STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDGARDO RUIZ VALESCO,

Petitioner,

vs. Case No. 21-0057

HOLZMAN MACHINE LLC,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020),[1] on April 20, 2021, by Zoom video conference from Tallahassee, Florida.

APPEARANCES

For Petitioner: Jason Imler, Esquire
Printy & Printy
3411 West Fletcher Avenue, Suite A
Tampa, Florida 33618

For Respondent: Jolinda Dianna Holzman
Holzman Machine, LLC
12900 Automobile Boulevard, Suite G
Clearwater, Florida 33762

STATEMENT OF THE ISSUE

Whether Petitioner, Edgardo Ruiz Valesco, was subject to an unlawful employment practice by Respondent, Holzman Machine LLC, based on his

[1] All statutory references are to Florida Statutes (2020), unless otherwise noted.

race, national origin, disability, or in retaliation, in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On June 4, 2020, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the "Commission") alleging that Respondent, Holzman Machine LLC ("Holzman Machine"), violated the Florida Civil Rights Act ("FCRA") by discriminating against him based on his race, national origin, and disability, as well as in retaliation for his practice of an activity protected by the FCRA.[2]

On December 1, 2020, the Commission notified Petitioner that no reasonable cause existed to believe that Holzman Machine had committed an unlawful employment practice.

On January 5, 2021, Petitioner filed a Petition for Relief with the Commission alleging a discriminatory employment practice. The Commission transmitted the Petition to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on April 20, 2021. At the final hearing, Petitioner testified on his own behalf. Holzman Machine presented the testimony of Jolinda Holzman, Russell Holzman, and Terry Carter. Petitioner's Exhibits 1 through 15 were admitted into evidence.

A court reporter recorded the final hearing. Neither party ordered a transcript. At the close of the final hearing, the parties were advised of a ten-day timeframe following the hearing to file post-hearing submittals. Both

[2] Petitioner concomitantly filed a Charge of Discrimination with the Pinellas County Office of Human Rights alleging a violation of Pinellas County Code Section 70-53.

parties timely filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Holzman Machine is a small, family-owned business located in Clearwater, Florida. Holzman Machine is jointly owned by Jolinda Holzman and her son, Russell Holzman.

2. Holzman Machine manufactures machined parts and products based on customer orders. To perform this task, Holzman Machine owns and operates five CNC machines. "CNC" stands for "computer numerical control." A CNC machine uses multiple cutting tools guided by computerized controls to lathe or mill raw material, such as metal, plastic, or wood, into custom-designed parts. A CNC machine operator programs the CNC machine to shape the desired part to exact and precise specifications.

3. Petitioner started working for Holzman Machine on April 6, 2020. Holzman Machine agreed to pay Petitioner $20 per hour.

4. Petitioner was hired as a CNC machinist to operate one of Holzman Machine's five CNC machines. In Petitioner's words, as a CNC machinist, his job was to set up, adjust, and maintain the equipment used to create the manufactured components. He would then activate the CNC machine, which would follow an automated computer program to produce the appropriate parts and tools.

5. Holzman Machine fired Petitioner on May 5, 2020, one month after he was hired.

6. Petitioner is Hispanic. He was born in Mexico. Petitioner entered the United States when he was three years old. He became an American citizen in approximately 2000.

7. Petitioner testified that he has worked in the parts manufacturing industry for over 23 years. Petitioner asserted that he possesses the experience and training necessary to skillfully operate a CNC machine. In

fact, before Holzman Machine hired him, Petitioner spent the previous five years as a CNC machinist. Petitioner explained that he left his former job for better work hours with Holzman Machine. Petitioner declared that, unfortunately, the move was the "worst decision I ever made."

8. At the final hearing, in recounting the discrimination he believes he encountered at Holzman Machine, Petitioner identified several alleged inappropriate acts and activities.[3] Initially, Petitioner focused on the objectionable behavior of Eric Kirchner, another CNC machinist who was working at the company when Petitioner arrived. Petitioner expressed that Mr. Kirchner, who is white, was aggressive and unfriendly from the start. Petitioner declared that Mr. Kirchner constantly made offensive racial comments to him. For instance, Mr. Kirchner repeatedly called Petitioner random Mexican names such as "Raymundo," "Javier," and "Jose" (which are not Petitioner's names). Mr. Kirchner also frequently spoke to Petitioner using a fake Spanish accent.

