STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
GRETCHEN GAFFNEY,	)	
	)	Charge No.: 2021CR2256
Complainant,	)	
	)	ALS No.: 23-0022
and	)	
	)	
DOVENMUEHLE MORTGAGE CORP.,	)	
	)	
Respondent.	)	
	)	

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision and the Complainant's Exceptions filed thereto.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Pursuant to 775 ILCS 5/8A-104(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on April 19, 2024, has become the Order of the Commission.[1]

STATE OF ILLINOIS	**)**	
	)	**Entered this 16th day of OCTOBER 2024.**
HUMAN RIGHTS COMMISSION	**)**	

Commissioner Elizabeth A. Coulson

Commissioner Janice M. Glenn

Commissioner Demoya R. Gordon

[1] This order is entered pursuant to a 3-0-0 vote by the Commissioners.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF: **GRETCHEN GAFFNEY**, Complainant, v. **DOVENMUEHLE MORTGAGE CORP.**, Respondent.	Charge No.: 2021-CR-2256 EEOC No.: n/a **ALS No.: 23-0022** Administrative Law Judge Azeema N. Akram

RECOMMENDED ORDER AND DECISION

This matter comes to be heard on a motion for summary decision filed by Respondent Dovenmuehle Mortgage, Inc. ("Respondent"), along with supporting exhibits and the affidavit of its Senior Employee Relations Specialist, Lisa Wilk. *See* Respondent's Memorandum in Support of Motion for Summary Decision ("Mot.") (filed Nov. 3, 2023). Complainant Gretchen Gaffney ("Complainant") filed a response, along with attached exhibits and her own affidavit, as well as a Motion To Bar Unsigned Verbal Written Warning/Warnings and for Trial. *See* Complainant's Answer to Respondent's Mot. for Summary Judgement [sic] ("Response") (filed Dec. 4, 2023). Respondent filed a reply in support of its motion and attached an affidavit from its attorney, William Pokorny, Esq. *See* Respondent's Reply in Support of its Motion for Summary Decision ("Reply") (filed Dec. 29, 2023). The motion is thus fully briefed and ready for decision.[1]

For the reasons discussed below, Respondent's motion for summary decision is GRANTED, and judgment as a matter of law is entered in Respondent's favor.[2]

---

[1] Complainant filed a pleading on January 4, 2024, titled Supplemental Answer to Respondent's Motion. Because she failed to file it in accordance with the briefing schedule or request leave to do so, it is DISREGARDED. *See* Order (entered Oct. 23, 2023).

[2] Respondent, whose legal name is "Dovenmuehle Mortgage, Inc.," is incorrectly named in the caption of this matter as "Dovenmuehle Mortgage Corp."

RESPECTIVE CONTENTIONS OF THE PARTIES

Respondent is a nationwide mortgage subservicing company that specializes in servicing loans on behalf of commercial banks, credit unions, mortgage banking companies, and state and local housing finance agencies. It employs approximately 3,000 employees and has clients located in all 50 states and some U.S. territories. [3]

Complainant was hired by Respondent on November 17, 2017 as a Customer Service Representative I. In this role, Complainant was responsible for handling inbound calls from borrowers regarding their mortgages, and reviewing their escrow accounts, insurance information, and taxes to offer them information to resolve their mortgage-related problems. She also provided administrative assistance to borrowers to update their mortgage accounts, and troubleshot website issues to help manage their online profiles. During her employ in this role, Complainant was expected to maintain a calls-per-day average of 65 and a quality average of 90%.

Respondent provided Complainant with its Employee Handbook, which describes its policies and rules and includes Respondent's disciplinary procedures. The Discipline and Discharge section of the Employee Handbook lists examples of "unacceptable conduct that may lead to disciplinary action, up to, and including immediate termination of employment." Mot., Ex. 2 at 23. Such conduct includes "any careless action which . . . places the financial assets of [Respondent] and/or its customers at risk," and "abusive, or threatening language toward any . . . customer; indifference or rudeness towards a customer; any unprofessional or disorderly/antagonistic conduct." *Id*. At the time of her hire, Complainant signed a form

[3] Unless otherwise indicated, the facts summarized in this section are either uncontested or admitted by the parties in their respective submissions. Citations to pleadings and other exhibits appearing in the record are provided where facts are disputed, or where it may be helpful in navigating the documents submitted by the parties.

acknowledging that she received and reviewed Respondent's Employee Handbook and that she understood, *inter alia*, that her employment could be terminated at-will. *See id*. at 1.

I. Complainant's Job Performance

Complainant received multiple performance reviews over the course of her employment with Respondent. On January 4, 2018, Complainant received her 45-Day New Hire Review, which informed her that she was "Not meeting department standards." Mot., Ex. 7. She was advised of her specific objectives for her upcoming 90-day review, which included meeting department goals of maintaining a calls-per-day average of 75 and quality average of 90%. *See id*. Complainant agreed that she needed more experience to improve her performance. *See id*.

On February 7, 2018, Complainant received her 90-Day New Hire Review. *See* Mot., Ex. 8. While her call quality improved up to 85.8% and her average calls-per-day had increased to 62, Complainant was still not meeting department standards. *See id*. In addition, she was advised to maintain a professional tone while speaking on the phone with callers. *See id*. This feedback was based on an incident that occurred the prior month in January 2018, which resulted in Complainant being coached regarding her tone and professionalism on calls. *See* Mot., Ex. 11. While on a call with a brand representative and their borrower, Complainant was apparently argumentative and later disconnected the caller despite telling them she would look into an issue while placing them on hold. *See id*.

On September 11, 2018, Complainant received her first Annual Performance Review for the period of May 1, 2017 through April 30, 2018. *See* Mot., Ex. 9. Complainant's total score was a 2.14 out of a possible 5.0. The review specified that Complainant "Needs Improvement" in the areas of Initiative/Creativity and Cooperation/Teamwork, and that her performance was "Unsatisfactory" in the areas of Quality of Work, Quantity of Work, and Job Knowledge. *See id*.

During this time period, Respondent issued two Customer Service Coaching forms to Complainant. The first was in relation to the phone call described in her 90-Day New Hire Review, regarding her lack of professionalism in the inappropriate way she handled a phone call with a customer on January 15, 2018. *See* Mot., Ex. 11. On February 23, 2018, she was coached for budget drafting issues and for incorrectly advising a borrower about whether Respondent offers the Budget Draft program. *See* Mot., Ex. 12. On March 3, 2018, Complainant was coached for "cold transferring a call to the escalated line." *Id*. Accordingly, she was directed to remain professional on every call, and if a call is escalated to a supervisor, she must "warm transfer [the call] to the escalated line" without confrontation and argument, and hold (not mute) them for "no longer than 5 minutes" without returning to the caller with further instructions. *Id*.

