

# Opinion

No. 1-19-2397

05-10-2021

LATONIA MALLETT, Petitioner-Appellant, v. THE HUMAN RIGHTS COMMISSION, THE DEPARTMENT OF HUMAN RIGHTS, and WALMART, INC. #1489, Respondents-Appellees.

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JUSTICE COGHLAN delivered the judgment of the court.

**NOTICE:** This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1). Petition for Direct Administrative Review of a Decision of the Illinois Human Rights Commission Charge No. 18 CP 2163 JUSTICE COGHLAN delivered the judgment of the court.

Justices Hyman and Pierce concurred in the judgment.

## ORDER

¶ 1 Held: The decision of the Human Rights Commission to sustain the Department of Human Rights' dismissal of petitioner's claim of discrimination is affirmed where petitioner did not present substantial evidence. ¶ 2 Petitioner Latonia Mallett appeals pro se from a final decision entered by the Human Rights Commission (Commission) sustaining the Department of Human Rights' (Department) dismissal 2 of her discrimination claim pursuant to the Illinois Human Rights Act (Act) (775 ILCS 5/1-101 et seq. (West 2016)). We affirm. ¶ 3 On April 25, 2018, petitioner filed a complaint with the Department, claiming that Walmart, Inc. (Walmart), denied her full and equal enjoyment of its store located in Vernon Hills, Illinois, because she is African-American. Specifically, she alleged that Walmart employee Ismael M. denied her service due to her race during an incident in November 2017 when he refused to exchange a pair of shoes and called her a racist, while "[s]imilarly situated non-black customers were treated more favorably." ¶ 4 The Department investigated, interviewing petitioner and assistant Walmart store manager Jerad Evans. ¶ 5 According to the investigator's report, petitioner relayed that on November 9, 2017, she arrived at the Walmart at approximately 9:50 p.m. to return a pair of shoes. The store closed at 10 p.m. She went to the customer service counter, where Walmart employee Ismael M. refused to help her and claimed his cash register was closed. Petitioner believed Ismael M. sounded "irate," which made her "uncomfortable." She asked another employee if she could speak to a manager, and as she did so, she also asked Ismael M. what language he spoke. He responded by calling her "a racist." Another employee arrived and exchanged petitioner's shoes, and she left. Petitioner did not know if Ismael M. assisted other customers after he refused to assist her. The following day, petitioner called Walmart and spoke to Jennifer Moore, a store manager, who apologized and offered petitioner a gift card. 3 ¶ 6 Evans relayed to the investigator that Walmart trains its employees on anti-discrimination policies. On November 9,

2017, Ismael M. told petitioner that he could not assist her because he had closed his register. Petitioner then asked Ismael M. "what language do you speak?" Ismael M. interpreted this comment as derogatory based on his Hispanic heritage, and called petitioner a racist in response. Evans confirmed that another Walmart employee helped petitioner return the shoes during her visit on November 9, 2017. Walmart "counseled and reprimanded" Ismael M. because of the incident, and he was ultimately fired in July 2018. Walmart invited petitioner back to the store and offered her gift cards of \$25 and \$100, but she "refused and demanded a \$300 gift card," then ceased contact. ¶ 7 On January 24, 2019, the Department concluded that petitioner did not provide substantial evidence of discrimination and recommended dismissal. Specifically, it found that Walmart did not deny petitioner the full and equal enjoyment of its services and facility because another employee returned her shoes. The Department also concluded that the evidence showed Ismael M. did not act with racial animus. ¶ 8 On April 30, 2019, petitioner filed a request that the Commission review the Department's dismissal. In an attachment, petitioner again recounted the incident at Walmart, and added that Ismael M. "treated other non-black customers suitably and more favorably by helping them." She denied that she requested, or that Walmart offered, a gift card. She also attached a list of phone calls she purportedly made related to the incident. She did not submit this list to the Department during the investigation. ¶ 9 On July 8, 2019, the Department filed a response arguing that petitioner failed to establish a *prima facie* case for discrimination because she did not demonstrate that Walmart denied her the full and equal enjoyment of its services and facility based on her race, or that Walmart treated similarly situated individuals who were not African-American more favorably. ¶ 10 On October 29, 2019, the Commission sustained the Department's dismissal, finding that petitioner's allegations did not establish that Walmart denied her the full and equal enjoyment of its services and facility. Instead, the Commission found that another employee assisted her, Ismael M.'s alleged "rudeness" did not constitute a denial of full and equal enjoyment, and "[h]er dissatisfaction with her subsequent interactions with Walmart" was irrelevant. ¶ 11 On November 27, 2019, petitioner filed a petition for direct administrative review with this court. ¶ 12 On appeal, petitioner claims that the Commission erred by sustaining the Department's dismissal of her complaint. ¶ 13 At the outset, we note that petitioner's brief does not comply with Illinois Supreme Court Rule 341(h)(6) because she did not include citations to the record in her statement of facts. See Ill. S. Ct. R. 341(h)(6) (eff. Oct. 1, 2020). Additionally, petitioner does not set out the standard of review in her argument section. Ill. S. Ct. R. 341(h)(3) (eff. Oct. 1, 2020). But while petitioner's pro se status does not excuse these errors, we will reach the merits of the appeal because we have the benefit of the appellee's brief, and petitioner's general claim challenging the Commission's decision is discernible from her filing. See *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001). 5 ¶ 14 Pursuant to the Act, when a petitioner files a complaint claiming discrimination, the Department investigates to determine whether there is substantial evidence to support the claim. 775 ILCS 5/7A-102(A)-(D) (West Supp. 2017). "Substantial evidence is evidence which a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance." 775 ILCS 5/7A-102(D)(2) (West Supp. 2017). If the Department finds the claim is not supported by substantial evidence, it will dismiss the claim. *Young v. Illinois Human Rights Commission*, 2012 IL App (1st) 112204, ¶ 8. The petitioner can appeal this dismissal to the Commission, and if the Commission then sustains the Department's dismissal, the petitioner may appeal to the appellate court. 775 ILCS 5/7A-102(D)(3), (G)(3) (West Supp. 2017). ¶ 15 The appellate court reviews the decision of the Commission for abuse of

