

NOTICE
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2014 IL App (4th) 130798-U
NO. 4-13-0798
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
September 5, 2014
Carla Bender
4th District Appellate
Court, IL

DECATUR PUBLIC SCHOOL DISTRICT NO. 61,)
Petitioner,)
v.)
THE HUMAN RIGHTS COMMISSION; THE)
DEPARTMENT OF HUMAN RIGHTS; and)
STEVEN LUKER,)
Respondents.)

Petition for Direct Review of
an Order of the Illinois Human
Rights Commission
No. 07SF1749

JUSTICE HARRIS delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

- ¶ 1 *Held:* The Commission's decision was against the manifest weight of the evidence where the complainant failed to establish a *prima facie* case of gender-based employment discrimination.
- ¶ 2 Petitioner, Decatur Public School District No. 61 (District), appeals the decision of the Illinois Human Rights Commission (Commission) adopting the September 29, 2011, recommended order and decision of the Administrative Law Judge (ALJ) finding the District discriminated against respondent, Steven Luker, on the basis of his gender. On appeal, the District asserts in the alternative (1) the Commission's decision is against the manifest weight of the evidence because (a) Luker failed to establish a *prima facie* case of gender-based employment discrimination for failing to place him on the substitute-office-personnel call list or (b) even if Luker established a *prima facie* case of gender-based employment discrimination, the District articulated a legitimate nondiscriminatory reason for not placing him on the call list for

substitute office personnel; or (2) if Luker established the District engaged in unlawful discrimination, the Commission's remedy of placing Luker on the substitute-office-personnel call list and giving him the right of first refusal for one school year is unjust. Because we agree with the District that Luker failed to establish a *prima facie* case of gender-based discrimination for the substitute-office-personnel position, we vacate the Commission's order.

¶ 3

I. BACKGROUND

¶ 4

The following factual information is derived from the common-law record and the testimony given during the November 2008 hearing before the ALJ. We discuss only the facts relevant to the disposition of this appeal.

¶ 5

On August 3, 2006, Luker submitted an application to the District for a substitute-teaching-assistant position. Although he did not apply for a clerical position, Luker filled in the section of the application indicating he typed 60 words per minute and had both data-entry and computer experience. Luker testified that he filled in this section because he felt computer and typing skills might be necessary for the substitute-teaching-assistant position. Specifically, he thought these skills might be required "[i]f [he] had to fill out *** homework assignments or classroom materials."

¶ 6

Shortly after submitting his application for the substitute-teaching-assistant position, Luker saw a newspaper advertisement indicating the District was hiring a secretary. Luker could not recall whether he saw this advertisement before or after his interview, although he later testified it must have been before. Also in early August, Luker attended an orientation at one of the District's schools relating to the substitute-teaching-assistant and office positions. On August 9, 2006, Luker filled out a "Classified Substitute Profile Sheet," in which he indicated that he was interested in both the teaching-assistant and office-personnel positions by placing a

check mark next to both titles. On August 14, 2006, Luker completed the office-worker and typing tests offered by the District. He scored an 81% on the office-worker test and typed 61 words per minute.

¶ 7 On August 24, 2006, Marcia Uchtorff, assistant to the director of human resources for the District, interviewed Luker for the position of substitute teaching assistant. Luker testified that during his interview, which lasted approximately 15 minutes, Uchtorff asked him general questions, as well as more specific ones, including, "Do you have any experience with children?" and "Do you even know what a teaching assistant does?" According to Luker, Uchtorff did not ask him any questions related to an office-personnel position. After leaving the interview, Luker "had the impression that [Uchtorff] was only interviewing [him] for the substitute teaching assistant."

