STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ERIC WENDELL HOLLOMAN,

Petitioner,

vs. Case No. 14-1920

LEE WESLEY RESTAURANTS, d/b/a
BURGER KING,

Respondent.
_____/

RECOMMENDED ORDER OF DISMISSAL

A duly-noticed hearing was held in this case on June 19, 2014 by video teleconference in Tallahassee, Florida, and Jacksonville, Florida, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Eric Wendell Holloman, pro se
Post Office Box 13153
Jacksonville, Florida 32206

For Respondent: Karen K. Rose, Qualified Representative
Lee Wesley Restaurants
6817 Southpoint Parkway, Suite 2101
Jacksonville, Florida 32216

STATEMENT OF THE ISSUE

Whether Respondent is liable to Petitioner for public accommodation discrimination based on Petitioner's handicap, in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

Petitioner, Eric Wendell Holloman, filed a Complaint of Discrimination (Complaint) against Burger King Restaurant on November 27, 2013. While the Complaint is filed on a form titled "Employment Complaint of Discrimination," Petitioner alleges a case of public accommodation discrimination.

The Florida Commission on Human Relations (Commission) investigated the Complaint, and on April 14, 2014 issued a Determination: No Cause, and Notice of Determination: No Cause, determining no reasonable cause existed to believe an unlawful public accommodation discrimination practice occurred.

Petitioner timely filed with the Commission a Petition for Relief from an unlawful public accommodation practice, which was forwarded to the Division on April 25, 2014, for assignment of an Administrative Law Judge to conduct the final hearing in this matter.

The final hearing commenced as scheduled on June 19, 2014, by video teleconference in Tallahassee and Jacksonville.

Petitioner testified on his own behalf and offered no exhibits. Respondent was represented by Karen Rose, its Qualified Representative, and offered Exhibits P1 through P4, which were admitted into evidence. Respondent attempted to introduce the testimony of Ronald Gibson, whose testimony was excluded because Respondent did not disclose his name and

address to Petitioner at any time prior to the hearing, in violation of the Initial Order entered on April 25, 2014.

The final hearing was recorded by a court reporter; however, the parties did not order a transcript of the proceedings. Both parties timely filed Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Eric Wendell Holloman, is a 60-year-old man who resides in Jacksonville, Florida, and has been diagnosed with arthritis, diabetes, and high blood pressure.

2. Respondent, Lee Wesley Restaurants, LLC, is the owner and operator of the Burger King restaurant located at 210 East State Street in Jacksonville, Florida. The corporate headquarters are located at 6817 Southpoint Parkway, Suite 2101, Jacksonville, Florida 32216.

3. At all times relevant hereto, Respondent employed more than 15 employees.

4. Petitioner has a driver's license, but he asserted that he does not know how to drive a car. Petitioner's primary method of transportation is his bicycle.

5. Petitioner eats at a number of fast-food restaurants in the area of State Street in Jacksonville. Petitioner testified that he can't cook because he doesn't have a wife.

6. Petitioner administers his own insulin to treat his diabetes and takes medication for high blood pressure.

7. Petitioner uses a walking cane which was provided to him by the local Veteran's Administration where he receives medical care.

8. Petitioner's cane is metal with four "legs" extending outward from the bottom of the upright metal post. Each leg is capped with a rubber "foot." The cane will stand up on its own when not in use.

9. Petitioner recounts the following events in support of his claim of public accommodation discrimination:

On June 4, 2013, Petitioner entered the Burger King in question, ordered a meal with a drink, and took it to a table in the dining area where he proceeded to eat. At some point while he was dining, Petitioner accidentally knocked over his drink with his cane, which he testified was on the table with his food. Petitioner testified that no employee of the restaurant spoke to Petitioner about the spill, offered to help him clean it up, or otherwise acknowledged that he spilled his drink.

Petitioner did not clean up the spill either. Petitioner helped himself to a drink refill and left the restaurant without incident.

The following day, June 5, 2013, he entered the same restaurant and attempted to order a meal. According to

Petitioner, he was told by an employee that he must leave and he would not be served at that restaurant. Petitioner identified Randall Gibson, the man seated with Respondent's Qualified Representative at the final hearing, as the employee that asked him to leave the restaurant on June 5, 2013.

Petitioner exited the restaurant via the rear door, which he testified was close to the flag pole where he had parked his bicycle. According to Petitioner, two Burger King employees followed him outside and threatened him with "bodily harm" if he returned to the restaurant.

