STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MATTIE LOMAX,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-0931
	)	
WAL-MART STORES EAST,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on June 23, 2008, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Mattie Lomax, pro se
Post Office Box 015262
Miami, Florida 33101

For Respondent: Scott A. Forman, Esquire
Linda Noel Fleurimond, Esquire
Littler Mendelson, P.C.
Two South Biscayne Boulevard, Suite 1500
Miami, Florida 33131

STATEMENT OF THE ISSUE

Whether Respondent committed the violation alleged in Petitioner's Public Accommodations Complaint of Discrimination and, if so, what relief should the Florida Commission on Human Relations grant Petitioner.

PRELIMINARY STATEMENT

On April 26, 2007, Mattie Lomax filed with the Florida Commission on Human Relations (FCHR) a Public Accommodations Complaint of Discrimination, alleging that she was "harassed and denied service because of her race (black)" at the Hialeah Gardens Super Wal-Mart on March 27, 2007, in violation of "Florida Statute, Chapter 509/760."

On January 24, 2008, following the completion of its investigation of the complaint, the FCHR, through its Executive Director, issued a Notice of Determination: No Cause, advising that a determination had been made that there was "no reasonable cause to believe that a public accommodation violation [had] occurred."

Petitioner, on or about February 14, 2008, filed a Petition for Relief with the FCHR.

On February 21, 2008, the FCHR referred the matter to DOAH for the assignment of a DOAH administrative law judge to conduct a hearing on the allegations of public accommodation

discrimination made by Petitioner in her complaint against Respondent.

As noted above, the final hearing in this case was held on June 23, 2008.[2] Two witnesses testified at the hearing: Petitioner and Lieutenant Carlos Fojo of the Hialeah Gardens Police Department. In addition, 13 exhibits (Petitioner's Exhibit 4, and Respondent's Exhibits 1 through 10, 15, and 17) were offered and received into evidence.

At the close of the evidentiary portion of the hearing, the undersigned established the deadline for filing proposed recommended orders at 30 days from the date of the filing of the hearing transcript with DOAH.

On June 30, 2008, Petitioner filed a motion requesting that the evidentiary record in this case be reopened for purposes of allowing her to change testimony she gave at the final hearing. The motion was denied, by order issued July 9, 2008, because the "motion d[id] not contain a persuasive explanation as to why the relief requested therein should be granted."

The Transcript of the final hearing (consisting of one volume) was filed with DOAH on July 24, 2008.

On August 20, 2008, the parties filed a motion jointly requesting a two-week extension of the deadline for filing proposed recommended orders in the instant case. The motion was

granted, and the proposed recommended order filing deadline was extended to September 8, 2008.

Petitioner and Respondent timely filed their Proposed Recommended Orders on September 8, 2008.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Petitioner is a black woman.

2. On March 27, 2007, Petitioner went shopping at the Wal-Mart Supercenter located at 9300 Northwest 77th Avenue in Hialeah Gardens, Florida (Store).

3. This was Petitioner's "favorite store." She had shopped there every other week for the previous four or five years and had had a positive "overall [shopping] experience." At no time had she ever had any problem making purchases at the Store.

4. At around 5:00 p.m. on March 27, 2007, Petitioner entered the Store's electronics department to look for two black ink cartridges for her printer. In her cart were several items she had picked up elsewhere in the store (for which she had not yet paid).

5. Because the cartridges she needed were located in a locked display cabinet, Petitioner went to the counter at the electronics department to ask for assistance.

6. Maria Castillo was the cashier behind the counter. She was engaged in a "casual conversation," punctuated with laughter, with one of the Store's loss prevention officers, Jessy Fair, as she was taking care of a customer, Carlos Fojo, a non-black Hispanic off-duty lieutenant with the Hialeah Gardens Police Department.

7. Lieutenant Fojo was paying for a DVD he intended to use as a "training video." The DVD had been in a locked display cabinet in the electronics department. A sales associate had taken the DVD out of the cabinet for Lieutenant Fojo.