9. Petitioner claims that he informed Jolinda and Russell Holzman of Mr. Kirchner's offensive conduct on three separate occasions. Petitioner, however, never observed the owners take any action to correct Mr. Kirchner's actions.

10. Petitioner also described a specific incident that occurred on April 17, 2020. Petitioner relayed that shortly after he arrived at Holzman Machine, the company moved to a new location. On April 15, 2020, Petitioner, along with the other Holzman Machine employees, helped moved various tools and supplies to the new shop. On the last day of the move, Friday, April 17, 2020, several Holzman Machine employees, including Petitioner, Terry Carter

[3] In the course of this matter, Petitioner also asserted that he suffered a back injury assisting Holzman Machine move its shop to a new business location. (See paragraphs 19 through 21 below.) The undersigned does not address any issues related to a potential worker's compensation claim or Holzman Machine's other possible responsibilities associated with the injury, as those disputes fall outside the scope of Petitioner's FCHR cause of action. Further, the evidence in the record does not support a claim that Holzman Machine made any adverse employment decisions based on Petitioner's alleged disability.

(another CNC machinist), and Jolinda and Russell Holzman were sitting around a table in the new space having a pizza lunch. Mr. Kirchner, however, would not join them. Petitioner claims that Mr. Kirchner announced that "he did not want to share his meals with Hispanics."

11. Petitioner asserted that he later reported Mr. Kirchner's comment to Mr. Holzman. Petitioner claims that, upon hearing his complaint, Mr. Holzman simply laughed and replied that Mr. Kirchner would get over it.

12. Regarding his termination, Petitioner expressed that May 5, 2020, began like every other work day. He arrived at Holzman Machine in the morning and started cutting parts with his CNC machine. Soon, however, Petitioner noticed that the parts he was producing were not matching the programmed dimensions. Petitioner stopped his machine to try to determine the cause of the error. At that point, Petitioner attested that Mr. Carter informed him that he had seen Mr. Kirchner in Petitioner's area tampering with his CNC machine's input.

13. Later that day, around 1:00 p.m., Petitioner claimed that he saw Mr. Kirchner and Mr. Holzman talking alone together in Mr. Holzman's work space. Petitioner asserted that, unbeknownst to the two of them, he overheard Mr. Kirchner confide to Mr. Holzman, "You don't really want any Mexicans around here, right?" Petitioner testified that Mr. Holzman responded, "You got that right." Mr. Holzman then laughed like they were sharing "a little joke."

14. At that point, Petitioner interrupted the two of them. Mr. Kirchner walked away.

15. Afterwards, at approximately 3:30 p.m., Mr. Holzman came up to Petitioner and announced, "I think we're going to let you go." Petitioner asked him, "Why?" Mr. Holzman did not offer Petitioner a specific reason

other than to say that Holzman Machine needed a CNC programmer, not a machinist.[4]

16. Petitioner was confused why Mr. Holzman fired him. Petitioner contends that, for the brief time he worked for Holzman Machine, he did a good job and had no issues. Neither was he ever disciplined or notified of any performance problems. Petitioner concedes that he did make a few mistakes. However, he was frustrated why Mr. Holzman did not show him any grace.

17. Petitioner was also critical of the short amount of time that Holzman Machine allowed him to accustom himself with the CNC machine he was to operate. Petitioner pointed out that Holzman Machine's move to the new shop took about a week, which only left him just over two weeks to prove himself. Petitioner further commented that Holzman Machine did not provide him any orientation or training programs to familiarize him with its CNC machines and standard procedures.

18. About a month following his termination, Petitioner represented that he actually rebounded into a more favorable job after leaving Holzman Machine. Petitioner was hired as a CNC mechanist for another company and currently makes parts for the aerospace industry. Petitioner commented that, unlike his Holzman Machine experience, he was provided three weeks of training at the new job. His salary was also increased to $24 an hour. Petitioner expressed that he has not received any complaints or negative write ups in the year that he has worked with his new employer.

19. Finally, at the hearing, Petitioner also complained that the Holzmans refused to pay him for some additional handyman work that he performed for the company. Petitioner explained that, during the move from the old shop, Holzman Machine was forced to cut through an interior wall to free one of the CNC machines from the building. During the pizza lunch on the Friday after

[4] Petitioner conveyed that a CNC programmer must be able to read and interpret blueprints to produce the components outlined in the program. Petitioner explained that a programmer's job is "vastly different" from a machinist's job, which is primarily to operate the CNC machine and produce the part(s).

the move, Jolinda and Russell Holzman discussed how they were going to fix the damage. Petitioner informed Mr. Holzman that he possessed the skills to repair the wall. Petitioner testified that Mr. Holzman agreed to pay him $985.00 as an independent contractor to perform the repairs.

