

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONNETTA BENEDICT,)
)
 Petitioner,)
)
 vs.) Case No. 08-1755
)
 WAL-MART STORES EAST,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A hearing was conducted pursuant to notice on September 18, 2008, via video teleconferencing with sites in Jacksonville and Tallahassee, Florida, before the Division of Administrative Hearings by its duly-designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Jonnetta Benedict, pro se
5534 Casavedra Court
Jacksonville, Florida 32244

For Respondent: Jonathan A. Beckerman, Esquire
Scott Forman, Esquire
Littler Mendelson, P.C.
One Biscayne Tower, Suite 1500
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STATEMENT OF THE ISSUE

Whether Respondent committed the violation alleged in Petitioner's Public Accommodations Complaint of Discrimination filed by Petitioner on September 6, 2007, and if so, what relief should be provided.

PRELIMINARY STATEMENT

On September 6, 2007, Petitioner filed with the Florida Commission on Human Relations (FCHR), a Public Accommodations Complaint of Discrimination, alleging that she had been discriminated against pursuant to Chapter 760, Florida Statutes, in that she was denied service because of her race.

The allegations were investigated and on February 29, 2008, FCHR issued its Determination: No Cause and a Notice of Determination: No Cause. A Petition for Relief was filed by Petitioner on March 27, 2008.

On April 10, 2008, FCHR transmitted the matter to the Division of Administrative Hearings for the assignment of an administrative law judge.

A Notice of Hearing was entered on April 24, 2008, scheduling the case for formal hearing on June 10 and 11, 2008. Respondent filed an unopposed Motion for Continuance, which was granted. The case was re-scheduled for final hearing on September 18, 2008, and proceeded as scheduled.

At hearing, Petitioner testified on her own behalf and presented the testimony of Brian Benedict, Wayne Benedict, and Adarious Pickens. Petitioner did not offer any exhibits into evidence. Respondent presented the testimony of Jonnetta Benedict and Jeannie Jo Thornton. Respondent offered one exhibit which was admitted into evidence.^{1/}

A one-volume transcript was filed on October 3, 2008. The parties were given until November 3, 2008, to file proposed recommended orders. Respondent filed a Proposed Recommended Order which has been carefully considered in the preparation of this Recommended Order. No post-hearing submission was received from Petitioner.

FINDINGS OF FACT

1. Petitioner is an African-American woman living in the Jacksonville area. She is married to Wayne Benedict and is the mother of Bryan Benedict.

2. On July 23, 2007, Petitioner went to Wal-Mart to do the family's grocery shopping. Her son, Bryan, and his friend, Adarious Pickens, also African-American, were with her.

3. When she arrived at Wal-Mart, she proceeded to the deli counter, where she usually begins her shopping trip.

4. On the day in question, the numbering system in the deli was broken. When operating, the numbering system dispenses tickets with numbers on them which determine which customers arrived first and who receives service first.

5. At the time Petitioner approached the deli counter, three Caucasian customers were present and waiting for service. After the three Caucasian customers were served, another Caucasian customer approached the deli counter and was waited upon. Because Petitioner believed that the last Caucasian customer had been served out of turn, Petitioner left the deli

area to find a manager. After learning that the manager had gone for the day, she was directed to a person who was "team lead." She complained to the team lead who apologized to Petitioner.

6. After speaking to the team lead, Petitioner then returned to the deli department and asked one of the deli associates, Jeanne Thornton, to identify the other deli associate. Ms. Thornton identified the other associate as "Trish." Petitioner again left the deli area.

7. At the time of this incident, Ms. Thornton and Trish were the only two Wal-Mart associates were working at the deli counter. Petitioner acknowledges that the deli appeared to be short-staffed, as she typically sees three or four associates working behind the deli counter.

8. Several minutes later, Petitioner returned to the deli counter and requested service. Prior to this time, Petitioner waited for service, which was not forthcoming, but did not verbally request service. Ms. Thornton then waited on Petitioner, who left the deli area after she was given the food items she requested. Ms. Thornton noticed that Petitioner was angry and upset.

9. The deli counter in question is at least 30 feet long. The deli contains both a cold food section and a hot food section. In addition, there is a lower shelf where items are for sale, which do not require the assistance of deli associates.

10. On any given day, associates are assigned to work in either the hot or cold food sections. At the time Petitioner approached the deli counter, Trish was assigned to the deli's hot food section, and Ms. Thornton was in the midst of filling a large cold food order.

11. When a deli associate is assigned to cook food in the deli department's hot food section, it is that person's responsibility to perform duties related to the hot food. According to Ms. Thornton, "when the food comes up, it has to be temped, logged, and put in the hot bar." These duties of an associate assigned to the hot food section of the deli take priority over helping customers. If the hot food is not properly temped, logged, and put in the hot bar, the hot food must be thrown away.

12. On those occasions when the numbering system is not working, the deli associates rely on customers to tell them who should be waited on next. This is, in part, because the associates often turn their backs to the customers at the deli counter while they are cutting meat, etc.

13. Food items sold from the deli counter are not intended for on-site consumption. Petitioner did not intend to consume the items purchased from the deli on the premises of Wal-Mart.

