

COOK COUNTY COMMISSION ON HUMAN RIGHTS
69 West Washington Street, Suite 3040
Chicago, Illinois 60602

Fabian CAMBRON, Complainant)	
)	
)	Case No. 2011E021
v.)	
)	
KELVYN PRESS INCORPORATED,)	Entered: July 28, 2014
Respondent)	

ORDER

On or about July 6, 2011, Complainant Fabian Cambron (“Cambron”) filed a complaint against his former employer, Respondent Kelvyn Press Incorporated (“Kelvyn”), alleging employment discrimination on the basis of race and parental status in violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”). Cambron, a Hispanic, single-parent, alleges that he was unlawfully demoted in January 2010 and later terminated on June 30, 2011 because of his race and parental status. Kelvyn denies both that Cambron was demoted in January 2010 and that he was terminated on June 30, 2011. Instead, Kelvyn asserts that Cambron’s shift was changed for operational reasons in 2010 (while maintaining his salary and job duties) and that he left his job in 2011 voluntarily after a disagreement with Kelvyn’s owner. Having completed its investigation of Cambron’s claims, the Cook County Commission on Human Rights (“Commission”) now determines that Cambron has failed to provide sufficient evidence of unlawful discrimination.

BACKGROUND

Cambron alleges that he was hired by Kelvyn in May 2008. Compl. ¶ I. At Kelvyn, Cambron worked as a Supervisor/Pressman, running the third shift of the Sheetfed Pressroom. Pos. Stmt., p. 4. In this role, Cambron only supervised one other employee and both reported to Mike Malacina (“Malacina”), Kelvyn’s owner. *Id.* On October 12, 2009, Cambron’s supervisee – the only other Kelvyn employee on the third shift – quit. *Id.* at 5. With his departure, Kelvyn eliminated the third shift entirely instead of having Cambron work alone.¹ *Id.*; Investig. Rep., Exh. F. Around January 2010, Cambron was moved to a floating assignment on the two earlier shifts, but maintained the same salary and job duties. *Id.* at 8. From Cambron’s perspective, this

¹ The Commission’s investigation found evidence of quality control concerns about Cambron’s work at Kelvyn, such as an April 20, 2009 Notice of Performance for a poor print job. *See* Investig. Rep., Exh. E. His various coworkers described him as having “many quality control problems” with printing that “was not commercially acceptable” and “the worst printer of all three shifts at Kelvyn.” *Id.* at Exh. B. Other coworkers were critical of what they identified as “a bad attitude.” *Id.* at Exh. C (“He wouldn’t do his actual duties. I would have to do work that he refused to do[.]”).

shift change was a demotion, and he noted that none of the non-Hispanic, non-single parent supervisors on the other shifts had their shifts changed. Compl. ¶¶ II. B-D.

It appears that Cambron's responsibilities as a parent made this floating assignment difficult. On June 29, 2011, the first shift supervisor asked Cambron to cover the second shift instead for the next two days. Compl. ¶ II(E). Cambron told his colleague that he could switch to the second shift because he could not get childcare to cover in time. *Id.* ¶ II(F). The following day, Malacina, Cambron and others met to find a volunteer to cover the second shift on a go forward basis. *Id.* & II(G-K). When no one stepped forward, Malacina allegedly admonished Cambron for not being willing to do it. *Id.* According to Cambron, Malacina characterized Cambron's continued employment as a "favor" and asked, "If you can't take the shift, then what do I need you for?" *Id.*

Kelvyn's summary of this exchange is slightly different. According to Kelvyn, Cambron was the focus of the meeting to find coverage for the second shift because he had the least experience and was the least skilled. Investig. Rep., Exh. G. Moreover, Kelvyn asserts that Malacina said something approximating:

Fabian, I don't know what to tell you. If you insist you can't work 2nd shift then I [(i.e. Malacina)] will have to work 2nd shift and if I work 2nd shift, we don't need you because you are supposed to be a floater filling in, and if I have to become the floater in your position, then why do I need you?

Pos. Stmt., p. 7. In Kelvyn's version of the story, Cambron said "I don't care." *Id.* In either version of the story, Malacina never actually told Cambron that he was fired, and Cambron left the premises, never returning to work.

