

COOK COUNTY COMMISSION ON HUMAN RIGHTS
69 West Washington Street, Suite 3040
Chicago, Illinois 60602

Marie LACARIA, Complainant)	
)	
v.)	Case No. 2015E002
)	
GAIL’S CARRIAGE INN, INC., Respondent)	Entered: April 6, 2016
)	
)	

ORDER FINDING SUBSTANTIAL EVIDENCE

On January 14, 2015, Complainant Marie LaCaria (“LaCaria”) filed the above-captioned complaint with the Cook County Commission on Human Rights (“Commission”) against her former employer, Gail’s Carriage Inn, Inc. (“GCI”). LaCaria alleges that GCI engaged in unlawful discrimination in violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”) by terminating her employment because she was pregnant. *See* Cook County Code of Ordinances (“County Code”), § 42-35(b)(1).

The Commission has completed its investigation of LaCaria’s complaint and, for the reasons explained below, finds sufficient evidence of pregnancy discrimination to merit further proceedings on that charge.

BACKGROUND

On September 8, 2014, LaCaria began working as a server at GCI, a restaurant and pancake house located in Des Plaines, Illinois. Compl. ¶ I; Resp., p.1. GCI is owned by Gail Janczak (“Gail”) and, at all relevant times, was co-managed by Gail and her husband, Michael Janczak (“Mike,” collectively, “the Janczaks”). *See* G. Janczak Interview (Sept. 16, 2015) (stating she was GCI’s owner and president); M. Janczak Interview (Sept. 16, 2015) (stating his title was Manager). LaCaria usually worked on Fridays, Saturdays and Sundays from 9:00 a.m. to closing (2:00 p.m. on weekdays; 2:30 p.m. on weekends). M. Janczak Interview (Sept. 16, 2015).

Pregnancy-Related Incidents

A few weeks after starting, on or around September 21, 2014, LaCaria learned she was pregnant. Compl. ¶ II.A. On October 17, 2014, following her first prenatal appointment, LaCaria told Mike she was pregnant. *Id.* At that time, LaCaria was approximately two months pregnant. *See* Cp. 2nd Q. Resp. No. 1.

LaCaria alleges that the next day (October 18, 2014), Gail made the following statements to LaCaria: “You shouldn’t have kids and not be married” and, you should “get rid of it” (which LaCaria understood as Gail telling her to have an abortion). Compl. ¶ II.B. Gail emphatically denies making these specific statements or saying anything like this to LaCaria. G. Janczak Interview (Sept. 16, 2015).

LaCaria further claims that on November 9, 2014, Mike also made insulting and prejudiced remarks, telling her: “A woman at your age with two kids has no business having another child,” and “You should have gotten rid of it when you had a chance. Customers don’t want to see a pregnant waitress.” Compl. ¶ II.C. Like Gail, Mike also denies ever making these or any similar comments to LaCaria. M. Janczak Interview (Sept. 16, 2015).

There were no witnesses to either offensive remark. LaCaria said she thought one of the busboys, Marco Velazquez (“Velazquez”) had heard some of Mike’s November 9th comments, but that Velazquez probably would not admit as much to a Commission investigator because he still works at GCI. LaCaria Interview (Aug. 11, 2015). When interviewed, Velazquez did indeed deny overhearing Mike make the alleged comments. Velazquez Interview (Oct. 14, 2015). Velazquez added that he never heard anyone at GCI make any negative comments about LaCaria’s pregnancy. *Id.* LaCaria also claims that right after the negative statements were made, she told two other GCI waitresses: Samantha Coghill (“Coghill”) and Nikki Formanski (“Formanski”). LaCaria Interview (Aug. 11, 2015). In fact, LaCaria claims that she texted the information to Formanski. *Id.* LaCaria, however, did not produce documentation of these alleged texts to Formanski. LaCaria remains friendly with Coghill, and she had worked previously with Formanski, who had given LaCaria a reference for the GCI job. *Id.* Even so, neither Coghill nor Formanski recalled LaCaria telling them about the rude remarks. Coghill Interview (Dec. 22, 2015); Formanski Interview (Sept. 16, 2015). Notably, while Coghill did not recall LaCaria telling her about the Janczaks’ specific comments, Coghill did recall that LaCaria told her that the Janczaks had “issues” with her pregnancy. Coghill Interview (Dec. 22, 2015).

Mike’s alleged statements occurred in the context of a larger conversation. Both parties agree that on November 9th, Mike asked LaCaria if she was planning on coming back to work at GCI after she had the baby. M. Janczak Interview (Sept. 16, 2015); Cp. 2nd Q. Resp. No. 2. Mike added that he also asked LaCaria about how long she planned on working while pregnant. M. Janczak Interview (Sept. 16, 2015). LaCaria said she told Mike that she planned to work until she had the baby and then take six to eight weeks off afterwards before returning to work at GCI. *See* Cp. 2nd Q. Resp. No. 2.

