

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARI ANDERSON,)
)
 Petitioner,)
)
 vs.) Case No. 11-0055
)
 WAL-MART STORES EAST,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, a hearing was held before the Division of Administrative Hearings by its designated Administrative Law Judge Diane Cleavinger on August 17, 2011, in Panama City, Florida.

APPEARANCES

For Petitioner: Cari Anderson, pro se
Post Office Box 371792
Las Vegas, Nevada 89137

For Respondent: Amy R. Turci, Esquire
Ford & Harrison, LP
225 Water Street, Suite 710
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Whether Petitioner has been the subject of discrimination in a public accommodation due to a disability.

PRELIMINARY STATEMENT

On October 14, 2009, Petitioner, Cari Anderson (Petitioner), filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that Respondent, Wal-Mart Stores East, L.P. (Wal-Mart or Respondent), violated chapter 760, Florida Statutes. Specifically, Petitioner alleged that Respondent discriminated against her because of her disability when Respondent's employees objected to the presence of her service dogs while in the checkout line at the store and later allegedly had her arrested while she was leaving the store.

FCHR investigated Petitioner's allegations. After investigation, FCHR issued its determination of no cause on Petitioner's Charge of Discrimination on April 13, 2010. FCHR also advised Petitioner of her right to file a Petition for Relief.

On May 13, 2010, Petitioner filed a Petition for Relief. The Petition was forwarded to the Division of Administrative Hearings (DOAH) for formal hearing and assigned Case No. 10-2565. Subsequently, Petitioner failed to comply with an Order of the Division of Administrative Hearings and the case was closed. After closure, Petitioner requested that the case be reopened and presented excusable cause for her failure to comply

with the Division's earlier Order. The case was reopened under Case No. 11-0055.

At the hearing, Petitioner testified on her own behalf and presented the testimony of one witness. Additionally, Petitioner offered one exhibit into evidence. Respondent presented the testimony of three witnesses and offered one exhibit into evidence.

After the hearing, Respondent filed a Proposed Recommended Order on October 7, 2011. Petitioner filed a Proposed Recommended Order in letterform on October 12, 2011. Attached to Petitioner's letter was a purported copy of an alleged settlement agreement between Wal-Mart and the United States, a non-party entity, as well as, news articles about the settlement. None of these documents was introduced at the hearing and are therefore, not considered in this Recommended Order. Additionally, Petitioner's letter contained two CDs which were not submitted at the hearing and could not be viewed on the undersigned's computer. Similarly, these CDs are not considered in this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Cari Anderson, is a veteran of the Iraq War and has Post Traumatic Stress Disorder (PTSD). Her PTSD is sufficiently severe so as to constitute a disability under Florida law. Because of her disability, Petitioner keeps with

her two small poodle-type service dogs that help her remain calm. Petitioner also trains such service dogs.

2. On April 5, 2009, Petitioner was visiting her friend, Michelle Clas-Williams, at her home in Panama City, Florida. During her visit at around 2:00 in the morning, Petitioner, along with her friend, and her friend's daughter, decided to go shopping at the Wal-Mart store in Callaway, Florida.

3. Petitioner brought along her two service animals to the Callaway Wal-Mart. Neither of the dogs wore any identification as service dogs; and therefore, could not be readily identified as such. Upon arrival, Petitioner and her friend obtained separate shopping carts. Petitioner placed her two dogs on the bottom of the shopping cart, on a towel.

4. Petitioner and her shopping companions entered the main part of the store. No one from Wal-Mart stopped Petitioner from entering the store. Both she and her friend spent the next 20-30 minutes shopping throughout the Callaway Wal-Mart store where surveillance cameras intermittently monitored their passage through the store. None of the surveillance footage has sound. As a consequence, the surveillance footage of Petitioner's visit does not add support for either party's version of the events in this case.

5. During her time in the store, Petitioner walked freely throughout the aisles and was not prevented from shopping at the

Callaway store. On at least two separate occasions, individual employees politely informed Petitioner that she could not have her dogs in the store. However, on each such occasion Petitioner explained to the employee that her dogs were service animals. The employees responded positively and Petitioner continued her shopping. There was no evidence that these employees communicated with Wal-Mart management.

