

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

VANESSA PUCCINI,

Petitioner,

vs.

Case No. 21-1409

BROOKS BURGER,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, the final hearing was conducted in this case on June 28, 2021, via Zoom teleconference from Tallahassee, Florida, before Lynne A. Quimby-Pennock, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Vanessa Puccini, pro se
Apartment 517
4680 Saint Croix Lane
Naples, Florida 34109

For Respondent: Thomas K. Rinaldi, Esquire
Bond, Schoeneck & King, PLLC
4001 Tamiami Trail North, Suite 105
Naples, Florida 34103

STATEMENT OF THE ISSUE

Whether Petitioner, Vanessa Puccini (“Ms. Puccini”), was subject to an unlawful employment practice by Respondent, Brooks Burger (“Respondent”),

based upon her race or national origin, in violation of section 760.10, Florida Statutes,¹ and if so, what remedy should be imposed.

PRELIMINARY STATEMENT

On October 23, 2020, Ms. Puccini filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (“Commission”) alleging discrimination based on her race or national origin. Ms. Puccini alleged the following acts were discriminatory:

I am Black and of Haitian descent. I believe I am being discriminated against because of my race and national origin. I began my employment with Respondent in November 2016. My current position title is Server. On September 18, 2020, Gary Stevens (an owner) and Marie Giebelhouse confronted me about my past three paychecks, stating that I have been overpaid. They also said that because I did not mention it, that was an indication that I was defrauding the company. I had previously been being paid that extra amount due to the COVID shutdown. Marie Giebelhouse previously mentioned that the extra pay would be coming to an end soon, however, she did not give specifics as to when it would end. There has been a continuous pattern of discrimination from Gary and Marie towards me. Marie would continuously give me the slow section every shift until I spoke up about it. I was the only employee sent home for a week without pay. I was told it was because I left a customer on hold on the phone too long. Other employees were not disciplined even when they have more severe violations such as drinking alcohol on the job. I also had to pay customers’ bills twice because they left without paying and I am the only one who must do this as well. Mr. Stevens once said to me that this is the reason companies don’t want to work with Haitians.

¹ Citations shall be to Florida Statutes (2020) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

The Commission investigated Ms. Puccini's allegations. On April 21, 2021, the Commission issued a written determination that there was no reasonable cause to believe an unlawful employment practice occurred. The Commission's determination provided in relevant part:

Complainant filed a complaint of discrimination with the Florida Commission on Human Relations (Commission) alleging that Respondent committed unlawful discrimination on the bases of race and national origin in violation of the Florida Civil Rights Act of 1992. As required in Rule 60Y-5.004(1), Florida Administrative Code (F.A.C.), the Commission's Office of Employment Investigations completed an investigation of this matter, which is reported in the Investigative Memorandum. The Commission's Office of General Counsel reviewed all available evidence and the Investigative Memorandum, and made a recommendation to me, as Executive Director of the Commission, that it is unlikely that unlawful discrimination occurred in this matter.

Ms. Puccini timely filed a Petition for Relief ("Petition") with the Commission citing a "Discriminatory Employment Practice." On April 27, 2021, the Commission referred the Petition to DOAH for the assignment of an ALJ to conduct the requested hearing. The Notice of Hearing by Zoom Conference and Order of Pre-hearing Instructions were issued on May 5, 2021.

On June 16, 2021, Respondent's Motions in Limine ("Motion") was filed.

On June 21, 2021, a pre-hearing conference call² was held at which time the Motion was argued. The Motion contained two issues: 1) the possibility of

² The pre-hearing conference call was noticed on May 15, 2021, to discuss three items: 1) to conduct a trial run of the Zoom conference platform (for the benefit of both parties to ensure the Zoom connection could be established); 2) to discuss any outstanding motions; and 3) to resolve any other issues relevant to the conduct of the hearing.

