STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 09 EAO 079 EEOC NO. 16J-2008-00420

In the matter of

Martha D. Benitez
Complainant

v. DECISION AND ORDER

PYRAMID CASE COMPANY, Reynar Vazquez, *alias*,
Blanca Cruz and Mario Meletz
Respondents

INTRODUCTION

On October 3, 2008, Martha D. Benitez (hereafter referred to as the Complainant) filed a charge against PYRAMID CYCLE, INC., Reynar Vazquez, *alias*, Blanca Cruz and Mario Meletz[1] with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). On February 23, 2009, the Complainant filed an amended charge against PYRAMID CASE COMPANY, Reynar Vazquez, *alias*, Blanca Cruz and Mario Meletz (hereafter referred to as the Respondents). The amended charge alleged that the Respondents discriminated against the Complainant with respect to terms and conditions of employment, harassment and termination of employment because of her ancestral origin and in retaliation for opposing unlawful employment practices, in violation of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA). This amended charge was investigated. On August 20, 2010, Preliminary Investigating Commissioner Alton W. Wiley, Jr. assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the Respondents violated the provisions of Section 28-5-7 of the General Laws of Rhode Island. On October 1, 2010, a complaint and notice of hearing issued. The complaint alleged that the Respondents discriminated against the Complainant with respect to terms and conditions of employment and termination of employment because of her ancestral origin and in retaliation for opposing unlawful employment practices.

Hearings on the complaint were held before Commissioner John B. Susa on February 14, 2012, February 15, 2012 and February 16, 2012.[2] The Complainant and Pyramid Case Company

[1] Mario Meletz's name was misspelled as "Melez" until it was corrected by stipulation at the hearing on February 15, 2012.

[2] When the transcripts of the hearings are referred to in this Decision and Order, the Volumes will be referred to as follows: the February 14, 2012 transcript will be referred to as Vol. 1, the February

(hereafter referred to as Respondent Pyramid) were represented by counsel. The Complainant filed a Post-Hearing Memorandum on July 2, 2012.

JURISDICTION

Respondent Pyramid is a corporation doing business in this state that employs four or more employees and thus it is an employer within the definition of R.I.G.L. Section 28-5-6(7)(i) and is subject to the jurisdiction of the Commission. Reynar Vazquez, *alias*, Blanca Cruz and Mario Meletz are persons who were alleged to have aided, abetted and incited discrimination against the Complainant and to have attempted, directly and indirectly, to commit unlawful employment practices and therefore they are subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The Complainant was born in Ecuador. She moved to the United States in 1987. She began working for Respondent Pyramid on March 23, 2003. She worked for Respondent Pyramid until she was laid off on May 9, 2008.

2. In 2003, Respondent Pyramid made glasses cases, bags and other things. Persons of various ancestral origins were employed there. The ancestral origins of people employed there included Puerto Rican, Dominican, Honduran, Salvadoran, Bolivian, Guatemalan and Ecuadorian.

3. The Complainant worked as a sewer on a single-needle machine. Her main job was to sew the basic glasses case. She sewed cases, boxes, pockets, Velcro and zippers. When she started, the Complainant was paid $7 per hour. When she was laid off, the Complainant was being paid $8 per hour. The Complainant's work was good.

4. Respondent Blanca Cruz and Respondent Mario Meletz were floor supervisors for Respondent Pyramid. Blanca Cruz was the Complainant's primary supervisor. Joseph Caruso was the President and sole shareholder of Respondent Pyramid. The Complainant believed that Respondent Reynar Vazquez was a manager. At times, Respondent Vazquez acted as if he had supervisory authority. Mr. Caruso testified that Respondent Vazquez was not an employee and that he came in on a regular basis to fix machines. Some weeks he would be at Respondent Pyramid six days; some weeks he would be there three days. He would bill Mr. Caruso for his time. He worked on jobs for other companies. Trans. Vol. 1, pp. 93-94. Respondents Cruz, Meletz and Vazquez were of Guatemalan ancestral origin. Mr. Caruso is not Hispanic.

5. Respondent Pyramid did not have an employee handbook or a formal system of progressive discipline. On occasion, Respondent Pyramid would write up incidents, so that it had a

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15, 2012 transcript as Vol. 2, and the February 16, 2012 transcript as Vol. 3.

record. Mr. Caruso handled problems with employees on a case-by-case basis. The workforce was not in a union. There was no policy of giving annual pay raises to employees.

6. The Complainant testified that before 2007, with respect to her treatment based on her ancestral origin, everything was fine. Trans. Vol. 1, p. 28.

7. At the end of August 2007, the Complainant went to Respondents Cruz, Meletz and Vazquez and asked for a pay raise. They had asked Mr. Caruso for pay raises for other employees but not for the Complainant. The Complainant did not receive a pay raise and continued to ask Respondents Cruz, Meletz and Vazquez about it. They told her that Mr. Caruso was on a trip.