8. It was Store policy to require customers seeking to purchase items in locked display cabinets in the electronics department to immediately pay for these items at the electronics department register. Lieutenant Fojo was making his purchase in accordance with that policy.

9. Two Store sales associates, Carlos Espino and Sigfredo Gomez, were near the counter in the electronics department when Petitioner requested assistance.

10. In response to Petitioner's request for help, Mr. Espino and Mr. Gomez went to the locked display cabinet to get two black ink cartridges for Petitioner, with Petitioner following behind them.

11. Ms. Castillo and Mr. Fair remained at the counter and continued their lighthearted conversation, as Ms. Castillo was finishing up with Lieutenant Fojo.

12. Petitioner was offended by Ms. Castillo's and Mr. Fair's laughter. She thought that they were laughing at her because she was black (despite her not having any reasonable basis to support such a belief). She turned around and loudly and angrily asked Ms. Castillo and Mr. Fair what they were laughing at. After receiving no response to her inquiry, she continued on her way behind Mr. Espino and Mr. Gomez to the display cabinet containing the ink cartridges.

13. When Mr. Espino arrived at the cabinet, he unlocked and opened the cabinet door and removed two black ink cartridges, which he handed to Mr. Gomez.

14. Petitioner took the cartridges from Mr. Gomez and placed them in her shopping cart.

15. Mr. Espino tried to explain to Petitioner that, in accordance with Store policy, before doing anything else, she needed to go the register in the electronics department and pay for the ink cartridges.

16. Petitioner responded by yelling at Mr. Espino and Mr. Gomez. In a raised voice, she proclaimed that she was "no thief" and "not going to steal" the ink cartridges, and she

"repeated[ly]" accused Mr. Espino and Mr. Gomez of being "racist."

17. Instead of going directly to the register in the electronics department to pay for the cartridges (as she had been instructed to do by Mr. Espino), Petitioner took her shopping cart containing the ink cartridges and the other items she intended to purchase and "proceeded over to the CD aisle" in the electronics department. Mr. Espino "attempt[ed] to speak to her," but his efforts were thwarted by Petitioner's "screaming at [him and Mr. Gomez as to] how racist they were."

18. Lieutenant Fojo, who had completed his DVD purchase, heard the commotion and walked over to the "CD aisle" to investigate.

19. When he got there, he approached Petitioner and asked her, "What's the problem?" She responded, "Oh, I see you too are racist and I see where this is coming from."

20. Lieutenant Fojo went on to tell Petitioner the same thing that Mr. Espino had: that the ink cartridges had to be taken to the register in the electronics department and paid for immediately ("just like he had paid for his [DVD]").

21. Petitioner was defiant. She told Lieutenant Fojo that she would eventually pay for the cartridges, but she was "still shopping."

22. Moreover, she continued her rant that Lieutenant Fojo and the Store employees were "racist."

23. "[C]ustomers in the area were gathering" to observe the disturbance.

24. To avoid a further "disrupt[ion] [of] the normal business affairs of the [S]tore," Lieutenant Fojo directed Petitioner to leave and escorted her outside the Store.

25. In taking such action, Lieutenant Fojo was acting solely in his capacity as a law enforcement officer with the Hialeah Gardens Police Department.

26. Once outside the Store, Lieutenant Fojo left Petitioner to go to his vehicle.

27. Petitioner telephoned the Hialeah Gardens Police Department to complain about the treatment she had just received and waited outside the Store for a police officer to arrive in response to her call.

28. Officer Lawrence Perez of the Hialeah Gardens Police Department responded to the scene and met Petitioner outside the Store.

29. After conducting an investigation of the matter, Officer Perez issued Petitioner a trespass warning, directing that she not return to the Store.

30. At no time subsequent to the issuance of this trespass warning has Petitioner returned the Store (although she has shopped at other Wal-Mart stores in the area).

