



Issue Date: 03 June 2020

CASE NO.: 2017-FDA-00007

In the Matter of:

SHERRY L. SCOTT,
Complainant,

v.

THE ROOT CELLAR, LLC,
Respondent.

Appearances: Jack Cohoon, Esq.
For the Complainant.

Donald V. Meyers, Esq.
For the Respondent.

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge.

DECISION AND ORDER DENYING COMPLAINT

This proceeding arises from Sherry Scott's ("Ms. Scott" or Complainant) complaint of retaliation in violation of the employee protection provisions of the Food Safety Modernization Act, 21 U.S.C. § 399d(a), and its implementing regulations, 29 C.F.R. Part 1987 (FSMA or the Act). Complainant contends The Root Cellar, LLC ("The Root Cellar" or Respondent) terminated her because the owners erroneously believed she filed a complaint with the South Carolina Department of Health and Environmental Control. As discussed in greater detail below, I conclude The Root Cellar did not violate the Act and deny the complaint.

Procedural History

On October 7, 2016, Ms. Scott filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging The Root Cellar terminated her in violation of the FSMA. On March 16, 2017, OSHA sent a letter to the parties advising that following an investigation it found no reasonable cause to believe Respondent violated the Act. On April 20, 2017, Ms. Scott timely filed a letter requesting a hearing before the Office of Administrative Law Judges. After it was assigned to two other administrative law judges, and after an earlier continuance of a hearing, the matter was reassigned to me on October 24, 2019. I held a formal

hearing on January 27, 2020. Complainant's Exhibits (CX) 1-3 and Respondent's Exhibits (RX) 1-5 and 7 were admitted into evidence. Hearing Transcript (Tr.) at 6-9, 78-79.¹ Four witnesses testified at the hearing: Sherry Scott; Blair Sims; Ashley Sims; and John Sease. Counsel chose to submit closing arguments at the hearing and waived the filing of post-hearing briefs.

Summary of Relevant Evidence

A. Complainant's Exhibits

CX 1: "June 22, 2016 Ticket." It appears to be a receipt from The Root Cellar for a customer's meal.

CX 2: "Text Messages between Sherry Scott and Ashley Sims."

June 26, 2016

A. Sims: Hey Sherry! I have Shannon working your shift in the morning so you can come in at 5 tomorrow. The rest of the week we will figure out tomorrow.

Just let me know you got the text please!

S. Scott: Hi ashley....just got home from hospital and got your text....thank you for letting me know and i will be there...have a good night off.....sherry

A. Sims: Thank you! Hope you have a great night

June 29, 2016

S. Scott: Ashley....still at hospital....they just took mom to OR to put in a new pic line...the one in her neck is leaking...didn't know if i was on schedule...don't want to leave her tonight if at all possible....but will be there if u need me...don't want to put yall in a bind....please let me know....i am in OR waiting room.....waiting...thank you...sherry²

A. Sims: No you are not on the schedule for tonight

June 30, 2016

S. Scott: Ashley....i think u had me scheduled for friday day....i am with erin now aand she would like to work that day shift and i will work for her on friday night...us that ok with yall??? Sherry.... p.s. need to work as we

¹ RX 6 was excluded on relevance grounds because the OSHA investigators' findings have no bearing on this *de novo* hearing. See Tr. at 9.

² This text message was sent at 2:32 PM.

are so broke....i just cant work during the day....but can work any night except thursday and sunday....i hope this will be ok with u and blaire and I appreciate my job....please text me back

A. Sims: You called DHEC on us and used your mothers name. I have a good friend that works there. You no longer have a job at The Root Cellar and are not welcome here. We will mail you your check. Good luck

CX 3: "Text Messages between Sherry Scott and Erin Love."

June 30, 2016

S. Scott: Yes and she accused me of calling DEHEC and filing a complaint...IN MY MOTHERS NAME!!!! And said i was no longer employed or welcomed at the restaurant!!!!!!when i text her in kmart parking lot it was 10;30....she text me back at 5 p.m....i am in total shock!!!! She text me that she has a friend at DEHEC who told her....i have never never in my life heard of such pure [*expletive*]....did you ever text her??? No worries I am just wondering

E. Love: I did and she didn't get back in touch until 7ish. She said I could work in morning. I cannot believe this! What the hell!

S. Scott: Did she say anything else????

E. Love: She told me you no longer worked there and she mentioned DHEC. I didn't know what to say. I mean, what? Sherry, I am very sorry. I don't even know what to think about that place anymore

July 1, 2016

S. Scott: Morning...give me a quick call please before u have to work

Ps i luvu [emojis]

Can u please call me??? Are you working a double???....if u need a ride home i am going that way shortly

Ummmmm whats up????? [emojis]

Hanging in there...reeeeally wants to come on home!! [emoji] Still waiting for doc to call after he finish his rounds.....tell me what u heard at work about me today....like what they are saying.....i need the truth and i know u will tell me

E. Love: Of course. [emoji] Apparently, the reason you were let go is for being a "no call, no show" Wednesday...

S. Scott: Well i have text back and forth with ashley that proves that is another lie!!!!

B. Respondent's Exhibits

RX 1 is a three-page document. The first page is a handwritten statement on notebook paper, dated 6/20/2016, signed by Blair Sims. It reads:

Ashley observed Sherry smoking during the shift she was warned and reminded about our smoking policy between the hours of 11-2 and 6-9 PM.

The second page is a typed statement, dated June 22, 2016, signed by Blair. It reads:

The Chef alerted me to Mrs Scott outside smoking around 6:30PM and yelling and cussing into her phone. I approached her and she said that she was having problems with her mother and that she was coming inside. I reminded her about our policy in regards to smoking between the hours of 6-9PM and she became very defensive and said it was a one-time thing and that it was only because of her mother. I asked her about the previous shift she worked when my wife had caught her smoking and she became even more defensive. I reminded her that I had told her before she ever worked a shift that if she couldn't make it three hours without a cigarette that she should get some Nicorettes.

About an hour later we were very busy and I was working the expo window when Mrs Scott confronted me about some food for one of her tables. I thought she hadn't rung it in and I asked her about it, at which time she became irate and said I was wrongfully accusing her of not doing her job. I told her that I was doing my job by making sure everything was rung into the system. At this point she became very loud and hostile and started cussing. She slammed some dishes down and went out the kitchen door and slammed it into the wall. I then brought her into the office and told her that she was being terminated and that I was going to transfer her tables to another server. She began crying and begging to be allowed to finish her shift. She could finish her shift but she is on her final warning. Any other transgressions by her will result in termination.

