STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: June 27, 2019]

MARTHA D. BENITEZ	:	
	:	
v.	:	**C.A. No. PC 2012-6637**
	:	
JOHN B. SUSA, NANCY KOLMAN VENTRONE, and CAMILLE VELLA WILKINSON, in Their Capacities as Commissioners of the Rhode Island Commission for Human Rights;	:	
MICHAEL D. EVORA, in His Capacity as Executive Director for the Rhode Island Commission for Human Rights,	:	
PYRAMID CASE COMPANY, REYNAR VAZQUEZ, BLANCA CRUZ, and MARIO MELETZ	:	

DECISION

VOGEL, J. Martha D. Benitez (Benitez or Appellant) brings this appeal from a December 11, 2012 decision and order of the Rhode Island Commission for Human Rights (the Commission) dismissing her complaint. This appeal was first assigned to this Judge for Decision on March 19, 2019, after the parties finally submitted their briefs.[1] In 2012, the Commission found that Benitez

[1] The Court notes that this appeal was filed on December 28, 2012. The record was transmitted on February 14, 2013. By stipulation filed with the Court on March 13, 2013, the following briefing schedule was set. Appellant was required to file her brief by April 8, 2013, and the Commission was to file its response brief by May 8, 2013. There was no further activity on this file for five years, until April 27, 2018, when Pyramid filed a motion to dismiss the appeal for lack of prosecution. Another Justice of this Court denied the motion on June 29, 2018, and on July 25, 2018, the Court set a new briefing schedule. Under the law of the case doctrine and in the absence of an expanded record, '"after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling.'" *Lynch v. Spirit Rent-A-Car, Inc.*, 965 A.2d 417, 424 (R.I. 2009) (quoting *Chavers v. Fleet Bank (RI), N.A.*, 844 A.2d 666, 677 (R.I. 2004) (further

failed to prove a violation of the Fair Employment Practices Act, (FEPA), G.L. 1956 § 28-5-7. This Court exercises jurisdiction over this matter pursuant to G.L. 1956 § 42-35-15(g). For the reasons set forth herein, the Court affirms the decision of the Commission.

I

Facts and Travel

Martha D. Benitez was born in Ecuador and speaks only Spanish. (Hr'g Tr. at 16-17, Feb. 14, 2012 (Vol. I).) She came to the United States in 1987 and began working at Pyramid Case Company (Pyramid) on March 23, 2003, where she remained continuously employed until temporarily leaving work on sick leave in November, 2007. *Id.* at 17, 33-34. She returned to work on March 11, 2008, and remained employed until May 9, 2008, when she was laid off allegedly due to lack of work. *Id.* at 34, 28. Her starting wage was $7.00 per hour which increased to $8.00 per hour by the time she left her employment in 2008. *Id.* at 18.

The firm employed workers from various national origins, including Puerto Rico, Guatemala, El Salvador, Bolivia, Honduras, and Ecuador. (*Id.* at 19, 70; Hr'g Tr. at 79, 104, Feb. 15, 2012 (Vol. II); Hr'g Tr. at 9, Feb. 16, 2012 (Vol. III).) By all accounts, Benitez was a good worker and operated a single needle sewing machine for the company. (Hr'g Tr. Vol. II at 89-90, 109.) Pyramid manufactured eye glass cases to be supplied to optical companies. (Hr'g Tr. Vol. I at 84-86; Hr'g Tr. Vol. III at 18.) Benitez never qualified to work on more complex machinery which would have required the worker to demonstrate greater strength and skill to operate. (Hr'g Tr. Vol. II at 7-8, 89-90, 109, 119; Hr'g Tr. Vol. III at 29.)

citation omitted)). For that reason, this matter remains before the Court over seven years after the appeal was taken.

At all times material hereto, Blanca Cruz and Mario Meletz supervised Benitez. (Hr'g Tr. Vol. I at 19-20; Hr'g Tr. Vol. III at 12.) Reynar Vazquez maintained the company machines and may have had managerial responsibilities at Pyramid. (Hr'g Tr. Vol. I at 19-20; Hr'g Tr. Vol. II at 66, 75.) Vazquez, Cruz, and Meletz are of Guatemalan origin.

Three events allegedly occurred in 2007 pertinent to Benitez's allegations against her former employer. These events predated Appellant's sick leave. First, in August 2007, Benitez purportedly asked Cruz, Meletz, and Vazquez for a raise in pay. (Hr'g Tr. Vol. I at 21.) Apparently, none of those individuals passed her request on to her employer, Joseph Caruso, the owner of the company. *Id.* at 24, 74. However, it does appear that Cruz and Meletz did communicate similar requests to him on behalf of other employees. *Id.* On October 19, 2007, Benitez and her daughter, Paola Harris (Harris), who assisted her with English translation and sometimes communicated on her behalf, met with Caruso. *Id.* at 23-24, 73. He told Benitez that he had not received her request for a pay increase, to which she responded that the failure to pass along her request was due to discrimination against her. (*Id.* at 28, 75; Hr'g Tr. Vol. III at 26, 44.) She claimed that the supervisors favored Guatemalans, and she was Ecuadorian. (Hr'g Tr. Vol. I at 24-26, 28, 75.) Caruso brought Cruz into the meeting, and he asked her about Benitez's job performance, which Cruz acknowledged was good. *Id.* at 26.

According to Benitez, Caruso later spoke to Harris and promised that her mother would receive a $1 wage increase, and that she also would be given an opportunity to work on more complex machines. *Id.* at 27; 52-53, 76-77. For his part, Caruso maintains that the promised raise was fifty cents, not a dollar. (Hr'g Tr. Vol. II at 6-7.) Caruso claims that he communicated the pay raise to his secretary, Marilyn Martinez (Martinez), but apparently, the raise was not processed. *Id.* at 7. Benitez did not receive the increase in pay. *Id.*

On October 23, 2007, Benitez claims that she was called to Caruso's office where she found Caruso, Vazquez, Cruz, Meletz, and Martinez laughing and speaking in English. (Hr'g Tr. Vol. I at 29-30.) She claims that she thought that their comments and humor were directed at her, and she left the meeting upset. *Id.* at 30-31.

