STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCARLETT D. EVANS,

Petitioner,

vs. Case No. 16-0097

MOMMA G'S, INC.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 29, 2016, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Robert L. Thirston, II, Esquire
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For Respondent: John Bassett Trawick, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, Momma G's, Inc. ("Momma G's"), violated the Florida Civil Rights Act of 1992, sections 760.01 through 760.11 and 509.092, Florida Statutes(2015),[1/] by discriminating

against Petitioner ("Scarlett Evans" or "Ms. Evans") or by retaliating against her for participating in a protected activity.

PRELIMINARY STATEMENT

Scarlett Evans filed a complaint with the Florida Commission on Human Relations ("the FCHR") alleging that Momma G's violated the Florida Civil Rights Act of 1992. The FCHR conducted an investigation and ultimately determined that there was no reasonable cause to believe that Momma G's committed an unlawful employment practice.

Ms. Evans filed a Petition for Relief with the FCHR on January 8, 2016, and the matter was referred to DOAH for a formal administrative hearing.

The final hearing was commenced as scheduled on March 29, 2016, and Ms. Evans' attorney invoked the rule of sequestration. During the final hearing, Ms. Evans presented the testimony of three witnesses, and Ms. Evans' Exhibits 1 and 2 were accepted into evidence. Momma G's presented the testimony of three witnesses, and Exhibits 1 through 4 from Momma G's were accepted into evidence.

The proceedings were recorded, and a two-volume Transcript was filed on April 26, 2016. The parties filed Proposed Recommended Orders that were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Momma G's is a sandwich-shop franchise consisting of franchisees and company-owned stores.

2. Ms. Evans is a female who began working at a Momma G's franchise located in Panama City, Florida ("the restaurant"), in October of 2013. Ms. Evans started as a cashier, and her good performance led to her being promoted to shift leader in May of 2014.

3. A few months later, the franchise owners asked Ms. Evans to become the restaurant's general manager because the current general manager was doing a poor job.

4. While employed as the restaurant's general manager, Ms. Evans typically worked Monday through Friday for 35 to 40 hours a week. Ms. Evans occasionally worked weekends in order to account for inventory, and she asserts that she had no problem with working weekends.

5. In approximately December of 2014, the restaurant's three owners notified Momma G's corporate headquarters that the restaurant was struggling. The restaurant was six months behind on its rent, and the landlord was threatening eviction. In addition, the owners had accumulated over $300,000 in bank debt.

6. Because closings damage a restaurant chain's image, Momma G's corporate headquarters negotiated a deal in which the

franchisor acquired the restaurant and would operate it as a company-owned store.

7. Accordingly, Momma G's assumed control of the restaurant on May 1, 2015. Momma G's did not fire any of the restaurant's employees, but it did require all of them to re-apply for positions at the restaurant.

8. Mike Davis is the vice president of Operations for Momma G's. At the times relevant to the instant case, he oversaw 30 restaurants.

9. Once Momma G's corporate headquarters completed the negotiations to acquire the restaurant, Mr. Davis immediately drove to Panama City in order to oversee the transition.

10. Mr. Davis contacted another Momma G's employee (Sam Ferminella) and asked him to assist with the transition. Mr. Ferminella was a general manager who had proven to be proficient in turning around troubled stores.

11. After the May 1, 2015, acquisition, Mr. Davis remained in Panama City for approximately three days to oversee the transition. Mr. Ferminella was more involved with improving the restaurant's day-to-day operations, and he spent approximately 10 to 11 days in Panama City during the first three weeks after the acquisition.

12. At some point during the 10 to 11 days following the acquisition, Ms. Evans talked to Mr. Davis and/or Mr. Ferminella

about continuing as the restaurant's general manager. It is unclear what Ms. Evans was told, but there is no dispute that she was essentially in charge of the restaurant after Mr. Ferminella left Panama City following his initial 10-to-11 day visit.

13. Rather than being a salaried employee, Ms. Evans was paid by the hour before and after the acquisition.

14. On May 11, 2015, Ms. Evans learned that the restaurant's general manager position was being advertised on-line. She texted Mr. Ferminella to inquire about the situation, and he promptly called her. Ms. Evans alleges that Mr. Ferminella told her during that conversation that Momma G's cannot have a single mother working as a general manager because the restaurant needs someone who can work long hours, be available any day of the week, and respond on a moment's notice if there is a problem at the restaurant.

