

COOK COUNTY COMMISSION ON HUMAN RIGHTS

69 West Washington Street, Suite 3040
Chicago, Illinois 60602

Brandon ROBERTSON, Complainant)	
)	
v.)	Case No. 2013E030
)	
ALLSTATE-LOUIS DODD AGENCY,)	Entered: November 20, 2014
Respondent)	
)	

ORDER

Complainant Brandon Robertson (“Robertson”) brought this action on October 22, 2013 against Respondent Allstate–Louis Dodd Agency (“Respondent”) for unlawful employment discrimination on the basis of a disability in violation of Section 42-35(b)(1) of the Cook County Code of Ordinances (“County Code”). Robertson alleged that Respondent terminated his medical insurance benefits and employment based on his disability and failed to provide a reasonable accommodation for the same. The Cook County Commission on Human Rights (“Commission”) now dismisses Robertson’s complaint because its investigation shows a lack of substantial evidence that a violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”) occurred.

Background

On December 3, 2012, Robertson began working for Respondent, on a probationary basis, as a Licensed Sales Professional. Compl., ¶¶ I(B)(2), II(B)(2). The key functions of this job include the solicitation and writing of new business by making telemarketing calls, meeting with new customers, and developing agency relationships with existing customers. Questionnaire Resp., Ex. A(2). Respondent’s Licensed Sales Professionals also attend weekly networking meetings and participate in weekly onsite agency training sessions. *Id.* Robertson’s employment was subject to a 90-day, probationary period, after which Respondent would review Robertson’s performance and determine whether to offer him a permanent position. *Id.* (per Robertson’s employment agreement: “At the end of the 90 day period, both parties will review the performance to determine if a permanent position will be established.”).

In addition to the probationary period, there are two other provisions of note in the employment contract. First, the employment contract required that Robertson acquire (or reinstate) appropriate insurance sales licenses during the probationary period and maintain that license in an active status throughout the duration of his employment. *Id.* Second, Respondent typically did not provide probationary employees with insurance unless they had worked for at least 90 days, but, as an exception, Robertson’s employment contract gave him immediate access to the company’s insurance plan. *Id.* (The health coverage section of the agreement indicates that, as an exception, Robertson was “immediately eligible to enroll in [the] plan.”); *see also*

Dodd Interview (Apr., 17 2014) (indicating that Respondent's health insurance did not take effect until after 90 days but that Complainant could not wait that long). As a result, Robertson enrolled in Respondent's group insurance plan.

Robertson has psoriasis and suffers painful flare-ups that render him unable to wear clothes or leave his home. Compl., ¶¶ I(B)(1), II(B)(1). Due to his condition, Robertson missed several weeks of work at Respondent. Compl., ¶¶ I(B)(4), II(B)(4); Questionnaire Resp., Ex. C. Prior to March 3, 2013 (the end of Robertson's 90-day probationary period), Robertson was absent due to illness a total of sixteen days. Questionnaire Resp., Ex. C (recording absences on January 16, 17, 21-24, 30, 31; February 1, 18-22, 25 and March 1 between December 3, 2012 and March 3, 2013); *see also* Ex. J. At the request of Respondent, Robertson provided medical documentation regarding some of his leave. Questionnaire Resp., ¶ 4. That medical documentation cleared Robertson to return to work on March 26, 2013, with "no restrictions." *Id.* at Ex. F. Subsequent to March 26, 2013, Robertson continued to accrue absences due to his condition, but Robertson did not provide medical documentation for these absences. *Id.* at ¶ 4.

Robertson's resident insurance license also expired on March 31, 2013. Allstate, however, did not learn that Robertson's license was expired until April 23, 2013. *Id.* at Ex. G. And the owner of the agency acknowledged that he was unaware that Robertson's license had lapsed until after Robertson had been terminated. Dodd Interview (Apr., 17 2014).

The parties agree that Respondent terminated Robertson's medical insurance on April 8, 2013 (*i.e.* approximately two weeks after Robertson failed to return to work). The parties dispute Respondent's reason for doing so. Compl., ¶ I(B)(6); Resp., ¶ I(B)(6). Robertson alleges that his insurance was terminated because of his disability and because Respondent was incurring costs to pay its share of the insurance. Compl., ¶ I(B)(6-8). Respondent argues that the insurance was terminated for the same reason that Robertson's employment was terminated – Robertson did not return to work after receiving medical authorization to come back and had a job that required him to leave his house to meet his performance targets. Dodd Interview (Apr., 17 2014). To wit, the parties agree that Respondent informed Robertson that he would not be employed on a permanent basis, but the parties dispute both the date on which said notice was given, and the date on which Robertson was actually terminated. Compl. ¶ II(B)(8); Resp., ¶ II(B)(8). Robertson alleges that Respondent informed him that he was terminated and effectuated that termination on July 1, 2013. Compl., ¶ II(B)(8). Respondent argues that the date of notification and termination was several months earlier, on April 25, 2013. Resp., ¶ II(B)(8).

