

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEVIN TIMMONS,)
)
 Petitioner,)
)
 vs.) Case No. 05-2085
)
 WAFFLE HOUSE, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice a hearing was held on November 7, 2005, before the Honorable Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings in Quincy, Florida.

APPEARANCES

For Petitioner: Barbara Hobbs, Esquire
Cummings, Hobbs & Wallace, P.A.
462 West Brevard Street
Tallahassee, Florida 32301

For Respondent: Tracey T. Barbaree, Esquire
Sandra Kim, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner because of his race.

PRELIMINARY STATEMENT

On April 1, 2005, Petitioner, Kevin Timmons, (Petitioner) filed a Public Accommodation Complaint of Discrimination against Respondent, Waffle House, Inc. (Respondent), with the Florida Commission on Human Relations (FCHR). The Complaint alleged that Respondent denied him service at its restaurant based on his race. On June 8, 2005, the Florida Commission 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 June 8, 2005, Petitioner filed a Petition for Relief alleging the same facts that were contained in his earlier complaint. The Petition for Relief was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in his own behalf and offered the testimony of two witnesses. Petitioner did not offer any exhibits into evidence. Respondent offered the testimony of three witnesses and offered four exhibits into evidence.

After the hearing Petitioner and Respondent filed their Proposed Recommended Orders on December 21, 2005.

FINDINGS OF FACT

1. Respondent, Waffle House, Inc., owns and operates a Waffle House unit located at 2380 E. Brickyard Road, Midway, Gadsden County, Florida (Midway Waffle House). The Midway

Waffle House offers food and beverages for sale to the public and is a "public food service establishment" within the meaning of Florida Statutes.

2. Petitioner, his wife, Toyka Timmons and her cousin, Kanton Enzor, are African-American. Petitioner and his wife live close to St. Petersburg, Florida. Mr. Enzor lives in Gadsden County, Florida.

3. Mr. Timmons is a school teacher in St. Petersburg, Florida. He teaches Health and Physical Education. He and his wife came to Tallahassee around February 5, 2005. On that day Mr. Timmons, his wife and Mr. Enzor visited Mr. Timmons mother-in-law's home. The group was at the mother-in-law's home most of the day. Around 4:00 p.m., or 5:00 p.m., Mr. Timmons consumed two beers. Because he was not close to a trash can and did not want to throw the beer caps on the ground, Mr. Timmons put both beer caps into the pocket of the jacket he had on. Other than these two beers, neither Mr. or Mrs. Timmons consumed any other alcohol.

4. Later in the evening at about 7:00 p.m., the Timmons and Mr. Enzor went to Mrs. Timmons' brother's home on Ocala Street, in Tallahassee, Florida. Over the next several hours the group watched a few movies and reminisced about family memories.

5. Mrs. Timmons had been upset all day and had been crying over the recent death of her grandmother and the serious illness of her grandfather. While at her brother's house she continued to be emotionally distraught and was crying, making her eyes red and swollen.

6. On February 6, 2005, at about 1:00 a.m., Petitioner, his wife and Mr. Enzor decided to get something to eat and take Mr. Enzor home. Everyone decided to go to the Midway Waffle House since it was on the way to Mr. Enzor's home in Gadsden County. Mrs. Timmons was dressed in a head scarf, sweat suit like jacket, a t-shirt and some jeans. Mr. Timmons was dressed in a sweat suit jacket, t-shirt and jeans. Neither was dressed for going out to a club.

7. The group got into the Timmons' car. Mr. Enzor drove so that Mr. Timmons could sit in the back seat of the car with his wife in order to console her. She was again crying.

8. When the group arrived at the Waffle House a large crowd was both inside and outside of the restaurant. The people gathered outside of the Waffle House were playing music and not eating. The crowd both inside and outside the restaurant was predominantly black and appeared to have come from the Ten-Ninety Club, a nightclub located close to the Midway Waffle House. Petitioner testified that there were a lot of drunk people coming from the nightclub. The Ten-Ninety club is

patronized predominantly by African-Americans. Apparently, it is not unusual for the Waffle House restaurant and parking lot to be extremely crowded after the club closes. On February 6, 2005, the crowd in the parking lot was estimated to be in the hundreds and the restaurant was full.

9. As the Timmons' group drove up to the Waffle House, Mr. Enzor thought that it was going to be a while before they would be able to get something to eat. Mrs. Timmons saw a Caucasian couple walk into the restaurant. Additionally, as Petitioner's car pulled into the Midway Waffle House parking lot, Gadsden County Sheriff's Officer, Deputy Stach McIntyre, pulled into the parking lot to respond to a public disturbance call from the Midway Waffle House staff. The Timmons' group and the Deputy walked up to the restaurant at the same time. The Deputy opened the door for Petitioner, Mrs. Timmons, and Mr. Enzor.