8. The Complainant and her daughter, Paolo Harris, went to talk to Mr. Caruso on October 19, 2007. They did not have an appointment but Mr. Caruso agreed to talk with them. The Complainant does not speak English and Ms. Harris was acting as her translator. Mr. Caruso told them that the supervisors had not requested a pay raise for the Complainant. The Complainant told Mr. Caruso that she thought that she had not received a raise because she is not Guatemalan.

9. Mr. Caruso asked the Complainant's supervisors to come to the meeting and Respondent Cruz came. She told Mr. Caruso that the Complainant was a good worker. Mr. Caruso talked about trying the Complainant on other machines so that she could receive higher pay.

10. On October 23, 2007, the Complainant was asked to report to Mr. Caruso's office. Mr. Caruso, Marilynn Martinez, the office manager, and Respondents Cruz, Meletz and Vazquez were there. The Complainant testified that they started talking in English, looked at the Complainant and laughed. Trans. Vol. 1, p. 30. The Complainant believed that they were talking about her and left. She went back to her work station, feeling pain on her chest, and she cried. Mr. Caruso came with Ms. Martinez (who often acted as his translator) to ask if she was "okay". Mr. Caruso testified that at this meeting they discussed finding out if the Complainant could do other jobs, other than working on the single-needle machine. Trans. Vol. 3, pp. 27-28. Mr. Caruso said that the meeting was "under control … I wouldn't let anyone laugh at anybody". Trans. Vol. 3, p. 28. Ms. Martinez testified that the purpose of the meeting was to discuss trying the Complainant on different machines in order to qualify her for a raise "because what she was getting paid what she was doing". Trans. Vol. 3, p. 7. Ms. Martinez testified that the meeting was civilized and that there was no laughing. Trans. Vol. 3, p. 7.

11. Mr. Caruso made the final decision on raises for Respondent Pyramid's employees. He testified that the primary factors on determining a raise were productivity and attendance. The amount paid to an employee also was based on the machine(s) used by the employee; some machines required more skill to operate and Respondent Pyramid paid more for the employees working those machines. Trans. Vol. 3, pp. 22-23. He testified that the pay rate for the factory workers ranged from $7.50 to $8.50 per hour. Trans. Vol. 2, p. 21.

12. Mr. Caruso testified that he was informed that the Complainant was breaking needles when she was tried on another machine which was more complicated than the single-needle machine. Trans. Vol. 1, pp. 104-105, Vol. 2, p. 5. Needles were expensive. Mr. Caruso had a certified mechanic come in to examine the machine and the mechanic told Mr. Caruso that there was nothing wrong with the machine. The Complainant also had trouble working with other models of machines, other than the single-needle machine. Mr. Caruso testified that they were seeking people who could run the more difficult machines, but that it "didn't work out" with the Complainant; it "wasn't a good mix". Trans. Vol. 2, pp. 5-6. Mr. Caruso testified that he told his secretary to give the Complainant a raise of $.50 per hour but it was not implemented. Mr. Caruso testified that he was not told that the raise was not implemented. Trans. Vol. 2, p. 6. Respondent Pyramid returned the Complainant to the single-needle machine.

13. The Complainant testified that the supervisors had requested pay raises for "Elba" who is Bolivian, "Arelis" who is Salvadoran, and "Juana", "Mercedes", "Paolina", "Betty", "Carlos", "Martha Garcia" and "Cesar" who are Guatemalan. Trans. Vol. 1, pp. 25-26. There was no testimony on the positions held by these individuals or what machines they operated. Payroll records for 2007 indicated that in 2007, Elva Rodriguez received a pay raise from $7.50 to $8.00 per hour; that Arely Campos received a pay raise from $7.50 to $8.00 per hour, that Betty Chacon did not receive a raise, that Carlos Pastor received a raise from $7.50 to $8.00 per hour, that Martha Garcia received a raise from $7.50 to $7.75 per hour and that Cesiah Vargas received a raise from $7.75 to $8.00 per hour.

14. Of the employees who received raises in 2007, after their raises, only 5 were making more than the $8.00 per hour that the Complainant was making: Ryder Kenny, position unknown, Henry Bamisile, a shipper, Respondent Mario Meletz, a supervisor, and Bayron and Ramiro Meletz, positions unknown.

15. On the payroll check date of October 19, 2007, the same day as the meeting between the Complainant, Mr. Caruso, Ms. Harris and Respondent Cruz, the Complainant was making less than 8 co-workers[3], the same as 10 co-workers and more than 14 co-workers.

