

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLENE MCADORY,)
)
 Petitioner,)
)
 vs.) Case No. 04-2642
)
 DENNY'S RESTAURANT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on November 3 and 4, 2004, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Charlene McAdory, pro se
417 Oliver Avenue North
Minneapolis, Minnesota 55405

For Respondent: Susan S. Erdelyi, Esquire
Marks Gray, P.A.
Post Office Box 447
Jacksonville, Florida 32201

STATEMENT OF THE ISSUE

The issue is whether Respondent, a restaurant, unlawfully discriminated against the Petitioner, who is African-American, by refusing to serve her because of her race.

PRELIMINARY STATEMENT

On August 15, 2003, Petitioner, Charlene McAdory, filed a charge of discrimination with the Florida Commission on Human Relations ("FCHR") in which she alleged that she was discriminated against at a Denny's restaurant located near the Jacksonville, Florida International Airport. Petitioner specifically alleged that Respondent's employees refused to serve her a meal at the restaurant on July 2, 2003, because she is African-American. After investigating Petitioner's claim, the FCHR issued a determination of no cause on June 23, 2004.

Petitioner filed a Petition for Relief from the no cause determination on July 23, 2004, and the matter was transferred to the Division of Administrative Hearings on July 26, 2004. The undersigned Administrative Law Judge was assigned to the case and the matter proceeded to hearing in Jacksonville, Florida, on November 3 and 4, 2004.

At the final hearing, the Petitioner testified herself, and offered the testimony of witnesses Shane Durbec, Audrey Howard, Rhonda Nicks, Deanna Owens, and Sheri Thomas, and offered Exhibit Nos. 1 through 12, all of which were admitted into evidence. Respondent offered the testimony of witnesses Brandy Turner, Michael Kinnaman (via telephone), Joanna Lopez, Charlene McAdory, and Shane Durbec, and offered Exhibit Nos. 1 through 12, all of which were admitted into evidence.

No transcript was filed. After the hearing, Petitioner and Respondent filed their Proposed Recommended Orders on November 19, 2004.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. At approximately 2:25 p.m., on July 2, 2003, Petitioner, an African-American resident of Minneapolis, Minnesota, entered the premises of a Denny's Restaurant located at 14697 Duval Road, Jacksonville, Florida, to eat a meal.

2. Petitioner had spent the previous night in Gainesville, Florida, and had interviewed for a position with the City of Gainesville that morning before driving to Jacksonville to fly home to Minneapolis.

3. Petitioner approached the wait stand and waited approximately three minutes to be seated.

4. Petitioner noticed only five guests in the restaurant at the time she was seated, all of whom were Caucasian.

5. Petitioner was seated close to a Caucasian family of four and a single Caucasian male seated at another table.

6. Petitioner did not claim that she had been segregated in the restaurant, and admitted that she had been seated close to tables with customers of other races.

7. Immediately after being seated, Petitioner asked the hostess for a cup of hot water with lemons, which was promptly delivered to her by the hostess.

8. Petitioner was treated respectfully by the hostess.

9. After the hostess left, Petitioner drank her beverage while she reviewed the menu and waited to be greeted by her server and to have her order taken.

10. Although there appeared to be three servers in the restaurant at the time of Petitioner's visit, only one appeared to be serving. The others appeared to be completing their "side work," that is, restocking and end-of-shift cleaning duties.

11. The only person actually serving customers during Petitioner's visit was Rhonda Nicks, a Caucasian woman. The restaurant was short staffed during this period due to a shift change and another server's failure to show for her shift.

12. While she waited to be served, Petitioner observed that two Caucasian women entered the restaurant, were seated, and were promptly served by Ms. Nicks who appeared to be the only server in the restaurant.

13. Petitioner next observed as a Caucasian man and woman entered the restaurant, were seated, then promptly had their drink and food orders taken and served by Ms. Nicks.

14. After waiting 20-25 minutes, and not having her food order taken, or even being acknowledged by the server,

Petitioner went to the cashier's stand where she was met by Audrey Howard, an African-American employee of the restaurant, who asked Petitioner if she wanted to see a manager. Petitioner replied that she did want to see a manager, and one was summoned.

15. After waiting a few minutes, Petitioner was greeted by a Caucasian manager who identified himself as Mike Kinnaman. After speaking with Petitioner, Mr. Kinnaman offered to immediately put in Petitioner's food order, to even cook the meal himself, and to provide the meal at no charge.