Also agreed is that Mike expressed concern about covering LaCaria’s shifts while she went on leave. According to Mike, he told LaCaria that as a small business, GCI does not carry extra help, and “it was putting [GCI] in a bad situation because [he] would have to hire a person to fill her position while she was off.” M. Janczak Interview (Sept. 16, 2015). LaCaria’s complaint provided a harsher description. *See* Compl. ¶ II.C. (alleging that Mike told LaCaria that “because of her pregnancy, he and Gail were ‘not happy’” and, “We have a business to run and when you have your baby we are going to be shorthanded”).

The parties disagreed about how the burden of covering LaCaria’s shift during any maternity leave would be shared. In Mike’s version, after LaCaria told him that the other

restaurants where she had worked previously had given her time off to have a baby and kept her job waiting, Mike responded that if he had to train a new person to fill in for LaCaria, everyone would have to give up a day to fit this person into the schedule. Resp. ¶ II.C. LaCaria, on the other hand, alleged that Mike targeted her by saying, “When I find a girl to replace you[,] I will cut your hours,” and that this left LaCaria upset, physically shaken, and afraid she would lose her job and not be able to provide for her family. Compl. ¶ II.C. LaCaria admitted that during this conversation she told Mike that she would contact an attorney about taking legal action if he continued to threaten her with cutting her hours and not bringing her back after maternity leave. LaCaria Interview (Aug. 11, 2015). Mike said LaCaria declared she would “report[]” him. Resp. ¶ II.C. Soon after, Mike says that he called a government agency and was told that with so few employees, GCI was not legally required to hold LaCaria’s job for her if she went on a maternity leave. *Id.*

On November 16, 2014, LaCaria experienced some spotting while at work, and her physician recommended that she rest for the remainder of the day as a precaution. Cp. 2nd Q. Resp. No. 3. Gail gave LaCaria permission to take the rest of the day off. *Id.* After LaCaria met with her doctor, the doctor advised her that it was probably due to her recent ultrasound and not a cause for concern. *Id.* LaCaria obtained a doctor’s note and called Gail the next day to say that she was cleared to return to work. *Id.*

It is undisputed that on November 17th or 18th, Gail told LaCaria that they were hiring back Christie Maga (“Maga”), a former server at GCI, and that LaCaria would need to give up either her Saturday or Sunday hours to work Maga into the schedule. Compl. ¶ II.D (LaCaria recalled being informed by Gail about Maga’s rehiring during their November 17th phone call); Cp. 2nd Q. Resp. (same). *Compare* Resp. ¶ II.D (GCI asserts that on November 18th, Gail told LaCaria and the rest of the staff that Maga was returning, and that all servers would need to give up some hours to fit Maga in). LaCaria did not want to lose hours, but feared for her job, so she agreed to give up Saturdays. Compl. ¶ II.D. GCI admits that Maga was hired “in part because [GCI] had to plan for LaCaria’s absence when she was out for the birth of her child.” Rp. Q. Resp. No. 8. *See also* Coghill Interview (Dec. 22, 2015) (stating that Maga was hired in preparation for LaCaria being on maternity leave).

While LaCaria claimed she was the only server who was forced to give up her hours to Maga, LaCaria Interview (Aug. 11, 2015), this was contradicted by the testimony of two other GCI servers. Both Coghill and Formanski told Commission investigators that they too gave up hours to work Maga into the schedule. Coghill Interview (Dec. 22, 2015); Formanski Interview (Sept. 16, 2015).

LaCaria’s Alleged Work Performance Issues

The Janczaks claim that LaCaria was a poor performer from the time she was hired and never improved. They maintain that LaCaria was fired on December 5, 2014 because of her slow service and other ongoing performance problems, culminating in an incident where she violated a GCI rule and lost a customer. Resp. ¶ II.F. Gail claims that GCI intended to bring LaCaria back after she had her baby, but LaCaria’s performance issues prior to going out on leave prevented this from even being an issue. G. Janczak Interview (Sept. 16, 2015).

GCI's central complaint about LaCaria was that she worked too slowly, which led to customer complaints and less frequent table turnover. *See* G. Janczak Interview (Sept. 16, 2015) (asserting that LaCaria never improved on her slow service and that customers joked about it); M. Janczak Interview (Sept. 16, 2015) (claiming that LaCaria was slow and would often forget syrup and other condiments). Other restaurant employees agreed with the Janczaks' characterization of LaCaria's performance. Velasquez (a busboy) provided the most detail, telling Commission investigators that he had heard GCI customers and other servers complain about LaCaria's service, and that he had noticed her slower pace as well. Velazquez Interview (Oct. 14, 2015) (also stating that he had noticed that regular customers tended to avoid sitting in areas that they knew LaCaria would be covering).¹ Nicholas Morland ("Morland") also stated that LaCaria was slower than other servers. Morland Interview (Sept. 30, 2015). Morland is Mike's adult son and a part-time host at GCI. *Id.* Morland added that when the restaurant was busy, Mike and Gail both had told him several times to stop seating people in LaCaria's section because she gets overwhelmed. *Id. See also* Formanski Interview (Sept. 16, 2015) (stating that LaCaria was slower than other servers).