Benitez continued working at Pyramid until she took sick leave in November 2007. *Id.* at 33-34. When she returned on March 11, 2008, her particular station was occupied by someone else, and she claims that she was unable to find personal items she had left at work when she became ill. *Id.* at 34, 36. Apparently, she was given a different work station and continued working on a single needle machine until May 9, 2008, when she received a letter from the company stating that she was being laid off due to lack of work as of May 12, 2008. *Id.* at 38-40; *see also* Complainant's Ex. 1.

On October 3, 2008, Benitez filed a charge with the Commission against Pyramid, Cruz, Meletz, and Vazquez, alleging discriminatory terms and conditions of employment, harassment and termination based upon her ancestral origin, and retaliation for opposing unlawful employment practices in violation of § 28-5-7. (Compl. ¶ 3).[2] On February 23, 2009, she amended the charge against the respondents, raising the same allegations. *Id.* The Preliminary Investigating Commissioner found probable cause that Pyramid, Cruz, Meletz, and Vazquez violated § 28-5-7, as alleged. *Id.*

On October 1, 2010, the Commission issued a Notice of Hearing and Complaint. The hearing on the Complaint was conducted on February 14, 15, and 16, 2012. The following persons provided testimony at the hearing: Benitez, her daughter, Harris; two former co-workers who

[2] The record transmitted by the RICHR to this Court did not include any documents submitted prior to the October 1, 2010 Notice of Hearing and Complaint.

received similar termination letters; and Caruso, Martinez, Meletz, and Cruz. The Commission also received numerous exhibits.

At the hearing, Benitez appeared as the first witness. She testified that she had worked as a sewer at Pyramid sewing boxes, pockets, Velcro, and zippers. (Hr'g Tr. Vol. I at 18.) Benitez also testified that although she had not received a pay raise in three years, some of her co-workers had received raises. *Id* at 22. She stated that she was aware that Vazquez, Cruz, and Meletz had put in for pay raises for her co-workers, so in August 2007, she asked them for a raise. *Id.* at 21. When Benitez did not receive an immediate response, she repeated her request several times. *Id.* at 22. They informed her that Caruso was away on a trip. *Id.*

Benitez later decided that she should meet with Caruso to discuss a pay raise, and she asked her daughter, Harris, to help with translation. *Id* at 23-24. On October 19, 2007, Benitez, Harris, and Caruso met to discuss Benitez's raise. *Id.* at 24-28. It was at this meeting that Benitez discovered that her supervisors had not forwarded her previous requests to Caruso. *Id.* at 24. According to Benitez, the supervisors had forwarded pay-raise requests from eight of her co-workers, only two of whom were not Guatemalan. *Id.* at 25.

Benitez testified that she told Caruso that she believed she did not receive a raise because she was Ecuadorian and not Guatemalan. *Id.* at 28. Benitez further testified that her supervisors treated her differently by not fixing her machine in a timely manner after it broke, even though they would timely fix the machines of her Guatemalan co-workers. *Id.* at 29. She also stated that Guatemalan employees would get the "best jobs" and that any mistakes that they made would be discarded; whereas, she would have to "break the stitches and resew it again." *Id.* It is unclear from her testimony, however, whether Benitez informed Caruso about this purported differential treatment.

Caruso summoned the supervisors to his office to make inquiries about Benitez's work performance, but Cruz was the only one to appear. *Id.* at 26. Cruz told Caruso that Benitez "was a good worker." *Id.* At that point, Benitez returned to her work station, while Harris remained behind to speak to Caruso. *Id.*

Benitez testified that Caruso told Harris that he would check her mother's employment file. *Id*. at 27. She stated that Harris informed Caruso that her mother "was a very serious person at work and always on time . . . ." *Id*. Caruso then allegedly told Harris that he would give Benitez a one dollar raise "under the condition that I [Benitez] wouldn't tell anything to any of my co-workers, but for that they were going to change me to another machine." *Id.* Benitez testified that her understanding was that Caruso would have her try to work on another machine so that she could make more money, but that they never put her on a different machine. *Id.* at 52-53. Benitez had never graduated from the single needle machine for which she had been hired to operate. *See* 2003 Appl. for Employment.

Benitez testified that four days later, on October 23, 2007, Vazquez instructed Benitez to go to Caruso's office for a meeting. *Id.* at 29. She testified that when she arrived, Cruz, Meletz, Vazquez, Martinez, and Caruso already were present, and that they were speaking in English and laughing. *Id*. at 30. Benitez stated that she became very upset because she did not understand what they were saying, but that she "kn[e]w they were talking about [her] at that time." *Id.* Benitez left the room and returned to her work station. *Id.* According to Benitez, Caruso and Martinez then came to her work station to inquire about her wellbeing, and that "[t]hey were very upset because I had brought in my daughter." *Id.*

Benitez testified that her supervisors began to treat her differently after the October 19, 2007 meeting by talking "behind [her] back" and giving overtime to workers who mostly were

from Guatemala. *Id.* at 32-33. On November 23, 2007, Benitez was hospitalized, and did not return to her job until March 11, 2008, at which time another employee was occupying her work station and she discovered that her personal belongings were missing. *Id.* at 34-36. Benitez testified that she always performed her job in an excellent manner, that she always was punctual, and that she never had received a probation or suspension from work. *Id.* at 37-38.

On May 9, 2008, Pyramid laid off Benitez due to an alleged lack of work. *Id.* at 38. Benitez testified that she had not noticed any slowdown in work at the time. *Id.* at 40. She also testified that despite her continuous efforts to find a new job (as of the date of her testimony during the February 14, 2012 hearing), she had not succeeded in doing so, and that she suffers from depression following her separation from Pyramid. *Id.* at 40-46. At the February 14, 2012 hearing, Benitez stated that she was then taking the medication Lexapro to treat her symptoms of depression. *Id.* at 45.

Benitez's daughter, Harris, testified next. She stated that she arrived at Pyramid without an appointment to meet with Caruso on October 19, 2007. *Id.* at 72-73, 79. She did so because she wanted to serve as a translator at a meeting between Benitez and Caruso. *Id.* at 73-74. Harris testified that Caruso expressed surprise when he learned that Benitez previously had requested a pay raise. *Id.* at 74. According to Harris, Caruso stated that the supervisors had requested raises for "Juana, Carlos, Elba, Arelis, Martha Garcia, [and] Betty[,]" and that "[t]hey were the only workers that received a raise." *Id.* She stated that according to her mother, four of those workers were Guatemalan, one was from Bolivia, and one was from "Salvador." *Id.* Harris testified that Benitez told Caruso that she believed she was not given a raise because she was from Ecuador rather than from Guatemala. *Id.* at 75, 77.

