NOTICE
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2026 IL App (5th) 250268-U

NO. 5-25-0268

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

ANTHONY ANDERSON, Petitioner, v. ILLINOIS HUMAN RIGHTS COMMISSION, ILLINOIS DEPARTMENT OF HUMAN SERVICES, and CHESTER MENTAL HEALTH SERVICES, Respondents.	)	Petition for Review of an Order of the Illinois Human Rights Commission. Charge No. 2020-SF-1724 EEOC No. 21-BA-00888 ALS No. 21-0345

JUSTICE SHOLAR delivered the judgment of the court.
Justices McHaney and Bollinger concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the Illinois Human Rights Commission's summary decision where petitioner failed to establish a *prima facie* case of racial discrimination.

¶ 2 On June 7, 2020, petitioner, Anthony Anderson, filed a "Charge of Discrimination" with the Illinois Department of Human Rights (DHR) alleging civil rights violations by respondent, the Illinois Department of Human Services (DHS) and Chester Mental Health Center (Chester). Petitioner alleged that, because of his race (Black), he was (1) subjected to unequal terms and conditions of employment, (2) harassed, and (3) placed on indefinite suspension. On July 8, 2021,

the DHR issued a "Notice of Substantial Evidence" as to the first and third allegations but found a lack of substantial evidence regarding petitioner's second claim.

¶ 3 On September 29, 2021, the DHR filed a two-count complaint against respondent with the Illinois Human Rights Commission (Commission). Count I alleged that respondent subjected petitioner to unequal terms and conditions of employment due to his race, in violation of section 2-102(A) of the Illinois Human Rights Act (Act). 775 ILCS 5/2-102(A) (West 2020). Count II alleged that respondent first suspended and ultimately discharged petitioner because of his race, also in violation of section 2-102(A) of the Act. *Id.* Following discovery, respondent filed a motion for summary decision. On March 18, 2025, the Commission entered an order granting respondent's motion for a summary decision and dismissing petitioner's complaint with prejudice.

¶ 4 On appeal, petitioner contends the Commission erroneously granted respondent's motion for summary decision, arguing that he presented a triable issue of fact regarding the criminal prosecution that stemmed from the incident at the center of the controversy. Petitioner also argues that the Administrative Law Judge (ALJ) erred in determining that count II was subject to dismissal and by declining to consider count II on its merits. We affirm the Commission's decision.

¶ 5 I. BACKGROUND

¶ 6 The following background is taken from the complaint, respondent's motion for summary decision, petitioner's response, and attachments to the parties' filings. Those attachments include affidavits, depositions of petitioner and two DHS employees, and the investigative reports of the Illinois Department of Human Services' Office of the Inspector General (OIG).

¶ 7 Petitioner began working at Chester in 2015. He was employed as a Security Therapy Aid I (STA-I). Chester had a Code Red Policy for when an employee needs assistance with a patient. The employee calls for help, and help is sent to that location. On January 21, 2019, another STA-

I, Tracy Apple, was bitten by a patient and called for help. Petitioner, along with Kevin Hayman and Shawn Plumlee (both Security Therapy Aid-II (STA-II)), responded and helped gain control of the patient. Apple was subsequently treated at a hospital. According to the complaint, Apple, Hayman and Plumlee are all "non-black."

¶ 8 Later that same day, there was an incident during which a different patient, R.M., was "play fighting" with another patient. According to the complaint, R.M. started telling petitioner he " 'could kick [petitioner's] ass' ", that " 'his penis was bigger than [petitioner's]' ", and that " 'he didn't like all these n*** working here.' " Petitioner claimed that he tried to de-escalate the situation and to direct R.M. back to his room, but R.M. kept threatening petitioner. Another staffer, Erin Stauffer (STA-I, non-white) was present at this time. Per the complaint, R.M. told Stauffer, " 'Ms. Erin, I would fuck this n*** up if you weren't standing there.' " Petitioner stated that he told Stauffer that they needed to put R.M. in a "hold" but that Stauffer did not assist him in restraining R.M. Instead, Stauffer "just stood in the middle" between the two men. Petitioner also stated that he saw Kevin Hayman (STA-II) observing the incident while looking through a window, but that Hayman did not come to his assistance.

¶ 9 The OIG's Investigative Report of the incident included summaries of statements provided to both the OIG and the Illinois State Police (ISP). The record reflects that petitioner gave varying accounts of what occurred. Petitioner initially denied striking R.M. or that he contacted R.M.'s face and shoulder area. Petitioner's statements were consistent, however, in that he maintained that the contact with R.M. was both accidental and incidental to defending himself against R.M. Petitioner also told investigators that he did not call for help because fellow staff members were watching and did nothing to assist him. R.M. told investigators that he and petitioner were in each other's faces and that petitioner backed him up and hit him in the chin with his left hand.