15. That conversation prompted Ms. Evans to file a complaint with the Equal Employment Opportunity Commission ("the EEOC") on May 20, 2015.

16. Momma G's learned of Ms. Evans' complaint on approximately May 25, 2015. On May 26, 2015, Sandy Gnad (who was responsible for Human Resources at Momma G's) contacted Ms. Evans via telephone and e-mail. Ms. Gnad wanted to know if there was something she could do to help.

17. Mr. Davis learned of the complaint at some point in June of 2015.

18. After Momma G's learned of her complaint, Sam Moore began working as the restaurant's general manager, and Ms. Evans claims that her work hours were reduced. According to Ms. Evans, she typically worked 35 to 40 hours a week. However, her hours were allegedly reduced to 20 to 30 a week in late May. In addition, there were occasions when she would be released after two to two and one-half hours of work when she had been scheduled to work six hours.

19. Ms. Evans was the restaurant's highest paid hourly worker.

20. Ms. Evans alleges that the restaurant was having trouble keeping up with demand at some point that summer. According to Ms. Evans, Mr. Davis dealt with the problem by increasing Ms. Evans' hours and splitting the general manager duties between Ms. Evans and Mr. Moore. At that point, Ms. Evans asserts that the only difference between her and Mr. Moore was that he was a salaried employee, while Ms. Evans was still paid by the hour.

21. Mr. Moore resigned from the restaurant at the end of June, and Ms. Evans had been acting as a de facto general manager.

22. Ms. Evans filed a complaint of discrimination with the FCHR on July 8, 2015, alleging that she was not hired for the restaurant's general manager position because she is a single mother.

23. On August 7, 2015, Ms. Evans and a co-worker named Sierra Kennedy were at the restaurant prior to 10:00 a.m. and were preparing to open the store at 10:30 a.m.

24. Mr. Davis had made an appointment to interview Stefanie Flaugher at the restaurant for the vacant general manager position, and Ms. Flaugher arrived at approximately 9:45 a.m. on August 7, 2015, for her 10:00 a.m. interview. However, Mr. Davis had not arrived, and Ms. Flaugher was standing outside the restaurant waiting for him.

25. Ms. Evans had to make a bank deposit, and she encountered Ms. Flaugher on her way out of the restaurant. Ms. Flaugher told Ms. Evans that she was there to interview with Mr. Davis for the general manager position. Ms. Evans expressed frustration and told Ms. Flaugher that the general manager position was her job, and proceeded to the bank.

26. When Ms. Evans returned to the restaurant, Mr. Davis was interviewing Ms. Flaugher in a booth.

27. At some point during the interview or soon thereafter, Mr. Davis approached Ms. Kennedy and said something to the effect that, "So Scarlett quit." When Ms. Kennedy reported that

Ms. Evans had not resigned, Mr. Davis turned back to the booth where Ms. Flaugher was still sitting and stated, "No, she did not quit."

28. According to Ms. Kennedy, Mr. Davis appeared to be excited when he thought that Ms. Evans had resigned. However, his excitement reportedly turned to disappointment after Ms. Kennedy corrected him.

29. Mr. Davis remained at the restaurant for approximately two hours after the interview concluded. During that time, he worked on his laptop, walked around the store, and did paperwork. He never seemed excited or upset. Mr. Davis said nothing of any significance to Ms. Evans.

30. On August 11, 2015, Ms. Evans received a message that Ms. Gnad wanted to speak with her. After she and Ms. Kennedy finished serving the restaurant's lunchtime customers, Ms. Evans returned Ms. Gnad's call. Upon reaching Ms. Gnad, Ms. Evans learned that the call was being recorded and that Mr. Davis was joining the call.

31. Upon joining the call, Mr. Davis stated that Ms. Flaugher had reported to him that Ms. Evans had used the "f-word" when they conversed outside the restaurant on August 7, 2015. Mr. Davis had hired Ms. Flaugher to be the restaurant's general manager, and he wanted Ms. Evans to sign a letter stating that she would respect Ms. Flaugher's authority.