The third page is a typed statement, dated June 29, 2016, signed by Blair. It reads:

Mrs Scott was scheduled to work today at 11AM and never showed up or called out. She has been terminated for no call no show.

RX 2 is the affidavit of Phillip Crowe, dated December 8, 2016. Mr. Crowe is the chef at The Root Cellar and has worked there since it opened in June 2016. He worked with Ms. Scott during the few shifts she worked at The Root Cellar. All

employees were aware of the smoking policy and despite knowing the rule, Ms. Scott violated the policy on multiple occasions. Mr. Crowe witnessed Ms. Scott “blow up” at Blair Sims in front of the expo window, and he is sure customers could hear. She was cussing and yelling at Mr. Sims in full rage. Mr. Sims fired her and Ms. Scott stormed out of the restaurant. After speaking with her, Mr. Sims decided to give her a second chance. Ms. Scott did not show up for one of her scheduled shifts and did not call to let anyone know. It was clear that she would be terminated after a no-call, no show. The same day Ms. Scott failed to show up to work, the DHEC arrived to do an inspection responding to a complaint. The complaint alleged “cross-contamination, dirty plates and silverware, dirty kitchen, servers sweating on food, no gloves, and thawing in hand sink.” Mr. Crowe is an award-winning chef and would never allow his kitchen to have any of these issues. The inspection report reflected the complaints were not substantiated.

RX 3 is the affidavit of Tyler Sease, dated December 8, 2016. Mr. Sease is a current employee at The Root Cellar and has worked there since its opening in June 2016. Prior to working at The Root Cellar, Mr. Sease was an employee at Stephanos, an Italian-themed restaurant that preceded The Root Cellar in the same location. Mr. Sease and Ms. Scott worked together as servers for approximately 6 months at Stephanos and for a brief period at The Root Cellar. Mr. Sease found Ms. Scott to be very unpleasant, very negative, and very controlling. Despite having knowledge of The Root Cellar’s smoking policy, Ms. Scott violated the policy by taking smoke breaks while she had tables. Ms. Scott worked only a few shifts at The Root Cellar. During one of those shifts, Ms. Scott blew up at Blair Sims. Ms. Scott disagreed with the way Mr. Sims wanted Ms. Scott to do something. She was acting like a kid because she wanted to do it her way. The restaurant was full of customers and they could hear Ms. Scott yell and cuss at Mr. Sims. Mr. Sims fired her being insubordinate. She went outside and begged Mr. Sims for her job. Mr. Sims relented and gave her job back. At The Root Cellar, the work schedule was posted and it was the servers’ responsibility to check the schedule to know when they worked, or if they were away from the restaurant, to call in to find out their shifts. Ms. Scott did not show up for one of her shifts or call in. Having already been given a second chance, it was safe to assume she was fired when she was a no-call, no-show.

RX 4 is the affidavit of Elizabeth “Cissy” Robinson, dated December 8, 2016. Ms. Robinson is a current employee at The Root Cellar and has worked there since its opening in June 2016. Prior to working at The Root Cellar, Ms. Robinson was an employee at Stephanos. Ms. Robinson and Ms. Scott worked together as servers for approximately 6 months at Stephanos and for a brief period at The Root Cellar. Ms. Scott was very difficult to work with, extremely rude to Ms. Robinson and other servers when they worked together at Stephanos. Ms. Scott was very aggressive and bullied people to make sure that she got her way at all times. At Stephanos, Ms. Scott had a history of showing up to work an hour to an hour and a half late. Half of the time she was at work, she was outside smoking. Ms. Scott attended a meeting with Blair and Ashley Sims where they outlined the smoking policy for their new restaurant, The Root Cellar. Ms. Robinson, also a smoker, understood the policy and took steps not to violate it. On either her first or second shift at The Root Cellar, Ms. Scott was upset about something and made a scene

by loudly throwing dishes and things around the kitchen. At The Root Cellar, the work schedule was posted and it was the servers' responsibility to check the schedule to know when they worked, or if they were away from the restaurant, to call in to find out their shifts. Ms. Scott did not show up for one of her shifts or call in. Ms. Robinson understood Ms. Scott was terminated for being a no-call, no-show.

RX 5 is the affidavit of Erin Love, dated December 8, 2016. Ms. Love is a current employee at The Root Cellar and has worked there since its opening in June 2016. Prior to working at The Root Cellar, Ms. Love was an employee at Stephanos. Ms. Love and Ms. Scott worked together as servers beginning in August 2015 and for a brief period at The Root Cellar. Outside of work, Ms. Love likes and cares about Ms. Scott. However, Ms. Love found her very difficult to work with. Ms. Scott is very aggressive and bullies people to get her way. Ms. Scott wants to do things her way or no way. On occasions, Ms. Love attempted to mediate issues between Ms. Scott and the other servers to minimize the negativity. She took on this role because Ms. Love was the closest to Ms. Scott. Ms. Scott had a history of showing up late to work. Ms. Scott claimed she did not know she had to work one of her shifts and did not show up. It was the servers' responsibility to check the schedule to know when they worked, or if they were away from the restaurant, to call in to find out their shifts. Ms. Love understood Ms. Scott was terminated for being a no-call, no-show.

RX 7 is an updated Position Statement of The Root Cellar.

C. Hearing Testimony

1. Sherry Scott

Ms. Scott is 61 years old and has a high school education. Ms. Scott worked at Stephanos for over a year. Ms. Scott began working for The Root Cellar sometime in June 2016.

Blair and Ashley Sims are the owners of The Root Cellar. Before she started working at The Root Cellar, she discussed her availability with ownership. She stated there was "an availability paper that we all filled out and I said on the paper that I could not work during the day." Tr. at 19. Ms. Scott explained to ownership she could not work during the day because she was caring for her elderly mother and she only had help in the evenings. To find out what shifts they were assigned, servers would look at the schedule. Ms. Scott assumed the availability paper would go into the employees' files.

Ms. Scott's understanding of The Root Cellar's smoking policy was that smoking was permitted "as long as you didn't have any tables and it wasn't during the peak hours." Tr. at 20. She stated, "I tried to abide by it. It was a little bumpy in the beginning, but I understood what they were trying to do." *Id.* She denied that Blair and Ashley Sims talked to her about the smoking policy, other than during the orientation meeting.

Ms. Scott denied she was ever told her job was in jeopardy or she was at risk of losing it. She denied ever being told she was terminated or begging for her job back. She stated, "No, they did not tell me I was terminated. I wanted to keep my job, but it was not because she told me I was terminated." Tr. at 21. She denied ever getting any written disciplinary actions or warnings, nor did she receive a termination letter.