Petitioner was clearly upset with Mr. Gibson and other employees of the Burger King. Petitioner explained that on June 4, 2013, when Petitioner ordered his food at the counter, Mr. Gibson and a female employee were engaged in behavior he found offensive. Specifically, Petitioner testified that Mr. Gibson was "up behind" the female employee engaging in hip and pelvic gyrations. Petitioner twice stood up from his chair and demonstrated the hip and pelvic gyrations to the undersigned.

10. Petitioner testified that he has at least 50 cases pending in state and federal courts alleging civil rights violations.

11. The final hearing was one and one-half hours in duration. Only a small portion of the hearing time was devoted

to presentation of evidence relevant to Petitioner's claim of discrimination based on a disability. During his testimony, Petitioner often strayed into lengthy tirades against racial discrimination, quoting from the United States Constitution, as well as the writings of Dr. Martin Luther King, Jr., and other leaders of the Civil Rights Movement. The undersigned had to frequently reign in Petitioner's testimony to relevant events.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter of, and the parties to, this proceeding. § 120.569 and 120.57(1), Fla. Stat. (2014).

13. Section 760.08, Florida Statutes (2013),[1/] provides as follows:

> **760.08 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.

14. Section 760.02 defines "public accommodations" 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:
>
> * * *
>
> (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.

15. Respondent is a "public accommodation" for the purposes of the statute.

Burden of Proof

16. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, prohibits discrimination in places of public accommodation, in identical language as that found in section 760.08, Florida Statutes, 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 Servs., 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 (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 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 alleged 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 the 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) he is a member of a protected class; (2) he attempted to contract for services of a public accommodation; (3) he was denied those services; and (4) the services were made available to similarly situated persons outside his protected class. Fahim, 551 F.3d at 350.

Handicap

19. Petitioner alleges that he was denied the equal enjoyment of Respondent's services based on his handicap. Petitioner identifies his handicap as having to walk with a cane due to arthritis in his knees and hips.

20. There is no definition for the term "handicap" used in section 760.08, Florida Statutes, and the Commission has not adopted a rule to define the term.

21. The courts have construed the term "handicap" in chapter 760 in accordance with the definitions of "disability" in the federal Rehabilitation Act of the Americans with Disabilities Act (ADA). See, e.g., St. John's Sch. Dist. v. O'Brien, 973 So. 2d 535, 540 (Fla. 5th DCA 2007); Green v. Seminole Elec. Coop., 701 So. 2d 646, 647 (Fla. 5th DCA 1997); Brand v. Fla. Power Corp., 633 So. 2d 504, 510 n. 10 (Fla. 1st DCA 1994).

22. A petitioner has a "disability" for purposes of the ADA if he (1) has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) has "a record of such impairment"; or (3) is "regarded as having such an impairment." 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

23. "To rise to the level of a disability, an impairment must significantly restrict an individual's major life

activities. Impairments that result in only mild limitations are not disabilities." Lewis v. Arlen House East Condo. Assoc., Case No. 11-5475 (Fla. DOAH June 12, 2012).

24. The ADA does not define "major life activities." Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994). However, the Equal Employment Opportunity Commission (EEOC) regulations broadly define "major life activity" to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, and working. 29 CFR § 1630.2(i).

25. The determination whether an impairment substantially limits a major life activity requires an individualized assessment. 29 CFR § 1630.2(j)(1)(iv). In relevant part, the regulations suggest considering "the nature and severity of the impairment." 29 CFR § 1630.2(j)(4).

26. As applied to the major life activity of walking, an individual who, due to an impairment, walks at an average speed, or even at moderately below average speed, is not disabled. See Turner v. the Saloon, Ltd., 595 F.3d 679, 689 (7th Cir. 2010) (citing 29 C.F.R. app.); Rossbach v. City of Miami, 371 F.3d 1354, 1358 (11th Cir. 2004)("someone who walks, sits, stands, or sleeps 'moderately below average' is not disabled under the Act.") See also, Wells v. Willow Lake Estates, 390 Fed. Appx. 956, 958 (11th Cir. 2010)(plaintiff who contended he "cannot

bend or move easily" has not adequately pled that he is disabled); Lewis, Case No. 11-5475, RO at 9-10 (petitioner did not demonstrate that her impairment rose to the level of a disability when she offered no testimony that her arthritis caused her to walk at a slower pace than other individuals, have difficulty with balance, break frequently when walking, or use an assistive device).