¶ 10 According to Stauffer, she heard petitioner and R.M. arguing loudly, so she went over to them. She attempted to redirect R.M. to his room when petitioner shoved R.M. in the chest and then slapped R.M. in the "cheek/head/neck" area. She believed it was open-handed, but that it was not a soft slap. She then stepped between the two men and told petitioner to calm down. While both men were arguing and R.M. acted like he was going to hit petitioner, Stauffer told investigators that R.M. never threw a punch. Stauffer told petitioner that what he did was "not right."

¶ 11 Hayman told investigators that he heard yelling and looked through a window on a door to unit B-1. He saw petitioner "up in a patient's face." Petitioner walked toward the patient, and the patient walked backwards. Hayman saw petitioner push R.M. before the two men moved out of his sight.

¶ 12 Shawn Plumlee (STA-II) told investigators that he heard yelling coming from unit B-1 and looked through a window and saw petitioner and R.M. arguing. The two men were within arm's reach of one another. Plumlee saw petitioner strike R.M. but could not see whether petitioner's hand was open or closed. Plumlee told investigators that R.M.'s head and body twisted as though he had been struck in the jaw. Plumlee also told investigators that he could see the anger on petitioner's face.

¶ 13 Anne Kracht was a registered nurse working at Chester. She was in the nurse's cage preparing medication for patients when a commotion caused her to look up. She saw petitioner hit R.M. "upside the head." She did not know whether it was an open or closed hand strike. Afterwards, she conducted an exam of R.M. and found no injuries. Following the incident, petitioner was sent home.

¶ 14 Incident reports were filed by Stauffer, Hayman, Plumlee and Kracht. The incident reports were forwarded to Barry Smoot, the Chief of Security at Chester. Smoot notified the OIG of the incident that same day. The OIG Intake Form suggested that Smoot notified the ISP as well, although the OIG Investigative Report states that "OIG referred this allegation to the Illinois State Police *** Division of Internal Investigation" on January 23, 2019. Both the OIG Investigative Report and the ISP report stated that videos of the incident were recovered.

¶ 15 In March 2019, petitioner was charged with misdemeanor battery for his conduct. Petitioner was placed on administrative leave and was subsequently placed on "Suspension Pending Judicial Verdict". Petitioner was convicted of the battery charge in March 2021.

¶ 16 The OIG issued its Amended Investigative Report on September 13, 2021. The report concluded that petitioner "made non-accidental and inappropriate contact with [R.M.] when he pushed [R.M.] backward, slapped [R.M.] in the face, and smacked [R.M.'s] hands." The report further found that "[a]lthough [petitioner] minimized the nature of this conduct, the video footage of the incident shows that [petitioner] aggressively approached and assaulted [R.M.], and that the video evidence *** corroborated *** the statements of multiple credible witnesses." Finally, the report found that, by failing to act, Hayman and Plumlee failed to provide R.M. with "adequate personal care and failed to maintain [R.M.]'s safety."

¶ 17 Based upon the criminal conviction and the OIG investigative report, Jessica Lawson, a Human Resources Specialist for DHS, recommended that petitioner be discharged from employment. DHS's Director of Labor Relations, Edward Jackson, likewise recommended discharge, and on September 30, 2021, Central Management Services (CMS) discharged petitioner.

¶ 18 In June 2020 petitioner filed a charge of discrimination with the DHR alleging civil rights violations by respondent. Petitioner alleged that, because of his race, he was (1) subjected to unequal terms and conditions of employment, (2) harassed, and (3) placed on indefinite suspension. As noted above, on July 8, 2021, the DHR issued a "Notice of Substantial Evidence" as to the first and third allegations but found a lack of substantial evidence regarding petitioner's second claim.

¶ 19 The DHR filed the complaint herein in September 2021. Count I alleged that respondent subjected petitioner to unequal terms and conditions of employment due to his race, in violation of section 2-102(A) of the Act. 775 ILCS 5/2-102(A) (West 2020). Specifically, petitioner alleged that neither Stauffer, Hayman nor Plumlee came to assist him with restraining R.M., but that other "similarly situated non-black [STA-Is], such as Apple" received assistance, thereby subjecting petitioner to unequal terms and conditions of employment. Count II alleged that respondent first suspended and ultimately discharged petitioner because of his race, also in violation of section 2-102(A) of the Act. *Id.* Specifically, petitioner alleged that three other STA-Is had engaged in more egregious conduct, breaking a patient's arm and breaking a patient's foot. Petitioner contended that (1) while one of the STA-Is was suspended, he was not charged criminally, (2) the two others were not suspended pending an investigation, and (3) none of the other STA-Is were discharged.