31. While Petitioner has been deprived of the opportunity to shop at the Store, it has been because of action taken, not by any Store employee, but by Hialeah Gardens law enforcement personnel. Moreover, there has been no showing that Petitioner's race was a motivating factor in the taking of this action.[3]

CONCLUSIONS OF LAW

32. The Florida Civil Rights Act of 1992 (Act) is codified in Sections 760.01 through 760.11, Florida Statutes, and Section 509.092, Florida Statutes. § 760.01(1), Fla. Stat.

33. The Act was "patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting [these federal statutory provisions] is applicable to cases arising under the Florida Act." Florida State University v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); see also Velez v. Levy World L.P., 182 Fed. Appx. 929, 932 (11th Cir. 2006)("Plaintiffs' failure to establish a prima facie federal case of public accommodations discrimination also applies to their state-law claims under Fla. Stat. §§ 509.092, 760.11."); and 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 Stevens' and Harris' civil rights claims under the Florida statute.").

34. "The general purposes of the [Act] are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state." § 760.01(2), Fla. Stat.

35. The FCHR is empowered "[t]o receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice, as defined by the Florida Civil Rights Act of 1992." § 760.06(5), Fla. Stat. If it finds, following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, that a "discriminatory practice" has been committed, it must issue a final order "prohibiting the practice and providing affirmative

relief from the effects of the practice."[4] § 760.11(6), Fla. Stat. A prerequisite to obtaining such relief is the filing of a timely complaint. § 760.11(1), Fla. Stat.

36. "[T]o prevent circumvention of the [FCHR's] investigatory and conciliatory role, only those claims that are fairly encompassed within a [timely-filed complaint] can be the subject of [an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes]" and any subsequent FCHR award of relief to the complainant. Chambers v. American Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994).

37. A "discriminatory practice," as that term is used in the Act, "means any practice made unlawful by the [Act]." § 760.02(4), Fla. Stat.

38. Such "discriminatory practices" include those described in Section 509.092, Florida Statutes (dealing with "public lodging establishments" and "public food service establishments") and Section 760.08, Florida Statutes (dealing with "places of public accommodation"), which provide as follows:

> § 509.092. Public lodging establishments and public food service establishments; rights as private enterprises
>
> 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.

§ 760.08. Discrimination in places of public accommodation

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

39. A "public lodging establishment," as that term is used in Section 509.092, Florida Statutes, is defined in Section 509.013,(4), Florida Statutes, as follows:

(a) "Public lodging establishment" means any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings, which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests. License classifications of public lodging establishments, and the definitions therefor, are set out in s. 509.242. For the purpose of licensure, the term does not include condominium common elements as defined in s. 718.103.

(b) The following are excluded from the definition in paragraph (a):

1. Any dormitory or other living or sleeping facility maintained by a public or

private school, college, or university for the use of students, faculty, or visitors;

2. Any hospital, nursing home, sanitarium, assisted living facility, or other similar place;

3. Any place renting four rental units or less, unless the rental units are advertised or held out to the public to be places that are regularly rented to transients;

4. Any unit or group of units in a condominium, cooperative, or timeshare plan and any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit that is rented for periods of at least 30 days or 1 calendar month, whichever is less, and that is not advertised or held out to the public as a place regularly rented for periods of less than 1 calendar month, provided that no more than four rental units within a single complex of buildings are available for rent;

5. Any migrant labor camp or residential migrant housing permitted by the Department of Health; under ss. 381.008-381.00895; and

6. Any establishment inspected by the Department of Health and regulated by chapter 513.

40. A "public food service establishment," as that term is used in Section 509.092, Florida Statutes, is defined in Section 509.013(5), Florida Statutes, as follows:

(a) "Public food service establishment" means 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.

(b) The following are excluded from the definition in paragraph (a):

1. Any place maintained and operated by a public or private school, college, or university:

a. For the use of students and faculty; or

b. Temporarily to serve such events as fairs, carnivals, and athletic contests.

