STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TINA GARNER,

Petitioner,

vs. Case No. 20-2448

JR CONWAY ENTERPRISES, LLC,

Respondent.
_______________________________________/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on November 16, 2020, via Zoom, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: William Sheslow, Esquire
Whittle & Melton, LLC
11020 Northcliffe Boulevard
Spring Hill, Florida 34608

For Respondent: Erik DeL'Etoile, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent, JR Conway Enterprises, LLC (Respondent), violated the Florida Civil Rights Act of 1992, section 760.10(7), Florida Statutes,[1] by terminating Petitioner, Tina Garner (Petitioner), in retaliation for her reporting sexual harassment.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination dated January 11, 2019, with the Florida Commission on Human Relations (the Commission or FCHR), which was assigned FCHR No. 2019-17800 (Complaint). The Complaint alleged that Respondent engaged in sex discrimination and retaliation against Petitioner.

After investigating Petitioner's allegations, the Commission's executive director issued a determination dated April 15, 2020 (Determination), finding that Petitioner was "unable to establish a prima facie case of hostile work environment sexual harassment" but that "evidence in the file supports [Petitioner's] prima facie case of retaliation." Despite finding a prima facie case of retaliation, the Determination ultimately concluded that "no reasonable cause exists to believe that an unlawful practice occurred" because Petitioner did not show that Respondent's reasons for terminating Petitioner were "pretextual." An accompanying Notice of Determination notified Petitioner of her right to file a Petition for Relief for an administrative proceeding within 35 days of the Notice. On May 19, 2020,

[1] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the current versions, which have not substantively changed since the time of the alleged discrimination.

Petitioner, through counsel, timely filed a Petition for Relief, and on May 22, 2020, the Commission forwarded the petition to DOAH for the assignment of an administrative law judge to conduct a hearing.

The case was assigned to the undersigned and was scheduled for an administrative hearing to begin July 19, 2020. Thereafter, the original date for the hearing was twice continued and was ultimately rescheduled for November 16, 2020. During the hearing, Petitioner called Morgan Katocs and Jake Fryer, as witnesses, and testified on her own behalf. Petitioner offered 19 exhibits received into evidence as Exhibits P-1 through P-19, without objection. Respondent presented the testimony of Jill Franklin, John Labbe, Kay Stapleton, and Jeff Conway, but offered no exhibits.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript to submit their proposed recommended orders. The one-volume Transcript of the hearing was filed December 17, 2020. Thereafter, the parties received an extension until January 22, 2021, to file their proposed recommended orders. The parties filed their respective Proposed Recommended Orders on January 22, 2021, both of which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, JR Conway Enterprises, LLC, owns a number of businesses.

2. Jeff Conway is Respondent's managing member.

3. Petitioner was hired by Respondent near the end of July 2018, to work as a bookkeeper doing payroll and accounts for Respondent's real estate office known as Sunshine State Deals.

4. In September 2018, Respondent opened a Smoothie King in the Spring Hill, Florida area.

5. As the date for opening the Smoothie King grew closer, Petitioner took on more responsibilities and helped open and operate that store.

6. Morgan Katocs was hired in September 2018 to work at the Smoothie King. Ms. Katocs was 17 years old at the time she was hired.

7. Ms. Katocs brother, Hunter McGhee, was also hired to work at the Smoothie King.

8. The Smoothie King store opened on September 18, 2018.

9. Petitioner had no authority to hire employees for Respondent.

10. Apparently, all hires to work at the Smoothie King were made by Brandon Berlinrut, who was a friend of Jeff Conway and recruiter for Respondent.

11. While Petitioner had no hiring authority, during the time she worked at the Smoothie King, she supervised Ms. Katocs.

12. As the Smoothie King was opening, there was work that needed to be completed. Respondent hired his friend, Constantine Tremoularis, as an independent contractor to install security cameras, work on the point of sale, and conduct various work at the location.

13. Mr. Tremoularis was given access to areas at the Smoothie King store where only employees were permitted.

14. While working at the Smoothie King, Ms. Katocs had physical limitations due to a back condition caused by a car accident.

15. When Ms. Katocs requested assistance in lifting a mop bucket, Mr. Tremoularis responded, "I bet men like to say that they broke your back," in a context inferring injury during sex.

