

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TROY PERRY,)
)
Petitioner,)
)
vs.) Case No. 02-1624
)
SPEEDWAY SUPERAMERICA, LLC,)
d/b/a STARVIN' MARVIN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal administrative hearing in this case on December 18, 2002, in Viera, Florida.

APPEARANCES

For Petitioner: Troy Perry, pro se
2010 Paradise Court
Palm Bay, Florida 32905

For Respondent: Susan P. Norton, Esquire
Allen, Norton & Blue, P.A
121 Majorca Avenue, Suite 300
Coral Gables, Florida 33134

STATEMENT OF THE ISSUE

Whether Petitioner, Troy Perry, was denied service at Respondent's, Speedway SuperAmerica, LLC, d/b/a Starvin' Marvin, service station because of his race.

PRELIMINARY STATEMENT

On May 19, 2001, Petitioner filed a Charge Of Discrimination - Public Accommodation with the Florida Commission on Human Relations. On March 11, 2002, the Florida Commission on Human Relations filed a Notice Of Determination: No Cause, which advised Petitioner that he had 35 days from the date of the Notice to request an administrative hearing. On April 17, 2002, Petitioner's Petition For Relief was received by the Florida Commission on Human Relations.

On April 23, 2002, the Division of Administrative Hearings received a Transmittal of Petition from the Florida Commission on Human Relations forwarding Petitioner's Petition For Relief requesting the assignment of an Administrative Law Judge to conduct all necessary hearings.

On April 23, 2002, an Initial Order was sent to both parties. On May 9, 2002, Respondent filed a Motion to Dismiss alleging that Petitioner's Petition For Relief was not timely filed and, therefore, barred. On May 23, 2002, the case was scheduled for final hearing in Viera, Brevard County, Florida, on June 27 and 28, 2002. On June 7, 2002, Petitioner sought a continuance of the final hearing scheduled for June 27 and 28, 2002. The final hearing was rescheduled for July 31, 2002.

On June 18, 2002, a Recommended Order Of Dismissal was entered recommending that the Florida Commission on Human

Relations dismiss Petitioner's Petition For Relief as it was not timely filed. On August 6, 2002, the Florida Commission on Human Relations forwarded a letter to the Division of Administrative Hearings instructing the Administrative Law Judge to "withdraw your Recommended Order of Dismissal and set a final hearing date in this case."

On October 11, 2002, the Division of Administrative Hearings received the Florida Commission on Human Relations' Order Remanding Petition For Relief From An Unlawful Employment Practice, remanding the case for further proceedings and concluding that Petitioner's Petition For Relief had been timely filed. On October 17, 2002, the case was rescheduled for final hearing on December 18, 2002.

The final hearing was conducted on December 18, 2002, as rescheduled. Petitioner presented three witnesses: himself, Dawnetta Davis, and Rose Locasio. Petitioner offered one exhibit which was received into evidence and marked Petitioner's Exhibit 1. Respondent did not present any evidence; instead, it moved for a directed verdict asserting that Petitioner had failed to present a prima facie case.

The Transcript of the hearing was filed with the Division of Administrative Hearings on January 13, 2003. Respondent filed a Proposed Recommended Order on January 21, 2003, which was thoughtfully considered.

FINDINGS OF FACT

1. Petitioner is a 39-year-old, African-American male.

2. Respondent operates and maintains an automobile service station in Palm Bay, Brevard County, Florida.

3. On the evening of May 24, 2000, Petitioner attempted to obtain gasoline for his automobile at Respondent's service station. For the preceding two years Petitioner had frequently obtained gasoline at Respondent's service station without incident or any suggestion of racial discrimination.

4. The gasoline pumps at Respondent's service station utilize computers in their operation. On this particular evening, the computers were not functioning properly and, as a result, Rose Locasio, a cashier at Respondent's service station, had announced over a speaker system audible at the gasoline pumps that all customers would have to pre-pay for gasoline purchases. There is no evidence that Petitioner heard this announcement.

5. Ms. Locasio had been an employee of Respondent's service station from January 1998 until July 2000. Her employment is coincident with Petitioner's frequent patronization of the service station.

6. Petitioner removed the gasoline nozzle from the pump and inserted it into his gas tank. He was not able to pump any gas.