In addition, the letter noted that Ms. Evans had "rudely spoke[n] to a manager candidate who was waiting outside for an interview, addressing her disrespectfully and using the 'f' word multiple times." Mr. Davis told Ms. Evans that she could either sign the letter or resign.

32. Ms. Evans vehemently denied using any profanity during her conversation with Ms. Flaugher.

33. Prior to this phone conversation, Ms. Evans had not been given a copy of the letter Mr. Davis wanted her to sign. When Ms. Evans refused to sign the letter after hearing a description of its contents, Mr. Davis fired her.

34. Ms. Kennedy resigned that day.

Testimony Adduced at the Final Hearing

35. Ms. Evans testified that Mr. Ferminella told her in May of 2015 that Momma G's could not have a single mother as a general manager because the position essentially requires one to be available at all times.

36. Mr. Ferminella testified that Momma G's has hired single mothers to fill general manager positions, and he denied ever telling Ms. Evans that she was ineligible for the general manager position. He testified that Ms. Evans had been hired as a "supervisor" in May of 2015 and that he never told anyone to reduce Ms. Evans' hours.

37. Mr. Ferminella testified that the highest paid hourly worker in a restaurant is typically released early on days when business is slow.

38. Mr. Davis testified that he had agreed to hire Ms. Evans as an hourly supervisor. Her responsibilities included management of the restaurant's daily operations, managing other employees, and purchasing.

39. Mr. Davis denied telling anyone to reduce Ms. Evans' hours. He also testified that the restaurant industry has a practice of releasing the highest paid hourly worker early when business is slow on a particular day. That helps keep costs down.

40. Mr. Davis testified that Momma G's has hired single mothers to fill general manager positions in the past.

41. Mr. Davis testified that Ms. Flaugher told him during her interview about her conversation with Ms. Evans. According to Mr. Davis, Ms. Flaugher told him that Ms. Evans had used the "f-word" during that conversation.

42. Mr. Davis testified that use of the "f-word" by a Momma G's employee results in immediate termination. Nevertheless, Mr. Davis did not take immediate action. Instead, he testified that he had to "listen and investigate and take time, and then report to my direct report[2/] the conversation.

And, you know, that's the way things work. Things were very – move very slowly in this business, making decisions."

43. Mr. Davis also testified that he hired Ms. Flaugher to be the general manager of the restaurant in Panama City. According to Mr. Davis, Ms. Flaugher accepted the offer and reported for training at a Momma G's restaurant in Auburn, Alabama. Momma G's even reserved a hotel room for her while she was training in Auburn. However, Ms. Flaugher supposedly left the week-long training after a few days without giving notice of any kind to Mr. Davis or anyone else associated with Momma G's.

44. During the final hearing, Mr. Davis attributed Ms. Flaugher's sudden and unexplained disappearance to her being "traumatized" by her conversation with Ms. Evans on August 7, 2015.

45. As noted above, Ms. Gnad performed human relations work for Momma G's, and she testified that Mr. Davis "has complete authority to hire or fire whoever he wants" at a Momma G's owned store without needing anyone else's approval. However, her statement only applied to certain Momma G's stores, and it is unclear whether Mr. Davis had such authority at the Panama City restaurant.

Ultimate Findings of Fact

46. Ms. Evans failed to establish that Momma G's discriminated against her when she was not hired for the general manager's position.

47. Ms. Evans also failed to prove that Momma G's retaliated against her by reducing her hours during the summer of 2015.

48. However, Ms. Evans did prove that Momma G's effort to discipline her, and ultimately terminate her, based on the conversation with Ms. Flaugher, was retaliation for filing complaints with the EEOC and the FCHR.

49. The testimony of Ms. Evans and Ms. Kennedy was far more credible than Mr. Davis's. In particular, the undersigned credits Ms. Kennedy's testimony that Mr. Davis approached her and excitedly said something to the effect that, "So Scarlett quit." After Ms. Kennedy corrected him, Mr. Davis appeared to be disappointed, turned back to the booth where Ms. Flaugher was still sitting, and stated, "No, she did not quit." That testimony indicates Mr. Davis was hoping that Ms. Evans' employment at the restaurant would come to an end.