¶ 20 Following discovery, respondent filed a motion for summary decision. With regard to count I, respondent argued that petitioner's claim that he was subjected to unequal terms and conditions of employment failed both as a matter of law and fact.

¶ 21 First, respondent argued that, although both Hayman and Plumlee were STA-IIs and worked as "lead workers" for STA-Is, neither Hayman nor Plumlee were petitioner's supervisors or managerial staff at Chester. In this role, they could not hire, fire or discipline petitioner, they

could not approve time off for petitioner, and they lacked the ability to change petitioner's job duties or assignments. Instead, petitioner's supervisor was an STA-IV, Scott Koon. An STA-IV is responsible for "assigning and reviewing work; preparing, conducting and signing performance evaluations; *** recommending and imposing disciplinary action and adjusting grievances for the incumbent of this position." Consequently, respondent argued, even if Hayman and Plumlee were motivated by racial animus, the DHS as their employer is not strictly liable for their actions.

¶ 22 Second, respondent argued that petitioner failed to identify a similarly situated individual who was treated differently from petitioner. Petitioner's complaint referred to the incident earlier that day during which petitioner, Hayman and Plumlee provided assistance to Apple, and respondent argued that Apple's incident was not comparable in that (1) it was a far more violent situation, (2) Apple needed to seek medical attention as a result of the incident, and (3) Apple called out for assistance. By contrast, petitioner's involvement with R.M. was far less violent and did not involve serious injury. Further, respondent argued, petitioner did not call for help and that the incident was largely of petitioner's own creation in that he was the aggressor.

¶ 23 Regarding count II, respondent argued that petitioner's claim failed because he had not identified any similarly situated comparators outside of his protected class who were subjected to less discipline. According to respondent, in order to prevail, petitioner would have needed to find "a non-Black employee who had both a substantiated finding of abusing a patient from OIG *and* a conviction for that abuse" who was not discharged from employment. (Emphasis in original.) Concurrent with its motion for summary decision, respondent filed a motion for leave to file the video exhibits in support of its motion for summary decision.

¶ 24 The ALJ entered a written order, filed April 8, 2024, denying respondent's request to file the video exhibits. The order then contained the following:

> "Additionally, I note that Respondent's summary judgement [*sic*] motion contains arguments that address [petitioner's] discharge. While that is understandable given that the [DHR's] attorney makes that allegation in Count II of the instant complaint, a close reading of the Complaint indicates that [petitioner's] termination, which occurred on September 30, 2021, was never a part of the Charge of Discrimination that forms a part of the instant complaint. And indeed, [petitioner] filed a separate charge of discrimination that did allege a discriminatory discharge and formed a basis of an unsuccessful Request for Review. As such, he cannot allege a discriminatory discharge in this Complaint, where the Commission has already disposed of the Charge of Discrimination that contained [petitioner's] discharge. (See, *Anderson and SOI Department of Human Services*, IHRC, ALS No, 23-0032 (5/16/2023).) Hence, the only claim that is properly before the Commission in this Complaint is [petitioner's] unequal terms and conditions claim. Accordingly, [petitioner] shall file a response only with respect to that aspect of Respondent's motion seeking issuance of a summary decision."

¶ 25 On May 24, 2024, petitioner filed his response to respondent's motion for summary decision. Petitioner argued that the discovery disclosed that there were several other employees who engaged in conduct that should have been disciplined, but that were "either not reported at all, or received a significantly smaller sanction. [Petitioner] was the only employee who was referred out for prosecution, and as a result [he] was convicted and was barred from future state employment." The list of other employees provided in discovery was identified as Exhibit D. Petitioner argued that the issue of whether these other employees were similarly situated was an issue for a trier of fact. Petitioner concluded that "[t]his is a case about whether [petitioner] was discriminated against because he was the only one referred to the ISP for criminal prosecution, which subsequently resulted in him being barred from future state employment."

¶ 26 Respondent filed a reply, arguing that petitioner's response to its motion for summary decision ignored the issues raised in the motion and argued allegations that were outside the scope of the complaint. Specifically, after noting that, pursuant to the ALJ's most recent order, count II was no longer before the Commission, Respondent argued that petitioner "spends the entirety of his filing arguing that he was disciplined more severely than other STA's at Chester. Nowhere in

Count I of the [petitioner's] Complaint does it allege he was subjected to unequal treatment due to discipline."

¶ 27 On August 9, 2024, the ALJ issued a "Recommended Order and Decision". The proposed order began by noting that count I claimed that petitioner was subjected to unequal terms and conditions of employment due to his race by virtue of the fact that two STA-II employees, Hayman and Plumlee, failed to intervene on petitioner's behalf during his conflict with R.M. The order also noted that count II alleged that petitioner was discharged from employment based on his race. The order then noted that count II was previously dismissed since the Commission, in a separate case, had already rejected petitioner's claim that he was discharged on the basis of his race.

