STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VERONICA M. KING AND WALTER E. KING,	)	
Petitioners,	)	
vs.	)	Case No. 02-2502
LA PLAYA-DE VARADERO RESTAURANT,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on September 5, 2002, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Veronica M. King, pro se
Walter E. King, pro se
2595 Pea Ridge Road
Mill Spring, North Carolina 28756

For Respondent: Tomas A. Pila, Esquire
Pila & Associates, P.A.
2525 Southwest Third Avenue
Suite 304
Miami, Florida 33129

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, a restaurateur, unlawfully discriminated against Petitioners, who

are African-Americans, by refusing to serve them based upon race.

PRELIMINARY STATEMENT

In a Charge of Discrimination filed with the Florida Commission on Human Relations ("FCHR") on November 16, 2001, Petitioners Veronica and Walter King alleged that they were discriminated against at Respondent La Playa de Varadero, a restaurant located in Miami Beach, Florida. Specifically, Petitioners complained that, because they are African-Americans, Respondent's employees had rendered slow service to them when they tried to eat dinner at the restaurant in July 1991. The FCHR investigated Petitioners' claim and, on May 14, 2002, issued a letter stating that it had found "reasonable cause to believe that an unlawful employment practice had occurred."[1] Thereafter, Petitioners timely filed a Petition for Relief with the FCHR in which they repeated their allegation that Respondent had denied them service based upon race.

On June 17, 2002, the FCHR transferred the matter to the Division of Administrative Hearings for further proceedings, and an administrative law judge ("ALJ") was assigned to the case. The ALJ scheduled a final hearing for September 5, 2002.

At the final hearing, both Petitioners testified. They offered no other evidence. Respondent called three witnesses:

Rainer Armas, Ariel Diaz, and Lourdes Rodriguez. It offered no additional evidence.

The final hearing transcript was filed on February 5, 2003. Petitioner submitted a proposed recommended order; Respondent did not.

FINDINGS OF FACT

1. On or about July 7, 2001, Petitioners Veronica King and Walter King (the "Kings"), who were then on vacation in Miami Beach, Florida, decided to eat dinner at La Playa de Varadero Restaurant ("La Playa"), a Cuban restaurant near their hotel.[2]

2. They entered the restaurant some time between 3:00 and 5:00 p.m. Though the dining room was full of patrons, there were a few empty tables. The Kings seated themselves.

3. The Kings reviewed the menus that were on the table and conversed with one another. They waited for a server, but none came promptly. After waiting about 10 or 15 minutes, Mrs. King signaled a waitress, who came to their table and took their drink and food orders.[3]

4. The waitress brought the Kings their drinks without delay. The food, however, did not appear, and the Kings grew increasingly impatient and irritated. It seemed to the Kings, who are African-Americans, that other customers——none of whom was black——were being served ahead of them.[4] After about a half

an hour or so, having yet to be brought food, the Kings decided to leave without eating.

5. On the way out of the restaurant, the Kings paid the cashier for their drinks. They complained to the cashier about the slow service and expressed to her their dissatisfaction at having waited so long, and in vain, for their meals.[5] The Kings perceived that the cashier and other employees, including their waitress who was standing within earshot, were indifferent to the Kings' distress.

Ultimate Factual Determinations

6. At the material time, La Playa was a "public food service establishment" within the reach of Section 509.092, Florida Statutes, and hence subject to liability for unlawful discrimination in violation of the Florida Civil Rights Act.

7. The greater weight of the evidence fails to establish that La Playa refused to serve, or otherwise unlawfully discriminated against, the Kings.

CONCLUSIONS OF LAW

8. 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.

9. Being a private entrepreneur, a restaurant operator "has the right to refuse . . . service to any person who is objectionable or undesirable to the operator[.]" Section

509.092, Florida Statutes. Under the Florida Civil Rights Act,[6] however, a "public food service establishment" may not refuse to serve any person on the basis of "race, creed, color, sex, physical disability, or national origin." Id. "A person aggrieved by a violation of [Section 509.092] or a violation of a rule adopted [thereunder] has a right of action pursuant to s. 760.11." Id.

