STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	CHARGE NO.:	**2014CF2506**
	EEOC NO.:	**21BA41274**
	ALS NO.:	**14-0531**
MARITZA DELUNA,		
Petitioner.		

ORDER

This matter coming before the Commission by a panel of three, Commissioners Hermene Hartman, Steve Kim, and Cheryl Mainor presiding, upon Maritza Deluna's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2014CF2506, the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW**,** THEREFORE, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge for **LACK OF SUBSTANTIAL EVIDENCE** is **SUSTAINED**.

DISCUSSION

On March 27, 2014, the Petitioner, a daycare teacher, filed a charge of discrimination with the Respondent, alleging that Little Footsteps Academy ("Employer") subjected her to unequal terms and conditions of employment based on her ancestry, Hispanic, her national origin, Mexico, and in retaliation for engaging in a protected activity, in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act ("Act"). On August 27, 2014, the Respondent dismissed the Petitioner's charge for lack of substantial evidence. The Petitioner filed a timely Request.

For the reasons that follow, the Commission concludes that the Respondent properly dismissed the Petitioner's claims for lack of substantial evidence. Substantial evidence is that 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); Owens v. Dep't of Human Rights, 403 Ill. App. 3d 899, 917, 936 N.E.2d 623, 638 (1st Dist. 2010). If no substantial evidence of

[1] In a request for review proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Illinois Department of Human Rights's action shall be referred to as the "Petitioner."

discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. Id.

To establish her discrimination claims, the Petitioner may ultimately proceed under one of two methods: either with direct evidence that discriminatory animus was a determining factor in the Employer's adverse action, or indirectly through the burden-shifting method of proof. Schnitker v. Springfield Urban League, Inc., 2016 IL App (4th) 150991, 67 N.E.3d 583, 591-92 (4th Dist. 2016). To establish a *prima facie* case under the indirect method, the Petitioner must show: (1) she is a member of a protected class; (2) she was performing her work satisfactorily; (3) she was subject to an adverse employment action; and (4) the Employer treated a similarly situated employee or employees outside her protected class more favorably under similar circumstances. Marinelli v. Human Rights Comm'n, 262 Ill. App. 3d 247, 634 N.E.2d 463 (2d Dist. 1994).

The evidence here does not support a discrimination claim through the direct method. The circumstance giving rise to the Petitioner's claim was the Employer's change to her schedule from full-time to part-time. The Petitioner states that during the meeting where that change occurred, the Employer's owner told her that she should not speak Spanish when non-Spanish speaking staff members were present. In her Request for Review, the Petitioner, apparently for the first time, also states that the owner and the director would repeatedly come to observe her more closely than they did other teachers in the daycare center.

However, these facts alone do not show that the Petitioner's ancestry and/or national origin were the causative factor in the schedule change. In order to qualify as direct evidence, the Employer's comment "would have to prove the particular fact in question, without reliance on inference or presumption." Lalvani v. Illinois Human Rights Comm'n, 324 Ill. App. 3d 774, 791, 755 N.E.2d 51, 65 (1st Dist. 2001). Moreover, the uncontested evidence also shows that during the schedule change meeting, the Employer communicated to the Petitioner that because her certification to work with children only allowed her to work with children up to 36 months old, she could not remain in the classroom where she was currently stationed. The Employer offered the Petitioner full-time hours within a different timeframe in a different classroom, but the Petitioner could not accept that full-time schedule due to her personal childcare situation.

Nor does substantial evidence exist to support an indirect claim. The Petitioner has not identified a similarly-situated employee, outside her protected class, who the Employer treated more favorably. In her charge, the Petitioner names Gina Fedricks [sic] as another teacher who was not forced to work part-time hours. But in fact, the

investigation showed that the Petitioner was offered a full-time schedule similar to another teacher named Gina Frederick, but she could not accept that schedule due to her personal circumstances.

In her Request for Review, the Petitioner provides statements from other teachers who volunteered to adjust their schedules so that the Petitioner could work more hours. The Employer stated it did not accommodate those requests because it would have left the Petitioner in classrooms with children over 36 months old. But even assuming the Employer could have done more to provide the Petitioner more hours, it is not the Commission's role to second-guess the staffing decisions of an employer, absent other evidence of discriminatory intent. See Carlin v. Edsal Manufacturing Co., IHRC, Charge No. 1992CN3428, 1996 WL 652580 *7 (May 6, 1996).

Turning to the Petitioner's retaliation claim, the Commission likewise finds no substantial evidence in support. To prove a *prima facie* case of retaliation under the Act, the Petitioner must establish that: (1) she engaged in a protected activity; (2) the Employer took an adverse action against her; and (3) a causal nexus exists between the protected activity and the adverse action. Welch v. Hoeh, 314 Ill. App. 3d 1027, 1035, 733 N.E.2d 410, 416 (3d Dist. 2000).

Here, the evidence does not establish a causal connection between the protected activity and the reduction in the Petitioner's hours. The basis for the Petitioner's retaliation claim is that she provided witness testimony in September 2013 in an unrelated charge filed by her co-worker against the Employer. However, the Respondent's investigation showed that the Petitioner's statement was favorable to the Employer in that case. The Petitioner stated she did not observe any discrimination, as her co-worker had alleged. It is not clear why the Employer would take adverse action against the Petitioner based on a favorable statement. Moreover, the Petitioner's sister-in-law also provided a witness statement in that case and experienced no change to her schedule.

Accordingly, the Petitioner has not presented enough evidence to show that the Respondent's dismissal of the charge was not in accordance with the Act.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The dismissal of the Petitioner's charge is hereby **SUSTAINED.**

2. This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois

Department of Human Rights, and Little Footsteps Academy as respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS)
) **Entered this 21st day of November 2018**
HUMAN RIGHTS COMMISSION)

Commissioner Hermene Hartman

Commissioner Steve Kim

Commissioner Cheryl Mainor