10. Shortly, after the Deputy arrived at the restaurant, the majority of those not eating left. The remaining patrons consisted of two-to-three Caucasians, including the couple who had entered earlier, with the remainder African-American.

11. The Midway Waffle House consists of several booths and a dining counter. All the booths were full with groups. The Timmons group sat at the counter along with the Caucasian couple who had entered before them.

12. The Caucasian couple who had walked in before the Timmons' group had been given glasses of water. The evidence did not show whether the couple desired to order any food or, if they did, whether their order was taken.

13. Once inside the Waffle House, Mr. Timmons, his wife and Mr. Enzor quietly waited to be served.

14. At the time, there were three Waffle House employees working in the restaurant. One waitress was African-American. The grill cook was Caucasian, and another waitress, Elizabeth Watson, was "a woman of color," or mixed descent who "could have been" African-American. Ms. Watson was the waitress for the Timmons' group. Ms. Watson no longer works for Waffle House and has moved to New York. She did not testify at the hearing.

15. As the Timmons' group waited to be served, Ms. Watson walked back and forth in front of them several times and never addressed Mr. Timmons, his wife or Mr. Enzor. Other African-American patrons of the restaurant were being served and Mr. Timmons recalled watching Ms. Watson walk over to a table of six African-American customers. He also recalled that some of the African-American customers had drinks.

16. Mr. Timmons raised his finger and said, "Excuse me" several times. The waitress ignored them and kept walking back and forth. After about 20 or 25 minutes passed Mr. Timmons asked the waitress if they would be served. Finally the

waitress stopped and told them there were some 30 to 35 orders in front of them and that they would not be served anytime soon and needed to go somewhere else to eat.

17. Mrs. Timmons asked if they could get a drink, the waitress said, "No, you might as well go somewhere else. You're not going to be served here today." Mrs. Timmons recalls a party of four or five African-American customers in a booth near the counter and describes, "I just remember their food coming out to them, and I remember thinking, now, why do they have their food and I'm not going to be served?"

18. After the waitress tried to explain that the cook "couldn't prepare any more meals at the current time." Mrs. Timmons became angry with Ms. Watson, raised her voice and stated, "You mother heifer, you mean to say you're not going to serve us here? That's not fair. We haven't done anything. We've been sitting here for about 40 minutes and you're not going to serve us." Mr. Enzor admits that it was "possible" Mrs. Timmons used profanity with Ms. Watson. At this point, Mr. Timmons was relatively quiet and Mrs. Timmons asked loudly why they weren't going to be served. Both asked to speak with the manager. The waitress pointed to a 1-800 complaint number posted on the wall. Mr. Timmons demanded to speak with a manager, not understanding that the manager was not on the premises. The discussion grew heated and words were exchanged.

The disturbance could be heard over the background noise of the restaurant, which was relatively loud.

19. At this point, the grill cook noticed Mr. and Mrs. Timmons. He "heard quite a few expletives used," and recalls "the gentleman was using language, and then the lady then actually jumped into--got into the situation." The cook also heard the server tell Mr. and Mrs. Timmons that she refused to serve them because of their "language and their attitude."

20. At about the same time, Deputy McIntyre noticed the disturbance. He came over and sat down in an empty chair next to Mr. Timmons and asked "what the problem was." Mr. Timmons said the waitress refused to take their order. The deputy asked Ms. Watson "why she wasn't taking the order." Ms. Watson told him that she had been called a "mother F'er."

21. Waffle House policy provides that anyone who is disruptive or uses profanity can be refused service in the restaurant at any time, that a server has the right to ask such a customer to leave, and that if the customer does not leave, the server can contact the police and have the customer removed. Customers at the Midway Waffle House have been denied service for being drunk and disorderly, for using foul language, and for fighting.

22. Deputy McIntyre asked the waitress what she wanted to do. She said she wanted them to leave. At the hearing,

Petitioner admitted that the waitress "probably wanted us to leave because my wife probably said some words to her, but I was never rude to her. I was very polite to her asking for service, and never received it."

23. Both the Timmons and the waitress were agitated. Mr. Timmons asked Deputy McIntyre why he had to leave when all they wanted was to get served. Mr. Timmons said, "She can't tell us to leave. We didn't do nothing wrong. We want something to eat." The Deputy said, "She wants you to leave," and indicated that they had to leave the Waffle House because they were trespassing.

24. Mr. Timmons demanded to see the manager. He was again directed to the 1-800 number listed on the wall of the Waffle House. Deputy McIntyre tried to explain that there was no manager at the Waffle House and that "if you don't leave, I'm going to have to make you leave." Mr. Timmons said "Go ahead, arrest me something along those lines." Mr. Timmons responded, "If you touch me, I'll sue you and I'll have your badge."