10. The term "public food service establishment" is defined as "any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption." Section 509.013(5)(a), Florida Statutes. As found, La Playa was, in fact, a public food service establishment.

11. Actions for redress of civil rights violations arise less frequently out of retail and service settings than from employment situations. Indeed, if the dearth of state case law on the subject is instructive, the right of action authorized under Section 509.092, Florida Statutes, appears rarely to have been exercised.

12. In the absence of any decisions of the state appellate courts interpreting the pertinent language of Section 509.092,

the undersigned finds persuasive the opinion of a federal district court sitting in Florida, which found, in a case brought under Florida law involving the allegation that a restaurant had discriminated against the African-American plaintiffs by requiring prepayment for their meals, that the substantive rights afforded under the state statute are informed by the federal anti-discrimination laws after which the Florida Civil Rights Act was patterned. See Stevens v. Steak N Shake, Inc., 35 F.Supp.2d 882, 886 (M.D.Fla. 1998)("[T]his Court looks to established federal public accommodation law in order to determine the meaning of the term 'such refusal may not be based upon race, creed, [or] color . . .' in Fla. Stat. § 509.092, and to determine the elements of [the plaintiffs'] civil rights claims under the Florida Statute."); see also Laroche v. Denny's, Inc., 62 F.Supp.2d 1375 (S.D.Fla. 1999)(in case where restaurant was alleged to have refused service to black customers, court treated plaintiffs' federal and state law claims as having identical substantive elements),[7] rev'd in part, vacated in part, 281 F.3d 1285 (11th Cir. 2001)(Table).

13. The two federal statutes that guard against discrimination in public accommodations, including restaurants, are Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq., and 42 U.S.C. § 1981. E.g. Stevens, 35 F.Supp.2d at 886. As a practical matter, in race-based, refusal-to-serve

cases, courts usually draw no meaningful distinction between the elements of a Title II claim, on the one hand, and a Section 1981 claim, on the other. E.g. id. at 886-87; Laroche, 62 F.Supp.2d at 1382-83.

14. In Stevens, the district court, following federal precedents, held that to prevail under Section 509.092, Florida Statutes, a plaintiff must establish three elements: (1) he is a member of a protected class; (2) the defendant intended to discriminate against the plaintiff on that basis; and (3) the defendant's racially discriminatory conduct abridged a statutorily protected right. Id. at 887.

15. Other courts, including the district court in Laroche, have found the familiar McDonnell Douglas framework of elements and shifting burdens,[8] which was fashioned for use in Title VII litigation, to be applicable in public accommodation cases. This shifting-burden scheme is generally viewed as being more plaintiff-friendly than the simple tripartite test employed in Stevens, for, in permitting the plaintiff to profit from an inference of discriminatory intent, the McDonnell Douglas framework enables him to make a prima facie case without direct evidence of intent, which is often unavailable.[9]

16. There is some disagreement between the courts that have followed the shifting-burden approach as to the specific elements of the plaintiff's prima facie case. In Laroche, for

example, the court required the plaintiffs to establish initially, by a preponderance of the evidence, that:

1. they are members of a protected class;
2. they attempted to contract for services and to afford themselves the full benefits and enjoyment of a public accommodation;
3. they were denied the right to contract for those services and, thus, were denied the full benefits or enjoyment of a public accommodation; and
4. such services were available to similarly situated persons outside the protected class who received full benefits or enjoyment, or were treated better.

62 F.Supp.2d at 1382. Other courts have deemed the foregoing four-part formula to be too restrictive and onerous for plaintiffs, given that, in the context of retail transactions, plaintiffs can be expected to encounter difficulties in attempting to produce similarly situated persons who were not discriminated against. A few courts thus have adopted a three-part prima facie test tailored to the public accommodation setting, under which a plaintiff must prove that:

1. he is a member of a protected class;
2. he sought to make or enforce a contract for services ordinarily provided by the defendant; and

3. he was denied the right to enter into or enjoy the benefits or privileges of the contractual relationship in that (a) the plaintiff was deprived of services while similarly situated persons outside the protected class were not and/or (b) the plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.

