

COOK COUNTY COMMISSION ON HUMAN RIGHTS

69 West Washington, Suite 3040
Chicago, Illinois 60602

Fenton POWELL, Complainant)	Case No. 2011E004
v.)	Entered: February 14, 2014
NORTHWESTERN UNIVERSITY,)	
Respondent)	

ORDER

Complainant Fenton Powell (“Powell”) brought this action on January 14, 2011 against his former employer, Respondent Northwestern University (“Respondent” or “NU”), for unlawful employment discrimination on the basis of race and unlawful retaliation in violation of Sections 42-35(b)(1) and 42-41(a), respectively, of the Cook County Code of Ordinances (“County Code”). Powell’s claim for unlawful discrimination is facially thin. Powell, an African American, alleges that he was terminated on August 26, 2010, while a white coworker (who was in no way similarly situated) was not. Compl., ¶¶ I, II.E; Questionnaire Resp. No. 12. Powell’s retaliation claim is only slightly more developed. He notes that his termination followed just weeks after he was listed as a witness in a U.S. Equal Employment Opportunity Commission (“EEOC”) proceeding brought by another former coworker, but ignores documented performance issues stretching back into early 2009 provided by his employer. Compl., ¶ II.B; Investigation Report, Exhs. B-G. Having completed its investigation of both claims, this Commission now dismisses Powell’s entire complaint for lack of substantial evidence of a violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”).

Background

Prior to his termination, Powell worked for NU as a Community Service Officer (“CSO”) in the University Police Department (“UPD”). Compl., ¶ I. As a CSO, Powell’s duties included providing security for the University’s residence halls. Pos. Stmt., Exh. C.

The Commission’s investigation shows that more than a year prior to his August 26, 2010 termination, Powell’s relationship with management had already taken an unhappy turn. According to a written warning in Powell’s personnel file, on January 12, 2009, he was observed on duty out of his UPD uniform. Investigation Report, Exh. B. Powell received a verbal warning for this infraction, only to be observed again on duty out of uniform on January 14, 2009. *Id.* In an interview with Commission staff, Powell claimed that the uniform requirement for CSOs was unclear. Powell Interview (Nov. 28, 2012). But the Northwestern University Police Department Rules and Regulations state, “All Community Service Officer Supervisors and Community Service Officers will wear the prescribed uniform for Residential Security operations

while on duty. . . . From November 1 to March 31 . . . [t]ies, turtlenecks, or mock turtlenecks will be worn.” Investigation Report, Exh. A (Rule 12.a, c).

A UPD sergeant asked Powell to submit a written report to him, no later than January 25, 2009, explaining the uniform infractions. Investigation Report, Exh. B. Separately, a UPD lieutenant asked Powell to meet with another CSO to determine building coverage assignments and update the lieutenant by February 1, 2009. *Id.* When Powell, followed neither directive by February 6, 2009, he received a written warning for insubordination and was given an action plan for remediation. *Id.* The plan for remediation included providing Powell’s sergeant and lieutenant with their requested reports and following all of their future directions. *Id.* More generally, the written warning (and all those that followed) apprised Powell that:

You should be aware that your employment with the University is in jeopardy. Any future incident(s) of the above deficiencies in performance, violations of policy or procedures, or failures to successfully complete all the requirements and expectations of your position will result in additional action, up to and including termination.

Id.

Despite this, Powell continued to receive written warnings from NU for a pattern of unsatisfactory performance and failure to follow corrective supervisory directives. According to an April 3, 2009 written reprimand, Powell ignored a directive from his sergeant to submit his license application to his sergeant so that all of the applications for UPD could be submitted to the Illinois Department of Professional Regulation together. *Id.* at Exh. C. This April 2009 written warning also indicated that Powell had failed to submit the reports requested after the previous written warning. *Id.*

On July 21, 2009, Powell received another written reprimand. This one cited a continuation of many of the issues previously identified as well as poor communication with Powell’s supervisors and co-workers. *Id.* at Exh. D.

Powell received a fourth written reprimand on November 6, 2009, for attempting to attend a course for which he was not registered on October 30, 2009. *Id.* at Exh. E. When the course administrator asked Powell to leave, Powell allegedly became belligerent. *Id.* The administrator stated that “she felt intimidated by [Powell’s] behavior. She described [his] behavior as aggressive and hostile towards her.” *Id.*

On December 19, 2009, Powell received a fifth written warning. This warning referred to a series of new transgressions, including Powell incorrectly recording sick time as vacation time on his timesheet and then refusing to correct the mistake. *Id.* at Exh. F.

An additional written warning was filed on March 2, 2010, and a May 29, 2010 performance review followed with notations of deficiencies, including the failure to follow supervisory directives. *Id.* at Exh. G. According to his personnel file, on July 20, 2010, Powell again attempted to attend a course for which he had not registered and had not received prior

authorization. *Id.* When the course administrator reminded Powell of the deficiency on the day of the course, Powell behaved in a manner that “made another member of the university community apprehensive and concerned.” *Id.* Like the incident the previous fall, Powell was, according to the course administrator, “rude” and undermined her authority to run the class. *Id.* When Powell’s sergeant and lieutenant attempted to address the issue with Powell, he was dismissive. *Id.* And with a number of other corrective action items from previous written warnings still unmet, on July 28, 2010, they requested that NU terminate Powell. *Id.*

Powell, however, does not consider the July 20, 2010 argument with the course administrator to be the straw that broke the camel’s back. Instead, he observes that a former coworker filed a discrimination complaint with the EEOC and named Powell as a witness “[i]n approximately, July 2010.”¹ Compl., ¶ II.B. Powell alleges that NU was aware that he was a witness in this EEOC case at the time he was fired. *Id.* at ¶ II.C. The Commission’s investigation shows that neither the sergeant nor the lieutenant involved in Powell’s discipline during his employment at NU were aware, if at all, of Powell’s involvement with the EEOC matter until many months after Powell’s termination. *See* Questionnaire Resp. No. 9.