DISCUSSION

The Human Rights Ordinance prevents any employer from "directly or indirectly discriminat[ing] against any individual in hiring . . . discharge . . . or other term, privilege, or condition of employment on the basis of unlawful discrimination." Cook County Code of Ordinances ("County Code"), § 42-35(b)(1). Unlawful discrimination is defined as "a means of discrimination against a person because of the actual or perceived status, practice, or expression of that person's race, color . . . national origin, ancestry . . . [or] parental status[.]" *Id.* at § 42-31.

I. January 2010 Shift Reassignment

To prevail on a discrimination charge, a complainant must either present direct evidence proving discriminatory intent on the part of the respondent, or present indirect evidence, following the *McDonnell Douglas* burden-shifting method. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Simmons v. Chi. Bd. of Educ.*, 289 F.3d 488, 492 (7th Cir. 2002). Direct proof of discriminatory intent is rare. In most instances, the respondent must essentially admit that a supervisor's actions were discriminatorily motivated. *Cerutti v. BASF Corp.*, 349 F.3d 1055, 1061 (7th Cir. 2003). But a direct case of discrimination can also be built around strong circumstantial evidence surrounding the respondent's actions sufficient to raise an inference of discriminatory intent. *Id.*

In the present case, Cambron has not presented any evidence that a representative of Kelvyn admitted to ill motives regarding either his demotion or termination. Neither Malacina nor any other representative of Kelvyn made any statements to Cambron or otherwise regarding race or parental status.

Cambron's attempt to rely on circumstantial evidence is equally unavailing. Sufficient circumstantial evidence to establish a successful discrimination claim under the direct method can include: 1) suspicious timing, ambiguous statements, *etc.*; 2) evidence of similarly situated employees treated differently; or 3) evidence that the employee was qualified and passed over for the job and the employer's reason for the difference in treatment is pretextual. *Gorence v. Eagle Food Ctrs., Inc.*, 242 F.3d 759, 762 (7th Cir. 2002). Although not the only examples of sufficient circumstantial evidence, none of the aforementioned examples are supported by the evidence regarding Cambron's alleged demotion. Kelvyn changed Cambron's shift immediately following his supervisee quitting his position, leaving Cambron as the sole employee working on the third shift. Pos. Stmt., p. 5; Investig. Rep., Exh. F.

There is also no evidence that Kelvyn treated similarly situated, non-Hispanic, non-parents more favorably. To show that an employee is "similarly situated," complainant must prove that the other employee is directly comparable to her in all material respects. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). The supervisors on the first and second shifts identified by Cambron as receiving preferential treatment by not having their shifts changed are not similarly situated to Cambron because they were not on a shift without any supervisees. Cambron was the only employee whose shift had to be changed when Kelvyn got rid of the third shift.

Cambron has not presented, nor has the Commission discovered during the course of its investigation, any evidence that the decision to end the third shift itself was a pretext for Kelvyn's anti-Hispanic or anti-parent animus. As such, Kelvyn was within its rights to determine that Cambron could not run a third shift without any other employees.

Because the evidence does not establish discrimination under the direct approach, the Commission must analyze the case using the *McDonnell Douglas* indirect burden-shifting approach. For a complainant to prove discrimination under the *McDonnell Douglas* approach Complainant must first establish a *prima facie* case of discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). To establish a *prima facie* discrimination case, complainant must show that 1) she is a member of a protected class; 2) she performed her job satisfactorily; 3) she was subjected to an adverse employment action; and 4) similarly situated employees outside of her protected class were treated more favorably. *Id.* After a complainant establishes a *prima facie* case, the burden then shifts to the respondent to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Id.* The burden then shifts back to the complainant to present evidence that the claimed non-discriminatory reason is a pretext for discrimination. *Id.*

Based on the facts found as part of its investigation, Cambron, as a Hispanic, single parent, is a member of both protected classes. The evidence is mixed with respect whether he was meeting Kelvyn's reasonable expectations, but for the purpose of this decision, the Commission presumes that there is sufficient evidence that he was. Nonetheless, there is still

insufficient evidence to support Cambron's *prima facie* case of discrimination because he did not suffer a legally adverse employment action.