¶ 28 The recommended order then found that petitioner, in his response to the motion for summary decision, had "unilaterally changed the focus of Count One *** when he inaccurately wrote: 'This case is about whether [petitioner] was discriminated against because he was the only one referred to ISP (Illinois State Police) for criminal prosecution, which subsequently resulted in him being barred for future state employment.' " Instead, the ALJ characterized the case as being "about whether Respondent directed two employees to delay in assisting [petitioner] in his altercation with a patient because of [petitioner's] race." Accordingly, the ALJ declined to consider whether respondent's referral of petitioner to the ISP was based on his race.

¶ 29 The order then found that petitioner "decided not to show supportive evidence that discriminatory behavior existed when two STA-IIs failed to intervene between [petitioner] and a patient during a physical confrontation." For this reason, the order found that "Respondent is exculpated from any associated liability as pled in Count One, as there is no evidence of any material fact requiring a trial." Notwithstanding this conclusion, the ALJ continued his analysis "to demonstrate that this case could not proceed even where [petitioner] had offered evidence on

his claims as pled." The ALJ found that petitioner failed to show that Hayman and Plumlee were supervisors, noting that even the complaint failed to allege supervisory status for the two men. The ALJ found that petitioner used "the generic term 'supervisor' interchangeably with a legal term of art[,]" whereas the facts demonstrated that Haywood and Plumlee were "charge aides" who did not have decision-making duties concerning the terms and conditions of petitioner's employment. Rather, STA-IIs were responsible "for directing where the staff and patients are going" and "for all the counts." The immediate supervisor for STA-IIs were STA-IVs, and Scott Koon was petitioner's immediate supervisor. The ALJ noted that, in responding to the incident in question, the STA-IIs called the STA-IVs seeking guidance on how to proceed.

¶ 30 In further analyzing the motion for summary decision, the ALJ noted the *prima facie* case for disparate treatment for race discrimination where unequal terms and conditions of employment are alleged: (1) petitioner is a member of a protected class, (2) petitioner was subjected to adverse treatment by respondent, and (3) similarly situated persons who are not members of the petitioner's protected class were treated better than petitioner. While noting that petitioner's status as a member of a protected class was undisputed, the ALJ found that petitioner failed to provide adequate admissible evidence as to the last two elements of a *prima facie* case.

¶ 31 With regard to the second element, whether petitioner was subjected to adverse treatment by respondent, the ALJ considered the nature of the investigations conducted by the OIG and the ISP. The ALJ noted that the issue before the Commission was whether Hayman's and Plumlee's delays in intervening during the incident somehow constituted disparate treatment that would support a race discrimination claim. Because the investigation concluded that Hayman's and Plumlee's delays failed to provide R.M. with adequate personal care and protection, the ALJ stated

that petitioner was, in essence, requesting the Commission conduct a *de novo* review of the investigation, something it was prohibited from doing. The ALJ concluded:

> "The issue before the investigative bodies was whether cause existed to support discipline against the employees; here, the issue is whether the investigations were discriminatory and whether the provisions of the Act have been violated.
>
> Therefore, I find that there is no evidence that creates a dispute over whether the Respondent honestly believed the results and the content of the third-party investigations, or the subsequent conviction of [petitioner]. Thus, [petitioner] failed to show evidence that any of the inquiry was racially discriminatory or that he ever claimed the investigations were racially skewed."

¶ 32 The ALJ next considered whether petitioner suffered an adverse employment action. The ALJ first noted that the investigation revealed that it was R.M., and not petitioner, who suffered the adverse consequences of the assault and the delay. The ALJ found that petitioner "offered no evidence to show that any delay by Haywood [*sic*] and Plumlee caused material harm to him, or that such delays rose to the level of an adverse or race-based action." Finding no genuine issue of a material fact, the ALJ concluded that petitioner had not established the second prong of a *prima facie* case for racial discrimination.

¶ 33 Finally, the ALJ considered the third prong of the *prima facie* test for disparate treatment for race discrimination where unequal terms and conditions of employment, specifically whether similarly situated persons who are not members of the petitioner's protected class were treated better than him. The ALJ noted that petitioner "flagged a situation in which a different patient became violent and physically struggled with STA-I Tracy Apple ***, who is not Black, which resulted in Hayman and Plumlee assisting Apple." The ALJ found that the Apple incident was not "similarly situated" to petitioner's incident the same day, concluding:

> "Here, [petitioner] offers no evidence that would enable this administrative court to conclude that timing, logistics, and sequence of the conflict between the patient and Apple were sufficiently the same as the conditions prevailing at the time that he assaulted a patient on January 21, 2019. Such deficiencies and differences

> between [petitioner's] and Apple's situations have long been recognized as a means of disrupting the potential comparison between two (or more) similarly situated employees."

