

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

Yolanda MARINO, Complainant)	
)	
)	Case No. 2012E029
v.)	
)	
CHICAGO HORTICULTURAL SOCIETY,)	Entered: July 10, 2015
Respondent)	

ORDER DENYING RECONSIDERATION

On July 27, 2012, Complainant Yolanda Marino (“Marino”) filed a discrimination complaint against her former employer, Respondent Chicago Horticultural Society (“Respondent”), alleging that Marino’s employment was terminated because of her age and sexual orientation in violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”). See Cook County Code of Ordinances (“County Code”), § 42-35(b)(1).

After investigating Marino’s claims, the Cook County Commission on Human Rights (“Commission”) dismissed her complaint on March 20, 2015, for a lack of substantial evidence of a violation of the Human Rights Ordinance. *Marino v. Chicago Horticultural Society*, 2012E029, *9 (CCHRC Mar. 20, 2015) (“Dismissal Op.”). On April 17, 2015, Marino filed a timely Request for Reconsideration.

After careful consideration of the additional evidence that Marino submitted, the Commission finds that there is still insufficient evidence to show that Respondent’s proffered reason for terminating Marino was a pretext for age- or sexual orientation discrimination. Accordingly, the Commission now denies the Request for Reconsideration and re-affirms its dismissal of this matter.

BACKGROUND

The relevant facts and analysis of the Dismissal Opinion are set out in full there. To briefly review, Marino claims that she was fired from her job as a part-time human resources assistant by the then-new Human Resources (“HR”) Director Aida Amsel (“Amsel”) because of her age (*i.e.* 65 years old at the time of her termination) and sexual orientation (*i.e.* homosexual). Marino was hired by the Chicago Horticultural Society in 2007, and her prior performance reviews up to 2012 were mostly positive. Notably during this same period, the Chicago Horticultural Society fired two HR Directors and the position was empty for some time before Amsel started in June 2011.

Amsel gave Marino a highly critical performance review in January 2012, and then fired Marino during their February 2012 review meeting. According to Respondent, Marino was discharged because she failed to perform two job duties – ordering uniforms and verifying

employees' immigration status – even after repeated requests from Amsel. Respondent offers that Marino was terminated was on-the-spot because Amsel believed that Marino had lied during the review meeting about whether she had used an E-Verify system to perform the latter task.

Marino, for her part, claims that she was treated worse than Amsel's other HR supervisee, Ellen Slattery ("Slattery"). Slattery was just 49 at the time and presumably heterosexual. Marino complains that Amsel gave Slattery months of counseling before recommending her termination in July 2012,¹ while Amsel did not even follow Respondent's basic progressive discipline policy when she fired Marino on the spot for an error. Curiously, in an interview with Commission investigators, Marino also stated her belief that the "real reason" Amsel fired her was that Amsel was worried that Marino would reveal Amsel's poor Spanish-speaking skills.

In the Dismissal Opinion, the Commission found a *prima facie* case for age discrimination because Marino was replaced by a substantially younger woman, but not for sexual orientation discrimination because there was no evidence that Amsel or other managers knew Marino was homosexual. Dismissal Op. at *7-8. The Commission also found that Respondent satisfied its burden of giving a legitimate reason for the discharge (*i.e.* Marino's poor work performance and her alleged lie to Amsel), and that Marino failed to provide substantial evidence that this rationale was a pretext for discrimination. *Id.* at *8-9. Additionally, the Commission noted that Marino's "real" story about why Amsel fired her – insecurity about her Spanish-language skills – completely undercut any grounds to infer discriminatory motive. *Id.* at *9.

DISCUSSION

Marino's Request for Reconsideration provides considerable additional information to demonstrate her good work performance and explain that the comment that got her fired was an oversight, not an outright lie. Nonetheless, even assuming that all of this new information is true, there is still insufficient evidence for a reasonable administrative law judge to conclude that the reasons Respondent gave for Marino's discharge were a pretext for discrimination.

Additional, But Irrelevant Facts

First, Marino notes and produces on reconsideration evidence of a short, but positive employee evaluation on the basis of work she performed in the second half of 2009. Req. to Reconsider at 10, Exh. E. Similarly, Marino produced a review indicating that she was "meet[ing] expectations" for initiative in 2010. *Id.* at 15, Exh. F. These reviews are of limited utility to the Commission in evaluating Respondent's reasons for terminating Marino because prior to Amsel being hired in June 2011, the Chicago Horticultural Society was in a "transition period to the new Vice President of HR." *Id.* at 10, Exh. E. As Marino's 2009 reviewer anticipated, "[o]nce the new VP is hired . . . goals and responsibilities going forward will be reviewed and discussed." *Id.* For what it is worth, the Commission assumes here (as it did in its original dismissal order) that Marino met the reasonable expectations of supervisors who preceded Amsel.

