2017 IL App (1st) 162941-U

FOURTH DIVISION
August 10, 2017

No. 1-16-2941

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MIRIAM SHIMKO, Petitioner-Appellant, v. ILLINOIS HUMAN RIGHTS COMMISSION, THE ILLINOIS DEPARTMENT OF HUMAN RIGHTS, and PLAINFIELD SCHOOL DISTRICT #202, Respondents-Appellees.	)	Appeal from the Order of the Illinois Human Rights Commission. Charge No. 2011 CF 451

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Human Rights Commission's order is affirmed; the Commission's finding that petitioner failed to prove similarly situated males were treated more favorably than petitioner, and that petitioner failed to show she was discharged for a discriminatory reason and failed to demonstrate how respondent's articulated non-discriminatory business justification for discharging petitioner was a pretext for unlawful discrimination, was not arbitrary or capricious nor did it constitute an abuse of discretion.

¶ 2 Petitioner, Miriam Shimko, appeals from the Illinois Human Rights Commission's (Commission) order sustaining the notice of dismissal issued by the Illinois Department of Human Rights (Department). Petitioner alleged she was subject to unlawful discrimination when Plainfield School District #202 (District) terminated her employment. Petitioner argued similarly situated male employees were not discriminated against and the District's non-discriminatory business justification for her discharge was pretextual. The Department dismissed petitioner's charge for lack of substantial evidence and petitioner sought review by the Commission. The Commission sustained the Department's dismissal of petitioner's charge against the District. The Commission found petitioner failed to support a *prima facie* case of discrimination and the District articulated a non-discriminatory business reason for discharging petitioner that was not a pretext for unlawful discrimination. For the reasons that follow we affirm the order of the Commission.

¶ 3 BACKGROUND

¶ 4 Petitioner was employed by the District as a campus monitor at Plainfield North High School from March 1, 2006, until she was discharged as part of a reduction in force on June 2, 2010. As part of her duties as a campus monitor, petitioner monitored student behavior during and between classroom periods. The District's job description of petitioner's position indicated "the primary function of the campus monitor is to assure the regular and consistent enforcement of the defined standards for student conduct, safety, and security inside the school building, which includes, but is not limited to *** rest rooms." Campus monitor responsibilities included intervening in potential conflicts and emergency situations, and also monitoring students inside locker rooms and bathrooms. Campus monitors were responsible for "implement[ing] appropriate and effective intervention strategies." Campus monitors were required to

"maintain[] professional confidentiality in all areas of responsibility." Bathrooms and locker rooms in the school were designated as male or female only areas, and campus monitors could only perform unannounced checks in bathrooms and locker rooms of their sex.

¶ 5 In early 2010 the District proposed a reduction in force to help close a $16 million budget deficit. The District sent petitioner a letter in April 2010 informing her she was being discharged effective June 2, 2010 due to a reduction in force. According to a collective bargaining agreement between the District and the Plainfield Association of Support Staff, employees with the lowest seniority would be first discharged, provided the more senior employees are qualified, in the event of a reduction in force. As part of the reduction in force, the District went from employing 52 campus monitors (33, or 63%, of whom were female) to employing 26 campus monitors (14, or 54%, of whom were female). The district discharged 20 female campus monitors and 6 male campus monitors. Of the remaining 12 male campus monitors employed, 6 had less seniority than petitioner. Of the 20 female campus monitors discharged, 7 had more seniority than petitioner. The district indicated it laid off more female than male campus monitors to ensure a gender balance among the remaining campus monitors.

¶ 6 Petitioner filed a charge of unlawful discrimination in violation of the Illinois Human Rights Act (Act) with the Department in August 2010. The Act prohibits employers from engaging in unlawful discrimination:

> "It is a civil rights violation:
>
> (A) Employers. For an employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or

citizenship status." 775 ILCS 5/2-102(A) (West 2016).

The Act defines "unlawful discrimination":

> "Unlawful Discrimination. 'Unlawful discrimination' means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service as those terms are defined in this Section." 775 ILCS 5/1-103(Q) (West 2016).