discretion, and will not reverse unless the decision is "arbitrary or capricious." *Young*, 2012 IL App (1st) 112204, ¶ 33. A decision is arbitrary and capricious "if it contravenes legislative intent, fails to consider a critical aspect of the matter," or if the agency's explanation is "so implausible that it cannot be regarded as the result of an exercise of the agency's expertise." *Id.* The reviewing court will not "reweigh the evidence or substitute its judgment for that of the Commission," and should only reverse if "no reasonable man could agree with the position" of the Commission. *Id.* ¶ 16 Here, petitioner claims that Walmart discriminated against her by denying her full and equal enjoyment of its services and facility. Under the Act, "the full and equal enjoyment of the facilities, goods and services of any public place of accommodation" may not be denied to an individual based on his or her membership in a protected class (775 ILCS 5/5-102(A) (West 2016)), including, *inter alia*, actual or perceived race (775 ILCS 5/1-103(Q) (West 2016)). To establish a prima facie claim of discrimination under this section, a claimant must show that (1) she is a member of a protected group, (2) she attempted to exercise her right to full enjoyment of respondent's services, (3) she was denied that enjoyment, and (4) other similarly situated individuals who are not members of the claimant's protected class were treated more favorably. See, e.g., *McCoy v. Homestead Studios Hotels*, 390 F. Supp. 2d 577, 583-85 (S.D. Tex. 2005). If the claimant establishes a prima facie case, a rebuttable presumption of discrimination arises, which the respondent may counter by articulating a legitimate, non-discriminatory reason for its action. *Zaderaka v. Illinois Human Rights Commission*, 131 Ill. 2d 172, 179 (1989). If respondent successfully rebuts, the burden shifts back to the claimant to demonstrate by a preponderance of the evidence that respondent's articulated reason was pretextual. *Id.* The ultimate burden remains on the claimant at all times. *Id.* ¶ 17 The record shows that petitioner arrived at Walmart at 9:50 p.m. to exchange a pair of shoes. She went to Ismael M., who told petitioner he could not help her because his register was closed. Petitioner asked what language Ismael M. spoke, which prompted Ismael M. to call her a racist. Another Walmart employee assisted petitioner and exchanged her shoes, and she left. Petitioner told the Department she did not know if Ismael M. assisted other customers while she was in the store. The Commission sustained the Department's dismissal, finding that based on these facts, petitioner could not establish a prima facie case of discrimination because Walmart did not deny her the full and equal enjoyment of its services and facility. ¶ 18 On this record, we find that the Commission did not abuse its discretion by sustaining the Department's dismissal of petitioner's claim. It is undisputed that petitioner went to Walmart to exchange shoes. Although Ismael M. did not initially assist petitioner, another employee executed the exchange. Petitioner argues in her brief that Walmart denied her full and equal enjoyment because her service was not "prompt" in that she did not leave the store until approximately midnight, but she did not make this claim before the Department, and does not dispute that the exchange occurred. Thus, petitioner's own account of the incident demonstrates that Walmart ultimately provided the full service she sought when she entered the store, and she only experienced a delay in service. In this scenario, the Commission could reasonably conclude that Walmart did not deny petitioner full and equal enjoyment of its services and facility, and thus she could not establish a prima facie case for discrimination. See *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043, 1048 (N.D. Ill. 1998) (collecting cases where courts have held that a delay in services does not constitute an unlawful denial of services). ¶ 19 Petitioner alleges that Ismael M. treated other similarly situated customers differently, but never provided details regarding this claim. In any event, this argument fails because petitioner stated to the Department investigator that she did not know whether Ismael M. assisted other customers. The Commission could reasonably credit this

account of petitioner's statement, and we may not substitute our judgment for that of the Commission regarding this finding. See *Young*, 2012 IL App (1st) 112204, ¶ 33. Additionally, even if we accepted this allegation as true, the Commission could still reasonably find that Walmart did not deny petitioner full and equal enjoyment because her exchange was only delayed, and thus she cannot satisfy a necessary element of a *prima facie* case of discrimination. ¶ 20 Petitioner cites to *Windsor Clothing Store v. Castro*, 2015 IL App (1st) 142999, to support her claim. In *Windsor*, a clothing store failed to respond to the claimant's complaint that the store discriminated against her when an employee followed her while she was shopping in the store. 8 *Windsor*, 2015 IL App (1st) 142999, ¶ 4. The Department defaulted the store and awarded the claimant damages, and this court upheld the default and damage award on appeal. *Id.* ¶¶ 41, 46. Here, in contrast, both parties participated in the Department's investigation, and the operable facts the Department and Commission considered were not significantly disputed during the investigation. Accordingly, *Windsor* is inapplicable to the present matter. ¶ 21 For the foregoing reasons, the Commission's decision is affirmed. ¶ 22 Affirmed.