STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.: **2014CF2278**
	)	EEOC NO.: **21BA41109**
Vida Buckley	)	ALS NO.: **15-0088**
Petitioner	)	

ORDER

This matter coming before the Commission by a panel of three, Chair Rose Mary Bombela-Tobias and Commissioners Patricia Bakalis Yadgir and Duke Alden, presiding upon Vida Buckley's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2014CF2278 and 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 is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

DISCUSSION

On November 11, 2013, the Petitioner filed an unperfected charge of discrimination with the Respondent, perfected on April 11, 2014, and amended on November 19, 2014, alleging that FP Mailing Solutions ("FP"), harassed her (Count A); placed her on a performance improvement plan ("PIP") (Count B); and discharged her (Count C) due to her race, black; and discharged her in retaliation for complaining about discrimination (Count D), in violation of Sections 2-102 (A) and 6101(A) of the Illinois Human Rights Act ("Act").

On December 15, 2014, the Respondent dismissed the Petitioner's charge in its entirety. After being granted an Extension of Time to file a Request for Review, the Petitioner filed a timely Request for Review on March 18, 2015.

The Commission concludes that the Respondent properly dismissed all counts of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. 775 ILCS 5/7A102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence

[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."

sufficient to support a conclusion. *In re Request for Review of John L. Schroeder*, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

On December 17, 2012, Petitioner began employment as a contract analyst with FP, a postage meter manufacturer and mailroom solution, until she was discharged for poor performance on September 5, 2013. Petitioner states that from November 2012 to September 5, 2013, she was harassed daily by Team leader, Sonia Huerta ("Huerta") and co-worker, Ginny Hutson ("Hutson") based on her race. Huerta yelled and spoke to her in an unprofessional manner; misinformed her about certain job procedures to set-her up for discharge; criticized her work and allowed a co-worker to harass her. On June 20, 2013, Petitioner received an "Employee Counseling Written Warning" because her error rate was more than .49% between March 2013 and May 2013. Four days later,
Petitioner was placed on a Performance Improvement Plan ("PIP") for poor work performance, specifically she had a high error rate. On August 2, 2013, Petitioner received a Final Written Warning because her year-to-date error was .60%, including an error of .75% in July 2013. Since Petitioner's job performance did not improve after she was issued a PIP and Final Written Warning, Petitioner was released from FP on September 5, 2013.

As to Counts A-D, Petitioner is unable to prove that she was harassed and placed on a performance improvement plan ("PIP") and discharged due to her race and in retaliation for opposing discrimination.

To establish a *prima facie case* for racial harassment, Petitioner must demonstrate: (1) she was subject to unwelcome harassment; (2) the harassment was based on her race; (3) the harassment was as severe and pervasive enough to alter the conditions of her environment and create a hostile and abusive working environment; and (4) there is a basis for employer liability. *Beamon v. Marshall & Ilsley Trust Co.*, 411 F3d 854 (7th Cir. 2005). A hostile environment based on race is analyzed like a hostile environment based on sex. *Trayling v. Bd. of Fire and Police Comm'nrs*, 273 Ill App3d 1, 10-11 (1995).

Further, to qualify as racial harassment, the harassing behavior must occur frequently enough to constitute a term or condition of employment", and that "[i]nfrequent slurs are not sufficient to establish racial harassment". (Slip op. at p. 5). Moreover, it should be noted under the Commission's decision in *Hill* and *Crider and IL. Dept. of Veteran Affairs*, 25 Ill. HRC Rep. 214, 220 (1986) that a complainant in a racial harassment claim has the burden of establishing the existence of a "working environment in which racially charged verbal or non-verbal behavior [has been] directed toward a minority employee".

The incidences alleged by Petitioner do not rise to the level of harassment under the Act simply because there is no support that she was subjected to a pattern of racially motivated incidences such as racial slurs, etc. The only statement that Petitioner specifies related to race is that an employee, Huerta, referenced a co-worker as a black girl. The incidences thus were isolated and trivial. Further, Petitioner never complained to Human Resources about the recurrence of any statements Huerta

allegedly made. Any other incidences were work-related and primarily dealt with disciplinary matters which were discrete acts and not repeated conduct.

To prove a *prima facie case* of race discrimination, Petitioner must show that: 1) she is a member of the protected class; 2) she was performing her job duties according to Respondent's legitimate expectations; 3) she suffered an adverse employment action; and 4) other individuals not within her protected class were treated more favorably. *Interstate Material Corp. v. Human Rights Comm'n*, 274 Ill. App. 3d 1014, 1022, 654 N.E.2d 713, 718 (1st Dist. 1995); *Marinelli v. HRC*, 262 Ill.App.3d 247, 634 N.E.2d 463 (2d Dist. 1994).