Ms. Scott recounted how she found out she no longer had a job at The Root Cellar: "Because I had worked on Monday and saw that on the schedule, they had me scheduled for Wednesday and Friday at lunch which I could not do. So, I told Ashley Sims that I could not work those lunches, but I could get someone to cover me on Friday and she said she would get someone to cover me on Wednesday." Tr. at 21-22. Ms. Scott testified they had this conversation in-person and it took place on Monday in the dining room of the restaurant sometime around the beginning of her shift. She testified they did not have any other conversations about scheduling with Ms. Sims "because [Ms. Sims] said she would cover Wednesday and then Thursday when I texted her that I had Friday covered was when she texted me back and told me I no longer had a job. I was in shock." Tr. at 22-23.

Complainant's counsel asked Ms. Scott about CX 2. She confirmed the phone number belongs to Ashley Sims and that CX 2 is a record of text messages between Ms. Sims and herself. It was "not unusual" for Ms. Scott to deal with Ms. Sims by text. Tr. at 23.

The texts on June 26 show Ms. Scott trying to work out an issue with her shift for the following day. Ms. Scott had to sort out these issues because she "had been wrongly scheduled to work at lunch and [she] could not do so because of [her] mother." Tr. at 24.

Ms. Scott did not hear anything about being a no call, no show on June 30. She testified in her 20 years, she has "never done a no-call, no-show." Tr. at 28. When Ms. Scott texted Ms. Sims on June 30, Ms. Scott thought she had a job. The purpose of the June 30 text to Ms. Sims was to take care of the lunch shift for which she was scheduled but was unavailable to cover. Ms. Scott advised Ms. Sims that she switched schedules with Erin Love, allowing Ms. Love to work the lunch shift and Ms. Scott to work the dinner shift. Ms. Scott testified she was in her car with Ms. Love when Ms. Scott sent that text and she was still with Ms. Love when she received Ms. Sims's response text.

Ms. Scott testified she did not call DHEC and did not use her mother's name to file a complaint. Nor did her mother file a complaint with DHEC.

Erin Love was a co-worker and fellow server at The Root Cellar, with whom frequently texted.

Ms. Scott's position is that The Root Cellar terminated her based on the belief Ms. Scott made a complaint. Ms. Scott was out of work from July 1, 2016

through December 1, 2017. Ms. Scott wanted to work between four and five shifts per week. She would normally earn between \$75.00 and \$100.00 a night.

On cross-examination, Ms. Scott stated she was only available to work during evenings; she was unavailable during lunch shifts. She admitted she helped ownership clean up before The Root Cellar opened and this cleaning took place during the daytime. Ms. Scott reiterated she filled out an availability sheet and informed ownership she could only work evenings. She did not keep a copy of that availability sheet she filled out. Ms. Scott testified she never heard anything on either June 30 or July 1 about being terminated for being a no-call, no-show.

Respondent's counsel asked Ms. Scott to explain why she texted Ms. Sims on Wednesday about the schedule, when, according to Ms. Scott's earlier testimony, Ms. Sims told Ms. Scott in-person two days earlier she did not have to work Wednesday. Ms. Scott responded, "Well, I didn't know the schedule. I'm sitting in limbo except that she put me on at lunchtime." Tr. at 37. Respondent's counsel rephrased the question, and Ms. Scott stated, "I don't have an answer for that." Tr. at 38.

Ms. Scott admitted she learned she had been fired on June 30. Ms. Scott opined Ms. Love's text message implies her termination was connected to the DHEC. Ms. Scott admitted she did not know from that text message whether Ms. Love was talking about DHEC showing up. Ms. Scott admitted she learned on July 1 she was terminated for being a no-call, no-show from Ms. Love.

Ms. Scott denied begging for her job when she texted Ms. Sims "I need to work," "we are so broke," "I appreciate my job," on June 30. Ms. Scott denied knowing she had been fired when she sent that text. Tr. 47-48.

Ms. Scott testified she remembered the June 22 incident between her and Mr. Sims, "very well." Tr. at 50. She admitted she was smoking again, adding she "had reasons." *Id.*

Ms. Scott disagreed with the portion of Ms. Love's affidavit indicating Ms. Scott is aggressive, bullies people, wants to do things her way, and that Ms. Love attempted to mediate conflicts between Ms. Scott and the other servers. Ms. Scott agreed with the portion of her affidavit indicating Mr. Sims advised the staff of the new smoking policy. Ms. Scott did not recall Mr. Sims offering nicotine patches to those who might need it. Ms. Scott disagreed with Ms. Love's understanding that The Root Cellar terminated Ms. Scott for being a no-call, no-show, stating "[t]hat is not my belief." Tr. at 53.

On re-direct examination, Ms. Scott stated she was never told by Ashley Sims she was terminated for being a no-call, no-show. The first Ms. Scott heard she was terminated for being a no-call, no-show was when Erin Love mentioned it.

Ms. Scott testified, to her knowledge, she was never written up and she never received anything in writing regarding any disciplinary actions. She admitted she had "an altercation with Blair" on June 22. Tr. at 59. She described how the

altercation started and escalated. Ms. Scott testified Mr. Sims was yelling and screaming in her face. She stated she “tried to” handle herself in a professional manner, and she “could not believe how Mr. Sims acted “over something so small that could be fixed.” Tr. at 60. Ms. Scott denied this altercation resulted in a formal disciplinary action.

Ms. Scott denied she was begging for her job in CX 2. Ms. Scott explained she was just letting Ms. Sims know that she appreciated her job and was serious about her job.

Ms. Scott was recalled as a rebuttal witness, and testified that she did not recall the incident involving Ms. Robinson that Mr. Sease mentioned in his testimony. Ms. Scott disagreed with Mr. Sease’s version of what happened on June 22 “because Blair was yelling and screaming at me and then we took it outside. Mr. Sims had to come in and calm down before we went outside. He was just ranting and raving.” Tr. at 117.

2. Blair Sims

Blair Sims and his wife own The Root Cellar. He has been in the restaurant business since 1996 and The Root Cellar opened June 2016. The building that is now The Root Cellar used to be an Italian restaurant called Stephanos. Mr. Blair and his wife bought the building from the owners who were retiring. They changed the whole theme from an Italian restaurant to a farm-to-table look and feel.

