FIFTH DIVISION
June 16, 2017

No. 1-16-0094

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MAURICE PRYOR,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County.
	)	
v.	)	
	)	
HENRY SCHEIN, INC., d/b/a	)	
UNIVERSAL FOOTCARE PRODUCTS	)	No. 12 CH 31377
COOK COUNTY COMMISSION ON,	)	
HUMAN RIGHTS.	)	
	)	
Respondents-Appellees.	)	Honorable
	)	Rodolfo Garcia
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The hearing officer did not err by: (1) finding Mr. Keller's statement about Ms. Johnson's grandchild did not constitute direct evidence of racial discrimination; (2) finding Ms. Johnson's testimony credible; (3) allowing testimony from the temp agency;

not allowing Mr. Pryor to amend his complaint to include the temp agency as a respondent; (5) allowing the parties to file separate pre-hearing memoranda and not require stipulated facts; and (6) admitting Universal's attendance records into evidence.

¶ 2 Petitioner Maurice Pryor appeals the dismissal of his petition for a writ of *certiorari* to review the September 11, 2012, decision of the Cook County Commission on Human Rights (Commission). After a full hearing on the merits, the Commission dismissed Mr. Pryor's complaint finding that Mr. Pryor failed to meet his burden of proof to establish a claim of discriminatory discharge under the Cook County Human Rights Ordinance (Ordinance) (Cook County Code of Ordinances § 42–30 *et seq.* (amended Nov. 19, 2002)). In response, Mr. Pryor petitioned the circuit court which affirmed the Commission's decision on December 9, 2015. Subsequently, Mr. Pryor filed a timely notice of appeal on January 8, 2016.

¶ 3 BACKGROUND

¶ 4 Mr. Pryor is African American and was first employed by respondent Universal Footcare Products, Inc. (Universal) in 1996. He was certified as a forklift operator and his responsibilities included loading boxes onto delivery trucks and maintaining the dock area of the warehouse where deliveries and supplies are shipped and received. Mr. Pryor worked for Universal until 1999 when he was terminated as a result of attendance and tardiness issues; however, he was later rehired in 2001.

¶ 5 According to the record, the racial composition of the employees at Universal fluctuated from 1991 to 2010. At one point there were only three African American employees and the rest were Caucasian. Later, the composition shifted to being predominantly African American; however, by 2010 the predominant ethnicity at Universal was Hispanic.

¶ 6 Joe Keller, a Caucasian male, is the director of distribution at Universal and has worked at the company for 35 years. In 2010, he was in charge of 21 employees and was responsible for the warehouse. Two supervisors, Walter Readus and Ricardo Reyes, reported to him and managed the employees and warehouse.

¶ 7 Mr. Readus is African American and worked for Universal in the warehouse for 24 years. He began working on the dock, unloading trucks and was later promoted to supervisor. Mr. Reyes is Hispanic and began working for Universal as a temporary employee and served as a general warehouse employee. He was later promoted to supervisor. After his promotion, there was stricter enforcement of workplace rules. Mr. Reyes also initiated cross training of employees which he felt would promote productivity by allowing employees to fill in and do other people's jobs. He asked Mr. Pryor if he was interested in being cross trained, but Mr. Pryor declined the offer and never received the training.

¶ 8 Sometime in November 2003 Mr. Pryor was suspended from work, and he had chronic tardiness problems in 2004, 2005, and 2006. In September 2006 he was suspended for a "no show" after he called in to state that he would be in at 10 and never arrived for work. Mr. Pryor was tardy over 36 times in 2006, and on October 2, 2006, he was placed on probation for 30 days.

¶ 9 On December 6, 2006, there was an incident involving damage to a garage door by a FedEx truck driver. Mr. Pryor was responsible for opening the garage doors and monitoring movement of the delivery trucks into the warehouse. The FedEx driver backed into a door where the door had been partially closed, which resulted in damage to the door. Universal determined that Mr. Pryor was partially responsible for the property damage. The next day on December 7, 2006, Mr. Pryor was terminated. Universal stated that the garage incident was the last straw.

According to Mr. Keller, Mr. Pryor was terminated for "an accumulation of things***attitude, tardiness, absence." He also testified that the December 2006 incident "was the straw that broke the camel's back."

¶ 10 According to the Commission, Universal had no written personnel policies, did not have an established written policy of progressive discipline, did not issue written warnings, and did not keep accurate attendance or tardiness records. The Commission acknowledged that Universal's failure to maintain accurate records resulted in omissions and inaccuracies, and the Commission noted that entries appeared not to be entered in "logical chronological order." Universal also did not have written guidelines for opening and closing the warehouse doors to allow trucks access to the dock.