16. The Complainant testified that her supervisors did not fix her machine quickly when it broke down, while they fixed the machines operated by those of Guatemalan ancestral origin more quickly. She also testified that her supervisors had "their own group", who got the best jobs and that if members of this group would have a rejected job, they would just discard it whereas when the Complainant's work got rejected, she would have to break the

[3] In calculating the differences in pay, the Commission excluded Mr. Caruso, and other employees when the testimony or exhibits indicated that they held positions other than sewer – Respondent Cruz, Respondent Meletz, Mr. Bamsile, a shipper, Richard Caruso, a salesperson, Steven Hartley, Purchasing Agent, Marilynn Martinez, Office Manager, Cristian Carvajal, office worker and Inocencia Taveres in Maintenance. Of the remaining employees, it is not clear how many were sewers and how many held other positions.

stitches and resew it. Trans. Vol. 1, p. 29.

17. After the meeting on October 23, 2007, the Complainant found her treatment by her supervisors to be "unbearable". Trans. Vol. 1, p. 30. She testified that the supervisors took jobs away from her and gave preference to the "group", workers who were mainly from Guatemala. She testified that the supervisors gave overtime to the "group", most of whom were from Guatemala. (Respondent Pyramid paid bonuses for extra work.) The Complainant did not receive overtime. She testified that the supervisors commented about her behind her back, and ignored her. Trans. Vol. 1, pp. 31-33. She testified that there were preferences for friends of "hers" (presumably Respondent Cruz) who were mostly from Guatemala. Trans. Vol. 1, p. 32.

18. In late November, 2007, the Complainant was hospitalized for high blood pressure and depression. After she was released from the hospital, the Complainant went on a leave of absence of over three months from Respondent Pyramid. She returned to work on March 11, 2008.

19. When the Complainant returned to work in March 2008, she believed that her supervisors were ignoring her and communicating more with other people than with the Complainant. The Complainant's work station had been given to another person. The Complainant's personal things had been thrown away and she could not find her radio.

20. While the Complainant was employed by Respondent Pyramid, she never received discipline and she was never placed on probation or suspended.

21. The Complainant was laid off from her employment on May 9, 2008. The letter from the Respondent said that she was laid off "due to lack of work". The letter also stated that Respondent Pyramid "will be calling people back when work increases". Complainant's Exhibit 1.

22. Respondent Pyramid laid off 11 employees in May 2008. Mr. Caruso testified that Respondent Pyramid laid off employees in May 2008 because they lost a contract for the open-end glasses case. Trans. Vol. 3, p. 30. The Complainant's primary work was with the open-end glasses case. Respondent Pyramid obtained new contracts but not for the open-end glasses case at that time. Starting in or around 2008, Respondent Pyramid became a subcontractor for the military, making the cases that hold goggles. Making the goggles case required utilizing a more difficult machine. Respondent Pyramid did not re-hire employees who did only single-needle machine work. It hired new people who could run the more complicated machines. When single-needle machine work was needed, Respondent Pyramid would assign sewers who could work on both the more complicated machines and the single-needle machines.

23. In 2008, the Respondent Pyramid laid off/terminated 16 people, none of whom was recalled in 2008. The Complainant was the second most senior employee who was laid off in 2008. Other employees who were laid off included those who had been hired in 2002, 2004 or

2006. Respondent Pyramid hired 20 new employees in 2008. Six of those newly-hired employees were laid off in 2008. Respondent Pyramid's work changed, they were making more contract cases that were more expensive and more complicated to make.

CONCLUSIONS OF LAW

The Complainant did not prove by a preponderance of the evidence that the Respondents discriminated against her with respect to terms and conditions of employment, harassment or termination of employment because of her ancestral origin or in retaliation for opposing unlawful employment practices.

DISCUSSION

I. EFFECT OF THE DEFAULT OF INDIVIDUAL RESPONDENTS

The individual Respondents, Respondent Cruz, Respondent Meletz and Respondent Vazquez were defaulted upon the motion of the Complainant because none of them filed an answer to the Complaint. Commission Procedural Rules and Regulations, Rule 8.06 provides in relevant part that: "A respondent who has not filed an answer, as provided in Rules 8.01 through 8.05 of the Commission Rules and Regulations shall be deemed in default and the hearing shall proceed on the evidence in support of the complaint". Even though the individual Respondents were defaulted, the Complainant must still prove that they discriminated in order to prove that they violated the FEPA.

II. THE COMPLAINANT DID NOT PROVE DISCRIMINATION IN COMPENSATION

The FEPA prohibits discrimination in compensation because of ancestral origin. R.I.G.L. Section 28-5-7(1)(ii). The Commission utilizes the decisions of the Rhode Island Supreme Court, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for evaluating evidence of discrimination. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the FEPA. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See* Newport Shipyard, Inc., 484 A.2d at 897-98." Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998) (hereafter referred to as Barros).

The Complainant is of Ecuadorian ancestral origin. The individual Respondents are of Guatemalan ancestral origin. In 2007, the Complainant requested a pay raise from the Respondents and did not receive it. In 2007, the individual Respondents requested pay raises for other employees, some of whom were Guatemalan, but did not request a pay raise for the Complainant. The Complainant was a good worker and had not received a pay raise since 2005.