The Department investigated petitioner's charge that the District unlawfully discriminated against petitioner. Petitioner argued similarly situated male campus monitors were not similarly discriminated against. The District replied that those male campus monitors with less seniority than petitioner were not discharged because they were not similarly situated. Only male campus monitors could perform unannounced checks of male locker rooms and bathrooms – petitioner was not qualified to perform the same function. The Department issued its report on July 27, 2011, finding petitioner's charge lacked substantial evidence. The Department noted how the District retained more female than male campus monitors, the District's justification of maintaining a sufficient amount of male campus monitors was not a pretext for discrimination, and petitioner did not allege the District made derogatory comments or otherwise expressed discriminatory animus toward her. Petitioner timely filed her request for review of the Department's dismissal to the Commission on August 4, 2011. On October 6, 2016, the Commission issued an order sustaining the Department's dismissal of petitioner's charge, finding petitioner's charge lacked substantial evidence.

¶ 7 The Commission found petitioner's charge lacked sufficient evidence to establish a *prima*

facie case of unlawful discrimination. The Commission found no similarly situated male campus monitors were more favorably treated under similar circumstances, and that the District retained more female campus monitors than males. The Commission further concluded the District articulated a non-discriminatory business reason for discharging petitioner, and the non-discriminatory business reason was not a pretext for unlawful discrimination. This appeal followed.

¶ 8 ANALYSIS

¶ 9 Petitioner brought a charge of unlawful discrimination under the Illinois Human Rights Act against respondent District. 775 ILCS 5 (West 2016). We review the Commission's order sustaining the Department's dismissal and not the Department's decision itself. *Marinelli v. Human Rights Comm'n*, 262 Ill. App. 3d 247, 253 (1994) ("It is the decision of the Commission, not the Department, which we review."). We will not disturb the Commission's decision to sustain the dismissal of a complaint for lack of substantial evidence unless the Commission's decision was an abuse of discretion. *Id.* ("The reviewing court will not disturb the Commission's decision to dismiss a complaint for lack of substantial evidence, unless that decision was arbitrary and capricious or an abuse of discretion."); *Young v. Illinois Human Rights Comm'n*, 2012 IL App (1st) 112204, ¶ 32. An abuse of discretion will be found where no reasonable person could agree with the decision of the Commission. *Young*, 2012 IL App (1st) 112204, ¶ 33. "Under the abuse of discretion standard, the court should not disturb the Commission's decision unless it is arbitrary or capricious. [Citation.] A decision is arbitrary or capricious if it contravenes legislative intent, fails to consider a critical aspect of the matter, or offer an explanation so implausible that it cannot be regarded as the result of an exercise of the agency's expertise." *Id.* "It is axiomatic that a reviewing court may not reweigh the evidence or

substitute its judgment for that of the trier of fact. Findings of fact are entitled to deference, and this is particularly true of credibility determinations." *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 180 (1989).

¶ 10 As noted above, the Act prohibits employers from engaging in unlawful discrimination:

> "It is a civil rights violation:
>
> > (B) Employers. For an employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status." 775 ILCS 5/2-102(A) (West 2016).

Under the Act, "unlawful discrimination" includes discriminating against a person because of that person's sex. 775 ILCS 5/1-103(Q) (West 2016). If discriminated against, an employee may file a charge of discrimination with the Department within 180 days of the date the civil rights violation allegedly occurred. 775 ILCS 5/7A-102(A) (West 2016).

> "When the Department accepts a discrimination complaint, a Department official investigates the allegations of the discrimination charge cited in the complaint. After analyzing the claim, the investigator prepares a written report recommending whether or not there is 'substantial evidence' that an act of discrimination occurred. [Citation.] Substantial evidence is defined as evidence that a reasonable person would accept as sufficient to support the complainant's allegations and that 'consists of more than a mere scintilla but may be somewhat less than a preponderance.' " *Young*, 2012 IL App (1st) 112204, ¶ 8.