¶ 11 Later in 2007, a Hispanic worker, Hugo Alcantarra, attempted to stop a truck driver from backing into the garage door at the warehouse; however, his attempt was unsuccessful. Mr. Alcantarra was considered by Universal to be a very good employee with no attendance issues. He was cross trained and consistently kept busy. Mr. Alcantarra was not fired or disciplined and continued to work at Universal until he eventually left voluntarily.

¶ 12 According to the record, Universal usually used a temporary employment agency (temp agency) to hire new warehouse employees. The temp agency is owned by Steve Feldman and provided new employees to Universal for eleven years. Mr. Feldman estimated that the demographics of the labor pool from which Universal was staffed was comprised of 50% Hispanic applicants, 30% African American and 20% Caucasian.

¶ 13 On May 14, 2007, Mr. Pryor filed a complaint of race discrimination with the Commission alleging he was terminated on the basis of race. He argued that the record supported a finding of liability based on the following three theories: (1) direct evidence of race

discrimination, and/or (2) a "pattern and practice" of favoring Hispanics over African Americans, and/or (3) traditional burden shifting under the McDonnell Douglas model.

¶ 14 On November 16, 2009, three days before the administrative hearing, Mr. Pryor filed a "Motion to Amend Charge or, alternatively, to Bar Testimony." He sought to add the temp agency as an additional respondent and add "aiding and abetting" as an additional charge against Universal. He also sought to bar Mr. Feldman from testifying on behalf of Universal. The hearing officer denied Mr. Pryor's motion, and Mr. Feldman was permitted to testify and be cross examined. However, the hearing officer noted that his testimony added little to the case and had no bearing on her ultimate decision.

¶ 15 During the administrative hearing, Mr. Pryor offered as evidence the affidavit and testimony of Kimberly Johnson, an African American employee who had worked for Universal for ten years. In her affidavit, Ms. Johnson stated that she asked Mr. Keller if she could take a couple of days off because she was trying to get custody of her grandson. According to the affidavit, Mr. Keller responded "why don’t you let him go to the state."

¶ 16 Ms. Johnson also testified that after she submitted a statement to Mr. Pryor's attorney, she was called into Mr. Keller's office, and he said "I'm not trying to upset you or anything, but do you think I'm prejudiced?" Ms. Johnson answered affirmatively, and Mr. Keller responded by asking her about her attendance. On questioning by the Hearing Officer, Ms. Johnson said she was angered but did not feel threatened. At the time of the hearing, Ms. Johnson was still employed by Universal and did not testify that any retaliatory actions had been taken against her. The Hearing Officer observed her testimony and conduct and found her testimony to be "forthright, relaxed, and absent indications of intimidation or fear."

¶ 17 ANALYSIS

¶ 18 On appeal, Mr. Pryor claims the hearing officer erred by: (1) allegedly discounting evidence of Mr. Keller's racial bias; (2) finding Ms. Johnson's testimony credible despite her prehearing questioning by Mr. Keller; (3) allowing testimony from the temp agency; (4) not allowing Mr. Pryor to amend his complaint to include the temp agency as a respondent; (5) not requiring stipulated facts; and (6) relying on Universal's attendance records to render her decision.

¶ 19 Mr. Pryor also argues for the first time on appeal that he should be permitted to recover damages from the Commission pursuant to the Right to Remedy and Justice provision of the Illinois Constitution (Ill. Const., art. I, Sec. 12 (West 2016)). It is well-settled that any arguments not made in the trial court cannot be brought for the first time on appeal, and thus the issue is forfeit. See *Darnall v. City of Monticello,* 168 Ill. App. 3d 552, 553 (1988) ("[A]n issue not presented to or considered by the trial court cannot be raised for the first time on review").

¶ 20 Accordingly, Mr. Pryor's first six claims of error are the only issues properly before this court. For the reasons that follow, we affirm the decision of the Commission.

¶ 21 Discussion

¶ 22 The decision of the Commission, which adopted the hearing officer's recommendations, is an administrative decision and judicial review is governed by the Administrative Review Law (735 ILCS 5/3–101 *et seq.* (West 2012)). *Crittenden v. Cook County Comm'n on Human Rights*, 2012 IL App (1st) 112437, ¶ 40; 325 ILCS 5/7.16 (West 2012). While this appeal arises from petitioners' petition for a writ of *certiorari,* "[t]he standards of review under a common law writ of *certiorari* are essentially the same as those under the Administrative Review Law." *Crittenden*, 2012 IL App (1st) 112437, ¶ 40 (quoting *Hanrahan v. Williams*, 174 Ill. 2d 268, 272

(1996)). In the case of an administrative review action, we review the findings of the hearing officer during the administrative hearing and not the decision of the circuit court. *Id.* In reviewing the actions of an administrative agency, "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." *Id.* The reviewing court is not to reweigh the evidence or make an independent determination of the facts. *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund,* 234 Ill. 2d 446, 463 (2009).