To make a prima facie case of discrimination in compensation based on ancestral origin, a complainant must show: "(1) [s]he belongs to a protected class; (2) [s]he received low wages; (3) similarly situated comparators outside the protected class received higher compensation; and (4) [s]he was qualified to receive the higher wage". Tucker v. Fulton County, Ga., 470 Fed.Appx. 832, 835 (11th Cir 2012) (unpublished).

The Complainant testified that nine employees received pay raises, all but two of whom were of Guatemalan ancestral origin. She gave only first names for the employees involved, except for one employee for whom she gave a first and last name. Trans. Vol. 1, p. 25. The payroll records for 2007 show pay raises for four workers with first names the same or similar to the ones given by the Complainant and one for one worker for whom the Complainant gave a first and last name. Three were of Guatemalan ancestral origin, two were not. The Complainant made the same as or more than these individuals after they received their raises.

Mr. Caruso testified that the wages for factory workers ranged from $7.50 to $8.50 per hour. Trans. Vol. 2, p. 21. He made the final decision on raises and the primary factors were productivity and attendance. The amount paid to an employee also was based on the machine(s) used by the employee; some machines required more skill to operate and Respondent Pyramid paid more for the employees working those machines. The Complainant was working a single-needle machine that did not require the strength or skill needed to operate other machines. Respondent Pyramid is not a union shop and there is no evidence that it utilized seniority as a factor in compensation. There was no system of regular annual raises. The Complainant was making the same or more than 24 of her co-workers on the date that she and her daughter met with Mr. Caruso to complain about her rate of pay, October 19, 2007. Further, Mr. Caruso directed that the Complainant try to operate other machines which required more skill and were more valuable to the company so that he could justify a pay raise for her. The Complainant was not able to demonstrate that she could operate the other machines well. The Complainant did not produce evidence of an employee who operated only the single-needle machine, who was of Guatemalan ancestral origin, or of any other origin, who was paid more than she was. The Complainant did not establish a prima facie case of discrimination in compensation because she did not establish that she was paid less than similarly-situated co-workers. *See* Martinez v. W.W. Grainger, Inc., 664 F.3d 225 (8th Cir. 2011) (a Manager of Cuban ancestral origin had alleged discrimination in compensation based on national origin and race; summary judgment for the employer was upheld, plaintiff did not establish a pay disparity, he was paid more than other similarly-situated non-Cuban managers). *Compare* Onyiah v. St. Cloud State University, 684 F.3d 711 (8th Cir. 2012) (summary judgment for the employer upheld; Plaintiff, a man of Nigerian national origin, claimed discrimination in pay because of his race and national origin; the Court held that the Plaintiff did not prove that the reasons given for the lower pay were a pretext for discrimination, he did not prove the proffered reason factually incorrect and he did not compare himself with similarly-situated higher paid employees).

The Complainant further argues that she was denied overtime because of her ancestral origin. The testimony of the parties did not clearly delineate Respondent Pyramid's system for overtime or bonuses. It is unclear whether overtime/bonuses were based on objective criteria, favoritism,

nepotism[4] or preference for certain ancestral origins. The Complainant testified that the "group" received more overtime from the individual Respondents, but acknowledged that the "group" did not consist solely of workers of Guatemalan ancestral origin. Trans. Vol. 1, pp. 32-33. The Complainant did not establish that other single-needle machine sewers were granted overtime or bonuses. Without evidence of someone in a position comparable to the Complainant's position receiving overtime, the Commission finds that the Complainant did not establish discrimination against her in the awarding of overtime/bonuses.

The Complainant did not prove discrimination in compensation.

III. THE COMPLAINANT DID NOT PROVE HARASSMENT

The FEPA, in R.I.G.L. Section 28-5-7(1), prohibits discrimination in any matter related to employment because of ancestral origin. R.I.G.L. Section 28-5-7(6) provides that it is an unlawful employment practice:

> For any person, whether or not an employer, employment agency, labor organization, or employee, to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful employment practice, or to obstruct or prevent any person from complying with the provisions of this chapter or any order issued pursuant to this chapter, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful employment practice.

R.I.G.L. Section 28-5-7(5) makes retaliation unlawful. It is unlawful to discriminate in any matter against an individual because she has opposed an unlawful employment practice.

The standards for evaluating evidence of racial or ancestral origin harassment generally track the standards for sexual harassment. *See* Faragher v City of Boca Raton, 524 U.S. 775, 786 – 787, 141 L.Ed.2d 662, 118 S. Ct. 2275, 2283 (1998); AMTRAK v. Morgan, 536 U.S. 101, 116, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002); Boutros v. Canton Regional Transit Authority, 997 F.2d 198, 202 - 203 (6th Cir. 1993).

The Commission's Guidelines on Sexual Harassment, which track the Guidelines on Sexual Harassment of the U.S. Equal Employment Opportunity Commission (EEOC), 29 C.F.R. Chapter XIV, Part 1604, Section 1604.11, provide in part as follows:

> 3001. Sexual Harassment
>
> 3001(A) Harassment on the basis of sex is a violation of the Fair Employment

[4] The Complainant testified that relatives of Respondent Cruz and Respondent Meletz received overtime. Trans. Vol. 1, p. 33.

