STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHYLLIS PHYL,

Petitioner,

vs.

Case No. 14-4457

G6 HOSPITIALITY,LLC,
d/b/a STUDIO 6,

Respondent.[1/]
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 18, 2015, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Phyllis Phyl, pro se
6079 Boca Colony Drive, Unit 1012
Boca Raton, Florida 33433

For Respondent: Warren Astbury, Esquire
Ogletree, Deakins, Nash, Smoak
& Stewart, P.C.
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Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, a public lodging establishment, unlawfully discriminated against Petitioner, who is African-American, by refusing to provide her accommodations or service based upon race.

PRELIMINARY STATEMENT

In a Public Accommodation Complaint of Discrimination filed with the Florida Commission on Human Relations ("FCHR") on May 5, 2014, Petitioner Phyllis Phyl alleged that she had been discriminated against at Respondent's hotel in Pompano Beach, Florida. Specifically, Ms. Phyl complained that, because she is black, Respondent had refused to check her in as soon as she arrived at the hotel, where she had a reservation for a two-night stay beginning on February 22, 2014, claiming that no rooms were available.

The FCHR investigated Ms. Phyl's complaint and, on August 14, 2014, issued a notice stating that it had found "no reasonable cause to believe that a public accommodation violation occurred." Thereafter, Ms. Phyl timely filed a Petition for Relief with the FCHR in which she repeated her allegation that Respondent had refused promptly to offer accommodations or service based upon race.

On September 22, 2014, the FCHR transferred the matter to the Division of Administrative Hearings for further proceedings, and an administrative law judge ("ALJ") was assigned to the case.

After a couple of continuances, the final hearing took place on March 18, 2015, with both parties present. Petitioner testified on her own behalf. Petitioner's Exhibits D, F, G, I,

J, K, M, Q, X, and Y were received in evidence. Petitioner's Exhibits H and R were offered and rejected as inadmissible hearsay. Respondent called its employees Juan Carlos Villa and Charles Carter as witnesses. Respondent's Exhibits 1 through 14 were admitted into evidence without objection.

The final hearing was transcribed, but neither party ordered a transcript of the proceeding. Each side submitted a proposed recommended order before the deadline established at the conclusion of the hearing, which was March 30, 2015.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2014 Florida Statutes.

FINDINGS OF FACT

1. Petitioner Phyllis Phyl ("Phyl") is an African-American woman who resides in Boca Raton, Florida.

2. Respondent G6 Hospitality, LLC, d/b/a Studio 6 ("Studio 6"), is the owner and operator of the Studio 6 Extended Stay Hotel located in Pompano Beach, Florida (the "Hotel").

3. Phyl arrived at the Hotel at around 1:30 p.m. on February 22, 2014. Previously, she had made a reservation for a two-night stay, booking a nonsmoking room with a queen bed. Phyl was aware that check-in time at the Hotel was 3:00 p.m., but she decided to take a chance that a room would be available for earlier occupancy. When Phyl attempted to register,

however, the clerk informed Phyl that no rooms were available for early check in.

4. Phyl elected to wait in her car, which was parked in the Hotel's parking lot. From there, she watched a black man enter the Hotel and walk out a few minutes later. Phyl assumed that he, too, had been told that his room was not ready. She did not, however, witness his attempt to check in (if that is what occurred), and therefore Phyl lacks personal knowledge of this man's transaction with the Hotel, if any.[2/]

5. Unhappy, Phyl walked around the Hotel grounds and peered through the window of an apparently vacant room, which she determined, based on her observation, was clean and ready for occupancy. Phyl might have been mistaken, for she could not see, e.g., the bathroom, but even if her assumption were correct, the fact is not probative of discriminatory intent. This is because a room is not "available" for guest occupancy at this Hotel until after a manager has inspected the room, deemed it "clean," and caused such information to be entered into the Hotel's computer system, at which point the front-desk clerk is on notice that the room is ready. Thus, there is a delay between the time the housekeeping staff finishes cleaning a room and the time the front-desk clerk is able to let the room to a guest.