25. Deputy McIntyre arrested Mr. Timmons for trespassing and public intoxication and placed him in handcuffs. Mr. Timmons' asked, "Why are you arresting me? You can't arrest me for nothing. I haven't done nothing." He then told the officer, "I could have your badge for this. What is your name?" Mr. Timmons was escorted out of the Waffle House. Mrs. Timmons

and Mr. Enzor followed the officer outside. Deputy McIntyre searched Mr. Timmons and found the two beer bottle caps in his jacket pocket. Mrs. Timmons, who was agitated, asked the officer why her husband was being arrested. Deputy McIntyre grew exasperated and threatened to place Mrs. Timmons under arrest if she did not remain quiet and leave. Because Mrs. Timmons did not cease asking the officer what her husband was charged with and did not leave, she too was arrested and charged with trespassing. Mr. Enzor who remained quiet outside the Waffle House was not arrested. Mr. and Mrs. Timmons were later acquitted after a trial on the criminal charges.

26. Mr. Timmons testified that as a result of this incident he suffered a great deal and incurred both actual and future damages. Unquestionably, Mr. Timmons was mortified, embarrassed and angered over the incident at the Midway Waffle House and his subsequent arrest. However, Mr. Timmons never sought to discuss the Waffle House visit and/or his arrest with a mental health professional or counselor. He returned to work the next school day after the arrest. He testified that the incident caused his relationship with his wife and her family to take an emotional beating because they believed that he was the reason she had gotten arrested. However, there was no objective evidence to support Mr. Timmons' assertion. Mr. Timmons also testified that his future earning capacity would be impacted

because of the arrest and the manner in which he was treated by Waffle House. However, at this point, such impacts are highly speculative, at best. Finally, Mr. Timmons testified that his out-of-pocket expenses related to the defense of his criminal charges totaled \$12,000.00.

27. After the incident Petitioner filed a complaint with the Waffle House. The complaint stated: "I was very dissatisfied because the waitress was rude because she was upset with other customers."

28. The Timmons believe that "the reason they were not being served was because there was a rowdy crowd that was inside the Waffle House and on the outside, and that they were being grouped with those people." They felt this was racial discrimination.

29. However, no Waffle House employee told Deputy McIntyre to arrest Mr. or Mrs. Timmons. It was Deputy McIntyre's decision to arrest both Timmons. Likewise, no employee of Waffle House made any statement that indicated the Timmons' group had come from the Ten-Ninety Club. Additionally, there was no mention of race by any employee of Waffle House or by Deputy McIntyre. Finally, the evidence in this case does not show that the Timmons' treatment at the Waffle House or subsequent arrest were motivated by their race. The evidence was clear that the events of that night were caused initially by

Mrs. Timmons' behavior and added to by Mr. Timmons' behavior and an overworked waitress. The whole incident was unfortunate with events escalating out-of-control. The events were not due to racial discrimination, and the Petition For Relief should be dismissed.

CONCLUSIONS OF LAW

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

31. Section 760.08, Florida Statutes, provides:

all persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, . . . without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion.

32. Section 509.092, Florida. Statutes, provides that a restaurant operator "has the right to refuse . . . service to any person who is objectionable or undesirable to the orpeator[.]" Read together, it is clear that a restaurant may refuse to serve potential customers for a variety of reasons, but may not refuse service based on the customer's race, creed, color, sex, physical disability, or national origin.

33. Section 509.013(5)(a), Florida. Statutes, defines "public food service establishment" as follows:

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.

Waffle House is a public food service establishment and is subject to the Florida Civil Rights Act.

34. The Florida Civil Rights Act is based on federal anti-discrimination statutes, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq. and 42 U.S.C. § 1981. See Stevens v. Steak N Shake, Inc., 35 F. Supp. 2d 882, 886 ("[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 Florida Statutes, Section 509.092, and to determine the elements of [the plaintiffs'] civil rights claims under the Florida Statutes."); 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), rev'd in part, vacated in part, 281 F.3d 1285 (11th Cir. 2001). Therefore, federal case law can be used to interpret the Florida Civil Rights Act.

35. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court of the United States articulated the burden of proof for cases involving allegations of discrimination under Title VII cases. Under that case, a plaintiff has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If the plaintiff establishes a prima facie case then the respondent must go forward and articulate a legitimate nondiscriminatory reason for the action taken by the respondent. Once the respondent has articulated a legitimate nondiscriminatory reason, the plaintiff then must establish by a preponderance of the evidence that the reason given is not true or merely pretextual. The same framework also applies to complaints regarding discrimination in public accommodations. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); see also generally Brown v. American Honda Motor Co., 939 F.2d 946, 949 (11th Cir. 1991) (applying Title VII procedural framework to Section 1981 case; granting summary judgment for defendant).