Discussion

Powell alleges that his termination amounts to both unlawful discrimination and unlawful retaliation under the Human Rights Ordinance. There is not substantial evidence to support his position on either count.

1. Unlawful Discrimination

The Human Rights Ordinance prohibits an employer from directly or indirectly discriminating “against any individual in hiring, classification, grading, recruitment, discharge, discipline, compensation, selection for training and apprenticeship, or other term, privilege, or condition of employment *on the basis of unlawful discrimination.*” County Code, § 42-35(b)(1) (emphasis supplied). As used in the Human Rights Ordinance, “unlawful discrimination” means discrimination against a person on the basis of “race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status, source of income, gender identity or housing status[.]” *Id.* at § 42-31.

In order to show that there is substantial evidence to support his claim of race discrimination, Powell must establish a *prima facie* case of discrimination consisting of evidence (1) that he is a member of a protected class under the Human Rights Ordinance, (2) that he suffered an adverse employment action; (3) that he was qualified for the position he held and performing to his employer’s satisfaction; and (4) that similarly situated individuals who were not members of the same protected class were treated more favorably.² *See McCarroll v. Mulligan*

¹ It appears that Powell was actually named as a witness in the Freddie Lee EEOC matter in May 2010. Questionnaire Resp. No. 9.

² Establishing a *prima facie* case of discrimination would raise the rebuttable presumption of a violation of the Human Rights Ordinance. The Commission would hold a hearing on such a claim if during the course of the Commission’s investigation the respondent could not articulate a legitimate, non-discriminatory reason for the adverse employment

Management, 2011E002, *5 (CCHRC Jan. 8, 2014); *Grigsby v. Office of the Cook County Public Defender*, 2010E020 (CCHRC Oct. 28, 2013); *Rush v. Ford Motor Co.*, 1995E013 (CCHRC Sept. 13, 2000).

Powell is black and there is no dispute that he was terminated, but halfway is not far enough when it comes to complaints of unlawful discrimination. Even if the Commission could overlook the litany of written warnings in his personnel file and imagine that Powell was somehow meeting his employer's standards, Powell's entire claim of race discrimination boils down to just two dismissable facts. First, Powell notes that four years prior to his termination, another university employee used a racial epithet in his presence. Compl., ¶ II.D. Second, at the time Powell was terminated, another white UPD CSO was not. *Id.* at ¶ II.F. Neither fact, without more, can come remotely close to establishing a *prima facie* case of discrimination.

The Commission's investigation shows that the "coworker" who supposedly used a racial epithet in Powell's presence in 2006 worked for the Chemistry Department, not UPD. Although this individual may have been a bigot, he had no supervisory responsibility for Powell nor played any role in any of the aforementioned discipline in Powell's personnel file. See Questionnaire Resp. No. 11. As to the allegedly similarly situated white UPD CSO who was not fired along with Powell, the Commission's investigation found a fatal difference in circumstances. An inspection of this white CSO's personnel file revealed not a single written warning to hold up against Powell's five or six. *Id.* at No.12.

2. Unlawful Retaliation

The Human Rights Ordinance prohibits retaliation against any person "because that person in good faith has opposed that which he or she reasonably believed to be unlawful discrimination, sexual harassment, or other violation of this Ordinance or has made a complaint, testified, assisted or participated in an investigation, proceeding, or hearing under this Ordinance." County Code, ¶ 42-41(a). In order to prevail on a claim of unlawful retaliation under the Human Rights Ordinance, a complainant must show: (1) that he sought to exercise a right protected by the Ordinance; (2) that he suffered adverse treatment that is reasonably likely to deter the complainant or others from engaging in protected activity and (3) that there is a causal connection between the protected activity and the adverse employment action. *Washington v. Cook County*, 2005E065, *4 (CCHRC Sept. 26, 2013). The Commission must dismiss a claim in its entirety where there is a lack of substantial evidence to support any element of the claim. *Id.*

It does not appear that Powell ever engaged in protected activity under the Human Rights Ordinance so as to avail himself of the law's anti-retaliation provision. While filing a discrimination complaint with the EEOC can be characterized as good faith opposition to unlawful discrimination, simply being named by someone else as a witness to the discrimination complaint he or she filed cannot. The Human Rights Ordinance also protects individuals who testify "in an investigation, proceeding, or hearing" but only if that investigation, proceeding, or hearing is one that occurs "under this Ordinance," *i.e.* the Human Rights Ordinance. A claim or

action or the complainant could point to substantial evidence that the respondent's proffered explanation was pretextual.

proceeding before the EEOC is made under federal law, not the County ordinance.

But the chief stumbling block for Powell's retaliation claim is that there is not substantial evidence that being named as a witness to an EEOC proceeding precipitated Powell's termination. Instead, the Commission's investigation shows that Powell had received repeated warnings that he was failing to meet his employer's expectations beginning in early 2009. While someone at NU may have known that Powell was going to be a witness in a discrimination suit in July 2010, the Commission's investigation found that the UPD supervisors who requested Powell's termination on July 28, 2010 did not. Instead, they knew that Powell had a personnel record showing unheeded warnings over the course of more than a year. They also had documentation that Powell had just interacted with another University employee in a manner that Powell had already been advised was inappropriate the previous fall.

Conclusion

For the foregoing reasons, the Commission orders that complaint 2011E004 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.

February 14, 2014

By delegation:



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