16. Petitioner refused Mr. Kinnaman's offer, stating that she had to return her rental car at the airport, then catch a flight. Mr. Kinnaman then offered Petitioner a business card on which he wrote "1 free entrée, 1 free beverage, 1 free dessert . . . Unit #1789."

17. Mr. Kinnaman told Petitioner that she could use the card for a free meal at another time. This offer was made based upon the manager's belief that Petitioner did not have time to eat and needed to leave for the airport.

18. After speaking with the manager, Petitioner left the restaurant at approximately 3:00 p.m. She drove the short distance to the airport, removed her luggage and belongings from the rental car, turned in the car, and received her receipt

which showed that she had turned in the car at the airport Hertz location at 3:20 p.m.

19. Although Petitioner told the Respondent's manager that she had to leave to catch a flight, the evidence showed that Petitioner's flight was not scheduled to leave for another four hours. Petitioner's rental car receipt documented the fact that she had a two-day rental and could have kept the car for almost another full day.

20. Petitioner was in no jeopardy of incurring additional rental car charges or of missing her flight when she hurried from the restaurant at 3:00 p.m.

21. Although Petitioner observed only nine other customers in the restaurant while she waited to be served, Respondent's records and the testimony of Audrey Howard, a former cook at Respondent's restaurant, 24 customers were served in the restaurant between 2:00 and 3:00 p.m. on the day of Petitioner's visit.

22. Although Petitioner testified that she was the only African-American customer in the restaurant, Ms. Howard recalled a table of two African-American patrons who were served during the time period when Petitioner was in the restaurant. She specifically recalled these patrons because the gentleman returned his omelet to the kitchen, asking for more cheese.

23. During her time in the restaurant, Petitioner observed only five employees. Respondent's records demonstrate that 14 hourly employees were in the restaurant between 2:25 and 3:00 p.m.

24. From where she was seated in the restaurant, it is likely that Petitioner could not see every customer and employee in the restaurant.

25. Petitioner never attempted to call a server over to her table, nor did she ask the hostess to either take her order or ask a server to provide her with service while she waited.

26. Petitioner did not complain to the manager that she had been discriminated against. She complained that she had received poor service.

27. Respondent requires training for all of its employees on diversity and discrimination issues before they are allowed to work for Respondent. Every server who testified at hearing had specifically undergone diversity and discrimination training.

28. Although Respondent has a history of past discrimination against African-Americans as evidenced by a consent decree entered into by the company with the United States Justice Department, it has since received national awards and recognition for its strides in the areas of discrimination and diversity.

29. Respondent takes claims of discrimination very seriously, and has a zero tolerance standard for acts of discrimination by its employees.

30. Respondent's managers are required to report all claims of racial discrimination to a 1-800 hotline. No call was made by the manager in this case because he did not believe that a claim of discrimination had been made by Petitioner when she claimed she had received poor service.

31. Petitioner offered no evidence that she had suffered damages as a result of the poor service she received at the restaurant.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has Jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

33. Section 509.092, Florida Statutes, applies to public food service establishments such as Respondent's restaurant:

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 who claims to have suffered a violation of this statute may pursue a claim under the provisions of Section 760.11, Florida Statutes.

34. 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." § 509.013(5)(a), Fla. Stat. The Denny's Restaurant located in Jacksonville, Florida, which is the subject of this proceeding, is a public food service establishment.

35. Very little case law exists concerning violations of Section 509.092, Florida Statutes. Since no decisions have been reported from Florida courts interpreting the provision, it is necessary to look to federal actions for guidance. In LaRoche v. Denny's, Inc., 62 F. Supp. 2d 1375 (S.D. Fla. 1999), the court treated the plaintiffs' federal and state law claims as having identical substantive elements. Stevens v. Steak n Shake, Inc., 35 F. Supp. 2d 882 (M.D. Fla. 1998); and Wells v. Burger King Corporation, 40 F. Supp. 2d 1366 (N.D. Fla. 1998), specifically apply the statute to restaurant discrimination claims. The Wells case ultimately focused on the application of

42 U.S.C. Section 1981 and applied the burden shifting test contained in McDonnell Douglas Corp. v. Green, 41 U.S. 792 (1973), which requires the Petitioner to initially establish that 1) they are members of a protected class; 2) they attempted to contract for certain services; 3) they were denied the right for certain services; and 4) such services remained available to similarly situated persons outside the protected class. Wells, supra, at 1368.