27. Use of an assistive device for walking is probative of whether an individual is substantially limited in his or her ability to walk. See Drexel Univ., 94 F.3d at 106 (affirming the district court's holding that, "as a matter of law that [plaintiff's] trouble climbing stairs [] does not substantially limit his ability to walk" where plaintiff "presented no evidence that he required special devices like a cane or crutches to aid him in walking."); Lewis, Case No. 11-5475, RO at 9 (petitioner did not demonstrate that her impairment rose to the level of a disability where there was no "evidence that Petitioner has difficulty with balance, utilizes an assistive device (e.g., a walker or cane), moves at a slower pace than most individuals, requires frequent breaks, or is in any manner severely restricted in her ability to walk.").

28. However, the use of an assistive device is not the sine qua non of being substantially limited in walking. See EEOC v. E.I. DuPont de Nemours & Co., 406 F. Supp. 2d 645, 656

(E.D. La. 2005), aff'd, 480 F. 3d 724 (5th Cir. La. 2007), rev'd in part, 480 F. 3d 724 (5th Cir. La. 2007)(reversed as to award of front pay only). The appropriate inquiry is not whether an individual uses an assistive device, but whether the individual is "significantly restricted as to the condition, manner, or duration" in which he can walk as compared to an average person in the general population." Id., quoting, 29 CFR § 1630.2(j)(1)(ii).

29. The only evidence introduced by Petitioner to prove that his arthritis limits his ability to walk is his claim that he walks with a cane. Petitioner offered no other evidence to demonstrate that he is significantly restricted as to the condition, manner, or duration in which he can walk as compared to an average person in the general population.

30. The undersigned carefully considered Petitioner's evidence, along with his testimony that he rides a bicycle every day, and the agility demonstrated by the hip and pelvic gyrations he offered more than once during the final hearing. Petitioner's evidence is insufficient to establish that his impairment rises to the level of a disability.

31. Petitioner offered no evidence that he either "has a record of a disability" or is "regarded as having a disability."

32. Thus, Petitioner has failed to prove the first element of a prima facie case of public accommodation discrimination – that he is a member of a protected class, i.e, handicap.

33. Assuming, arguendo, Petitioner did prove he had a handicap pursuant to the Act, the undersigned does not find that Petitioner proved the third element – that he was denied the services of the Burger King establishment in question.[2/] Petitioner's evidence was limited to his personal testimony, which was simply not credible. It is within the purview of the trier-of-fact to weigh the conflicting evidence and make a determination as to the credibility of witnesses. See Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277 (Fla. 1st DCA 1985).

34. Petitioner testified that he left the restaurant via the "back door" which was closer to his bicycle, leaving the undersigned with a number of questions and doubts: Why would Petitioner exit the restaurant through the "back door" which was "closer to where his bicycle was parked" but enter the restaurant through a door which was further from where his bicycle was parked? Why would Petitioner place his cane, which stands up on its own, on the table while he was eating? How did Petitioner knock over his drink with the cane?

35. Further, it is implausible that Burger King employees were so upset over the spill that they banned Petitioner from the restaurant the following day, but not one Burger King

employee spoke to Petitioner about the spill on the day it occurred. It is equally implausible that the Burger King Manager was performing a bump and grind with a cashier in full view of the patrons of the restaurant.

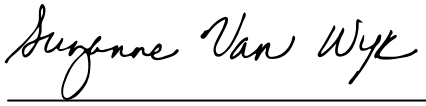
36. Finally, Petitioner's credibility was sorely undermined by his revelation that he has filed over 50 civil rights cases in state and federal courts, as well as his numerous colorful detours into issues unrelated to discrimination on the basis of disability.

37. Petitioner failed to carry his burden of proof to establish a prima facie case of public accommodation discrimination based on a disability by a preponderance of the evidence.

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 dismissing the Petition for Relief filed by Eric Wendell Holloman in FCHR No. 2013-02160.

DONE AND ENTERED this 28th day of July, 2014, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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 28th day of July, 2014.

ENDNOTES

[1/] Except as otherwise noted herein, all statutory references are to the 2013 version of the Florida Statutes.

[2/] There is no question that Petitioner attempted to contract for the services provided by the Burger King, thus satisfying the second element of a prima facie case.

COPIES FURNISHED:

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

Karen K. Rose, Controller
Lee Wesley Restaurants
6817 Southpoint Parkway, Suite 2101
Jacksonville, Florida 32216

Eric Wendell Holloman
Post Office Box 13153
Jacksonville, Florida 32206

Cheyanne Costilla, 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.