A related problem was LaCaria's alleged difficulty in carrying plates out to the tables. G. Janczak Interview (Sept. 16, 2015). As Mike explained it, while LaCaria was an experienced waitress, at the restaurants where she had worked in the past, servers had runners to bring out the food from the kitchen on trays. M. Janczak Interview (Sept. 16, 2015). At GCI, in contrast, servers had to carry out plates balanced on their arms, and LaCaria was never able to master this. *Id.* Formanski, who had worked with LaCaria at a prior job and was LaCaria's reference for the job at GCI, confirmed both that LaCaria lacked experience carrying plates out to the tables on her arms and that LaCaria never quite got the hang of it. Formanski Interview (Sept. 16, 2015).²

Two other alleged ongoing performance problems involved typical, minor workplace issues not specific to LaCaria: unexcused lateness and texting on the job. Gail claimed that LaCaria was late to work on three occasions; two other GCI employees confirmed Gail's impression. G. Janczak Interview (Sept. 16, 2015); Formanski Interview (Sept. 16, 2015) (recalls LaCaria being late a few times); Velazquez Interview (Oct. 14, 2015) (same). The Janczaks asserted that on one occasion LaCaria was 15-20 minutes late and failed to call ahead. G. Janczak Interview (Sept. 16, 2015) (specifying October 12, 2014); M. Janczak Interview (Sept. 16, 2015). Gail claims that LaCaria was counseled about this problem. G. Janczak Interview (Sept. 16, 2015). She said that Mike would write down these kinds of issues with staff, but that these notes were not retained. *Id.* Mike claims that he and Gail were strict with start times and had fired 4-5 servers for being tardy in the past, M. Janczak Interview (Sept. 16, 2015), but GCI did not produce any documentation to support these claims.

¹ Gail added that some customers complained that LaCaria had a "bad attitude" and asked not to be seated in her section. G. Janczak Interview (Sept. 16, 2015). Mike also said that a few times some customers complained about her bad attitude, and that he had talked to LaCaria about this. M. Janczak Interview (Sept. 16, 2015).

² In another related alleged deficit, Gail claimed that LaCaria handed customers hot plates, rather than setting them down on the table in front of customers as she was supposed to, and that LaCaria kept making this mistake even after Gail told her not to do so. G. Janczak Interview (Sept. 16, 2015). Formanski also told Commission investigators that she noticed LaCaria doing this. Formanski Interview (Sept. 16, 2015).

Regarding GCI's other minor gripe, Mike claimed that LaCaria texted on the job in violation of GCI rules. M. Janczak Interview (Sept. 16, 2015). Mike alleged that this occurred twice – on October 3, 2014, and again on November 23, 2014 – and that LaCaria was flippant with him when he admonished her after the first occasion. *Id.* Other restaurant employees agreed that GCI had a strict rule against cell phone use on the job, but no one recalled LaCaria violating the rule. *See* Formanski Interview (Sept. 16, 2015) (also noting that she herself has been admonished for this several times); Morland Interview (Sept. 30, 2015); Velazquez Interview (Oct. 14, 2015).

LaCaria disputes all of these allegations about her supposedly poor performance. LaCaria denies that she was slow or unable to handle plates properly. LaCaria Interview (Aug. 11, 2015). LaCaria counters that Mike “always told [her] that [she was] doing a good job,” and she denies ever being told about her alleged performance problems. *Id.* LaCaria also denies that she had any issue with lateness, and claims she called ahead the one time she was 15 minutes late. *Id.* She also said that the Janczaks never reprimanded her for lateness or cell phone use. *Id.* (LaCaria recalls the Janczaks admonishing Coghill for being tardy). LaCaria also asserts that at no time during her employment at GCI did her pregnancy ever prevent her from performing all duties required of servers. Compl. ¶ II.F.

The one witness identified by the parties and interviewed by Commission investigators who was not GCI management or current staff was GCI regular customer David Morton (“Morton”). Morton supported LaCaria's view of her own performance. *See* Morton Interview (July 31, 2015). During the time period that LaCaria worked at GCI, Morton was a frequent customer, usually coming in three times a week. *Id.* Morton testified that he had never noticed LaCaria having problems with how she carried or handed plates to customers, and that he had never seen her argue with customers or use her cell phone while working. *Id.* Moreover, he was not aware of any pattern of lateness or any other transgression by LaCaria. *Id.*

GCI points to an incident on Sunday, November 30, 2014, as the final reason for LaCaria's dismissal. Resp. ¶ II.F. After LaCaria made the common server error of getting an order wrong, the customer became irate and rude. LaCaria Interview (Aug. 11, 2015). The confrontation culminated with the customer saying she would never return to the restaurant. Morland Interview (Sept. 30, 2015).