2. Any eating place maintained and operated by a church or a religious, nonprofit fraternal, or nonprofit civic organization:

a. For the use of members and associates; or

b. Temporarily to serve such events as fairs, carnivals, or athletic contests.

3. Any eating place located on an airplane, train, bus, or watercraft which is a common carrier.

4. Any eating place maintained by a hospital, nursing home, sanitarium, assisted living facility, adult day care center, or other similar place that is regulated under s. 381.0072.

5. Any place of business issued a permit or inspected by the Department of Agriculture and Consumer Services under s. 500.12.

6. Any place of business where the food available for consumption is limited to ice, beverages with or without garnishment, popcorn, or prepackaged items sold without additions or preparation.

7. Any theater, if the primary use is as a theater and if patron service is limited to food items customarily served to the admittees of theaters.

8. Any vending machine that dispenses any food or beverages other than potentially hazardous foods, as defined by division rule.

9. Any vending machine that dispenses potentially hazardous food and which is located in a facility regulated under s. 381.0072.

10. Any research and development test kitchen limited to the use of employees and which is not open to the general public.

41. "Public accommodations," as that term is used in Section 760.08, Florida Statutes, is defined in Section 760.02(11), Florida Statutes, as follows:

"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. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section:

(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence.

(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other

> facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.
>
> (c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.
>
> (d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.

42. 42 U.S.C. § 2000a, the federal counterpart of Section 760.08, Florida Statutes, contains a substantially identical description of the term "place of public accommodation." It provides, in pertinent part, as follows:

> (a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this

> title [42 U.S.C. §§ 2000a-2000a-6] if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Federal courts construing the language of 42 U.S.C. § 2000a(b) have held that retail establishments not selling food for on-premises consumption are not "places of public accommodation" covered by 42 U.S.C. § 2000a. See, e.g., Rousseve v. Shape Spa for Health and Beauty, Inc., 516 F.2d 64, 70 (5th Cir. 1975)("In enacting the public accommodations section of the 1964 Act,

Congress did not intend to regulate all establishments that it had the power to regulate. Broad coverage of retail establishments was originally contemplated, H.R. 7152, but that coverage was deleted when the House Judiciary Committee reported the bill. . . . Congress intended to limit coverage to 'those business establishments which on the basis of current experience have proven to be the most important sources of discrimination and, therefore, the focal point of most discriminations.'"); Taylor v. Volkswagen of America, Inc., No. C07-1849RSL, 2008 U.S. Dist. LEXIS 20298 *6-7 (W.D. Wash. March 3, 2008)("As for the dealerships, it does not appear that Congress intended to cover retail establishments. First, the definition section above includes a detailed list of establishments, none of which is a retail store. Second, the definition includes cafeterias, lunchrooms, and any facility 'located on the premises of any retail establishment . . . .' The clear implication of this provision is that Congress did not intend to include retail establishments. If it had, there would be no need to state that restaurants within retail establishments are covered."); Brackens v. Big Lots, Inc., No. A-06-CA-532, 2007 U.S. Dist. LEXIS 5021 *5-7 (W.D. Tex. January 24, 2007)("The statutory framework of Title II is such that retail stores, in and of themselves, are specifically not included under Title II. 42 U.S.C. § 2000a(b). . . . Big Lots, a retail store that is not

