

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

COOK COUNTY SHERIFF'S OFFICE,)

Petitioner,)

v.)

COOK COUNTY COMMISSION ON)
HUMAN RIGHTS and CYNTHIA)
WALKER,)

Respondents.)

) Case No. 13 CH 17663

) Judge David B. Atkins

) Courtroom 2102

JUDGE DAVID B. ATKINS

FEB 11 2015

Circuit Court-1879

MEMORANDUM OPINION AND ORDER

THIS CAUSE COMING ON TO BE HEARD on petitioner Cook County Sheriff's Office's Complaint for Common Law Writ of *Certiorari*, and the court having considered the briefs submitted and the arguments of counsel, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that judgment on the petition for *certiorari* is entered in favor of respondents Cook County Commission on Human Rights and Cynthia Walker.

Background

This case is a petition for *certiorari* brought by petitioner Cook County Sheriff's Office ("Sherriff's Office") in response to a sexual harassment and age harassment ruling entered against it by respondent Cook County Commission on Human Rights ("CCCHR").

In April 2004, respondent Cynthia Walker began working as a computer operator in the Management Information System Department ("MIS") for the Cook County Department of Corrections. She was in her mid-late 40s when she began working and had been married for nearly 30 years.

Shortly after she began working at MIS, Antonio Belk, a jail supervisor,¹ asked Walker to design a database for him. This project gave Belk occasion to come into contact with Walker on a fairly regular basis. The record reflects that, during this time, Belk would engage in physical contact with Walker such as standing behind her chair and massaging her shoulders, running his fingers through her hair, and hugging her. Belk also asked Walker to dinner on numerous occasions. Despite Walker's admonitions, this behavior continued. Walker complained to various supervisors but nothing came of it. After she finished the database project in 2005, she had little contact with Belk until September 2006.

¹ Antonio Belk was promoted to the rank of sergeant around the time Walker began working for the Cook County Sheriff's Office and attained the rank of lieutenant in April 2007.

In August 2006, Andy Krok became the Director of MIS. Belk was ordered to be Krok's second-in-command, which made him Walker's direct supervisor. Walker met with Krok in September 2006 and informed him of her prior issues with Belk and she made it clear she did not want to be assigned under him. Nevertheless, Belk formally became Walker's supervisor in September 2006.

As soon as Belk began working at MIS, he again tried to hug and kiss Walker. She pushed him away and told him to stop. The unwanted physical touching continued through 2006 and 2007. The record indicates that, despite Walker's protestations, Belk would massage her shoulders while she was in her chair, run his hands through her hair, hug her and try to touch her face. Certain physical touching was somewhat violent and intimidating. On at least one occasion, Belk pushed Walker while she was fending off his physical advances.

Many of Belk's physical advances occurred in the presence of other MIS employees. For instance, in January 2007 he placed Walker in a headlock in front of her coworkers and she had to struggle to get free. The record indicates that Belk did not engage in this kind of behavior with other MIS employees, except for hugging those who did not object. Walker testified that his conduct made her feel uncomfortable.

In addition to the physical contact, Belk made various negative comments about Walker's age in front of other MIS employees. The record indicates that he called her "old timer" and "old fogey," as well as singing a song to her in the mornings indicating that she was the "Old Fogey from Muskogee." He also told her to "sit [her] old ass down and that she was "older than dirt" and "older than God."

Belk would also give Walker programming duties to perform specifically for him, outside the normal chain of command at MIS, which increased her work load. When Walker complained about this to Krok, Belk confronted her and told her to watch what she said about him. He confronted her several times about the fact that she was complaining about him to Krok. Belk also made veiled threats, telling Walker that he owned this "m-f jail." Belk also made physical threats and, in December 2007, he threw a punch near Walker's face.

