STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSE M. GANDIA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-4147
	)	
WALT DISNEY WORLD,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final hearing in the above-styled case on November 20, 2007, in Orlando, Florida.

APPEARANCES

For Petitioner: Jose M. Gandia, pro se
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Orlando, Florida 32825

For Respondent: Paul J. Scheck, Esquire
Shutts & Bowen, LLP
300 South Orange Avenue, Suite 1000
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STATEMENT OF ISSUE

Whether Respondent, Walt Disney World, violated Section 760.08, Florida Statutes (2006), as alleged in the Petition for Relief in this matter.

PRELIMINARY STATEMENT

On August 30, 2007, the Florida Commission on Human Relations (FCHR) notified Petitioner, Jose M. Gandia, that based on its investigation of his March 5, 2007, Complaint of Discrimination, Public Accommodations, it had determined that "there was no reasonable cause" to believe that unlawful discrimination had occurred, as per his Complaint.

On September 5, 2007, Petitioner filed his Petition for Relief. On September 11, 2007, FCHR forwarded the case to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct all necessary proceedings required by law and submit a recommended order.

On September 14, 2007, an Initial Order was sent to both parties requesting mutually convenient dates for a final hearing. On October 9, 2007, based on Respondent's response to the Initial Order (Petitioner did not reply), the case was scheduled for final hearing in Orlando, Florida, on November 20, 2007.

The case was heard as scheduled. Petitioner testified on his own behalf. Respondent presented three witnesses: Alan E. Bakko, Patrick J. Fanning, and Russell A. Olson. Neither party offered exhibits.

The two-volume Transcript was filed with Clerk of the Division of Administrative Hearings on January 22, 2008. The

parties agreed to submit proposed recommended orders within 30 days of the filing of the Transcript. Respondent timely filed a Proposed Recommended Order.

All references are to 2006 Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Fact are made:

1. Petitioner is a Caucasian male, born in Puerto Rico. He is an amateur photographer. He had visited Walt Disney World at least ten times prior to December 1, 2006.

2. Respondent owns and operates a theme park in Orange and Osceola Counties, Florida. Respondent employs individuals with the job title, "security host," with the responsibility of maintaining security in the theme park. This category of employees is licensed by the State of Florida, and they receive training in "abnormal behavior of guests," threat analysis, surveillance, intelligence, and other job-related skills incidental to maintaining a safe environment within the theme park. Respondent has a specific protocol regarding theme park guests exhibiting "abnormal behavior."

3. In the context of this case, taking photographs in the theme park is not an "abnormal behavior." In fact, guests are encouraged to photograph those accompanying them and various

theme park characters, e.g., Mickey Mouse. However, excessive photographing of structures, "mapping or progression photography," is considered "abnormal behavior." "Mapping" consists of taking pictures in a progression, so as to familiarize someone who has never been to an area with the layout of that area and is considered very unusual behavior.

4. Petitioner entered the Magic Kingdom, part of Respondent's theme park, on December 1, 2006. A security host observed Petitioner photographing the main entrance and security bag check. Petitioner was unaccompanied.

5. The subject matter and manner of Petitioner's photography was considered to be "abnormal" by the security host. Once a security cast member identifies potentially abnormal behavior by a guest, the protocol requires the security host to contact a member of management (by radio) and continue to observe the guest.

6. Petitioner moved further into the Magic Kingdom and took photographs of Main Street and City Hall. Because Petitioner was limiting his photography to structures, the security host's initial impression that Petitioner was doing something "abnormal" was reinforced and, in accordance with the established protocol, he again called management.

7. As further dictated by Respondent's security protocol, the uniformed security host is then met by an "undercover"

security host whose job-responsibility is "real-time threat analysis."

8. The "threat-analysis" security host continued to observe Petitioner as he took what was interpreted by the security host to be "panoramic" photographs of Town Square and "mapping" photographs of the interior of the train station. He, too, assessed Petitioner's photographic activities as "abnormal."

9. Because the "threat analysis" security host concurred with the initial determination of "abnormal," the security protocol dictates that a security manager make contact with the guest. This was done in a discreet and unobtrusive manner.

10. The security manager identified himself as an employee of Respondent and asked Petitioner if "he could do anything to assist him." Petitioner did not respond, so the security manager repeated himself.

11. Respondent responded that he "was not an Arab terrorist," or words to that effect. His response was louder than conversational, and he appeared to be agitated. Because Petitioner was uncooperative, the security manager called a uniformed law enforcement officer, an Orange County, Florida, deputy sheriff, as dictated by Respondent's security protocol.

12. The deputy sheriff asked for, and received, Petitioner's driver license. After a license check revealed

that Petitioner's address was valid, he was allowed to pursue his activities in the theme park. His interaction with the security manager and deputy sheriff lasted approximately 15 minutes.

13. Petitioner then returned to his theme park photography without limitation and spent an additional two hours in the theme park, until his camera's battery pack ran down. He did not have any further interaction with Respondent's security personnel, nor was he kept under surveillance.