¶ 23 The propriety of the agency's findings of fact will be upheld unless they are against the manifest weight of the evidence. *Kouzoukas,* 234 Ill. 2d at 463. "An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Abrahamson v. Illinois Department of Professional Regulation,* 153 Ill. 2d 76, 88 (1992). The fact that the opposite conclusion is reasonable or that the reviewing court may have reached a different outcome does not justify reversal of the administrative findings. *Abrahamson,* 153 Ill. 2d at 88. "If the record contains evidence to support the agency's decision, it should be affirmed." *Abrahamson,* 153 Ill. 2d at 88–89.

¶ 24 On appeal, Mr. Pryor claims that a variety of conduct by the Commission's hearing officer constituted reversible error, and he cites numerous sections of the administrative record as support for his claims of error. Specifically, Mr. Pryor cites to the transcripts of the administrative proceedings; however, he has not provided this Court with the administrative record on appeal.

¶ 25 It is well established that the appellant has the burden to present a sufficiently complete record to support a claim of error on appeal. *Webster v. Hartman,* 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant,* 99 Ill. 2d 389, 391–92 (1984); *Larkin v. George*, 2016 IL App (1st) 152209,

¶ 20. “From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant.” *Larkin*, 2016 IL App (1st) 152209, ¶ 20 (quoting *Foutch,* 99 Ill. 2d at 391). Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a report or record of the proceeding. *Webster*, 195 Ill. 2d at 432. Without such a record, it is presumed that the order entered by the trial court is in conformity with the law and has a sufficient factual basis. *Foutch,* 99 Ill. 2d at 392. “Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Foutch,* 99 Ill. 2d at 392.

¶ 26 In this case, Mr. Pryor first contends that the hearing officer discounted the evidence of Mr. Keller's racial bias. According to Mr. Pryor, Ms. Johnson testified during the administrative hearing that Mr. Keller asked her "why don't you let him become a ward of the state like most people?" in response to her request for time off to deal with issues regarding custody of her grandchild. Mr. Pryor argues that this question was clear evidence of Mr. Keller's racial bias against African Americans, and he argues that the phrase "like most people" was an innuendo for African Americans. The record contains no transcript of any hearing, no report of proceedings, no bystander's report, and no agreed statement of facts. Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Moreover, the record contains nothing evidencing this statement was ever made outside of Mr. Pryor's allegations. Contrary to the statement in Mr. Pryor's brief, Ms. Johnson's affidavit contends that Mr. Keller asked her "why don’t you let him go to the state." The Commission found that while Ms. Johnson felt the comment was racially charged, without more, it could not be considered direct evidence of race discrimination. In light of Mr. Pryor's failure to provide us with a transcript of Ms. Johnson's testimony, and because any doubts which may arise from the

incompleteness of the record will be resolved against the appellant, we must affirm the Commission's decision on this issue. See *Foutch,* 99 Ill. 2d at 392.

¶ 27 Next, Mr. Pryor contends that allowing Ms. Johnson to testify, in spite of Mr. Keller questioning her in his office prior to her testimony, irreparably tainted the proceeding and rendered her testimony unreliable. In essence, Mr. Pryor is asking us to reweigh the evidence and determine that Ms. Johnson was not credible. As noted, we are not permitted to reweigh the evidence or make credibility determinations [citation], and we will affirm an agency's decision if there is evidence in the record to support it. *Crittenden v. Cook Cty. Comm'n on Human Rights*, 2012 IL App (1st) 112437, ¶ 43. In the case at bar, there is evidence in the record to support the hearing officer's determinations. Ms. Johnson testified that although Mr. Keller's questioning angered her, she did not feel threatened by the conversation and she felt her employment was not adversely affected. Moreover, the record contains no evidence of an objection or motion to strike made by Mr. Pryor. A claimant waives the ability to attack evidentiary determinations that he or she did not object to during the administrative proceeding. See *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 855 (2004); see also *Foutch,* 99 Ill. 2d at 392. Accordingly, we find the hearing officer did not err when she found Ms. Johnson's testimony credible.

¶ 28 Next, Mr. Pryor contends that the hearing officer erred by denying his motion to amend his claim to include the temp agency as a respondent, or in the alternative to bar the temp agency from testifying. Specifically, Mr. Pryor contends that Universal was permitted to "introduce an entirely new defense vis-à-vis the employment agency" three years into the case and after discovery had closed. We find these claims unpersuasive.

¶ 29 In Illinois, courts are encouraged to freely and liberally allow amendments to pleadings. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). Notwithstanding that liberal

policy, a party's right to amend is not absolute and unlimited. *Lee,* 152 Ill. 2d at 467. The decision whether to grant leave to amend a pleading rests within the sound discretion of the trial court. *Lee,* 152 Ill. 2d at 467. Therefore, the trial court's decision will stand absent an abuse of discretion. See *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273–74 (1992). An abuse of discretion occurs when no reasonable person would take the view adopted by the court or agency. *Trettenero v. Police Pension Fund of the City of Aurora*, 333 Ill. App. 3d 792, 801 (2002).