On September 27, 2019, Complainant received her second Annual Performance Review for the period of May 1, 2018 through April 30, 2019. *See* Mot., Ex. 9. Her overall score was 3.08, indicating that she "Meets Expectations." While she "Exceeds Expectations" in the areas of Initiative/Creativity and Cooperation/Teamwork, she "Needs Improvement" in the area of Job Knowledge. Complainant's performance was also "Unsatisfactory" in the area of Quality of Work. According to Respondent, Complainant was issued a warning for unprofessional behavior based on a client complaint. *See* Mot., Ex. 13; *see also* Ex. 19, Affidavit of Lisa Wilk ("Wilk Aff.") at ¶ 18. Respondent avers that Complainant "sounded irritated and rude while answering [a] phone call" from a borrower (*i.e*., customer) who had a complaint. *Id*. "Her tone was condescending and abrupt" and she "interrupted the caller multiple times during the call and 'laughed' at the borrower." *Id*. Respondent warned Complainant that "There must be immediate and substantial improvement in the performance described [] or it will result in further corrective action up to and including termination of employment." *Id*.

On September 14, 2020, Complainant received her third Annual Performance Review for the period of May 1, 2019 through April 30, 2020. *See* Mot., Ex. 10. She received an overall score of 3.8 out of 5, again meeting expectations. The review specified that Complainant "Needs Improvement" in the area of Verbal/Written Communication, signaling that her performance in this area had declined within the past year. "Two complaints for professionalism from 2019 were documented," which impacted this rating. In addition to the warning described above, Respondent avers that it issued another warning to Complainant on May 3, 2019 for unprofessional behavior based on a second client complaint and cold transferring an escalated call. *See* Mot., Ex. 13 at 2. During this call, Complainant "got into a back and forth argument" with the borrower after allowing the call to escalate because she did "not show any empathy" for the borrower's frustration by apologizing "to diffuse the tension." *Id*. Respondent provided Complainant with corrective actions to take and again warned her that "There must be immediate and substantial improvement in the performance described [] or it will result in further corrective action up to and including termination of employment." *Id*.

Complainant denies that she received any of the disciplinary action forms introduced by Respondent and avers that their contents were "never brought to [her] attention." Motion To Bar Unsigned Verbal Written Warning/Warnings and for Trial ("Mot. to Bar") at 1.

II. Complainant's Allegations

A. Failure to Promote

In April of 2019, Complainant was promoted to Customer Service Representative III. Approximately a year later, she applied for the position of Operations Analyst I on May 22, 2020. Respondent's Assistant Vice President Alec Pearl ("AVP Pearl") and Supervisor Kyle Mertes interviewed Complainant for the position on June 11, 2020. Soon thereafter, she was advised that

she had not been selected for the Operations Analyst I position. *See* Wilk Aff. ¶ 4. Respondent had offered the position to Sierra Tevenal ("Tevenal"), an external candidate with prior operations experience who previously worked as a supervisor in Respondent's call center for six years. *See id*.

On July 16, 2020, Complainant emailed Respondent's Assistant Manager of Human Resources Erika Lowe ("Lowe"), alleging that she had suffered from "unfair treatment and discrimination" during her pursuit of the promotion opportunity. Mot., Ex. 17, Email from Complainant to Lowe. Complainant stated that she felt her time spent in the customer service department provided her with the experience necessary for the Operations Analyst I position and that she was upset over not being selected for the position. *See id.* She claimed to have witnessed "other people who's [sic] performance" is subpar to hers "and with less seniority than [her] get promoted," and accused AVP Pearl of unspecified violations of the Equal Employment Opportunity Commission's guidelines during her interview. *Id*. Complainant proclaimed that she was the "victim of . . . discrimi[n]ation by race, age, retaliation and failure to promote," and requested that Lowe "escalate the matter." *Id*. Respondent's human resources ("HR") team subsequently investigated Complainant's allegations.

Respondent's HR investigation resulted in a determination that there was no evidence of discrimination against Complainant as she was given the same consideration and asked similar questions as other candidates for the Operations Analyst I position. *See* Wilk Aff. ¶ 6. Although the investigation revealed there had been discussions between AVP Pearl and Complainant "regarding her communications and attitude," there was no evidence that these discussions had anything to do with her race or any other protected status. *Id.* The investigation included a comparison of Complainant's qualifications to Tevenal's, which resulted in a conclusion that

Tevenal had been selected for legitimate reasons—specifically, her previous supervisory experience in Respondent's call center and her greater knowledge of its operations compared to Complainant. *See id.* Tevenal also had sufficient experience with Excel, which Complainant lacked. *See id.* Complainant had been advised to attend Excel training courses offered by Respondent, but chose not to. *Id.* Additionally, Complainant had previously been coached regarding her communication style, whereas Respondent had no similar concerns about Tevenal. *See id.*; Mot., Ex. 9–Ex. 13.

On October 19, 2020, Complainant was promoted to Team Lead I. *See* Mot., Ex. 5, Promotion Announcement. Nevertheless, she complained to Ms. Lowe again via email that she "was excited about becoming a Team Lead until [she] discovered that [she] was a victim of retaliation." Mot., Ex. 18, Emails from Complainant to Lowe, *et al*. at 1. Complainant further alleged that Respondent had given her limited advancement opportunities due to her prior grievance activity. *See id*. She accused a Team Lead of retaliating against her by inappropriately promoting another employee over Complainant, and also accused an Assistant Manager of "theft and fraud." *Id.*

In the fall of 2020, Respondent posted an opening for the Supervisor I position. *See* Wilk Aff. ¶ 9. Complainant did not apply for the position. *See id*. at ¶ 10. Regardless, she lacked the experience required for this role and had been previously informed that "Team Leads are able to apply for a supervisor position after 6 months of being a Team Lead." Mot., Ex. 18 at 2. Meanwhile, Complainant began taking escalation calls around this time, "which was a responsibility outside of her then-current job duties and corresponded better with the Team Lead II position." Wilk Aff. ¶ 11.

On December 8, 2020, Linda Virzi ("Virzi"), who was employed by Respondent as a Team Lead II, applied for the Supervisor I position. *See id*. at ¶ 12. Based on her application, interview, and prior call center supervisory experience gained from prior employment, Respondent promoted Virzi to the Supervisor I/Team Lead III role on January 18, 2021. *See id*.

In the interim, Complainant and Assistant Vice President of Customer Service Jeffrey Grant ("AVP Grant") had a series of discussions between January 15, 2021, and January 19, 2021, regarding her pay in light of her recently increased responsibilities handling escalation calls. *See id*. at ¶ 11; *see also* Mot., Ex. 6, Communications Between AVP Grant and Complainant. AVP Grant told Complainant on January 15th that he had an update for her regarding the position of Team Lead II. *See id*. at 1. On January 19th, he told Complainant that he was "waiting on a response from" human resources to approve a backdated pay increase for her for her "promotion" to the Team Lead II position he previously mentioned to her. *Id*. at 2.