¶ 34 The ALJ concluded that petitioner failed to show that respondent harbored any race-based animus against him. The ALJ further found that, by failing to identify viable similarly situated employees, petitioner failed to show a pretext for any unequal terms and conditions of employment based on race.

¶ 35 Petitioner filed an objection to the proposed decision, arguing that he claimed that the referral to the ISP and the consequences thereof had caused him damages. He cited his affidavit and exhibits which demonstrated that other similarly situated employees who engaged in inappropriate conduct had not been referred out for ISP investigation. Petitioner also noted that Smoot, "who conducted the investigation of the Petitioner, had previously made a false claim against Petitioner" in that Smoot told others that petitioner had circulated nude photos of petitioner's white girlfriend. Petitioner also noted that he submitted a report from an expert who stated that the video of the incident was missing 80 frames of footage, and that the video did not show the entire incident.

¶ 36 Petitioner's objection also argued that the ALJ misconstrued the complaint and erroneously concluded that count II had been dismissed. According to petitioner, he should be able to proceed on both counts I and II because the allegations therein "do not exclusively claim discrimination because of being terminated from employment." Petitioner noted that count I alleged that petitioner was criminally charged. With regard to count II, petitioner noted that he alleged that the OIG investigated the incident and notified the ISP, and that petitioner was arrested for battery. According to petitioner, the ALJ erred in concluding that he was required to amend his complaint to seek recovery under a new legal theory. In support of his argument, petitioner noted that "[b]oth

Counts I and II complain that [petitioner] was investigated and subsequently charged based on Barry Smoot's referral. Clearly, he was the one who did the investigations and made the decisions as to criminal referrals." Petitioner then noted that Smoot would be considered a supervisor under Title VII and that a criminal charge is an adverse act.

¶ 37 Respondent filed a reply, arguing that petitioner's exception focused on Smoot, who was not mentioned in the complaint. Respondent also argued that petitioner's "issue with his criminal prosecution lies with the Randolph County State's Attorney's Office since it decides whom to prosecute. Smoot, nor anyone else at Chester, can refer matters for criminal prosecution; those referrals must come from law enforcement."

¶ 38 On March 18, 2025, the Commission entered an order adopting the ALJ's recommended order and granting respondent's motion for a summary decision. This matter is before this court on direct appeal pursuant to Illinois Supreme Court Rule 335 (eff. July 1, 2017), and section 3-113 of the Code of Civil Procedure (735 ILCS 5/3-113 (West 2022)). See 775 ILCS 5/8-111 (West 2018). On appeal, the Illinois Human Rights Commission was named as a respondent pursuant to section 3-113(b) of the Code of Civil Procedure (735 ILCS 5/3-113(b) (West 2022)).

¶ 39 II. ANALYSIS

¶ 40 On appeal before this court, petitioner contends that the Commission erred in granting respondent's motion for summary decision, arguing that he presented a triable issue of fact regarding the criminal prosecution that stemmed from the incident involving R.M. Petitioner contends that (1) both counts I and II allege that he was investigated and subsequently charged based upon Smoot's decision to make a criminal referral, (2) that other similarly situated employees were not referred out for criminal referral, and (3) that he was convicted and barred from future state employment as a consequence of the referral and his criminal conviction.

Petitioner claims the decision to refer him for criminal prosecution was based upon his race. Petitioner also argues that count II had not been dismissed and that the ALJ improperly declined to consider it on the merits. We address each claim in turn.

¶ 41 The Illinois Human Rights Act prohibits discrimination against a person on the basis of, *inter alia*, his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from miliary service. 775 ILCS 5/1-102 (West 2022). In assessing claims brought under the Act, courts "are guided not only by Illinois case law but also by (1) federal case law relating to federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (2012)), which prohibits discrimination on the basis of sex, race, and national origin, among other things." *Lau v. Abbott Laboratories*, 2019 IL App (2d) 180456, ¶ 38 (2019) (citing *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178 (1989)).

¶ 42 In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the United States Supreme Court set out a three-part analysis for analyzing discrimination claims adopted by the *Zaderaka* Court. *Zaderaka*, 131 Ill. 2d at 178. First, "a plaintiff must produce enough evidence to establish a *prima facie* case that she was a member of a protected class and that she was treated less favorably than someone who was not in the protected class 'under circumstances which give rise to an inference of unlawful discrimination.' " *Lau*, 2019 IL App (2d) 180456, ¶ 39 (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). "If the plaintiff can do this, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for taking the action it did." *Id.* (citing *Burdine*, 450 U.S. at 253). "Finally, if the employer is able to articulate such a reason, the plaintiff 'must then have the opportunity to prove' that the

reason offered by the employer was not its true reason, but rather was a pretext for discrimination." *Id.* (citing *Burdine*, 450 U.S. at 253).