¹ Slattery resigned first.

Second, Marino quibbles on reconsideration that the job description provided to the Commission by the Respondent after her termination includes some job duties that were not on an April 2009 job description that Marino has in her possession. *Id.* at 7; compare *id.* at Exh. C with *id.* at Exh. D. Whatever the exact scope of Marino's other duties, she does not contend on reconsideration that she was not responsible for ordering uniforms and verifying new hire's immigration status. It is clear from the Commission's investigation that regardless of whether either duty was written down on Marino's official job description,² Respondent expected Marino to work on both tasks and Marino did, in fact, work on these tasks during her tenure at the Chicago Horticultural Society.

Finally, Marino produces documentation calling into question Respondent's claim that it was unaware of Marino's sexual orientation. Specifically, Marino's employment form listed a woman as a domestic partner. *Id.* at 6, Exh. B. In addition, Marino represents that she once told Amsel that she was going to the Gay Pride Parade with her partner and claims that the CEO of the Chicago Horticultural Society saw her there. *Id.* at 5. This evidence certainly brings Marino a bit closer to proving a *prima facie* case of sexual orientation discrimination, and, for the sake of rendering this decision, the Commission assumes that there is now substantial evidence to establish a *prima facie* case of sexual orientation discrimination. But this assumption does not mean that Marino could prevail on this claim; in order to have a viable sexual orientation discrimination claim, Marino still needs to produce substantial evidence that Respondent's proffered reason for terminating her employment was a pretext for discrimination. *See Robinson v. CEDA*, 2012E015, *3 (CCHRC July 25, 2014) (“[A] *prima facie* showing is not relevant if the respondent has a legitimate, nondiscriminatory reason for the adverse employment action.”). As discussed below, that is a conclusion that is still beyond the evidence produced in support of Marino's request for reconsideration.

Pretext Analysis

Marino alleges that Respondent fired her for reasons related to her age and sexual orientation. Respondent contends that it fired Marino for poor performance in ordering uniforms and for poor performance and lying about an issue related to verification of the employment eligibility of new hires. *See Dismissal Op.* at *8 (“Respondent asserted that Marino was fired based on a series of unmet requests from her supervisor, Amsel, which resulted in her work having to be done by others, and culminating in a meeting at which Amsel saw Marino as deliberately falsifying information in an effort to excuse undone work.”).

Looking first at the uniform ordering task, Marino describes and documents on reconsideration that she worked on this project from August 2011 until February 2012, and essentially claims that the delay was Amsel's fault, not hers. *Req. to Reconsider* at 23, Exhs. G-H. While Marino's story differs from Amsel's on some details, Marino's additional information supports, rather than rebuts, Amsel's criticism. Marino explained that she “worked on uniforms throughout the year,” including via email exchanges in October 2011 and during the January-February 2012 timeframe. *Id.* But this drawn-out process was the very reason that Amsel gave for finding Marino's performance unacceptable: Amsel asked Marino to complete this task in

² Ordering uniforms is a job duty listed on the document Marino produced as her job description on reconsideration. *Req. to Reconsider*, Exh. C.

September 2011 and, by January 2012, found it necessary to assign a second employee to help finish the job. Investig. Rep. Exh. E (Amsel Performance Review of Marino).³ Thus, while there may be disputes about specific details, Marino's new information does not actually provide substantial evidence to support her argument that her termination was pretextual.

Turning to the E-Verify issue, Marino also explains on reconsideration the reasons for her apparent mistakes and delays in setting up this online system. Req. to Reconsider at 27. According to Marino, she had started setting up E-Verify several times under prior HR Directors using a different method which required attending a webinar. *Id.* While this new information explains Marino's confusion in setting up E-Verify for Amsel, it does not demonstrate that she competently did so. Marino represents that the outdated list of E-Verify webinars that she gave Amsel was all that was available online when Marino was trying to fulfill Amsel's request. *Id.*, Exh. I. But Marino also confirms on reconsideration that Amsel took over the project, figured out another way to register, and set up the E-Verify account herself. *Id.* at 27. Again, Marino's additional explanation does not show that Amsel's criticism of Marino's work was baseless.