14. Petitioner returned to Respondent's theme park on December 9, 27, 28, 29 and 30, 2006 (he had an annual pass), had access to all facilities without difficulty, and had no encounters with Respondent's security personnel.

15. The incident that occurred on December 6, 2006, was a result of Petitioner's photography being identified as "abnormal." There is no evidence that it was precipitated by his national origin or that Respondent was not exercising reasonable diligence in an effort to protect theme park visitors and employees.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and subject matter at this proceeding pursuant to Subsection 120.57(1) and Section 760.11, Florida Statutes (2007).

17. Section 509.092, Florida Statutes, provides:

> 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.

18. Subsection 760.02(11), Florida Statutes, states, in part:

> "Public accommodations" means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. . . .

19. Respondent is a "public accommodation" as defined in Florida law.

20. The court in LaRoche v. Denny's, Inc., 62 F. Supp. 2d 1375, 1382-1383 (S.D. Fla. 1999), a case dealing with racial discrimination in public accommodations, sets forth the analysis which should be used in public accommodation cases in Florida:

> Under the McDonnell Douglas framework, as further elucidated in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), the Plaintiffs must prove by a preponderance of the evidence a

prima facie case of discrimination. Specifically, the Plaintiffs must prove 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. United States v. Lansdowne Swim Club, 894 F.2d 83, 88 (3rd Cir. 1990).

Once the Plaintiffs meet this burden, they establish a presumption of intentional discrimination. Hicks, 509 U.S. at 506, 113 S.Ct. 2742. The effect of this presumption shifts the burden to the Defendant to produce evidence of a legitimate, non-discriminatory reason for the challenged action. Id. at 506-507; McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 255, n. 10. The Defendant's burden of production is a light one. Batey v. Stone, 24 F.3d 1330, 1334 (11th Cir. 1994).

When a defendant meets its burden of production, the presumption of discrimination which the McDonnell Douglas framework creates, "drops from the case" and "the factual inquiry proceeds to a new level of specificity." Burdine, 450 U.S. at 255, n. 10. The burden then shifts back to the Plaintiffs to demonstrate that the Defendant's actions were not for the proffered reason, but were, in fact, motivated by race. Hicks, 509 U.S. at 507-08; Burdine, 450 U.S. at 253. Plaintiffs may prove this fact either by means of affirmative evidence that race played an impermissible role in Mr. Ibarra's action, or by showing that the proffered non-discriminatory reason does not merit

> credence. Id. at 256. The ultimate burden is on the Plaintiffs to prove that they were the victims of intentional discrimination.

21. In the present case, Petitioner is a member of a protected class by virtue of his national origin, Puerto Rican. He attempted to avail himself of the full benefit and enjoyment of the public accommodation. He failed to demonstrate that he was denied the full benefit and enjoyment of the public accommodation; in fact, after the inquiry into his photographic activity, he was allowed full utilization of the facility, and he returned five times in the same month. Finally, Petitioner failed to establish that such services were available to similarly-situated persons outside the protected class who received full benefits or enjoyment or were treated better.

22. Assuming, arguendo, that Petitioner established a prima facie case of intentional discrimination and denial of public accommodations based on his national origin, Respondent now has the burden of producing evidence of a legitimate, non-discriminatory reason(s) for stopping Petitioner and inquiring regarding his photography. Respondent has provided ample evidence of non-discriminatory reasons for the challenged action. Respondent's activities were deemed "abnormal" by employees of a public facility that has an obligation to protect individuals within the confines of the theme park. The inquiry was reasonable and unobtrusive. It was occasioned by

Petitioner's photographic activity; there is no evidence that Respondent's concern with Petitioner's photographic activities was motivated by his national origin.

23. Petitioner has the burden of proving a prima facie case by the preponderance of the evidence that Respondent denied him full access and enjoyment of a public accommodation based on his national origin. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). He has failed to present a prima facie case.

25. Respondent has produced evidence of legitimate, non-discriminatory reasons for the challenged action. Had Petitioner presented a prima facie case, any presumption of discrimination arising out of the prima facie case "drops from the case." Krieg v. Paul Revere Life Ins. Co., 718 F.2d 998, 1001 (11th Cir. 1983), cert. denied, 466 U.S. 929 (1984); and Equal Employment Opportunity Commission v. Navy Federal Credit Union, 424 F.3d 397, 405 (4th Cir. 2005). The ultimate burden remains upon Petitioner to prove that Respondent denied him public accommodation based on his national origin. He has failed to do so.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Jose M. Gandia, failed to present a prima facie case of discrimination based on national origin, and, therefore, this matter should be dismissed in its entirety and a determination be entered by the Florida Commission on Human Relations that Respondent, Walt Disney World, did not violate the provisions of Chapter 760, Florida Statutes, as alleged in the Petition for Relief.

DONE AND ENTERED this 13th day of March, 2008, 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 13th day of March, 2008.

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.