¶ 8 Uchtorff testified that, at the time of the interview, she would have had Luker's file containing his application, a "classified[-]substitute[-]interview sheet," and any of his test results. The classified-substitute-interview sheet denotes which substitute position an applicant is applying for and contains an area for the interviewer to make notes during the interview. Although the interview sheet had an "X" marked next to both the teaching-assistant and office-personnel titles, Uchtorff did not recall asking Luker any questions pertaining to an office-personnel position, nor did she make any notations under the office-personnel column. Had Uchtorff noticed the section labeled "Office Personnel" was marked on the interview sheet, she "would have talked about it and I would have made some notation in this column about office personnel." According to Uchtorff, a secretary would have filled out this portion of the interview form (containing the "X" marked next to "Office Personnel") before Uchtorff received it, and Uchtorff would have completed the remainder of the form.

¶ 9 On August 28, 2006, Marla Robinson, director of human resources for the District, sent Luker a rejection letter. Specifically, the letter stated as follows: "This letter is in response to your application and interview to work as a substitute teaching assistant for [the District]. After processing your application, we are unable to offer you employment." Regarding the rejection letter, Luker testified, "as far as Marla Robinson was concerned, I was only interviewing for the teaching assistant, but [Uchtorff] checked off she was interviewing me for the office worker." When asked later why Luker was not placed on the eligibility list for the position of substitute office personnel, Robinson responded, "We really didn't look at Mr. Luker through the secretary assistant piece—secretary substitute piece. I know he took the test, but if you look at the letter I wrote, it refers to the teaching assistant piece."

¶ 10 At the November 2008 hearing, Luker acknowledged the District did not contact him regarding his application for the substitute-office-personnel position. The following colloquy ensued:

"[ALJ]: All right. So as far as you know, your application is still pending even as of November 6th of 2008 with respect to the office assistant substitute?"

MR. LUKER: Right. As far as I know. It wasn't put in the letter.

[ALJ]: Did you make some sort of inquiry after the August 28th, 2006, letter as to the secretarial substitute job?

MR. LUKER: I did not—I have not written a letter or anything to them asking them. But I—as far as I knew, they were done with me after I complained—after I told Marla Robinson I was going to file a complaint."

¶ 11 On August 30, 2006, Luker went to the District's office to speak with Robinson and find out why he was not hired. While waiting to meet with Robinson, Luker amended his original application to indicate he suffered from a disability, noting at the bottom of the application, "Nature of disability is private." At the hearing, Luker explained as follows:

"I wanted [*sic*] to make it clear that [the District] did not know I was disabled when I applied for the job. During the interview she—she may have—I may have told her that I received Social Security, but she did not know I was disabled, and this was added, this 'Nature of disability is private[,] []' this was added after the interview and after I received the rejection letter from Marla Robinson."

The following inquiry ensued:

"[ALJ]: Okay. How is it so that you wanted to change your application to reflect that at that particular moment in time?

MR. LUKER: When I found out that I was not going to be hired, I felt that I should be protected as a disabled person for this—to apply for a job. It was too late because I'd already gotten the rejection letter, but I wanted to add it.

[ALJ]: Okay. So in your mind the employer can do an adverse act and then—at some point in time and then subsequent to that you can try to create a cause of action by giving them certain information?

MR. LUKER: No, I don't—I don't believe that they—
because they didn't—it was only if—if I reapplied for the same
position, they would know that I was disabled then.

[ALJ]: Okay. All right. So you went in and who did you
talk to and what did you say?

MR. LUKER: The only—the only question would be,
since they didn't reject me for the office worker—a substitute
office worker and they now knew that I'm disabled that I could
bring an action that—well, for the office worker that I would be
protected as being disabled, because I haven't received a rejection
yet."

¶ 12 Luker testified that when he met with Robinson on August 30, 2006, she told him he was not hired because "he was not a good fit for the job." Robinson did not elaborate on the reasons he was not a good fit for the job, so Luker told her he "was going to file a complaint because I had not been given a clear answer as to why I was not being hired. She—she had told me that I was not a good fit for the job, but she didn't tell me why I was not a good fit. *** She just said, 'you aren't a good fit.' Well, I took it as, well, you don't want a male to work this job." According to Luker, Robinson also told him, "we can hire anybody we want." Robinson's handwritten notes dated September 1, 2006, state, "Luker didn't understand we can hire who we wish." Luker did not inquire about his substitute-officer-worker application at the meeting with Robinson. He was subsequently asked to leave and was escorted from the building.