20. Thereafter, on Monday, April 20, 2020, Ms. Holzman and Petitioner drove together to Home Depot to purchase the supplies necessary to repair the wall. They then travelled to the old shop, where Petitioner went to work. Petitioner completed the work on the wall on Wednesday, April 22, 2020.

21. Petitioner asserts that the Holzmans never paid him for the repair work. At the final hearing, Petitioner produced an invoice, billed to Russell Holzman at Holzman Machine LLC for $985.00. The invoice records that Petitioner performed sheetrock repair, framing, and painting of a lobby and an office space. Petitioner testified that he sent the invoice to Holzman Machine after he was terminated. However, he never received any payment from Holzman Machine.

22. Both Jolinda and Russell Holzman testified at the final hearing. The Holzmans are white.

23. Jolinda Holzman initially conveyed that she manages the office administration tasks, including overseeing accounts, payroll, and shipping operations for Holzman Machine. In her words, she does "everything but make the parts."

24. Regarding Petitioner's time with the company, Jolinda relayed that she had very little interaction with Petitioner while he worked at Holzman Machine. She explained that her son, Russell, oversees the machine shop, as well as the machinists. Jolinda also imparted that Petitioner was the first Hispanic the company had ever hired.

25. Jolinda testified that she understood from her son that Holzman Machine fired Petitioner based on his poor work on the CNC machine. However, Jolinda disclosed that she had no firsthand knowledge of Petitioner's job performance other than what her son told her. Jolinda further

divulged that Holzman Machine did not maintain any written records documenting Petitioner's work competency or the reasons why the company let him go. However, Jolinda offered that Holzman Machine tries to give new employees at least 30 days to establish their competence.

26. That being said, Jolinda stated that she was well aware of a customer complaint that Holzman Machine received about Petitioner's work during his short stint with the company. Jolinda voiced that, just after Holzman Machine moved to the new shop, she received an email from a customer who claimed that Holzman Machine incorrectly manufactured an order of over 1,000 parts. Based on the error, the parts were useless, and the customer rejected the entire lot.

27. Jolinda believed that Petitioner was solely responsible for the mistake because the ruined parts were specifically cut at the CNC machine assigned to him. Jolinda explained that, to rectify the problem, Mr. Holzman instructed Petitioner to recast the entire order so that Holzman Machine could refill the full request. Jolinda asserted that due to Petitioner's failure to competently operate his CNC machine, Holzman Machine was forced to cover the cost of the material used to make the replacement parts. Consequently, Holzman Machine made no profit from the transaction.

28. Regarding Petitioner's allegations about Mr. Kirchner, Jolinda denied that Petitioner ever reported to her that Mr. Kirchner, or anyone else at Holzman Machine, ever made racial comments at work. Similarly, Jolinda testified that she had never personally heard Mr. Kirchner make racial comments to or about Petitioner. She further denied that during the pizza lunch, she heard or observed Mr. Kirchner make disparaging comments about not eating with Petitioner.

29. Jolinda was also skeptical of Petitioner's claim that he secretly overheard Mr. Kirchner utter the word "Mexicans" in Mr. Holzman's office just before he fired Petitioner. Jolinda explained that Mr. Holzman's "office" is really just a desk planted in an open area of the shop floor. There are no

walls. In addition, the CNC machine assigned to Petitioner was located just next to Mr. Holzman's desk. Therefore, Jolinda believed that Mr. Holzman would have been well aware of Petitioner's presence during any (alleged) conversation he had with Mr. Kirchner.

30. Finally, Jolinda relayed that Mr. Kirchner no longer works for Holzman Machine. He voluntarily resigned in June 2020.

31. Regarding Petitioner's comments about the move to the new shop and his repair work on the wall at the old shop, Jolinda confirmed that Holzman Machine's relocation covered three days, from Wednesday, April 15, 2020, through Friday, April 17, 2020. Jolinda relayed that she hired movers to transport the five CNC machines. For the remaining office materials, supplies, and tools, all the employees (including Petitioner) "chipped in" to help pack up. After the move was completed that Friday, she and Mr. Holzman treated everyone to pizza for lunch at the new location.