Mike acknowledged that all servers sometimes have angry customers; this incident was a serious problem only because LaCaria failed to tell either him or Gail while it was happening. M. Janczak Interview (Sept. 16, 2015). Mike told Commission investigators that all GCI employees know the rule that one of the Janczaks should be alerted immediately if a customer is upset so that management has the chance to resolve the dispute and retain the customer's patronage. *Id.*

LaCaria claimed that neither Janczak had ever told her this was their rule, but she also admitted to Commission investigators that she knew she was supposed to do this based on her years working as a server at other restaurants. LaCaria Interview (Aug. 11, 2015). LaCaria explained that she did not immediately tell Gail or Mike about the upset customer on November 30th because they were both busy. *Id.* Instead, LaCaria told Morland, Mike's son, right away. *Id.*

The evidence shows that staff of the restaurant was aware of the GCI rule and also agreed that Morland was not an appropriate substitute for Mike or Gail when a customer was upset because Morland was not a supervisor and only worked at GCI a few times a month. Ejnik Interview (Aug. 24, 2015); Formanski Interview (Sept. 16, 2015); Morland Interview (Sept. 30, 2015). Formanski said that she did not understand LaCaria's actions that day because they were all trained to tell one of the Janczaks if a situation like that arose, and Gail was working right next to LaCaria that day. Formanski Interview (Sept. 16, 2015). Formanski added that Morland was the "last person" she would have told in LaCaria's shoes because he was there so seldom. *Id.* Morland said he thought LaCaria told him because he was working the front counter, so that he would be alerted in case the customer mentioned it when paying the bill. Morland Interview (Sept. 30, 2015). Morland, however, assumed that LaCaria had already also alerted his father or Gail. *Id.*

Mike gave two contradictory accounts of when he learned about the customer dispute that day. In an interview, he told Commission investigators that he did not learn of the problem until "much later in the workday." M. Janczak Interview (Sept. 16, 2015). Morland confirmed Mike's testimonial account: Morland said that he did not mention the problem to his father until the end of the day because Morland assumed that Mike already knew. Morland Interview (Sept. 30, 2015). In the Verified Response, however, Mike wrote that he was at the front register when the angry customer came up to pay and complained to him about LaCaria. Resp. ¶ II.F. Mike wrote that he apologized at that point, but the angry customer said that she was never coming back because of LaCaria.³ *Id.*

The next time LaCaria came in to the restaurant to work, on Thursday, December 5, 2014, Mike called her into his office and fired her. LaCaria alleges that Mike told her that he was firing her because of two minor mistakes she made when serving tables on the prior Sunday. Compl. ¶ II.E. GCI's position, on the other hand, is that LaCaria was fired for losing a customer that Sunday and because, in the longer term, she was not able to do the job she was hired to do. Resp. ¶ II.F. That is to say that GCI claims that LaCaria should have alerted Mike or Gail to the upset customer on her last shift, and when GCI hired LaCaria, she did not tell Mike that she had no experience carrying plates out to the tables herself; she was slow and never improved at the kind of serving done at GCI. *Id.*

Morton, the regular GCI customer, backs up LaCaria's description of the reason given contemporaneously for her termination. Morton said that when he asked Morland why LaCaria was fired, Morland said it was because LaCaria made a mistake on a customer's order on November 30th. Morton Interview (July 31, 2015) (referring to Morland as "Nikki the manager"). Morton also told Commission investigators that he did not understand why LaCaria would be fired for such a "petty" reason. *Id.*

Other Evidence of the Janczaks' Attitude Towards Pregnant Employees

To support their claim that neither of them made the offensive statements alleged by LaCaria about her pregnancy, the Janczaks provided evidence that one of their servers at GCI,

³ The Verified Response, while unsigned, appears to have been written by Mike: it is written in the first person and at one point refers to "I Michael Janozak [sic]." See Resp. ¶ II.C.

Heather Ejnik (“Ejnik”), had worked for GCI through two pregnancies. Resp. ¶ II.F; G. Janczak Interview (Sept. 16, 2015). Ejnik testified that with her first child in 2011, she worked at GCI through her eighth month of pregnancy, and that with her second in 2014, when she left in the fifth month, it was by her own choice and not under pressure from the Janczaks. Ejnik Interview (Aug. 24, 2015). Ejnik said she returned to work six months after her second child was born, and that she was allowed to use a breast pump during breaks. *Id.* Ejnik does not recall anyone being hired to cover her shift, but thinks other servers just filled in. *Id.* In response to questions, Ejnik stated that she is married and was married during both pregnancies. *Id.* She worked at GCI on Tuesdays and occasionally on Saturdays, and has done so on and off since she was in high school in 1995. *Id.*

DISCUSSION

LaCaria alleges that GCI subjected her to offensive comments and then discharged her because of her pregnancy. Compl. ¶ I. In relevant part, the Human Rights Ordinance prohibits any employer from “directly or indirectly discriminat[ing] against any individual in . . . discharge . . . or other term, privilege, or condition of employment on the basis of unlawful discrimination.” County Code, § 42-35(b)(1). Unlawful discrimination is defined to include “discrimination against a person because of the actual or perceived status, practice, or expression of that person’s . . . sex[.]” *Id.* at § 42-31.

Pregnancy is an inherently gender-specific condition, and thus a covered “expression” of a woman’s sex protected by the Human Rights Ordinance. The Commission’s interpretation of the Human Rights Ordinance as including pregnancy discrimination is codified by rule. *See* CCHR Pro. R. 500.100 (discharging an employee because she is pregnant is “a *prima facie* violation of the Ordinance”).⁴

The Commission now turns to evaluating whether there is enough evidence of unlawful pregnancy discrimination in this case to require a hearing on the merits. To do so, the Commission uses a hybrid test: a modified version of the familiar *McDonnell Douglas* burden-shifting approach, expanded to incorporate the more flexible range of evidence used in the newer “mosaic” test. *See Marino v. Chicago Horticultural Society*, 2012E029, *6 (CCHRC Mar. 20, 2015) (reviewing case law and explaining the rationale for Commission’s hybrid test).

