



City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Santiago Boror Sian
Complainant,
v.

Rod's Auto & Transmission Center
Respondent.

Case No.: 07-E-46

Date of Ruling: June 16, 2010

Date Mailed: June 30, 2010

TO:

TO:

Santiago Boror Sian
4027 West Kamerling Ave.
Chicago, Illinois 60651

Rod's Auto and Transmission Center
Attention: Rod Pavlovic
840 W. 35th St.
Chicago, Illinois 60609

FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on June 16, 2010, the Chicago Commission on Human Relations issued a ruling in favor of Respondent in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(15) and 250.150, Complainant may seek a review of this Order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

CHICAGO COMMISSION ON HUMAN RELATIONS
Dana V. Starks, Chair and Commissioner



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FINAL RULING ON LIABILITY

I. INTRODUCTION

Complainant Santiago Boror Sian ("Sian") filed a Complaint on June 6, 2007, alleging discrimination based on disability when he was fired from his job doing general maintenance work at Respondent Rod's Auto and Transmission Center ("Rod's Auto"). Respondent maintains that Sian was discharged after he failed to return to work or call in for two weeks. Respondent denies that it discriminated against him because of his medical condition and says that it no longer needed Sian's services as it was downsizing due to loss of business, and for that reason Sian was not replaced.

Both parties appeared *pro se* at the administrative hearing conducted on March 25, 2009. Because Sian's first language is Spanish, an interpreter was provided throughout the hearing.¹

The hearing officer mailed her Recommended Decision on Liability to the parties on April 30, 2010. No objections were filed.

II. FINDINGS OF FACT

1. Complainant, Santiago Boror Sian, was hired by Rod's Auto and Transmission Center on April 28, 1999. (Tr. 30)

2. Rod's Auto and Transmission Center is owned by Rod Pavlovic ("Pavlovic"). Pavlovic stated that he has been in the car repair business since 1987. (Tr. 79) Pavlovic stated that by the time of the hearing, the number of employees had been reduced to five (including himself). (Tr. 79)

3. When Sian began working for Rod's Auto, he started first in cleaning, and then they started to need him for a lot of jobs. Sian stated that he started to "clean up above and down below," to "light up things," and to take down motors, and that he needed to use a lot of strength to do his work. (Tr. 30)

4. Pavlovic stated that he was the one who hired Sian to do janitorial work in 1999.

¹ At the start of the hearing, Sian indicated that he had limited hearing in one ear and was having difficulty hearing. The hearing officer asked that all parties, including the interpreter, keep their voices raised. Thereafter, Sian did not report any problems hearing any of the parties during the proceeding.

Pavlovic stated that Sian's duties included sweeping the floor and lunchroom, and cleaning the floors in the shop. (Tr. 80) Sian's duties remained the same throughout the time he worked for Respondent. (Tr. 80) Sometimes Sian would do more than his assigned duties to help the mechanics, and Pavlovic would tell him not to [do heavy work] as it was not his job.

5. Sian stated that he worked eight hours a day, from 1999 until he was terminated. During this time he would mark a card or punch in to report to work, and Pavlovic was his supervisor. (Tr. 31) Sian also said that the mechanics who spoke Spanish would translate for him. Initially there were three mechanics that spoke Spanish. After they left, Sian's friend Rodolfo Castaneda and his brother, Luis Castaneda, started working for Respondent and they continued to translate for him. (Tr. 31)

6. Sian stated that he received some written rules about when to show up for work, but only for the beginning and the hour for leaving. (Tr. 32) During the six months before Sian was terminated, he was the only employee doing the work he performed. In addition, there were about eight other employees including three mechanics, the electronic technician, and a transmission technician. (Tr. 33)

7. Sian stated that Pavlovic never treated him badly; however, before he was let go, Sian believed that Pavlovic did not accept him because he was not able to fully exert himself. (Tr. 30)

8. The background relating to Sian's shoulder injury was somewhat unclear. Both parties agreed that during the fall of 2006, Sian injured his shoulder.