'principally engaged in selling food for consumption on premises' 42 U.S.C. § 2000a(b)(2), is not covered by Title II."); Hickman v. Burlington Coat Factory of Kansas, LLC, No. 07-2101-JWL , 2007 U.S. Dist. LEXIS 38751 *5 (D. Kan. May 24, 2007)("BCF, as a retail store, is simply not a 'public accommodation' within the meaning of 42 U.S.C. § 2000a."); Darden v. E-Z Mart Stores, Inc., No. 2-05-CV-64 (TJW), 2006 U.S. Dist. LEXIS 4353 *10-11 (E.D. Tex. January 20, 2006)("It is undisputed that E-Z Mart is a convenience store. Further, Plaintiffs admitted in their depositions that E-Z Mart was not a restaurant and that food was not served for consumption on the premises. In light of Plaintiffs' own admissions and the weight of authority establishing that convenience stores are not principally engaged in selling food for consumption on the premises, E-Z Mart is therefore not a place of public accommodation. Accordingly, the Court grants Defendants' Motion for Summary Judgment regarding Plaintiffs' claims of violations of 42 U.S.C. § 2000a."); Kelly v. Yorktown Police Department, No. 05 Civ. 6984 (DC), 2006 U.S. Dist. LEXIS 83223 *15 (S.D. N.Y. November 13, 2006)("The text of § 2000a does not explicitly include retail establishments. Case law confirms that retail stores are not places of public accommodation with the meaning of § 2000a."); McCrea v. Saks, Inc., No. 00-CV-1936, 2000 U.S. Dist. LEXIS 18990 *5 (E.D. Pa. December 2, 2000)("It is clear

that Congress did not intend for retail establishments such as Saks to be covered by this section."); Gigliotti v. Wawa Inc., NO. 99-3432, 2000 U.S. Dist. LEXIS 1021 *4 (E.D. Pa. February 4, 2000)("Retail establishments are not 'places of public accommodation' under § 2000a."); Haywood v. Sears, Roebuck, & Co., No. 7:94-CV-106-BR2, 1996 U.S. Dist. LEXIS 11954 *7 (E.D. N.C. July 18, 1996)("As to plaintiffs' claim under § 2000a, the court concludes that defendant's retail store is not a place of 'public accommodation' as defined by 2000a(b)."); and Priddy v. Shopko Corp., 918 F. Supp. 358, 359 (D. Utah 1995)("It is clear that Congress did not intend for retail establishments such as Shopko to be included in § 2000a. Section 2000a(b)(2) lists cafeterias, lunchrooms, etc. as establishments which are considered as 'places of public accommodation.' This subsection goes on to include any facility (e.g., restaurants) '. . . located on the premises of any retail establishment . . . .' The clear implication of this provision is that Congress did not intend to include retail establishments--thus the need to make clear that restaurant type facilities within a retail establishment were covered under 42 U.S.C. § 2000a(b)(2). If retail establishments were also intended to be covered, there would be no need for this provision.").

43. In the Public Accommodation Complaint of Discrimination she filed with FCHR in the instant case,

Petitioner alleged that on March 27, 2007, while she was attempting to shop at the Hialeah Gardens Super Wal-Mart, Respondent engaged in practices made unlawful by the Act by "harass[ing] [her] and den[ying] [her] service because of [her] race (black)."

44. The burden was on Petitioner to prove by a preponderance of the evidence adduced at the final hearing that she was the victim of such public accommodation discrimination at the hands of Respondent, as alleged in her complaint. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996)("'The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue.'"); Espinoza v. Department of Business and Professional Regulation, Florida Board of Professional Engineers, 739 So. 2d 1250, 1251 (Fla. 3rd DCA 1999)("The general rule is that, apart from statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal."); and Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974)("As a general rule the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial proceeding - that is, a preponderance of the evidence.").

45. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

46. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." King v. La Playa-De Varadero Restaurant, No. 02-2502, slip op. at 15 n.9 (Fla. DOAH February 19, 2003)(Recommended Order); see also Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004)("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'"). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination." Maynard v. Board of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

47. "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor. . . . If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence."

Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).

48. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

49. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, "the Supreme Court's shifting-burden analysis adopted in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), . . . is applicable." Laroche v. Denny's Inc., 62 F. Supp. 2d 1375, 1382 (S.D. Fla. 1999); see also Feacher v. Intercontinental Hotels Group, No. 06-CV-877, 2008 U.S. Dist. LEXIS 43779 *21 (N.D. N.Y June 3, 2008)("Section 2000a claims are analyzed similarly, also using the McDonnell-Douglas burden-shifting framework when the case is based upon circumstantial evidence of discrimination."). "Under this framework, the [complainant] has the initial burden of establishing a prima facie case of discrimination.[5] If [the complainant] meets that burden, then an inference arises that the challenged action was motivated by a discriminatory intent. The burden then shifts to the [respondent] to 'articulate' a legitimate, non-

discriminatory reason for its action.[6] If the [respondent] successfully articulates such a reason, then the burden shifts back to the [complainant] to show that the proffered reason is really pretext for unlawful discrimination." Schoenfeld, 168 F.3d at 1267 (citations omitted).

50. "The analysis of pretext focuses only on what the decisionmaker, and not anyone else, sincerely believed." Little v. Illinois Department of Revenue, 369 F.3d 1007, 1015 (7th Cir. 2004).

51. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the [respondent] intentionally discriminated against the [complainant] remains at all times with the [complainant]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. BT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007)("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times."); and Brand v. Florida Power Corp., 633 So. 2d 504, 507 (Fla. 1st DCA 1994)("Whether or not the defendant satisfies its burden of production showing legitimate, nondiscriminatory reasons for the action taken is immaterial insofar as the ultimate burden of persuasion is concerned, which remains with the plaintiff.").

52. Where the administrative law judge does not halt the proceedings "for lack of a prima facie case and the action has been fully tried, it is no longer relevant whether the [complainant] actually established a prima facie case. At that point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination. . . . [W]hether or not [the complainant] actually established a prima facie case is relevant only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Green v. School Board of Hillsborough County, 25 F.3d 974, 978 (11th Cir. 1994)(citation omitted); see also Aikens, 460 U.S. at 713-715 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non. . . . [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection [as a candidate for promotion], the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case,' and 'the factual inquiry proceeds to a

new level of specificity.' After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. The District Court was then in a position to decide the ultimate factual issue in the case. . . . Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'")(citation omitted); Beaver v. Rayonier, Inc., 200 F.3d 723, 727 (11th Cir. 1999)("As an initial matter, Rayonier argues it is entitled to judgment as a matter of law because Beaver failed to establish a prima facie case. That argument, however, comes too late. Because Rayonier failed to persuade the district court to dismiss the action for lack of a prima facie case and proceeded to put on evidence of a non-discriminatory reason--i.e., an economically induced RIF--for terminating Beaver, Rayonier's attempt to persuade us to revisit whether Beaver established a prima facie case is foreclosed by binding precedent."); and Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1129 (11th Cir. 1984)("The plaintiff has framed his attack on the trial court's findings largely in terms of

whether the plaintiff made out a prima facie case of discrimination. We are mindful, however, of the Supreme Court's admonition that when a disparate treatment case is fully tried, as this one was, both the trial and the appellate courts should proceed directly to the 'ultimate question' in the case: 'whether the defendant intentionally discriminated against the plaintiff.'").

53. The instant case was "fully tried," with Petitioner and Respondent having both presented evidence.

54. A review of the evidentiary record reveals that Petitioner failed to meet her burden of proving that Respondent engaged in the race-based public accommodation discrimination that she alleged in her complaint. Her proof was lacking in three respects.

55. Firstly, Petitioner did not establish that the Wal-Mart store at which she was allegedly "harassed and denied service because of [her] race" was a "public lodging establishment" or a "public food service establishment" (as described by Section 509.092, Florida Statutes) or a "place of public accommodation" (as described in Section 760.08, Florida Statutes). There was no evidence presented that the goods offered for sale at the store included food intended for on-premises consumption. Absent such proof, the record is insufficient to support a finding that the store was a retail

establishment covered by the Act. Accordingly, Respondent could not have committed the public accommodation discrimination alleged in Petitioner's complaint.