¶ 43 Pursuant to the Act, either party may move for a summary decision in its favor, and the Commission's hearing officer "shall grant" the motion if the pleadings and the affidavits show that there is no genuine issue of material fact. See 775 ILCS 5/8-106.1 (West 2022); see also 56 Ill. Adm. Code 5300.735 (2010). "[A] 'summary decision is the administrative agency procedural analogue to the motion for summary judgment in the Code of Civil Procedure.' " *Sola v. Illinois Human Rights Comm'n*, 316 Ill. App. 3d 528, 534 (2000) (quoting *Cano v. Village of Dolton*, 250 Ill. App. 3d 130, 138 (1993)). Accordingly, it is appropriate to rely upon summary judgment case law when reviewing the propriety of an order granting a motion for summary decision. *Id.* We review the Commission's grant of summary decision *de novo*. *Sola*, 316 Ill. App. 3d at 536.

¶ 44 Initially, we note that petitioner advanced one theory with the DHR and in his complaint (that he was subjected to unequal terms and conditions of employment because Hayman and Plumlee did not come to his aid) while advancing a different theory in response to respondent's motion for summary decision (that he was racially discriminated against by respondent in that Smoot referred him out for investigation and criminal charges). The ALJ found that petitioner improperly advanced a new "legal theory that [was] not articulated in either his complaint or his underlying charge of discrimination." For this reason, the ALJ "decline[d] to consider [petitioner's] alternative theory of liability under Count One, in which he claims racial discrimination under the [new] theory that Respondent referred his role in [the] altercation with a patient to the Illinois State Police." In his reply brief, petitioner notes that "[t]he parties are in sharp dispute regarding one pivotal issue: Whether the Complaint raised the issue of whether the referral for criminal prosecution constituted discrimination against him on the grounds of his race."

Accordingly, we first address whether the ALJ erred in failing to consider petitioner's "alternative theory of liability."

¶ 45 Petitioner does not dispute that this court must look to the complaint to determine what issues have been raised in reviewing the entry of a summary decision, but argues that this court should review the complaint with a view of doing substantial justice to the parties. Respondents argue that, because summary judgment motions are limited to issues raised in the complaint, the ALJ properly declined to consider petitioner's alternative theory of liability. We agree with respondents.

¶ 46 Petitioner contends that respondent received "ample notice that he was seeking relief for being discriminated against for his arrest and criminal prosecution based upon his race." In support of his argument, petitioner points to two paragraphs in count I and two paragraphs in count II. In count I, paragraph 23 alleges "[t]hat as a result of this January 21, 2019[,] incident [petitioner] had an aggravated battery charge proceeding in Court." Also, in count I, paragraph 28 alleges "[t]hat Respondent subjected [petitioner] to unequal terms and conditions of employment due to his race, black, in violation of Section 2-102(A) of the Act." Count II alleges, in paragraphs 34-35, "[t]hat the OIG investigated the January 21, 2019, incident and determined to call the Illinois State Police;" and "[t]hat on or about March 19, 2012, the Illinois State Police arrested [petitioner] for Battery." Petitioner further notes that, in opposition to the motion for summary decision, he argued that "other employees had engaged in behavior that was far less offensive than what he was accused of but none of them were ever referred to the Illinois State Police for criminal prosecution."

¶ 47 Upon our review of petitioner's complaint, we note that petitioner failed to specifically plead a theory that the discriminatory act was Smoot's referral of the matter to the ISP for criminal

prosecution.[1] Petitioner's new theory is that Smoot was a supervisor who held racial animus toward petitioner as evidenced by his claim that Smoot had falsely accused petitioner of circulating nude photos of petitioner's white girlfriend. These allegations do not appear in the complaint. Indeed, Smoot's name does not appear in the complaint, and the complaint does not contain a specific allegation that the discriminatory act was the referral of the matter to the ISP. We note that petitioner sought and received permission to depose Smoot, but that the deposition never occurred.

¶ 48 Illinois courts have observed that "it is axiomatic that summary judgment motions are limited to the issues raised in the complaint, and a plaintiff cannot raise new issues not previously pled in its complaint in order to obtain, or defeat a motion for, summary judgment." *800 South Wells Commercial LLC v. Cadden*, 2018 IL App (1st) 162882, ¶ 43. A response to a motion for summary judgment is just not the proper vehicle to assert new factual allegations that should have been included in the underlying complaint. *Abramson v. Marderosian*, 2018 IL App (1st) 180081, ¶ 55. Courts have further observed that "[w]hen ruling on a motion for summary judgment, the trial court looks to the pleadings to determine the issues in controversy. [Citation.] If a plaintiff desires to place issues in controversy that were not named in the complaint, the proper course of action is to move to amend the complaint. [Citation.]." *Filliung v. Adams*, 387 Ill. App. 3d 40, 51 (2008).

