

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YONEL VIXAMAR,)
)
 Petitioner,)
)
 vs.) Case No. 08-1330
)
 TRI-MANAGEMENT COMPANY, d/b/a)
 BURGER KING,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on July 25, 2008, in Naples, Florida.

APPEARANCES

For Petitioner: Yonel Joseph Vixamar, pro se
14095 Collier Boulevard North
Naples, Florida 34119

For Respondent: J. Scott Hudson, Esquire
Hudson Law Firm
SunTrust Center
200 South Orange Avenue, Suite 1220
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of national origin or race in violation of Section 760.08, Florida Statutes (2005),¹ during Petitioner's visit to a Burger King restaurant on June 3, 2006.

PRELIMINARY STATEMENT

Petitioner filed a Complaint of Discrimination with the Florida Commission on Human Relations (the Commission) on May 25, 2007. On January 24, 2008, the Commission issued a Notice of Determination: Cause. Petitioner timely filed a Petition for Relief, and the Commission referred the matter to DOAH to conduct an administrative hearing.

At the hearing, Petitioner testified, called one other witness, and submitted seven exhibits for admission into evidence. Respondent called one witness and submitted four exhibits. The identity of the witnesses and exhibits, and any associated rulings, are reported in the Transcript of the hearing filed with DOAH on August 22, 2008. Respondent filed its Proposed Recommended Order (PRO) on August 26, 2008. Petitioner did not file a PRO.

FINDINGS OF FACT

1. Petitioner is in a protected class within the meaning of Subsection 760.02(6). Petitioner's national origin is Haitian, and his race is Black.

2. Respondent operates a Burger King restaurant located at 1260 North Fifteenth Street, Immokalee, Florida 34142 (the Restaurant). The Restaurant is a place of public accommodation, defined in Subsection 760.02(11)(b).

3. Petitioner, his wife, and his two children visited the Restaurant on June 3, 2006, for the purpose of purchasing and consuming food served by the Restaurant. Petitioner and his family entered the Restaurant, and Petitioner waited in line to order food for the family.

4. Petitioner placed his order and paid for the food he ordered. The cashier and food service employee on duty at the Restaurant was Ms. Jessica Lopez. Ms. Lopez is a Hispanic woman who is married to a Haitian man.

5. Ms. Lopez delivered the correct food order to Petitioner and placed all of the food on one service tray. Petitioner asked Ms. Lopez to sort the food orders onto separate trays. In response, Ms. Lopez provided Petitioner with additional trays so that Petitioner could sort the food orders onto separate trays.

6. Petitioner requested Ms. Lopez to either sort the orders onto separate trays or refund Petitioner's money to him. Ms. Lopez refunded Petitioner's money, and Petitioner started to exit the Restaurant.

7. Petitioner's testimony is clear that Petitioner had concluded his business transaction with the Restaurant after receiving the refund. Petitioner intended to leave the Restaurant and take his family to a nearby McDonald's restaurant.

8. Petitioner claims that before he left the Restaurant Ms. Lopez cursed at him and referred to his national origin by saying, "Get the fuck out of here, you fucking Haitian." Ms. Lopez testified that Petitioner cursed at her when he requested a refund and that she may have cursed at him at the time she refunded the money. However, Ms. Lopez denied making any comments related to national origin. The fact-finder finds her testimony to be credible and persuasive.

9. Petitioner's testimony at the hearing conflicts with his deposition testimony that was published in the record. In deposition testimony, Petitioner testified that he was "pissed off" and "screaming" at Ms. Lopez in the Restaurant, but that Ms. Lopez did not respond. Rather, she continued waiting on other customers.

10. During the incident at the Restaurant, three other men joined Petitioner at the counter as he screamed at Ms. Lopez. None of the men testified at the hearing. The other witness called by Petitioner did not hear the exchange between Petitioner and Ms. Lopez. It is undisputed that the alleged comments by Ms. Lopez are the only alleged references to the national origin or race of Petitioner by any employee or manager at the Restaurant.

11. Respondent's store manager, Mr. Lewis Sowers, a Caucasian male, heard the disturbance at the counter of the

Restaurant. Mr. Sowers asked Petitioner and the other gentlemen to leave the Restaurant.

12. Mr. Sowers contacted the police department regarding the disturbance, and the officer on the scene completed a police report. A copy of the police report was admitted into evidence as Respondent's Exhibit 2 without objection.

13. Petitioner exited the Restaurant and also contacted law enforcement. A police report and related statements were admitted into evidence at the hearing as Petitioner's Exhibits 3 through 5 without objection.