32. Jolinda recalled discussing the issue of the damaged wall during the pizza lunch. She explained that a wall had been torn open to extricate one of the CNC machines from an indoor room. Consequently, once the move was completed, the wall needed to be replaced. Therefore, the Holzmans accepted Petitioner's offer to repair the wall.

33. Jolinda stated that Petitioner worked on the wall for approximately three days, from Monday, April 20, 2020, through Wednesday, April 22, 2020.

34. Jolinda testified that she never had any discussion with Petitioner about paying him extra for his repair services. Instead, Holzman Machine allowed Petitioner to work on the wall during his normal business hours (7:00 a.m. through 3:30 p.m.). Therefore, she asserted that Holzman Machine was only obligated to pay Petitioner his agreed daily wage ($20 per hour) for the time he spent at the old shop.

35. Jolinda further denied that Holzman Machine ever received Petitioner's $985 invoice for his repair work. (Jolinda stated that the first time she saw the bill was about a month before the final hearing.)

36. On the other hand, Jolinda agreed with Petitioner's representation that he could not operate his CNC machine during that time he spent repairing the wall. Jolinda further agreed that Holzman Machine has no formal training program. Consequently, Jolinda voiced that Holzman Machine tries to hire experienced employees. Based on the prior experience Petitioner included on his resume, Holzman Machine expected him to know how to perform the job of a CNC machinist when he was hired.

37. Russell Holzman's testimony echoed his mother's on a number of points. Initially, Mr. Holzman relayed that Holzman Machine manufactures parts for a number of industries. Currently, the majority of its customers come from the aerospace industry.

38. As his mother stated, Mr. Holzman explained that he manages the machining and shop operations, while his mother handles the company's office administration. Mr. Holzman remarked that, for a typical work order, Holzman Machine receives blueprints or drawings from a customer. He then designates a CNC machinist to fill the order.

39. At the final hearing, Mr. Holzman testified that he made the decision to terminate Petitioner. Mr. Holzman asserted that he fired Petitioner based on his poor performance. Specifically, Mr. Holzman expressed that Petitioner had difficulty completing the "setup" of his CNC machine on his own. Mr. Holzman explained that he expected the CNC machinists working for him to perform the day-to-day setups of their machines. Mr. Holzman commented that if a CNC machinist fails to properly set up the CNC machine, then his machine will not produce good parts. Mr. Holzman further asserted that Petitioner did a bad job checking the quality of his work, and he continually made mistakes.

40. Mr. Holzman testified that when he hired Petitioner, based on his prior experience, he expected Petitioner to possess the knowledge and experience to competently operate a CNC machine. However, Mr. Holzman quickly observed that Petitioner struggled to properly accomplish this task.

41. Mr. Holzman relayed that Petitioner's deficiencies became clear after a customer notified Holzman Machine that certain parts his company produced were out of compliance. Upon review, Mr. Holzman quickly realized that the dimensions of the parts were "coming up short." Mr. Holzman traced the miscast parts to Petitioner's CNC machine. Mr. Holzman suspected that Petitioner incorrectly set up his machine and failed to ensure that the parts he produced were "in tolerance" throughout the manufacturing process. As a result, the parts in question fell out of conformity by up to 1/8th of an inch. Mr. Holzman believed that Petitioner should have caught the error. Instead, Petitioner produced over 1,000 bad parts, which effectively became nothing more than scrap. Mr. Holzman expressed that Petitioner's error cost the company approximately $2,000, which Holzman Machine was forced to spend to acquire replacement material and stock to recut new parts.

42. At the final hearing, Mr. Holzman acknowledged that other CNC machinists at Holzman Machine made mistakes when operating their machines, including both Mr. Kirchner and Mr. Carter. He further agreed that it is not uncommon to see "minimal" errors in the industry. However, Mr. Holzman declared that none of the other Holzman Machine employees had produced such a "large quantity" of bad parts as Petitioner did during his error. Mr. Holzman commented that Petitioner's mistake was not "small."

43. Mr. Holzman disavowed hearing Mr. Kirchner make any racist remarks to or about Petitioner. Mr. Holzman specifically denied hearing Mr. Kirchner refer to Petitioner by another Hispanic name or speak in a fake Spanish accent. Mr. Holzman further denied that he heard Mr. Kirchner say that he would not "eat with Mexicans" at the pizza lunch.