> Practices Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

This regulation, if adapted for ancestral origin harassment, would provide that conduct would be ancestral origin harassment if it were verbal or physical conduct relating to ancestral origin that had the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment.

To prove a hostile environment harassment claim, a complainant must show:

> (1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome … harassment; (3) that the harassment was based upon [a protected class status]; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that … objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for … liability has been established.

O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001) (citing Faragher, 524 U.S. at 787-89; Harris v. Forklift Sys., Inc., 510 U.S. 17, 20-23, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993), Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-73, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986)). *See also* Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008).

The Complainant is a member of a protected class – she is Ecuadorian. She did oppose what she believed to be unlawful employment practices. However, the Complainant did not prove that she was subjected to harassment that was so severe that it changed the conditions of her employment or created a hostile work environment.

The harassment of which the Complainant testified includes no ethnic slurs, no slighting remarks and no threats. With respect to two of the incidents mentioned, the Commission does not find them to be evidence of harassment. The Complainant testified that she went to a meeting in Mr. Caruso's office with Mr. Caruso, the individual Respondents and Marilynn Martinez and that they were speaking in English about her and laughing at her. Trans. Vol. 1, p. 30. Respondents' witnesses dispute that people were laughing about her at that meeting. Trans. Vol. 3, pp.7, 27, 28. Further, Respondents Cruz and Meletz need a translator to fully communicate with Mr. Caruso so it is unlikely that they were discussing the Complainant in English. As the Complainant also needs a translator to communicate with those who speak English, it seems likely that she misunderstood what people were saying. The Complainant also alleges harassment because her personal

belongings and radio were missing when she returned from her medical leave. There is no evidence that ties the disappearance of her belongings, after a three-month absence, to the Respondents. The Complainant did not persuade the Commission that these two incidents were evidence of harassment.

Other incidents described by the Complainant constitute some evidence of adverse conduct by the Respondents. The Complainant testified that the supervisors commented on her behind her back, and ignored her. Trans. Vol. 1, pp. 31-33. She testified that there were preferences for "the group"/ friends of the individual Respondents. Trans. Vol. 1, pp. 29, 32. She testified that when machines broke down, the machines of the employees of Guatemalan ancestral origin were fixed more quickly than hers and that employees of Guatemalan ancestral origin could throw out their mistakes while she had to break the stitches and resew the product. Trans. Vol. 1, p. 29. The Complainant also testified that when she returned from her leave, the individual Respondents ignored her and communicated more with other people. Her work station had been given to another employee. Trans. Vol. 1, p. 36. Taking all of these circumstances into account, there is insufficient evidence that the Respondents created a hostile work environment. *See* Harris v. Forklift Systems, 510 U.S. 17, 114 S. Ct. 367, 126 L.Ed2d 295 (1993) (remarks or conduct must be severe and pervasive to create a hostile work environment); Lauture v. Saint Agnes Hosp., 429 Fed.Appx. 300 (4th Cir. 2011) (unpublished) (summary judgment for the employer upheld; the Haitian-born plaintiff did not provide evidence of conduct severe enough to constitute harassment on the basis of her national origin; she claimed that her supervisors made an inaccurate accusation against her, used an ethnic word with respect to a dispute, failed to investigate her allegations of discrimination and stated that she was untrainable); Singh v. Town of Mount Pleasant, 172 Fed.Appx. 675, 681 (7th Cir. 2006) (unpublished) (summary judgment for employer upheld; the plaintiff did not provide sufficient evidence of a hostile work environment based on her national origin when she gave evidence that two questionable remarks relating to her national origin were made, that she was socially excluded in the office, that one of her supervisors lost his temper at times and that another supervisor investigated her time reports). The Complainant did not prove that the Respondents subjected her to severe or pervasive harassment because of her ancestral origin or in retaliation for her opposition to unlawful employment practices.

IV. THE COMPLAINANT DID NOT PROVE DISCRIMINATION BASED ON ANCESTRAL ORIGIN OR RETALIATION WITH RESPECT TO TERMINATION

THE STANDARDS FOR EVALUATING EVIDENCE OF DISCRIMINATION AND RETALIATION WITH RESPECT TO TERMINATION

There are two common methods for analyzing evidence of discrimination, one is denominated the "pretext method" and the other the "mixed motives method".

With respect to the pretext method, the Courts in Barros, Newport Shipyard v. Rhode Island Commission for Human Rights, 484 A.2d 893 (R.I. 1984), McDonnell Douglas v. Green, 411 U.S.

792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) (hereafter referred to as McDonnell Douglas), Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) (hereafter referred to as Hicks) set forth methods for analyzing evidence of discrimination. According to these methods, the complainant must first establish a prima facie case of discrimination. A complainant may establish a prima facie case of ancestral origin discrimination with respect to termination by proving that:

1. She was of a particular ancestral origin;
2. She was qualified for her position;
3. She was terminated;
4. She was replaced by persons of other ancestral origins and/or the employer continued to need a person to carry out the complainant's work.