As indicated above, Walker complained to Krok at least twice between October 2006 and January 2008 but nothing happened. Krok also cancelled many scheduled meetings. Walker complained to other supervisors but nothing came of it. In December 2007 Walker met with a representative from the Employee Assistance Program ("EAP"). On January 4, 2008, Walker met with Krok. Following that meeting, Belk was removed as Walker's supervisor. On February 12, 2008, Walker was transferred to a position outside of the MIS.

Also in January 2008, Walker availed herself of the psychological counselling services provided by the EAP. She also made a formal complaint of sexual harassment and age harassment to Krok at this time. The record indicates that Walker suffered PTSD and panic attacks as a result of her experiences. She was receiving psychological care from January 2008 through January 2011 (the date of the administrative hearing) and was taking multiple prescribed anti-anxiety, anti-depression, and sleep medications.

At the time of her January 4, 2008 meeting with Krok, Walker was also in the process of filing a formal complaint with the Office of Professional Conduct (“OPC”). The OPC conducted an investigation and found Walker’s claims of harassment and discrimination to be unsubstantiated; however, the OPC did find Belk’s conduct to be unprofessional. Belk was brought before the Sheriff’s Merit Board on disciplinary charges and ultimately suspended for thirty days.

The present matter stems from a complaint Walker filed before the CCHRC. The administrative hearing took place over the course of four-and-a-half days in late 2010 and early 2011. 18 witnesses testified and over 30 exhibits were introduced. The hearing officer issued a 60-page opinion. The administrative decision found that Walker had proven her case of sexual harassment and age harassment; she was awarded \$75,000 in damages for emotional pain and suffering, plus interest. The CCHRC also entered a permanent injunction against the Sheriff’s Office related to their policies and procedures for addressing harassment.

In the matter before this court, the Sheriff’s Office seeks review of the CCHRC administrative decision. After full briefing,² the court heard oral argument and took the matter under advisement to issue this ruling.

Legal Standard

Illinois’ Administrative Review Law, 735 ILCS 5/3-101 *et seq.* (“ARL”), is applicable only where it is expressly adopted by the act creating or conferring power on the agency at issue. 735 ILCS 5/3-102; *Smith v. Dep’t of Public Aid*, 67 Ill. 2d 529, 540 (1977). Where an agency’s enabling act does not expressly adopt the ARL or otherwise provide an alternative method of review, the common law writ of *certiorari* may be utilized to obtain circuit court review of administrative proceedings. *Outcom, Inc. v. Ill. DOT*, 233 Ill. 2d 324, 333 (2009); *Russell v. Dep’t of Nat. Resources*, 183 Ill. 2d 434, 440-41 (1998). In this case, the CCHRC has not expressly adopted the ARL so a writ of *certiorari* is the proper mechanism through which to review the agency’s decisions.

However, the substantial differences that formerly existed between common law *certiorari* and administrative review actions have been all but obliterated and are no longer recognized by Illinois courts. *Smith*, 67 Ill. 2d at 541-42. Thus, the standards and procedures for judicial review of an administrative decision by way of *certiorari* are essentially the same as those under the ARL. See *Hanrahan v. Williams*, 174 Ill. 2d 268, 272 (1996); *Quinlan & Tyson, Inc. v. Evanston*, 25 Ill. App. 3d 879, 884 (1st Dist. 1975).

In a *certiorari* proceeding, the relevant records of the administrative agency are brought before the reviewing court. *Quinlan & Tyson, Inc.*, 25 Ill. App. 3d at 884. The only province of the trial court is to consider the record and ascertain whether the agency has jurisdiction, whether it exceeded its jurisdiction, whether it proceeded according to law and acted on evidence, and whether there is anything in the record which fairly supports the agency’s action. *Id.* Under any standard of review, the petitioner bears the burden of proof and relief will be denied if he or she

² Of the two respondents, only Cynthia Walker filed a response brief.

fails to sustain that burden. *Marconi v. Chi. Heights Police Pension Bd.*, 225 Ill. 2d 497, 532-33 (2006).

