

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHEL J. THERMITUS,)
)
 Petitioner,)
)
 vs.) Case No. 08-2379
)
 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 September 5, 2008, in Fort Myers, Florida.

APPEARANCES

For Petitioner: Michel J. Thermitus, pro se
Post Office Box 525
Immokalee, Florida 34143

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, but did not call any witnesses or submit any exhibits. Respondent called one witness and submitted three exhibits. The identity of the witnesses and exhibits and any associated rulings are reported in the Transcript of the hearing filed with DOAH on September 19, 2008.

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

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. At the time the food was ready, Ms. Lopez called the order number. Petitioner attempted to retrieve the food and Ms. Lopez asked him for his receipt with the order number on it. Petitioner indicated that he did not have the receipt. Ms. Lopez directed Petitioner's attention to a sign stating that customers must have a receipt in order to be served. After a short conversation about the store's policy and requirement to have a receipt, Ms. Lopez served Petitioner his food.

6. The food order was correct, but Petitioner objected to the manner in which Ms. Lopez placed his food service tray on the counter. Petitioner claims that Ms. Lopez threw the tray on the counter. None of the food spilled out of containers or off the tray.

7. Petitioner demanded that she serve him correctly or refund his money. Ms. Lopez refunded Petitioner's money.

8. It is undisputed that Petitioner had concluded his business transaction with the Restaurant after requesting the refund. Petitioner intended to leave the Restaurant.

9. 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, fucking Haitians." Ms. Lopez testified 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 the testimony of Ms. Lopez to be credible and persuasive.

10. During the incident at the Restaurant, Petitioner's two friends and another gentleman joined Petitioner at the counter as he argued with Ms. Lopez. None of the men testified at the hearing. 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. The alleged discrimination by Ms. Lopez did not impede Petitioner's ability to contract for goods or services at the Restaurant. The absence of a receipt did not prevent

Respondent's employee from serving Petitioner his food order, and the order appeared to be correct.

14. Once Petitioner received his refund, Petitioner had no intention of staying in the Restaurant and does not have a practice of visiting Burger King restaurants unless he is eating there. Thus, any attempt to contract for goods and services with Respondent had terminated before the alleged discrimination.

15. Petitioner did not see any other customers who lost or did not produce their receipts. Petitioner did not recall the race or national origin of any other customers who may have had their food order served in a different manner.

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

17. 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.

18. 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).

19. 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).

20. 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) He is a member of a protected class;
- (2) He attempted to contract for services and to afford himself the full benefits and enjoyment of a public accommodation;
- (3) He 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.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); 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).

21. 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.

22. 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).

23. 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).

24. 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.

25. 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 did not show there were any other customers who failed to retain their receipts or the race or national origin of other customers in the Restaurant who may have received better treatment.

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).

26. With regard to purported damages, in the final hearing, Petitioner asserted that he wanted to be "compensated" in the form of "money." Subsection 760.11(6) states that the "administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." Since back pay is not at issue in a public accommodation case, DOAH is authorized to afford remedies that work to prohibit the practice and provide affirmative relief to that end. In cases where Petitioner's have proven discrimination, some ALJ's have held that affirmative relief could include compensatory damages. Vanessa Brown v. Capital Circle Hotel Company, Case No. 01-3882 (DOAH October 17, 2002). However, in this case Petitioner has not provided any evidence that he sustained damages nor has he sought affirmative relief.

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 17th day of October, 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 17th day of October, 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.