50. During his testimony, Mr. Davis was adamant that a Momma G's employee would be immediately terminated for using profanity. However, when he supposedly learned from Ms. Flaugher on August 7, 2015, that Ms. Evans had used the

"f-word," he took no action whatsoever despite being at the restaurant with Ms. Evans and Ms. Kennedy for approximately two hours after the interview had concluded. His lack of prompt action belies Mr. Davis's assertion that he needed to conduct an investigation. Any such investigation would have included a prompt discussion with the accused (i.e., Ms. Evans).

51. In addition, Mr. Davis simply accepted a statement made by a complete stranger without conferring with an employee who was regularly in charge of the restaurant.

52. In short, there was no true investigation and no intent to conduct one.

53. The undersigned also has a difficult time reconciling Mr. Davis's assertion that Ms. Flaugher was "traumatized" by her encounter with Ms. Evans when Ms. Flaugher: (a) agreed to be the general manager at the restaurant; (b) traveled to Auburn, Alabama, for one week of training; and (c) attended a few days of that training prior to leaving with no explanation.

54. If Ms. Flaugher was so traumatized, it seems very unlikely that she would have accepted Mr. Davis's job offer. It is even more unlikely that one so traumatized would travel from her home for a week-long training session and suddenly realize after a few days of training that she could not accept the general manager position.

55. By attributing Ms. Flaugher's unexplained disappearance to being traumatized by her conversation with Ms. Evans, Mr. Davis demonstrates a pretextual basis for his desire to have Ms. Evans' employment at the restaurant end.

56. Finally, Mr. Davis's credibility was also undermined by his demeanor on the witness stand. He appeared to be very nervous or uncomfortable when cross-examined by Ms. Evans' attorney, and he appeared even more nervous or uncomfortable when the undersigned questioned him about certain aspects of his testimony.

57. In sum, Mr. Davis's failure to obtain Ms. Evans' version of what happened outside the restaurant on August 7, 2015, demonstrates that the effort to discipline her on August 11, 2015, was a pretext for retaliating against her for filing complaints with the EEOC and the FCHR. In other words, Mr. Davis had no interest in conducting an actual investigation and giving Ms. Evans an opportunity to rebut Ms. Flaugher's assertion. Rather than being motivated by a desire to ascertain what actually happened outside the restaurant on August 7, 2015, Mr. Davis was motivated by a desire to take some sort of adverse action against Ms. Evans.

58. There is no other reasonable conclusion because all of the evidence indicates that Ms. Evans was a good employee. Mr. Ferminella testified that Ms. Evans would have been

considered for the general manager position if she had been willing to work the required hours and be a salaried employee. Also, even after Momma G's acquired the restaurant, Ms. Evans continued in a leadership role, even though she was never officially designated as the restaurant's general manager. The evidence and testimony presented at the final hearing demonstrates that there was a causal connection between the filing of Ms. Evans' complaints and the adverse employment action at issue.

CONCLUSIONS OF LAW

59. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

60. The State of Florida, under the legislative scheme contained in sections 760.01 through 760.11 and 509.092, known as the Florida Civil Rights Act of 1992 ("the Act"), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, et seq.

61. The Florida law prohibiting unlawful employment practices is found in section 760.10. This section prohibits discrimination "against any individual with respect to

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status." § 760.10(1)(a), Fla. Stat.

62. Pursuant to section 760.10(7), it is an unlawful employment practice for an employer to discriminate against a person because that person has, "opposed any practice which is an unlawful employment practice" or because that person "has made a charge . . . under this subsection."

63. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act of 1964, as amended, federal case law dealing with Title VII is applicable. See e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21-22 (Fla. 3d DCA 2009).

64. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence which, if believed, would prove the existence of discrimination without inference or presumption. Usually, however, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas Corp. v. Green,

411 U.S. 792 (1973). See Holifield v. Reno, 115 F. 3d 1555, 1562 (11th Cir. 1997).

65. Under the shifting burden pattern developed in McDonnell Doudglas:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F. 2d 864, 870 (11th Cir. 1990)(housing discrimination claim); accord, Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009)(gender discrimination claim)("Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.").