The findings and conclusions of the administrative agency on questions of fact shall be considered *prima facie* true and correct. *Goldberg v. Dep't of Prof'l Regulation*, 331 Ill. App. 3d 797, 803-04 (1st Dist. 2002). The court is not to reweigh evidence or make an independent determination of the facts, but rather to ascertain whether such findings are against the manifest weight of the evidence. *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 386-87 (2010). An administrative agency's factual determination is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210 (2008). The mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings. *Abrahamson v. Ill. Dep't of Prof'l Regulation*, 153 Ill. 2d 76, 88 (1992).

An administrative agency's conclusions of law are reviewed under a *de novo* standard. *City of Belvidere v. Ill. State Labor Rels. Bd.*, 181 Ill. 2d 191, 205 (1998). However, an agency is presumed to make informed judgments based on its experience and expertise and courts will defer to an agency's construction of its own rules and the statutes it administers unless the agency's interpretation is unreasonable or plainly erroneous. See *Bloom Township High Sch. Dist. 206 v. Ill. Educ. Labor Rels. Bd.*, 312 Ill. App. 3d 943, 953-54 (1st Dist. 2000); *Russell v. Dep't of Cent. Mgmt. Servs.*, 196 Ill. App. 3d 641, 644 (1st Dist. 1990). Where a statute is ambiguous, the court will not substitute its own construction of a provision for the reasonable interpretation of the agency charged with the statute's administration. *Quality Saw & Seal v. Ill. Commerce Comm'n.*, 374 Ill. App. 3d 776, 782 (2d Dist. 2007).

Finally, mixed questions of law and fact are reviewed by the court for clear error. *Marconi*, 225 Ill. 2d at 532. A mixed question of law and fact is one in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the rule of law as applied to the established facts is or is not violated. *Cinkus v. Vill. of Stickney Mun. Officers Election Bd.*, 228 Ill. 2d 200, 211 (1988). An agency's decision is clearly erroneous when the reviewing court is "left with the definite and firm conviction that a mistake had been committed." *AFM Messenger Serv., Inc. v. Dep't of Emp't Sec'y*, 198 Ill. 2d 380, 393 (2001) (internal quotations omitted).

Discussion

Petitioner advances three main arguments. First, petitioner argues the finding that Walker was subjected to sexual harassment is against the manifest weight of the evidence. Second, petitioner contends that the Cook County Human Rights Ordinance ("Ordinance") does not provide a cause of action for age harassment. In the alternative, petitioner argues that the finding of age harassment is against the manifest weight of the evidence. Third, petitioner contends that CCCHR was not authorized to award prospective injunctive relief for violations of the Ordinance and, even if it was, the proscribed relief is arbitrary and unreasonable.

Issues related to the hearing officer's factual findings will be addressed first as they are all subject to the manifest-weight-of-the-evidence standard. The remaining issues are questions of law.

Findings of Fact

Petitioner's arguments that the findings of sexual harassment and age harassment are against the manifest weight of the evidence are without merit. An agency's factual finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Marconi*, 225 Ill. 2d at 534 (quoting *Abrahamson*, 153 Ill. 2d at 88).

Petitioner argues that, even though Belk's conduct was deplorable and may have been harassing to Walker, it did not actually constitute physical or age harassment. The Ordinance defines "sexual harassment" as:

[A]ny unwelcome sexual advance, request for sexual favors, or conduct of a sexual nature when:...

- c. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Cook Cty. Code § 42-31. Although the Ordinance does not explicitly mention age harassment, it would appear the hearing officer extrapolated the Ordinance and used a similar "hostile environment" standard.

The CCCHR uses a two-part test to determine whether a plaintiff states an actionable claim for harassment under the Ordinance. Indeed, the CCCHR has explicitly adopted the analysis used by the United States Supreme Court to evaluate Title VII claims. See *Gluszek v. Stadium Sports Bar and Grill*, Cook Cty Comm'n on H.R. 1993E052 (3-16-95) (citing *Harris v. Forklift Sys.*, 510 U.S. 17 (1993)). This test was applied to both of Walker's claims.