7. After waiting a few minutes for the gasoline pump to be activated, Petitioner went into the service station and presented \$15 to Rose Locasio. She activated the gasoline pump. At this point, Petitioner questioned Ms. Locasio regarding the requirement that he pre-pay suggesting that he was required to pre-pay because he was black.

8. Ms. Locasio commented that she discriminated against all minorities, blacks, Hispanics, Indians, and whites.

9. Feeling insulted by Ms. Locasio's comment, Petitioner decided he didn't want to purchase gasoline from Respondent's service station and requested his \$15 back.

10. Ms. Locasio explained that she could not refund the \$15 once the computer had been activated without the station manager's permission. The station manager was not on duty.

11. Petitioner called the police, as did another of Respondent's employees. When the police arrived they effected the return of Petitioner's \$15.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.57 and 760.11, Florida Statutes.

13. Petitioner claims racial discrimination in violation of Sections 760.01 through 760.11 and 509.092, Florida Statutes, known as the "Florida Civil Rights Act of 1992."

14. Section 509.092, Florida Statutes, provides as follows:

Public lodging establishments and public food service establishments are private enterprises, and the operator has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator, but such refusal may not be based upon race, creed, color, sex, physical disability, or national origin. A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action pursuant to s. 760.11.

15. Section 760.07, Florida Statutes, reads as follows:

Any violation of any Florida statute making unlawful discrimination because of race, color, religion, gender, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations gives rise to a cause of action for all relief and damages"

16. The provisions of the Florida Civil Rights Act are to be read in pari materia with parallel federal civil rights legislation, and, accordingly, reliance on federal civil rights case law is appropriate in interpreting Florida civil rights law. Bass v. Board of County Commissioners, Orange County, Florida, 256 F.3d 1095, 1109 (11th Cir. 2001); Stevens v. Steak n Shake, Inc., 35 F.Supp. 2d 882, 886 (M.D. Fla. 1998); Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

17. Cases involving allegations of violations of Section 509.092, Florida Statutes, like those involving violations of

federal civil rights legislation, are subject to a shifting burden of proof. Petitioner has the burden of proof in this case to show that he was discriminated against on the basis of race. The ultimate burden of persuasion (by a preponderance of the evidence) always rests on the party claiming violation of the statute. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

18. The typical discrimination case usually involves two shifts of the burden of going forward with the evidence. The initial burden falls on the party alleging the discriminatory conduct. In order for the case to proceed, Petitioner must establish a prima facie case of the alleged discrimination. In the instant case, accomplishing this task requires Petitioner to present evidence that:

(1) He is a member of a protected class;

(2) He attempted to contract for services and to afford himself the full benefits and enjoyment of a public accommodation;

(3) He was denied the right to contract for those services and, therefore, was denied the full benefits and enjoyment of a public accommodation; and

(4) Such benefits and services were available to similarly situated persons outside the protected class who received full benefits or enjoyment, or were treated better.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); United States v. Lansdowne Swim Club, 894 F.2d 83, 88 (3rd Cir. 1990); Laroche v. Denny's, Inc., 62 F.Supp. 2d 1375, 1382 (S.D. Fla. 1999).

19. In the instant case, Petitioner failed to establish a prima facie case. While Petitioner demonstrated that he is a member of a protected class, African-American, he failed in his attempt to demonstrate the remaining three elements of a prima facie case.

20. He attempted to purchase \$15 worth of gasoline and was given the opportunity to make the purchase by pre-paying for the purchase (which he did). He was not denied service; he could have pumped the gasoline; however, after being insulted by Respondent's cashier, he elected to demand the return of his money. Morris v. Office Max, Inc., 89 F.3d 411, 414 (7th Cir. 1996); White v. Denny's, Inc., 918 F.Supp 1418, 1424-1425 (D. Colo. 1996).

21. Petitioner, and apparently every other customer of Respondent's service station, were being asked to pre-pay. The requirement to pre-pay was applied to all customers uniformly and non-discriminatorily. As a result, the evidence adduced demonstrates that Petitioner was not discriminated against on a racial basis. Stevens v. Steak n Shake, Inc., 35 F.Supp. 2d 882, 887 (M.D. Fla. 1998).

RECOMMENDATION

Based of the Foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner has failed to present a prima facie case of discrimination based on race; therefore, his Petition For Relief should be dismissed.

DONE AND ENTERED this 3rd day of February, 2003, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2003.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.