Mr. Sims testified he gave the previous owners his word that he would give all their employees an opportunity to maintain their jobs. He estimated The Root Cellar retained 20 former Stephanos employees. Ms. Scott was one of the former Stephanos employees. Prior to The Root Cellar’s grand opening, Ms. Scott and a couple of other former Stephanos employees helped clean, scrub walls, and perform general maintenance. All of this labor was performed during the daytime.

Prior to the opening, they had an initial orientation meeting to discuss The Root Cellar’s policies and the employees filled out payroll paperwork. Their new policies addressed dress code, tardiness, customer service expectations, and smoking. The smoking policy is no smoking between 11:00 AM - 2:00 PM or 6:00 PM - 9:00 PM, or if the server is currently waiting on a table. Mr. Sims testified he offered to bring nicotine patches for anyone who may have difficulty complying with this policy.

At the meeting, Ms. Scott indicated the smoking policy would be a problem for her because she could not go that long without a cigarette. Mr. Sims testified he offered to bring some nicotine patches. He made clear the policy was non-negotiable. Ms. Scott did not say anything else about the smoking policy during the meeting. Mr. Sims explained his policy on employees failing to show up to work:

No-call, no-show, and that’s an industry standard, is no job. I mean, anybody’s who’s been in the restaurant business knows if you don’t show

up and you don't call, you're terminated and we don't send out a letter or call them up and say, 'Hey, you didn't show up for your shift today so you're fired.' I mean, that's not how we operate.

Tr. at 68. He testified the schedule is posted for all employees to see on the door of the office.

RX 1 documents incidents where Ms. Scott was caught smoking and when she lost her cool on Mr. Sims in the kitchen. On June 20, his wife observed Ms. Scott smoking out back. Ms. Sims told Mr. Sims about it and it was his responsibility to enforce the rules. Mr. Sims testified he "said something" to Ms. Scott, made a quick note, threw it in Ms. Scott's personnel file, and moved on.

On June 22, the chef could not find Ms. Scott who was responsible for bringing out food to the customers' tables. The chef went outside and found her out back smoking. Mr. Sims stated he reminded and warned her again, and repeated his offer to bring Nicorette. Later on in the shift, there was an issue with one of Ms. Scott's checks. Mr. Sims testified, "We were trying to figure it out and she just told me I was accusing her of being a liar. It escalated the situation to the point to where we did take it outside because she was cussing. I mean, it was like a complete rage." Tr. at 72. According to Mr. Sims, when they returned inside, he told Ms. Scott, "You can't work here. We ... don't operate like this. You're not fitting into the culture. You're --- honestly you're not doing anything like we're asking you to do and you're doing the opposite of the things we're asking you to do and I'm letting you go." *Id.* Mr. Sims testified the altercation was loud enough for the customers in the restaurant to hear it, and she made "very vulgar" comments directed at Mr. Sims. *Id.* Ms. Scott went outside, came back in some time later, sobbing about her mother and how they needed money; Ms. Scott claimed she was sorry and would change. Mr. Sims "felt sorry for her" and reversed his decision to terminate Ms. Scott. Tr. at 73. He indicated he now regrets changing his mind.

Mr. Sims stated CX 1 is a receipt and distinguished it from a ticket. A ticket is what the staff works from in the kitchen. A receipt is what the guest receives.

There were no incidents during Ms. Scott's third shift on June 27. According to Mr. Sims, Ms. Scott was scheduled to work a shift beginning 11:00 AM on June 29, and she was a "no-call, no-show." Tr. at 77. As a result of the no-call, no-show, Mr. Sims informed the staff they would have to "rewrite the floor plan" and the other servers had to cover Ms. Scott's section. This caused disruption for the employees and the operation of the restaurant.

Mr. Sims testified the dates on RX 1 are the dates they were prepared.

Mr. Sims gave his opinion of Ms. Scott as an employee:

She certainly was a holdover from the Stephanos crew that seemed unwilling to try to conform to the new culture that we were trying to create in our business and very combative, very 'This is how we do it,' not understanding that you're not who makes that decision, that we're trying to

do something completely different, combative with the other servers, had people complaining ... I mean, she's a nightmare of an employee.... I'd put her the worst employee I've ever had that three days to this point in my 30 years of restaurant business. Not fun to be around, didn't fit the culture, gave terrible service, broke the rules, hard to figure out when she could work or couldn't work. I mean, it was a god send when she no-call, no-showed on the 29th.

Tr. at 80.

Mr. Sims testified his wife did not work on June 29. He testified Ms. Scott was fired at 11:00 AM for being a no-call, no-show. Approximately 1 hour and 40 minutes later, the DHEC conducted a surprise inspection. According to Mr. Sims, DHEC received a complaint about The Root Cellar's practices in the kitchen, so they did a "full-blown inspection;" the complaint was found to be "baseless." Tr. at 81. He testified DHEC did not inform them who filed the complaint.

Respondent's counsel asked about text messages in CX 2, specifically, the one from Ashley Sims's phone that reads: "You called DHEC on us and used your mother[]s name. I have a good friend that works there. You no longer have a job at The Root Cellar and are not welcome." Mr. Sims testified he wrote this text message on his wife's phone. Mr. Sims explained he wrote the message because he thought it was a "cowardly act" and wanted Ms. Scott to know they knew she was the one who filed the complaint. Tr. at 82. Mr. Sims testified the complaint had nothing to do with the reason she was fired. Mr. Sims testified he learned Ms. Scott was responsible for the complaint on June 30, when Cissy Robinson told him. Mr. Sims stated he did not mention the no-call, no-show in the text because he did not have to, nor did he think he needed to.

Phillip Crowe was the chef who could not locate Ms. Scott on June 22; his affidavit is in the record at RX 2. Mr. Sims stated Elizabeth "Cissy" Robinson was a waitress and another holdover from Stephanos. Her affidavit is in the record at RX 4.

Mr. Sims has worked in five restaurants and estimated he has fired "hundreds" of employees for being no-call, no-shows. Tr. at 88. He stated no-call, no-show is "the ultimate sin in the restaurant business." Tr. at 89. Mr. Sims testified the DHEC inspection had absolutely no effect on the firing of Ms. Scott because "she was already fired." Tr. at 90.

On cross-examination, Complainant's counsel asked about "the good friend at DHEC" he referred to in CX 2. Mr. Sims responded, "Cissy Robinson. I think her sister or somebody was working there." *Id.* He admitted he did not know anyone working at DHEC, he was not informed by any DHEC employee about this particular case, and he learned the information from one of his employees. Mr. Sims testified he has "no idea whether she really called DHEC or not and really don't care." Tr. at 91. Mr. Sims agreed if Ms. Scott in fact made the complaint, he believed it was a cowardly act. He could not prove Ms. Scott was the person who filed the complaint. He confirmed the text he sent to Ms. Scott did not mention the

no-call, no-show, and he never had any conversation with Ms. Scott informing her she was fired for being a no-call, no-show.