An adverse employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). To be an adverse employment action, an employer's decision must significantly alter the terms or conditions of the employee's job. *Gurley v. LaHood*, 504 Fed. Appx. 498, 501 (7th Cir. 2013). An adverse employment action must be more than mere inconvenience. *Id.* An employer's decision must cause a significant change in benefits to be adverse. *Id.* Simply changing an employee's working hours or shift, especially where the employee's salary and job duties remain the same is, in some circumstances inconvenient (*e.g.*, for a parent who must scramble to arrange child care), but, as a matter of law, it does not rise to the level of being an adverse employment action upon which a discrimination claim can be based. *Grube v. Lau Indus.*, 257 F.3d 723 (7th Cir. 2001).

Cambron asserts that his reassignment from the third shift to floater status was a demotion because he lost his supervisory title. Compl. ¶¶ II. B. The loss of title alone does not establish that Cambron was demoted. Putting aside Cambron's title, the Commission's investigation found that there were no significant changes in the terms or conditions of Cambron's employment with Kelvyn. Pos. Stmt., p. 8. After January 2010, Cambron had the same responsibilities and no significant change in benefits. *Id.* In fact, Cambron received the same base salary with a greater opportunity to work more overtime. *Id.*

II. June 30, 2011 Termination

The Commission's analysis of Cambron's discriminatory termination claim begins where its analysis of Cambron's discriminatory demotion claim ended. Putting aside all questions of discriminatory intent, Cambron's claim fails with respect to his June 30, 2011 termination because there is insufficient evidence that Kelvyn actually took an adverse employment action against him that day, discriminatory or not.² The parties disagree only slightly about what words were exchanged between Malacina and Cambron on his last day of work, but both are in agreement that Malacina never actually told Cambron that he was being let go.

The threshold question for this Commission then is whether it was reasonable for Cambron to infer from his exchange with Malacina that Malacina was terminating him. Constructive discharge arises when an employer consciously makes an employee's conditions at work so intolerable that the employee is compelled against his will to resign. *Steele v. Human Rights Com.*, 160 Ill. App. 3d 577, 581 (3d Dist. 1987). To demonstrate that a constructive discharge has occurred, a complainant must show that his or her working conditions were so unpleasant and difficult that a reasonable person in the employee's shoes would have felt compelled to resign. *Id.*

² The Illinois Department of Employment Security ("IDES") concluded that Cambron was discharged from his employment at Kelvyn. Investig. Rep., Exh. A. IDES's inquiry for the purpose of determining eligibility for unemployment insurance is different than this Commission's with respect to constructive discharge.

The Commission's investigation finds that on June 30, 2011, Malacina expressed his frustration with Cambron's refusal to be flexible about the shifts he was working in his new role as a floater. After Cambron had refused to cover the second shift instead of the first, Malacina asked him in essence, "What do I need you for?" Kelvyn places an additional gloss on this statement by noting that if Cambron did not cover the rotations on the second shift, Malacina would have to. But even without this clarification, the Commission finds that it is simply unreasonable for an employee to treat that sort of an inquiry during a disagreement with one's employer as the equivalent of a termination.

If Cambron had answered that question with something other than walking out, Malacina may have been reminded of Cambron's other qualities as an employee and Cambron might have continued to work for Kelvyn. In the alternative, Malacina might have fired Cambron for his lack of flexibility (or out of his alleged animus for minorities and parents). Either way, Cambron's claim of unlawful employment discrimination under the Human Rights Ordinance could not ripen until Kelvyn actually discharged him, and, under the circumstances, there is insufficient evidence to conclude that Malacina's rhetorical question had the effect of constructively discharging Cambron. A complainant cannot ripen his or her claim under the Human Rights Ordinance by behaving unreasonably in anticipation of an adverse employment action.

CONCLUSION

For the foregoing reasons, the Commission orders that complaint 2011E021 pending before this Commission be **DISMISSED** for **LACK OF SUBSTANTIAL EVIDENCE** of a violation of the Human Rights Ordinance. In accordance with CCHR Pro. R. 480.100(A), either party may file a request for reconsideration with the Commission within 30 days of the date of this order.

July 28, 2014

By delegation:

A handwritten signature in black ink, appearing to read "R. Hakim", is written over a horizontal line.

Ranjit Hakim
Executive Director of the Cook County
Commission on Human Rights