As in the present case, when the Department finds a petitioner's claim lacks substantial evidence

it dismisses the charge. The petitioner may request review of her discrimination claim with the Commission or may file a complaint in circuit court. *Id.*; 775 ILCS 5/7A-102(D)(3) (West 2016). Here petitioner requested review with the Commission, which affirmed the Department's dismissal for lack of substantial evidence.

¶ 11 The Commission used the analytical framework for discrimination claims set in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as adopted by our supreme court in *Zaderaka v. Illinois Human Rights Commission*.

> First, petitioner must establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination. If a *prima facie* case is established, a rebuttable presumption arises that the employer unlawfully discriminated against petitioner. Second, to rebut the presumption, the employer must articulate, not prove [citation], a legitimate, nondiscriminatory reason for its decision.
>
> Finally, if the employer carries its burden of production, the presumption of unlawful discrimination falls and petitioner 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. This merges with petitioner's ultimate burden of persuading the trier of fact that the employer unlawfully discriminated against petitioner. [Citation.] This ultimate burden remains at all times with petitioner." *Zaderaka*, 131 Ill. 2d at 178–79.

Here the Commission concluded petitioner failed to establish a *prima facie* case of discrimination because no similarly situated male campus monitors were treated favorably to petitioner. The District retained more female than male campus monitors. Further, the Commission found the District articulated a non-discriminatory business reason for retaining a

balance of male and female campus monitors: the school has single-sex designated areas that only campus monitors of the same sex can inspect and supervise unannounced. Petitioner failed to prove this justification was a pretext for unlawful discrimination. Thus, the Commission found petitioner failed to uphold her burden to show the District unlawfully discriminated against her.

¶ 12 Waiver

¶ 13 The District argues petitioner's appeal should be dismissed because petitioner waived her argument of sex discrimination. The District argues that petitioner, in her request for review by the Commission, challenged the Department's dismissal on the basis that the District violated the collective bargaining agreement. The District relies on *Wallace v. Human Rights Comm'n*, 261 Ill. App. 3d 564 (1994) to support its argument. We find the District's contention has no merit. *Wallace* held that an argument is deemed waived if it was not raised before *either* the Department or the Commission. *Id*. at 569. Here it is clear petitioner raised the issue of sex discrimination before the Department when she alleged sex discrimination in her original charge. Petitioner timely filed a request for review of the Department's decision to dismiss. When the Commission reviews the decision of the department "[t]he Commission is empowered to review the Department's findings, and it may consider the Department's report, any argument and supplemental evidence submitted, and the results of any additional investigation. [Citation.] The Commission reviews the factual findings of the Department to determine if substantial evidence exists to support the filing of a charge." *Marinelli*, 262 Ill. App. 3d at 253. To review the department's findings, the Commission was required to consider petitioner's charges of sex discrimination. We acknowledge that in her petition for review of the Department's decision petitioner alleged a violation of the collective bargaining agreement when she was discharged.

(A violation of the collective bargaining agreement is a factor to be considered in determining whether discrimination occurred) (*Giacoletto v. Amaz Zinc Co., Inc.*, 954 F.2d 424, 427 (7th Cir. 1992))**.** The commission can hear additional arguments when reviewing the Department's decision. 775 ILCS 5/8-103(B) (West 2016). We find petitioner's allegations of sex discrimination were at issue before both the Department and the Commission. *Wallace* is therefore inapplicable here. We find petitioner did not waive her argument and we will consider this case on the merits, as did the Commission.