Once a complainant has made a prima facie case of discrimination, the respondent must present a legitimate, non-discriminatory reason for its actions in order to negate the prima facie case of discrimination.

> Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the *prima facie* case - *i.e.*, the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, non-discriminatory reason". Burdine, 450 U.S. at 254. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. *Id*. at 254-255, and n.8.

Hicks, *supra*, 509 U.S. at 506 – 507, 113 S. Ct. at 2747, 125 L.Ed.2d at 416. [Emphasis in original.]

Once a respondent has presented a legitimate, non-discriminatory reason for its actions, a complainant may prove discrimination by proving that the reason given is a pretext for discrimination. The complainant may present direct or indirect evidence that the respondent was motivated by discrimination (such as evidence that the reasons presented by the respondent are not credible). Under Hicks, the finder of fact, in this case the Commission, must find that the respondent's actions were motivated by discrimination. "It is not enough to disbelieve the employer; the factfinder must believe plaintiff's explanation of intentional discrimination." Hicks, *supra*, 509 U.S. at 519, 113 S. Ct. at 2754, 125 L.Ed.2d at 424. [Emphases in original.] The "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination" but it does not compel such a finding. Hicks, *supra*, 509 U.S. at 511, 113 S. Ct. at 2749, 125 L.Ed.2d at 417. *See also* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000).

The other method for analyzing evidence of discrimination is the mixed motives method. The FEPA specifically provides that a plaintiff may prove discrimination by proving that discrimination

was a motivating factor for the respondent's actions, even though the decision was also motivated by other lawful factors. R.I.G.L. Section 28-5-7.3 provides that:

> An unlawful employment practice may be established in an action or proceeding under this chapter when the complainant demonstrates that race, color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin was a motivating factor for any employment practice, even though the practice was also motivated by other factors. Nothing contained in this section shall be construed as requiring direct evidence of unlawful intent or as limiting the methods of proof of unlawful employment practices under § 28-5-7.

Title VII of the Civil Rights Act of 1964 contains similar language (42 U.S.C. Section 2000e-2(m)) which was interpreted in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (hereafter referred to as Desert Palace). Both R.I.G.L. Section 28-5-7.3 and Desert Palace provide that a plaintiff does not need direct evidence to prove that discrimination was a motivating factor. A complainant may use circumstantial evidence to prove that discrimination was a motivating factor. Desert Palace, 539 U.S. at 99-101.

To evaluate whether a complainant has proved discrimination under R.I.G.L. Section 28-5-7.3, the Commission has utilized a "modified" McDonnell Douglas approach.[5] *See* Bagnall v. UPN 28 TV, WLWC, Paramount Pictures, Commission File No. 01 EAG 069 (2005) Selvidio v. TGI Fridays (Carlson Restaurants Worldwide), Commission File No. 07 EMD 142 (2011). A modified McDonnell Douglas approach, continues to use the first two "prongs" of the analysis – i.e., that the plaintiff must make a prima facie case of discrimination and the defendant must then proffer a legitimate, non-discriminatory reason for its actions, and then modifies the third "prong".

> This Circuit has adopted use of a "modified McDonnell Douglas approach" in cases where the mixed-motive analysis may apply. *See* Rachid, 376 F.3d at 312. After the plaintiff has met his four-element *prima facie* case and the defendant has responded with a legitimate nondiscriminatory reason for the adverse employment action:
>
> > [T]he plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct,

[5] The Commission does not intend to foreclose other methods of analysis that might be appropriate in a particular case to prove discrimination. For example, there may be cases in which a complainant who could not present sufficient evidence to establish a prima facie case of discrimination could still establish that discrimination was a motivating factor in the employer's decision. In most cases, however, the modified McDonnell Douglas approach provides a useful method of analysis.

> and another motivating factor is the plaintiff's protected characteristic. (mixed-motive[s] alternative). *Id.* (internal quotation marks and citations omitted).

Keelan v. Majesco Software, Inc., 407 F.3d 332, 341 (5th Cir. 2005).[6]

With respect to evidence of retaliation[7], the standards are very similar. Federal cases interpreting evidence in retaliation cases generally use the method of proof used to evaluate evidence of discrimination. *See* Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2nd Cir. 1998) (hereafter referred to as Quinn). Quinn sets forth the standards used to evaluate evidence in retaliation cases. The prima facie case for proving unlawful retaliation can be made by demonstrating that:

1) The complainant engaged in protected activity (such as opposing unlawful employment practices) known to the respondent;
2) The respondent took adverse action against the complainant;
3) There is a causal link between the protected activity and the adverse action.