Harris then stated that when Cruz joined the meeting, Cruz reported that Benitez was a good worker. *Id* at 75. Harris also stated that Caruso said that he would review Benitez's employment file, and that he later called Harris to inform her that "he agreed to give a $1 raise to [her] mother and [Benitez] need[ed] to be quiet about the raise and she would be working on different machine." *Id.* at 77.

Caruso testified that he has owned the forty-year-old Pyramid Case Company since 1989. *Id.* at 83-84. Traditionally, the company only made cases for optical companies for their designer glasses; however, it since has expanded into contract work such as making bullet proof vests for the government. *Id.* at 84. Caruso testified that during the time period relevant to this case, Pyramid had a lot of low-end contract work. *Id.* at 85. He stated that factory employees make between $7.50 and $8.50 per hour, and that Benitez was making $8 when she was laid off. (Hr'g Tr. Vol. II at 17-21, 30.) He further stated that Benitez worked on the single needle machine making the basic case. (Hr'g Tr. Vol. I at 89; Hr'g Tr. Vol. III at 24.) Caruso said that the basic case required great volume in order to render it a viable, worthwhile product to make. (Hr'g Tr. Vol. III at 24.) He also stated that Vazquez was not on the payroll, and that Vazquez provided maintenance work as an independent contractor. (Hr'g Tr. Vol I at 93; Hr'g Tr. Vol. III at 27.)

Caruso testified that Benitez told him at the October 19, 2007 meeting that her supervisors had discriminated against her based on her national origin. (Hr'g Tr. Vol. III at 44.) He denied considering a person's background in making a hiring decision, because in his opinion, all his employees are "Americans[.]" *Id.* at 33; *see also id.* at 53 ("I made it a point, I always looked at them, you know, the same. They're Americans, they have a job to do.").

Caruso also testified that the October 23, 2007 meeting was "cordial" and "professional." (Hr'g Tr. Vol. III at 28.) He stated that the meeting was "under control . . . I wouldn't let anyone

laugh at anybody . . . We were trying to figure out if she can do some other jobs." *Id.* Caruso further testified that when he asked Meletz and Cruz at the meeting whether they were "discriminating against [Benitez] because she's from Ecuador," they denied the accusation. (Hr'g Tr. Vol. III at 45.) He said Vazquez also denied the same question. *Id.* Caruso admitted that he agreed to give Benitez a pay raise, but he disputed the amount, testifying that he agreed to a fifty-cent raise rather than one dollar. (Hr'g Tr. Vol. II at 6-7.) He stated that he told his secretary to give Benitez a fifty-cent raise, but that "it didn't happen" and "that was a mistake." *Id.* at 7.

Caruso also testified that although Benitez met his legitimate expectations with respect to the particular glasses case that she made, she was unable to run "other machines," because she would break the needles. (Hr'g Tr. Vol. I at 88, 104-105; Hr'g Tr. Vol. II at 5-6; Hr'g Tr. Vol. III at 29.) Thus, he testified when he gave her an opportunity to work on more complex machines, the effort failed. She could not operate them successfully. (Hr'g Tr. Vol. II at 7-8; Hr'g Tr. Vol. III at 29.) Caruso testified that the company lost a contract to manufacture the type of case that utilized a single needle machine—the same open end case that Benitez made on her machine—and that this led to a "lack of work." (Hr'g Tr. Vol. I at 107-111; Hr'g Tr. Vol. III at 30, 39-42.)

As a result, he testified that "[eleven] employees were terminated around the same time as Ms. Benitez" because of "lack of work. Because of the work they did." (Hr'g Tr. Vol. II at 45.) He further testified that Pyramid's business was shifting during this period, and that it was producing products which required a more "sophisticated" type sewing that Benitez was unable to perform. (Hr'g Tr. Vol. I at 122-123; *see also* Hr'g Tr. Vol. III at 31, 50, 61-62.)

Caruso stated that Pyramid did not recall any of the eleven laid-off workers back to work; however, it did hire nine new workers "a few months later" because work increased "in other areas." (Hr'g Tr. Vol. II at 46.) Caruso further stated that he has to keep his "workforce very

lean[,]" and that he only hires people with the requisite skills needed by the company. (Hr'g Tr. Vol. I at 130, 132.) Caruso acknowledged that Pyramid still manufactures the basic case that Benitez was capable of sewing; however, because it lost most of that business to a competitor, Caruso assigns current employees who also can "run the other machines" to manufacture the basic case because such work does not "justify a full-time employee." (Hr'g Tr. Vol. I at 124-25, 128.) Caruso "did not rehire anyone to do single needle work." (Hr'g Tr. Vol. I at 125.)

Former Pyramid employee Vanessa Echevarria testified at the hearing.[3] (Hr'g Tr. Vol. II at 61.) She stated that Vazquez hired her and was her supervisor, and that he also performed other tasks such as fixing machines. *Id.* at 63-66. Echevarria admitted that she did not know Cruz, and only had limited interactions with Meletz. *Id.* at 70, 72-73. She testified that she believed Pyramid laid her off because "they weren't satisfied with my job anymore[;]" however, she said that her termination letter indicated that the reason for her lay off was because Pyramid "didn't have a lot of work." *Id.* at 67-68.

Ruth Hawksley, a Bolivian, testified that she is a former Pyramid employee who held the position of machine operator until she was laid off due to lack of work. *Id.* at 73-75, 81. She testified that Cruz and Meletz were her supervisors, and that she did not report to Vazquez, who apparently held himself out as a manager. *Id.* at 76-77. Hawksley testified that she believed that Cruz, Meletz, and Vazquez gave preferential treatment to Guatemalans when assigning overtime work because "[t]he ones not from Guatemala they would send us home." *Id.* at 78-79. However, when asked if she was claiming that she had been denied overtime due to her ethnicity, Hawksley

[3] The parties stipulated that Echevarria commenced her employment on November 27, 2007 and that her last week with the company ended on April 26, 2008. (Hr'g Tr. Vol. II at 63.)

responded "No." *Id.* at 83. She also testified that she had never observed Cruz, Meletz, or Vazquez mistreat Benitez. *Id.* at 79.