Note that in an action alleging race discrimination and/or unlawful retaliation, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Human Rights Act. *See Thompson and Hoke Construction Co.*, IHRC, ALS No. S9135, June 2, 1998), and *Loyola University of Chicago v. Illinois Human Rights Commission*, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1st Dist., 3rd Div. 1986). Assuming arguendo that Petitioner established a *prima facie case* of discrimination, FP must articulate a legitimate, nondiscriminatory reason for its actions. If this is done, the Petitioner must prove by a preponderance of the evidence that the articulated reason advanced by FP is a pretext. *See Clyde and Caterpillar, Inc.*, IHRC, ALS No. 2794, Nov. 13, 1989, *aff'd sub nom Clyde v. Human Rights Com'n*, 206 Ill. App.3d 283, 564 N.E.2d 265 (4th Dist.1990); and *Texas Dep't. of Community Affairs v. Burdine*, 450 US 248, 254-55 (1981).

Here, Petitioner fails to meet the second and fourth elements of her prima facie case for race discrimination. As to the second prong, Petitioner failed to perform her job duties according to her employer's legitimate expectations as evidenced by the high error rate.

As to the fourth prong, Petitioner has not shown that a similarly situated non-black employee whose job performance was comparable to hers with an error rate over a period of several months of at least .50%, and whom was not placed on a PIP and disciplined as she was. Although in December 2013, Hutson was given a written warning because her three-month average error form September 2013 to November 2013 was .61%. The Seventh Circuit has made it clear that an employee's failure to identify a comparator is detrimental to their ability to maintain an action for discrimination. *Erverroad v. Scott Truck Systems, Inc.*, 604 F3d 471, 480-482.

Being placed on a PIP and discharged by FP were for reasons unrelated to her race, namely a high error rate. Thus, FP articulated a legitimate, nondiscriminatory reason for placing Petitioner on a PIP and thereafter terminating her. Petitioner failed to present any, much less compelling, evidence that FP's articulated reasons for placing Petitioner on a PIP and then terminating her were a pretext for racial discrimination. In the absence of any evidence that the business consideration relied upon by FP is a pretext for discrimination, it is improper to substitute judgment for the business judgment of the employer. *See Berry and State of IL, Dept. of Mental Health and Developmental Disabilities*, IHRC, ALS no. S-1946, Charge No. 1994SA0240 (December 10, 1997). Additionally, FP is entitled to make employment decisions based on its reasonable belief surrounding the situation. "Respondent may take

its action for good reason, bad reason, reason based upon erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason…The correctness of the reason is not important as there was good faith belief by Respondent in its decision…" *See Carlin v. Edsal Manufacturing Co.*, 1996 WL 652580, Charge No. 1992CN3428 (Ill.HRC, May 6, 1996). Therefore, Petitioner failed to show substantive evidence that she was issued a PIP and terminated because of her race.

To establish a *prima facie case* for retaliation, the following must be established by Petitioner: 1) she engaged in protected activity; 2) FP committed an adverse action against her; and 3) a causal connection existed between the protected activity and the adverse action. *Hoffelt v. Ill. Dep't of Human Rights, 367 Ill. App.3d 628*, 867N.E.2d 14 (1st Dist. 2006); *Welch v. Hoeh*, 314 Ill.App.3d 1027, 1035, 733 N.E. 2d 410,416 (3d Dist. 2000).

Petitioner is unable to satisfy the third element of her *prima facie case*. As to prong three, Petitioner provided no evidence of a causal connection between the protected activity of opposing discrimination and her September 5, 2013 termination. While Petitioner's PIP and discharge followed her participation in a protected activity within such a short period of time to raise an inference of retaliatory motive, FP articulated a legitimate, nondiscriminatory reason that Petitioner was terminated thereafter for failure to improve upon her deficiencies outlined in the PIP. Additionally, Petitioner failed to present any evidence that these reasons were pretextual. Therefore, Petitioner fails to show substantial evidence that she was discharged in retaliation for opposing discrimination.

In her Request for Review, there is no additional evidence provided by Petitioner that would warrant a reversal of Respondent's original determination.

Accordingly, the Petitioner has not presented substantial 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 FP Mailing Solutions 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 17th day of December 2018.**
HUMAN RIGHTS COMMISSION)

Chair Rose Mary Bombela-Tobias

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden