

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST
FOR REVIEW BY:

KURTIS CLAY,

Petitioner.

)
)
)
)
)
)
)

CHARGE NO.: **2021CR0829**

EEOC NO.: **N/A**

ALS NO.: **23-0207**

ORDER

This matter coming before the Commission on January 10, 2024, by a panel of three, Commissioners Janice M. Glenn, Demoya R. Gordon, and Stephen A. Kouri II presiding, upon the Request for Review (“Request”) of Kurtis Clay (“Petitioner”), of the Notice of Dismissal issued by the Illinois Department of Human Rights (“Respondent”)¹ of Charge No. 2021CR0829, and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the dismissal of Counts A, B, D, and E of the Petitioner’s charge is **VACATED** and Counts A, B, D, and E are **REMANDED** for **FURTHER INVESTIGATION** and for further proceedings consistent with this Order and the Illinois Human Rights Act (“Act”); and the dismissal of Counts C and F is **VACATED** and Counts C and F are **REMANDED** for a **FINDING OF SUBSTANTIAL EVIDENCE** and for further proceedings consistent with this Order and the Act.²

DISCUSSION

On November 25, 2020, the Petitioner filed a charge of discrimination with the Respondent alleging that Kinder Morgan (“Employer”) suspended him due to his race (Count A), his disability (Count B), and in retaliation for engaging in a protected activity (Count C), and discharged him due to his race (Count D), his disability (Count E), and in retaliation (Count F), in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act. On November 5, 2021, the Respondent dismissed the Petitioner’s charge for lack of substantial evidence. The Petitioner filed a request for review. On June 14, 2022, the Commission vacated the dismissal of the charge and remanded the charge to the Respondent for further investigation. On August 19, 2022, the Respondent dismissed the charge a second time for lack of substantial evidence. The Petitioner filed a request for review. On January 23, 2023, the Commission vacated the dismissal of the charge and remanded the charge to the Respondent for further investigation. On May 5, 2023, the Respondent dismissed the charge a third time for lack of substantial evidence. The Petitioner has filed this timely Request.

¹ In a request for review proceeding, the Illinois Department of Human Rights is the “Respondent.” The party to the underlying charge requesting review of the Illinois Department of Human Rights’s action shall be referred to as the “Petitioner.”

² This order is entered pursuant to a 3-0-0 vote by the Commissioners.

The Petitioner was hired on June 5, 2018, as a Terminal Operator for the Employer, a company that holds oil and gasoline for other companies.³ According to the Employer, the Petitioner's responsibilities included moving petroleum products in pipelines, and opening and closing correct valves.

The Petitioner stated that he had diabetes, and that he submitted disability documentation to the Employer about four months after he was hired. The Petitioner stated that the Employer tried to fire him at that time, but that he then submitted a reasonable accommodation request and ended up not being disciplined. When he told Manager Jacob Marshall about his disability, Marshall told him it was fine and just to let him know if he needed a break or needed to go to his car. The Petitioner stated that his new manager, Terminal Manager Shaun Flatt, did not know about his disability. The Petitioner provided a verification of disability form, which indicated that his diabetes was not minor and was permanent, and the Petitioner did not have any restrictions relating to his condition.

The Petitioner stated that in 2019, he filed a complaint of harassment because of his race. The Petitioner also stated that the Employer tried to fire him in 2018, but could not because of his diabetes. He stated that a manager harassed him and wanted to terminate him, and said the Petitioner faked having diabetes. The Petitioner also complained to Flatt in September 2019 and again in January 2020, about race discrimination and harassment in that Superintendent Brad Tonsor (White; non-disabled; no protected activity) was harassing him and threatening to fire the Petitioner the first chance he got.

The Petitioner stated that on February 29, 2020, he was suspended by Flatt and Tonsor. The Petitioner was told that he was suspended pending an investigation into a violation of the Employer's dual verification policy. The Petitioner conceded he did not verify the movement of a valve. The Petitioner stated that on March 13, 2020, Flatt and Tonsor discharged him for willfully and deliberately violating the Employer's dual verification policy. The Petitioner stated that he and another employee, Erick Hecker (White; non-disabled; no protected activity), were both discharged for the same incident and violation.