To start, a complainant must establish a *prima facie* case of unlawful discrimination. For a pregnancy discrimination claim, this requires showing the following four factors:

- 1) At the time of the alleged violation, complainant was pregnant and

⁴ Part 500 of the Commission’s Rules (entitled “Pregnancy, Childbirth and Child-Rearing”) also specifically requires equal treatment of pregnancy-related and non- pregnancy-related disabilities and leave. CCHR Pro. R. Part 500.

The Commission did not always take the position that pregnancy discrimination was covered by the Human Rights Ordinance. *See Pirrone v. Wheeling Industries Clinic*, 1997E005 (CCHRC Apr. 12, 2001) (dismissing pregnancy discrimination claim as not actionable). This position, however, was based, in part, on the Commission’s observation at the time that pregnancy was not included in the statutory or regulatory definition of sex discrimination. *Id.* at *5. Now that the Commission’s procedural rules have been amended to cover pregnancy discrimination, *Pirrone* is no longer good law. To the extent *Pirrone* can be read more broadly to undermine the validity of pregnancy discrimination claims under the Human Rights Ordinance, it is now overruled.

- respondent knew she was pregnant;
- 2) complainant was performing her job satisfactorily;
 - 3) complainant suffered an adverse employment action; and
 - 4) strongly probative evidence raises the inference that respondent had a discriminatory motive for this adverse employment action.

See Bell v. Parkville Autobody, Inc., 2014E010, *5 (CCHRC Apr. 20, 2014) (setting forth basic four-part *prima facie* case as first step of Commission’s hybrid test); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 551 (7th Cir. 2011) (*prima facie* test for pregnancy discrimination also requires employer’s knowledge of pregnancy). Under the *McDonnell Douglas*-style test used in other jurisdictions, the fourth element of the *prima facie* test requires showing that similarly situated employees who are not members of the complainant’s protected class were treated more favorably than complainant. Importantly, the fourth element of the hybrid test used by this Commission may also be satisfied by other types of evidence, which likewise suggest a respondent’s discriminatory intent (*e.g.*, biased statements, suspicious timing). *Marino*, 2012E029 at *6.

At this stage of the proceedings, the complainant must provide substantial evidence of each element of the *prima facie* case. If this first step is satisfied, then the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Id.* If the respondent provides such an explanation, then the burden shifts back to the complainant. *Id.* To move forward to a hearing, the complainant must be able to point to substantial evidence that the respondent’s proffered explanation is pretextual. *Id.* *See also Cuevas v. Coty, Inc.*, 2006E054, *3-4 (CCHRC May 20, 2014) (explaining use of the burden-shifting test at the evidentiary determination stage).

1. The Prima Facie Case

LaCaria easily satisfies the first and third elements of the *prima facie* case. It is undisputed that she was pregnant and that she told Mike that she was pregnant on October 17, 2014. *See* Compl. ¶ II.A; Resp. ¶ II.A. And the parties agree that on December 5, 2014, LaCaria was fired, the ultimate adverse employment action.⁵ *See* Compl. ¶ II.E; Resp. ¶ II.E.

⁵ LaCaria also alleges that before she was “eventually” terminated, she was “subjected to offensive comments.” Compl. ¶ I. If LaCaria intended to add a second independent claim of sex/pregnancy harassment, she failed to do so. First, LaCaria’s complaint explicitly alleged only one claim – for sex (pregnancy) discrimination. Second, even if she had included a harassment claim, the two offensive comments were not sufficiently “severe or pervasive” to state a claim for “hostile environment” sex/pregnancy harassment. *See generally Porecca v. Anderson*, 2011E011 (CCHRC July 10, 2015). That is not to say that repeatedly telling a supervisee or coworker to terminate a pregnancy could never rise to the level of actionable harassment. *Cf. Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 854-55, 859 (8th Cir. 1998) (reversing summary judgment on pregnancy-discrimination claim, court held that plaintiff met third element by showing an intolerable work environment amounting to constructive discharge based on evidence that supervisor repeatedly tried to convince her to get an abortion, including by six comments overheard by a co-worker, one long phone conversation, and even threatening to cause a miscarriage).

As to the second element, LaCaria has met the *prima facie* case's minimal burden for showing adequate job performance. The complaint alleged that LaCaria's pregnancy never interfered with her job performance, Compl. ¶ II.F, and GCI did not dispute that point. LaCaria also maintains that Mike always told her she was doing well. LaCaria Interview (Aug. 11, 2015).

This is not to suggest that there is no dispute of fact as to LaCaria's view of her performance. As part of this litigation, GCI now asserts that LaCaria's job performance was inadequate from the start and provides evidence of numerous specific flaws, some dating to before LaCaria told Mike that she was pregnant. Resp. ¶ II.F. GCI also claims that the immediate trigger for firing LaCaria was poor performance leading to the loss of a customer on November 30, 2014. *Id.* In other words, GCI points to LaCaria's allegedly poor performance as its nondiscriminatory reason for terminating her.