B. Termination of Employment

On January 18, 2021, Respondent's Account Relations Manager Nathalie Malats ("Malats"), sent an urgent email to all of the Customer Service department managers regarding a complaint from a borrower concerning previous phone calls and requested audio recordings of those calls. *See* Mot., Ex. 14, Customer Service Department Emails and Disciplinary Notice to Complainant at 3. The next day, Malats informed Respondent's Customer Service department managers that "there were more calls with this borrower from the last two weeks," which led to the borrower submitting "a formal complaint with the BBB," and restated her request for the corresponding audio recordings. *Id*. at 2. She further stated, "we need answers today on this, [the borrower] is stating that he may need to get an attorney involved. There is also misconduct allegations we need to review all calls received in the past week on this." *Id*. The department

managers reviewed the audio recordings and attached the one associated with the customer complaints to a response in the email chain. The phone call, which occurred on January 15, 2021, was summarized by Juaneka Malone in an email to the department managers, as follows:

> BI called in and spoke to [Complainant] regarding it's been 5 months and he still has not received his escrow check. He advised he has called in about 10 times and he was supposed to get a call back from a supervisor and no one has called him back. [Complainant] advised she has reached out to the department who handles the reissuing of the escrow checks. BI advised he keeps hearing the same thing that it will get looked into and nothing happens and wanted a resolution the day of the call.
>
> [Complainant] assured the borrower that she put in a request to have the check processed that day. She advised either 1 or two things will happen. She advised if they have not received the request then it will be processed but if they have received the request then they will email her back saying the check has already been processed. The borrower advised that's not going to help with the check being sent out that day. [Complainant] advised she doesn't know if the check will be sent out that day. BI wanted to speak to someone who would advise him that his escrow check would be mailed out that day and he is not taking no for an answer.
>
> [Complainant] asked the borrower for his contact number so a manger can give him a call back. [Complainant] advised she emailed the department for a response and she is not able to call that department. The borrower asked [Complainant] would she be upset about the situation and [Complainant] replied and said, "she wouldn't have to be, and she would have handled the situation differently"." If it was her money, she wouldn't be calling the company 5 months later". [Complainant] advised she will have a manager call him back.
>
> The borrower ended the conversation by asking [Complainant] why did she tell him it's his fault that he has not received his money. [Complainant] stated she never said that and kept interrupting the borrower and the borrower advised the call is being recorded and [Complainant] never said anything back to borrower but he stated he could hear her breathing and the call ended.

Id. (text divided into paragraphs for clarity). Jeremy Latham replied in the email chain: "This is worth a listen, should likely end in some kind of coaching/discipline." *Id*. at 1.

Later that same day, AVP Grant, who was copied on the email chain, reviewed the audio recording and recommended that Respondent terminate Complainant's employment due to her "entirely unacceptable" "behavior on this call." *Id*. He described Complainant's handling of the call as "multiple instances of belittling, arguing, over-talking, accusations, etc." and stated that the fact that she "is a Team Lead brings heightened concern to her demeanor on this call." *Id*.

According to Lisa Wilk ("Wilk"), Respondent's Senior Employee Relations Specialist, Respondent's practice is to speak with an employee regarding alleged misconduct before making a final decision to terminate their employment. *See* Wilk Aff. ¶ 23. Accordingly, AVP Grant and Wilk (who also reviewed the recorded call) contacted Complainant by phone on January 20, 2021 to discuss the customer complaint and phone call incident. *See id*. Complainant answered the phone. *See id*. As soon as AVP Grant advised that the reason for the call was to discuss a phone call that took place on January 15, 2021, between Complainant and a borrower, Complainant hung up, logged out of Respondent's phone system, and did not respond to multiple subsequent attempts by AVP Grant to reach her by telephone and internal instant messaging. *Id*. at ¶¶ 23–24.

Later that afternoon, Wilk sent an email to Complainant's personal email address with an attached letter informing Complainant that Respondent was terminating her employment for "unprofessional behavior while working with a borrower." Mot., Ex. 16. The letter further provides:

> On January 15, 2021, you spoke with a borrower. Your response towards the borrower was handled with indifference and rudeness; it was unprofessional and antagonistic. This call was not handled with the expectations set forth by the department and Dovenmuehle Mortgage, Inc.
>
> In the employee handbook, it states unacceptable conduct may lead to disciplinary action, up to and including immediate termination of employment. This includes:
>
> - Abusive language toward a customer; rudeness toward a customer; any unprofessional conduct.

Id.

III. Complainant's Causes of Action

The Illinois Department of Human Rights (the "Department") filed a four-count Complaint with the Commission on Complainant's behalf in this matter. *See* Complaint of Civil Rights Violations ("Compl.") (filed Jan. 30, 2023). Complainant alleges therein that AVP Grant verbally

offered her the Supervisor I/Team Lead III position on January 15, 2021, to which Respondent then unlawfully failed to promote her because of her race (Black) when it instead promoted Virzi (race not specified) to the position. *See id*. at Count I ¶¶ 3–15. Complainant further alleges that Respondent's failure to promote her to Supervisor I was done in retaliation for engaging in a protected activity when she complained to Lowe about discrimination and retaliation on July 16, 2020, and October 26, 2020. *See id*. at Count II ¶¶ 9–15. Complainant also alleges that she was unlawfully discharged on January 24, 2021, by Respondent because of her race and in retaliation for engaging in a protected activity. *See id*. at Count III ¶¶ 9–13, Count IV ¶¶ 9–14.

Respondent denies these allegations and moves for summary decision, asserting that there are no genuine issues of material fact and Complainant cannot meet her burden of establishing her *prima facie* claims of unlawful discrimination or retaliation. *See* Mot. at 12–13. Respondent also argues that Complainant cannot prevail because she can neither demonstrate that she applied for the Supervisor I position to which she alleges Respondent failed to promote her, nor identify any similarly situated non-Black employees who were not discharged following comparable misconduct. *See id*. at 9–11. Additionally, Respondent contends that Complainant has failed to show that its legitimate, non-discriminatory reason for terminating her employment was a pretext for unlawful discrimination and retaliation. *See id*. at 13.

CONCLUSIONS OF LAW

Based on the evidence submitted by the parties and the pleadings before me, I make the following conclusions of law:

1. This Commission has jurisdiction over this matter and over the parties who have appeared in this case.

2. During the time period relevant to the allegations described in the Complaint, Complainant was an "Employee" of Respondent as defined by the Illinois Human Rights Act. *See* 775 ILCS 5/2-101(A)(1)(a). As such, Complainant is authorized to invoke the protections of the Act.

3. During the time period relevant to the allegations described in the Complaint, Respondent was an "Employer" of Complainant as defined by the Illinois Human Rights Act. *See* 775 ILCS 5/2-101(B)(1)(a). As such, Respondent was (and still is) subject to the provisions of the Act.

4. Complainant is unable to assert a *prima facie* case of either race discrimination or retaliation against Respondent for failing to promote her because she has not presented any evidence demonstrating that Respondent took any adverse action against her. Even if she had established that she suffered an adverse action, Complainant's failure to promote claim would still fail because she does not identify any similarly situated non-Black employees who were promoted by Respondent under comparable circumstances.

5. Complainant is further unable to assert a *prima facie* case of unlawful discharge against Respondent based on her race because she has not presented any evidence demonstrating that she was meeting Respondent's legitimate business expectations (*i.e.*, professional conduct with customers) and that Respondent imposed lesser discipline on any non-Black employee for analogous misconduct.

6. Complainant has sufficiently raised an inference of retaliatory discharge due to the short temporal proximity between the protected activity and adverse action by Respondent. However, her retaliatory discharge claim fails because is unable to meet her burden of proving that

Respondent's legitimate, non-discriminatory reason for discharging her was really a pretext for unlawful retaliation.