9. Sian went to Cook County Hospital ("County") at Pavlovic's suggestion and received treatment at the emergency room. Sian said that the hospital did not take care of him. The doctors only x-rayed his shoulder and then gave him an appointment eight days later. At that appointment, County gave him another appointment three months later. Sian decided to go to an orthopedic doctor. (Tr. 33, 34)

10. Following the Cook County Hospital visit, it appears that Sian returned to work and took time off during the day to attend physical therapy sessions and doctor's appointments, as needed. (Tr. 85)

11. Sian did not offer any information about when he stopped working. However, at some point during the winter it appears that he was off work because of his injury.

12. The parties dispute what happened when Sian attempted to return to work. Sian stated that in February he arrived at work with a letter from the doctor that said he had to work with restrictions (not over 30 pounds). He stated that he gave the letter to Pavlovic and Pavlovic told him that he was going to call Sian in two weeks, but he didn't call. (Tr. 35) Sian stated that this conversation took place on February 4, 2007, in the workshop, and that the three mechanics, Saul Castaneda, Rodolfo Castaneda, and Juan Santiago, were present. (Tr. 35) However, at a later point in his testimony, Sian stated that he gave the letter to Pavlovic's son, and the son took charge of giving the letter to Pavlovic. (Tr. 37) Sian stated that they responded that there wasn't work for him, because the only thing that was available was hard work, and that there wasn't anything because he had been "damaged." (Tr. 38)

13. Sian stated that his shoulder continues to hurt and he can't do heavy work. (Tr. 38, 39) Sian stated that he can do lighter jobs, painting, and other softer jobs.

14. Sian submitted medical records (Compl. Ex. 1) in support of his claim. Sian was permitted to introduce the medical reports into the record and to describe how he believed the reports supported his claims.² (Tr. 41-43)

15. Pavlovic denied receiving the medical reports at or near the time they were created; however, he acknowledged that he knew Sian had filed a workers compensation claim, and the work status reports appeared to be the sorts of reports an employee could be expected to provide to a workers' compensation insurer. In any event, Pavlovic did not dispute that he knew that Sian had injured his shoulder in the fall of 2006 or that he had been receiving medical treatment. Indeed, it was Pavlovic who directed Sian to Cook County Hospital when it first became apparent that Sian's shoulder problem had not resolved itself.

16. Sian testified that he still is unable to exert a lot of force: he can only lift up things of 25-30 pounds, and for that reason he cannot work at most jobs such as construction. (Tr. 51) He has been able to find work repairing floors and walls, and has earned about \$3,000 since he was terminated by Respondent. (Tr. 52)

17. Sian stated on cross-examination that he did not explain to anybody at Rod's Auto that he could not work for the two weeks after February 4, and that he went himself to the shop. (Tr. 56) Sian's testimony was unclear on whether he called in to Respondent during the two-week period; and Sian did not offer an explanation for what he did during this two-week period.

18. None of the reports offered by Sian, however, relate to his condition on or about February 4, 2007; it remained unclear what report Sian claimed he provided to Pavlovic (or asked his witness to provide) on February 4, 2007.

19. Sian also stated that Castaneda called him at 8:00 a.m. on February 4, 2007, and said that Castaneda was sorry to have to say that the man [Pavlovic] says that you are fired. Sian offered this statement as explanation for what caused him to take his doctor's report and talk to Pavlovic in his office. Castaneda said that he realized that Pavlovic told Castaneda and his brother that because Sian was badly hurt [in his arm] he no longer wanted Sian to work for him. (Tr. 74)

20. Sian stated that he believed Pavlovic did not accept him at the end of his tenure because he was not able to exert his complete strength. (Tr. 30)

21. Sian's co-worker, Rodolfo Enrique Castaneda-Azuara, ("Castaneda") also testified. He stated that he began working for Respondent in the beginning of 2007 as a mechanic. Castaneda stated that he was terminated by Respondent about two to three months after Sian was terminated. (Tr. 65) Castaneda stated that he sometimes helped to translate for Sian while at work.