Nonetheless, at the *prima facie* stage of a discrimination case, a complainant is not required to provide sufficient evidence to rebut respondent's proffered nondiscriminatory reasons for discharge; that assessment belongs in the third stage pretext analysis. *See Marino*, 2012E029 at *7 (citing *Cline v. Catholic Diocese*, 206 F.3d 651, 661 (6th Cir. Ohio 1999)). While there may be some cases where a respondent could defeat a complainant's *prima facie* case by disproving essential claims of adequate performance, here, GCI failed to produce any documentation or disinterested witness testimony to do so. Thus, LaCaria's own statements about her satisfactory job performance provide a sufficient basis to satisfy the second element of the *prima facie* analysis.

The Janczaks' alleged offensive remarks about LaCaria's pregnancy satisfy the fourth and final element of the *prima facie* case. To raise the inference of GCI's discriminatory intent, LaCaria claims that GCI's owner told her: "You shouldn't have kids and not be married," and advised LaCaria to have an abortion. Compl. ¶ II.B. LaCaria also claims that GCI's manager said to her: "A woman at your age with two kids has no business having another child;" "[y]ou should have gotten rid of it when you had a chance;" and "[c]ustomers don't want to see a pregnant waitress." *Id.* at ¶ II.C. Gail and Mike both emphatically deny ever making these comments or saying anything similar to LaCaria. G. Janczak Interview (Sept. 16, 2015); M. Janczak Interview (Sept. 16, 2015). There were no witnesses to either alleged remark.⁶ Of course, either LaCaria is telling the truth or Gail and Mike are, but at this stage the Commission will leave that credibility determination to an administrative law judge at a hearing on the merits. For the purpose of determining whether there is substantial evidence sufficient to justify holding such a hearing, LaCaria's description of both Janczaks' negative comments about her pregnancy, rebutted only by their denials, is sufficient to raise the inference of their discriminatory motive and meet the fourth element. In sum, LaCaria has provided sufficient evidence to satisfy the *prima facie* case.

2. GCI's Articulated Non-Discriminatory Reason

As noted above, GCI has met its burden of articulating a legitimate, non-discriminatory reason for firing LaCaria. GCI asserts that LaCaria was "let go because she lost [] a customer on

⁶ LaCaria believes that Velazquez overheard Mike's offensive comments, but Velazquez denied hearing any part of the November 9th conversation. LaCaria Interview (Aug. 11, 2015); Velazquez Interview (Oct. 14, 2015).

a Sunday,” the busiest day of the week, “and she couldn’t do the job like she was hired to do[.]” Resp. ¶ II.F. In support of this claim, GCI described a long list of LaCaria’s deficits: she worked slowly compared to other servers, which led to slower table turnaround; she had difficulty carrying the plates to the tables and often handed customers hot plates, rather than placing them on the table in front of the customer. *Id.* In addition, GCI claims that LaCaria had a “bad attitude”; was late without calling on October 12, 2014; texted on the job against GCI rules on October 3 and November 23, 2014 and was flippant with Mike when admonished. *Id.* Finally, on November 30, 2014, immediately before her discharge, LaCaria caused GCI to lose business when she offended a customer who became angry and then failed to ask either Mike or Gail for assistance, which violated a GCI rule. *Id.*

3. Showing Pretext

To prevail at the pretext stage, a complainant must point to substantial evidence that the respondent’s articulated reason was not the real reason she was fired. To meet this burden, a complainant must “identify such weaknesses, implausibilities, inconsistencies, or contradictions” in the employer’s asserted justification “that a reasonable person could find [it] unworthy of credence.” *Coleman v. Donahoe*, 667 F.3d 835, 852 (7th Cir. 2012). Here, this case must proceed to a hearing on the merits because it would not be unreasonable for an administrative law judge to conclude that GCI’s claimed performance issues with LaCaria were a pretext for pregnancy discrimination based on the totality of circumstances shown by the Commission’s investigation to date: inconsistencies in GCI’s explanations, supplemented by the Janczaks’ alleged biased statements, and suspicious timing in hiring a non-pregnant replacement for LaCaria.

Work performance

LaCaria denies the truth of GCI’s full litany of her alleged work performance deficits. When assessing pretext, however, it is not necessary or sufficient to show that the employer was objectively wrong on the facts or in its judgment, the inquiry is whether the employer in good faith believed that the employee performed poorly in the manner alleged. *See Sifuentes v. J.P. Morgan Chase & Co.*, 2013E014, *12 (Aug. 13, 2015) (citing *Porreca v. Anderson*, 2014E011, *30 (CCHRC July 10, 2015)). But even if so, the employer’s articulated reason still may be a “pretext” for unlawful discrimination if the evidence shows that those alleged performance problems were not, in fact, the employer’s real reason for discharging the complainant. *See* 1 Barbara T. Lindemann et al., *Employment Discrimination Law* §§ 2-60–61 (5th ed. 2012) (collecting cases applying *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)).