¶ 14 The Commission Did Not Abuse its Discretion by Sustaining the Department's Dismissal of Petitioner's Charge

¶ 15 The Commission found petitioner lacked substantial evidence to support a *prima facie* case of unlawful discrimination. To establish a *prima facie* case of unlawful discrimination, an employee must prove four elements by a preponderance of the evidence: "(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) the employer treated others similarly–situated outside the class more favorably." *Young*, 2012 IL App (1st) 112204, ¶ 34. Though petitioner demonstrated she met the first three criteria, the Commission found she failed to prove the fourth. Petitioner is female, she met the District's legitimate business expectations, and she was discharged. However, petitioner failed to show other similarly situated employees outside her class were more favorably treated. The Commission found the District did not treat other similarly situated male campus monitors more favorably. The District discharged six male campus monitors and the majority of remaining campus monitors (54%) were female. Petitioner contends six male campus monitors were retained that had less seniority than petitioner, and that they were otherwise similarly situated to petitioner. "When determining whether employees are similarly situated, courts consider whether the employees 1) had the same job description; 2)

were subject to the same standards; 3) were subject to the same supervisor; and 4) had comparable experience, education, and other qualifications." *Boumehdi v. Plastag Holdings,* LLC, 489 F.3d 781, 791 (7th Cir. 2007). Petitioner was not similarly qualified as the male campus monitors because female campus monitors were unable to perform unannounced checks of male washrooms or locker rooms.

¶ 16 Petitioner contends her male colleagues were similarly situated because they were qualified to perform the same functions. Petitioner maintains she was able to perform announced checks of male restrooms and locker rooms, and that all campus monitors had the same job description. We disagree. *McLain v. Board of Education of Georgetown Community Unit School District No. 3 of Vermilion County,* 66 Ill. App. 3d 1024 (1978), provides instructive analysis for determination of whether employees are similarly situated. In *McLain,* a school board eliminated a full-time drivers education position that the plaintiff held and the plaintiff was honorably dismissed. *Id*. at 1025. For the subsequent school year, the board hired a female nontenured teacher to teach junior high health and girls' physical education. *Id*. The plaintiff made a demand on the school district that he should have been offered that position because he was a tenured teacher and entitled to preferential hiring under Illinois law. *Id*. The superintendant of the defendant school district testified the plaintiff was not hired because of his sex. *Id*. at 1027. While the plaintiff was qualified to teach the classes, he was not qualified to supervise female locker rooms during changing and showering after class. *Id*. at 1026. The court found the district was not obligated to offer the plaintiff the position because the plaintiff was not similarly situated to the female employee who obtained the position. *Id*. at 1027. The plaintiff was not similarly qualified to perform all the responsibilities included in the job description: supervising girls' locker rooms during changing and showering. *Id*.

¶ 17 The plaintiff in *McClain* argued he was similarly qualified as the nontenured teacher who was hired because he was equally certified to teach the courses and teachers' aides could supervise the locker rooms. *Id*. at 1026. However, the *McClain* court rejected this rationale finding the school board's exercise of discretion was not arbitrary or capricious. "Where the legislature has empowered a school board to perform certain acts, courts will not interfere with the exercise of those powers, or substitute their discretion for that of the school board, unless the board's action is palpably arbitrary, unreasonable, or capricious." *Id*. at 1026-27. The court refused to require the school to hire additional personnel or to substitute its judgment for the school board's.

> "While at first glance it may appear that the use of teachers' aides is a reasonable resolution of the problem, this court has no authority to define the roles of school board employees. The use of teachers' aides is within the delegated discretion of the school board. We are not prepared to mandate that, in order to satisfy the requirements of section 24-12, a school board must hire additional personnel at an increased cost to do the work which one teacher could perform, merely to provide a position for a tenured teacher previously dismissed because of economic cutbacks. Furthermore, it is not unreasonable for the Board to determine that the supervision of the girls' locker room during changing of clothes and showering requires the actual presence of a certified teacher rather than a noncertified aide to handle any emergencies quickly and effectively and to render instruction concerning personal hygiene.
>
> Petitioner has made no argument of bad faith by the Board, nor has he made any allegation of restructuring of positions to eliminate the possibility of reassigning

> the petitioner to another position. While petitioner may be 'legally qualified' to teach the subjects *** it is clear that petitioner cannot fulfill all the responsibilities of the position because of his sex. We conclude that since sex is a *bona fide* factor in the performance of the duties attendant to the position *** the Board did not violate the spirit and purpose of section 24-12 in failing to tender that position to the petitioner." *Id*. at 1027.

