STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MODESTO A. TORRES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-1901
	)	
WINN DIXIE STORES, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

The parties having been provided proper notice, Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings conducted a formal hearing of this matter in Miami, Florida, on August 1, 2002.

APPEARANCES

For Petitioner: Modesto A. Torres, pro se
25302 Southwest 127th Place
Miami, Florida 33032

For Respondent: Maria H. Ruiz, Esquire
799 Brickell Plaza, Suite 900
Miami, Florida 33131

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent unlawfully discriminated against Petitioner in connection with Petitioner's employment by Respondent on the basis of his national origin.

PRELIMINARY STATEMENT

On June 25, 2001, Petitioner Modesto A. Torres ("Torres"), filed a handwritten charge of discrimination with the Florida Commission on Human Relations ("FCHR") that accused his former employer, Respondent Winn-Dixie Stores, Inc. ("Winn-Dixie"), of having terminated his employment as a bagger because of his national origin. Torres filed an Amended Charge of Discrimination with the FCHR on August 13, 2001, in which he made essentially the same allegations.

The FCHR investigated Torres's claim and, on March 29, 2002, issued a letter stating that it could find no reasonable cause to believe that an unlawful employment practice had occurred. Thereafter, Torres timely filed a Petition for Relief with the FCHR contending that Winn-Dixie had discriminated against him and some co-workers because they were of Puerto Rican descent. On May 7, 2002, the FCHR transferred the matter to the Division of Administrative Hearings ("DOAH") for further proceedings, and an administrative law judge ("ALJ") was assigned to the case. The ALJ scheduled a final hearing for August 1, 2002, at 9:00 a.m. in Miami, Florida.

At the final hearing, Torres testified on his own behalf and called one witness, a Winn-Dixie employee named Louis F. Haza. Torres offered no exhibits. During its case, Winn-Dixie presented the testimony of Mr. Haza (who is an assistant store

manager) and also called Steven H. Hollingsworth, a human resources manager for Winn-Dixie. Winn-Dixie offered exhibits numbered 1 through 5 into evidence, and the undersigned received one additional document (Torres's June 25, 2001, charge of discrimination) as DOAH Exhibit 1.

The final hearing transcript was filed with DOAH on August 14, 2002. Pursuant to instructions given at the conclusion of the final hearing, the parties' respective proposed recommended orders were due to be filed on August 22, 2002. Winn-Dixie timely filed a proposed recommended order.

FINDINGS OF FACT

The evidence adduced at final hearing established the facts that follow.

1. In May 1999, Winn-Dixie hired Torres to work as a bagger in one of its grocery stores. Until the event that precipitated his termination in July 2000, Torres's job performance was generally satisfactory, although he was formally reprimanded at least once, in December 1999, for insubordination.

2. Torres was at work bagging groceries on July 14, 2000. The store was crowded that day, and the lines were long at the cash registers. A customer checking out in one line asked Torres——who was stationed at another lane——to bag his groceries. Torres refused, and the man (according to Torres) called Torres

an “asshole.” Torres retorted, “You’re the asshole.” (At hearing, Torres admitted using the epithet in front of “a whole line” of customers but explained——in effect——that, since his antagonist had used the word first, the man had it coming.)

3. Having thus offended one another, the two men——Torres and the customer——engaged in a loud shouting match. The assistant store manager, who was in the parking lot outside when this verbal altercation began, was called inside to restore calm and order. Taking charge, he separated the disputants, apologized to the customer (who was a regular shopper at that store), and sent Torres home to cool off.

4. When Torres reported for work the next day, he was fired. He complained, then as now, that Winn-Dixie’s decision was the result of his Puerto Rican origin. His supervisors, however, claimed——then as now——that the cause of Torres’s firing was his profanity-laced row with a customer, which had occurred in front of other customers.

Ultimate Factual Determinations

5. Winn-Dixie fired Torres, not because of his national origin, race, or ethnicity, but because Torres quarreled with a customer——angrily and loudly——before other customers. This is a legitimate reason for a grocery store to discharge a bagger.

6. There is no credible, competent evidence that Winn-Dixie tolerated similar behavior in non-Hispanic (or non-Puerto Rican or non-minority) employees.

7. The evidence does not support a finding that Winn-Dixie feigned disapproval of Torres's dustup with a shopper as a pretext for discrimination.

8. In short, Winn-Dixie did not discriminate unlawfully against Torres.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

10. It is unlawful for an employer to discharge or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin. Section 760.10(1)(a), Florida Statutes.

11. Federal discrimination law may properly be used for guidance in evaluating the merits of claims arising under Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

12. In McDonnell Douglas Corp. v. Green, 4ll U.S. 792, 802-03 (1973), the Supreme Court of the United States articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

13. Pursuant to this analysis, the plaintiff (Petitioner here) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

14. If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent here) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

15. In Hicks, the Court stressed that even if the trier of fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to dis believe the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

16. Torres complains that his termination was motivated by his national origin. This is a disparate treatment claim. To present a prima facie case of disparate treatment using the indirect, burden-shifting method just described, Torres needed to prove, by a preponderance of the evidence, that "(1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

17. Torres failed to establish a prima facie case of unlawful discrimination using circumstantial evidence. He produced no credible evidence that similarly situated employees of a different classification (either non-Hispanics specifically or non-minorities generally) were treated more favorably than

he, as was his burden under McDonnell Douglas. See Campbell v. Dominick's Finer Foods, Inc., 85 F. Supp. 2d 866, 872 (N.D. Ill. 2000)("To establish this element, [the claimant] must point to similarly situated non-[minority] employees who engaged in similar conduct, but were neither disciplined nor terminated."). For this reason alone, Torres's claim cannot succeed.

18. Torres likewise offered no persuasive direct evidence sufficient to demonstrate that Winn-Dixie had fired him with a discriminatory intent. See Denney v. The City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield, 115 F.3d at 1563.

19. Although Torres's failure to meet his initial burden obviates the need for further analysis, Winn-Dixie, as found above, proved a legitimate, nondiscriminatory reason for firing Torres, and Torres failed to demonstrate that the stated ground for his discharge——arguing with a customer——was merely a pretext for discrimination. These circumstances provide an independent, alternative——and equally compelling——basis for the undersigned's recommendation.

20. In view of Torres's testimony that the customer provoked him to anger, it should be noted, before concluding, that Torres's belief that he, himself, was blameless in regard to the incident——or even the fact that the customer may have "started it"——is irrelevant to the instant discrimination claim. See Webb v. R&B Holding Co., Inc., 992 F. Supp. 1382, 1387 (S.D.

Fla. 1998). What matters is "'the perception of the decision maker.'" Id. (quoting Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980)).

21. Here, where the assistant store manager was required to break up a verbal fight between the employee and a customer, and where the employee admits that he called the customer an "asshole," Winn-Dixie reasonably could have concluded that Torres was at fault and way out of line. Winn-Dixie's management acted well within legal boundaries in terminating an employee who, even if provoked, should have heeded the maxim, "the customer is always right," and refrained from retaliating in kind. Common sense and everyday experience teach that even a rude or abusive customer ordinarily should be dealt with courteously; calling him an "asshole" and engaging in a shouting match in front of other patrons are patently inappropriate responses.

22. The bottom line is, Winn-Dixie did not discriminate in this instance: Torres, the record shows, was fired for legitimate, nondiscriminatory reasons.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order dismissing Torres's Petition for Relief.

DONE AND ENTERED this 30th day of August, 2002, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
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this 30th day of August, 2002.

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.