

2019 IL App (1st) 181928-U

No. 1-18-1928

Order filed: April 19, 2019

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LEE ANDREW MITCHELL,)	Petition for Direct
)	Administrative Review of a
Petitioner-Appellant,)	Decision of the Illinois Human
)	Rights Commission.
v.)	
)	
THE DEPARTMENT OF HUMAN RIGHTS, THE)	Charge No. 2011 CF 1150
HUMAN RIGHTS COMMISSION, and B-WAY)	
CORPORATION,)	
)	
Respondents-Appellees.)	

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The decision of the Human Rights Commission sustaining the Department of Human Rights' dismissal of petitioner's charge of employment discrimination for lack of substantial evidence is affirmed.

¶ 2 Petitioner Lee Andrew Mitchell appeals *pro se* from a final order entered by the Human Rights Commission (Commission) sustaining the Department of Human Rights' (Department) dismissal of his charge of employment discrimination against his former employer, B-Way

Corporation (B-Way). Mitchell alleged that B-Way had terminated his employment based on his race. The Commission concluded that the Department properly dismissed Mitchell's discrimination charge for lack of substantial evidence. On appeal, Mitchell contends that he did not have an opportunity to present his evidence to the Department because he was given an incorrect date for the Department's fact-finding conference, and therefore, did not attend the conference or present any evidence to the Department. Mitchell also maintains that B-Way discriminated against him when it terminated his employment based on his race. We affirm.

¶ 3 On October 21, 2010, Mitchell filed a charge of discrimination with the Department alleging that he was discharged by B-Way based on his race, African-American. Mitchell stated that he had been employed with B-Way as a senior seamer operator from July 26, 2004, until his termination on October 7, 2010. He stated that his work performance had met B-Way's expectations. Mitchell stated that he was informed by the regional human resources manager, Rick Nevell, who is not an African-American, that he was terminated because he was involved in a physical confrontation on B-Way's property. Mitchell alleged that a similarly situated non-African-American employee, Angel Lozano, was treated more favorably than him under similar circumstances.

¶ 4 The Department's investigator, Jean Harris, investigated Mitchell's claim and issued an investigation report. The report notes Mitchell's allegations, as stated above. The report indicates that B-Way stated that Mitchell was discharged for violating a work rule which prohibited fighting on B-Way's premises. The report details the evidence presented by both parties during the Department's investigation.

¶ 5 Under “Complainant’s Evidence,” the report indicates that Mitchell stated that on September 30, 2010, his coworker, Lozano, was driving a forklift in the garage and asked Mitchell to move. Mitchell waved for Lozano to go around him. Lozano stopped the forklift and asked Mitchell what he said. Lozano then walked up to Mitchell and bumped him in the chest. Mitchell asked Lozano “what’s the problem?” Lozano bumped Mitchell again. Lozano pushed Mitchell in the chest, and Mitchell “went into” a parked Jeep. Another coworker (unidentified) approached Lozano and asked him why he was acting in that manner. Lozano returned to the forklift and drove away. Mitchell reported the incident to his supervisors, Ken Bush and Steve Vukmir, who are Caucasian. Vukmir took Mitchell to the human resources office where Mitchell completed paperwork reporting the incident. A human resources employee, Martinez Cruz, told Mitchell that the incident would be investigated. Mitchell was sent back to work. On October 4, 2010, Mitchell was notified that he was suspended without pay pending further investigation. A week later, Mitchell received a letter in the mail notifying him that he had been discharged. Mitchell stated that he did not touch Lozano. No supervisors were present during the incident. Mitchell stated that the only reason Lozano stopped pushing him was because another employee told him to stop. Mitchell stated that Lozano had been involved in another altercation and was not discharged, but instead, was transferred to another shift.

¶ 6 Under “Respondent’s Evidence,” the report indicates that the information was provided by Cruz, the human resources manager, who is not African-American. Cruz stated that Mitchell was a seamer operator, and Vukmir was the supervisor on the day of the incident. Nevell mailed a letter to Mitchell notifying him that he was discharged because he violated a company policy that prohibited fighting on the premises. On September 30, Mitchell filed a claim that he had

