STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.: **2014CF2033**
	)	EEOC NO.: **21BA40929**
	)	ALS NO.: **14-0603**
MAREK FRACZAK,	)	
Petitioner.	)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Robert A. Cantone, Hamilton Chang, and Nabi R. Fakroddin presiding, upon Marek Fraczak's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2014CF2033, 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 February 13, 2014, the Petitioner, a former machinist, filed a charge of discrimination with the Respondent, amended June 23, 2014, alleging that Dentsply International, Inc. ("Employer") harassed him because of his national origin, Poland (Count A) and in retaliation for his wife filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") (Count B), and later discharged him because of his national origin (Count C), and in retaliation for his wife's EEOC charge (Count D), in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act ("Act"). On August 28, 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 claim 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

[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."

N.E.2d 623, 638 (1st Dist. 2010). If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. Id.

The Petitioner operated a machine producing parts for dental products. The Petitioner and another machinist, Milan Subotin, worked opposite shifts on the same machine. In October 2013, the Employer began investigating a claim by Mr. Subotin that someone forged his name and initials on a document for parts he did not actually produce. The document, called a Target Verification Form ("TVF"), was dated October 2, 2013. The parts attributed to Mr. Subotin on the TVF were defective and had to be discarded at a loss to the Employer.

The Employer's Human Resources Director interviewed Mr. Subotin as well as an engineer present on the day in question. Mr. Subotin claimed he did not produce the parts and he did not know how his initials came to be on the form. However, the Petitioner worked the machine directly thereafter that day, and the parts were produced during his shift, so Mr. Subotin believed that the Petitioner forged his initials. The engineer concurred, stating that he had observed Mr. Subotin do some set-up work, but that Mr. Subotin had not produced the parts and had left the TVF blank at the end of his shift. The engineer observed the Petitioner later produce the parts on his shift.

The Petitioner stated that he was called into a meeting with the Human Resources Director and his supervisor in late October or early November about the TVF. Subsequent meetings were held on November 22, 2013 and December 10, 2013 to address the issue. The Petitioner asserts that he maintained at all times that he had not written in Mr. Subotin's initials. The Employer states that the Petitioner changed his story several times, at one time stating he did not know what happened, and at another point stating that Mr. Subotin told him to write his initials on the form. On February 3, 2014, the Petitioner was informed he was terminated for falsifying the TVF.

Also in November 2013, the Petitioner's wife, who was employed by the Employer, was terminated for purported performance issues. The Petitioner's wife filed a separate charge of discrimination with the Respondent on November 27, 2013, which the Employer acknowledged came to its attention sometime in December.

The Employer provided two previous disciplinary records involving the Petitioner's production of defective parts, one dated August 19, 2013, and one dated March 29, 2010. Both documents indicate the Petitioner "refused to sign." The Petitioner took the position in the investigation that these forms were concocted by the Employer after the fact. However, in his Request for Review, the Petitioner acknowledges that he did receive the August 19, 2013 form while he was still working, although he seems to suggest there was not a formal meeting where he was asked to sign off on it.

Counts A and B: Harassment

To establish his harassment claims, the Petitioner must show that the Employer subjected him to a pattern of incidents sufficiently severe and pervasive so as to alter the terms and conditions of his employment, and that the Employer's behavior was motivated by discriminatory and/or retaliatory intent. Village of Bellwood Bd. of Fire and Police Com'rs v. Human Rights Com'n, 184 Ill. App. 3d 339, 541 N.E.2d 1248 (1st Dist. 1989). However, criticism of work performance rarely rises to the level of actionable harassment. See Motley v. Illinois Human Rights Comm'n, 263 Ill. App. 3d 367, 375, 636 N.E.2d 100 (4th Dist. 1994).

The Petitioner states that he was subject to harassment in the form of constant criticism about his work, beginning November 1, 2013 until his termination in February 2013. The Petitioner states these incidents were discriminatory based on his national origin as well as retaliation for his wife's filing a discrimination charge.

The record does not contain reference to any specific incidents or comments during this time frame other than the meetings held to investigate the October 2 incident. While the quality of the Petitioner's work and his truthfulness were certainly called into question during those meetings, the evidence does not show that they were severe enough to "alter the terms and conditions" of his employment. Whatever the actual cause of the issue regarding the TVF, the Employer was certainly entitled to investigate it.