Hawksley stated that on October 23, 2007, she saw Benitez enter the office along with Vazquez, and that shortly thereafter, Cruz and Meletz also entered the office. *Id.* at 80; *see also id.* at 85 (stating "the lady went in there, and then after that the other people went in"). Hawksley further stated that when Benitez returned to the factory floor, "she was bad, she was shaking, red, her eyes very, very reddish . . . [s]he couldn't talk to me she was so bad." *Id.* at 80.

Cruz, a native of Guatemala, testified next. *Id.* at 87, 98. She stated that during the time period in question, she worked as a supervisor. *Id.* at 88. Cruz testified that Pyramid produced three bags during the relevant time period, but that Benitez only sewed the basic single needle case and "wouldn't" do other types of sewing. *Id.* at 89-90. Cruz stated that Pyramid now produces fewer basic cases than it did before. *Id.* at 93, 100.

Cruz testified that she encouraged Benitez to try to learn to use other machines, but that Benitez was unable to productively use those other machines. *Id.* at 92. She testified that she is not involved in hiring, firing, giving pay raises, or giving overtime work—Caruso makes those decisions based on an employee's worksheets—and that had she seen or heard of anyone harassing Benitez, she would have reported it to Caruso. *Id.* at 91, 94-95.

On cross-examination Cruz testified that Caruso would ask both her and Meletz to give him feedback about an employee's performance, and that he would rely on their responses in making decisions. *Id.* at 97. However, Caruso would make the ultimate decision. *Id.* at 98. Cruz also testified that she did not recommend that Caruso lay off Benitez, and that Benitez never reported to Cruz that she had been mistreated on the basis of ethnic origin. *Id.* at 99, 105.

Supervisor Meletz took the stand next. *Id.* at 106. He testified that Benitez worked the single needle machine to make basic cases. *Id.* at 107. He then discussed the different sewing machines that employees use at Pyramid. *Id.* at 108-113. For example, some machines require more strength to operate. *Id.* at 109. Meletz testified that Pyramid does very little straight stitching anymore; instead, it has expanded its line to include gloves and hard bags. *Id.* at 111.

Meletz further testified that he never complained to Caruso about any worker, never discouraged Caruso from giving a raise to any employee, and that if he had seen anyone harassing Benitez, he would have addressed the issue. *Id.* at 113. Meletz stated that he does not assign overtime in the sewing department, and that he has never received any complaints about him giving preferential treatment to Guatemalans. *Id.* at 114. Meletz testified that Caruso would rely upon his recommendation concerning pay raises, but that usually he recommends that an employee directly ask Caruso to give him or her a pay raise. *Id.* at 121, 123.

Pyramid's office manager and Caruso's personal secretary, Martinez, also testified. (Hr'g Tr. Vol. III at 4.) Martinez, who is bi-lingual, testified that she attended the October 23, 2007 meeting as a translator. *Id.* at 6. She stated that Caruso speaks only English while some others, including Benitez, Cruz, and Meletz speak only Spanish. *Id.* at 8. She testified that the meeting was scheduled to discuss how to justify a pay raise for Benitez, a sewer who worked only on a simple needle machine. *Id.* at 7.

Martinez denied the allegation that all were speaking English, laughing or raising their voices. *Id.* at 7-8. Instead, she described the meeting as "very professional" and "civilized[.]" *Id.* at 7-8. Martinez further denied Benitez's contention that she and Caruso tried to comfort Benitez after she left the meeting; later, Martinez admitted that she had no recollection of attempting to comfort Benitez. *Id.* at 13-14.

Martinez, who acted as translator between Caruso and non-English speaking employees, testified that in her twelve years as office manager, she never had heard an employee complain of discrimination due to ethnic background. *Id.* at 3-4, 8. She further testified that she maintained employee personnel files, including copies of their green cards, but that until the instant matter arose, she was unaware that Benitez was from Ecuador. *Id*. at 8-10. In addition, she stated that Caruso never inquired about the ethnic backgrounds of his employees. *Id.* at 9.

Following the conclusion of testimony, the Commission issued its decision on December 11, 2012 denying the allegations set forth by Benitez. In pertinent part, the Commission found no evidence of discrimination in compensation, discrimination in termination, or discrimination based upon retaliation. The Commission found also no evidence of a hostile work environment or unlawful employment practices. Commission's decision at 8, 10, 15-16.[4] From this decision, Benitez took a timely appeal to the Superior Court.

II

Standard of Review

Chapter 35 of title 42, the Administrative Procedures Act, governs the Superior Court's review of an administrative appeal. Section 42-35-15(g) provides:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

[4] The Commission also held that the individual Respondents could not be held individually liable under § 28-5-7(6) because Pyramid did not commit an unlawful employment practice. However, had the Commission found individual liability, such finding would have been erroneous. *See Mancini v. City of Providence*, 155 A.3d 159, 165 (R.I. 2017) ("At the end of the day, after closely analyzing the language of § 28-5-7(6), it is our unequivocal conclusion that said statute does not authorize the imposition of individual liability.").

> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

"When reviewing an agency decision pursuant to § 42-35-15, the Superior Court sits as an appellate court with a limited scope of review." *Mine Safety Appliances Co. v. Berry*, 620 A.2d 1255, 1259 (R.I. 1993). The court's review is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." *Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd.*, 608 A.2d 1126, 1138 (R.I. 1992). "Legally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting the agency's findings." *Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993) (citing *Sartor v. Coastal Res. Mgmt. Council*, 542 A.2d 1077, 1083 (R.I. 1988)). The court "may reverse, modify, or remand the agency's decision if the decision is violative of constitutional or statutory provisions, is in excess of the statutory authority of the agency, is made upon unlawful procedure, is affected by other errors of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary or capricious and is therefore characterized by an abuse of discretion." *Barrington Sch. Comm.*, 608 A.2d at 1138 (citing § 42-35-15(g)).

While the "reviewing court may not substitute its own judgment for factual determinations made by an administrative agency," questions of law "are not binding upon the court and may be reviewed to determine what the law is and its applicability to the facts." *Narragansett Wire Co. v. Norberg*, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977).

III

Analysis

A

The State Fair Employment Practices Act

The Rhode Island General Assembly, in enacting FEPA, declared that "it is . . . to be the public policy of this state to foster the employment of all individuals in this state in accordance with their fullest capacities, regardless of their race or color . . . or country of ancestral origin, and to safeguard their right to obtain and hold employment without such discrimination." Sec. 28-5-3. Section 28-5-7 provides, in pertinent part:

> "It shall be an unlawful employment practice:
> "(1) For any employer:
> "(i) To refuse to hire any applicant for employment because of his or her race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin;
> "(ii) Because of those reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment." Sec. 28-5-7.