Mr. Sims testified his wife was responsible for handling scheduling for the wait-staff. Ms. Sims was the correct person for Ms. Scott to interact with regarding scheduling and availability. Mr. Sims was unaware how his wife or the chef handled scheduling. Mr. Sims can neither dispute nor confirm Ms. Scott's testimony she filled out an availability form when she began.

Mr. Sims stated the schedule is a printed document and confirmed the schedule in question was not admitted into evidence in this case. He did not know whether the schedule still exists. Mr. Sims confirmed none of the memos in Ms. Scott's file were signed by Ms. Scott nor was she given a copy of any of those documents.

Mr. Sims confirmed he was aware Ms. Scott's mother had health problems. He denied he was aware Ms. Scott could not work day shifts. He testified she worked every day for two weeks before the restaurant opened.

Mr. Sease is still employed by The Root Cellar, but Mr. Crowe, Ms. Robinson, and Ms. Love no longer work there.

3. Ashley Sims

Ms. Sims is married to Blair Sims and part owner of The Root Cellar. She testified she was not at work on June 29 when her husband terminated Ms. Scott.

Ms. Sims confirmed there is a text in the record from June 26 where Ms. Sims told Ms. Scott they would figure out the schedule when she came in the following day. Ms. Sims denied having a conversation with Ms. Scott about her working on June 29, or ever telling Ms. Scott she did not have to work on June 29.

Ms. Sims confirmed Ms. Scott texted her on June 29 asking whether she was on the schedule that night, and Ms. Sims responded, telling Ms. Scott she was not on the schedule that night. At that time, Ms. Sims did not know Mr. Sims had fired Ms. Scott because she was not at work that day. She confirmed Mr. Sims used her phone to text Ms. Scott that she was fired. Ms. Sims denied knowledge of an availability form that Ms. Scott described in her testimony.

On cross-examination, Ms. Sims testified she was unaware Ms. Scott needed to be with her mother during the day. She explained, "She would come out and help us even before we opened the restaurant during the day when she supposedly needed to be off and would help us clean and had no problem working during the day." Tr. at 102. Ms. Sims confirmed the schedule is not in evidence.

Ms. Sims testified she was made aware of the DHEC inspection on June 29 by her husband. Ms. Sims agreed with her husband that if Ms. Scott filed the complaint, it was a cowardly act; however, she does not know for a fact whether Ms. Scott did so. She admitted she definitely felt betrayed by Ms. Scott. On June

30, Cissy Robinson called Ms. Sims to tell her Sherry Scott was responsible for the DHEC complaint. Ms. Robinson told Ms. Sims she had a good friend that worked at DHEC, and this unidentified good friend disclosed to Ms. Robinson that Ms. Scott filed a complaint using her mother's name. Ms. Sims admitted the text message her husband sent was not factually accurate because he did not have a friend who works at DHEC. She stated, "It's coming from a former employee which is one of Sherry Scott's friends." Tr. at 105.

On re-direct examination, Ms. Sims testified the schedules are prepared weekly. When the week is done, another schedule is posted. She saves the old schedule for about a week and then throws them away.

If someone was scheduled to work a shift but could not do so and arranged for another employee to cover that shift, that schedule switch must be approved by Ms. Sims.

4. Tyler Sease

Mr. Sease is a part-time employee at The Root Cellar and has worked in the restaurant industry since December 2015. He worked with Ms. Scott at Stephanos. He described Ms. Scott as a "very difficult employee, very disagreeable and unenjoyable. She definitely made shifts unpleasant." Tr. at 108-09.

Mr. Sease confirmed he knew Cissy Robinson and worked with her at Stephanos. He testified he witnessed altercations between Ms. Robinson and Ms. Scott, and described one incident that occurred shortly before Stephanos closed.

Mr. Sease testified he first met Blair and Ashley Sims at the orientation meeting. At that meeting they discussed the smoking policy at that meeting. Some employees were fired for violating the smoking policy.

It is the employee's responsibility to check the schedule. According to Mr. Sease, if an employee does not show up to work as scheduled, he or she "should immediately know" he or she longer has a job. Tr. at 111-12. That rule is "very well understood" by every server and employee at any restaurant. Tr. at 112.

Mr. Sease confirmed he was present on June 22 when there was a confrontation between Mr. Sims and Ms. Scott, and had a "front row seat" to the incident. *Id.* He testified the confrontation got very loud, vulgar language was used, and "the customers could definitely hear them so they took it outside at that point." Tr. at 113. He stated Ms. Scott "came back in and you could just see that she had been bawling and that she believed [she] lost her job and kind of begged for her job back." *Id.* He testified Ms. Scott was saying, "Please, I need to work. I need the money. I have a mother, I need the money." Tr. at 114. Mr. Sims let her finish her shift and work her tables.

On cross-examination, Mr. Sease testified to his knowledge, he did not complete an availability form or some other document advising ownership what shifts he would be available to work.

Findings of Fact and Conclusions of Law

Section 402 of the Food Safety Modernization Act prohibits employers from discharging or otherwise discriminating against an employee for reporting violations of the Act to federal or state authorities. 21 U.S.C. § 399d(a); 29 C.F.R. § 1987.102. To prevail on her claim, Complainant must demonstrate her protected activity was a contributing factor in the unfavorable personnel action. 21 U.S.C. § 399d(c)(ii). A contributing factor is “any factor which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *McMullen v. Figeac Aero North America*, ARB No. 2017-0018, slip op. at 6 (March 3, 2020).

This case is unusual in that Complainant concedes she did not engage in protected activity. She denies having ever filed a complaint with the South Carolina Department of Health and Environmental Control.³ In almost any other case that confession would be fatal to her complaint.⁴ Complainant argues she was fired from The Root Cellar as a result of the owners’ *mistaken* belief she filed a complaint with South Carolina Department of Health and Environmental Control. It is irrelevant whether she actually engaged in protected activity.

Complainant’s counsel correctly avers there is case law involving other employee protection statutes that supports such a theory of retaliation. *See* Tr. at 121-22. The United States Court of Appeals for the Third Circuit, in the seminal case endorsing what is referred to as the “perception theory,” wrote:

Discrimination refers to the practice of making a decision based on certain criterion and therefore focuses on the decisionmaker’s subjective intent. What follows, the word “because,” specifies the criterion that the employer is prohibited from using as a basis for decisionmaking. The laws, therefore, focus on the employer’s subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer’s discriminatory animus are actually correct as a factual matter.