7. Respondent has articulated a legitimate, nondiscriminatory reason for its action, in that it discharged Complainant for engaging in unacceptable conduct toward a client.

8. There are no genuine issues of material fact and Respondent is entitled to a judgment as a matter of law on all four causes of action asserted by Complainant in this case.

LEGAL STANDARD: SUMMARY DECISION

Section 8-106.1 of the Illinois Human Rights Act (the "Act") authorizes any party to move for summary decision "as to all or any part of the relief sought." 775 ILCS 5/8-106.1. Summary decision is the "procedural analogue" to a motion for summary judgment filed under the Illinois Code of Civil Procedure. *Cano v. Vill. of Dolton*, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200 (1st Dist. 1993). As such, summary decision (or summary judgment) is only granted where the pleadings, depositions, admissions, and affidavits on file—when viewed in the light most favorable to the non-moving party—demonstrate that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 809 N.E.2d 1248 (2004). "Material" facts are those that might affect the outcome of the case under the applicable substantive law. *GreenPoint Mortgage Funding, Inc. v. Hirt*, 2018 IL App (1st) 170921, ¶ 17, 97 N.E.2d 66, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

Although not required to prove their 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, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. *Chevrie v. Gruesen*, 208 Ill. App. 3d 881, 883-84, 567

N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on his pleadings to create a genuine issue of material fact. *Fitzpatrick v. Ill. Human Rights Comm'n*, 267 Ill. App. 3d 386, 392, 642 N.E.2d 486, 490 (4th Dist. 1994). Where the party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a party's failure to file counter-affidavits in response is frequently fatal to their case. *Rotzoll v. Overhead Door Corp*., 289 Ill. App. 3d 410, 418, 681 N.E.2d 156, 161 (4th Dist. 1997).

Summary decision is not granted where material facts are in dispute, or where reasonable persons might draw different inferences from undisputed facts in the record. *Adams*, 211 Ill. 2d at 43. At the same time, a court may not weigh the evidence or assess the credibility of a witness when ruling on a motion for summary judgment. *Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266, ¶ 34, citing *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396, 893 N.E.2d 303 (2008). This is because the purpose of summary decision is not to try a question of fact, but rather to determine if one exists. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186, 766 N.E.2d 1118 (2002). However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Bowles v. Owens-Illinois, Inc*., 2013 IL App (4th) 121072, ¶ 19, 996 N.E.2d 1267, 1272, citing *Sorce v. Naperville Jeep Eagle, Inc*., 309 Ill. App. 3d 313, 328, 722 N.E.2d 227, 237 (1999).

Because summary judgment is a "drastic" method of resolving litigation, it is generally granted only where the right of the moving party is "clear and free from doubt." *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 518, 622 N.E.2d 788 (1993) (internal citations omitted).

DISCUSSION AND FINDINGS

Under the Illinois Human Rights Act (the "Act"), a complainant can prove discrimination either by introducing direct and/or circumstantial evidence of an unlawful practice, or by utilizing the indirect, burden-shifting approach first announced by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). In the instant case, Complainant has no "direct" evidence of race-based discrimination or retaliation on the part of Respondent and, thus, must proceed by burden-shifting under the indirect theory of persuasion. Yet even with benefit of every reasonable inference drawn in her favor, Complainant cannot show a genuine dispute of material fact that might lead to the conclusion that Respondent treated her unlawfully (or even differently) based on her race, or in retaliation for engaging in a protected activity.

I. Evidentiary Rulings

I begin by addressing several evidentiary issues raised by the parties.

A. Complainant's Motion To Bar Evidence is Denied

As part of her Response, Complainant has attached a motion to bar in which she argues that the disciplinary action forms submitted by Respondent should be excluded because they "are not signed in their attempt to enforce them as a defense to this discrimination case." Mot. to Bar at 1. Complainant maintains that these forms, which she does not specifically cite to or identify from among Respondent's exhibits, have "no signatures, and specifically not my signature." *Id*. Complainant further argues that she never saw these forms, which "contain[] no manifestation of [her] knowledge" because she "did not sign" them. *Id*. She cites to an Illinois Appellate Court case to support her position that although "acceptance may be manifested in ways other than [a] signature, [Respondent] failed to allege an alternative manifestation of my acceptance" of the

disciplinary action forms. *Id*.; *see Beard Implement Co., v. Krusa*, 208 Ill. App. 3d 953, 567 N.E.2d 345 (4th Dist. 1991). [4]

Respondent urges this court to disregard Complainant's motion to bar based on its facial deficiencies. First, the motion fails to specify which documents Complainant seeks to bar. While I concur with that observation, it was easy enough for this administrative court to review Respondent's exhibits, from which it appears that the disciplinary action forms at issue are marked as Exhibit 11 (Customer Service Coaching for Professionalism dated 1/25/18), Exhibit 12 (Customer Service Coaching Forms dated 2/23/18 and 3/20/18), and Exhibit 13 (Verbal Written Warnings dated 5/3/19 and undated). Respondents go on to contend that Complainant's motion fails to provide or cite to any admissible evidence or applicable authority in support of her position. *See* Reply at 7–8. Respondent also claims that Complainant's arguments are simply incorrect, as all of its exhibits are properly authenticated through Wilk's affidavit (its Exhibit 19). These arguments are well-taken.

The Illinois Rules of Evidence provide that evidence must be authenticated and identified prior to admission, and that this condition is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ill. R. Evid. 901(a). Evidence may be authenticated or identified by testimony of a witness with knowledge that the "matter is what it is claimed to be." Ill. R. Evid. 901(b)(1).

Here, Respondent submits the disciplinary action forms to show that it issued corrective warnings to Complainant for failing to meet its expectations during her employment. *See* Mot. at 4–5. In *Beard Implement Co.* (the case cited by Complainant in support of her request to bar), the

[4] Complainant previously filed a similar Motion to Bar Unsigned Verbal Written Warnings/ Documents on July 13, 2023, which was denied without prejudice as premature during the discovery phase of this litigation. *See* Order (entered July 21, 2023).

Illinois Appellate Court found that no contract for sale was formed where a plaintiff declined to sign a commercial instrument, thus negating the plaintiff's acceptance of the defendant's offer. *See* 208 Ill. App. 3d at 961. Here, on the other hand, the disciplinary action forms submitted by Respondent are not "contracts" that can somehow be enforced. Thus, Complainant's reliance on *Beard Implement Co.* to exclude these documents is misplaced in the context of a discrimination case. I also find that Respondents have properly authenticated these records through Wilk's affidavit, which thoroughly describes when and for what reason(s) they were issued to Complainant by Respondent. *See* Wilk Aff. ¶¶ 15, 16, 17. Complainant neither disputes that Wilk has personal knowledge of the forms nor refutes Wilk's sworn facts (or the even contents of the forms themselves). Rather, Complainant contends only that she had never seen the forms, as indicated by the absence of her signature. This is an argument that goes to the weight I give to these documents, not their admissibility.

Therefore, I conclude that the disciplinary action forms are admissible. Complainant's motion to bar is therefore DENIED.