Ms. Puccini “introducing video taped [sic] recordings of telephone conversations between”³ one of Respondent’s owners and Ms. Puccini; and 2) the possibility of Ms. Puccini introducing an unsigned letter or text message from a person whom Ms. Puccini refused to disclose. As to the first issue, Ms. Puccini acknowledged that she could not introduce the video-taped recordings, and for that issue, the Motion was granted. As to the second issue, the undersigned reserved ruling on it, pending the possibility that the anonymous person would be disclosed to Respondent and discovery completed. As provided in this Order, the second issue became moot when the letter or text message was not introduced during the hearing.

The hearing was scheduled for and completed on June 28, 2021.

At the hearing, Ms. Puccini testified on her own behalf and presented the testimony of her husband, Richard Puccini.⁴ Ms. Puccini did not offer any exhibits into evidence.⁵ Respondent presented the testimony of Todd Brooks, Respondent’s principal owner; Gary Stevens, Respondent’s co-owner; and Marie Giebelhouse, Respondent’s general manager (“GM”). Respondent did not offer any exhibits.

³ During the pre-hearing conference call, it was confirmed that the recordings included the audio of the conversations, obtained without the consent of all persons on the telephone.

⁴ Dan C. Beauchard (Ms. Puccini’s friend), and Laura Saint-Jean (Ms. Puccini’s cousin) each attended a portion of the hearing, but did not testify. Ms. Puccini testified that their testimony (Mr. Beauchard’s and Ms. Saint-Jean’s) would be based solely on conversations each had with Ms. Puccini.

⁵ On Friday, June 25, 2021, Ms. Puccini faxed approximately 22 pages of material to DOAH. There was no indication on the cover sheet that Respondent was provided copies of the material, however it was late in the day, and the undersigned determined to address it at the hearing on Monday, June 28, 2021. At the hearing, Respondent’s counsel acknowledged receipt of the pages. However, Ms. Puccini did not ask that the material be admitted into the record.

Upon conclusion of the hearing, it was confirmed that a transcript of the proceedings would be ordered. The parties were advised that any proposed recommended orders (“PROs”) were to be filed within 10 days after the filing of the transcript.

The one-volume Transcript of the hearing was filed with DOAH on July 7, 2021. Later that day, a Notice of Filing Transcript was issued advising the parties that the Transcript had been filed.

Ms. Puccini filed her PRO on July 19, 2021.⁶ Respondent filed its PRO on July 9, 2021.⁷ To the extent that either PRO contained hearsay evidence not supported by direct testimony or evidence, that information has not been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Brooks is one of the owners of Respondent.
2. Mr. Stevens is one of the owners of Respondent. He credibly testified that Respondent is a Naples, Florida, area restaurant business, specializing in hamburgers.
3. Ms. Giebelhouse is Respondent’s GM.
4. At all times pertinent to this matter Respondent employed only 12 persons. This information was never challenged or contradicted.
5. Ms. Puccini is of Haitian descent, is black, and speaks with a noticeable accent. She lives in Naples, Florida, with her husband and daughter.
6. Respondent hired Ms. Puccini in November 2016 as an employee. Although different position titles were provided for the positions she held,

⁶ Ms. Puccini’s PRO did not reflect a certificate of service and a Notice of Ex Parte Communication was issued.

⁷ Respondent’s electronic PRO was filed on July 9, 2021, along with a “Notice of Filing.” A hard copy of the PRO was filed on July 12, 2021. Each reflected that Ms. Puccini was provided a copy of the PRO.

after several promotions Ms. Puccini became a shift leader/manager/server. Ms. Puccini was an employee of Respondent until January 2021, when she was let go.

7. According to Mr. Brooks, Mr. Stevens, and Ms. Giebelhouse, Ms. Puccini was a “good server,” “good employee,” and “great worker,” who did a “good job.” While working for Ms. Giebelhouse, Ms. Puccini was promoted from server to shift manager. Despite this promotion, Ms. Puccini claimed her discrimination started when Ms. Giebelhouse started with Respondent. However, no time was provided.