44. Mr. Holzman expressly refuted the allegation that Mr. Kirchner made any comments to him regarding whether Mexicans should be allowed to work at his company. Mr. Holzman also declared that Mr. Kirchner had no input or influence on his decision to fire Petitioner.

45. Finally, Mr. Holzman denied that anyone at Holzman Machine ever treated Petitioner differently because of his race. Mr. Holzman maintained that neither he nor his mother would tolerate such behavior. Mr. Holzman expressed that, as far as he knew, everyone in his shop got along well. Mr. Holzman insisted that he and his mother treat all their employees with fairness and kindness.

46. Regarding Petitioner's work on the wall at the old shop, Mr. Holzman supported his mother's testimony that Petitioner performed all repairs during his normal (daytime) work hours. Mr. Holzman specifically denied that Holzman Machine entered into any separate agreement to pay Petitioner an additional amount for his repair work. Further, like his mother, Mr. Holzman denied that he was aware of, or had ever received, Petitioner's $985 invoice.

47. Petitioner Rebuttal: During his testimony, Petitioner offered an explanation for the faulty parts that led to the customer complaint. Petitioner stated that about one week before Holzman Machine fired him, he found that his CNC machine was "messing up." For some reason, the output was incorrect. Petitioner stated that just before the issue started, he had momentarily stepped away from his workspace. When he returned, he saw Mr. Kirchner leaving Petitioner's CNC machine. When Petitioner inspected his CNC machine, Petitioner claims that he saw that some of the controls had been manipulated without his knowledge. Petitioner promptly recalibrated the controls. However, when Petitioner later learned that a large order that he had produced was miscast, he suspected that Mr. Kirchner had deliberately sabotaged his machine. Petitioner asserted that he informed Mr. Holzman that someone had changed the dimensions of his CNC machine. However, once again, Mr. Holzman was not helpful and took no action, except, as it turned out, to fire Petitioner.

48. As a final witness, Holzman Machine called Terry Carter to testify on its behalf. Mr. Carter has worked continuously for Holzman Machine since

February 2020, including the period of time during which Petitioner worked for the company. Mr. Carter is white.

49. Like Petitioner, Holzman Machine hired Mr. Carter as a CNC machinist. Unlike Petitioner, Mr. Carter had no machinist experience when he joined the company. (Mr. Carter also began at the lower rate of pay of $13.00 an hour.) Consequently, after he started, Mr. Carter stated that Mr. Holzman and Mr. Kirchner trained him how to operate a CNC machine. By the time Holzman Machine hired Petitioner, Mr. Carter was independently running his own machine.

50. Mr. Carter admitted that he "made a bad part every now and then" as he learned how to use the CNC machine. He reflected that if he made a mistake, he simply "moved forward" and "tried not to let it happen again." Despite his periodic mistakes, however, Mr. Carter stated that Holzman Machine never issued him a written warning or threatened to fire him.

51. Regarding Petitioner's complaints about Mr. Kirchner, contrary to Petitioner's allegations, Mr. Carter testified that he never heard Mr. Kirchner make any racial comments while working at Holzman Machine. Neither did he hear Mr. Kirchner call Petitioner a Hispanic name or speak in a fake Spanish accent. Similarly, Mr. Carter denied hearing Mr. Kirchner announce during the pizza lunch that he would not eat with Mexicans.

52. Finally, Mr. Carter denied ever seeing Mr. Kirchner loitering next to the CNC machine that Petitioner operated. Mr. Carter further denied ever telling Petitioner that Mr. Kirchner surreptitiously changed his CNC machine's controls.

53. Based on the competent substantial evidence in the record, the preponderance of the evidence does not establish that Holzman Machine discriminated against Petitioner based on his race, national origin, disability, or in retaliation for his complaint of discrimination. The testimony of Jolinda Holzman and Russell Holzman explaining the circumstances of Petitioner's termination from Holzman Machine is credible and is credited. The

Holzmans persuasively explained that the reason Holzman Machine fired Petitioner on May 5, 2020, was due to issues they experienced with Petitioner's operation of the CNC machine. Accordingly, Petitioner failed to meet his burden of proving that Holzman Machine committed an unlawful employment action against him in violation of the FCRA.

CONCLUSIONS OF LAW

54. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. *See also* Fla. Admin. Code R. 60Y-4.016.