The two-part *Harris* test has a subjective and an objective component, thereby requiring the conduct at issue to be both objectively and subjectively severe. The objective prong uses a "reasonable person" standard, which in this case would be a reasonable woman in Walker's position. The subjective component requires that the complainant actually find the behavior to be offensive. As the *Harris* court explained:

This is not, and by its nature cannot be, a mathematically precise test... But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

510 U.S. at 22-23 (internal citations omitted).

In addition to these rules, there are a couple factual matters of note. First, the hearing officer found Belk to be the least credible witness he had ever heard in over 20 years of experience as a hearing officer. Second, as is common in workplace harassment cases, Walker kept a journal of Belk's conduct that she relied on heavily to refresh her recollection during her testimony. Petitioner contends that the hearing officer overly relied on the journal in his decision and that the journal is hearsay and unreliable on its face. Respondent notes that the journal was admitted as a joint exhibit which means petitioner waived its objection to foundation. Further, petitioner made no objection to use of the journal at the hearing, thereby suggesting that petitioner has waived its ability to object to the journal's reliability. Indeed, the journal is likely a hearsay exception as a present sense impression contemporaneously recorded (even though some entries do not have dates). Moreover, even though Walker relied heavily upon the journal at the hearing, there were many other witnesses whose testimony corroborated her statements.

Petitioner has three other main issues with the sufficiency of the evidence pertaining to the sexual harassment claim, none of which merit reversal or remand. First, petitioner claims that Walker did not subjectively regard Belk's behavior as offensive. While this may be true of certain conduct, Walker clearly states that she was "uncomfortable" by Belk's unwanted physical contact. Her psychological treatment is other evidence of the subjective impact of Belk's conduct. Second, petitioner argues that while Belk's conduct may have been harassment, it was not sexual harassment. This argument is stronger than the first. Indeed, while Belk touched Walker repeatedly, the touching was not in any erogenous zone and fairly mild in terms of sexual contact. However, the hearing officer's finding that the repeated unwanted touching amounted to sexual harassment comports with the *Harris* test and does not run afoul of the extremely deferential manifest-weight-of-the-evidence standard. Third, petitioner argues that there was no significant difference between Belk's conduct in 2004 and 2005, which the hearing officer specially found did *not* amount to sexual harassment, and his conduct from 2006 onward. However, there were major differences. For instance, Belk became Walker's direct supervisor in late 2006 and began having regular contact with her at that time. While Belk's conduct may not have risen to the level of a "hostile environment" in 2004-05 when Walker was creating the database, circumstances changed in 2006 when Belk became Walker's direct supervisor.

Similarly, petitioner contends that the allegations of age harassment did not rise to a level that created a hostile work environment. This appears to be based primarily on Walker's admission that she once joked with Belk about her age, calling him a "fish-eyed fool." However, given the ample examples in the record, the findings of age harassment was not against the manifest weight of the evidence.

Finally, respondent contends that all of these arguments were waived because petitioner did not raise them in its Exceptions to the hearing officer's first decision.³ Although the court need not reach this argument, respondent appears to be mistaken in this contention – but not for the reason advanced by petitioner. In its reply, petitioner argues the administrative decision states on its face that petitioner was not required to exhaust its administrative remedies in order to pursue administrative review in this court. This simply means that petitioner was not required to seek reconsideration of the decision prior to filing in this court; however, this exception to the ordinary rules of exhaustion under the ARL has nothing to do with waiver. Further, common

³ The hearing officer issued a "First Recommended Decision and Order" to which petitioner filed Exceptions and then issued his "Final Recommended Decision and Order."

sense dictates that petitioner would not be able to raise objections to the evidentiary foundation of the administrative decision until after the administrative decision was issued.