While not conclusive, the evidence gathered as part of this investigation does seem to suggest that the Janczaks believed LaCaria had the performance problems alleged. GCI’s main stated criticism, that LaCaria was a slow server, was supported by detailed recollections from several staff. *See, e.g.*, Velazquez Interview Oct. 14, 2015) (echoing Gail’s testimony, stated that he had heard customers (as well as other servers) complain about LaCaria’s slow service and he had also noticed the same). *See also* Morland Interview (Sept. 30, 2015) (stating that Mike and Gail had each told him several times when the restaurant was busy to stop seating people in LaCaria’s section because she got overwhelmed). Morton did not rebut (or clearly address) this point. Also, the related issue of LaCaria’s failure to master the skill of carrying and serving numerous plates without the use of a separate runner or large tray is supported by a credible back

story. *See* Formanski Interview (Sept. 16, 2015) (confirming that LaCaria's prior experience did not require this type of serving and agreeing with Mike that LaCaria was never able to master it at GCI). Morton did state that he never noticed this problem, *see* Morton Interview (July 31, 2015), but the relative simplicity of serving a table for one arguably dilutes the value of his account on this point.⁷ GCI contests LaCaria's claim that the Janczaks never alerted her to any of their alleged concerns about her work performance. While the Janczaks described various times she was admonished, GCI did not provide any documentation of this.⁸

But there is sufficient evidence to justify a hearing on the point that the proffered list of LaCaria's alleged deficits is not the real reason she was fired from GCI. First, LaCaria states that when Mike fired her on Thursday, December 5th, he gave her only one reason: the two minor mistakes she made when serving a customer during her last shift, on Sunday, November 30th. Morton's testimony supports that this was Mike's concurrent justification. Morton said he asked Morland why LaCaria had been fired, and Morland told him that LaCaria was fired because she made a mistake on a customer's order, referring to the November 30th incident. Morton Interview (July 31, 2015).

During this investigation, however, GCI has described LaCaria's November 30th error differently. GCI claims, and LaCaria admits, that she violated a basic rule when she failed to tell either Mike or Gail when her customer started getting angry. Resp. ¶ II.F; LaCaria Interview (Aug. 11, 2015). GCI could have considered this lapse a firing offense, especially because it led to the very problem the rule is designed to prevent: losing the customer's business. *See* M. Janczak Interview (Sept. 16, 2015).

At this stage of the case, however, the Commission is unable to fully credit GCI's explanation for firing LaCaria because Mike's accounts of November 30, 2014 are inconsistent. In GCI's Verified Response, Mike wrote that he was at the front register when the customer complained to him about LaCaria. Resp. ¶ II.F. Mike apologized to the customer, but it was too late, the customer said she was never coming back again because of LaCaria. *Id.* Later, when interviewed by Commission investigators, Mike said he did not even hear about LaCaria's angry customer until Morland told him at the end of the workday. M. Janczak Interview (Sept. 16, 2015). *See also* Morland Interview (Sept. 30, 2015) (same). Although an administrative law judge at a hearing may ultimately overlook this inconsistent testimony, it could also provide a reasonable basis for concluding that the reasons now asserted by GCI were not the actual reasons relied on when firing LaCaria. The Commission will not foreclose this possibility by dismissing LaCaria's claim at this stage.

⁷ LaCaria did successfully undercut GCI's more trivial issues with her performance: the evidence does not suggest that she had a particular problem with being late or using her cell phone on the job. *See* LaCaria Interview (Aug. 11, 2015) (claiming Coghill had been admonished for lateness, but that she had not); Formanski Interview (Sept. 16, 2015) (noting that Formanski had been admonished several times for violating rule against cell phone use). *See also* Morton Interview (July 31, 2015) (saying that he never noticed either problem).

⁸ This is not to say that a small employer's lack of documentation of a complainant's performance problems is necessarily fatal to its defense. Inadequate record-keeping alone does not show pretext. *Pryor v. Universal Footcare Products, Inc.*, 2007E035, *7, 13 (CCHRC Aug. 17, 2010) (holding pretext not shown where respondent's reasons for firing complainant were proved by testimony and a few (incomplete) records of tardiness, where respondent did not issue written warnings generally and had no formal disciplinary policy).

Biased Statements

Gail's and Mike's highly offensive comments, if true, are also strongly probative of discriminatory animus. Suggesting to an employee that she should "get rid of" her baby because she is unmarried or too old is not just deplorable, it also suggests hostility towards LaCaria's pregnancy. Even more clearly, telling a pregnant employee that "customers don't like pregnant waitresses" comes close to being direct evidence of a discriminatory motive. A remark suggesting displeasure at LaCaria's continued employment while pregnant certainly casts suspicion on GCI's asserted reasons for discharging her.

The Janczaks vehemently deny making the statements attributed to them by LaCaria, but there are no witnesses who can verify which party is right.⁹ Such a pure credibility dispute cannot be resolved against the complainant without a hearing.