As an illustration by analogy, imagine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute.

³ For purposes of this decision, I presume the filing of a complaint with the state health department would qualify as FSMA-protected activity.

⁴ The ARB has consistently held that engaging in protected activity is a necessary element of any whistleblower retaliation claim. *E.g., Palmer v. Canadian Nat’l. Ry.*, ARB No. 16-035, slip op. at 16, n.74 (Sept. 30, 2016).

Fogleman v. Mercy Hospital, Inc., 283 F.3d 561, 571 (3d Cir. 2002), *cert. denied* 537 U.S. 824 (2002).⁵ Although Complainant presents a viable legal theory, a preponderance of credible evidence does not support her version of events.

Complainant's version of events: Before working at The Root Cellar, Complainant made the owners, Ashley and Blair Sims, aware she could not work during the day time because she took care of her sick, elderly mother at that time. Tr. at 19. Complainant filled out an availability form advising she could only work dinner shifts. *Id.* Ashley Sims created a schedule for the Week of June 27, 2016, which disregarded the information Complainant provided her on the availability form. Complainant was scheduled to work the morning shift on Monday, June 27, and the lunch shifts on Wednesday, June 29, and Friday, July 1. CX 2; Tr. at 21-22.

On Sunday, June 26, Ashley Sims texted Complainant advising she was able to get another employee to cover Complainant's Monday morning shift; Complainant could work at 5 PM on Monday. CX 2. Ashley Sims added they would figure out the rest of the week "tomorrow." *Id.* Complainant worked the dinner shift on Monday, June 27. Tr. at 22. Sometime around the beginning of her shift, Complainant talked to Ashley Sims about the schedule, as they had planned to do. CX 2; Tr. at 22. Complainant told Ashley Sims she could not work the lunch shifts on Wednesday or Friday. Tr. at 21-22. Complainant assured Ashley she could get someone to cover her Friday lunch shift. *Id.* Ashley Sims told Complainant she would get someone to cover the Wednesday lunch shift. *Id.* Complainant was therefore not expected to work Wednesday.

Complainant contacted Ashley Sims on Thursday, June 30 to advise Erin Love was willing and able to switch shifts on Friday; Erin Love would work the

⁵ *Fogleman* involved employment discrimination claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634; and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons.Stat. §§ 951-963. *See also Fogarty v. Boles*, 121 F.3d 886, 890 (3d Cir. 1997) ("Because [the retaliatory discharge provisions of the NLRA and FLSA] are aimed at eliminating an atmosphere of intimidation, the discharge of employees under the mistaken impression that they had participated in protected statutory activity is enough to violate the Acts."); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987) ("It is evident that the discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations."); *Murphy v. District of Columbia*, 390 F. Supp. 59, 69-72 (D.D.C. 2019) (denying motion to dismiss the plaintiff's Title VII claim based on "perception theory"); *Johnson v. Napolitano*, 686 F. Supp.2d 32, 37 (D.D.C. 2010) (same); *Grosso v. City Univ. of N.Y.*, 2005 WL 627644 at *3 (S.D.N.Y. 2005) (same); *Kurtz v. Caesars Entertainment, Inc.*, 266 Fed. Appx. 676, 677 (9th Cir. 2008). *Cf. Carpenter v. Solis*, 439 Fed. Appx. 480, 485-86 & n.2 (6th Cir. 2011) (noting it could not find any case law applying the perception theory in the context of claim of retaliation in violation of the Clean Air Act, Safe Drinking Water Act, Energy Reorganization Act, Toxic Substances Control Act, Comprehensive Environmental Resources, Compensation, and Liability Act, or the Pipeline Safety Improvement Act); *Salay v. Baylor University*, 115 S.W.3d 625, 627 (Tex. Ct. App. 2003) (following *Fogleman* would "effectively discount the plain words of the statute requiring active participation," and "encroach on the at-will employment doctrine without express legislative action.").

Friday lunch shift and Complainant would work the dinner shift. CX 2. At some point, Cissy Robinson spread a false rumor to Blair and Ashley, accusing Complainant of filing a complaint under her mother's name, with the South Carolina Department of Health and Environmental Control. See Tr. at 82, 90-91, 104-05. This alleged complaint triggered the surprise health inspection that occurred on June 29. *Id.* Believing the rumor to be true and feeling betrayed, Blair used his wife's phone to send a text message to Complainant telling her she was fired from The Root Cellar, she was not welcome at their establishment, and it was because they knew she filed a complaint with the health department. CX 2; Tr. at 11, 92-94. 118-19.

Realizing what they had done is illegal, and having provided the smoking gun text message to prove it, Blair and Ashley Sims manufactured a post hoc justification for terminating Complainant. Tr. at 119-20. Blair and Ashley fed a rumor to Erin Love that Complainant had actually been fired for being a no-call, no-show, which Erin shared with Complainant by text message on July 1. *Id.*; CX 3. Having been caught in a lie, Blair and Ashley Sims created a falsified paper trail, see RX 1, and collected a series of vague affidavits, see RX 2-5, to corroborate their no-call, no-show lie. Tr. at 120.

Respondent's version: Respondent contends that Ms. Scott did not inform either Mr. or Ms. Sims that she was unable to work during the lunch shift. There was no availability form provided to its employees or turned in by them. Ms. Sims did not have a conversation with Ms. Scott on Monday, June 27 concerning her schedule for the rest of the week. Ms. Scott was scheduled to work the lunch shift on Wednesday, June 29, 2016. She was fired because she failed to show up for her scheduled shift on June 29 at 11:00 AM, and did not call out. Tr. at 124. The South Carolina Department of Health and Environmental Control conducted an inspection of The Root Cellar 1 hour and 40 minutes after Complainant failed to show up for work. Tr. at 123. Respondent posits Complainant was fired before the inspection even took place. Tr. at 124. Respondent claims the text was just "blowing off steam and had nothing to do" with the real reason for the termination because Complainant had already been fired. Tr. at 123.