been involved in a physical altercation with Lozano. That day, B-Way interviewed Mitchell, Lozano, and three other employees – Tina Davis and Larry Baggett, who are both African-American, and Marco Lopez, who is not African-American. Written statements were given to Nevell and plant manager Dave Leber. Lozano was suspended on September 30, pending further investigation. B-Way continued its investigation and obtained additional statements from employees Bobby Garcia, Angel Cordova, Vincent Lopez, and Maria Lopez, none of whom are African-American. Supervisors Vukmir and Bush also provided written statements. After reviewing the interviews and written statements, B-Way determined that Mitchell had also physically attacked Lozano. B-Way suspended Mitchell on October 4. B-Way finalized its investigation on October 7, and decided to terminate both Mitchell and Lozano for fighting on company premises. Cruz explained that B-Way's protocol provided that an attack on an employee must be reported to the supervisor. Cruz stated that Mitchell should have walked away and reported the incident to his supervisor. Cruz stated that this incident was the only altercation that occurred in the workplace in the last four years and eight months.

¶ 7 The report indicates that, in addition to Cruz's statements, B-Way submitted several documents to the Department as evidentiary exhibits. Exhibit C was a copy of B-Way's work rules and regulations, which showed that fighting on company premises was a violation of company policy. Exhibit D was a copy of B-Way's investigation interviews of Mitchell, Lozano, supervisors Bush and Vukmir, and the seven employees named above. The report states that the interviews showed that Mitchell and Lozano were pushing each other. Exhibit E was a copy of B-Way's discipline reports for Mitchell and Lozano dated September 30, October 4, and October 10. The report states that the discipline reports showed that both men were suspended and

discharged. The Department's investigation report notes that B-Way stated in a questionnaire response that no other employee was discharged during the 12-month period preceding Mitchell's discharge, nor had any other employee engaged in the same violation as Mitchell during that timeframe. The report also indicates that Exhibit A was a "Verified Response," and Exhibit B was an "EEO Report." None of the exhibits are included in the record on appeal.

¶ 8 The Department's investigation report indicates that Mitchell did not provide any information or evidence in rebuttal. It further indicates that the witnesses who participated in the Department's investigation were Mitchell, Cruz, and Vukmir.

¶ 9 In its analysis, the Department found that its investigation did not reveal that B-Way had discharged Mitchell based on his race. The Department found that the documentation indicated that Mitchell violated B-Way's policy by fighting on company premises. It further showed that no other employee had engaged in a similar violation. The investigation revealed that four witnesses stated that Mitchell and Lozano were pushing each other with their chests. The Department found that the documentation showed that B-Way conducted an investigation into whether Mitchell had violated its policy, and concluded that he had done so by fighting on company premises. The Department further found that B-Way took action against Mitchell based on its reasonable belief that he had been fighting on company premises. The investigation failed to show that B-Way treated similarly situated non-African-American employees differently under similar circumstances. The Department noted that Mitchell had named Lozano as a comparative. It found that the documents did not show that Lozano was treated differently than Mitchell, but instead, showed that Lozano and Mitchell were discharged on the same day. The

Department concluded that there was no evidence that B-Way discharged Mitchell based on his race.

¶ 10 In its findings and conclusion, the Department stated that its investigation revealed that B-Way discharged Mitchell because he violated a company policy. The investigation further revealed that Mitchell's coworker, Lozano, who also violated B-Way's policy, was also discharged. The Department concluded that there was no evidence that B-Way discriminated against Mitchell due to his race. The Department's investigator, Harris, therefore, recommended a finding that there was a "lack of substantial evidence" to support the discrimination charge.

¶ 11 On August 17, 2011, the Department dismissed Mitchell's discrimination charge for lack of substantial evidence. In its notice of dismissal, the Department stated that, based on its investigation report, it determined that there was not substantial evidence to support the allegations in the charge.

¶ 12 On October 4, 2011, Mitchell filed a timely request for review, asking the Commission to review the Department's dismissal of his charge. Therein, Mitchell stated that he did not have an opportunity to present any of his evidence or his side of the story at the Department's fact-finding conference. Mitchell stated that Harris told him that the conference was going to be held on March 10, 2011. Mitchell called Harris on March 9 to confirm that the conference was the following day. Harris then asked Mitchell why he did not appear at the conference, which was held on March 8. Mitchell stated that Harris told him that B-Way's representatives changed the date of the conference. Mitchell stated that he was unaware that the date had been changed. Mitchell asserted that had he known of the date change, he would have attended the conference, presented his testimony and evidence, and provided rebuttal. The Commission's request for

review form indicates that a complainant may attach additional information or documents in support of his request for review. Mitchell did not provide any additional information.