² The reports themselves are of limited relevancy. Although it is unclear whether the medical reports were properly authenticated, there were discrepancies in the reports that undercut Sian's claim that his condition is determinable and not transitory.

22. Castaneda stated that Sian asked for his help in giving his doctor's report to Pavlovic, and to tell Pavlovic that Sian was ready to work. (Tr. 68) Castaneda's testimony was confusing in that he could not remember when that conversation took place or what was the report that Sian wanted him to give to Pavlovic. (Tr. 69-70) However, Castaneda seemed to agree with Sian's statement that this meeting occurred early in February. Castaneda also stated that he did not believe that Sian did not call in during the two weeks that Pavlovic said Sian did not appear. (Tr. 70) Castaneda claimed that Sian was in communication with Castaneda and his brother the whole time, and that Sian's arm was bad, and that he could not work. (Tr. 70)

23. Castaneda claimed that he spoke with Pavlovic, whom he only knew as Rod, after he talked to Sian. And yet, he also denied speaking with Pavlovic after Sian came to him because he did not know Sian's condition during the two weeks Sian was off.

24. Pavlovic testified that he had four employees as of the time of the hearing, three mechanics and himself as manager. (Tr. 79, 80) He stated that he was the one who hired Sian to do janitorial work in 1999. Pavlovic stated that Sian's duties included sweeping the floor and the lunchroom and cleaning the floors in the shop. He stated that Sian's duties remained the same through the time he worked for Respondent. (Tr. 80) Pavlovic stated that sometimes Sian would do more than those duties to help the mechanics, and he would tell him not to because it was not his job.

25. Sometime during the fall 2006, Pavlovic learned that Sian had injured himself, and Pavlovic encouraged Sian to go to Cook County Hospital. (Tr. 82) Pavlovic stated that Sian took a bus and went to see the doctor. Sian did not return to work that week, but he returned the following Monday. (Tr. 82) Pavlovic asked Sian what the doctor said and Sian related that he needed to see the doctor some other times. That conversation occurred in September; and then during October, November, December, occasionally Sian would said he had to go see the doctor and that he would need a half a day off. (Tr. 83)

26. The hearing officer found Sian to be credible as far as his statements about his physical condition. She determined that it seemed clear that Sian believed that he had some limitation surrounding his ability to use his left shoulder; however, the nature and extent of that limitation was unclear in that some of Sian's medical records that he introduced seemed to be contrary to the level of limitation that Sian related. However, the hearing officer found Sian less than credible regarding the information he provided to Pavlovic and when he provided it, particularly regarding his need for time off and his efforts to report in to Pavlovic.

27. In addition to his own testimony regarding whether he called in, Sian called Castaneda to testify. However, Castaneda's testimony was not helpful, as he did not explain why Sian did not call in and speak with Pavlovic. Instead, Castaneda stated that both he and his brother spoke with Pavlovic on Sian's behalf; however it was unclear what and when information was communicated to Pavlovic.

28. The hearing officer found Pavlovic's testimony to be credible. Pavlovic stated that the reason he discharged Sian was because Sian was no call/no show for a two-week period in February. He did not appear to have any disability-related *animus* toward Sian. In fact, Sian testified that it was Pavlovic who told him to go to Cook County Hospital, and Pavlovic testified that he knew that Sian was receiving workers' compensation and that Respondent's insurer had paid Sian's medical bills. It appeared clear that Pavlovic was concerned about having enough work for his employees, as

his business was slow. He stated that for that reason Sian was not replaced.