The parties did not submit a set of stipulations, but from the record I find that there is no dispute of the following facts:

1. Complainant was a former Stephanos employee.
2. Blair and Ashley Sims promised the former owners of Stephanos that their employees would have an opportunity to keep their jobs.
3. Complainant was given that opportunity.
4. Prior to The Root Cellar's grand opening, Complainant came in during daytime hours to help clean, scrub walls, and do other necessary work.
5. Complainant was employed as a server at The Root Cellar when it opened in June 2016.
6. Complainant and Blair Sims were involved in a verbal altercation on June 22, 2016.
7. Complainant did not work on Wednesday, June 29, 2016.
8. Complainant was fired from The Root Cellar.

9. Complainant was told that she no longer had a job by text message on June 30, 2016.
10. On July 1, 2016, fellow waitress, Erin Love, advised Complainant via text message she was terminated for being a “no-call, no-show.”
11. The Sims never directly contacted Complainant to tell her she was fired for being a “no-call, no-show.”

Complainant and Respondent do not agree on much else. I will weigh the evidence as a whole, make credibility determinations when necessary, and make findings of fact to arrive at a final decision.

I. Complainant was expected to work the Wednesday lunch shift.

A preponderance of credible evidence establishes that Complainant was on the schedule to work Wednesday, June 29 at 11:00 AM and Complainant failed to make arrangements with Ashley Sims to cover her shift.

Complainant contends Blair and Ashley Sims knew she was unavailable to work the Wednesday lunch shift because: Blair and Ashley knew she had a sick, elderly mother, and Complainant was her caretaker during the daytime; she filled out an availability form before she started working there stating she could not work daytime hours; and Ashley spoke to Complainant in-person at the restaurant on Monday, June 27 and Ashley assured Complainant she would get another employee to cover the Wednesday lunch shift. Complainant also highlights the fact the schedule in question is noticeably absent from the record, suggesting Respondent destroyed important evidence that would prove Complainant was not on the schedule.

A. Knowledge of Mother's Health

Blair and Ashley Sims knew Complainant had a sick elderly mother, but testified they did not know Complainant could not work daytime shifts. Tr. at 96; CX 2. They explained they were under the impression Complainant could work during the day because, before The Root Cellar's grand opening, she came in during the daytime to help clean, scrub walls, and do other necessary work. Tr. at 97, 102. Complainant confirmed she came in during the daytime to help prepare the restaurant for opening. Tr. at 35.

The fact Blair and Ashley Sims knew about Complainant's mother's poor health is relevant, but it does not independently establish any understanding that would relieve Complainant of her obligation to show up for a scheduled shift.

B. Availability Form

At the hearing, Ashley Sims and Tyler Sease denied knowing about the availability form Complainant described in her testimony. Tr. at 101, 114-15. For reasons discussed *infra*, I find Complainant's testimony generally not credible. Specific to her testimony regarding the availability form, Complainant failed to

provide a basic level of detail as to what information the form requested, who gave her the form, who else was present when she filled out her form, and to whom was the form submitted.

As Complainant's testimony is generally not credible and there is no evidence to corroborate her claims about an availability form, it is more likely than not the availability form never existed. It is quite unlikely that the person responsible for making the schedules for the wait staff (Ashley Sims) would forget about creating, distributing, and collecting employee availability forms, which would likely be very helpful in making a schedule. The fact a fellow employee (Tyler Sease) could not remember filling out such an availability form casts further doubt as to its existence. I find, as a factual matter, that no such availability form was given to Ms. Scott and she did not return any such form to either Mr. or Ms. Sims.

C. In-Person Conversation

On Sunday, June 26, Ashley Sims sent the following message to Complainant:

Hey Sherry! I have Shannon working your shift in the morning so you can come in at 5 tomorrow. **The rest of the week we will figure out tomorrow.**

CX 2 (emphasis added). The text indicates Ashley Sims and Complainant planned to have a conversation the following day to work out scheduling issues Complainant had apparently raised. According to Complainant, the conversation took place as planned and Ashley Sims assured Complainant her Wednesday lunch shift would be covered. Tr. at 21-22. According to Ashley Sims, this conversation never happened; at no point did she ever tell Complainant she did not have to show up to work on Wednesday. Tr. at 100. It is apparent one witness is telling the truth and the other is not, but who?

Fast forward to Wednesday, June 29, when Complainant sent a text message to Ashley Sims at 2:32 PM saying:

Ashley....still at hospital....they just took mom to OR to put in a new pic line...the one in her neck is leaking...**didn't know if i was on schedule...don't want to leave her tonight if at all possible....**but will be there if u need me...don't want to put yall in a bind....please let me know....i am in OR waiting room.....waiting...thank you...sherry

CX 2. If Complainant's testimony is true, this text message makes very little sense. If just two days earlier, Ashley Sims and Complainant had had a conversation and reached a clear understanding that Ashley would get another employee to cover the Wednesday shift, then why would Complainant text Ms. Sims asking whether or not she was scheduled to work? When asked to explain this inconsistency in her story, Complainant testified, "Well, I didn't know the schedule. I'm sitting in limbo except that she put me on at lunchtime." Tr. at 37. Respondent's counsel

rephrased his question to ensure Complainant understood and Complainant responded, "I don't have an answer for that." Tr. at 38.

I find Complainant's explanation and subsequent non-answer here to be plainly inadequate. If Complainant and Ashley Sims had reached an understanding that Complainant did not have to work the Wednesday lunch shift, Ms. Scott would not have sent a text message asking whether she was on the schedule. I find that Ms. Scott and Ms. Sims did not discuss the Wednesday lunch shift, and did not reach an understanding that Complainant would not have to work it.

This text message is far more consistent with Ms. Sims's version of events than with Complainant's. As Complainant testified, she knew she was scheduled to work the Wednesday lunch shift; she and Ashley Sims did not discuss the schedule on Monday and Ashley Sims did not tell Complainant she did not have to work Wednesday. This suggests that Complainant knew she was scheduled to work the Wednesday lunch shift, realized she was a no-show, feigned ignorance to give herself plausible deniability, and used her mother's poor health as a way to garner sympathy, in hopes Blair and Ashley Sims would forgive yet another transgression.

D. Absence of Schedule from Evidence

Complainant highlights the fact the schedule in question was not admitted into evidence, suggesting the schedule was destroyed for the purposes of concealing evidence and I should therefore draw inferences adverse to The Root Cellar (that the schedule would show Complainant was not scheduled to work Wednesday). Tr. at 119. Ashley Sims credibly testified when the week comes to a close, she puts up a new schedule, keeps the old schedule for about a week, and then throws it out. Tr. at 105-06. As this is The Root Cellar's normal course of business for handling this type of record, I decline to draw any adverse inferences against Respondent.