See Christian v. Wal-Mart Stores, Inc., 252 F.2d 862, 872-73, supplemented on rehearing, 266 F.3d 407 (6th Cir. 2001); O'Neill v. Gourmet Systems of Minnesota, Inc., 213 F.Supp.2d 1012, 1020 (W.D.Wis. 2002)

17. The undersigned has refrained from going into great detail concerning the various tests that courts have developed for articulating the elements of a plaintiff's prima facie case in the public accommodation context because the subtleties and nuances of the respective legal theories underlying such tests are academic in the case at hand. The reason is that, even under the most lenient test, the Kings simply have not made out a prima facie case of discrimination.

18. In making this determination, the undersigned has found persuasive the opinions of several courts that have examined "slow service" (as opposed to "no service") claims against restaurants. The difficulty inherent in such claims is

that nearly everyone who eats in restaurants experiences slow service now and again; indeed, such occasional frustrations, like finding oneself trapped in what seems to be the slowest checkout line at the supermarket, are commonly experienced by everyone, regardless of race, creed, color, sex, physical disability, or national origin. Faced with one of these unexpected inconveniences, moreover, it is human nature, the undersigned believes, to perceive that others around us have avoided our present misfortune——which, of course, adds insult to the injury. Thus, for example, while standing in the slow checkout aisle, we observe a customer in another lane paying for his purchase, even though we know he got in his line after we got in ours.

19. Mindful of these considerations, courts have found that poor service in the retail or restaurant industry, without more, is just too commonplace to give rise to an inference of discrimination. This point was well put in Robertson v. Burger King, Inc., 848 F.Supp. 78 (E.D.La. 1994), wherein the plaintiff, a black man, alleged that the defendant's employee had discriminated against him by making him wait for his food, after ordering, while proceeding to take the orders of several white men who had stood behind him in line. Dismissing the case, the court wrote:

> In the instant case, plaintiff was not denied admittance or service——his service was merely slow. While inconvenient, frustrating, and all to common, the mere fact of slow service in a fast-food restaurant does not, in the eyes of this Court, rise to the level of violating one's civil rights. While it is unfortunate that plaintiff had to wait for his food, and may have in fact been served after others who had not ordered sausage biscuits, he has nevertheless failed to state a cognizable claim for violation of his civil rights.

Id. at 81 (footnote omitted). The court noted that the plaintiff had "not claimed that others who came after him and ordered similar items were served their food first," id. at 81 n.4 (emphasis added), which cast some doubt on whether the plaintiff and the white patrons were truly similarly situated.

20. To prevail on a claim of unlawful discrimination involving slow service, then, the plaintiff must demonstrate that the slow service was accompanied by some additional conduct, or attended by some other circumstances, such that, taken as a whole, the resulting situation was "tantamount to a denial of service or a refusal to serve," Stevens, 35 F.Supp.2d at 891 n.6, from which the requisite discriminatory intent can reasonably be inferred. A good example of the kind of additional conduct that transforms slow service into a civil rights violation is provided by Charity v. Denny's, Inc., 1999 WL 544687 (E.D.La. 1999). In that case, a waiter was alleged to have harassed and taunted the plaintiffs, and to have directed a

highly offensive, racially charged comment to them. Id. at *5.[10] The court concluded that the plaintiffs, having alleged more than mere bad service, had stated a cause of action. See also Bobbitt by Bobbitt v. Rage Inc., 19 F.Supp.2d 512, 519-20 (W.D.N.C. 1998)(plaintiffs' allegation that restaurant manager had required them to prepay for their meals went beyond poor service and stated legally sufficient claim)

21. Here, the Kings have established that, regrettably, they received slow service at La Playa, but not that La Play treated them in a markedly hostile manner and in a manner that a reasonable person would find objectively discriminatory. There are no facts——other than the slow service, which is, of itself, insufficiently probative——suggesting that someone intended to discriminate against the Kings on the basis of race.[11] The evidence, in sum, does not reasonably support the inference of discriminatory intent. Therefore, while the undersigned cannot, of course, completely rule out the possibility that the Kings were in fact victims of discrimination, he concludes, based on the evidence presented, that such possibility is too remote or speculative to be considered "more likely than not."[12]

RECOMMENDATION

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

DONE AND ENTERED this 19th day of February, 2003, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of February, 2003.