III. CONCLUSIONS OF LAW

This case arises under Section 2-160-030 of the Chicago Human Rights Ordinance (“CHRO”), which provides: “No person shall directly or indirectly discriminate against any individual in hiring...discharge...or any other term or condition of employment because of the individual’s disability.” It is Complainant’s burden to prove, by a preponderance of evidence, that his disability motivated the Respondent to discharge him. See, e.g., *Lockett v. Chicago Dept of Aviation*, CCHR No. 97-E-115 (Oct. 18, 2000); *Van Dyck v. Old Time Tap*, CCHR No. 04-E-103 (Apr. 15, 2009) Disability is defined as “a determinable physical or mental characteristic, which may result from disease, injury, congenital condition of birth, or functional disorder.” Chicago Muni. Code § 2-160-020 (c) and Regs. Part 100 (11). This definition can include the perception of such a characteristic by the person complained against. *Id.* The Commission has held that to be actionable, the medical condition must not be insubstantial or transitory. *Jacobs v. White Cap, Inc.*, CCHR No. 96-E-238 (July 29, 1997)

In order to prevail, Complainant must first establish: (1) he is a member of a protected class (a person with a disability or perceived as such); (2) he was performing his job to his employer’s legitimate expectations; (3) he suffered an adverse employment action; and, (4) similarly-situated employees did not suffer the same adverse action.³ *Wehbe v. Contacts and Specs*, CCHR No. 93-E-232 (Nov. 20, 1996); *McDonnell Douglas v. Green*, 411 U. S. 792 (1973) Respondent apparently contests each of these elements.

First, Complainant must establish that Respondent knew or perceived him to have a disability. The evidence regarding Sian’s medical condition was somewhat contradictory. There seems to be no dispute that he injured himself sometime during the fall of 2006. Sian stated he injured his left shoulder, and Pavlovic testified that he directed Sian to Cook County Hospital for treatment. It appears that Sian received treatment from the emergency room, subsequently received some physical therapy, and returned to work (other than taking an hour or so off, from time to time, to go to the doctor) at least for most of the fall and into the early winter.

Complainant testified that his shoulder injury was ongoing and that he has been limited in the amount of physical labor he can do. However, Complainant’s medical records were inconsistent. Even if the records he presented had been properly authenticated, the January 22, 2007, report from Dr. Sclamberg diagnosed his condition as a left shoulder impingement with bicep rupture, and he was referred to physical therapy for three weeks. But the March 23, 2007, work status report, also completed by Dr. Sclamberg, stated that he had no restrictions and was working. There was some question whether Pavlovic was fully aware of the extent of Sian’s medical condition. Pavlovic stated that he knew that Sian hurt himself and believed that Sian was receiving physical therapy and that the medical expenses were paid by Rod’s Auto’s workers’ compensation carrier. However, Pavlovic

³ Under the *McDonnell-Douglas* indirect method of proof, once a complainant establishes a *prima facie* case of discrimination, the respondent must articulate a legitimate nondiscriminatory reason for the challenged actions. *Texas Dept of Community Affairs v. Burdine*, 450 U. S. 248, 253 (1981) Complainant must then prove by a preponderance of evidence that the Respondent’s reasons are more likely not its true reason but was pretext for discrimination. *St. Mary’s Honor Center v. Hicks*, 509 U. S. 502, 510-11 (1993). Here, even if Sian had established a *prima facie* case of disability discrimination, he offered no evidence to support a finding that Respondent stated reason for terminating him—because he failed to report to work or call in—was pretextual.

also testified that he never saw the medical reports that Sian offered at hearing, which supports his statement that he was not fully aware of Sian's condition. It is Complainant's burden to prove every element of his claim. But even allowing some leeway because Sian was not represented by counsel and also that there was a language barrier, there simply is no evidence to establish that Rod's Auto believed that Sian was an individual with a determinable and non-transitory medical condition. Therefore, Complainant has not proved the first element of his *prima facie* case, and for that reason, the complaint must be dismissed.

Turning to the remaining elements of the *prima facie* case, Sian's claim still would fail. The second element Complainant must establish is that he was performing his job up to his employer's expectations. There is some dispute regarding whether Sian was performing his job adequately. Pavlovic claimed he was not, because of Sian's unexplained absenteeism. There also testimony that prior to this absence Sian was performing adequately and Pavlovic did not have complaints about his work performance. However, it is Complainant's burden to present sufficient evidence to support every element of his claim, and here he failed to do so.