GCI, however, points to other evidence which it says makes it unreasonable to believe that either Janczak would make such offensive statements (or fire LaCaria for being pregnant). Specifically, in the recent past, another GCI server worked throughout most of her two pregnancies with their full approval and support. Resp. ¶ II.F; G. Janczak Interview (Sept. 16, 2015). But this evidence does not conclusively show that Mike would never say "customers don't like pregnant waitresses": indeed, this prior experience could be the very basis for his conclusion. In addition, a close look at Ejnik, GCI's counter-example, shows potentially significant differences between the two women. Ejnik worked regularly predominantly on Tuesdays, and it was easy for other servers to cover that shift during her maternity leave. *See* Ejnik Interview (Aug. 24, 2015). LaCaria, in contrast, worked the restaurant's busiest days: Friday, Saturday and Sunday. Also, Gail's alleged remarks conveyed disapproval of LaCaria's unmarried state as a pregnant woman, while Ejnik was married each time that she was expecting. *Id.* Finally, Ejnik has worked at GCI (on and off) for two decades. The Commission cannot rule out that this long association afforded Ejnik some extra flexibility. At least at this stage of the proceedings, the Janczaks' admittedly supportive treatment of pregnant server Ejnik does not change the Commission's assessment of whether there is sufficient evidence that the Janczaks made the alleged offensive remarks to merit a hearing on that point.

Suspicious Timing

Finally, the investigation uncovered one more circumstance that the Commission finds suggestive of pretext and that counsels in favor of holding a hearing on the merits of LaCaria's charge: the suspicious timing of hiring a non-pregnant server to cover LaCaria's far-off maternity leave. At the time Mike asked LaCaria about her plans for working during pregnancy and maternity leave, on November 9, 2014, LaCaria was approximately three months pregnant, and thus not expecting until sometime in May 2015.¹⁰

⁹ There are no witnesses to the specifically-alleged offensive comments, only numerous witnesses saying they never heard the Janczaks make any negative remarks about LaCaria's pregnancy. *See, e.g.,* Velazquez Interview (Oct. 14, 2015); Coghill Interview (Dec. 22, 2015); Formanski Interview (Sept. 16, 2015).

¹⁰ According to LaCaria, she was four to five weeks along when she learned she was pregnant on or around September 21, 2014. Cp. 2nd Q. Resp. No. 1. Calculating from there, LaCaria was about two months pregnant when she told Mike on October 17, 2014, and close to three months pregnant when they talked on November 9, 2014.

It is undisputed that this November 9th conversation became quite heated. Both agreed that Mike was upset about having to cover LaCaria's shifts during her planned leave, and that they argued over GCI's legal obligation to hold her job. LaCaria Interview (Aug. 11, 2015); M. Janczak Interview (Sept. 16, 2015). A week later, LaCaria experienced some spotting and left work early with Gail's permission. Cp. 2nd Q. Resp. No. 3. The next day, she informed Gail that her doctor said she was fine and cleared to return to work. *Id.*

On or about the same day, Gail told LaCaria they were rehiring Maga,¹¹ and that LaCaria had to give up some of her hours so they could add Maga to the November schedule. Maga was formally rehired on November 27th "in part because [GCI] had to plan for LaCaria's absence when she was out for the birth of her child." Rp. Q. Resp. No. 8.

Putting it all together, GCI's claim that the reason it hired Maga was to provide coverage for LaCaria's maternity leave – six months in the future – is inherently implausible.¹² It is also inconsistent with Mike's prior statement to LaCaria that she would need to give up some hours if he had to train a new person to cover her absence: Maga was a rehire, so she did not require training to be able to fill in once she was needed.

The immediately preceding events add to the inference of pregnancy discrimination. GCI rehired Maga right after two significant incidents: (i) the tense discussion of LaCaria's plans for maternity leave on November 9, 2014 – when she also told Mike she planned to work during her pregnancy – and (ii) LaCaria's leaving work early on November 17, 2014, for a pregnancy-related medical problem. Also, LaCaria was fired almost immediately after Maga started working at GCI. The Janczaks may well have a good explanation for these circumstances but based on the substantial evidence suggesting discriminatory motive gathered as part of this investigation, that explanation will now have to be made to an administrative law judge at a hearing on the merits of LaCaria's pregnancy discrimination claim.

¹¹ There is no evidence to suggest that Maga was pregnant when GCI rehired her or anytime thereafter. *See* Rp. Q. Resp. No. 8 (the Janczaks were not aware whether Maga was pregnant when hired).

¹² If GCI had replaced LaCaria shortly before or during her planned extended absence, doing so would not suggest or constitute pregnancy discrimination. *See, e.g., Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (unless other employees are allowed to take non-pregnancy-related extended leaves without similar penalty, no claim for pregnancy discrimination claim where plaintiff fired the day before her maternity leave was to begin because of planned absence and uncertainty of return).

CONCLUSION

For the foregoing reasons, the Commission finds **SUBSTANTIAL EVIDENCE** to support the unlawful discrimination claim based on pregnancy in Complaint No. 2015E002 pending before the Commission. The Commission will issue a notice of the date and time of an Initial Status for a dispositive Administrative Hearing on this claim.

April 6, 2016

By delegation:

A handwritten signature in black ink, appearing to read "R. Hakim", with a horizontal line extending to the right.

Ranjit Hakim
Executive Director of the Cook County
Commission on Human Rights