B. The "Transcript" is Disregarded

Complainant objects to admission of the "transcript" submitted by Respondent, which purports to be a written record of the January 15, 2021, call between a borrower and Complainant that led to her termination. She argues that "[t]his document is fake and has not been authenticated" because it "has no date" and "no signature from any personnel" at Respondent," "is nothing more than hearsay," "and was never produced in discovery. Response at 1–2. She also asserts that there is no proof that the transcript was used by any other personnel at Respondent.[5]

[5] Although Complainant also briefly discusses the transcript in her Motion to Bar, the title of the motion makes no mention of it. Because her Response brief includes a more fulsome argument regarding the transcript, the identical argument contained in the Motion to Bar is DISREGARDED.

Respondent contends that the affidavit of Wilk, who stated that she has personal knowledge of the facts contained in her affidavit and is competent to testify to those facts, is sufficient to authenticate the documents cited therein, including the January 15, 2021, phone call transcript (and the disciplinary forms, as discussed above). *See* Reply at 3–5. Wilk's sworn statement regarding the transcript is as follows:

> Respondent's Exhibit 15 is a true and accurate copy of the transcript of the January 15, 2021 call between the borrower and [Complainant], which was prepared and maintained in the ordinary course of [Respondent]'s business. I reviewed the transcript in January 2021 after Human Resources was notified of the borrower's complaint regarding [Complainant].

Wilk Aff. ¶ 20.

To refute Complainant's claim that she never received the transcript during discovery, Respondent submits the affidavit of its attorney, William Pokorny, who states that the transcript (Respondent's Exhibit 15) was provided to Complainant on June 16, 2023, in its response to Complainant's discovery requests. *See* Reply, Ex. 21, Affidavit of William R. Pokorny at ¶ 4. Indeed, the record shows that on June 16, 2023, Respondent served its Response to Production Request on Complainant by email. *See* Certificate of Service (filed June 16, 2023). Complainant's filings do not contradict this.

In addition to the provisions cited earlier, the Illinois Rules of Evidence provide that evidence may be authenticated or identified by testimony of a witness with knowledge that the "matter is what it is claimed to be." Ill. R. Evid. 901(b)(1). Additionally, a business record (*e.g.*, a "memorandum, report, record, or data compilation, in any form") is admissible "under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record":

> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.

Ill. R. Evid. 902(11). In other words, "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" a business record under this rule. *Id*. However, it may still be inadmissible if "the opposing party shows that the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *Id*. at Rule 803(6).

Here, Complainant neither provides relevant authority for her argument regarding the lack of a signature or date (which is incorrect, as the transcript does show the date), nor counters the business record hearsay exception under which Respondent has introduced the transcript. In fact, she refers to an unidentifiable case using an incomplete citation to nonetheless acknowledge that proper foundation for authenticating a document need not be established *only* through personal knowledge. *See* Response at 1–2.

Turning to Wilk's sworn statement, I find that it barely meets the requirements of Rule 803(6). While it establishes that the transcript was drafted within the same month that the phone call occurred, and was reviewed by Wilk after she listened to the call, it does not address how "regularly" Respondent engages in this practice of transcribing recorded calls. And although Complainant does not cite to any authority to support her argument that the transcript must somehow be "official" to be admitted as evidence, her point is well-taken. The document reads as if it was prepared by someone who is not practiced at transcribing speech in a neutral manner. In fact, it reads very much like someone's personal interpretation and opinion of the dialogue they are listening to as they transcribe it.

But while the parties dedicate significant attention to the admissibility of the transcript, it proves to be a less important issue in the overall scheme of this case. As Complainant states, "[t]here is no proof that this transcript was used by any" of Respondent's employees involved in

her termination. Response at 2 (internal quotations omitted). Though it certainly would have been advantageous for Respondent to submit either the recording of the call (if available), or a more professionally-prepared, neutrally-drafted transcript—the extent to which Respondent relies on the content of the transcript in its briefs does not make its admissibility a material issue, as Respondent largely relies on other evidence to support its position (as discussed below). Nevertheless, to assure that my grant of summary decision in this matter is in no way reliant on the transcript (or my review of it), the transcript is DISREGARDED.

C. Admissibility of the Affidavits

Each party challenges the admissibility of the other's submitted affidavit (except for the affidavit of Respondent's attorney regarding the production of the phone call transcript in discovery). Respondent argues that Complainant's affidavit fails to comply with the requirements of Illinois Supreme Court Rule 191(a) and should be ignored because it is "filled with unsupported assertions, opinions, self-serving, or conclusory statements." Reply at 6. It also unnecessarily includes "a copy and paste of the Commission's November 9, 2022 Order" from Complainant's prior Request for Review action challenging the Department's dismissal of her claims. *Id*.

Also citing Rule 191(a), Complainant argues that Wilk's affidavit fails to comply thereto because it is not notarized, contains "no statement that material facts were unavailable," and fails to state "why affidavits could not be obtained from" the various individuals named therein who were never deposed. Response at 2.

Pursuant to Illinois Supreme Court Rule 191(a):

> Affidavits . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.

However, "[u]nsupported assertions, opinions, and self-serving or conclusory statements do not comply with Supreme Court Rule 191(a)" and are not accepted. *MC Baldwin Fin. Co. v. DiMaggio, Rosario & Veraja, LLC*, 364 Ill. App. 3d 6, 21, 845 N.E.2d 22, 35 (1st Dist. 2006); *Geary v. Telular Corp*., 341 Ill. App. 3d 694, 699, 793 N.E.2d 128, 133 (1st Dist. 2003).

Here, Wilk's affidavit appears to comply substantially with Rule 191(a), as she properly swears under oath that her statements: (1) are made to the best of her knowledge; (2) set forth specific facts admissible in evidence that are relevant to the instant matter; (3) refer to specific attached exhibits; and (4) demonstrate that she could testify in conformity with her statements. Her affidavit is also properly verified. *See id*. at Rule 137(a). Complainant provides no authority for the peripheral requirements she wishes to impose on Wilk's affidavit to render it inadmissible. As to the references made to "individuals who were not deposed," Complainant never sought leave from this court to depose them, and she does not explain how "any of the material facts" in Wilk's affidavit are "known only to persons whose affidavits" Respondent "is unable to procure." *See id*. at Rule 191(b). Thus, because the material facts testified to in Wilk's affidavit are properly attested under applicable rules, , Wilk's affidavit is admissible.

Conversely, Complainant's affidavit fails to substantially comply with Rule 191(a). While she properly swears under oath, Complainant makes numerous conclusory assertions and statements in her affidavit of which she has no personal knowledge (or at least fails to state the basis for any personal knowledge). Therefore, she has failed to show that if sworn as a witness, she could offer competent testify regarding the contents of her affidavit that are supported by admissible statements.

Nevertheless, rather than strike her entire affidavit, I will simply disregard any statements made therein that do not comply with the Rule. In addition, the copied-and-pasted text from the

Commission's Order reversing her previous Request for Review action is hereby STRICKEN, as the Order (which is irrelevant to the current proceedings) speaks for itself, and was not made by Complainant. *See* Affadavit [sic] of Gretchen Gaffney at 4–6.