55. Petitioner brings this matter alleging that Holzman Machine discriminated against him based on his race and national origin in violation of the FCRA.[5]

56. The FCRA protects individuals from discrimination in the workplace. *See* §§ 760.10 and 760.11, Fla. Stat. Section 760.10 states, in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

[5] In his initial Charge of Discrimination, Petitioner also complained that Holzman Machine discriminated against him based on a disability and in retaliation. At the final hearing, however, Petitioner's evidence and testimony specifically focused on discrimination against his race (Hispanic) and national origin (Mexico). Accordingly, the Recommended Order in this matter is appropriately confined to an analysis of those allegations. In any event, the evidence in the record does not support a claim that Holzman Machine made any adverse employment decisions based on Petitioner's alleged disability or in retaliation for his participation in a protected act.

57. Section 760.11(7) permits a party for whom the Commission determines that there is not reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing before DOAH. Following an administrative hearing, if the Administrative Law Judge ("ALJ") finds that a discriminatory act has occurred, the ALJ shall issue an appropriate recommended order to the Commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay. § 760.11(7), Fla. Stat.

58. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). The preponderance of the evidence standard is applicable to this matter. *See* § 120.57(1)(j), Fla. Stat.

59. The FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Florida courts hold that federal decisions construing Title VII are applicable when considering claims under the FCRA. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); and *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

60. Discrimination may be proven by direct, statistical, or circumstantial evidence. *Valenzuela*, 18 So. 3d at 22. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the employment decision without any inference or presumption. *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001); *see also Holifield v. Reno*, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate …'

will constitute direct evidence of discrimination." *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

61. The record in this matter does not contain direct evidence of race or national origin discrimination on the part of Holzman Machine. Similarly, the record in this proceeding contains no statistical evidence of discrimination by Holzman Machine.

62. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence to prove a claim of discrimination. For discrimination causes of action involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *Valenzuela*, 18 So. 3d at 21-22; *see also St. Louis v. Fla. Int'l Univ.*, 60 So. 3d 455, 458 (Fla. 3d DCA 2011).

63. For the first part of an action alleging race or national origin discrimination, Petitioner bears the burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. To establish a prima facie case, Petitioner must show that: (1) he belongs to a protected class (race or national origin); (2) he was qualified for his position (CNC machinist); (3) he was subjected to an adverse employment action; and (4) his employer treated similarly-situated employees outside of his protected class more favorably than he was treated. *See McDonnell Douglas*, 411 U.S. at 802-04; *Burke-Fowler v. Orange Cty.*, 447 F.3d 1319, 1323 (11th Cir. 2006).

64. Demonstrating a prima facie case is not difficult, but rather only requires Petitioner "to establish facts adequate to permit an inference of discrimination." *Holifield*, 115 F.3d at 1562.

65. If Petitioner establishes a prima facie case, he creates a presumption of discrimination. At that point, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for taking the adverse action. *Valenzuela*, 18 So. 3d at 22. The reason for the employer's decision

should be clear, reasonably specific, and worthy of credence. *Dep't of Corr. v. Chandler*, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The employer has the burden of production, not the burden of persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. *Flowers v. Troup Cty.*, 803 F.3d 1327, 1336 (11th Cir. 2015). This burden of production is "exceedingly light." *Holifield*, 115 F.3d at 1564. The employer only needs to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (U.S. 1993).

66. If the employer meets its burden, the presumption of discrimination disappears. The burden then shifts back to Petitioner to prove that the employer's proffered reason was not the true reason but merely a "pretext" for discrimination. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997); *Valenzuela*, 18 So. 3d at 25.

67. In order to satisfy this final step of the process, Petitioner must show "directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the … decision is not worthy of belief." *Chandler*, 582 So. 2d at 1186 (citing *Tex. Dep't of Cmty. Aff. v. Burdine*, 450 U.S. 248, 252-56 (1981)). The proffered explanation is unworthy of belief if Petitioner demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1313 (11th Cir. 2016); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Petitioner must prove that the reasons articulated were false and that the discrimination was the real reason for the action. *City of Miami v. Hervis*, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011)(citing *St. Mary's Honor Ctr.*, 509 U.S. at 515)("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").

68. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the [respondent] intentionally discriminated against the [petitioner] remains at all times with the [petitioner]." *Burdine*, 450 U.S. at 253; *Valenzuela*, 18 So. 3d at 22.