14. No employee of Respondent made any racially derogatory or racially related comments to Petitioner.

15. Other than Petitioner's firm belief that she was overlooked in favor of Caucasian customers, no evidence was presented that the actions of Respondent's associates were racially motivated.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569, 120.57(1), and 760.11, Florida Statutes (2007).

17. Petitioner's complaint is based on a perceived violation of Section 760.08, Florida Statutes (2007), which requires all persons to be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in Chapter 760, Florida Statutes (2007), without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status or religion.

18. Pursuant to Section 760.02(11), Florida Statutes (2007), "public accommodations" is defined as follows:

(11) "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. (emphasis supplied)

19. The threshold question is whether Respondent is a place of public accommodation as defined by Section 760.02(11), Florida Statutes.

20. Because the food at Respondent's deli is not consumed on the premises, Respondent does not fit within the definition of public accommodation as defined by Section 760.02(11), Florida Statutes.

21. However, because the case was fully tried on the merits, it is appropriate to examine the ultimate question of discrimination. See Green v. School Board of Hillsborough

County, 25 F.3d 974, 978 (11th Cir. 1994); see also USPS Board of Governors v. Aikens, 460 U.S. 711 at 715 (1983).

22. Complainants may establish a prima facie case of public accommodation discrimination by proving: 1) that she is a member of a protected class; 2) that she attempted to contract for services and to afford herself the full benefits and enjoyment of a public accommodation; 3) that she was denied the right to contract for those services and thus denied the benefits and enjoyments of same; and 4) that similarly situated persons who were not members of the protected class received full benefits or enjoyment, or were treated better. Foster v. Howard University Hospital, No. 06-244, 2006 U.S. Dist. LEXIS 74512 (D.C. 2006); Afkhami v. Carnival Corp., 305 F. Supp. 2d 1308, 1322 (S.D. Fla. 2004); Laroche v. Denny's, Inc., 62 F. Supp. 2d 1375, 1382 (S.D. 1999).

23. The Florida Civil Rights Act (FCRA) is patterned after Title VII, and federal case law dealing with Title VII is applicable to cases arising under the Florida Act. Florida State University v. Sondel, 685 So. 2d 923, 925n.1 (Fla. 1st DCA 1996); Velez v. Levy World Limited Partnership, 182 Fed. Appx. 929, 932 (11th Cir. 2006).

24. In order to prove discrimination violative of Section 760.08, Florida Statutes, Petitioner may demonstrate her case through direct evidence of discrimination; pattern and practice of discrimination; or circumstantial evidence of discrimination.

Afkhami, supra at 320. Direct evidence of discrimination, which is "composed of only the most blatant remarks, where intent could be nothing other than to discriminate," Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999), is not at issue in this case. Likewise, Petitioner has not submitted evidence of a pattern and practice of discrimination. Akfhami, 305 F. Supp. 2d at 1321 (plaintiff must present evidence of a pattern and practice of differential treatment affecting other members of his or her class that is systematic as opposed to isolated, sporadic incidents).

25. 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 (citation omitted) (1973). . . is applicable." Laroche v. Denny's Inc., 62 F. Supp. 2d 1375, 1382 (S.D. Fla. 1999). Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. The burden then shifts to the respondent to articulate a legitimate, non-discriminatory reason for its action. If the respondent successfully articulates such a reason, than the burden shifts back to the complainant to show that the reasons given by the respondent are a pretext for discrimination. Feacher v. Intercontinental Hotels Group, 563 F. Supp. 2d 389 (N.D.N.Y. June 3, 2008). The ultimate burden of persuading the trier of fact that unlawful discrimination

occurred remains with the complainant. EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); and see Brand v. Florida Power Corp., 633 So. 2d 504, 507 (Fla. 1st DCA 1994).

26. Petitioner meets the first element of a prima facie case in that she is a member of a protected class, i.e., she is African-American. As to the second element, she attempted to contract for services and to afford herself the full benefits and enjoyment of a public accommodation. That is, assuming for this analysis that Respondent is a public accommodation, Petitioner went to Respondent's store to purchase deli items.

27. Petitioner did not, however, prove the third element. While she did not receive service as promptly as she wished, she was not denied service and ultimately purchased the food items she desired from the deli. Once Petitioner verbally requested service at the deli counter, she received it.

28. As to the fourth element, Petitioner presented evidence that Caucasian customers at the deli counter received service before she did. However, she did not establish that the deli associates knew that she was waiting for assistance longer than the Caucasian customers and then intentionally chose to assist those customers before helping Petitioner.

29. Because Petitioner did not prove all of the required elements, she did not establish a prima facie case. Even if she had, however, Respondent presented a legitimate, non-discriminatory reason for the delayed service to Petitioner.

That is, the numbering system was broken, the deli associates were relying on their customers to voice who was in line next, and the deli was short-staffed on the day in question. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991); Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000).

30. Finally, Petitioner did not show that a discriminatory reason more likely than not motivated the deli associates in their actions or inactions that day. Accordingly, Petitioner did not establish pretext.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered that dismisses Petitioner's claim of public accommodation discrimination.

DONE AND ENTERED this 19th day of November, 2008, in Tallahassee, Leon County, Florida.



Barbara J. Staros
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of November, 2008.

ENDNOTE

1/ Page 52 of Respondent's Exhibit 1 was admitted into evidence.

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.