8. Ms. Puccini alleged several instances that she felt she was discriminated against based on her race and national origin: her work schedule and section assignments; her discipline; her exclusion from management meetings; a payroll compensation error; and being compared to Haitian people who work elsewhere.

Work Schedule and Section Assignments

9. Prior to Ms. Giebelhouse becoming the GM, Ms. Puccini worked the dinner shift. When Ms. Giebelhouse prepared the work schedule, Ms. Puccini was switched to the lunch shift. Ms. Puccini felt that Ms. Giebelhouse did not provide her (Ms. Puccini) with her preferred work schedule, but instead did so for others. Ms. Puccini did not provide the race or national origins of the servers who received their preferred work schedule.

10. Ms. Puccini also alleged that she was assigned to the outside patio tables when it was cold, and that customers did not sit outside when it was cold so her tips were much less. Ms. Puccini did not provide the race or national origins of the servers who were or were not assigned the outside patio tables.

11. When Ms. Giebelhouse became the GM, she confirmed that she made the servers’ work schedule. Ms. Giebelhouse used a blank schedule with everyone’s name on it. She then asked all the servers to fill out their

preferred work schedule. Ms. Giebelhouse attempted to “make it [the schedule] as fair as possible for everybody.”

12. Ms. Giebelhouse “did the best [she] could” in making the server shift work schedule. Ms. Giebelhouse did not make her decisions to schedule Ms. Puccini to work on certain shifts or certain sections because of her race or national origin.

Discipline

13. Ms. Puccini alleged that she was disciplined differently than other servers when a customer, who telephoned Respondent, complained she had been put on hold for too long, and when two sets of diners left without paying for their meals. According to Ms. Puccini, she was sent home for a week after the customer complained she was put on hold for a long time. The complaining customer did not testify. Although Ms. Puccini claimed that other servers were not disciplined for the same offense, she did not provide the race or national origin of any affected server.

14. Mr. Stevens testified Ms. Puccini argued with a customer over an order. Ms. Giebelhouse testified Ms. Puccini was disciplined after she “repeatedly” argued with a customer. As a result, Ms. Puccini was not scheduled to work for a week.

15. In three instances, Ms. Puccini served diners who “dined and ditched,” meaning they left Respondent without paying for the meals. In the first instance, Ms. Puccini went outside to talk on her phone (which was against Respondent’s policies). Her customers left without paying for their meal. Ms. Puccini was told if it happened again, she would have to pay for the meal when customers walked out without paying.

16. The second time customers “dined and ditched,” Ms. Puccini paid the bill. The last time customers “dined and ditched” at one of Ms. Puccini’s tables was on a Sunday morning. Ms. Puccini called the police for assistance to catch the customers. For some undisclosed reason, Ms. Giebelhouse declined to allow the police to review Respondent’s video camera feed of the

incident, and the police were unable to locate those customers. Ms. Puccini paid the bill.

17. Ms. Puccini testified a “guy walked out of the place, the guy left without paying,” and Ms. Giebelhouse “discounted” a bill for “another server named Yvette in front of me [Ms. Puccini].” Ms. Puccini did not provide Yvette’s race or national origin.

18. In each of these circumstances, Ms. Puccini did not provide the race or national origin of the other servers who were or were not disciplined for similar issues as described above. Instead, Ms. Puccini testified:

They never punished anyone like me, like they did to me. They find employees drinking alcohol on the job. [Ms. Giebelhouse] give them notice and tell them, if they do that next time, I will have to punish you or to do something. [Ms. Giebelhouse] never give me any notice.

19. Ms. Giebelhouse and Mr. Stevens each testified that the responsibility to pay for the “dined and ditched” customers meals was not based on Ms. Puccini’s race or national origin. Rather it was because she left her tables unattended.