¶ 13 On December 19, 2006, Luker filed a charge with the Department of Human Rights, alleging the District discriminated against him on the basis of his gender, marital status,

and/or sexual orientation. On January 18, 2008, pursuant to section 7A-102(G)(2) of the Illinois Human Rights Act (775 ILCS 5/7A-102(G)(2) (West 2008)), Luker filed a complaint with the Commission, alleging the District discriminated against him on the basis of his gender, marital status, sexual orientation, or disability.

¶ 14 On November 6, 2008, a hearing on Luker's complaint was conducted by an ALJ, wherein the above testimony was elicited. On September 29, 2011, the ALJ filed his recommended order and decision, concluding (1) Luker failed to establish a *prima facie* case of discrimination based on his marital status or sexual orientation; (2) Luker established a *prima facie* case of gender-based discrimination regarding his application for the substitute-teaching-assistant and substitute-office-personnel positions; (3) the District articulated a legitimate, nondiscriminatory reason for not placing Luker on the substitute-teaching-assistant list and Luker failed in his burden to establish that the reason articulated by the District was a pretext for gender-based discrimination; and (4) the District failed to articulate a legitimate, nondiscriminatory reason why Luker was not placed on the eligibility list for the substitute-office-personnel position, requiring a finding as a matter of law that the District discriminated against him on the basis of gender. The ALJ recommended Luker "be given the right of first refusal for all absence-related work assignments for the substitute[-]office[-]worker position for an entire school year as a means to address the sex/gender discrimination that occurred in the instant case."

¶ 15 On November 3, 2011, the District filed its statement of exceptions to the ALJ's recommended order and decision. On August 21, 2013, the Commission declined further review of the matter and the ALJ's recommended order and decision became the order of the Commission.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, the District asserts in the alternative (1) the Commission's decision is against the manifest weight of the evidence because (a) Luker failed to establish a *prima facie* case of gender-based employment discrimination for failing to place him on the substitute-office-personnel call list or (b) even if Luker established a *prima facie* case of gender-based employment discrimination, the District articulated a legitimate nondiscriminatory reason for not placing him on the call list for substitute office personnel; or (2) if Luker established the District engaged in unlawful discrimination, the Commission's remedy of placing Luker on the substitute-office-personnel call list and giving him the right of first refusal for one school year is unjust.

¶ 19 A. Standard of Review

¶ 20 On review, we must affirm the Commission's findings of fact unless they are against the manifest weight of the evidence. 775 ILCS 5/8-111(B)(2) (West 2012); *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 180, 545 N.E.2d 684, 688 (1989). "An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Irick v. Human Rights Comm'n*, 311 Ill. App. 3d 929, 936, 726 N.E.2d 167, 172 (2000). We will not reweigh the evidence or substitute our judgment for that of the Commission. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210, 886 N.E.2d 1011, 1018 (2008).

¶ 21 B. Discrimination Claim

¶ 22 In analyzing employment-discrimination cases brought under the Illinois' Human Rights Act (775 ILCS 5/1-101 to 10-104 (West 2008)), we follow the three-part test first

articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *Zaderaka*, 131 Ill. 2d at 178, 545 N.E.2d at 687. Under this three-part test, a "plaintiff must [first] establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination." *Id.* at 178-79, 545 N.E.2d at 687. If a *prima facie* case is established, a rebuttable presumption of unlawful discrimination arises. *Id.* at 179, 545 N.E.2d at 687.