¶ 13 On November 29, 2011, the Department filed a response to Mitchell's request for review, recommending that the Commission sustain the Department's dismissal of Mitchell's charge for lack of substantial evidence. The Department stated that its investigation did not reveal, and Mitchell did not present, substantial evidence that B-Way discharged him based on his race. B-Way's work rules and regulations provided that fighting on company premises was cause for immediate termination. The Department's investigation revealed that B-Way launched an investigation into the altercation between Mitchell and Lozano. B-Way interviewed both men and nine additional employees. B-Way determined that Mitchell and Lozano physically attacked each other. The Department's investigation revealed that B-Way discharged Mitchell and Lozano on the same day for violating the company's rule.

¶ 14 The Department further stated in its response that Mitchell failed to establish a *prima facie* case of racial discrimination because, by violating a company rule, Mitchell was not performing his work satisfactorily. Furthermore, the fact that B-Way discharged Lozano on the same day it discharged Mitchell showed that B-Way did not treat a similarly situated employee, who was outside Mitchell's protected class, more favorably under similar circumstances. In addition, there was no evidence that B-Way's non-discriminatory reason for discharging Mitchell was a pretext for unlawful discrimination. The Department argued that Mitchell did not provide any additional information in his request for review that warranted a reversal of the Department's determination. The Department did not reply to Mitchell's argument that he was told the wrong date for the fact-finding conference.

¶ 15 In his written reply to the Department's response, Mitchell again asserted that he did not have an opportunity to be heard because he was not at the fact-finding conference. Mitchell stated that he was unaware of B-Way's policy prohibiting fighting on company premises, or that it was cause for immediate termination. He stated that he did nothing when he was attacked, and should not have been treated the same as his attacker. Mitchell described a similar situation involving other unidentified employees where a man driving a Jeep almost hit another man, which resulted in a face-to-face confrontation. Mitchell claimed that Cruz did not discipline the Jeep driver, but "jumped down" the other man, who was African-American. Mitchell alleged that Lozano had been moved to a different shift because "he was getting out of line." Mitchell also claimed that B-Way's investigation was misleading, based on lies and erroneous facts, and retaliation against him by Cruz.

¶ 16 On August 3, 2018, the Commission issued a final order sustaining the Department's dismissal of Mitchell's charge due to a lack of substantial evidence to support his claim. The Commission acknowledged that the Department found that Mitchell showed good cause for not attending the fact-finding conference. The Department, however, did not schedule a second conference because it received B-Way's evidence during the original conference, and received Mitchell's evidence via a telephone conference. The Commission found that the evidence was insufficient to establish a *prima facie* case of employment discrimination because there was no evidence that B-Way treated similarly situated employees outside of Mitchell's protected class more favorably under similar circumstances. There was no evidence that B-Way did not discharge a non-African-American employee for fighting on the job. Rather, the evidence demonstrated that B-Way did discharge a non-African-American employee for fighting on the

job. In addition, the Commission found that B-Way articulated a non-discriminatory business reason for discharging Mitchell, and there was no evidence of pretext. Consequently, the Commission concluded that Mitchell had not presented any evidence to show that the Department's dismissal of his discrimination charge was not in accordance with the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.* (West 2010)).

¶ 17 On appeal, Mitchell contends that he did not have an opportunity to present his evidence to the Department because he was given an incorrect date for the Department's fact-finding conference, and therefore, did not attend the conference or present any evidence to the Department. Mitchell also maintains that B-Way discriminated against him when it terminated his employment based on his race.

¶ 18 The State respondents (the Department and the Commission) and B-Way have filed separate responsive briefs. They both argue that the Commission did not abuse its discretion when it sustained the Department's dismissal of Mitchell's charge for lack of substantial evidence where Mitchell failed to establish a *prima facie* case of discrimination. They argue that Mitchell did not submit any evidence that B-Way discriminated against him based on his race. They contend that B-Way articulated a legitimate nondiscriminatory reason for firing Mitchell where its investigation revealed that Mitchell and Lozano were engaged in a mutual fight on company premises. They also point out that the only similarly situated employee, Lozano, was not treated more favorably than Mitchell, as both men were discharged for fighting.

¶ 19 B-Way further responds that Mitchell's claim that he did not have an opportunity to present evidence to the Department is contradicted by the record which shows that he had a second chance to present additional evidence in his request for review, but instead, he reargued

his interpretation of the facts. B-Way asserts that Mitchell was afforded the proper due process during the Department's investigation and Commission's review, which are not adjudicatory proceedings.