Accord, Velez v. Janssen Ortho, LLC, 467 F.3d 802 (1st Cir. 2006). The complainant's "prima facie burden [in a retaliation case] is not onerous." Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996) (hereafter referred to as Fennell). Once a complainant has made a prima facie case of retaliation, the respondent has the burden of presenting a legitimate, non-discriminatory reason for its actions. Once a respondent has presented a legitimate, non-discriminatory reason for its actions, the Commission must determine whether the complainant proved that the reason given by the respondent was a pretext for retaliation or that retaliation was a motivating factor for the respondent's actions. Fennell.

THE COMPLAINANT MADE A PRIMA FACIE CASE OF ANCESTRAL ORIGIN DISCRIMINATION AND RETALIATION WITH RESPECT TO HER TERMINATION

Applying the standards listed above, the Complainant made a prima facie case of ancestral origin discrimination and retaliation.

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[6] In Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009), the Court held that the essential question under any method of analysis is whether the plaintiffs:

> "present enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden type of bias." Hillstrom, 354 F.3d at 31 (discussing the "interaction between Desert Palace and McDonnell Douglas").

[7] R.I.G.L. Section 28-5-7(5) prohibits discrimination against an individual because she has opposed an unlawful employment practice.

With respect to ancestral origin discrimination, the Complainant proved that she was of Ecuadorian ancestral origin, she was qualified for her position, she was terminated and Respondent Pyramid still needed employees to run the single-needle machine.

With respect to retaliation, the Commission finds that the Complainant engaged in protected activity known to the Respondents. She informed Mr. Caruso that she believed that she was being denied a pay raise because she was not Guatemalan.[8] Respondent Pyramid took adverse action against the Complainant, it terminated her employment. While the termination took place over six months after her October 19, 2007 meeting with Mr. Caruso, she was on a leave of absence for over three of those months and was terminated two months after she returned from leave. The proximity of her termination to her opposition to unlawful employment practices is sufficient, for purposes of proof of a prima facie case of retaliation, to establish a causal connection.

RESPONDENT PYRAMID PRESENTED LEGITIMATE, NON-DISCRIMINATORY REASONS FOR ITS ACTIONS

Respondent Pyramid presented legitimate, non-discriminatory reasons for its actions. Mr. Caruso testified that Respondent Pyramid laid off employees in May 2008 because the company had lost a contract for the open-end glass case, which was the case on which the Complainant primarily worked. Vol. 3, p. 30. Respondent Pyramid's business was changing; they were receiving contracts for products which required work on the more difficult machines. Trans. Vol. 3, pp. 31, 33. Mr. Caruso testified that he had been informed that the Complainant could not satisfactorily work on the more difficult machines. Trans. Vol. 2, pp. 5-6. It is Respondent Pyramid's contention, in essence, that the type of work it did was changing and Respondent Pyramid needed employees with more skill than those who worked only the single-needle machine.

THE COMPLAINANT DID NOT PROVE ANCESTRAL ORIGIN DISCRIMINATION OR RETALIATION WAS A FACTOR IN HER TERMINATION

The Complainant did not prove that the reasons given by the Respondent Pyramid for its actions constituted a pretext for ancestral origin discrimination or retaliation, nor did she prove that ancestral origin discrimination or retaliation was <u>one</u> of the factors that caused Respondent Pyramid to terminate her.

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[8] An employee is protected against retaliation as long as the employee reasonably believes that discrimination has occurred and "communicates that belief to his employer in good faith". <u>Higgins v. New Balance Athletic Shoe, Inc.</u>, 194 F.3d 252, 262 (1st Cir. 1999). The Commission finds that the Complainant reasonably believed that the Respondents had discriminated against her and that she brought that issue to her employer in good faith.

The Commission found Mr. Caruso credible in his explanation of the business need for laying off workers because of loss of the contract that provided most of the work for single-needle machine sewers. The Complainant was not the sole employee laid off; ten other employees were also laid off. While some of those laid off were recent hires, others had worked for Respondent Pyramid for two to six years. The Complainant did not provide evidence that employees who could operate only single-needle machines were retained. The Complainant did not prove that the reasons given by Respondent Pyramid for her termination were a pretext for ancestral origin discrimination or retaliation.

The Complainant did not prove that her ancestral origin was one of the motivating factors in her termination. The Complainant testified that before 2007, with respect to ancestral origin, her treatment was fine. Trans. Vol. 1, p. 28. The Complainant did not present any evidence that would explain why the Respondents would discriminate against her ancestral origin in 2007, when they had not done so before that.