36. In Laroche v. Denny's, Inc., 62 F. Supp. 2d 1375 (S.D. Fla. 1999) a petitioner must initially establish by a preponderance of the evidence that:

- a. they are a member of a protected class;
- b. they attempted to contract for services and to afford themselves the full benefits and enjoyment of a public accommodation;
- c. they were denied the right to contract for those services and, thus, were denied the full benefits or enjoyment of a public accommodation; and
- d. such services were available to similarly situated persons outside the protected class who received full benefits or enjoyment, or were treated better.

37. Clearly, as an African-American, Petitioner is a member of a protected class. He attempted to eat at Waffle House and to enjoy the full benefits and enjoyment of the public restaurant. Mr. Timmons was denied the right to eat at the restaurant and was therefore denied the full benefits or enjoyment of a public accommodation. However, Petitioner failed to prove the fourth element of his prima facie case of race-based denial of service because other African-American customers were being served at the Waffle House by the same waitress.

38. Nor did Petitioner present any evidence of similarly-situated non-African-American customers who arrived after he and his party but received favorable treatment. Rather, all of the other customers, a few who were Caucasian and the vast majority of whom were African-American, appeared to have had their orders taken and/or received drinks or food. Petitioner and his party were the last to arrive and admit they were told that the waitress could not take their order because the cook had

30-to-35 orders in front of them. Moreover, the evidence demonstrates that Petitioner was not asked to leave the Midway Waffle House until he and his wife engaged in a heated exchange with the Waffle House waitress. See, e.g., Rosado Maysonet v. Solis, 409 F. Supp. 576, 579-80 (D.P.R. 1975) (finding no inference of racial discrimination where plaintiffs were excluded from casino due to refusal to comply with dress code and "rowdy" intoxicated behavior); Evans v. Holiday Inns, Inc., 951 F. Supp. 85 90 (D.Md. 1997) (granting motion for summary judgment where plaintiffs failed to establish prima facie case of discriminatory enforcement of a motel policy regarding sanctions for noise and obnoxious behavior).

39. Finally, Petitioner's claim that the waitress may have "associated" him and his party with a group of African-American customers with whom she had become upset earlier because they "were black" cannot form the basis of a claim of racial discrimination. Petitioner's "association" theory is based on speculation. Speculation alone cannot support a claim of discrimination. See Laroche v. Denny's Inc., 62 F. Supp. 2d 1366, 1368 (S.D. 1999) (holding that the "law is clear that suspicion, perception, opinion, and belief cannot be used to defeat" judgment as a matter of law). Lizardo v. Denny's Inc., 270 F.3d 94, 102 (2d Cir. 2001) ("A failure to greet customers on an extremely busy evening and an exasperated-even testy-

response to a complaint of discrimination do not constitute marked hostility as defined, nor are they conduct which should be presumed to have its origins in racial bias . . . the heated exchange of words does suggest anger, but there is nothing to suggest that the anger stemmed from a bias against people of [the plaintiff's] race."). See also Robertson v. Burger King, Inc., 848 F. Supp. 78, 81 (E.D. La. 1994) ("While inconvenient, frustrating, and all too 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."); See also Callwood v. Dave & Buster's, Inc., 98 F. Supp. 2d 694, 706 (D. Md. 2000).

40. Even assuming Petitioner presented a prima facie case of race discrimination, Respondent presented evidence of legitimate, nondiscriminatory reasons for Petitioner's failure to obtain service. Specifically, the evidence showed that the Waffle House waitress was overwhelmed, and that when the waitress told Mr. and Mrs. Timmons she could not take their order because there were 30-to-35 orders in front of them, Mr. and Mrs. Timmons became angry and engaged in a heated exchange with the waitress. Per the Waffle House policy the waitress legitimately decided she wanted them to leave. There was no evidence to suggest that Waffle House's nondiscriminatory reasons for asking Mr. Timmons and his party to leave were

pretextual. See Bass v. Guess? Inc., 54 F. Supp. 2d 1105, 1117 (S.D. Ala. 1999) (a plaintiff cannot show pretext where he concedes the accuracy of defendant's articulated non-discriminatory reasons for the adverse action); Alexis v. McDonald's Restaurants, Inc., 67 F.3d 341, 347-48 (1st Cir. 1985) (plaintiff's testimony that defendant acted "angrily" toward plaintiff with a negative tone and "had 'no reason' to eject" plaintiff from restaurant failed as a matter of law to demonstrate purposeful discrimination, noting that there was no probative evidence indicating that the manager's petulance was anything other than a race-neutral reaction to a stressful encounter). Therefore, the Petition for Relief should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that:

The Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 22nd day of February 2006, in
Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.