In construing and interpreting FEPA, this Court remains "faithful to federal precedents interpreting federal antidiscrimination statutes, such as Title VII." *DeCamp v. Dollar Tree Stores, Inc.*, 875 A.2d 13, 21 (R.I. 2005) (citing *Newport Shipyard, Inc. v. Rhode Island Comm'n for Human Rights*, 484 A.2d 893, 898 (R.I. 1984)). In Title VII cases, this Court utilizes the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *see Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros*, 710 A.2d 680, 685 (R.I. 1998); *Newport Shipyard, Inc.*, 484 A.2d at 898. This framework consists of three prongs: 1) the claimant must establish *prima facie* case; 2) the "burden of production, not persuasion, shifts to the

employer to articulate some legitimate, nondiscriminatory reason" for the employer's actions; and 3) if the employer meets that burden, "the presumption created by the employee's prima facie case disappears and the focus shifts back to the employee to demonstrate that the proffered reasons are a mere pretext for discrimination." *Barros*, 710 A.2d at 685. This framework "allocates burdens of production and orders the presentation of evidence so as 'progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" *Id.* (quoting *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091 (1st Cir. 1995)).

B

Discrimination

1

Discrimination in Compensation

Benitez contends that the Commission erred in finding that she did not establish her *prima facie* case of discriminatory compensation. She further contends that Pyramid did not provide competent evidence to demonstrate a legitimate nondiscriminatory reason for failing to give her a pay raise. In response, Respondents maintain that because Benitez failed to establish her *prima facie* case, the burden of providing a legitimate nondiscriminatory reason never shifted to Pyramid, and that even if she had established her *prima facie* case, Pyramid actually did provide a legitimate nondiscriminatory reason which Benitez failed to rebut.

In order to establish a *prima facie* case of intentional discrimination in compensation based on ancestral origin, Benitez had to "establish that (1) she belongs to [a protected class]; (2) she received low wages; (3) similarly situated comparators outside the protected class received higher compensation; and (4) she was qualified to receive the higher wage." *Cooper v. S. Co.*, 390 F.3d

695, 735 (11th Cir. 2004), *overruled on other grounds* by *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006).

In determining whether a complainant is similarly situated to other employees, "[r]easonableness is the touchstone: while the plaintiff's case and the comparison cases that he [or she] advances need not be perfect replicas, they must closely resemble one another in respect to relevant facts and circumstances." *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir. 1999); *see Caraballo-Caraballo v. Corr. Admin.*, 892 F.3d 53, 60 (1st Cir. 2018); *Bonilla-Ramirez v. MVM, Inc.*, 904 F.3d 88, 95 (1st Cir. 2018); *Lockridge v. The Univ. of Maine Sys.*, 597 F.3d 464, 471 (1st Cir. 2010). Once the complainant establishes a *prima facie* case of discrimination, "a presumption that the employer unlawfully discriminated against the employee arises." *Barros*, 710 A.2d at 685.

In its decision, the Commission found that Benitez "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[,]" and that she did not establish that similarly situated employees were awarded overtime or bonuses. (Commission's decision at 7, 8.) It is undisputed that Benitez, who was born in Ecuador, is a member of a protected class. It also is undisputed that her supervisors are of Guatemalan origin. Benitez's Employment Application reveals that she applied for a position of sewer on a single needle machine, and that her starting wage was $7.00 per hour. *See* 2003 Appl. for Employment. In 2007, she was receiving $8.00 per hour, which arguably satisfied the second prong of her *prima facie* case; namely, receiving a low wage.

With respect to the third prong, Benitez had to show that she was similarly situated to the Guatemalan employees who received pay raises above her wage rate. *Cooper,* 390 F.3d at 735.

Under the fourth prong, Benitez had to show that she was qualified to receive the same higher wage rate. *Id*.

The record reveals that Benitez did not receive a pay raise after requesting one in August of 2007, and that her pay rate when she was laid off was $8.00 per hour. Although her supervisors requested pay increases for other employees, and although Benitez testified that only two of those nine employees were not Guatemalan, she only provided hearsay evidence of the other employees' ancestral origin. The Commission had before it nothing in any of the payroll exhibits that Benitez submitted to indicate the ancestral origin of any of Pyramid's employees. Furthermore, even though Martinez testified that she maintains copies of the green cards of Pyramid's employees, Benitez did not submit any such copies to show that the employees who received pay raises were Guatemalan in origin, or even non-Ecuadorian in origin, for that matter.

The record also reveals that Benitez worked at a single needle machine—the position for which she was hired. Benitez was unsuccessful when she attempted to operate other, more complex machines. As such, her production was limited to basic sewing tasks.

Conversely, there was no evidence regarding the specific positions held by the purported similarly situated, non-protected individuals who received pay raises, and there was no evidence regarding their job descriptions or skill levels. Crucially, Benitez did not provide a scintilla of evidence that a non-Ecuadorian employee, who operated only a single stitch machine, received higher compensation than she received. Considering that Benitez failed to show that any similarly situated comparators received higher compensation, she failed to meet the third prong of her *prima facie* case.

It follows that because Benitez did not meet the third prong of her *prima facie* case, she necessarily failed to meet the fourth prong as well. The fourth prong required her to show that she

was qualified to receive the higher compensation, but as she failed to show that any non-Ecuadorian, single stitch sewer earned a higher compensation, there was no higher compensation for which she may have been qualified. Consequently, the Commission was not clearly erroneous in finding that Benitez failed to establish a *prima facie* case of discrimination in compensation.

2

Discriminatory Termination of Employment Based upon Ancestral Origin[5]

Benitez contends that Pyramid terminated her employment based on her ancestral origin. She asserts that although the Commission found that she established a *prima facie* case, it erroneously found Caruso's testimony credible on the issue of a legitimate, non-discriminatory reason for Pyramid's actions. She also contends that Pyramid should be judicially estopped from stating that it laid off Benitez due to the loss of a contract because it previously had asserted that the layoff was caused by a lack of work.[6] Benitez further contends that Caruso's position during

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[5] The phrase "termination of employment" is defined as "The complete severance of an employer-employee relationship." Black's Law Dictionary 1700 (10th ed. 2014). The term "layoff" is defined as "The termination of employment at the employer's instigation, usu. through no fault of the employee; esp., the termination—either temporary or permanent—of many employees in a short time—Also termed *reduction in force*." *Id.* at 1023 (emphasis in original). Considering that a layoff constitutes a termination of employment, the Court will use the terms layoff and termination interchangeably.