6. As Petitioner and her friend approached the checkout lines, the Customer Service Manager, Monica Amis, noticed Petitioner's two dogs in her shopping cart. Ms. Amis walked up to Petitioner and said, "Ma'am those dogs cannot be in the store." Before Ms. Amis could ask anything else, including whether the dogs were service animals, Petitioner erupted into a loud vocal tirade stating among other things, "You don't tell me what the fuck to do. I can do what I want. I'm sick of Wal-Mart's shit you think you own the world." Ms. Amis could not get a word in and could not calm Petitioner down. Petitioner demanded the store manager be called and demanded that some papers which "proved" her dogs were service animals be looked at. Within minutes of first approaching Petitioner, Ms. Amis instructed the cashier to process Petitioner's purchases. She then walked away and called the store manager. The better evidence did not demonstrate that Ms. Amis was rude or profane with Petitioner. The evidence did demonstrate that Ms. Amis'

actions in approaching and interacting with Petitioner were clearly reasonable and did not constitute discrimination against Petitioner.

7. Shortly after Ms. Amis' call, the store manager, Gary Wright, approached the front of the store. He could hear Petitioner yelling. He was very concerned about her behavior and the disturbance she was making. He approached her at the cash register.

8. Mr. Wright asked Petitioner to calm down so he could speak with her. As she was paying for her items, Petitioner continued to yell loudly and use profanity. She was permitted to complete her transaction and no one from Wal-Mart interfered with her ability to do so. However, Petitioner remained belligerent, loud, and profane. Petitioner believed that her rights were being violated and that Ms. Amis and the manager could not tell her that her dogs could not accompany her in the store and if they inquired about them, they could only ask one specific question about whether her dogs were service dogs under an alleged agreement Wal-Mart recently entered into with the federal government. Petitioner's beliefs about the meaning and scope of this alleged agreement, which was not introduced into evidence, is simply misplaced and does not establish any of the actions by either Ms. Amis or Mr. Wright as discriminatory acts.

9. Like Ms. Amis, Mr. Wright could not get a word in. He understandably became exasperated with Petitioner and the conversation devolved with Mr. Wright telling Petitioner on at least two occasions to "shut up" and "shut the fuck up." He also told her that he did not think poodles were service animals, but old-lady dogs. In the meantime, Petitioner was yelling about her papers and that Mr. Wright needed to look at them. Mr. Wright simply wanted Petitioner to leave the store. He also told her that he had no problems with the service dogs being in the store, but if she did not calm down, he would have to call the Bay County Sherriff's office. Given Petitioner's loud and irrational behavior it was reasonable for Mr. Wright to ask Petitioner to leave the store.

10. When Mr. Wright informed Petitioner that he was calling the Sheriff's office, Petitioner stated that she was glad they were coming. She wanted their assistance. Mr. Wright walked away and called the Sheriff's office. There was no evidence that Mr. Wright made a false report to the Sheriff's office. Additionally, Petitioner called 911 to confirm that an officer was en-route. Likewise, given Petitioner's continued behavior and her assent to the call, it was reasonable for Mr. Wright to call the Sheriff's office. Notably, the entire interaction between Petitioner, Ms. Amis, and Mr. Wright took less than 10 minutes.

11. After completing her purchase, Petitioner remained at the checkout lane while her friend, who was in another checkout lane, paid for her merchandise. Petitioner continued yelling, using profanity, and causing a disturbance.

12. Then Deputy, now Investigator, VanStrander arrived outside of Wal-Mart's east entrance doors and was met by Mr. Wright. Mr. Wright informed Investigator VanStrander that Petitioner was making a scene and being very loud and disruptive. Indeed, Investigator VanStrander could hear Petitioner yelling while he was outside the store and she was inside the store. Mr. Wright did not ask the officer to arrest Petitioner.