"Second, to rebut the presumption [of unlawful discrimination], the employer must articulate, not prove [citation], a legitimate, nondiscriminatory reason for its decision." *Id.* "Finally, if the employer carries its burden of production, the presumption of unlawful discrimination falls and plaintiff must then prove by a preponderance of the evidence that the employer's articulated reason was not its true reason, but was instead a pretext for unlawful discrimination." *Id.* "This merges with plaintiff's ultimate burden of persuading the trier of fact that the employer unlawfully discriminated against plaintiff. [Citation.] This ultimate burden remains at all times with plaintiff." *Id.*

¶ 23 "To establish a *prima facie* case of employment discrimination, a complainant must show: (1) [he] is a member of a protected class; (2) [he] applied and was qualified for a job for which the employer was seeking applicants; (3) [he] was rejected despite [his] qualifications; and (4) after [he] was rejected, the position remained open and the employer sought other applicants from persons of complainant's qualifications." *Stone v. Department of Human Rights*, 299 Ill. App. 3d 306, 315, 700 N.E.2d 1105, 1111 (1998) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802).

¶ 24 Clearly, as Luker suggests, the District could not discriminate against him in the hiring process based on his gender. See 775 ILCS 5/1-102(A) (West 2008). However, assuming, *arguendo*, that Luker made a *prima facie* showing he applied for and was qualified for

the substitute-office-personnel position—which the District disputes—he was still required to show the District rejected his application despite his qualifications. He did not do so. To the contrary, our review of the record suggests the District did not reject Luker for the position of substitute office personnel.

¶ 25 The August 2006 rejection letter from the District referenced only the substitute-teaching-assistant position. Specifically, it stated, "This letter is in response to your application and interview to work as a *substitute teaching assistant* for [the District]. After processing your application, we are unable to offer you employment." (Emphasis added.) During the November 2008 hearing, the ALJ asked Luker, "So as far as you know, *your application is still pending* even as of [today] *with respect to the office assistant substitute?*" (Emphases added.) Luker responded, "*Right. As far as I know.* It wasn't put in the letter." (Emphasis added.) Marla Robinson further testified, "We really didn't look at Mr. Luker through the *** secretary substitute piece. I mean I know he took the test, but if you look at the letter I wrote him, it refers to the teaching assistant piece." Additionally, when explaining why he amended his application after he received the rejection letter to include a notation regarding his disability, Luker testified as follows:

"The only—the only question would be, *since they didn't reject me for the office worker*—a substitute office worker and they now knew that I'm disabled that I could bring an action that—well, *for the office worker that I would be protected as being disabled, because I haven't received a rejection yet.*" (Emphases added.)

¶ 26 Despite the evidence in the record indicating (1) the District never rejected Luker for the substitute-office-personnel position, and (2) Luker's belief that his application for the

position was still pending, the ALJ nevertheless concluded that Luker established a *prima facie* case of gender-based discrimination regarding the substitute-office-personnel position. Although the ALJ cited *McDonnell*, which sets forth the elements Luker was required to prove, he failed to make a finding that Luker was rejected for the position of substitute office personnel despite his qualifications. See *Stone*, 299 Ill. App. 3d at 315, 700 N.E.2d at 1111 (citing *McDonnell Douglas Corp.*, 411 U.S. at 802) (a finding of rejection by an employer is a necessary element in establishing a *prima facie* case of employment discrimination).

¶ 27 To the extent the ALJ's statement that the District's "failure to place him on its eligibility list for both substitute positions in spite of his technical skill qualifications that easily surpassed prior successful female applicants creates an inference that considerations other than merit had influenced the placement process" can be interpreted as a finding that the District rejected Luker's substitute-office-personnel position, such a finding is against the manifest weight of the evidence. Here, the record contains no evidence that the District rejected Luker's application for the position of substitute office personnel, and Luker himself believed his application was still pending. Thus, the Commission's determination that Luker established a *prima facie* case of gender-based employment discrimination was against the manifest weight of the evidence. Accordingly, we vacate the Commission's order.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we vacate the Commission's order.

¶ 30 Vacated.