[6] With respect to Benitez's judicial estoppel argument, "[o]rdinarily, the application of estoppel is an extraordinary form of relief, that will not be applied unless the equities clearly [are] balanced in favor of the part[y] seeking relief." *Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 519 (R.I. 2006) (internal quotations omitted). Furthermore, "[o]f utmost importance in determining whether to apply the doctrine of judicial estoppel is whether the 'party seeking to assert an inconsistent position would derive an unfair advantage * * * if not estopped.'" *Id.*

Pyramid's layoff letter informed Benitez that she was being let go due to a lack of work. Pyramid also informed the Commission that it had laid off Benitez due to a lack of work. (Complainant's Exs. 9 and 10.) During the hearing, Caruso testified that Pyramid laid her off as the result of the loss of a contract for basic cases. Caruso testified as follows:

> "Q: Her layoff is because of lack of work.
> "[CARUSO]: Right.
> "Q: And when the company doesn't have work, enough work, they have to layoff workers, right? That's probably the easiest question you got today, right?

mediation undermined his claim that Benitez lacked the necessary skills to be rehired.[7] Pyramid and the Commission counter that the Commission properly found that it legitimately terminated Benitez for non-discriminatory reasons and that Benitez failed to rebut that finding.

To establish a *prima facie* case for discrimination based on termination due to ancestral origin, a complainant must prove:

> "(1) he or she belongs to a protected class, (2) he or she was qualified for the position, (3) despite the requisite qualifications, he or she was discharged from the position, and (4) the position remained open and was ultimately filled by someone with roughly equivalent qualifications to perform substantially the same work." *Barros,* 710 A.2d at 685 (citations omitted).

Here, the Commission found that Benitez set forth her *prima facie* case of termination based upon ancestral origin. As Pyramid and the Commission do not dispute this finding, the

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> "A: Yes.
> "Q: Because you still have to pay people to work.
> "A: Right.
> . . . .
>
> "Q: So on May 9, 2008 work was slow, right?
> "A: For that case, that case that – the open end case; we lost that contract." Hearing Tr. Vol. I at 109-10.

It is clear from the foregoing that Caruso was testifying that the loss of the contract *resulted* in a lack of work. As these are not inconsistent positions, the doctrine of judicial estoppel does not apply to this case. *See Plainfield Pike Dev., LLC v. Victor Anthony Properties, Inc.*, 160 A.3d 995, 1005 (R.I. 2017) (holding that there was no abuse of discretion where party invoking judicial estoppel failed to provide evidence of an inconsistency, or failed to show how the board and Superior Court were misled by the nonmoving party).

[7] This contention conflicts with Rhode Island Rule of Evidence 408 ("Evidence of conduct or statements made in compromise negotiations is . . . not admissible") and § 28-5-17(b) ("Nothing said or done during [informal methods of conference, conciliation, and persuasion] may be used as evidence in any subsequent proceeding."). Consequently, the Court declines to address this contention.

Court next determines whether Pyramid demonstrated a legitimate, non-discriminatory reason for terminating Benitez.

As previously stated, if the complainant establishes a *prima facie* case, the burden shifts to the respondent to present a legitimate and non-discriminatory reason for terminating the complainant's employment. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Here, the Commission found that Pyramid had proffered a legitimate, nondiscriminatory reason:

> "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. Respondent Pyramid's business was changing; they were receiving contracts for products which required work on the more difficult machines. Mr. Caruso testified that he had been informed that the Complainant could not satisfactorily work on the more difficult machines. 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." Commission's decision at 14 (internal citations omitted).

After reviewing the entire record, the Court concludes that the Commission did not err in finding that Respondents provided a legitimate, nondiscriminatory reason for Benitez's layoff. As this Court previously has found, Benitez was hired as a single needle sewer and never developed new skills after she was hired, despite efforts by her supervisors to train her on other machines. Caruso testified that Pyramid lost the contract to a competitor for the basic case that Benitez worked on primarily. Caruso testified that the resulting lack of work precipitated by the contract loss caused him to lay off a number of employees, including Benitez.

Caruso also stated that although Pyramid occasionally still produces basic cases, such orders are small and do not require a full-time employee; instead, he pulls a more skilled worker from his or her machine to fulfill the single stitch order. Both Caruso and Cruz testified that the company's newer products were more complicated to make than the basic case, products such as

bullet proof vests, gloves, and hard bags. Caruso explained that these products require higher skills to make than Benitez possesses; consequently, he did not rehire her when Pyramid expanded into those products. In light of the foregoing, the Court concludes that it was reasonable and legitimate for Pyramid to conclude that the loss of a major contract would result in less work for its employees such that layoffs might be necessary.

Since Pyramid sustained its burden of proving a legitimate, non-discriminatory reason for laying off Benitez, the burden shifted back to Benitez to prove that the reason provided was pretext for, or at least a motivating factor behind, Pyramid's actions. *See Barros*, 710 A.2d at 685 (stating that "the presumption created by the employee's prima facie case disappears and the focus shifts back to the employee to demonstrate that the proffered reasons are a mere pretext for discrimination") (citing *Resare v. Raytheon Co.*, 981 F.2d 32, 42 (1st Cir. 1992)). However, while the complainant "must do more than simply cast doubt upon the employer's justification," she is not required to "come forward with evidence of the 'smoking gun' variety." *Id.* An employee can establish pretext '"either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."' *Newport Shipyard, Inc*., 484 A.2d at 898 (quoting T*exas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

In its decision, the Commission "utilized a 'modified' *McDonnell Douglas* approach" with respect to Benitez's burden to show pretext. (Commission's decision at 12.) Under this approach, if a defendant meets its burden, then the third step of the *McDonnell Douglas* analysis then becomes such that:

> "the 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, and another motivating factor is the plaintiff's protected characteristic (mixed-motive[s] alternative)." *Rachid v. Jack In The Box, Inc*., 376 F.3d 305, 312 (5th Cir. 2004) (internal quotations omitted).[8]

Benitez asserts that if Pyramid had actually laid off Benitez due to the loss of a contract, it would have so stated in its response to the initial complaint rather than assert that it let her go due to a lack of work. However, this assertion does not rise to the level of pretext for discrimination. Indeed, as previously stated, these two reasons are not even inconsistent. Furthermore, as the Court previously found, Benitez failed to provide any evidence that other employees outside the protected class, and who only could operate a single-needle machine, like Benitez, were retained or rehired by Pyramid, at Benitez's exclusion. In its decision, the Commission observed that Benitez admitted that prior to 2007, she experienced no discrimination with respect to ancestral origin. The Commission further found that Benitez failed to present any evidence that might explain why Respondents would start to discriminate against her in 2007 based upon ancestral origin, when they had not done so before.