6. After peeking in the seemingly empty room, Phyl returned to her car, and soon she noticed a white couple enter the Hotel, from which they exited several minutes later. Phyl did not witness the couple's activities inside the Hotel. The man and woman got into their car and drove around the Hotel premises. Phyl followed. She watched the couple park, leave their car, and enter a room. She observed the man retrieve some luggage and bring his bags to the room. Phyl assumed that this couple had just checked in.

7. Phyl returned to the Hotel lobby and inquired again about the availability of a room. This time the clerk told her a room was ready. Phyl checked in at 2:09 p.m.

8. Phyl stayed two nights, as planned, and paid the rate quoted in her reservation. When she checked out on February 24, 2014, the clerk refunded the $25 security deposit Phyl had given the Hotel at check in, which was required because she wanted to pay cash for the room (and did). Phyl claims that the clerk was rude to her, and so she left without taking a receipt.

9. Hotel business records show that on February 22, 2014, no guest checked in between Phyl's arrival at 1:30 p.m. and 2:09 p.m., when she herself checked in. The white man who (together with a female companion) seemed to have checked in while Phyl was waiting actually had checked in earlier that day,

at 11:14 a.m. The undersigned rejects as unfounded Phyl's contention that the Hotel's records are unreliable and possibly fraudulent and instead accepts them as persuasive evidence.

Ultimate Factual Determinations

10. At the material time, the Hotel was a "public lodging establishment" within the reach of section 509.092, Florida Statutes, and a "public accommodation" as that term is defined in section 760.02(11). Thus, the Hotel is accountable to Phyl for unlawful discrimination in violation of the Florida Civil Rights Act if such occurred.

11. The greater weight of the evidence, however, fails to establish that the Hotel refused accommodations or service to Phyl, or otherwise unlawfully discriminated against her. Rather, the Hotel provided Phyl the type of room she had reserved, at the quoted rate, for the length of stay she requested. Indeed, despite arriving 90 minutes before the Hotel's published check-in time, Phyl was able to get a room *early*, after waiting little more than half an hour. The Hotel's conduct, in this instance, cannot be faulted.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

13. Being a private enterprise, a hotel "has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator[.]" § 509.092, Fla. Stat. Under the Florida Civil Rights Act,[3/] however, a "public lodging establishment" may not refuse to serve any person on the basis of "race, creed, color, sex, physical disability, or national origin." Id. "A person aggrieved by a violation of [section 509.092] or a violation of a rule adopted [thereunder] has a right of action pursuant to s. 760.11." Id.

14. The term "public lodging establishment" as defined in section 509.013(4)(a)1., Florida Statutes, includes "any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests."

15. The term "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" and includes "[a]ny inn, hotel, motel, or other establishment which provides lodging to transient guests." § 760.02(11)(a), Fla. Stat.

16. As found, the Hotel was, in fact, both a public lodging establishment and a public accommodation at all relevant times.

17. Section 760.08 provides as follows:

> 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.

18. The undersigned finds persuasive the opinion of a federal district court sitting in Florida, which found, in a case brought under Florida law involving the allegation that a restaurant had discriminated against the African-American plaintiffs by requiring prepayment for their meals, that the substantive rights afforded under the state statute are informed by the federal anti-discrimination laws after which the Florida Civil Rights Act was patterned. See Stevens v. Steak n Shake, Inc., 35 F. Supp. 2d 882, 886 (M.D. Fla. 1998)("[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 Fla. Stat. § 509.092, and to determine the elements of [the plaintiffs'] civil rights claims under the Florida Statute."); see also Laroche v. Denny's, Inc., 62 F. Supp. 2d 1375 (S.D. Fla.