Similarly, in the present case the District determined it required a certain amount of campus monitors of both sexes for adequate supervision of students. We cannot say the District's decision was unreasonable. Petitioner contends that with six fewer male campus monitors (leaving a total of six male campus monitors, only 23%) those remaining male campus monitors could sufficiently perform unannounced checks of male locker rooms and bathrooms. Petitioner argues this distinguishes her case from *McClain* as she is not proposing to have the District hire any more campus monitors. However, as the *McClain* court noted, we do not define the roles of District employees. It was not unreasonable for the District to determine it required a certain threshold number of male and female campus monitors to ensure adequate supervision of students, and that female campus monitors could not perform the same functions (i.e. unannounced checks) as their male counterparts, and vice versa. Therefore, the male campus monitors with less seniority than petitioner who were retained were not similarly situated as petitioner because petitioner was not equally qualified to perform the same job functions. The Commission found petitioner failed to support a *prima facie* case of discrimination. We cannot say no reasonable person could agree with the decision of the Commission, therefore we find no abuse of discretion. *Young*, 2012 IL App (1st) 112204, ¶ 33. We cannot say the Commission's decision "contravenes legislative intent, fails to consider a critical aspect of the matter, or offer

an explanation so implausible that it cannot be regarded as the result of an exercise of the agency's expertise." *Id*. Therefore, we do not find the Commission's decision to be arbitrary and capricious.

¶ 18 Even if petitioner met the threshold requirements for a *prima facie* discrimination case, the District articulated a non-discriminatory business justification for discharging petitioner. If an employee makes a *prima facie* case of discrimination, the employer may rebut the presumption of unlawful discrimination "by articulating a legitimate, nondiscriminatory reason for its decision. If the employer articulates such a reason, the burden shifts back to the employee to prove that the employer's reason was only a pretext for unlawful discrimination." *Young*, 2012 IL App (1st) 112204, ¶ 36. Here the District explained certain locations in schools are designated as single-sex (i.e. bathrooms and locker rooms). Only campus monitors of that sex can perform unannounced checks of those designated areas. While the District previously employed 52 campus monitors, and was able to maintain a ratio of 63% female campus monitors, to meet budget constraints the District determined it could operate with 26 campus monitors, 54% of whom were female. Petitioner has not upheld her burden of demonstrating how the District's non-discriminatory justification was a pretext for unlawful discrimination.

¶ 19 Petitioner contends the District's non-discriminatory business justification is a pretext for unlawful discrimination because the job description for campus monitors did not contain a sex based qualification. Petitioner maintains that the District previously only required at least one male at each building, and that male and female campus monitors were permitted to monitor all bathrooms and locker rooms. When a respondent asserts a defense that sex is a *bona fide* occupational qualification, the respondent "bears the initial burden of proving that a factual basis exists for a sex-based hiring decision. When privacy considerations of clients or guests serve as

a reason for hiring only members of one sex, however, the defendant must also prove that no reasonable alternatives exist to its gender-based hiring policy." *Norwood v. Dale Maintenance Systems, Inc.*, 590 F. Supp. 1410, 1415-16 (N.D. Ill. 1984). Petitioner cannot show a reasonable alternative existed. District policy prohibited petitioner from making unannounced checks of male-designated areas.