In addition, the record reveals that Martinez and Caruso both testified that the October 23, 2007 meeting was "professional" with Caruso adding that it also was "cordial." Caruso testified that he considered all his employees to be "American," and that he did not consider their ethnic backgrounds when making decisions. Caruso, Cruz, and Meletz each testified that they had never witnessed anyone display discriminatory animus against Benitez, and that had they witnessed any such behavior, they would have intervened to stop it. Although Hawksley stated that she believed

[8] Section 28-5-7.3 provides that "[a]n unlawful employment practice may be established in an action or proceeding under this chapter when the complainant demonstrates that . . . country of ancestral origin was *a motivating factor* for any employment practice, even though the practice was also motivated by other factors." Sec. 28-5-7.3 (emphasis added). Therefore, the Commission properly considered whether discrimination was a motivating factor.

Cruz and Meletz favored Guatemalans when assigning overtime, she did not believe that she had been denied overtime due to her Bolivian ethnicity.

The record further reveals that Benitez was one of several employees laid off on or around May 8, 2008, and like Benitez, that none of those employees was rehired. The new sewing hires all were qualified to work on more than just the single stitch machine, and there is no evidence that their ethnicity was a consideration for being hired.

After a close review of the record, as well as the factual determinations and decision of the Commission, this Court finds that Benitez failed to provide competent evidence of pretext or motivating factors for discrimination. The Court further finds that the Commission's decision was supported by "legally competent evidence in the record." *See Rhode Island Pub. Telecommunications Auth. v. Rhode Island State Labor Relations Bd.*, 650 A.2d 479, 485 (R.I. 1994); *Barrington Sch. Comm.*, 608 A.2d at 1138. Consequently, the Court finds that the Commission's finding that Benitez failed to prove that Pyramid's actions were a pretext or a motivating factor for discrimination was not clearly erroneous.

C

Retaliatory Termination

Benitez contends that the Commission erroneously found that Pyramid provided a legitimate, nondiscriminatory reason for laying her off. In its decision, the Commission found that Benitez established a *prima facie* case for retaliatory termination. However, it also found that Pyramid provided a legitimate, nondiscriminatory reason for the termination that Benitez failed to rebut with a showing of pretext.

To establish a *prima facie* case for retaliation[9] with respect to termination, a complainant must "establish that (1) she engaged in protected conduct; (2) she experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action." *Calero-Cerezo v. United States Dep't of Justice,* 355 F.3d 6, 25 (1st Cir. 2004); *Velez v. Janssen Ortho, LLC,* 467 F.3d 802, 806 (1st Cir. 2006).

In this case, Benitez made out a *prima facie* case for retaliation. This Court already has found that Pyramid provided a legitimate, non-discriminatory reason for terminating Benitez; namely, that Pyramid lost a major contract; that its business was changing such that its workers needed sufficient skills to operate more difficult machines; and that Benitez was not able to adequately operate the more difficult machines. That reason applies with equal force to a claim for retaliation. Consequently, the Court concludes that the Commission did not err in finding that Pyramid met its burden of presenting legitimate, non-retaliatory reasons for its action.

Once a defendant successfully provides a legitimate, non-retaliatory reason, "the ultimate burden falls on the plaintiff to show that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant's retaliatory animus." *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir. 1996). Here, the Commission found that "[w]hile the 6 ½ 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." Commission's decision at 15.

[9] Section 28-5-7(5) makes it unlawful "[f]or any employer . . . to discriminate in any manner against any individual because he or she has opposed any practice forbidden by this chapter, or because he or she has made a charge, testified, or assisted in any manner in any investigation, proceeding, or hearing under this chapter." Sec. 28-5-7(5).

The record reveals that after the October 19, 2007 meeting, where Benitez voiced her discrimination allegation to Caruso, Pyramid attempted to accommodate her by allowing her to operate other machines to justify a pay raise; however, Benitez was unsuccessful in doing so. This was the reason for her layoff—she simply could not handle the more complicated machines.

After a thorough review of the record, the Court finds that Benitez did not provide persuasive evidence to the Commission that the legitimate, nonretaliatory reasons Pyramid provided for laying off Benitez were either pretext for its actions, or that retaliation was nonetheless a motivating factor. Consequently, the Court concludes that the Commission did not err in finding that Benitez did not establish that retaliation was a factor in her termination.

D

Harassment

Benitez maintains that the Commission erroneously found that she did not meet her burden in making out a *prima* facie case for harassment. The Commission found that Benitez did not establish a *prima facie* case for harassment—on the basis of either discrimination based on ancestral origin or retaliation— because she failed to "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." Commission's decision at 9-10. Benitez has appealed this finding.

1

***Prima Facie* Case**

A complainant must show six elements to make her *prima facie* case for harassment:

> '"(1) the employee is a member of a protected class; (2) the employee was subjected to unwanted harassment; (3) that harassment was based upon . . . her [protected class status]; (4) that the harassment was sufficiently severe and pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that harassment 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 employer liability has been established."' *DeCamp*, 875 A.2d at 22–23 (internal quotations omitted) (quoting *O'Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001)).[10]

These elements are evaluated "in light of 'the record as a whole' and with regard to 'the totality of circumstances.'" *Decamp*, 875 A.2d at 22 (quoting *Meritor Savings Bank, FSB*, 477 U.S. at 69).