¶ 49 Here, petitioner could have rectified the situation, as the Act provides a limited mechanism for expanding the scope of a complaint once it is filed. Section 8A-102(C)(1) of the Act (775 ILCS

[1]The record is not clear that Smoot was the person who contacted the Illinois State Police. We note that the OIG's intake form (dated January 23, 2019) states, under "Caller's Statement", that "[i]t was also reported that the Illinois State Police have been notified and are investigating." By contrast, the OIG's final report states that the OIG referred the allegation to the ISP on January 23, 2019. Additionally, we note that petitioner's verified complaint states that "the OIG investigated the January 21, 2019, incident, and determined to call in the Illinois State Police."

5/8A-102(C)(1) (West 2022)) permits a complaint to be amended by leave of the presiding ALJ, for good cause shown, upon timely written motion and reasonable notice to all interested parties, at any time prior to the issuance of the ALJ's recommended order. *Id*. Petitioner articulated this new theory in his May 24, 2024, response to respondent's motion for summary decision. On June 14, 2024, respondent filed its reply brief and noted that petitioner had asserted allegations that were outside the scope of the complaint. The recommended order was entered on August 9, 2024. Petitioner had nearly two months to request leave to amend the complaint but did not do so. For this reason, we conclude that the ALJ did not err in declining to consider petitioner's alternative theory of liability.

¶ 50 We next consider whether the Commission erred by granting respondent's motion for summary dismissal based upon the allegations actually contained in the complaint. With regard to count I, the Commission's order concluded that petitioner failed to establish a *prima facie* case for racial discrimination. A *prima facie* case for discrimination requires evidence that (1) the plaintiff is a member of a protected class, (2) he was meeting his employer's legitimate employment expectations, (3) he suffered an adverse employment action, and (4) he was treated less favorably than a similarly situated person who is not a member of the protected class. *Lau*, 2019 IL App (2d) 180456, ¶ 40 (citing *Barbera v. Pearson Education, Inc.*, 906 F.3d 621, 629 (7th Cir. 2018)).

¶ 51 In the case before us, there is no dispute that petitioner, based upon his race, is a member of a protected class. The ALJ's analysis focused on the allegations in count I and (1) whether petitioner was subjected to adverse treatment by respondent and (2) whether similarly situated persons who were not a part of petitioner's protected class were treated better than petitioner. A petitioner's failure to establish any one of the elements of a *prima facie* case of discrimination is sufficient grounds to justify a dismissal of a petitioner's discrimination charge for lack of

substantial justice. *Hobgood v. Illinois Gaming Board*, 731 F.3d 635, 642 (7th Cir. 2013) ("If any one of the elements of the plaintiff's *prima facie* case is lacking, the plaintiff loses.").

¶ 52 The ALJ determined that the DHS did not subject petitioner to an adverse action based upon his co-workers' failure to intervene on his behalf during the incident with R.M. The ALJ first noted that the respondent was entitled to rely upon the investigations conducted by the OIG and the ISP, and that petitioner "failed to show evidence that *** the inquiry was racially discriminatory or that he ever claimed that the investigations were racially skewed." In considering whether petitioner suffered an adverse act, the ALJ noted that respondent's investigation concluded that R.M. was the one who suffered adverse consequences as a result of petitioner's assault and Hayman's and Plumlee's failure to act on R.M.'s behalf. The ALJ found that petitioner's argument consisted of unsupported conclusions about his behavior and the behaviors of others without any evidence supporting his claim of racial discrimination. Additionally, we note that the ALJ found that neither Hayman nor Plumlee qualified as "supervisors" for the purposes of a claim of employment discrimination.

¶ 53 We agree with the Commission. Petitioner fails to develop an argument challenging the Commission's conclusion that Hayman and Plumlee's failure to intervene did not subject him to unequal terms and conditions of employment. Again, petitioner instead relies upon his argument that the unequal terms and conditions of his employment was the result of Smoot's referral of the matter to the ISP.

¶ 54 Count I of the complaint alleged that petitioner suffered from racial discrimination because neither Hayman nor Plumlee intervened on his behalf during the altercation with R.M. The facts, however, do not show that petitioner suffered any adverse consequences based upon these failures. Instead, the investigation showed that it was petitioner's own actions—physically abusing R.M.—

led to his suspension and subsequent termination from employment. Furthermore, the investigation showed that "Hayman and Plumlee failed to provide [R.M.] with adequate personal care and failed to maintain [R.M.'s] safety." Simply stated, it cannot be said that petitioner suffered any adverse consequence as a result of his coworkers' inactions. Based upon this finding alone, petitioner failed to establish a *prima facie* case for disparate treatment based upon his race, and the Commission's decision to grant respondent's motion for summary decision was proper.