Overpayment

20. During a portion of the pandemic, Respondent was provided payroll protection funds (“PPF”) to help keep the business in operation. According to Ms. Giebelhouse, “A lot of the servers weren’t making the money that they were originally making when they worked, so [Respondent] decided to give the servers an extra raise on top of their normal pay.” This raise equated to five dollars over the hourly wage. At the time, Ms. Puccini was a shift leader/server who also benefited from the extra pay.

21. In August 2020, the PPF were exhausted. Ms. Giebelhouse informed Ms. Puccini that the PPF money had run out, and “effectively immediately” she (Ms. Puccini) was going back to her original hourly pay rate. The payroll

company failed to make the requisite adjustments, and Ms. Puccini was paid at the higher pay rate for three pay periods.

22. When Ms. Giebelhouse and Mr. Stevens became aware of the overpayment, they scheduled a meeting with Ms. Puccini in September 2020. Mr. Stevens expressed his disappointment that Ms. Puccini, as “a more valuable employee, being a shift leader manager,” did not let Respondent know of the overpayments. Ms. Giebelhouse testified that they (she and Mr. Stevens) “were just a little upset that” Ms. Puccini did not let them know of the three overpayments.

23. Ms. Puccini understood that mistakes could happen. However, she felt Mr. Stevens and Ms. Giebelhouse accused her of fraud or stealing the money. As an employee for over five years, Ms. Puccini felt threatened that they would think that of her. Further, Ms. Puccini felt they asked for the money to be paid back in cash, when she offered to return it via a check or money order. Ms. Puccini did not return the overpayment as Mr. Brooks spoke with her, and assured her that she need not return it, as it was a payroll error.

Management Meeting

24. Ms. Puccini also alleged she was excluded from Respondent’s management meeting once she became a shift leader/manager. She provided that it was a group that exchanged ideas, yet she only heard about it from a kitchen manager. Ms. Puccini admitted:

So they never – never tell me about that group, and I was not, do you know what, I don’t know the reason why I’m not in it, but it’s okay. I’m still – I love what I’m doing. I’m taking care of people, I’m grateful for that. It’s okay, I don’t want to be involved in everything.

Comparison to other Haitian people

25. Ms. Puccini alleged Mr. Stevens made some discriminatory remarks comparing Ms. Puccini to Haitian people working at other establishments, and at least one comment that Americans did not like to hire Haitians.

Ms. Puccini did not provide the “when, where, what, and who” of Mr. Stevens’ comments. Mr. Stevens denied making any discriminatory remarks towards Ms. Puccini.

26. Although Ms. Puccini testified that Mr. Brooks was present when Mr. Stevens made some discriminatory remarks towards her, Mr. Brooks credibly testified that he never heard Mr. Stevens say: “the reason [any] company in America don’t want to work with Haitian people.” Mr. Brooks agreed that he said Mr. Stevens “does live in the past ... he has a very old – old school style management.” However, there was no connection to that remark and any possible discriminatory language.

27. Ms. Puccini testified she was let go in January 2021. Ms. Puccini’s Petition did not include a retaliation claim for her termination. However, Mr. Brooks addressed her termination by providing that he attempted to keep her, yet there were multiple employees who indicated they were not going to work at the restaurant with her.

28. Richard Puccini was unable to provide any direct testimony as to events at Respondent’s location when Ms. Puccini was working there.

29. Ms. Puccini was emotional as she testified, and believes she was discriminated against. However, Ms. Puccini presented no persuasive evidence that comparable employees outside of her protected group (race or national origin) were treated differently than she. Ms. Puccini failed to provide specific information regarding other employees who were treated differently than she (names, dates, racial composition, national origins, and actions taken).

30. Ms. Puccini offered no credible evidence that Respondent discriminated against her because of her race or national origin in violation of section 760.10.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes, and Florida Administrative Code Rule 60Y-4.016.