16. Ms. Katocs interpreted the comment as an unwelcome sexual comment and was offended and upset.

17. Ms. Katocs reported the unwanted sexual comment to Ms. Garner within an hour after the comment was made.

18. Later, while Petitioner was at Respondent's real estate office, both Ms. Katocs and her mother called her on the telephone from the Smoothie King office and asked her to set up a meeting with Mr. Conway to discuss the unwanted sexual comment. They both expressed a desire for Petitioner to be present during the meeting.

19. Ms. Garner told Mr. Conway of Ms. Katocs and her mother's desire to have a meeting with him to discuss the unwanted sexual comment, and of their request that Petitioner be present at the meeting.

20. Mr. Conway met with Ms. Katocs and Ms. Katocs's mother on October 4, 2018, to discuss the incident. Mr. Conway did not invite Petitioner and Petitioner did not attend the meeting.

21. Although he did not tell Ms. Katocs or her mother, the reason that Mr. Conway did not want Petitioner in the meeting is because he had already decided to terminate Petitioner's employment for reasons unrelated to the reported unwanted sexual comment from Mr. Tremoularis.

22. At the meeting, Ms. Katocs, her mother, and Mr. Conway discussed the unwanted sexual comment. During the meeting, Mr. Conway agreed to make changes and provide sexual harassment training for Respondent's employees.

23. On October 4, 2018, the day after the meeting between Ms. Katocs, her mother, and Mr. Conway, Mr. Tremoularis apologized to Ms. Katocs. Although he was allowed to stay at the Smoothie King location from several days to over a week to finish the job, Mr. Tremoularis made no further unwanted sexual comments to Ms. Katocs.

24. On Saturday, October 6, 2018, Mr. Conway called Petitioner on the telephone and advised her that she was terminated.

25. Mr. Conway terminated Petitioner because he perceived her as rude, argumentative, and combative. Mr. Conway also believed that Petitioner was responsible for hiring her daughter, Tina Rowlands, to work at the Smoothie

King store even though Petitioner knew that Mr. Conway did not approve of the hire.

26. Mr. Conway's perceptions of Petitioner's aberrant behavior were consistent with those observations reported by Karen Stapleton in her testimony at the final hearing. Karen Stapleton, who worked with Mr. Conway's companies as a consultant and in accounting, worked with and helped train Petitioner at Respondent's real estate office in September 2018. Ms. Stapleton also observed Petitioner scream at an employee at Respondent's Smoothie King store.

27. When Mr. Conway terminated Petitioner, he also terminated Petitioner's daughter, Ms. Rowlands, as well as Petitioner's daughter's boyfriend, Jake Fryar. Although Mr. Conway approved of Jake Fryar's hire, he decided to terminate Mr. Fryar as well because of his association with Petitioner and Petitioner's daughter.

28. Respondent's decision to terminate Petitioner was made because of Mr. Conway's perceptions about Petitioner's combative behavior and Mr. Conway's belief that Petitioner was responsible for hiring her daughter.

29. Although in close proximity to the time of Petitioner's termination on October 6, 2018, Mr. Conway had already decided to fire Petitioner prior to Petitioner's report of the unwanted sexual comment made to Ms. Katocs and Mr. Conway's meeting with Ms. Katocs and her mother to discuss the incident.

30. As confirmed by the testimony of a locksmith, who was contacted on September 28, 2018, to change locks on Respondent's offices and the Smoothie King store, Respondent's decision to terminate Petitioner was made in late September 2018. Although the locks were not changed until October 6, 2018, the timing of the lock change request and Mr. Conway's credible testimony confirm that the decision to terminate Petitioner's employment was unrelated to her report of unwanted sexual comments.

31. Following the October 4, 2018, meeting between Ms. Katocs, her mother, and Mr. Conway, Morgan Katocs continued her employment at the Smoothie King store until she voluntarily left at the end of December 2018.

32. Ms. Katocs testified that she left Smoothie King because, in her view, nothing changed; she felt uncomfortable about remaining employed there, the promised sexual harassment training never occurred, and another employee was making inappropriate sexual remarks to other female employees. Ms. Katocs also did not like a manager that was hired after Petitioner was terminated, who, according to Ms. Katocs, was a bully and abusive.