D. Complainant's Exhibits A–BB

Respondent argues that Complainant's exhibits, marked as Exhibits A–BB, should be disregarded because she does not refer to them whatsoever in her Response brief and does not rely upon them at all in her affidavit. Additionally, Respondent emphasizes that they are not authenticated by any admissible testimony, citing to *In re Stewart Jr. v. Ill. Dep't of Transp.*, ALS No. 08-0252, 2023 ILHUM LEXIS 227, *64 (Nov. 21, 2023) ("the burden is on the complainant to proffer admissible sworn testimony and exhibits to counter the admissible sworn evidence that supports the motion for summary decision"); *In re Phelps v. United Parcel Serv.*, ALS No. 8226, 1996 ILHUM LEXIS 1047, *12 (Jul. 11, 1996) ("unsworn, unauthenticated exhibits [] are . . . insufficient to counter Respondent's sworn, authenticated materials"). I agree.

Yet while this conclusion legally entitles me to DISREGARD Complainant's exhibits in their entirety, I do not need to take the weightier step of barring the exhibits completely, as Complainant has failed to point me to any particular document or exhibit that she wishes for me to consider in support of her claims. To the extent Complainant was expecting this administrative court to wade through twenty-eight uncited exhibits in an effort to identify helpful evidence to support her opposition to Respondent's motion for summary decision, this is not my role. I am not Complainant's advocate, nor do I have time to review evidence that Complainant herself did not believe was important enough to discuss. Accordingly, while Complainant's exhibits will not be disregarded or barred from the evidentiary record, I did not review them in arriving at my decision in this matter, as Complainant failed to explain how I should consider any particular

exhibit in support of the idea that her wished-for causes of action should proceed to trial. With this final evidentiary issue resolved, I now turn to the merits of Complainant's claims.

II. Complainant Cannot Prove that Respondent Failed to Promote Her or Retaliated Against Her

In Counts I and II of her Complaint, Complainant alleges (respectively) that Respondent violated Section 2-102(A) of the Act when it failed to promote her to Supervisor I/ Team Lead II (the position filled by Linda Virzi) because of her race, Black, and that it retaliated against her for opposing unlawful discrimination. Compl. at Count I ¶ 14 and Count II ¶ 16. Section 2-102(A) makes it a civil rights violation for an employer to "act with respect to" promotion "on the basis of unlawful discrimination." 775 ILCS 5/2-102(A). Unlawful discrimination is defined as "discrimination against a person because of his or her actual or perceived" race or other specified protected class. *Id*. at 1-103(Q). Additionally, Section 6-101(A) makes it a civil rights violation to "[r]etaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination. *Id*. at 6-101(A). Yet Complainant is unable to demonstrate that Respondent failed to promote her to the Supervisor I position, for either discriminatory or retaliatory reasons, because she cannot establish that she actually applied for the position.

A. Failure to Promote: Unlawful Discrimination

To establish a *prima facie* case of race-based discrimination in a failure to promote claim under the Act, a complainant must show that: (1) she is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) she was rejected despite her qualifications; and (4) after she was rejected, the position remained open and the employer sought other applicants from persons of complainant's qualification, or the position was subsequently filled by a person not in her protected class. *See Stone v. Dep't of Human Rights*,

299 Ill. App. 3d 306, 315, 700 N.E.2d 1105, 1111 (4th Dist. 1998); *In re Patrick, Jr. v. City of Centralia Police Dep't*, ALS No. S-6648, 1999 ILHUM LEXIS 285, *16 (Nov. 16, 1999). Although Complainant easily establishes the first element, she fails to meet her burden of proving any and all of the remaining three.

Complainant admits that she did not actually apply for the Supervisor I position. *See* Compl. at Count I, ¶ 6; *see , e.g.*, *In re Hilton v. Schnucks Markets, Inc.*, ALS No. S-4609, 1993 ILHUM LEXIS 62 (Nov. 19, 1993) (no adverse action found where the employee did not apply for any open position with the employer). Notwithstanding this admission, Complainant pled that AVP Grant actually "verbally offered" the Supervisor I position to her. Compl. at Count I, ¶ 7. However, she points to no evidence (or details) to support this factual assertion. On the other hand, Respondent advises that its HR department—which keeps records of all offers extended—has no evidence of any such offer made to Complainant. *See* Mot. at 9.

Although Complainant and AVP Grant corresponded over instant messaging and email between January 15, 2021, and January 19, 2021, their communications have nothing to do with the Supervisor I/ Team Lead III role to which Virzi was supposedly promoted over Complainant. *See* Mot., Ex. 6. AVP Grant told Complainant on January 15th that he had an update for her about an entirely different position, Team Lead II. *See id*. at 1. On January 19th, he told Complainant that he was "waiting on a response from" human resources to approve a backdated pay increase for her for her "promotion," which appears to be the Team Lead II position he previously mentioned to her. *Id*. at 2. According to Wilk, this pay increase and promotion resulted from Complainant's extra work taking on escalation calls, "which was a responsibility outside of her then-current job duties and corresponded better with the Team Lead II position." Wilk Aff. ¶ 11.

The explanation offered by Respondent thus aligns with the reference to a promotion to the Team Lead II position that is mentioned in the conversation between Complainant and AVP Grant.

Conversely, there is no evidence indicating that AVP Grant made any offer of promotion to Complainant for the Supervisor I/ Team Lead III position, or that Complainant accepted such an offer or was otherwise placed in the position. Complainant cannot claim to have suffered an adverse employment action through the loss of a position that she never applied for and for which she was never employed. Consequently, she fails to establish the third element of her claim—*i.e.*, that she was somehow rejected for the position.

And yet even if Complainant could show that she suffered an adverse action, her claim still fails because she does not demonstrate that Respondent treated her less favorably than any similarly situated employee outside her protected class. Complainant has not established that Virzi is a proper comparator because no evidence has been introduced regarding Virzi's race. With no other comparators proposed by Complainant, she fails to show any evidence of discrimination based on race. And even if I were to assume that Virzi is not Black (and that she is in all other respects a proper comparator), Respondent maintains that it still would have selected Virzi over Complainant had she actually applied for the Supervisor I/ Team Lead III position. Unlike Complainant, Virzi was well qualified for the Supervisor I role because she had prior experience as a supervisor in a call center environment, whereas Complainant lacked supervisory experience. *See* Wilk Aff. ¶ 12. These facts are uncontradicted by Complainant and are, thus, accepted as true.

Therefore, I find that Complainant has failed to demonstrate that Respondent denied Complainant a promotion to the Supervisor I/ Team Lead III position because of her race, as Complainant neither applied for the position nor subsequently identified any similarly situated employees that Respondent treated more favorably under comparable circumstances.

B. Failure to Promote: Unlawful Retaliation

To establish a retaliation claim under the Act, a complainant must show that: (1) she engaged in a protected activity that was known by the respondent; (2) the respondent subsequently took some adverse action against her; and (3) there is a causal connection between the protected activity and the adverse action. *See Hoffelt v. Dep't of Human Rights,* 367 Ill. App. 3d 628, 633, 867 N.E.2d 14, 18 (1st Dist. 2006).

