

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MILDRED R. SMITH, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 11-2269  
 )  
 JUST 1 MORE BAR AND GRILL, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on July 20, 2011, in Lakeland, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mildred R. Smith, pro se  
Post Office Box 4158  
Lake Wales, Florida 33859

For Respondent: Robert H. Grizzard, II, Esquire  
Robert H. Grizzard, II, P.A.  
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Just 1 More Bar and Grill (hereinafter the "Bar"), discriminated against Petitioner, Mildred R. Smith, by refusing her entry into the Bar due to her race, African-American.

PRELIMINARY STATEMENT

The Florida Commission on Human Relations (the "Commission") filed a Transmittal of Petition with the Division of Administrative Hearings on May 5, 2011. The Transmittal contained a Petition for Relief filed by Petitioner. The Commission had previously made a determination that cause existed under the allegations set forth in the Petitions. The Commission did not appear at the final hearing.

At the final hearing, Petitioner testified on her own behalf. Petitioner did not offer any exhibits into evidence. The Bar called five witnesses: Barry Jackson, Jake Asberry, Lavelle White, Kerry Winkler, and Juana Winkler. The Bar offered two exhibits into evidence, which were received without objection.

The final hearing was taped by the presiding officer on a digital recorder, but no transcript of the tape was made. By rule, the parties were allowed ten days from the date of the final hearing to submit proposed recommended orders. Petitioner and Respondent each submitted a post-hearing submission. Each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American woman.

2. The Bar is a Florida sole proprietorship which operates as an establishment selling alcohol for consumption on the premises. Despite its name, there is no grill or food service at the Bar. The Bar is owned by Kerry Winkler, a Caucasian male.

3. On or about May 8, 2011, Petitioner was going to meet a male friend at an establishment across the street from the Bar. Petitioner could not remember the exact date, but thought it was in April or May. Petitioner was accompanied by a female friend. Petitioner and her female friend had just left church, and it was approximately three or four o'clock on a Sunday afternoon.

4. Upon arrival at the male friend's establishment, no one was there. Petitioner decided to go into the Bar to have a beer while she waited. Her companion did not join her.

5. Petitioner recounts that as she started to enter the Bar, a man stood in the doorway, held out his hand, and said, "You can't come in here." Nothing more was said. The man was a large white man and wearing a "biker's jacket" with a rag on his head. He had a large mustache.

6. Petitioner says that she could see into the Bar and that all the patrons in the Bar were white. She turned around and walked back to her car. As she crossed the parking lot, a man sitting on a motorcycle said, "Man, that was quick."

7. Petitioner concluded that she had been discriminated against because of her race. She believed she had been denied admission to the Bar because she is African-American. She filed a complaint with the Florida Commission on Human Relations about the incident. In her verified complaint, Petitioner said that she "was met by a white female (Kerry Winkler) who told me I could not enter the building and that I was not welcome there."

8. Under oath at the final hearing, Petitioner said that she could not explain her verified statement to the Commission, because she remembers being met by a large white male, not a woman. She did not know why the name Kerry Winkler was in her signed statement. Kerry Winkler, the owner of the Bar, is, in fact, a Caucasian male. At the final hearing, Petitioner was introduced to Kerry Winkler; she said he was not the man who met her at the door of the Bar.

9. No one associated with the Bar knows who the man was that Petitioner met at the front door. There are no employees fitting his description and neither the owner, nor patrons at the Bar, recognized the person Petitioner described.

10. Several regular patrons of the Bar testified at final hearing. Each of them was an African-American male. Each affirmed the Bar's open policy of allowing all people to come into the Bar. None of them had ever witnessed any

discriminatory behavior at the Bar, especially by the owner who they all knew and respected.

11. Neither the owner, nor his wife (who was likely operating the Bar on the day in question), could identify the person that Petitioner described. No one by that description is an employee or otherwise affiliated with the Bar.