14. The alleged discrimination by Ms. Lopez did not impede Petitioner's ability to contract for goods or services at the Restaurant. Petitioner admits that, if he had accepted the extra trays from Ms. Lopez and sorted the food order, there was no reason to believe he would have been asked to leave the Restaurant. Petitioner admits that once he received the refund, he had no intention of staying in the Restaurant, does not have a practice of visiting Burger King restaurants unless he is eating there, and was on his way out the door to another restaurant. Thus, any attempt to contract for goods and services with Respondent had terminated before the alleged discrimination.

15. Petitioner presented no evidence of any damages sustained as a result of the alleged discrimination. Petitioner

had a severe headache later in the day on June 3, 2006, and during portions of June 4, 2006. Petitioner attributed the headache to drinking a cold soda at McDonald's while upset about the events at the Restaurant. However, other than this claim of unidentified damages, Petitioner testified that he had not suffered any economic or other tangible harm from the alleged discrimination. Further, Petitioner failed to answer Respondent's Request for Documents evidencing mental anguish, suffering or punitive damage awards he believed to be appropriate.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the subject matter of and parties to this proceeding. §§ 120.57(1) and 760.11, Fla. Stat. (2008). It is an unlawful practice for a place of public accommodation to discriminate against or segregate individuals on the basis of race or national origin. § 760.08.

17. Chapter 760, The Florida Civil Rights Act (FCRA), is patterned after federal civil rights legislation. Cases construing federal civil rights legislation can be used to interpret the FCRA. Bass v. Board of County Commissioners, Orange County, Florida, 256 F.3d 1095, 1109 (11th Cir. 2001); Stevens v. Steak n Shake, Inc., 35 F. Supp. 2d 882, 886 (M.D. Fla. 1998); Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

18. Petitioner has the ultimate burden of proof in this proceeding. Petitioner must prove the alleged discrimination by a preponderance of the evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

19. Petitioner has the initial burden of establishing a prima facie case that the alleged discrimination occurred. In order to satisfy the requirement for a prima facie showing of discrimination, Petitioner must present evidence that:

(1) Petitioner is a member of a protected class;

(2) Petitioner attempted to contract for services and to afford himself the full benefits and enjoyment of a public accommodation;

(3) Petitioner was denied the right to contract for those services and, therefore, was denied the full benefits and enjoyment of a public accommodation; and

(4) Such benefits and 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); LaRoche v. Denny's, Inc., 62 F. Supp. 2d 1375, 1382 (S.D. Fla. 1999); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

20. Petitioner satisfied the first two requirements for a prima facie showing of discrimination. It is undisputed that Petitioner is a member of a protected class, based on his national origin and race, and that Petitioner attempted to contract for services and afford himself the full benefits and enjoyment of a public accommodation.

21. Petitioner did not satisfy the third requirement for a prima facie showing of discrimination. Petitioner admits he was not denied the right to contract for food and services served at the Restaurant and in fact paid for and received food and services for which he contracted. See Stevens v. Steak n Shake, Inc., 35 F. Supp. 2d 882, 890 (M.D. Fla. 1998) (no prima facie case of racial discrimination where the complaining party is not denied service).

22. Petitioner complains that he received poor service. However, poor service or slow service is not tantamount to the denial of service and does not represent a basis to assert a violation of Petitioner's civil rights. See Robertson v. Burger King, Inc., 848 F. Supp 78 (E.D. La. 1994) (no showing of discrimination where Caucasian customers, arriving later than the plaintiff, were served first). The alleged comment by Ms. Lopez, if proven, may demonstrate gross insensitivity, but in and of itself, does not establish a claim under the civil rights laws. Petitioner was still required to show that he was

refused service or admittance on the basis of race or national origin. See Stearnes v. Baur's Opera House, Inc., 788 F. Supp. 375, 378(C.D. Ill. 1992).

23. The request for Petitioner to leave the Restaurant did not deny Petitioner the right to contract for food and services. Petitioner successfully contracted for food and services, received a refund, and intended to leave the Restaurant before management requested Respondent to leave the Restaurant. The contract for goods or services ended well before management asked Petitioner to leave the Restaurant.

24. Petitioner also failed to meet the fourth requirement for a prima facie showing of discrimination. A preponderance of the evidence does not support a finding that similarly situated individuals of a different national origin or race received services or benefits that were denied to Petitioner. Petitioner's testimony affirms that he did not see Respondent's employees sort food orders onto separate trays for any other customer. Stevens v. Steak n Shake, Inc., 35 F. Supp. 2d at 890. Deshawn v. Denny's, Inc., 918 F. Supp 1418, 1424 (D. Colo. 1996).

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 finding Respondent not guilty of the alleged discrimination and dismissing the Petition for Relief.

DONE AND ENTERED this 12th day of September, 2008, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of September, 2008.

ENDNOTE

^{1/} References to chapters, sections, and subsections are to Florida Statutes (2005), unless otherwise stated.

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.