A complainant '"may recover on such a theory when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."' *Noviello v. City of Boston*, 398 F.3d 76, 84 (1st Cir. 2005) (quoting *Harris*, 510 U.S. at 21 (citations and internal quotation marks omitted)); *accord O'Rourke*, 235 F.3d at 728; *DeCamp*, 875 A.2d at 23. Unlike a discrimination claim under Title VII, a hostile work environment claim is based upon the cumulative effect of individual acts, which may not be actionable alone. *Nat'l R.R. Passenger Corp.*, 536 U.S. at 115.

As previously stated, it is undisputed that Benitez is a member of a protected class, as she is from Ecuador. She alleges that employees of Pyramid subjected her to unwelcome harassment due to her status as a member of a protected class. She alleges that her supervisors gave preferential treatment to Guatemalans with respect to recommending pay raises; she contends that they fixed Guatemalan workers' machines faster than they fixed her machine; they allowed Guatemalans to throw out "bad" work, but Benitez had to break stiches and redo her mistakes; and that they gave Guatemalan workers overtime, while ignoring her and talking behind her back. Benitez also

[10] Hostile work environment claims based on racial or ancestral origin harassment generally track the same standards for evaluating evidence as those based on sexual harassment. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-23 (1993).

asserts that when she walked into the meeting on October 23, 2007, Caruso, Meletz, Cruz, Vazquez, and Martinez already were present, and that they were speaking in English—a language she could not understand—and they were laughing at her. Benitez took a medical leave of absence from November 2007 to March 2008, and she alleges that upon her return, her supervisors continued to ignore her; that another worker was occupying her work station; and that she could not locate her personal belongings.

In weighing this evidence, the Commission found that Benitez did not establish the fourth prong of the test for harassment because she did not prove that the alleged harassment was sufficiently severe and pervasive enough so that it altered the conditions of her environment at work and created an abusive work environment. It further found it unlikely that Benitez's superiors spoke in English and laughed at her in the October 23, 2007 meeting.

The record demonstrates that both Cruz and Meletz spoke Spanish and needed a translator to converse in English, so it is unclear how they could have participated in any conversation that may have occurred in English at the October 23, 2007 meeting. Furthermore, the Commission had before it the testimony of disinterested witness Hawksley, who stated that she saw Benitez and Vazquez simultaneously enter the office that day, followed by Cruz and Meletz a short time later. Clearly, the Commission could have considered this conflicting testimony to support its finding that the events at this meeting did not constitute harassment. *See Kachanis v. Bd. of Review, Dep't of Employment & Training*, 638 A.2d 553, 555 (R.I. 1994) (observing that "when reviewing a decision of an agency, the [Superior] Court may not substitute its judgment for that of the agency with respect to the credibility of witnesses or the weight of the evidence on questions of fact").

Moreover, the record reveals that with respect to Benitez's allegation that Respondents removed her personal belongings, although some of Benitez's personal belongings may have been

missing after a three-month absence, there was no evidence to show that Respondents were involved in the disappearance of these belongings. As such, the Commission did not err in finding that this particular allegation did not constitute harassment.

Although the Commission acknowledged that Benitez provided some evidence of *adverse conduct* on the part of Respondents—such as ignoring her, commenting about her behind her back, making her redo her mistakes, fixing other machines before fixing her machine, and giving her work station to another employee while she was out on leave—it found that such conduct did not create a hostile work environment that subjected Benitez to unwanted harassment. *See Faragher*, 524 U.S. at 787 (stating "that '[d]iscourtesy or rudeness should not be confused with [ethnic] harassment' and that 'a lack of [ethnic] sensitivity does not, alone, amount to actionable harassment'") (quoting 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 349 and nn. 36-37 (3d ed. 1996)); *Krasner v. HSH Nordbank AG*, 680 F. Supp. 2d 502, 513 (S.D.N.Y. 2010) (declaring "that mistreatment at work, whether through subjection to a hostile environment or through such coercive deprivations as being fired or being denied a promotion, is actionable under Title VII only when it occurs because of an employee's sex, or other protected characteristic").

After a careful review of the record, the Court finds that Benitez failed to present any evidence that Respondents engaged in any conduct that was sufficiently severe and pervasive as to alter her working conditions or create an abusive work environment. *DeCamp*, 875 A.2d at 22-23. More importantly, even if she had experienced abusive conduct, she failed to demonstrate the requisite causal connection between the alleged harassment and her protected status. *See id.* (requiring the harassment to be based upon an individual's protected class status).

Benitez alleged that Respondents favored Guatemalans when allocating overtime; however, the record reveals that it was Caruso, not the supervisors, who made overtime decisions. Furthermore, there is no evidence in the record to show that the overtime involved the single stitch machine—the only machine Benitez was capable of operating—or that the individuals who received overtime were equally or less productive than Benitez. The allegation that unlike Benitez, Guatemalan employees were allowed to throw out their mistakes is just that, an allegation. Benitez failed to cross-examine either Cruz or Meletz on this issue, and she failed to show a causal connection between such actions and her ethnic status. As for the alleged comments behind her back, Benitez did not provide the context or content of these comments, so it is impossible for this Court to determine whether any such comments were causally connected to her ethnic ancestry.

This Court may not and will not "substitute its judgment for that of the agency in regard to the credibility of the witnesses or the weight of the evidence concerning questions of fact." *Costa v. Registrar of Motor Vehicles*, 543 A.2d 1307, 1309 (R.I. 1988). Therefore, after review of the entire record, the Court finds that the Commission's decision contains reliable, probative, and substantial evidence to support its finding that Benitez failed to make out a *prima facie* case for harassment.

IV

Conclusion

After a thorough review of the entire record, this Court finds that the decision of the Commission contains reliable, probative, and substantial evidence to support its findings. Further, this Court concludes that the Commission's decision was not in violation of constitutional or statutory provisions; in excess of its statutory authority; affected by error of law; or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

Substantial rights of the Appellant have not been prejudiced. Consequently, the Commission's decision is affirmed. In light of this conclusion, Benitez's request for reasonable litigation expenses under § 42-92-3(b) fails.

The Court pauses here to note that it would be remiss not to mention Benitez's failure to prosecute this administrative appeal in a timely manner. Such delay is troubling. Benitez set in motion the legal machinery and then appears to have lost interest in the case until required to respond to Pyramid's motion to dismiss. She had an obligation to meet the stipulated timelines for filing her brief and clearly failed to do so.

Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Martha D. Benitez v. John B. Susa, et al.
CASE NO:	PC 2012-6637
COURT:	Providence County Superior Court
DATE DECISION FILED:	June 27, 2019
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
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