12. Neither the owner, nor his wife, was aware that Petitioner had allegedly been denied admission into the Bar until several months after the fact. They received notice of the allegation from the Commission well after the fact.

13. Petitioner did not contact the Bar after the fact to make a complaint or report the alleged incident.

#### CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2010). All references to Florida Statutes herein shall be to the 2010 codification.

15. The Florida Civil Rights Act of 1992 (the "Act") is codified in sections 760.01 through 760.11 and 509.092, Florida Statutes. The Act is modeled after Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000, et seq. Therefore, case law interpreting Title VII is also relevant to cases

brought under the Act. Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

16. Section 760.08 states:

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.

17. Public accommodations are generally described as hotels, inns, restaurants, motion picture theaters, concert halls, stadiums, etc. The Act would apply to the Bar, a place of public accommodation. Petitioner is an African-American female and, thus, a member of a protected class.

18. In a discrimination case, the petitioner has the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). If the petitioner proves a prima facie case of discrimination, the burden shifts to the respondent to proffer a legitimate, non-discriminatory reason for the action it took. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The respondent's burden is one of production, not persuasion. The burden then shifts back to the petitioner to prove that the proffered reason is pretext and that the respondent

intentionally discriminated against the petitioner. Id. at 252-256.

19. Petitioner has the initial burden of proving by a preponderance of the evidence that the Bar violated her rights by refusing to allow her admission into the Bar because of her race. This is what Petitioner alleged in her complaint to the Commission. §§ 120.57(1)(j) and 760.34(5).

20. A prima facie showing of discrimination simply requires Petitioner to show that: (1) she is a member of a protected class; (2) she attempted to enjoy the services of a public accommodation; (3) she was denied those services; and (4) such services remained available to similarly-situated persons outside the protected class. See, e.g., Wells v. Burger King Corp., 40 F. Supp. 2d 1366 (N.D. Fla. 1998).

21. While Petitioner did prove she is a member of a protected class and that she wished to enjoy the services offered by the Bar, she could not establish the remaining elements of a prima facie case. There is no credible, persuasive evidence that the Bar denied her entry or that other persons outside the protected class, who attempted to go into the Bar, were allowed.

22. Failure to establish a prima facie case will require entry of a decision in favor of Respondent. Earley v. Champion Int'l Corp., 907 F.2d 1077 (11th Cir. 1990).

23. If Petitioner had established a prima facie case, the burden would then shift to the Bar to show that the actions it took were not discriminatory, but were based on other factors. However, inasmuch as the Bar was unaware of Petitioner's claim that she was denied admission and there is no evidence that the person who allegedly denied her admission is affiliated with the Bar, it is impossible for the Bar to defend its actions. As stated in Earley, infra, at 1081, "To a large extent, of course, the strength or weakness of the inference of discrimination created by the [Petitioner's] prima facie case defines the nature of the [Respondent's] rebuttal." (citing Meiri v. Dacon, 759 F.2d 989, 997 (2d. Cir. 1985)).

24. Under the shifting burden analysis, Petitioner would then have to provide evidence as to why the Bar's reasons were mere pretext and that the real reason for its actions was discrimination. Petitioner provided no evidence that would apply to that element of the analysis.

25. The Bar, in its defense of Petitioner's allegations, provided the testimony of several African-American patrons as to the non-discriminatory atmosphere at the Bar. Although such testimony does not directly address Petitioner's claim of discrimination on the day in question, it is relevant to show that the Bar and its owner were not known to practice discrimination and, thus, would not have been likely to



discriminate against Petitioner. See, e.g., McCuller v. Gaudry, 650 P.2d 148 (Or. Ct. App. 1982) (A bar's past practice of discrimination was admissible to help establish its intent to practice racial discrimination.).

26. There is no persuasive evidence that Petitioner was discriminated against by the Bar or anyone affiliated with the Bar. Petitioner failed to prove her claim.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief filed by Mildred R. Smith in its entirety.

DONE AND ENTERED this 8th day of August, 2011, in Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 8th day of August, 2011.

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.