For the same reasons discussed above in connection with her race discrimination claim, Complainant fails to establish that Respondent subjected her to an adverse action, as she neither applied for nor was actually offered (or qualified for) the Supervisor I/Team Lead III position. As a result, she cannot establish a causal connection between the alleged failure to promote and her protected activities—*i.e.*, notifying Lowe on July 16, 2020, and on October 26, 2020, that she was going to file a grievance for unlawful discrimination and retaliation. Respondent could not have reacted to the news of Complainant's internal complaints by denying her a promotion, as Complainant had not applied for any such promotion at that time.

And yet even if some adverse action were established, the temporal proximity is too remote to support an inference of retaliatory motivation by Respondent. Virzi was eventually promoted to Supervisor I/ Team Lead III on January 18, 2021—well over a year after Complainant made her second internal complaint on October 26, 2020. This is simply too long a period to suggest a retaliatory motivation for a later action taken by Respondent. *See In re Mitchell v. Local Union 146 Int'l Bhd of Elec. Eng'rs*, ALS No. No 947(Y), 1985 ILHUM LEXIS 241, *12 (Sept. 16, 1985) (the six-month time period between the protected activity and the adverse action is "sufficiently large to negate any inference of a connection between the two events."). Additionally, there is no evidence that the person to whom Complainant complained was involved in promoting Virzi, or

that such individual otherwise advised the decision-maker who promoted Virzi of Complainant's grievances. *See In re Horbas v. St. Joe Container Co. et al.*, ALS No. 4109; 5943, 2001 ILHUM LEXIS 170, *17–*18 (Apr. 23, 2001).

Therefore, I find that Complainant has failed establish that Respondent unlawfully retaliated against her by failing to promote her to Supervisor I/ Team Lead III position, as there was no adverse action taken against Complainant, nor can she show that similarly situated individuals outside her protected class were treated more favorably by Respondent after having engaged in a protected activity.

III. Complainant Fails to Establish the Elements of Unlawful Discharge Based on Race, but Establishes a *Prima Facie* Claim of Retaliatory Discharge.

In Counts III and IV of her Complaint, Complainant alleges (respectively) that Respondent discharged her because of her race, and that it retaliated against her for opposing discrimination under Sections 2-102(A) and 6-101(A) of the Act.

A. Discriminatory Discharge

To establish a *prima facie* case of unlawful discrimination in employment, an employee must show that: (1) she is a member of a protected class; (2) she was meeting her employer's legitimate business expectations; (3) she suffered an adverse employment action; and (4) her employer treated similarly situated employees outside her protected class more favorably. *Owens v. Dep't of Human Rights*, 403 Ill. App. 3d 899, 919, 936 N.E.2d 623, 640 (1st Dist. 2010). In the instant case, Complainant easily meets the first and third elements, in that she is a member of a protected class (Black) and that Respondent terminated her employment on January 20, 2021. But as with her failure to promote claim, Complainant identifies zero similarly situated non-Black employees who engaged in comparable misconduct and who were thereafter not terminated by

Respondent. Thus, without any indirect evidence of discrimination, Complainant cannot establish a *prima facie* case of discriminatory discharge based upon race.

Even if Complainant had proffered suitable comparators, her claim would still fail because she is unable to show that she was meeting Respondent's legitimate business expectations when she was fired. While she emphasizes that the email sent by Malats (to the managers in Respondent's Customer Service Department) does not suggest that the customer complaint was based on a phone call with her because she is not named by Malats—Complainant does not refute or discredit the subsequent emails in the conversation where her supervisors/managers specifically identify her as the employee about whom the borrower complained. Upon receiving the email from Malats, the Customer Service department reviewed phone call recordings from the relevant time period and was able to identify Complainant from the calls pertaining to the specific customer in question. Moreover, Complainant does not deny that AVP Grant (along with Wilk): (1) reviewed the recording; (2) determined that her conduct unacceptable; (3) recommended her termination; and (4) effectuated her termination after she refused their attempts to contact her regarding this incident.

Complainant acknowledges that she was expected to adhere to "certain rules of behavior and conduct, and that she could be subjected to "disciplinary action, up to, and *including immediate termination of employment*" for engaging in any unacceptable conduct. Mot., Ex. 2 (emphasis added). She also acknowledges that unacceptable conduct includes "any careless action which . . . places the financial assets of [Respondent] and/or its customers at risk," and "abusive, or threatening language toward any . . . customer; indifference or rudeness towards a customer; any unprofessional or disorderly/antagonistic conduct." *Id*. at 23. And yet while Complainant proclaims that she never saw the disciplinary action forms and was never made aware of their

contents, she does not refute the disciplinary issues mentioned in her annual performance reviews. Those documents show that she had been "coached regarding her tone and professionalism while speaking with callers" as a result of customer complaints multiple times throughout her employment. Mot., Ex. 8; *see also* Ex. 10. Hence, there is no genuine issue of material fact as to Complainant's disciplinary history, which is established through unrefuted evidence (and which was not the primary basis for her termination).

Therefore, I find that Complainant has failed show that Respondent unlawfully discharged her based on her race, as she is unable to demonstrate that she was meeting Respondent's legitimate business expectations when she was fired, and she has not identified any similarly situated individuals outside of her protected class who were retained by Respondent after engaging in similar misconduct.

B. Retaliatory Discharge

As with her aforementioned retaliation claim, Complainant must establish a *prima facie* case by showing that: (1) she engaged in a protected activity that was known by the respondent; (2) the respondent subsequently took some adverse action against her; and (3) there is a causal connection between the protected activity and the adverse action. *See Hoffelt*, *supra*, 367 Ill. App. 3d at 633. Complainant has established the first element, as the record shows that she complained to Lowe on July 16, 2020, and on October 26, 2020, that she believed she was being unlawfully discriminated and retaliated against. She also meets the second element, that she suffered an adverse employment action when she was discharged on January 20, 2021. However, her claim fails at the third element because she is unable to show a causal connection between the two.

There are three ways a complainant can establish the necessary "causal nexus" between a protected activity and a subsequent adverse action. Those methods are: (1) showing direct

evidence of retaliation; (2) showing evidence of unequal treatment of similarly situated persons who did not engage in the protected activity; or (3) establishing that the time period between the protected activity and the adverse action is short enough to create an inference of "connectedness." *In re Buenaventura v. Springfield Service Corp.*, ALS No. 11-0393, 2016 ILHUM LEXIS 52, *40 (Feb. 25, 2016), citing *Maye v. Ill. Human Rights Comm'n*, 224 Ill. App. 3d 353, 360, 586 N.E.2d 550 (1st Dist. 1991). Complainant is not pursuing her claim under the direct theory of persuasion, and she has not introduced any indirect evidence of similarly situated individuals who were treated more favorably than she by Respondent. As a result, temporal proximity is the only method available to her to demonstrate causation.

Complainant was discharged almost three months after her making her second complaint to Lowe. Case law supports a preliminary inference of connectedness between the protected activity and the adverse action. *See Maye*, *supra* (the three-month time period between the protected activity and the adverse action "is sufficiently suspect to establish a *prima facie* case of retaliatory discrimination."). But while the timing in this case supports the establishment of a *prima facie* case of retaliation, Complainant's burden does not end there. If Respondent articulates a legitimate, nondiscriminatory reason for its decision to discharge Complainant, she is required to establish pretext by a preponderance of the evidence.