ENDNOTES

[1]/ The reference to unlawful employment practices in the agency's Notice of Determination was clearly a mistake, for the Kings have never asserted an employment discrimination claim against Respondent.

[2]/ Petitioners brought this action against "La Playa de Varadero Restaurant," which, the record reveals, was not only the name of the restaurant but also the name of the establishment's former corporate owner, which latter was really the responding party. At the end of July 2001 (coincidentally not long after the events at issue), the corporation that then owned the business sold the restaurant to a third party. The record contains scant evidence concerning this transaction; indeed, it is an open question whether the former corporate owner presently exists as an active corporation. Nevertheless, because La Playa's former corporate owner appeared through counsel and participated in this proceeding as the responding party without objection, the undersigned concludes that any issue regarding the identity of the proper party respondent was waived.

[3]/ The Kings were not able to recall at hearing the entrées that they had ordered. Mrs. King thought she had ordered rice, and

Mr. King remembered ordering black beans and rice. Because these items are commonly served as side dishes at a Cuban restaurant——like a baked potato at a steak house——and would not ordinarily be ordered as the main course of a meal, the undersigned infers that the Kings ordered something more than beans and rice for dinner.

[4]/ While the undersigned accepts the Kings' testimony that none of the other diners was African-American, there is insufficient evidence about these customers (e.g. when they arrived and what they ordered) to determine whether they and the Kings were similarly situated. Put simply, it is impossible to make a meaningful "apples to apples" comparison between the Kings and the other customers, because the record sheds no useful light on the latter.

[5]/ The Kings did not, however, mention to her or to anyone else in the restaurant that they suspected racial animus had been the cause of the poor service.

[6]/ The Florida Civil Rights Act comprises Sections 760.01-760.11 and 509.092, Florida Statutes. See Section 760.01(1), Florida Statutes.

[7]/ This approach is in accord with the rule that federal anti-discrimination laws 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).

[8]/ 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. See also, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993).

Pursuant to this analysis, the plaintiff 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)).

If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant 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.

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.

[9]/ Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. The City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997).

[10]/ The plaintiffs alleged they had overheard the waiter say, "Management can't force me to serve niggers." Id. at *1.

[11]/ It should be remembered that the Kings failed to identify the waitress who served them, the cashier, or any other employees on duty at the time they visited La Playa; offered few details about their order; and produced no evidence showing that they and the other customers were similarly situated. Indeed, the Kings presented no documentary evidence, such as a receipt, corroborating their testimony that they visited La Playa. Faced with such limited proof, La Playa was left largely to guess at the reasons for the slow service (e.g. it was a busy evening, perhaps the Kings ordered a special dish, etc.). As a result, relatively few facts about the transaction could be found.

[12]/ This conclusion is not intended to be, and should not be construed as, a negative comment on the Kings' credibility or sincerity. Nor does the undersigned mean in any way to discount the Kings' subjective feelings. Indeed, the undersigned is convinced that the Kings were genuinely upset and offended by conduct that they strongly believe was discriminatory. No

matter how heartfelt, however, the Kings' personal perceptions of discrimination cannot legally provide a basis for imposing liability without proof of all the requisite elements of the cause of action asserted——proof that, in this case, was lacking.

COPIES FURNISHED:

Veronica M. King
Walter E. King
2595 Pea Ridge Road
Mill Spring, North Carolina 28756

Tomas A. Pila, Esquire
Pila & Associates, P.A.
2525 Southwest Third Avenue
Suite 304
Miami, Florida 33129

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.