The Petitioner believed that the suspension and discharge were due to his race because Tonsor told him that he was going to fire him and get rid of him as soon as he had a chance. The Petitioner believed that the suspension and discharge were due to his disability because Tonsor did not like the fact that the first time Tonsor tried to fire him, he did not know that the Petitioner had an accommodation. The Petitioner believed that the suspension and discharge were in retaliation for his complaint because others have had verification failures and nothing happened to them. The Petitioner stated that Tonsor, Terminal Operator Eric Phillips (White; non-disabled; no protected activity), and Terminal Operator Justin Simpson (White; non-disabled; no protected activity) violated the dual verification policy and were not disciplined or terminated. The Petitioner stated that Phillips's and Simpson's violation occurred in 2019, when they submitted a dual verification without signing off on it.

³ This summary of the case is comprised of the summary included in the Commission's June 14, 2022, order and additional facts from the Respondent's second and third investigations.

Confidential Witness 1 stated that he worked with the Petitioner, and that the Petitioner was treated differently than everyone else and was given worse jobs to do. Confidential Witness 1 stated that it seemed like the supervisors would argue with the Petitioner more and would be harder on him, and that the Employer had tried to fire him once before.

According to Tonsor, the Employer had a dual verification policy, requiring that every product transfer process activity undergo dual verification, failure of which would result in termination on the first offense. Flatt stated that all terminal operators had to follow the dual verification procedure, which required two employees to check relevant valves before performing any tank-to-tank transfer. Flatt stated that both the Petitioner and Hecker were suspended on February 29, 2020, for failure to follow the dual verification procedure on February 28, 2020, per company policy. On March 13, 2020, the Employer discharged the Petitioner, citing his failure to follow its dual verification policy, which resulted in product contamination. Flatt stated that Hecker was also discharged.

Both Tonsor and Flatt stated that the Petitioner never made any complaints of harassment or discrimination. Tonsor stated that the Petitioner had a previous written warning for sleeping on the job, which occurred in November 2018. Flatt stated that the Petitioner was going to be terminated, but then the Petitioner disclosed that he had diabetes. The Petitioner was then given time off to get his diabetes under control.

Tonsor stated that he never violated the dual verification policy, and that the Employer had no record of Phillips or Simpson violating the policy. The Employer provided copies of Tonsor's, Phillips's, and Simpson's employment records, which did not indicate that they had violated the dual verification policy. Customer Service Representative Lisa Wahl stated that she did not have any knowledge about any discipline of or violation of policy by Tonsor, Phillips, or Simpson.

Counts A, B, D, and E

The Petitioner argues that the Employer suspended him because of his race, Black (Count A), and disability, diabetes (Count B), and discharged him because of his race (Count D) and disability (Count E). In order to establish a *prima facie* case of race discrimination, the petitioner must show that 1) he is a member of a protected class, 2) he was performing his job satisfactorily, 3) he was subjected to an adverse action, and 4) the employer treated a similarly situated employee outside his protected class more favorably under similar circumstances. *Marinelli v. Ill. Human Rights Comm'n*, 262 Ill. App. 3d 247, 253 (2d Dist. 1994). In order to establish a *prima facie* case of disability discrimination, the petitioner must prove that 1) he is disabled within the definition of the Act; 2) his disability is unrelated to his ability to perform the functions of the job he was hired to perform; and 3) that an adverse job action was taken against him related to his disability. *Ill. Dep't of Corrections v. Ill. Human Rights Comm'n*, 298 Ill. App. 3d 536, 540 (3d Dist. 1998).

After the Respondent first dismissed his case for lack of substantial evidence on November 5, 2021, the Petitioner argued in his request for review to the Commission that Tonsor, Phillips, and Simpson were outside his protected classes and were not suspended and discharged for violating the Employer's dual verification policy. The Petitioner named Customer Service Representative Tammy Perry as a witness who knew of the better treatment of those comparators. The Commission vacated the Respondent's dismissal of the Petitioner's charge and remanded for further investigation.

