based on various legitimate business reasons. In any respect, the Complainant failed to list the similarly situated employees, when recalled, dates of hire, whether they were Helpers or Craftsman (i.e., insulators, carpenters, pipefitters, painters, etc.).

Respondent attempts to modify the “recall” to a “rehire,” as it had unilaterally argued that Complainant did not apply for the position. However, Complainant’s testimony supports “recall,” which was not countered by an appropriate foundational affidavit by Respondent. Thus, I find that Complainant was not required to reapply for a position.

> A. They (Respondent) said that they would be calling us back, so --
>
> Q. When you say they said they were going to call us back, tell me what you mean.
> A. When we had the meeting, Alberto said that we had to lay off everybody except for the people that they want needed there to continue working, that we’d be laid off and be called back as soon as this pandemic or whatever, they got it figured out what they’re going to do so ---
>
> Q. This meeting with Alberto, was it one on one or was it in a group setting?
> A. It was a group setting.
>
> Q. So, Alberto told the group that they’re all getting laid off?
> A. Right.
>
> Q. And that the intent was to call people back as soon as they figure out what to do with this pandemic?
> A. That’s what our understanding was, yes.
>
> Q. Do you any independent knowledge of what BrandSafway’s business needs were at the Morris job site after you were laid off?
> A. No
>
> Q. Do you have any independent knowledge about what Brandsafway’s budget was for the Morris job site after you were laid off?
> A. Nope.

In July 2020, the Complainant contacted Bibian by text message and phone and asked him, “Are you going to call me back, or should I be looking for another job?” Bibian responded, “At the moment, I don’t see calling you back.” The Complainant responded, “Okay.”

Q. Do you have any evidence to show me that refute that BrandSafway didn’t have a business need for another Helper at the Morris job site?

A. Nope.

Q. And do you have any evidence to refute that Brandafway did not have the budget for another Helper at the Morris job site?

A. Nope

Q. Do you know of any Helpers who were rehired at the Morris job site after March of 2020?

A. No.

Bibian answered Complainant’s question with the prefix, “At the moment.” Complainant made contact on July 2020, which was only three months after the RIF, and when the pandemic was still raging nationwide. Bibian answered the Complainant’s demand to have him either return, or he would look for another job. Complainant submits no evidence that at that moment of the call, an available Helper position was open or required and a similarly situated employee of a different protected class was recalled to his Helper position.

The accuracy of the employer's decision is secondary if there is a good faith belief in it. Holmes v. Board of County Commissioners, Morgan County. IHRC, ALS No. 1463 (K), April 10, 1986. The question is not whether the employer made a "perfect decision" but whether the decision was based on discrimination. A business decision may be considered "legitimate" and "non-discriminatory" within the meaning of McDonnell Douglas, supra, "even though the decision is not the most equitable one which could be made." Phillips et al. and Walsh Construction Company of Illinois, IHRC, ALS No. 1729, June 28, 1988.

As the Complainant has not shown the existence of a triable issue regarding pretext, a summary decision is appropriate regarding the failure to recall the Complainant based on race and national origin claim.

CONCLUSIONS OF LAW

1. Complainant is an “employee,” as that term is defined under the Illinois Human Rights Act (Act).
2. Respondent is an “employer,” as that term is defined under the Act and is subjected to its provisions.
3. Complainant has failed to establish the prima facie cause of action for national origin discrimination in overtime.
4. Complainant has failed to establish the prima facie cause of action for his layoff in a Reduction In Force based on his national origin and race.
5. Respondent has articulated a legitimate, nondiscriminatory reason for its decision to Conduct an RIF based on the COVID-19 pandemic and the company's economic downturn.
6. Complainant has failed to present evidence that the Respondent's reason for its action was a pretext for race and national origin discrimination.
7. Complainant has failed to establish the prima facie cause of action for not being recalled after the RIF based on race and national origin.
8. Respondent has articulated a legitimate, nondiscriminatory reason for not recalling Complainant on July 20, 2020.
9. Complainant has failed to present evidence that Respondent's reason for its act was a pretext for race and national origin discrimination, as no Helper positions were open as of July 20, 2020, because of the economic impact of the COVID-19 pandemic on Respondent.

10. There is no genuine issue of material fact regarding the Complainant's claim of race and national origin discrimination, and the Respondent is entitled to a recommended order in its favor as a matter of law.

Therefore, a summary decision in the Respondent's favor is appropriate in this case.

RECOMMENDATION

Based on the preceding, there are no genuine issues of material fact, and the Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the complaint and underlying charge in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:

WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: April 22, 2024