¶ 20 As a threshold matter, we note that in both responsive briefs, the parties have pointed out that Mitchell's brief contains numerous factual assertions and attachments that are not included in the record. They argue that this information is not properly before this court and cannot be considered on appeal. B-Way also asks this court to strike Mitchell's brief due to his failure to comply with the requirements of Supreme Court Rule 341(h) (eff. May 25, 2018).

¶ 21 We observe that Mitchell's *pro se* brief fails to conform with the requirements in Rule 341(h) and Rule 342 (eff. July 1, 2017). Most notably, his brief does not contain an organized statement of facts, and is completely devoid of any legal argument and citation to legal authority. Based on Mitchell's noncompliance with these rules, his appeal is subject to dismissal. *Marzano v. Department of Employment Security*, 339 Ill. App. 3d 858, 861 (2003). Nevertheless, we decline to strike Mitchell's brief. Striking a brief is appropriate only where the rule violations hinder our ability to review the case. *Affiliated Health Group, Ltd. v. Devon Bank*, 2016 IL App (1st) 152685, ¶ 15. Here, because Mitchell's issues are apparent, and we have the benefit of cogent briefs from respondents (see *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001)), we choose to entertain the appeal (see *Harvey v. Carponelli*, 117 Ill. App. 3d 448, 451 (1983)). In doing so, however, we will disregard any inappropriate factual assertions that are not contained in the record. *Affiliated Health Group*, 2016 IL App (1st) 152685, ¶ 15.

¶ 22 In addition, Mitchell attached to his brief copies of documents and statements from numerous employees that are not included in the record on appeal. We are precluded from considering the information contained in these documents and statements as they are not properly before this court and cannot be used to supplement the record. *Revolution Portfolio, LLC v. Beale*, 341 Ill. App. 3d 1021, 1024 (2003).

¶ 23 We first address Mitchell's assertion that he did not have an opportunity to present his evidence to the Department because he was given an incorrect date for the Department's fact-finding conference, and therefore, did not attend the conference or present any evidence to the Department. B-Way argues that Mitchell's claim is contradicted by the record. It also asserts that he was afforded the proper due process during the Department's investigation and Commission's review, which are not adjudicatory proceedings.

¶ 24 Whether a complainant's procedural due process rights were violated is a question of law that we review *de novo*. *Lyon v. Department of Children and Family Services*, 209 Ill. 2d 264, 271 (2004). The proceedings before the Department are investigatory and only become adjudicatory when the Department issues a complaint. *Jabbari v. Human Rights Comm'n*, 173 Ill. App. 3d 227, 232 (1988). Procedural rights that are essential to a judicial or quasi-judicial proceeding do not apply to the Department's fact-finding or investigative proceedings. *Willis v. Department of Human Rights*, 307 Ill. App. 3d 317, 325 (1999). The Department may convene a fact-finding conference as part of its investigation for the purpose of identifying the disputed issues and obtaining evidence. 56 Ill. Adm. Code 2520.440(a) (2006). Whether a fact-finding conference is rescheduled is within the sole discretion of the Department. 56 Ill. Adm. Code 2520.440(d)(5) (2006). This court has previously held that a complainant "has no constitutional

right of participation in the investigation of [his] charge. Such participation would entitle every complainant to a hearing regardless of the validity of the allegations of one's charge.' ” *Jabbari*, 173 Ill. App. 3d at 233 (quoting *Klein v. Fair Employment Practices Comm'n*, 31 Ill. App. 3d 473, 483 (1975)).

¶ 25 Here, we find that Mitchell's due process rights were not violated when the Department decided not to schedule a second fact-finding conference, as that decision was within the sole discretion of the Department. Moreover, the record shows that Mitchell had multiple opportunities to present evidence to support his charge, and in fact, presented evidence to the Department. The Department's investigation report includes a section entitled “Complainant's Evidence,” which reflects statements Mitchell made to the investigator, Harris, during her investigation into his charge. The Commission's order states that Mitchell provided this evidence to Harris during a telephone conference. The report shows that Mitchell told Harris his version of the incident. He also told Harris that he reported the incident to his supervisors and human resources, and was told that B-Way would investigate the incident. Mitchell told Harris that he was suspended without pay pending further investigation, and then discharged. The record further shows that Mitchell had a second opportunity to present additional evidence in support of his charge when he filed his request for review with the Commission. However, he did not do so. Based on this record, we find that Mitchell had a sufficient opportunity to present his evidence to the Department and the Commission during the investigation and review of his charge.