33. Ms. Katocs further testified that neither she, nor her brother, who was also employed at the Smoothie King, received negative repercussions from her report of the unwanted sexual comment from Mr. Tremoularis.

34. Ms. Katocs's brother remained employed at the Smoothie King until voluntarily leaving in April 2019.

CONCLUSIONS OF LAW

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

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

37. The Florida law prohibiting unlawful employment practices is found in section 760.10. The Act makes it an unlawful employment practice, among other things, for an employer:

> to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

§ 760.10(7), Fla. Stat.

38. 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).

39. 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, as in this case, 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).

40. Under the shifting burden pattern developed in *McDonnell Douglas*:

> 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, non-discriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance of the evidence that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(housing discrimination claim).

41. Just as under the Act, Title VII makes it unlawful for employers to retaliate against employees for opposing unlawful employment practices. *See* 42 U.S.C. § 2000e-3(a).

42. A plaintiff or petitioner may establish a claim of discrimination based on illegal retaliation using either direct or circumstantial evidence. As direct evidence of retaliation was not shown, use of the *McDonnell Douglas* analytical framework is appropriate in this case. *See Bryant v. Jones,* 575 F.3d 1281, 1307-08 (11th Cir. 2009). "Under [that] framework, a plaintiff alleging retaliation must first establish a *prima facie* case by showing that: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) she established a causal link between the protected activity and the adverse action." *Id.*

43. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997).

44. In this case, the facts are adequate to support a prima facie case of retaliation because: 1) Petitioner's report of inappropriate sexual comments to her employer was statutorily protected activity; 2) Petitioner was terminated from her position; and 3) the timing between Petitioner's report of inappropriate remarks and Petitioner's termination suggests a causal link between the two. *See e.g., Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2001)("The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action.")

45. Respondent's establishment of a prima facie case, however, is insufficient, in and of itself, to prevail on her claim. Rather, "[o]nce a plaintiff establishes a *prima facie* case of retaliation, the burden of production shifts to the defendant to rebut the presumption by articulating a legitimate non-

discriminatory reason for the adverse employment action." *Bryant*, 575 F.3d at 1308; *see also Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1495 (11th Cir. 1989)(noting that an "employer's burden of rebuttal is 'extremely light'").

46. If the employer carries its burden by articulating a legitimate non-discriminatory reason, "[t]he burden then shifts to the plaintiff to prove by a preponderance of the evidence that the 'legitimate' reason is merely pretext for prohibited, retaliatory conduct." *Sierminski v. Transouth Fin. Corp.,* 216 F.3d 945, 950 (11th Cir. 2000).

47. To establish pretext, a plaintiff must "present concrete evidence in the form of specific facts" showing that the defendant's proffered reason was pretextual. *Bryant,* 575 F.3d at 1308; *see also Vessels v. Atlanta Indep. Sch. Sys.,* 408 F.3d 763, 771 (11th Cir. 2005)(quoting *Cooper v. S. Co.*, 390 F.3d 695, 725 (11th Cir. 2004))(A plaintiff's evidence of pretext "must reveal '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.'"). "If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it. [citation omitted]. Quarreling with that reason is not sufficient." *Wilson v. B/E Aerospace, Inc.,* 376 F.3d 1079, 1088 (11th Cir. 2004). Conclusory allegations and assertions are insufficient. *See Bryant*, 575 F.3d at 1308.

48. In addition, a claim under Title VII or the Act requires proof that the employer's desire to retaliate was the "but-for" cause of the challenged employment action. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

49. In this case, while the evidence was sufficient to establish a prima facie case of retaliation, Respondent presented credible evidence that it had legitimate business reasons for terminating Petitioner's employment which were in the process of being implemented prior to the time that Petitioner

reported the inappropriate sexual comment to Respondent. And, Petitioner failed to demonstrate that Respondent's reasons for her termination were pretextual.

50. Further, under the "but-for" causation standard, "Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Nassar,* 570 U.S. at 360. In failing to do so, and in otherwise failing to demonstrate that Respondent's adverse actions against her employment were pretextual, Petitioner failed to demonstrate by a preponderance of the evidence that Respondent engaged in unlawful retaliation when it terminated her employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Complaint of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 9th day of February, 2021, in Tallahassee, Leon County, Florida.

James H. Peterson, III
Administrative Law Judge
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Filed with the Clerk of the
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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.