Discussion

The Human Rights Ordinance prohibits an employer, *inter alia*, from discriminating against any individual in discharge, or other term, privilege, or condition of employment "on the basis of unlawful discrimination." County Code, § 42-35(b)(1). The Human Rights Ordinance defines "unlawful discrimination" to include discrimination on the basis of actual or perceived "disability" and then defines "disability" as:

- (1) A physical or mental impairment that substantially limits one or more of the major life activities of an individual;

- (2) A record of such an impairment; or
- (3) Being regarded as having such an impairment. Excluded from this definition is an impairment relating to the illegal use, possession or distribution of “controlled substances” as defined in schedules I through V of the Controlled Substances Act (21 U.S.C. § 812).

Id. at § 42-31.¹ There is no dispute as to whether Robertson is disabled under the Human Rights Ordinance definition. Robertson’s psoriasis substantially limits² one or more of his major life activities,³ and there is a record of such impairment. *See* Questionnaire Resp., Ex. E. As such, the Commission presumes that Robertson’s complaint is based on a qualified disability under the Human Rights Ordinance.

There are three questions that remain at issue: (1) whether Respondent engaged in unlawful discrimination in its termination of Robertson’s medical insurance benefits; (2) whether Respondent engaged in unlawful discrimination in its termination of Robertson’s employment; and (3) whether Respondent failed to accommodate Robertson’s disability.

Termination of Medical Insurance Benefits

Respondent asserted that it terminated Robertson’s medical insurance benefits on April 8, 2013, pursuant to an employment agreement. Robertson argued that Respondent’s termination of the insurance benefits was discriminatory because similarly-situated, non-disabled employees did not have their medical insurance terminated. As a probationary employee, Robertson would not ordinarily have been allowed to enroll in Respondent’s group insurance policy. However, Respondent made an exception for Robertson during the negotiation of his employment contract to allow Robertson to enroll despite his probationary status. This is material in determining the relevant comparison group of similarly situated employees.

Here, the relevant comparison group is probationary employees. Robertson was not treated less well than this group with respect to the availability of medical insurance – he was treated better by receiving this employment benefit for part of his term of service instead of none of it. *See Crawford v. Indiana Harbor Belt R. Co.*, 461 F.3d 844, 846 (7th Cir. 2006) (reiterating consistent statements by the Seventh Circuit that “the plaintiff should have to show only that the members of the comparison group are sufficiently comparable to [him] [in all material respects] to suggest that [he] was singled out for worse treatment.”). Where no evidence suggests a discriminatory reason, Respondent should not be punished for merely returning Robertson to the same level as the other probationary employees. Therefore, Robertson lacks substantial evidence

¹ This definition is a nearly verbatim replication of the definition of “disability” under the federal Americans with Disabilities Act (“ADA”). *See* 42 U.S.C. § 12102(2). The Commission treats authority interpreting the ADA as persuasive, though not binding, in its interpretation of the Human Rights Ordinance. CCHR Pro. R. 620.100.

² While Robertson’s impairment is only substantially limiting during flare-ups, “[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines[.]” CCHR Pro. R. 620.110.

³ “‘Major life activities’ under the [Human Rights] Ordinance’s definition shall include such activities as . . . walking . . . working, lifting, and mobility in general.” CCHR Pro. R. 620.130.

to show that Respondent engaged in unlawful discrimination in its termination of Robertson's medical insurance benefits.

Respondent demonstrated that the insurance policy in question was subject to the terms of the employment agreement between Respondent and Robertson. That agreement did not specify a set duration during which Robertson would receive benefits, but Robertson's receipt of benefits was contingent on his continued employment. After the close of the 90-day probationary period, Respondent terminated Robertson's benefits. That Robertson was not also terminated at exactly the same time is not evidence of discrimination, but rather consistent with Respondent's representations of wanting to meet with Robertson, in person, to let him know that he would not be offered a permanent position. Dodd Interview (Apr., 17 2014). There is not substantial evidence to show that Respondent's stated reason for terminating Robertson's insurance was pretextual.