1999)(in case where restaurant was alleged to have refused service to black customers, court treated plaintiffs' federal and state law claims as having identical substantive elements).[4/]

19. The two federal statutes that guard against discrimination in public accommodations, including hotels, are Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq., and 42 U.S.C. § 1981. E.g. Stevens, 35 F. Supp. 2d at 886. As a practical matter, in race-based, refusal-to-serve cases, courts usually draw no meaningful distinction between the elements of a Title II claim, on the one hand, and a Section 1981 claim, on the other. E.g., id. at 886-87; Laroche, 62 F. Supp. 2d at 1382-83.

20. In Stevens, the district court, following federal precedents, held that to prevail under section 509.092, Florida Statutes, a plaintiff must establish three elements: "1.) that she is a member of a protected class; 2.) that defendant intended to discriminate against her on that basis; and 3.) that defendant's racially discriminatory conduct abridged a right enumerated in the statute." Id. at 887.

21. Other courts, including the district court in Laroche, have found the familiar McDonnell Douglas framework of elements and shifting burdens,[5/] which was fashioned for use in Title VII litigation, to be applicable in public accommodation cases. The McDonnell Douglas framework enables the plaintiff to make a

prima facie case without direct evidence of intent, which is often unavailable.[6/]

22. In Laroche, the court required the plaintiffs to establish, as a prima facie showing of discrimination, that:

> (1) they are members of a protected class; (2) they attempted to contract for services and to afford themselves the full benefits and enjoyment of a public accommodation; (3) they were denied the right to contract for those services and, thus, were denied the full benefits or enjoyment of a public accommodation; and (4) such services were available to similarly situated persons outside the protected class who received full benefits or enjoyment, or were treated better.

62 F. Supp. 2d at 1382; see also, e.g., Fahim v. Marriott Hotel Servs., 551 F.3d 344, 350 (5th Cir. 2008).

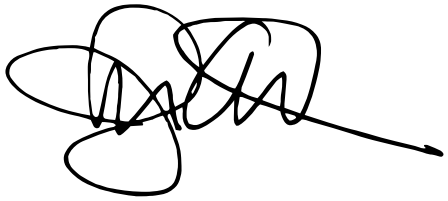
23. Phyl failed to make out a prima facie case of discrimination because she was not denied accommodations or service. She did not even suffer slow or delayed service. True, Phyl was not able to check in *immediately* upon her arrival, and she did have to wait approximately a half an hour for a room to become available. But the Hotel checked Phyl in nearly an hour before the published check-in time of 3:00 p.m. Phyl knew that she was taking a chance in arriving early that she would have to wait. Under the circumstances, any inconvenience she suffered was entirely predictable.

24. Moreover, there is no persuasive evidence that the Hotel had rooms available for early check in which it withheld from Phyl or let to other guests while making her wait. To the contrary, the persuasive evidence establishes that no rooms were available for occupancy at the moment Phyl arrived, and that as soon as a room became available, about 30 minutes later, the Hotel offered it to Phyl. Thus, even if Phyl had made a prima facie case of discrimination, which she did not, the Hotel articulated a legitimate, nondiscriminatory reason for the "delayed" service that the undersigned has found to be credible and nonpretextual.

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 Phyl's Petition for Relief.

DONE AND ENTERED this 22nd day of April, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 22nd day of April, 2015.

ENDNOTES

[1/] The undersigned has amended the style of the case to identify Respondent by its correct corporate name.

[2/] Phyl did not adduce any nonhearsay evidence at hearing to substantiate her assumption that the Hotel made another person of color wait for a room.

[3/] The Florida Civil Rights Act comprises sections 760.01-760.11 and 509.092, Florida Statutes. § 760.01(1), Fla. Stat.

[4/] This approach is in accord with the rule that federal anti-discrimination laws may properly be used for guidance in evaluating the merits of claims arising under section 760.10, Florida Statutes. See Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

[5/] In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court of the United States articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where the plaintiff relies upon circumstantial evidence. See also, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993).

Pursuant to this analysis, the plaintiff has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996)(citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

In Hicks, the Court stressed that even if the trier of fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." Id. at 519.

[6/] Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. The City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997).

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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.