The Respondent's second investigation resulted in a second dismissal for lack of substantial evidence on August 19, 2022. In his second request for review, the Petitioner again named Perry as a witness who knew about the dual verification policy violations of the named comparators. The Petitioner stated that Perry "was put in charge of finding discrepancies" and "brought findings to Flatt and Tonsor on several occasions, however, both elected to disregard proper procedure." Such evidence would establish that terminal operators outside of the Petitioner's protected classes were treated more favorably than him. In its response to request for review, the Respondent recommended that the Commission vacate the dismissal and remand for further investigation to investigate the named comparators and contact Wahl and Perry, the witnesses whom the Petitioner identified. The Commission followed the Respondent's recommendation and so ordered.

In its third investigation, the Respondent's investigator interviewed Wahl, who stated that she had no knowledge about other employees' violations or discipline. The Respondent did not, however, interview Perry. The Respondent noted:

[Petitioner] identified Tammy Perry as a witness to his charge in his second request for review. Staff attempted to contact Perry by phone on April 27, 2023, and April 28, 2023. Staff left a voicemail message on both occasions requesting for Perry to contact staff. Perry did not contact staff as requested.

The Respondent dismissed the Petitioner's charge of discrimination for lack of substantial evidence.

The Act provides that the Respondent "shall conduct an investigation sufficient to determine whether the allegations set forth in the charge are supported by substantial evidence." 775 ILCS 5/7A-102(C)(1). The Act further provides that the "Director or his or her designated representatives shall have authority to request any member of the Commission to issue subpoenas to compel the attendance of a witness or the production for examination of any books, records or documents whatsoever." 775 ILCS 5/7A-102(C)(2). Here, the Petitioner identified Perry as a witness who knew of employees outside his protected classes who violated the dual verification policy, brought the violations to the attention of Tonsor and Flatt, and knew that those employees were not disciplined. Because Perry's statement, if made, would have been critical to the Petitioner's case, the Commission concludes that the Respondent must again re-investigate his claims, by subpoena if necessary. Only then will the Respondent and the Commission have the information necessary to determine whether a civil rights violation occurred.

Counts C and F

The Petitioner argues that he was suspended (Count C) and discharged (Count F) in retaliation for complaining about racial discrimination. A *prima facie* case of retaliation requires evidence that 1) the petitioner engaged in a protected activity, 2) he suffered an adverse action, and 3) a causal connection exists between the protected activity and the adverse action. See *Welch v. Hoeh*, 314 Ill. App. 3d 1027, 1035 (3d Dist. 2000).

The Petitioner has established a *prima facie* case of retaliation: he complained about race discrimination to the Employer in January 2020; he was suspended on February 29, 2020, and discharged on March 13, 2020; and the proximity in time between the protected activity and the adverse actions creates an inference of retaliation. See *Mitchell and Local Union 146*, IHRC, 20 Ill. HRC Rep. 101, 110-11 (1985) (holding that a causal connection between the protected activity and the adverse action could be established if the time period between the two events was short enough to create an inference of connectedness). The Commission vacates the dismissal of Counts C and E and remands for a finding of substantial evidence.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The dismissal of Counts A, B, D, and E of the charge is **VACATED** and Counts A, B, D, and E are **REMANDED** for **FURTHER INVESTIGATION** and for further proceedings that are consistent with this Order and the Act.
2. The dismissal of Counts C and F is **VACATED** and Counts C and F are **REMANDED** for a **FINDING OF SUBSTANTIAL EVIDENCE** and for further proceedings that are consistent with this Order and the Act.

This Order is not yet final and appealable.

STATE OF ILLINOIS)

) Entered this 17th day of JANUARY 2024.

HUMAN RIGHTS COMMISSION)

Commissioner Janice M. Glenn

Commissioner Demoya R. Gordon

Commissioner Stephen A. Kouri II