Age Harassment as a Cause of Action

Petitioner correctly states that the Ordinance does not specifically prohibit age harassment.⁴ However, that does not mean the hearing officer exceeded his authority when he recognized a cause of action for age discrimination. The Ordinance provides that “[n]o employer shall directly or indirectly discriminate against any individual” or condition employment “on the basis of unlawful discrimination.” Ord. Art. II(B)(I). Further, the Ordinance defines “unlawful discrimination” as “discrimination against a person because of the actual or perceived status, practice, or expression of that person’s... age” of over 40 years. Ord. Art. II(2)(A)&(T).

As the hearing officer recognized in his decision, there is good reason to conclude that the Ordinance supports recognizing a claim for age harassment. In *Conway v. Trans Action Database Marketing, Inc.*, a manager made a number of slurs concerning a complainant’s race (African-America) and sexual orientation (homosexual). Cook Cty. Comm’n H.R. 199E010 at 9, N.6 (3-13-03). The CCHRC adopted the interpretation that that Ordinance recognized claims of racial harassment on the basis that that “[a]n employer has an affirmative duty to maintain a working environment free of harassment on the basis of membership protected by the [Ordinance].” Further, in *Hall v. GMRI, Inc. d/b/a Red Lobster Restaurants*, the CCCHR recognized discrimination on the basis of sexual orientation where sexual orientation was listed as a protected category but where no specific prohibition against such discrimination appears in the Ordinance. Cook Cty. Comm’n H.R. 1996E101 (9-10-98). As age is also a protected category under the Ordinance, there is good reason to conclude the statute should be extended to cover age discrimination.

In its brief petitioner argues for a clearly-erroneous standard of review on this issue. However, even under a *de novo* standard, there is no error here.

Prospective Injunctive Relief as a Remedy

Finally, petitioner contends that the CCHRC is not authorized to award prospective injunctive relief and, even if it was, the relief ordered in this case is arbitrary and unreasonable. In *Crittenden v. Cook County Commission on Human Rights*, the Illinois Supreme Court held that the CCCHR did not have the authority to award punitive damages because the Ordinance did not expressly provide for them. 2013 IL 114876. Although not argued in respondents’ brief, *Crittenden* is distinguishable because, in that case, the court based its decision in large part on the fact that “punitive damages are not favored under the law.” See 2013 IL 114876, ¶ 24.

The Ordinance states, in relevant part:

Remedies.

(1) Relief may include, but is not limited to, an order to:

⁴ In its brief, petitioner notes that the hearing officer converted Walker’s claim of age discrimination to a claim for age harassment *sua sponte*. However, it is not clear why this fact is significant or what bearing, if any, it has on the merits of petitioner’s case.

- a. Cease the illegal conduct complained of and to take steps to alleviate the effect of the illegal conduct complained of;
- b. Pay actual damages, as reasonably determined by the Commission, for injury or loss suffered;
- c. Hire, reinstate, or upgrade the complainant, with or without back pay, or to provide such fringe benefits as the complainant may have been denied;
- d. Sell or lease housing in question to the complainant;
- e. Admit the complainant to a public accommodation;
- f. Extend to the complainant the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the respondent;
- g. Pay the complainant all or a portion of the costs, including reasonable attorney's fees, expert witness fees, witness fees, and duplicating costs, incurred in pursuing the complaint before the Commission or at any stage of judicial review;
- h. Take such action as may be necessary to make the complainant whole, including, but not limited to, awards of interest on the actual damages and back pay from the date of the violation;
- i. File with the Commission a report as to the manner of compliance;
- j. Post in a conspicuous place notices which the Commission may publish or cause to be published setting forth requirements for compliance with this article or other relevant information which the Commission determines necessary to explain this article; and
- k. Pay a fine of not less than \$100.00 and not more than \$500.00 for each offense. Every day that a violation shall continue shall constitute a separate and distinct offense.