IV. Respondent Articulates a Legitimate, Nondiscriminatory Reason for Its Actions.

Respondent has the burden to articulate (but not prove) a legitimate, non-discriminatory reason for the adverse action. *See Owens*, *supra*, 403 Ill. App. 3d at 919. Here, Respondent's reason for discharging Complainant was her for unprofessional behavior and unacceptable conduct toward a borrower during a phone call on January 15, 2021.

On its face, Respondent's reason is nondiscriminatory and nonretaliatory. And while Complainant may take issue with Respondent's decision to administer the harshest discipline available under its Discipline and Discharge policy, her position does not undermine Respondent's rationale for Complainant's termination. "Mere unfairness, however, is not equivalent to a reasonable inference of unlawful discrimination." *In re Carlin v. Edsal Mfg. Co.*, ALS No. 7321, 1996 ILHUM LEXIS 350, *17 (Oct. 21, 1996). Indeed, as noted above, Complainant was warned that any unprofessional behavior on her part could lead to disciplinary action, up to (and including) termination.

Therefore, I find that Respondent has met its burden of production. Respondent's reason for terminating Complainat's employment has nothing to do with her race or that she engaged in a protected activity. The burden of proof now shifts back to Complainant to demonstrate the existence of a genuine issue of material fact as to the question of "pretext" to survive Respondent's motion for summary decision.

V. Complainant Fails to Establish a Genuine Issue of Material Fact as to Pretext, and Further Fails to Demonstrate That Respondent's Actions Were Motivated by Discriminatory Animus

"The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered." *In re McDaniel v. Little Co. of Mary & Health Care Ctrs.*, ALS No. 20-0233, 2023 ILHUM LEXIS 235, *39 (Sept. 20, 2023) (citing *Stewart v. Henderson*, 207 F.3d 374, 378, 2000 U.S. App. LEXIS 3721, *8 (7th Cir. 2000)). "Even if Complainant can show that Respondent's articulation was a lie, this does not mean that Complainant has prevailed." *Id*. Complainant must establish that Respondent had a discriminatory motive. *Id*. Under Illinois law, an employer may take its action for any good reason, bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a

discriminatory reason. *See In re Carlin*, 1996 ILHUM LEXIS 350 at *18. But where a decision by an employer is rendered without offense to any protected class, status, or activity established under the Act, the employer's decision will stand regardless of whether it may be harsh, unfair, or even flat-out wrong. *See In re Escobedo v. School Dist. # 116 Round Lake*, ALS No. 13-0383, 2018 ILHUM LEXIS 836, at *17–18 (Aug. 28, 2018) (citing *Mechning v. Sears, Roebuck & Co*., 864 F.2d 1359 (7th Cir. 1988)).

Respondent has consistently maintained that Complainant's conduct during the January 15, 2021 phone call was escalated to its management because the borrower complained to the Better Business Bureau and threatened legal action. The evidence shows that one of its Assistant Vice Presidents, AVP Grant, found Complainant's conduct especially egregious because of her position as a Team Lead, which ultimately caused him to recommend that she be terminated. When Complainant refused to discuss the incident with AVP Grant and Wilk despite their numerous attempts to contact her by various means, her termination was effectuated. There is no evidence of any intention to take any adverse action against Complainant prior to this incident. To the contrary, just before AVP Grant became aware of the borrower's complaint, he was working to secure a retroactive salary increase for Complainant. Complainant provides no evidence to refute any of this or to show that AVP Grant's or Wilk's actions are somehow a pretext for unlawful discrimination or retaliation based on race. *See In re Carlin*, 1996 Ill HUM LEXIS 350 at *18 ("The correctness of the reason is not important as long as there was a good faith belief by Respondent in its decision.") (internal citations omitted); *see also*, *Shah v. Ill. Human Rights Comm'n*, 192 Ill. App. 3d 263, 273-74 ("A good faith belief for an employment decision is sufficient to rebut" the presumption of a *prima facie* case). Complainant simply has no proof for the civil rights violations she claims.

In support of this idea, I find that Complainant would be unable to meet her burden of proving pretext at trial, as she has not introduced any evidence suggesting that her race played a part in Respondent's decision to fire her. In fact, instead of attempting to prove the allegations in her Complaint, she concentrates on discrediting the authenticity of certain evidence introduced by Respondent, much of which is immaterial to the determination of whether the decisionmakers involved in her termination were motivated by retaliatory (or discriminatory) animus. *See In re Proctor v. Bd. of Trustees of the Univ. of Ill.*, ALS No. 11-0433, 2018 ILHUM LEXIS 821, *45 (Aug. 30, 2018) (circumstantial evidence "must still do more than create a permissible inference of discrimination, in that the proffered evidence must present a 'convincing mosaic of [] discrimination' regarding the motivation of the decision-maker."). This again proves fatal to her claims.

And while it is obvious that Complainant disagrees with Respondent's decision to terminate her and believes it to be unfair, that is not the relevant inquiry here. Neither this administrative court nor the Commission sits as a "super personnel agency" that second-guesses whether employer decisions were correct. *In re Fitzgerald v. State of Ill. Dept. of Public Aid*, ALS No. S-8189, 1997 ILHUM LEXIS 749, *23 (July 8, 1997); *see also In re: the Request for Review by Lemuel Washington*, ALS No. 18-0233, 2019 ILHUM LEXIS 923, *4 (June 20, 2019) (the Commission refuses to interfere or second guess an employer's good-faith business decisions). On the contrary, because the correctness of an employer's decision is immaterial where there is a good faith belief in the rationale for the action, there simply is no place for second-guessing by this administrative court where a violation of the Act has not occurred. *See In re Bickel (Bradford) v. Northwestern Univ. & Kellogg School of Mgmt.*, ALS No. 17-0297, 2020 ILHUM LEXIS 268, *23-24 (Oct. 26, 2020).

In conclusion, Complainant has not introduced any admissible evidence demonstrating the existence of a genuine issue of material fact as to whether Respondent's motivation for its actions was based on a retaliatory (or discriminatory) animus. *See In re Barnwell v. Select Mgmt. Res., LLC, et al*., ALS No. S-12080, 2006 ILHUM LEXIS 49, *15 (Jan. 4, 2006) ("Complainant failed to prove that this contention was unworthy of belief, had no basis in fact," was not Respondent's "actual motivation, or that it was an insufficient reason."). Respondent has provided evidence supporting its belief, in good faith, that Complainant engaged in unacceptable conduct toward a customer. That is all that is necessary to prevail. Complainant is unable to demonstrate that this incident was not the "real" reason for her termination or that anyone involved in that decision acted upon any unlawful grounds against her based on race or because she engaged in a protected activity under the Act. Therefore, summary decision in Respondent's favor is warranted.

RECOMMENDATION

For the reasons discussed above, Respondent's motion for summary decision is GRANTED, and judgment as a matter of law is entered in Respondent's favor. I further recommend that the Illinois Human Rights Commission affirm this Recommended Order and Decision pursuant to 56 Ill. Admin. Code § 5300.910.

HUMAN RIGHTS COMMISSION

BY:_____

AZEEMA N. AKRAM
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: April 19, 2024