69. Applying the burden-shifting analysis to the facts found in this matter, Petitioner established a prima facie case that Holzman Machine discriminated against him based on his race and national origin. Initially, Petitioner belongs to a protected class (Hispanic/Mexican). He was also subject to an adverse employment action in that he was discharged from the company.

70. Petitioner further persuasively demonstrated that he was qualified to perform the duties of a CNC machinist. To demonstrate that he was qualified for the position, Petitioner "need only show that he or she satisfied an employer's objective qualifications." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005). While Petitioner may not have ultimately met Holzman Machine's expectations for its CNC mechanics, Petitioner did show that he possessed the experience and knowledge to proficiently operate a CNC machine and manufacture parts using the same.

71. Regarding the fourth element, Petitioner also presented sufficient evidence to show that Holzman Machine treated similarly-situated, white employees (Mr. Kirchner and Mr. Carter) differently. Holzman Machine hired both Mr. Kirchner and Mr. Carter to work in the same position as Petitioner (CNC machinists). As with Petitioner, both employees operated their own CNC machines and individually worked on customer orders. Further, the testimony indisputably establishes that both Mr. Kirchner and Mr. Carter (as

well as Mr. Holzman) made mistakes while operating their CNC machines.[6] Yet, unlike Petitioner, Holzman Machine elected not to terminate either Mr. Kirchner or Mr. Carter based on their missteps.

72. However, despite the fact that Petitioner established a prima facie case of discrimination, Holzman Machine articulated a legitimate, non-discriminatory reason for the adverse employment action about which Petitioner complains. As discussed above, Holzman Machine's burden to refute Petitioner's prima facie case is light. Holzman Machine met this burden by providing persuasive evidence that Petitioner made mistakes while operating his CNC machine. In addition, Jolinda Holzman and Mr. Holzman credibly testified that a customer complained to Holzman Machine about one of Petitioner's mistakes, and Holzman Machine lost money because of this mistake.

73. Completing the *McDonnell Douglas* burden-shifting analysis, Petitioner did not prove that Holzman Machine's stated reason for his termination was not its true reason, but was merely a "pretext" for discrimination based on his race or national origin. The evidentiary record does not support a finding or conclusion that Holzman Machine's explanation is false, implausible, inconsistent, or not worthy of credence. Mr. Holzman convincingly attested that he fired Petitioner based on the unacceptable work product that he produced from his CNC machine. During the final hearing, Mr. Holzman, as supported by Jolinda Holzman's testimony, credibly identified a concrete example of an error Petitioner made that detrimentally and financially impacted the company. Mr. Holzman cogently explained why Petitioner's poor performance, not his race or national origin, led directly to Holzman Machine's decision to let Petitioner go.

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[6] In determining whether employees are similarly-situated for purposes of establishing a prima facie case, "a plaintiff asserting an intentional-discrimination claim under *McDonnell Douglas* must demonstrate that [he] and [his] proffered comparators were 'similarly situated in all material respects.'" *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1218 (11th Cir. 2019). Based on the evidence in the record, Mr. Kirchner and Mr. Carter meet this requirement.

74. To argue that Mr. Holzman's justification for terminating him was simply a "pretext," Petitioner advances that the real reason Mr. Holzman fired him was because Petitioner overheard him sharing racially charged comments with an overtly racist co-worker (Mr. Kirchner). However, the out-of-court statements Petitioner alleges that Mr. Kirchner uttered to Mr. Holzman in Mr. Holzman's office space are clearly hearsay, and thus unreliable as substantive evidence. *See* § 90.801(1)(c), Fla. Stat. While the Administrative Procedure Act does allow hearsay evidence to be "used for the purpose of supplementing or explaining other evidence, … it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." § 120.57(1)(c), Fla. Stat.

75. During the final hearing, Petitioner did not present any exception to the hearsay rule which would allow the admissibility of Mr. Kirchner's out-of-court statements as factual findings. Further, no evidence was produced from any witness (in particular, Mr. Kirchner who did not appear at the hearing) that substantiated any of the objectionable comments that Petitioner claims he heard. Instead, Mr. Holzman credibly testified that he never participated in a racially offensive conversation with Mr. Kirchner in his office. In addition, the fact that Mr. Holzman's office is located in an open area of the shop floor casts doubt on Petitioner's representation that he secretly observed the dialogue without Mr. Holzman's knowledge. Accordingly, the evidence in the record does not support a finding that Mr. Holzman and Mr. Kirchner discussed Petitioner's race or national origin just before Mr. Holzman informed Petitioner that he was fired. Neither do they prove Petitioner's argument that Mr. Holzman's non-discriminatory explanation for terminating Petitioner was merely a pretext.[7]

[7] The undersigned recognizes that the statements attributed to Mr. Holzman might be offered into evidence as an admission by a party opponent under section 90.803(18), Florida Statutes. However, as stated above, Mr. Holzman credibly testified that he did not make or adopt any comments to or from Mr. Kirchner regarding Petitioner's race. Mr. Holzman also persuasively stated that neither Petitioner's race nor national origin played any part in his decision to fire Petitioner.