Regarding the third element, it is undisputed that Complainant was discharged by Respondent. However, it is unclear when Complainant was actually discharged. From the testimony at hearing it was clear that Sian stopped working at some point in January 2007 and that he was seeking medical treatment. It is unclear, however, whether (and when) Sian provided Pavlovic with the medical reports that supported his claim for time off, and as noted below, it seems clear that Sian did not follow the report procedure to keep Pavlovic informed about his work status.

It is the fourth element in particular where Complainant's case fails. The parties appear to agree that something happened on February 4, 2007; however, it seems that Sian believed that he provided (or believed his friend provided) Pavlovic with some sort of medical report stating that he needed additional time off, and that Pavlovic said to Castaneda that he did not want to keep Sian on the job. Pavlovic's description of that encounter with Sian is contrary; he stated that he received only some medical bills that Sian wanted his insurance company to pay and denied telling Sian or Castaneda that he wanted to fire Sian. Thereafter, Pavlovic testified credibly that Sian did not call in and it was this failure that caused him to terminate Sian. In either case, Sian did not provide the hearing officer with any medical report from February 4, 2007, which stated that he was going to be off work.

Sian did offer into the record the February 19, 2007, work status report. However, clearly, he could not have had this report with him on February 4, 2007, and there was no credible testimony that Sian even provided Pavlovic with the report of February 19, 2007 prior to being discharged. Even if Pavlovic could have inferred from Sian's conversation with him on February 4, 2007, that Sian was taking additional time off from work, Sian offered no credible evidence that he followed Respondent's call-in procedure.

Moreover, Castaneda's testimony also was not clear. Castaneda stated that Sian asked for his help in giving his doctor's report to Pavlovic, and was asked to tell Pavlovic that Sian was ready to work. But Castaneda's testimony was confusing in that he could not remember when that conversation took place or what kind of report Sian wanted him to give to Pavlovic. Although Castaneda claimed that Sian was in communication with Castaneda and his brother the whole time, and that Sian's arm was bad and that he could not work, the hearing officer determined that his statement that he kept Pavlovic apprised of Sian's condition was not credible. She explained that he

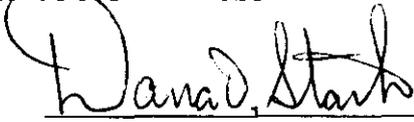
could not provide any details regarding when the conversation(s) took place, what was said, or even to whom the statements were made. She added that there was no credible evidence that Sian communicated with the Respondent during the two weeks at issue here.

Finally, Complainant failed to offer evidence to show that similarly-situated employees who did not have actual or perceived disabilities were treated more favorably. Sian failed to offer any evidence that other employees who failed to call in as expected following an absence were retained. Pavlovic's testimony on this point was credible; he expected his employees to report in to him to explain their absence. It was clear that this was a small workplace with no written policies; however, the hearing officer believed that Sian knew of the requirement to call in and that it was the practice.

As provided in §2-120-510(I) of the Chicago Municipal Code, the Commission must and does adopt the findings of fact recommended by a hearing officer if they are not contrary to the evidence presented at the hearing. The hearing officer's findings in this case are consistent with the evidence and well-supported in the hearing record. Determining credibility of witnesses and the reliability of their testimony and related evidence is a key function of hearing officers, who have the opportunity to observe the demeanor of those who testify. *Poole v. Perry & Assoc.*, CCHR No. 02-E-161 (Feb. 15, 2006). The hearing officer explained the reasons for her credibility determinations and the Commission does not find them to be against the weight of the evidence.

In conclusion, based on the recommendations of the hearing officer and the analysis stated above, the Board of Commissioners finds that Complainant has not established by a preponderance of evidence that he was terminated from employment because of an actual or perceived disability. Therefore, his Complaint must be and is DISMISSED.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: 

Dana V. Starks, Chair and Commissioner
Entered: June 16, 2010