E. Conclusion

A preponderance of the evidence establishes Complainant did not make alternate arrangements with Ashley Sims. Complainant was expected to work the Wednesday lunch shift, and she knew it. The text message Complainant wrote and sent to Ashley Sims on June 29 critically undermines her own account of what happened. Based on the self-serving nature, the inconsistencies, and the unsatisfactory answers given by Complainant at the hearing, I find her credibility to be poor. I therefore credit the testimony of Ashley Sims over that of Complainant, and find Complainant was expected to work the Wednesday shift, knew she was expected to work it, and failed to show.

II. Complainant was fired because she failed to show up for her scheduled shift.

Having established Complainant was expected to work the Wednesday lunch shift, I must determine whether failing to show up was the real reason Complainant was terminated. Complainant argues the real reason for her termination was set forth in the June 30 text message and Respondent is using the “no-call, no-show” excuse as pre-text for their illegal retaliation. Complainant points to the June 29 texts between Complainant and Ashley Sims as demonstrating Complainant still had a job as of June 29.

A. June 30 Termination Notice

On Thursday, June 30, Complainant – who testified that she was under the impression she still had a job – texted Ashley Sims requesting approval to swap shifts with Erin Love:

Ashley....i think u had me scheduled for friday day....i am with erin now aand she would like to work that day shift and i will work for her on friday night...us that ok with yall??? Sherry.... p.s. need to work as we are so broke....i just cant work during the day....but can work any night except thursday and sunday....i hope this will be ok with u and blaire and I appreciate my job....please text me back

CX 2. Blair Sims, using Ashley Sim’s phone, wrote back a short while later:

You called DHEC on us and used your mothers name. I have a good friend that works there. You no longer have a job at The Root Cellar and are not welcome here. We will mail you your check. Good luck

Id. At first glance, this is powerful, direct, and damning evidence of unlawful retaliation. Complainant was notified of her termination and the only apparent reason given was “You called DHEC on us,” referring to the South Carolina Department of Health and Environmental Control. Looking solely at this text message it is difficult to reach any conclusion but ‘Complainant was fired for calling DHEC.’ But other evidence leads me to a different conclusion.

Blair Sims testified he wrote and sent the message from his wife’s phone. Tr. at 82. At some point, Blair and Ashley Sims heard from Cissy Robinson that Complainant filed a complaint with the South Carolina Department of Health and Environmental Control against The Root Cellar. Tr. at 82, 104-05. And this complaint resulted in the surprise inspection that took place at the restaurant on June 29. *Id.* The fact the message was sent at all strongly suggests Blair believed the rumor to be true, at least when he sent the June 30 text to Complainant using his wife’s phone. Ashley Sims indicated the source suggested the information was reliable. She testified that Cissy Robinson was “a really good friend[]” of Complainant; it follows that Cissy would not spread false information about a good friend. Tr. at 104.

B. June 29 Text Conversation

Complainant contends the June 29 conversation with Ashley Sims demonstrates Complainant was still employed at the time of their conversation. It follows that if Complainant was still employed on June 29, it is more likely Complainant was actually fired on June 30 for the unlawful reason provided. In response to Complainant's text discussed *supra*, asking whether she was on the schedule, Ashley Sims wrote: "No you are not on the schedule for tonight." CX 2. But Ashley Sims credibly testified that she did not work on June 29, and when she sent that text message, she did not know Complainant had been fired. Tr. at 101. I find Ashley Sims to be a credible witness, and credit her response here. Furthermore, her answer is consistent with the remaining evidence of record.

C. Termination Memorandum

Blair Sims wrote a memorandum, dated June 29, 2016, stating: "Mrs[.] Scott was scheduled to work today at 11AM and never showed up or called out. She has been terminated for no call no show." RX 1. Complainant disputes the reliability of RX 1, *see* Tr. at 7, 78, 120, but has submitted no evidence that would lead me to doubt its authenticity. And I find Mr. Sims to be credible on this point. Based on the memorandum, I find Blair Sims terminated Complainant for being a "no-call, no-show."

D. Coworker Affidavits

The Root Cellar has submitted affidavits of former employees with whom Complainant worked. All declared under penalty of perjury they understood Complainant was fired for being a "no-call, no-show." RXs 2-5. Complainant argues these affidavits are vague and lack specifics. Tr. at 120. I agree. No person alleged specific knowledge of the relevant underlying facts of this case, most importantly whether Complainant was on the schedule for Wednesday. Accordingly, I do not rely on the affidavits in reaching my decision.

E. Conclusion

Complainant was scheduled to work the lunch shift on Wednesday, June 29, 2016. There is no dispute that Complainant did not work on that date. Based on the contemporaneous memorandum prepared by Blair Sims, I find Complainant was fired for being a "no-call, no-show" on June 29, 2016 at 11 AM. Although Complainant points to the conversation Complainant and Ashley Sims had on June 29 as showing she still had a job, credible evidence demonstrates Ashley Sims was unaware her husband had fired Complainant at the time she sent the text.

III. Employer's erroneous belief that Complainant filed a complaint with the health department played no role in its decision to terminate Complainant.

Complainant was fired for failing to show up to work on June 29 at 11:00 AM. At 12:40 PM, the South Carolina Department of Health and Environmental Control conducted a surprise inspection of The Root Cellar to investigate a

complaint alleging “cross-contamination, dirty plates and silverware, dirty kitchen, servers sweating on food, no gloves, and thawing in hand sink.” RX 2. The surprise inspection revealed no such practices. *Id.* Chef Phillip Rowe’s affidavit reflects, being an accomplished, award-winning chef, he was offended by the accusations. *Id.*

Blair and Ashley Sims testified they heard the health department rumor from Cissy Robinson on June 30. Tr. at 82, 104. There is no evidence in the record contradicting their testimony. The totality of the evidence demonstrates Blair and Ashley Sims believed the rumor to be true at the time. Blair Sims used his wife’s phone to tell Complainant she was fired and that *they knew* she called the health department on them. CX 2. If Blair or Ashley Sims doubted or even questioned the veracity of the rumor, as they do now, that text message would not have been sent.

Complainant was fired a full day before Blair and Ashley Sims heard the health department rumor and a little less than two hours before the surprise inspection, which supposedly arose from the complaint, occurred. Therefore, Respondent’s belief that Complainant filed the health department complaint could not have possibly factored into the decision to terminate Complainant.

ORDER

Based on the foregoing, Sherry Scott’s complaint of retaliation under the Food Safety Modernization Act is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/PML/ksw
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the

status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. &§ 1987.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. &§ 1987.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. &§ 1987.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1987.109(e) and 1987.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1987.110(b).