32. Respondent is not an “employer” as that term is defined in section 760.02(7), which provides the following:

“Employer” means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

33. The testimony is clear and persuasive: Respondent did not employ 15 or more employees at all times material to this Petition and case. Respondent does not meet the threshold for being deemed an employer under the provisions of chapter 760. No evidence was presented to contradict that information.

34. Ms. Puccini has not demonstrated that there is subject matter jurisdiction over the claim involved in this case because Respondent has fewer than 15 employees.

35. Assuming arguendo that there was subject matter jurisdiction in this case, Ms. Puccini’s claims that she was discriminated against based on her race and national origin will be addressed.

36. The Florida Civil Rights Act of 1992 (“the Act” or “FCRA”) prohibits discrimination in the workplace. *See* §§ 760.10 and 760.11, Fla. Stat.

37. 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.

38. Florida courts have determined that federal case law applies to claims arising under the FCRA, and, as such, the United States Supreme Court's model for employment discrimination cases set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination. See *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Paraohao v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); *Fla. Dep't of Cmty. Aff. v. Bryant*, 586 So. 2d 1205 (Fla. 1st DCA 1991).

39. "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting *Black's Law Dictionary* 413 (5th ed. 1979)). In *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989), the court stated:

This Court has held that not every comment concerning a person's age presents direct evidence of discrimination. [*Young v. Gen. Foods Corp.* 840 F.2d 825, 829 (11th Cir. 1988)]. The *Young* Court made clear that remarks merely referring to characteristics associated with increasing age, or facially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination. *Id.* Rather, courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination.

Ms. Puccini offered no evidence that would satisfy the stringent standard of direct evidence of discrimination.

40. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Ms. Puccini must establish that: (1) she is a member of the protected group; (2) she was subject to adverse employment action; (3) Respondent treated similarly situated employees outside of her protected classifications more favorably; and (4) she was qualified to do the job and/or was performing her job at a level that met the employer's legitimate expectations. *See, e.g., Jiles v. United Parcel Serv., Inc.*, 360 Fed. Appx. 61, 64 (11th Cir. 2010); *Burke-Fowler v. Orange Cty.*, 447 F.3d 1319, 1323 (11th Cir. 2006); *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir. 2003); *Williams v. Vitro Serv. Corp.*, 144 F.3d 1438, 1441 (11th Cir. 1998); *McKenzie v. EAP Mgmt. Corp.*, 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

41. Under the *McDonnell* analysis, in employment discrimination cases, Ms. Puccini has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Ms. Puccini to show by a preponderance of the evidence that the employer's offered reasons for its adverse employment decision were pretextual. *See Texas Dep't of Cmty. Aff. v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Such is not the case here. Ms. Puccini did not meet the preponderance of the evidence standard to establish a prima facie case.

42. Ms. Puccini established that she is a member of a protected group, in that she is black and of Haitian descent. However, Ms. Puccini failed entirely to present any evidence that otherwise similarly-situated persons were treated more favorably by Respondent or that such persons outside of her protected classifications. In other words, Ms. Puccini failed to prove a prima facie case of unlawful employment discrimination.

43. A court's role is not to sit as a "super-personnel department that reexamines an entity's business decisions." *Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001) (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)). Ms. Puccini offered no evidence to support her claim that she was discriminated against because of her race or national origin.

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 that Respondent does not employ over 15 employees, and the Petition should be dismissed for lack of subject matter jurisdiction. Alternatively, a final order should be entered determining that Ms. Puccini has not established her claim of racial or national origin discrimination and that her Petition for Relief should be dismissed in its entirety.

DONE AND ENTERED this 5th day of August, 2021, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of August, 2021.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020

Vanessa Puccini
Apartment 517
4680 Saint Croix Lane
Naples, Florida 34109

Thomas K. Rinaldi, Esquire
Bond, Schoeneck & King, PLLC
4001 Tamiami Trail North, Suite 105
Naples, Florida 34103

Cheyenne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020

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.