66. Ms. Evans did not present statistical or direct evidence of discrimination. Therefore, in order to prevail on her claim against Momma G's, Ms. Evans must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. (providing that "[f]indings of fact shall be based upon a preponderance of the evidence, except in

penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

67. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield, 115 F. 3d at 1562; cf. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000)(noting that "[a] preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.").

68. In the instant case, the FCHR concluded that Ms. Evans did not state a prima facie case of marital status discriminaton. As stated in the FCHR's determination of "no reasonable cause," Ms. Evans' allegation that Momma G's refused to hire her for the general manager position because she is a "single mother" does not "indicate that [Ms. Evans'] status as an unmarried person was the reason for the adverse action. It appears [Momma G's] took issue with [Ms. Evans'] status as a parent and a perceived lack of availability to work a flexible schedule arising from her parental status." See generally Donato v. AT&T, 767 So. 2d 1146, 1154 (Fla. 2000)(stating that under the plain meaning of section 760.10 "in this case, 'marital status' discrimination arises only when one either is

terminated or not hired on the sole basis of that person's status with respect to marriage, which in this case means married, single, divorced, widowed, or separated.").

69. Nevertheless, even if Ms. Evans had stated a prima facie case of discrimination, Momma G's was able to articulate a legitimate, nondiscriminatory reason for its action. Specifically, Momma G's asserted that Ms. Evans was unwilling to fulfill the job requirements by being available at all hours and working weekends.

70. Thus, Ms. Evans was unable to prove by a preponderance of the evidence that Momma G's stated reason for not hiring her for the general manager position was a pretext.

71. Ms. Evans's Complaint also alleges retaliation.

72. In order to establish a prima facie case for retaliation, a petitioner must show that: (1) she was engaged in a statutorily-protected expression or conduct; (2) she suffered an adverse employment action; and (3) there is some casual relationship between the two events. Holifield, 115 F. 3d at 1566.

73. If a petitioner fails to present a prima facie case for retaliation, the inquiry ends and the case should be dismissed. Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996).

74. However, if a petitioner is able to establish a prima facie case of retaliation, then the employer should come forward with a legitimate, non-retaliatory reason for its materially adverse action. Olmsted v. Taco Bell Corp., 141 F. 3d 1457, 1460 (11th Cir. 1998).

75. If the employer is able to present a legitimate, non-retaliatory reason for its materially adverse action, then a petitioner "bears the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct." Id. In order to satisfy that burden, a petitioner "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F. 3d 1519, 1528 (11th Cir. 1997).

76. With regard to the instant case, Ms. Evans has proven by a preponderance of the evidence that the adverse employment action was a pretext for filing her complaints with the EEOC and the FCHR. Given Mr. Davis's stated need to conduct an investigation, it is very strange that he would not confer with Ms. Evans prior to reaching a conclusion. That is underscored by the fact that Momma G's employed Ms. Evans as a supervisor

and trusted her to function as a de facto general manager at the time of the adverse employment action. Nevertheless, Mr. Davis immediately accepted Ms. Flaugher's statement and made a snap judgment without giving Ms. Evans an opportunity to tell her side.

77. Moreover, it is clear that Mr. Davis wanted to see Ms. Evans' employment at the restaurant come to an end. That is evident from Ms. Kennedy's testimony and from the fact that Mr. Davis implausibly attributed Ms. Flaugher's unexplained departure to being traumatized by her encounter with Ms. Evans.

78. Thus, the preponderance of the evidence supports a conclusion that Ms. Evans' failure to sign the August 11, 2015, letter (which contained a statement that she vigorously disputed) was a pretext for Momma G's retaliatory action towards the EEOC and FCHR filings.

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 awarding Scarlett Evans back pay, a reasonable attorney's fee, and any other relief she is entitled to under section 760.11, Florida Statutes.

DONE AND ENTERED this 26th day of May, 2016, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of May, 2016.

ENDNOTES

[1/] All statutory references will be to the 2015 version of the Florida Statutes unless indicated otherwise.

[2/] Momma G's Exhibit 4 indicates that Mr. Davis uses the term "direct report" to mean a supervisor or someone higher in the chain of command.

COPIES FURNISHED:

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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.