¶ 20 Petitioner relies on *U.S.E.E.O.C. v. Sedita*, 755 F. Supp. 808, 809 (N.D. Ill. 1991), to contend the District did not need a gender balance in male-designated areas. However, *Sedita* is inapposite to petitioner's case. *Sedita* dealt with a women's health club asserting being a female was a *bona fide* occupational qualification for management and instructors so it could refuse to hire male managers, assistant managers, and instructors. The court found this justification lacked a factual basis – the employer could maintain the privacy of gender-specific areas even while hiring *some* men. *Id*. at 812. The defendants in *Sedita* argued they could hire only women and the court found the defendants failed to show why hiring some men was not feasible for the health club. *Id*. at 811. In contrast, in the present case the District does not contend it need hire only male or female campus monitors. Rather, the District contends it needs to maintain a reasonable balance of female and male campus monitors to ensure adequate supervision of students in gender-specific areas. While reasonable minds may differ on the exact gender ratio of campus monitors, we cannot say the District's decision to retain a threshold number of campus monitors of both sexes was unreasonable, arbitrary, or capricious.

¶ 21 Moreover, privacy is a relevant consideration for jobs requiring supervision of washroom areas. "In certain situations the privacy rights of individuals justify sex-based hiring by an employer. The situations where privacy rights have been recognized as a [*bona fide* occupational qualification] involve those occupations which require an employee to work with or

around individuals whose bodies are exposed in varying degrees." *Norwood*, 590 F. Supp. at 1416. *Norwood* dealt with a female washroom attendant whose application for a day-shift washroom attendant position was denied because the position required servicing male washrooms. *Id*. at 1413. The plaintiff in *Norwood* worked as a custodian cleaning washrooms in the night-shift, and her employer did not assign its night-shift employees washroom cleaning duties on the basis of sex. *Id*. at 1412. The defendant employer determined it best operated during the daytime with male personnel servicing male washrooms and female personnel servicing female washrooms. *Id*. at 1414. The court found the defendant's assertion of sex as a *bona fide* occupational qualification for day-shift washroom attendants was supported by a factual basis and was not a pretext for unlawful discrimination. *Id*. at 1423. Critical to the court's decision was the privacy consideration involved in employees who must work in washroom areas. "[T]he court concludes that the intrusion on personal privacy which would occur if opposite sex attendants were allowed access into the washrooms while in use is sufficiently substantial so as to constitute a factual basis for defendants [sic] sex-based policy." *Id*. at 1417. "Time spent by an individual in a washroom is personal and private. The court will not require defendants to institute an alternative which would allow opposite sex cleaning but which would also infringe on privacy rights and unreasonably disrupt the normal operation of defendants' businesses." *Id*. at 1423. The court thus concluded it was reasonable for the defendant to determine sex was a *bona fide* occupational qualification for day-shift custodians servicing washrooms. *Id*. Here we are confronted with similar privacy considerations as in *Norwood* because campus monitors are required to maintain confidentiality and are also required to supervise students, intervening in conflicts as necessary. Campus monitors may need to make unannounced entry into a washroom or locker room as part of their supervisory duties. The

District could determine its need for campus monitors of both sexes to ensure effective operation of its schools. We cannot say it is unreasonable for the District to determine it required a certain number of male campus monitors to provide adequate supervision of male-designated areas when only male campus monitors could make unannounced entry in male washrooms and locker rooms.

¶ 22 Finally, the Commission found it lacked jurisdiction to consider petitioner's claim that the District violated the collective bargaining agreement. Petitioner argues the violation of the collective bargaining agreement is evidence of discriminatory animus in the reduction in force. Petitioner argues departure from standard internal procedures is evidence of pretext, relying on *Giacoletto v. Amaz Zinc Co., Inc.*, 954 F.2d 424, 427 (7th Cir. 1992). The *Giacoletto* court, clearly noted " 'departure from internal hiring procedures is *a factor* that the trier of fact may deem probative.' " (Emphasis added.) *Id*. (quoting *Johnson v. Lehman*, 679 F.2d 918, 922 (D.C. Cir. 1982)). While departure from procedure is certainly a factor to consider when determining whether an employer displayed discriminatory animus in discharging employees, it is not a dispositive factor as petitioner claims. In this case the Commission held petitioner failed to uphold her burden in sustaining a claim of unlawful discrimination. We do not find the decision to be arbitrary or capricious or an abuse of discretion.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we affirm the order of the Illinois Human Rights Commission.

¶ 25 Affirmed.