Cook Cty. Code § 42-34(c)(1).

In this case, the CCCHR ordered extensive prospective injunctive relief, including requiring the Cook County Sherriff to: hire a consultant to train managers on age and sexual harassment; adopt a policy against age harassment, and; create a procedure for the reporting of age or sexual harassment and make that procedure known to all employees.

Petitioner argues that such relief is not permitted by the Ordinance because it does not fall squarely within any of the categories in section 42-34(c)(1). However, the hearing officer relied on Article X(C)(1) of the Ordinance, which authorizes the CCCHR to order appropriate injunctive relief at its discretion. Moreover, respondent cites numerous cases wherein the CCCHR ordered prospective injunctive relief. Thus, it seems clear that such relief is authorized by the Ordinance. See *McClellan v. Cook Cty. Law Lib.*, 1996E026 at 29 (ordering sexual harassment prevention training for all managers and requiring the sexual harassment policy to be circulated among all employees and posted in a conspicuous location); *Hall*, 1996E101 at 22 (ordering sensitivity training for management and requiring a written communication be sent to all employees).

The more pressing question is whether the particular relief ordered by the CCCHR is arbitrary and unreasonable. Petitioner contends that the injunctive relief was intended to punish the Sherriff's Office and, as such, is serving as a proxy for punitive damages. However, there is

no support for this theory in the record and the pages cited in petitioner's brief simply state that the CCCHR is ordering injunctive relief because no amount of punitive damages would have the desired effect of deterring future wrongdoing. (See R. at 02290-91)

Petitioner next argues that the injunctive relief ordered was unreasonable and onerous because the Sheriff's Office already has a written sexual harassment policy in place and a procedure for conducting investigations pursuant to employee complaints.⁵ Specifically, petitioner contends that the CCCHR "glossed over" the relevant written policy and wrongly concluded that the policy was not in evidence. (See R. at 02292) While true that the CCCHR erroneously determined that petitioner's sexual harassment policy was not part of the evidence⁶ and that CCCHR gave the written policy only cursory treatment, this does not render the decision erroneous.

Instead of focusing on the letter of the written policy, CCCHR couched its decision in terms of the "broken" enforcement mechanism. Indeed, having a sexual harassment policy in place does not prevent injunctive relief when the policy is obviously ineffective. *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 864 (7th Cir. 2001). The hearing officer found that managers were uninformed about the specifics of the policy, generally, and unprepared to handle Walker's complaints in this particular case. Thus, it was not unreasonable or arbitrary to order reformulation of petitioner's sexual harassment policy. Moreover, it is undisputed that no policy exists with respect to age harassment.

Finally, contrary to petitioner's assertion, injunctive relief is appropriate under the circumstances. "In order to be entitled to a permanent injunction, the party seeking the injunction must demonstrate: (1) a clear and ascertainable right in need of protection; (2) that he or she will suffer irreparable harm if the injunction is not granted; and (3) that there is no adequate remedy at law." *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 772 (2009). Petitioner argues, without support, that injunctive relief was improper because there existed an adequate remedy at law. The CCCHR specifically found to the contrary and there is no reason to disturb this finding.

WHEREFORE, judgment on petitioner Cook County Sheriff's Office's Complaint for Common Law Writ of *Certiorari* is entered in favor of respondents Cook County Commission on Human Rights and Cynthia Walker and against petitioner Cook County Sheriff's Office. This disposes of the matter.

ENTERED BY JUDGE DAVID B. ATKINS
FEB 11 2015
Writ Court-1879
Judge David B. Atkins

The Court.

⁵ At oral argument petitioner argued that, since the time of the administrative hearing, the Sheriff's Office has reviewed and changed its policy pursuant to a *Shakman* decree. However, this argument cannot be considered on administrative review as it was not raised in the administrative proceeding and it is not part of the record.

⁶ To be clear, the policy was introduced into evidence but it was not an exhibit at the administrative hearing.