Termination of Employment

As discussed above, the Commission assumes that Robertson's psoriasis is a disability under the Human Rights Ordinance. Robertson now argues that Respondent terminated his employment based on said disability. Respondent, on the other hand, contends that Robertson's termination was based on factors other than his disability including Robertson's unexcused absences due to illness, failure to maintain state insurance licenses as required by Robertson's employment agreement, and Respondent's rights under the employment agreement to terminate employment after a probationary, 90-day period. Resp., Aff. Def. ¶¶ 1-3.

There is not substantial evidence that these reasons for terminating Robertson's employment were a pretext for discrimination.⁴ Respondent requested medical documentation regarding Robertson's absences. Robertson provided the requested documentation, but neither returned to work following the stated date of return in the medical documentation nor submitted updated medical documentation with a later return date. Furthermore, the employment agreement between Robertson and Respondent provided that Robertson could be terminated after a probationary 90-day period. That Respondent waited until Robertson failed to return from medical leave and even then waited several additional weeks for him an in-person meeting, if possible, is not evidence of animus towards the disabled, but rather suggestive of exactly the opposite.

Accommodation of Disability

The Commission's procedural rules outline the duty an employer has to reasonably accommodate an employee's disability "so as to attempt to enable the employee to perform the essential functions of the position in question." CCHR Pro. R. 630.120. The parties dispute

⁴ The lone potential exception is Respondent's argument that Robertson was terminated for failing to maintain his resident insurance license per his employment agreement. As the Commission discovered during the course of its investigation, Robertson had been terminated before the owner of the agency learned this fact. The Commission, however, assumes that Respondent mentioned this theory as an affirmative defense for the purpose of preservation and not deception. Dodd's frank admission during his interview with Commission staff does not suggest an intent to conceal his real motivation for terminating Robertson.

whether Robertson would have been able to perform the essential functions of an Allstate Licensed Sales Professional with or without a reasonable accommodation.

In order to accommodate Robertson's disability, Respondent would have had to allow Robertson to work from home, or allow Robertson such a flexible schedule that he would only need to work on days when he felt well enough to come in to the office. Respondent has asserted that such accommodations, in this case, are neither reasonable nor feasible. According to Respondent's Office and New Hires Manager, Robertson could only perform the work required of his position by being in the office to meet with new and existing customers. Yelverton Interview (Apr. 17, 2014). Respondent stated that its insurance sales take place at the office; it needed Robertson to be present in the office to meet his production expectations and service walk-ins at the office. *Id.*

Robertson disagrees and thinks that he could have been successful at Respondent with a more flexible schedule and a telecommuting arrangement. Although this dispute would ordinarily be grounds for a hearing, such a hearing is not necessary in this case because Robertson never requested an accommodation for his disability from Respondent.

While Robertson's complaint indicates that an accommodation was requested, Robertson admitted to the Commission during his investigation interview that he never asked Respondent for an accommodation. Cp. Interview (Mar. 13, 2014). Factual disputes aside, in order for Robertson to have a viable workplace accommodation claim under Section 42-35(b)(1), Robertson must have notified his employer of the "need for, basis for, and nature of a requested accommodation, unless the accommodation . . . would be obvious to a reasonable person without notice." CCHR Pro. R. 630.130. Where a complainant's testimony during an investigatory interview contradicts the complainant's pleadings in the complaint, the Commission credits the complainant's live testimony over the complaint. Thus, Robertson's testimonial admission that he never asked for an accommodation is taken as true when the Commission must make an evidentiary determination of whether to allow an investigation to proceed to adjudication.

When Robertson could not work, he informed Respondent by stating he was "having complications," "flared up," "ill," or "in pain." Questionnaire Resp., Ex. J. While Respondent was on notice that Robertson was ill and that Robertson's illness stemmed in large part from his psoriasis, Respondent was not on notice that Robertson needed an accommodation to be able to return to work. The medical documentation Robertson provided went so far as to state that Robertson could return to work with "no restrictions" after March 26. *Id.* at Ex. F. Therefore, Robertson lacks substantial evidence to show that Respondent engaged in unlawful discrimination by failing to accommodate Robertson's disability.

Conclusion

For the foregoing reasons, the Commission orders that complaint 2013E030 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.

November 20, 2014

By delegation:

A handwritten signature in black ink, appearing to read "R. Hakim", written in a cursive style.

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