

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: May 14, 2015
Respondent)	
)	

ORDER GRANTING RECONSIDERATION

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, who suffers from severe psoriasis, 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”) initially dismissed Robertson’s complaint on November 20, 2014, for a lack of substantial evidence that a violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”) occurred, but Robertson requested reconsideration of that decision.

The Commission remains unmoved that there is substantial evidence to support Robertson’s claim that Respondent discriminated against him by failing to provide him with a reasonable accommodation. But the Commission has reconsidered its evidentiary determination with respect to Robertson’s termination and will order an administrative hearing on this discriminatory treatment claim.

Background

The facts gathered in the course of the Commission’s investigation of Robertson’s complaint are set out in the Commission’s November 20, 2014 order of dismissal in this matter. *Robertson v. Allstate-Louis Dodd Agency*, 2013E030, *1-2 (CCHRC May 14, 2015) (“Order”). However, for ease of reference, they are also reproduced below:

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) an appropriate insurance sales license 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).

The Commission found substantial evidence from its investigation to support the conclusion that Robertson has a protectable disability under the Human Rights Ordinance. Order, p. 3. The Commission, however, dismissed Robertson's claim that the termination of his medical benefits on April 8, 2013 constituted unlawful discrimination. The Commission noted that Robertson had produced no evidence that similarly situated, probationary employees of the Respondent received any medical benefits at all. *Id.* at pp. 3-4. Instead, it appeared that Robertson was singled out for better treatment than his similarly situated, non-disabled coworkers when he received these benefits for part of his probationary period. *Id.*

Similarly, the Commission found a lack of substantial evidence that Respondent's decision to terminate Robertson weeks after he failed to return to the office from medical leave (or provide updated documentation as to when he could return to work) was based on Robertson's disability. *Id.* at p. 4. And finally, the Commission dismissed Robertson's failure to accommodate claim based on the uncontested evidence that he never requested such an accommodation. *Id.* at p. 5

Discussion

Discriminatory Treatment: Termination of Medical Benefits

On reconsideration, Robertson objects to being compared to other probationary employees for the purpose of determining if he was singled out for less favorable treatment in being denied medical benefits. Request for Reconsideration ("Req. Reconsider."), p. 2. Robertson asserts that as of March 3, 2013 – 90 days after he was hired by Respondent – the correct comparison group was Respondent's non-probationary employees with medical benefits. *Id.* at p. 3.

This theory, however, ignores the plain language of Robertson's employment contract with Respondent. That agreement states that "[a]t the end of the 90 day period, both parties will review the performance to determine *if a permanent position will be established.*" Questionnaire Resp., Ex. A(2) (emphasis supplied). As such, the Commission cannot agree with Robertson that he automatically became a permanent employee (with all the benefits and privileges thereof) on March 3, 2013, without any evidence that the parties actually reviewed Robertson's performance and mutually decided to establish such a relationship.¹

Discriminatory Treatment: Termination of Employment

Yet Robertson's arguments on reconsideration with respect to the termination of his employment are more convincing. The Commission found a lack of substantial evidence that

¹ The plain language of the employment contract also undermines Robertson's argument that Respondent no longer had the contractual right to terminate him as a probationary employee after March 3, 2013. *See* Req. Reconsider., p. 7.

Respondent's reasons for terminating Robertson were a pretext for discrimination because the Commission's investigation showed that Robertson failed to return to work on the date that the medical documentation he submitted to Respondent indicated that he was clear to return to work and Robertson's contract with Respondent gave Respondent the right to terminate Robertson during his probationary period. Order, p. 4.

On reconsideration, Robertson highlights the fact that excessive unexcused absences is actually the third explanation that Respondent has offered for terminating him. Req. Reconsider., pp. 5-6. The Commission had previously rejected Respondent's explanation that Robertson was terminated for failing to maintain a state insurance license. Order of Dismissal, p. 4 n.4. The Commission's investigation shows that Dodd (*i.e.* Respondent's decision maker) did not learn about Robertson's lapsed license until after terminating his employment on April 25, 2013. *Id.*

Robertson also brings to the Commission's attention that Respondent did not rely on the alleged unexcused absences in explaining its reason for terminating Robertson (or not rehiring him, depending on which party's timeline is ultimately proven to be true at a hearing). During a July 1, 2013 meeting between Dodd and Robertson, Dodd allegedly explained the decision with reference to Robertson's plans to start law school. Req. Reconsider., p. 5. Respondent's response to Robertson's Request for Reconsideration does not contest the substance of this alleged conversation, *see* Resp. to Req. Reconsider, p. 3 ("Information that the Complainant was planning on taking the LSAT exam, preliminary to attending law school, could be taken as an early indication that, if hired, he would not be a long-term employee of the Respondent."), and so at this preliminary stage, the Commission will assume that it has a basis in fact.

