

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRACIE INMAN,)
)
 Petitioner,)
)
 vs.) Case No. 11-5602
)
 JIAN DENG BAO, d/b/a CHINA)
 GARDENS RESTAURANT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on January 10, 2012, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sharon Caserta, Esquire
Jacksonville Area Legal Aid,
Deaf/Hard of Hearing
Legal Advocacy Program
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For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue is whether Respondent, Jian Deng Bao, d/b/a China Gardens Restaurant ("China Gardens") denied Petitioner full and equal enjoyment of the goods and services offered at its place

of public accommodation, in violation of section 760.08, Florida Statutes (2011).^{1/}

PRELIMINARY STATEMENT

On or about May 23, 2011, Petitioner Traci Inman ("Petitioner") filed with the Florida Commission on Human Relations ("FCHR") a Public Accommodation Complaint of Discrimination against China Gardens. Petitioner alleged that she had been discriminated against in violation of chapter 760, Florida Statutes:

On or about January 18, 2011, the Complainant went to China Gardens restaurant for dinner accompanied by her certified service dog Nauly and two companions.

Complainant attempted to enter the restaurant for dine-in service but was denied access by a female employee who told her the dog could not enter the restaurant.

The employee refused the Complainant, her service animal and her companions entrance to the restaurant, and told them they would either need to leave or order the food for takeout.

The FCHR investigated Petitioner's Complaint. In a letter dated October 6, 2011, the FCHR issued its determination that there was reasonable cause to believe that an unlawful public accommodation practice occurred.

On October 31, 2011, Petitioner timely filed a Petition for Relief and Administrative Hearing with the FCHR. On November 1, 2011, the FCHR referred the case to the Division of

Administrative Hearings ("DOAH"). The case was scheduled for hearing on January 10, 2012, at 9:30 a.m.

No representative of China Gardens appeared at the final hearing on January 10, 2012, the commencement of which was delayed by 10 minutes to allow China Gardens every opportunity to be heard. The hearing proceeded in order to allow Petitioner to present her prima facie case. The hearing adjourned at approximately 10:00 a.m.

On January 18, 2012, the undersigned entered an order to show cause directing China Gardens to provide, within 10 days, reasons why the record in the case should not be closed and the recommended order entered based on the current record. China Gardens did not respond to the order to show cause. An order closing the record was entered on January 30, 2012.

At the hearing, Petitioner testified on her own behalf and presented the testimony of Officer N. S. Eddy of the Jacksonville Sheriff's Office ("JSO"); Petitioner's husband, Kevin Inman; and Petitioner's daughter, Christina Inman. Petitioner's Exhibits 1 through 3 were admitted into evidence.

No court reporter was present at the hearing. The undersigned used a digital recorder to memorialize the hearing, and used the recording to assist in the writing of this recommended order. Petitioner timely filed a Proposed

Recommended order on February 3, 2012. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner, Tracie Inman, is deaf and blind. She uses a service dog to assist with her mobility. She is a resident of Duval County.

2. China Gardens is a restaurant operating at 13740 Beach Boulevard, #112, Jacksonville, Florida 32224.

3. Mrs. Inman is married to Kevin Inman. They have a daughter, Christina, who is of middle school age. Prior to January 18, 2011, the Inman family had dined at China Gardens at least ten times over the past few years.

4. On January 18, 2011, the Inman family went to China Gardens for dinner. On this occasion Mrs. Inman was accompanied, for the first time at China Gardens, by her service dog.

5. As the Inmans entered the restaurant, they were met by Hang Ping Bao, a female employee of the restaurant. Ms. Bao repeatedly stated, "No dog. No dog allowed."

6. Mr. Inman attempted to explain to Ms. Bao that the restaurant was required by law to allow his wife to enter with her service dog. He showed Ms. Bao a "Leader Dog Card" explaining Ms. Inman's right to enter places of public accommodation with her dog. Ms. Bao nonetheless continued to

refuse to allow the Inmans to enter the restaurant. She told them that they could order food to take out but they would not be seated in the restaurant. Other customers were seated and eating in the restaurant at the time the Inmans were denied entrance.

7. The family walked out of the restaurant. From the China Gardens parking lot, Mr. Inman phoned the non-emergency line of the JSO to report the incident and request assistance. The dispatcher who answered the call was unaware that denying service in a place of public accommodation based on the presence of a service dog is a criminal offense under section 413.08(4), Florida Statutes. Because she believed the incident described by Mr. Inman constituted only a civil matter, the dispatcher refused to send an officer to assist.