13. Once both Petitioner and her friend had completed their purchases, they began walking toward the exit, with Petitioner continuing to yell. Investigator VanStrander entered the store and was immediately approached by Petitioner who was screaming and "cussing like a sailor."

14. Investigator VanStrander instructed Petitioner that she needed to leave the store. He also informed her that she would be arrested if she did not comply. Petitioner did not immediately follow his instructions. Instead she attempted to argue her position and show the officer her papers. He again instructed her to leave and motioned to the door. He did not block the doorway as Petitioner claimed that he did. She again

did not immediately comply and within seconds the officer arrested Petitioner.

15. With little to no struggle she was handcuffed, placed into custody, and charged with disorderly conduct and resisting an officer without violence. Petitioner's interaction with the deputy while in the store lasted less than 5 minutes. Importantly, the evidence clearly demonstrated that the decision to arrest Petitioner was made by Investigator VanStrander. Respondent was not responsible for the actions of the officer or for Petitioner's behavior which led to her arrest. Given these facts, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this action, pursuant to chapters 120 and 760, Florida Statutes.

17. Chapter 760, Florida Statutes, is known as the Florida Civil Rights Act. Section 760.08, Florida Statutes (2008) provides:

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

18. The Florida Civil Rights Act is based on federal anti-discrimination statutes, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq. and 42 U.S.C. § 1981. See Stevens v. Steak N Shake, Inc., 35 F. Supp. 2d 882, 886 ("[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 Florida Statutes, section 509.092, and to determine the elements of [the plaintiffs'] civil rights claims under the Florida Statutes."); see also Laroche v. Denny's, Inc., 62 F. Supp. 2d 1375 (S.D. Fla. 1999) (in a case where a restaurant was alleged to have refused service to black customers, court treated plaintiffs federal and state law claims as having identical substantive elements), rev'd in part, vacated in part, 281 F.3d 1285 (11th Cir. 2001). Therefore, federal case law can be used to interpret the Florida Civil Rights Act.

19. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court of the United States articulated the burden of proof for cases involving allegations of discrimination under Title VII cases. Under that case, a plaintiff has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If the plaintiff establishes a prima facie case then the respondent must go forward and articulate a legitimate

nondiscriminatory reason for the action taken by the Respondent. Once the respondent has articulated a legitimate nondiscriminatory reason, the plaintiff then must establish by a preponderance of the evidence that the reason given is not true or merely pre-textual. The same framework also applies to complaints regarding discrimination in public accommodations. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); see also generally Brown v. American Honda Motor Co., 939 F.2d 946, 949 (11th Cir. 1991) (applying Title VII procedural framework to Section 1981 case; granting summary judgment for defendant).

20. In Laroche v. Denny's, Inc., 62 F. Supp. 2d 1375 (S.D. Fla. 1999), the Court held that a Petitioner must establish by a preponderance of the evidence that:

- a. they are a member of a protected class;
- b. they attempted to contract for services and to afford themselves the full benefits and enjoyment of a public accommodation;
- c. they were denied the right to contract for those services and, thus, were denied the full benefits or enjoyment of a public accommodation; and
- d. such services were available to similarly situated persons outside the protected class who received full benefits or enjoyment, or were treated better.

21. If a petitioner can establish a prima facie case, "the burden of persuasion shifts to [respondent] to proffer a legitimate business reason for the conduct at issue." Id.

22. In this case, as stipulated by Respondent, Petitioner is disabled and is a member of a protected class. Additionally, the parties agreed that Wal-Mart constitutes a "public accommodation" as defined by section 760.02(11).

23. However, Petitioner is unable to establish a prima facie case of public accommodation discrimination because she cannot establish that she was denied the ability to shop at Wal-Mart, or that a similarly-situated person outside the protected class was treated better.