¶ 55 Petitioner also contends that there is a triable issue of fact as to whether he has been treated differently than similarly situated individuals. The ALJ determined that petitioner failed to show how he was similarly situated to others, including Apple. Specifically, the ALJ found that petitioner "offers no evidence that would enable this administrative court to conclude that timing, logistics and the sequence of the conflict between the patient and Appl [*sic*] were sufficiently the same as the conditions prevailing at the time that he assaulted a patient on January 21, 2019." Petitioner criticizes the ALJ for considering only Apple as a comparator, and notes that his "affidavit makes clear that there were numerous white employees who had engaged in far more egregious conduct that were not referred out for criminal prosecution."

¶ 56 "The similarly-situated analysis calls for a flexible, common-sense examination of all relevant factors." (Internal quotation marks omitted.) *Lau*, 2019 IL App (2d) 180456, ¶ 46. The *Lau* court continued:

> "There must be enough common factors [***] to allow for a meaningful comparison in order to divine whether intentional discrimination was at play. [Citation.] *** In the usual case a plaintiff must at least show that the comparators (1) dealt with the same supervisor, (2) were subject to the same standards, and (3) engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. [Citation.] This is not a magic formula, however, and the similarly-situated inquiry should not devolve into a mechanical, one-to-one mapping between employees. [Citation.]

> Whether a comparator is similarly situated is usually a question for the fact-finder, and summary judgment is appropriate only when no reasonable fact-finder could find that plaintiffs have met their burden on the issue." (Internal quotation marks omitted.) *Id.*

¶ 57 Petitioner specifically contends that there is a genuine issue of material fact regarding whether he has identified similarly situated comparators who have engaged in similar conduct without differentiating or mitigating circumstances as would distinguish their conduct or respondent's treatment of them. We disagree.

¶ 58 A review of petitioner's affidavit, Exhibit D and other pleadings fail to support petitioner's claim that the individuals listed are similarly situated. Exhibit D shows that there were 17 other Chester employees who were discharged from employment after being disciplined for physical abuse and that 14 of those employees returned to work. The 14 individuals who returned to work filed grievances through the union and had their discipline reduced. We note that Exhibit D neither indicates whether the OIG referred these individuals to the ISP for investigation nor whether the ISP referred these individuals for criminal charges. Further, Exhibit D does not indicate whether any these individuals were actually prosecuted or, if they were, the outcome of those prosecutions. Succinctly stated, petitioner's claim fails because he does not identify a similarly situated, non-Black STA who was treated more favorably. A true comparator for petitioner would be an STA outside his protected class who engaged in similar conduct towards a patient that resulted in a referral to the ISP and a criminal conviction, but was not discharged.

¶ 59 For these reasons, even considering petitioner's affidavit and Exhibit D, we conclude that the Commission did not err in finding that petitioner did not meet his burden of establishing a *prima facie* case for disparate treatment based upon his race.

¶ 60 Finally, and with regard to count II, petitioner argues that count II had not been dismissed and that the ALJ improperly declined to consider it on the merits. Petitioner argues count II did

not exclusively claim discrimination because he was terminated from employment; rather, petitioner contends that count II also claimed that he was discriminated against because he was criminally prosecuted. Petitioner contends that the ALJ was wrong in concluding that petitioner was required to amend his complaint in order to seek recovery under a new legal theory. Respondents argue petitioner has forfeited review on this issue by failing to either object to the order dismissing count II in his response to respondent's motion for summary decision or in his exceptions to the recommended order and decision. Initially, we note that we have already rejected petitioner's claim that his new theory of liability was properly pled. Even in the absence of this finding, we agree that the matter was forfeited.

¶ 61 Petitioner did not raise the issue in his response to the motion for summary decision, which was filed after the April 8, 2024, order finding that the claim raised in count II had been previously disposed of by the Commission. In his objection to the proposed decision, petitioner contended that the ALJ "seriously misread" the complaint by determining that petitioner's new legal theory—that the discriminatory act was the referral to the ISP for criminal prosecution—was not adequately pled. Petitioner's exception, however, does not take issue with the reasoning contained in the prior order: that count II alleged discriminatory discharge and that the Commission found a substantial lack of evidence in petitioner's previous charge of discrimination. A party who fails to file exceptions to a recommended order is deemed to have failed to exhaust administrative remedies, and thereby waives any argument that could have been raised before the Commission. 56 Ill. Adm. Code 5300.910 (1996).

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we affirm the Commission's summary decision.

¶ 64 Affirmed.