The Complainant did not prove that her opposition to unfair employment practices was one of the motivating factors in her termination. While the 6½ months between her complaint of discrimination to Mr. Caruso to her termination was short enough to make a prima facie case of causation of retaliation, the inference of causation is overcome by the evidence in this case. After her complaint, Respondent Pyramid took steps to see if she could operate the more difficult machines in order to justify a pay increase. Respondent Pyramid gave her a three-month leave of absence and employed her for two months after she returned. The Complainant did not persuade the Commission that Respondent Pyramid was motivated by retaliation when it terminated her employment. *See* Jajeh v. County of Cook, 678 F.3d 560 (7th Cir. 2012) (with respect to Plaintiff's claim of retaliation, summary judgment for employer was upheld with respect to Plaintiff's layoff; there was no suspicious timing as the Plaintiff's EEOC complaint was five months before, there was no evidence that similarly-situated employees were treated differently, there was no evidence that the employer's given reason of a need to reduce costs was pretextual in that others besides the Plaintiff were laid off, seniority was not used as a primary factor for determining whom to layoff, and the Plaintiff did not provide sufficient evidence that the employer was motivated by retaliation); Turner v. NYU Hospitals Center, 470 Fed.Appx. 20, 23 (2nd Cir. 2012) (unpublished) (summary judgment for employer upheld; Plaintiff did not produce sufficient evidence that the employer's evidence that it laid off the Plaintiff for budgetary reasons was a pretext for national origin discrimination or retaliation); Langlie v. Onan Corp., 192 F.3d 1137 (8th Cir. 1999) (jury verdict for employer affirmed, there was sufficient evidence that the employer, in implementing its reduction in force, terminated the Plaintiff based on its evaluation of his department and concluding, among other factors, that the Plaintiff's projects were substantially completed and that he lacked the skills necessary for future projects); Mackentire v. Ricoh Corp., 995 F.2d 232, 1993 WL 188360 (Table), p. 1 (9th Cir. 1993) (unpublished) (summary judgment for employer upheld, employer provided evidence that it laid off the Plaintiff for business reasons because of financial losses and that it reordered a division to "de-emphasize the product for which [the Plaintiff] was most responsible" and the Plaintiff did not provide evidence that discrimination was the real reason for his layoff).

Taking all of the evidence into account, the Commission finds that the Complainant did not

establish that ancestral origin discrimination or retaliation for opposing unlawful employment practices was a factor in her termination.

THE COMPLAINANT DID NOT PROVE THAT THE INDIVIDUAL RESPONDENTS COMMITTED UNLAWFUL EMPLOYMENT PRACTICES

The FEPA provides that individuals may be liable for unlawful employment practices under R.I.G.L. Section 28-5-7(6), which states in relevant part that it is an unlawful employment practice:

> For any person, whether or not an employer, employment agency, labor organization, or employee, to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful employment practice, … or to attempt directly or indirectly to commit any act declared by this section to be an unlawful employment practice.

Since the Commission has found that Respondent Pyramid did not commit an unlawful employment practice with respect to the Complainant's termination, the individual Respondents cannot be liable for aiding, abetting, compelling or coercing an unlawful employment practice. Further, the Complainant has not presented evidence that the individual Respondents incited an unlawful employment practice or attempted, directly or indirectly, to commit an unlawful employment practice with respect to her termination. Mr. Caruso's testimony was that he made the decisions on terminations and that the supervisors were not allowed to fire employees. Trans. Vol. 3, pp. 30, 55, 66. While the individual Respondents provided information to Mr. Caruso about employees, there is no evidence that the individual Respondents recommended that the Complainant be laid off. Trans. Vol. 2, p. 91, 99 and Trans. *passim*. The Complainant did not prove that the individual Respondents discriminated against her with respect to her termination because of her ancestral origin or in retaliation for opposing unlawful employment practices.

ORDER

Having reviewed the evidence presented, the Commission, with the authority granted it under R.I.G.L. Section 28-5-25, finds that the Complainant failed to prove the allegations of the complaint and hereby dismisses the complaint with prejudice.

Entered this [11th] day of [December], 2012

_____/S/_____

John B. Susa
Hearing Officer

I have read the record and concur in the judgment.

_____/S/_____

Nancy Kolman Ventrone
Commissioner

OPINION OF COMMISSIONER CAMILLE VELLA-WILKINSON, JOINING IN PART AND DISSENTING IN PART

I join the Commission's opinion except with respect to the finding that Respondent Pyramid, Respondent Cruz and Respondent Meletz did not discriminate against the Complainant with respect to compensation because of her ancestral origin.

The testimony was undisputed that the Complainant did not receive a raise since 2005 and that the Complainant's supervisors, Respondent Cruz and Respondent Meletz, did not recommend that she receive a raise. There was no explanation from them as to why they did not recommend

her for a raise. Further, I credited the Complainant's unrebutted testimony that Respondent Cruz and Meletz did not fix her machine in a timely manner yet fixed the machines of Guatemalan workers in a timely manner. They required that she re-do mistaken work while allowing Guatemalan workers to throw out mistakes. These actions would affect the Complainant's production record and her ability to earn bonuses. It is my conclusion that the Complainant proved that Respondents Cruz, Meletz and Pyramid discriminated against her with respect to compensation because of her ancestral origin in violation of the FEPA.

_____/S/_____ [12/11/12]_____

Camille Vella-Wilkinson Date
Commissioner