Nor does Marino's full explanation of the February 2012 conversation in which Amsel believed Marino was lying resuscitate Marino's case. According to Marino, when Amsel asked if she had used E-Verify yet, and Marino replied something to the effect of "No because there have not been any new hires in the previous month," it was an innocent mistake. *Id.* Marino describes returning to her office, seeing that there had been one new hire in January 2012, and then returning to Amsel to correct her misstatement. *Id.*

Assuming the truth of Marino's statement on reconsideration, her version of the events still provides a reasonable, nondiscriminatory grounds for termination. Marino was the HR person responsible for verifying the immigration status of all new hires by obtaining I-9 forms to ensure their eligibility to work. Rp. Pos. St., pp. 2-3, Exh. C; Req. to Reconsider at 29. Verification of new hires, and maintaining and updating the paper I-9 files for all employees, had been Marino's responsibility for years. *Id.*⁴ Even if it was a mistake to say initially that no new hires had occurred in 2012, halfway through the first quarter of the year, the context of this mistake was all the back-and-forth between Marino and Amsel over Marino's alleged delay in starting the E-Verify program (as well as Amsel's ongoing questions and critiques of various alleged problems Marino had with keeping up with new hires and immigration status updates). *See* Rp. Pos. St. Exh. A (Marino Personnel File). Under these circumstances, Marino's failure to recall that a new employee had started a few weeks earlier – just as easily as a deliberate lie – could justify an immediate discharge without expending further managerial efforts.

More importantly, the Commission's dismissal order is not based on accepting the evidence that Marino told a deliberate lie in the moment. Instead, Marino's complaint fails because, although considering the evidence adduced from the Commission's investigation and

³ Marino provided notes of her emails because she does not have access to those documents. Req. to Reconsider at 23. These emails are already part of the investigation record, though; Respondent provided copies of Marino's emails with uniform vendors between November 2011 and the end of January 2012. Rp. Pos. St. Exh. A.

⁴ Marino also contests Respondent's claim that she improperly shredded all paper I-9s, which created significant confusion and duplication of lost work. Req. to Reconsider at 29. While this creates a credibility issue, there is no need to resolve it because the Dismissal Opinion did not include or rely on this point.

this request for reconsideration in the light most favorable to Marino, “the critical inquiry” in a pretext analysis “is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge.” *Fatemi v. White*, 775 F.3d 1022, 1045 (8th Cir. 2015) (citations omitted). See also e.g., *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000) (“Even if the reasons for [adverse action] were mistaken, ill considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown.”).

Marino’s additional evidence shows that she performed well in some parts of her job and that her work was appreciated by prior managers. But that information does nothing to show that her new manager’s dissatisfaction with her work was a pretext for discrimination. It may be that Amsel was a more demanding boss, more focused on speed and technology than Marino’s prior supervisors, but being so inclined does not suggest animus towards individuals of a particular age or sexual orientation.

Finally, Marino’s Request for Reconsideration leaves completely unaddressed an important consideration in issuing the original Dismissal Order. During the Commission’s investigation, Marino claimed that the real reason she was fired was Amsel’s desire to keep hidden her poor Spanish-speaking skills.⁵ This admission is fatal because it means that even if Respondent did not fire Marino for poor performance on two tasks as it represented to the Commission, the “real reason” Respondent fired Marino is still not something that is prohibited by the Human Rights Ordinance. The Request for Reconsideration does not even address this important, independent reason for dismissal.

For all these reasons, the new evidence submitted fails to show Respondent’s reasons for firing Marino were a pretext for age or sexual orientation discrimination.

CONCLUSION

For the foregoing reasons, the Commission DENIES Complainant’s REQUEST FOR RECONSIDERATION of its Dismissal of Complaint No. 2012E029 for Lack of Substantial Evidence. In accordance with CCHR Pro. R. 480.115, Complainant may seek administrative review of this decision by petitioning the Chancery Division of the Circuit Court of Cook County for a writ of certiorari.

July 10, 2015

COOK COUNTY COMMISSION ON
HUMAN RIGHTS:



Kenneth A. Gunn,
Chairperson

⁵ Apparently this was important to Amsel’s reputation. See Chicago Botanic Garden, “Senior Staff: Aida Giglio,” online at http://www.chicagobotanic.org/info/senior_staff/giglio (visited June 23, 2015) (formerly Aida Amsel; “She is also fluent in Spanish, which has been invaluable in her communication with the Garden’s Spanish-speaking population.”).