8. Mr. Inman later spoke with the Florida Department of Law Enforcement ("FDLE") to confirm his understanding of the law. The FDLE representative gave Mr. Inman the statutory citations to establish that the incident at China Gardens was indeed a matter for the police.

9. On January 19, 2011, Mr. Inman again phoned the JSO. This time the dispatcher understood the situation and agreed to send an officer to meet the Inmans at China Gardens to follow up on their complaint. Officer N.S. Eddy responded to the call and filed a police report, which was admitted into evidence.

10. Officer Eddy testified that Ms. Bao admitted to him that she had refused to allow the family to enter the restaurant with the service dog. Ms. Bao explained that she was unaware that the law required her to allow entrance to persons with service dogs. She assured Officer Eddy that China Gardens would comply with the law in the future. No criminal prosecution was brought against China Gardens.

11. At the hearing, Mrs. Inman testified that she felt humiliated by the incident on January 18, 2011. Other patrons in the restaurant witnessed the confrontation with Ms. Bao, which caused Mrs. Inman great embarrassment. Mrs. Inman testified that her family has not returned to China Gardens since the incident, and that she is fearful of going into any restaurant with which she is not already familiar.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

13. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, Florida Statutes, prohibits discrimination in the workplace and in places of public accommodation.

14. Subsection 760.08, Florida Statutes, provides:

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.

15. China Gardens is a "public accommodation" as defined in subsection 760.02(11), which provides the following, in relevant part:

"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:

* * *

(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....

16. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, prohibits discrimination in places of public accommodation, in language identical to that found in section 760.08, except for the omission of certain protected classes,

including handicap. Due to the lack of Title II cases, federal courts routinely find guidance in the law of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, including the law of the shifting burdens of production of evidence. See Fahim v. Marriott Hotel Serv., 551 F.3d 344, 349 (5th Cir. 2008), and cases cited therein. The United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), also provides the model for Title II cases. Fahim, 551 F.3d at 349-350.

17. Under the McDonnell analysis, as modified for cases of discrimination in places of public accommodation, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to Respondent to rebut this preliminary showing by producing evidence that the allegedly discriminatory action was taken for some legitimate, non-discriminatory reason. If Respondent rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that Respondent's offered reason was pretextual or that Respondent's reason, if true, was only one reason for its action and that another motivating factor was Petitioner's protected characteristic.

18. In order to prove a prima facie case of unlawful public accommodation discrimination under section 760.08, Petitioner must establish that: (1) she is a member of the protected class; (2) she attempted to contract for the services of a public accommodation; (3) she was denied those services; and (4) the services were made available to similarly situated persons outside her protected class. Fahim, 551 F.3d at 350.

19. Petitioner has proven a prima facie case of unlawful employment discrimination. Petitioner established that she is a member of a protected group, in that she has the handicaps of deafness and blindness. Petitioner attempted to contract for the services of China Gardens by entering the restaurant with her family and service dog. Petitioner was denied the requested services solely because of the presence of her service dog. Other patrons were dining in the restaurant at the time Petitioner was denied entrance.

20. Respondent did not appear at the hearing. Therefore, no rebuttal case was made.

21. After an administrative hearing, if the FCHR finds that a discriminatory practice has been committed, the FCHR must issue a final order "prohibiting the practice and providing affirmative relief from the effects of the practice . . ."
§ 760.11(6), Fla. Stat. However, the FCHR has no authority to award monetary relief for non-quantifiable damages such as pain,

embarrassment or humiliation. City of Miami v. Wellman, 976 So. 2d 22, 27 (Fla. 3d DCA 2008) (non-quantifiable damages "are uniquely within the jurisdiction of the courts").

22. Petitioner seeks an award of attorney's fees pursuant to section 760.11(6). However, that subsection provides that "the commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." Thus, the undersigned lacks authority to make such an award in the first instance. Under all the circumstances of this case, the undersigned recommends that the FCHR award Petitioner her costs and a reasonable attorney's fee, and remand the case for issuance of a recommended order regarding the amount of attorney's fees and costs owed to Petitioner. See, e.g., Caiminti v. The Furniture Enterprises, LLC, FCHR Order No. 10-022 (Feb. 26, 2010).

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order:

1. Finding that Respondent Jian Deng Bao, d/b/a China Gardens Restaurant, committed an act of public accommodations discrimination against Petitioner Tracie Inman;

2. Prohibiting any future acts of discrimination by Respondent; and

3. Awarding Petitioner her costs and a reasonable attorney's fee.

DONE AND ENTERED this 16th day of February, 2012, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2012.

ENDNOTE

^{1/} Citations shall be to Florida Statutes (2011) unless otherwise specified. Section 760.08, Florida Statutes, has been unchanged since its adoption in 2003.

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.