56. Secondly, there is no proof that Respondent or anyone acting on its behalf deprived Petitioner of the opportunity to shop at, or otherwise enjoy the facilities and services, of the Store on the same terms as other members of the public. It is true that, on March 27, 2007, Petitioner was escorted from the Store before completing her purchases and told not to return; however, this removal and banning of Petitioner from Store was action taken, not by any Store employee or agent, but by Hialeah Gardens law enforcement personnel.

57. Thirdly, there has been no showing made that at any time material to the instant case Petitioner was discriminated against because of her race. While Petitioner may sincerely believe that she was the victim of such discrimination, she failed to present sufficient evidence to back up this belief. "Mere speculation and conjecture [on a complainant's part regarding the motives of others] are wholly inadequate to support a claim of intentional discrimination." Barber v. City of Conover, 73 F. Supp. 2d 576, 587 (W.D. N.C. 1999).

58. In light of the foregoing, Petitioner's complaint should be dismissed in its entirety.

RECOMMENDATION

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

RECOMMENDED that the FCHR issue a final order dismissing Petitioner's Public Accommodations Complaint of Discrimination.

DONE AND ENTERED this 10th day of September, 2008, in Tallahassee, Leon County, Florida.

STUART M. LERNER
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 10th day of September, 2006.

ENDNOTES

[1] All references to Florida Statutes in this Recommended Order are to Florida Statutes (2007).

[2] The hearing was originally scheduled to commence on April 28, 2008, but was continued twice (the first time at Respondent's request and the second time at Petitioner's request).

[3] Petitioner would have been able to continue shopping at the Store had she, during her March 27, 2007, visit, simply followed the instructions she had been given regarding payment for the ink cartridges and not created a scene.

[4] The FCHR, however, has no authority to award monetary relief for non-quantifiable damages. See City of Miami v. Wellman, 976 So. 2d 22, 27 (Fla. 3d DCA 2008)("[N]on-quantifiable damages . . . are uniquely within the jurisdiction of the courts."); and Simmons v. Inverness Inn, No. 93-2349, 1993 Fla. Div. Adm. Hear. LEXIS 5716 *4-5 (Fla. DOAH October 27, 1993)(Recommended Order)("In this case, petitioner does not claim that she suffered quantifiable damages, that is, damages arising from being terminated from employment, or from being denied a promotion or higher compensation because of her race. Rather, through argument of counsel she contends that she suffered pain, embarrassment, humiliation, and the like (non-quantifiable damages) because of racial slurs and epit[he]ts made by respondents. Assuming such conduct occurred, however, it is well-settled in Florida law that an administrative agency (as opposed to a court) has no authority to award money damages. See, e.g., Southern Bell Telephone & Telegraph Co. v. Mobile America Corporation, Inc., 291 So. 2d 199 (Fla. 1974); State, Dept. of General Services v. Biltmore Construction Co., 413 So. 2d 803 (Fla. 1st DCA 1982); Laborers International Union of N.A., Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989). This being so, it is concluded that the Commission cannot grant the requested relief, compensatory damages.").

[5] Complainants may establish a prima facie case of public accommodation discrimination by proving 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." Laroche, 62 F. Supp. 2d at 1382. "'Similarly situated' means similar in all relevant respects." Afkhami v. Carnival Corp., 305 F. Supp. 2d 1308, 1322 (S.D. Fla. 2004).

[6] "To 'articulate' does not mean 'to express in argument.'" Rodriguez v. General Motors Corporation, 904 F.2d 531, 533 (9th Cir. 1990). "It means to produce evidence." Id.; see also Mont-Ros v. City of West Miami, 111 F. Supp. 2d 1338, 1349 (S.D. Fla. 2000)("This burden is merely one of production, not persuasion, and is exceedingly light.").

COPIES FURNISHED:

Mattie Lomax
Post Office Box 015262
Miami, Florida 33101

Scott A. Forman, Esquire
Linda Noel Fleurimond, Esquire
Littler Mendelson, P.C.
Two South Biscayne Boulevard, Suite 1500
Miami, Florida 33131

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

Denise Crawford, Agency Clerk
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.