76. The undersigned finds that the comments Mr. Kirchner allegedly made to Petitioner more accurately fall into the category of "stray remarks," and no evidence supports attributing those offensive comments to Holzman Machine. *See Parris v. Keystone Foods, LLC*, 959 F. Supp. 2d 1291, 1308 (N.D. Ala. 2013)("Stray remarks in the work place ... unrelated to the decisional process itself [cannot] suffice to satisfy the plaintiff's burden.") No evidence shows that Mr. Kirchner had any authority, responsibility, or role in Mr. Holzman's decision to fire Petitioner. Consequently, because Mr. Kirchner's (alleged) isolated and remote comments about Petitioner's name, accent, or lunch plans cannot be tied to Holzman Machine's decisional process to terminate Petitioner, they do not establish pretext. *See Rojas v. Florida*, 285 F.3d 1339, 1343 (11th Cir. 2002)(Because the alleged comment was "an isolated comment, unrelated to the decision to fire [the plaintiff], it, alone, is insufficient to establish a material fact on pretext.").

77. Finally, Petitioner contends that Mr. Holzman never gave him a fair chance to prove himself as a CNC machinist. Petitioner rightly points to the fact that, based on the company's relocation, he was afforded less than 30 days to work at his CNC machine. Petitioner also correctly asserts that Holzman Machine never spent the time to orient or train him on how it expected him to operate its CNC machines. In addition, Petitioner substantiated his position that all CNC machinist at Holzman Machine (if not industry-wide) commonly made mistakes. Therefore, he claims it was not fair for Mr. Holzman to single him out for termination.

78. However, to show pretext, Petitioner "must meet each proffered reason 'head on and rebut it, and [he] cannot succeed by simply quarreling with the wisdom of that reason.'" *Furcron*, 843 F.3d at 1313-14. "Unfair treatment, absent discrimination based on race, sex, or national origin, is not an unlawful employment practice under Title VII." *Coutu v. Martin Cty. Bd. of Cty. Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) "Title VII is not a shield against harsh treatment at the workplace. … The employer may fire an

employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984).

79. The fact that Petitioner may have been qualified to perform competently as a CNC mechanist does not mean that he actually did so. Nor does it mean that Petitioner automatically met the standard that Holzman Machine expected of its CNC mechanist. Based on the guiding case law, the undersigned's function is not to second-guess whether Holzman Machine's decision to fire Petitioner was fair. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000). Instead, the undersigned is charged with determining whether the adverse employment action was motivated by discriminatory intent. Based on the facts adduced at the final hearing, the undersigned concludes that Holzman Machine's decision was not.

80. Therefore, even though Petitioner presented enough evidence to establish a prima facie case of discrimination, he did not produce sufficient facts or testimony to prove that Holzman Machine treated him differently because of his protected class. Consequently, Petitioner did not meet his ultimate burden of proving, by a preponderance of the evidence, that Holzman Machine's decision affecting his employment was based on discrimination.

81. In sum, to establish discrimination, Petitioner attempts to connect Holzman Machine's adverse employment action to the fact that he is from Mexico. However, the evidence and testimony in the record does not, either directly or circumstantially, link Petitioner's termination with actual discriminatory animus. On the contrary, Holzman Machine credibly and persuasively explained that its decision to fire Petitioner was solely based on Petitioner's failure to properly operate his CNC machine. Consequently, Petitioner failed to meet his burden of proving that Holzman Machine

discriminated against him based on his race or national origin. Accordingly, Petitioner's Petition for Relief must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Petitioner, Edgardo Ruiz Valesco, did not prove that Respondent, Holzman Machine, committed an unlawful employment action against him; and dismissing his Petition for Relief from an unlawful employment practice.

DONE AND ENTERED this 18th day of June, 2021, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
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this 18th day of June, 2021.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.