¶ 26 Mitchell next challenges the dismissal of his discrimination charge, maintaining that B-Way discriminated against him when it terminated his employment based on his race. We review the final order of the Commission and not the decision of the Department. *Deen v. Lustig*, 337

Ill. App. 3d 294, 302 (2003). In doing so, the Commission's findings are given deference, and the reviewing court is prohibited from reweighing the evidence or substituting its judgment for that of the Commission. *Willis*, 307 Ill. App. 3d at 327. Where the Commission sustains the Department's dismissal of an alleged civil rights violation, we review that decision for an abuse of discretion. *Owens v. Department of Human Rights*, 403 Ill. App. 3d 899, 917 (2010). An abuse of discretion exists where the Commission's decision is against logic or was reached without employing conscientious judgment. *Deen*, 337 Ill. App. 3d at 302. In other words, we will not disturb the Commission's decision unless it is arbitrary or capricious. *Young v. Illinois Human Rights Comm'n*, 2012 IL App (1st) 112204, ¶ 33. A decision is arbitrary or capricious where it contravenes legislative intent, fails to consider a critical aspect of the matter, or provides an explanation that is so implausible that it cannot be considered the result of the agency's expertise. *Id.*

¶ 27 Discrimination claims are analyzed by employing a three-prong test where the petitioner must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *Owens*, 403 Ill. App. 3d at 918-19. If the petitioner establishes a *prima facie* case, a rebuttable presumption arises that the employer engaged in unlawful discrimination. *Id.* at 919. Under the second prong, to rebut the presumption, the employer must articulate a legitimate, nondiscriminatory reason for its decision. *Id.* If the employer does so, then under the third prong, the petitioner must prove by a preponderance of the evidence that the employer's reason is not true, and was merely a pretext for discrimination. *Id.* The petitioner maintains the burden of persuasion throughout the proceedings. *Id.*

¶ 28 To establish a *prima facie* case of employment discrimination to satisfy the first prong, the petitioner must demonstrate that: (1) he is a member of a protected class; (2) he met his employer's legitimate business expectations; (3) he suffered an adverse employment action; and (4) the employer treated a similarly situated employee outside of the protected class more favorably than the petitioner. *Id.*

¶ 29 Here, the record shows that Mitchell failed to establish a *prima facie* case of employment discrimination. In his charge, Mitchell stated that his work performance met B-Way's expectations. Mitchell also told Harris that Lozano had attacked him, and that he did not touch Lozano. However, during its investigation, B-Way interviewed and collected written statements from two supervisor and seven employees which revealed that Mitchell and Lozano were pushing each other, and thus, were mutually engaged in the physical altercation on company premises. B-Way presented the Department with its work rules and regulations, which showed that fighting on company premises was a violation of company policy. B-Way stated that the reason it discharged Mitchell was because he was fighting on company premises, in violation of the policy. The evidence before the Department thus showed that Mitchell had not met his employer's legitimate business expectation.

¶ 30 Moreover, Mitchell failed to establish that B-Way treated a similarly situated non-African-American employee, specifically Lozano, more favorably than him. The record shows that when Mitchell reported the incident to human resources on September 30, B-Way immediately suspended Lozano that day pending further investigation. Mitchell returned to work. As B-Way's investigation progressed, Mitchell was suspended on October 4. When B-Way finalized its investigation on October 7, it terminated both Mitchell and Lozano for fighting

on company premises. The evidence thus showed that Lozano was treated the same, or even less favorably, than Mitchell. Cruz told the Department that this incident was the only altercation that occurred in the workplace in the last four years and eight months. There were no other instances of B-Way treating a similarly situated employee more favorably than Mitchell.

¶ 31 Based on this record, we find that Mitchell failed to provide the Department with substantial evidence to support his charge, and thus, failed to establish a *prima facie* case of employment discrimination. The Department's dismissal of Mitchell's charge was warranted based on its investigation. Accordingly, we find no abuse of discretion by the Commission in sustaining the Department's dismissal of Mitchell's charge for lack of substantial evidence.

¶ 32 For these reasons, we affirm the judgment of the Commission.

¶ 33 Affirmed.