In his Request, the Petitioner points to comments made by Mr. Subotin during the investigation, where he opined that the Petitioner was "lazy," did not do good work, and left the machine a mess. But Mr. Subotin was a co-worker, with no supervisory authority over the Petitioner, and there is no evidence his remarks were motivated by any discriminatory or retaliatory animus. Moreover, this one series of remarks from Mr. Subotin does not rise to the level of actionable harassment under the Act.

Counts C and D: Termination

To ultimately establish his discrimination and retaliation claims, the Petitioner will need to show a *prima facie* case of unlawful discrimination and retaliation. Owens v. Dep't of Human Rights, 403 Ill. App. 3d 899, 919, 936 N.E.2d 623, 640 (1st Dist. 2010). The burden then shifts to the Employer to articulate a non-discriminatory reason for its employment action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (adopted by Illinois Supreme Court in Zaderaka v. Human Rights Comm., 131 Ill.2d 172, 179, 545 N.E.2d 684, 687 (1989)). The Petitioner must then show that the Employer's articulated reason for its employment action was a mere pretext. Id.

In this case, the Petitioner's claims fail because there is not more than a "scintilla" of evidence suggesting that the Employer's rationale for firing him was pretextual. Pretext may be shown if the Employer's stated reasons are untrue, did not actually motivate the Employer's decision, or were insufficient to motivate the Employer's decision. Sola v. Illinois Human Rights Comm'n, 316 Ill. App. 3d 528, 537, 736 N.E.2d 1150, 1158 (1st Dist. 2000). Here, the Employer had more than sufficient information to believe that the Petitioner falsified the TVF on October 2. Even assuming the Petitioner did not change his story several times (and the Commission is not in a position to make a credibility determination about this), the Employer had the reports of both Mr. Subotin and the engineer, which pointed to no one other than the Petitioner who could have initialed the TVF.

Of course, it could be that the Employer got it wrong, and perhaps Mr. Subotin and/or the engineer were untruthful in their statements. But an employer's reasoning need not be "accurate, wise, or well considered" to be sufficient. In the Matter of: Jerald Burkart, IHRC, 2018 WL 6071539 (Jan. 22, 2015). Rather, the Employer must have a good faith belief supporting its decision, and if it does, the Commission cannot second-guess that decision in the absence of other evidence supporting discriminatory intent. Carlin v. Edsal Manufacturing Company, IHRC, Charge No. 1992CN3428, 1996 WL 652580 (May 6, 1996). Here, the Employer reasonably relied on consistent statements from two other of its employees that pointed to the Petitioner as the wrongdoer, and no evidence points to discriminatory animus on the part of those two individuals.

In his Request, the Petitioner raises several other points to bolster his case, none of which supply substantial evidence that would direct this matter be remanded to the Respondent. First, the Petitioner states that the Employer and the union did not abide by the union contract and broke their own work rules. However, even if the Employer did not abide by the union contract, recourse for this is not available under the Act. Second, he indicated that the Employer's practice was for an inspector to daily check the parts made by workers and give a verbal or written approval or disapproval that same day. But he did not state that he was given any affirmative approval for parts he produced on October 2, and it is not clear how this otherwise would help the Petitioner's case. It was not contested throughout the Respondent's investigation that the parts were defective – the issue was the TVF and who was responsible.

Third, the Petitioner, apparently for the first time, identifies two other workers who he says the Employer treated less harshly for misconduct. The first is named only as "Sukret," who the Petitioner says was authorized to initial a form on behalf of a supervisor. But this comparison does not help the Petitioner. In that instance, the employee had been given authority from the supervisor to do so, and the Petitioner's position has been that he had

never admitted to initialing the form at all. The second is an employee named "Mitch," who the Petitioner says performed his work poorly and was only demoted to a lower position. But here, the Employer's decision to terminate the Petitioner was predicated on its conclusion that he falsified another worker's initials on the TVF, not simply that he performed his work poorly. The comparison to Mitch thus does not show that he was treated more favorably under similar circumstances.

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 Dentsply International, Inc. 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 December 2018**
HUMAN RIGHTS COMMISSION)

Commissioner Robert A. Cantone

Commissioner Hamilton Chang

Commissioner Nabi R. Fakroddin