36. In Stevens v. Steak n Shake, Inc., 35 F. Supp. 2d 882 (M.D. Fla. 1998), the plaintiffs alleged that Defendant violated Section 509.092 when its server asked African-American patrons to prepay for meals, allegedly because of their race. The plaintiffs maintained that white patrons were not required to prepay their meals. The court granted summary judgment in favor of Steak n Shake on the grounds that the plaintiffs had failed to make a prima facie case of discrimination under Section 509.092, Florida Statutes, namely, that the restaurant denied them the full benefits or enjoyment of Steak n Shake and that similarly situated Caucasians received full benefits or enjoyment. The court held that the test for establishing a prima facie case of discrimination under Section 509.092, the plaintiff must demonstrate 1) that he or she is s member of a protected class; 2) that defendant intended to discriminate against him or her on that basis; and 3) that defendant's

racially discriminatory conduct abridged a right enumerated in the statute. Stevens v. Steak n Shake, Id., at 887.

37. The distinction between cases where discrimination was found to have occurred and the present matter is that there is a clear distinction to be made between discriminatory service and slow or poor service. Nearly everyone who eats in restaurants, even those billed as "fast food" restaurants, have experienced slow or poor service from time to time. Everyone has experienced the feeling of choosing the "wrong" line at the supermarket checkout or the bank teller and experiencing frustrating delays while waiting to be served. These examples, however, fall far short of being discriminatory since they are based upon the incompetence or lack of training of the service person, rather than upon race, creed, color, national origin, sex, or physical disability. When faced with such inconveniences, it is natural for us to feel as though others around us are being treated with favoritism while we are being singled out for disparate treatment.

38. Recognizing these inconveniences of modern life, the courts have found that poor service in the retail or food service industries, without more, is too commonplace to give rise to an inference of discrimination. The point may be best expressed in Roberson v. Burger King, Inc., 484 F. Supp. 78 (E.D. La. 1994), in which the plaintiff, an African-American,

alleged that defendant's employee had discriminated against him by making him wait, after he had ordered, while proceeding to take the orders of several other Caucasian men who were in line behind him. In 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 too common, the mere fact of slow service in a fast-food restaurant does not, in the eyes of the 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 ordered sausage biscuits, he has nevertheless failed to state a cognizable claim for violation of his civil rights.

Id. at 81 (footnote omitted).

39. In the instant case, Petitioner failed to show that she was refused service. She was immediately given the beverage of her choice and, once she called to the manager's attention that she had not been served, he immediately offered to put in her order and even cook it himself. It was Petitioner who refused to accept the manager's offer, ostensibly because she had a plane to catch and a rental car to return. Petitioner's reason for not accepting the manager's offer turned out to be false since clearly Petitioner had nearly four hours until her flight was scheduled to depart and could have kept her rental car until that time without incurring additional charges. Moreover, Petitioner argued that she was the only African-

American patron in the restaurant, and that she alone was refused service based solely on her race. At least one employee who testified recalled other African-American patrons in the restaurant who were served during the same time period as Petitioner's visit. While Petitioner seemed to fall through the cracks by not being served after her initial beverage was delivered, she failed to prove that there was any discriminatory intent behind the server's actions. The manager certainly did everything within his power to make matters better once he learned of the poor service to Petitioner.

40. In order for Petitioner to prevail on a claim of discrimination involving slow service, she 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 v. Steak n Shake, 35 F. Supp. 2d at 891 n. 6, from which the requisite discriminatory intent can reasonable be inferred. Petitioner has the burden here of proving that she was discriminated against by Respondent when she visited the restaurant in Jacksonville. All that Petitioner has established is that she received slow service, but not that Respondent treated her in a hostile manner or one which a reasonable person would objectively find discriminatory. Petitioner presented no facts that, other than slow service, to

support her claim that she was discriminated against because of her race. Since the evidence failed to show a discriminatory intent on the part of Respondent, Petitioner has failed to show that Section 509.092, Florida Statutes, has been violated.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing Ms. McAdory's Petition for Relief.

DONE AND ENTERED this 20th day of December, 2004, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
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 20th day of December, 2004.

COPIES FURNISHED:

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

Susan S. Erdelyi, Esquire
Marks Gray, P.A.
Post Office Box 447
Jacksonville, Florida 32201

Charlene McAdory
417 Oliver Avenue North
Minneapolis, Minnesota 55405

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.