24. As the testimony revealed and as demonstrated by the surveillance footage viewed during the final hearing, Ms. Amis and the store manager briefly approached Petitioner in the checkout line. During that time, Petitioner became agitated and loud and engaged in a non-stop verbal assault to the point a person "could not get a word in." However, no one from Wal-Mart tried to stop or stopped Petitioner from purchasing her selected merchandise and she proceeded through the checkout line while continuing to yell about her rights, her dogs, and her papers for the dogs. The evidence demonstrated that Petitioner was not asked to leave Wal-Mart until she engaged in a heated exchange with the store manager. In general, a disability does not grant

permission for a disabled person to become disruptive in a public place. Therefore, asking a disruptive person to leave a public accommodation is neither discriminatory nor unreasonable. See, e.g., Rosado Maysonet v. Solis, 409 F. Supp. 576, 579-80 (D.P.R. 1975) (finding no inference of racial discrimination where plaintiffs were excluded from casino due to refusal to comply with dress code and "rowdy" intoxicated behavior); Evans v. Holiday Inns, Inc., 951 F. Supp. 85 90 (D.Md. 1997) (granting motion for summary judgment where plaintiffs failed to establish prima facie case of discriminatory enforcement of a motel policy regarding sanctions for noise and obnoxious behavior).

25. Similarly, treating Petitioner in a rude or hostile manner when she herself was rude and hostile does not demonstrate that such behavior or Wal-Mart's actions were discriminatory. See Lizardo v. Denny's Inc., 270 F.3d 94, 102 (2d Cir. 2001) ("A failure to greet customers on an extremely busy evening and an exasperated-even testy-response to a complaint of discrimination do not constitute marked hostility as defined, nor are they conduct which should be presumed to have its origins in racial bias . . . the heated exchange of words does suggest anger, but there is nothing to suggest that the anger stemmed from a bias against people of [the plaintiff's] race."). See also Robertson v. Burger King, Inc., 848 F. Supp. 78, 81 (E.D. La. 1994).

26. Additionally, because Petitioner appeared hostile and disruptive, the manager called the police. Petitioner also asked that the police be called and called 911 to confirm they were on their way. There was no evidence that demonstrated the store manager acted in a discriminatory manner towards Petitioner when he called the police and made a truthful report to them. Under the facts of this case, calling the police, and making a truthful report when a customer is loud and disruptive do not constitute discrimination on the part of Wal-Mart. Aviles v. Cornell Forge Co., 241 F.3d (7th Cir. 2001). Wal-Mart did not ask that Petitioner be arrested. It was Petitioner's own behavior that resulted in the sheriff's deputy's decision to arrest her.

27. In fact, the call to the police did not interfere with Petitioner completing her transaction at the store. Petitioner completed her shopping and purchases.

28. However, even assuming Petitioner presented a prima facie case of disability discrimination, Respondent presented evidence of a legitimate, nondiscriminatory reasons for its actions. Petitioner became angry and disruptive at Wal-Mart. It was reasonable for Wal-Mart personnel to request that she leave the property and to call the police to ensure that she left without incident when Petitioner became disruptive, and was creating a disturbance at 3:00 in the morning. There was no

evidence to suggest that Wal-Mart's nondiscriminatory reason for asking Petitioner to leave was pre-textual. Aviles, supra. Alexis v. McDonald's Restaurants, Inc., 67 F.3d 341, 347-48 (1st Cir. 1985) (plaintiff's testimony that defendant acted "angrily" toward plaintiff with a negative tone and "had 'no reason' to eject" plaintiff from restaurant failed as a matter of law to demonstrate purposeful discrimination, noting that there was no probative evidence indicating that the manager's petulance was anything other than a race-neutral reaction to a stressful encounter). Specifically, even if Petitioner could establish a prima facie case, which she cannot, Wal-Mart had a legitimate reason for calling the Bay County Sheriff's office. Therefore, Petitioner has not established that she was subjected to public accommodation discrimination and the Petition for Relief should be dismissed.

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 dismissing Petitioner's Complaint of Discrimination and Petition for Relief.

DONE AND ENTERED this 1st day of November, 2011, in
Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of November, 2011.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Amy Harrison Turci, Esquire
Ford & Harrison LLP
225 Water Street, Suite 710
Jacksonville, Florida 32202

Cari Anderson
Post Office Box 371792
Las Vegas, Nevada 89137

Larry Kranert, General Counsel
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.