¶ 30 According to the Commission, Mr. Pryor filed his motion on November 16, 2009, three days before the administrative hearing. He sought to add the temp agency as an additional respondent and add "aiding and abetting" as additional discriminatory conduct by Universal. The hearing officer explained in her order that the case before her was not a hiring, conditions or harassment case, and it was not a pattern and practice case. She explained that she was not precluding argument based on any reasonable theory of liability nor would she bar any relevant corroborative evidence. The owner of the temp agency, Mr. Feldman, was allowed to testify and be cross examined. The Commission found that his testimony added little to the case and had no bearing on the determination that Mr. Pryor failed to prove that his termination was motivated by racial animus. Again, we note that Mr. Pryor's motion to amend is not included in the record of appeal. Without such a record, it is presumed that the order entered by the trial court is in conformity with the law and has a sufficient factual basis. *Foutch,* 99 Ill. 2d at 392. Therefore, we cannot say that the hearing officer abused her discretion by denying Mr. Pryor's motion to amend his claim.

¶ 31 Similarly, we also find the hearing officer did not err where she denied Mr. Pryor's motion to bar Mr. Feldman's testimony. Mr. Pryor contends that he was unable to conduct

discovery on the temp agency because Universal never referenced or disclosed the existence of the agency during the three years prior to the hearing or during the Commission's investigation. He contends that the hearing officer should have barred Mr. Feldman from testifying and that she abused her discretion by allowing Universal to introduce a new defense through Mr. Feldman's testimony after discovery had closed. It is well settled that the granting or denial of a motion to bar testimony will not be disturbed absent a clear showing of an abuse of discretion. See *Sobczak v. Flaska*, 302 Ill. App. 3d 916, 925–26 (1998). As we previously noted, the Commission found Mr. Feldman's testimony unpersuasive. Moreover, the motion to bar his testimony is not included in the record of appeal before this Court. Therefore, we presume that the order denying Mr. Pryor's motion was entered in conformity with the law and had a sufficient factual basis. See *Foutch*, 99 Ill. 2d at 392.

¶ 32 Next, Mr. Pryor contends that the hearing officer erred by not enforcing Universal's duty to stipulate to facts which were true pursuant to the Ordinance. Specifically, Mr. Pryor contends that the hearing officer erred when she relied on the facts in his stipulations that he was suspended in 2003 and 2006. We find this claim meritless.

¶ 33 According to the Commission's decision, the hearing officer found that in spite of being allowed several continuances, Mr. Pryor routinely failed to comply with scheduling orders. The hearing officer also found that the working relationship between the parties attorneys was at times "strained, if not acrimonious." As a result, the hearing officer allowed each party to submit its own pre-hearing memorandum and she did not require stipulated facts. Further, the record demonstrates that she based her decision on the fact that the hearing date was fast approaching, and it appeared that counsel were unwilling or unable to reach an accord. Mr. Pryor has not explained nor cited any authority demonstrating how a hearing officer commits reversible error

where he or she bases his or her final determination on facts proffered by the complainant. It is well settled that failure to cite legal authority supporting a party's contention in their brief waives the issue for review. See *Campbell v. Wagner*, 303 Ill. App. 3d 609, 613 (1999); see also *Bank of Illinois v. Thweatt*, 258 Ill. App. 3d 349, 362 (1994). Accordingly, we find this argument is waived and that the hearing officer committed no error.

¶ 34 Finally, Mr. Pryor contends that the hearing officer erred by relying on Universal's attendance records to render her decision. He contends that the records relied on constituted inadmissible hearsay because they allegedly were not kept in the course of a regularly conducted business activity and did not qualify as business records. In support of his contention, Mr. Pryor draws this Court's attention to the fact that the hearing officer acknowledged in her findings of fact that the "entries appear not to be entered in logical [sic] chronological order." He contends that such an acknowledgement serves as a concession by the hearing officer that the records were not contemporaneously kept, were not business records, and admitting them constituted an abuse of discretion. These arguments are unpersuasive.

¶ 35 Mr. Pryor has not alleged that he objected during the hearing to the admission of Universal's attendance records, nor has he provided this Court with a record of the administrative proceedings. A claimant waives the ability to attack evidentiary determinations that he or she did not object to during the administrative proceeding. See *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 855 (2004); see also *Foutch*, 99 Ill. 2d at 392 (“Any doubts which may arise from the incompleteness of the record will be resolved against the appellant”). Without the administrative record, it is presumed that the order entered by the trial court is in conformity with the law and has a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. Accordingly, we find the hearing officer did not err by admitting Universal's attendance records.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.