This Commission has found substantial evidence to merit a hearing on pretext in cases where the facts supporting a respondent's nondiscriminatory reason for taking an adverse employment action shifted significantly during the course of an investigation. *See, e.g., Chavda v. Health Care Solutions Group, Inc.*, 2012E018, *3 (CCHRC Sept. 29, 2014) (evidentiary determination). And while an employer does not have a legal obligation to explain its decision to terminate an employee to that employee at the time of termination, *see Fritts v. Lo Voltage, Inc.*, 2013E012, *4 (CCHRC Apr. 21, 2015), it is curious that if Respondent had really terminated Robertson for absenteeism on April 25, 2013, it would have offered an entirely different explanation for its decision less than three months later.

In addition, the circumstantial evidence that might reasonably raise an inference of discrimination is strengthened by the fact that Respondent terminated Robertson's medical benefits several weeks before terminating his employment. In its prior decision the Commission had credited Respondent with waiting several weeks after Robertson failed to return from medical leave before terminating his employment. *See* Order, p. 4. But Robertson is correct to draw the Commission's attention to the significant gap in time between when Respondent terminated Robertson's medical benefits on April 8, 2013 and April 25, 2013, when Respondent claims to have terminated Robertson. *See* Req. Reconsider, pp. 4-5. During the course of the Commission's investigation, Respondent asserted that Robertson's medical benefits and employment were terminated for the same reason. Dodd Interview (Apr. 17, 2014). But on reconsideration, Respondent offers no explanation whatsoever for the gap in time between taking one adverse action and then the other.

A finder of facts might reasonably infer from this unexplained gap that Respondent's ultimate decision to terminate Robertson was motivated, at least in part, by a desire to avoid the added medical insurance expenses that the permanent employment of a disabled worker might entail. Of course, it might be just as reasonable for a finder of facts to conclude from Robertson's documented absences and failure to return to work on the date set out in the only medical documentation that he provided to Respondent that Respondent terminated Robertson's employment for reasons completely unrelated to unlawful discrimination. Fortunately, "[t]he Commission is not inclined to guess" as to which outcome is more reasonable "when the matter can be resolved dispositively by a hearing." *Chavda*, 2012E018 at *3.

Failure to Accommodate

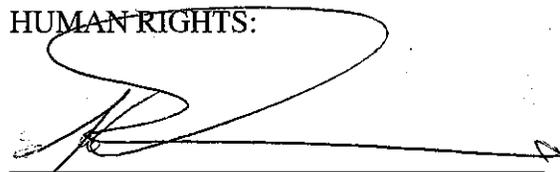
Finally, Robertson asserts that the Commission should have relieved him of the legal obligation to have requested a reasonable accommodation from Respondent because Respondent had allowed him to work from home in the past. Req. Reconsider, p. 8. Robertson's argument on reconsideration does not address the central issue of how Respondent would have been on notice that Robertson needed an accommodation, reasonable or otherwise, to return to work after March 26, 2013, when Robertson had provided Respondent with medical documentation indicating that Robertson could return to work with "no restrictions" after that date. Order, p. 5. In the absence of new evidence on this point, the Commission declines Robertson's invitation to reconsider its evidentiary determination as to this claim. See CCHR Pro. R. 480.105.

Conclusion

For the foregoing reasons, the Commission orders that Complainant's Request for Reconsideration be GRANTED IN PART and that complaint 2013E030 be reinstated in part. The Commission will issue a notice of the date and time of an Initial Status Conference for an Administrative Hearing on Robertson's remaining discriminatory termination claim.

May 14, 2015

COOK COUNTY COMMISSION ON
HUMAN RIGHTS:

A handwritten signature in black ink, appearing to read 'K. Gunn', is written over a horizontal line. The signature is stylized and somewhat cursive.

Kenneth A. Gunn,
Chairperson