STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUAN MONSALVO,

Petitioner,

vs. Case No. 14-4935

KEKE'S BREAKFAST CAFE,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Orlando and Tallahassee, Florida, on January 13, 2015, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Richard B. Celler, Esquire
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For Respondent: Alan Brent Taylor, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Charge of Discrimination filed by Petitioner on April 24, 2014.

PRELIMINARY STATEMENT

Petitioner, Mr. Juan Monsalvo (Petitioner), filed an Employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR), which alleges that his employer, KeKe's Breakfast Café, Inc. (Respondent or KeKe's), violated section 760.10, Florida Statutes (2013), by discriminating against him on the basis of national origin. Specifically, Petitioner alleges that he was the victim of discrimination as a result of Respondent enforcing a speak-English-only policy in the workplace. According to Petitioner, on February 12, 2014, he was forced to resign his employment with Respondent due to Respondent's alleged discriminatory employment practice.

The allegations were investigated, and on September 19, 2014, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on October 20, 2014. On October 21, 2014, FCHR transmitted the case to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing.

At the hearing, Petitioner testified on his own behalf and offered the testimony of no other witnesses. Mr. Keith Mahen,

co-owner of KeKe's, was the only witness to testify on behalf of Respondent. Joint Exhibits 1 and 2 were admitted into evidence. Petitioner's Exhibits 2, 6 and 9, and Respondent's Exhibits 2, and 5 through 7 were also admitted into evidence.

A Transcript of the final hearing was filed with the Division of Administrative Hearings on February 25, 2015. The parties each submitted a Proposed Recommended Order.

FINDINGS OF FACT

1. Petitioner is a resident alien and was born in Mexico. Petitioner's native language is Spanish. Petitioner has been in the United States of America for approximately eight years. During his time in the United States, Petitioner has learned to speak and read English but does not have the ability to write in English. Petitioner communicates with his friends and family in Spanish and admits that the only time he speaks English is when he is at his place of employment. Petitioner is bilingual although he prefers to speak Spanish. During times relevant to the instant matter, all employees at KeKe's spoke English and some of the employees were bilingual, speaking both Spanish and English.

2. Keke's is a restaurant that serves breakfast and lunch daily between the hours of 7:00 a.m. and 2:30 p.m. The restaurant is located in Orlando, Florida, and occupies a five thousand square foot building. In the kitchen of the restaurant

there is a "cooks' line" that contains 24 feet of cooking surface which includes a flat top griddle, open flames, and fryers. The cooks' line also contains a steam well and a bank of between four to six waffle irons. The waffle irons, when operational, have surface temperatures of about 425 degrees. Generally, there are four cooks assigned to the kitchen at any given time, with one cook preparing eggs, another preparing lunch items, a floater cook who is responsible for meats and home fries, and the fourth cook (expeditor) that helps to ensure that the meals are properly prepared and expeditiously delivered to the customers.

3. The kitchen also contains an area where fresh fruit, such as strawberries, is cut. In explaining the area where fruit is cut, the following evidence was presented:

> Q: Now, you mentioned you were on the cooks' line, and you were -- you were cutting fruit?
>
> A: Yes, we were cutting fruit.

The area where Petitioner was cutting fruit on the day in question is included within the area generally described as the "cooks' line."

4. In the kitchen at KeKe's, it is required that all cooks be able to effectively and efficiently communicate with one another. According to Keith Mahen,

> The cooks must communicate with each other on an immediate basis all day. Um, some of the gentlemen on the schedule only speak, to the best of my knowledge, one language, and they

> wouldn't have been able to understand what would or would not have been communicated if it would not have been in English.

Keke's employees act as a cohesive unit wherein the employees and management, and especially the line cooks, communicate with each other using a common language on an immediate basis during the workday. The ability to communicate by using a common language is critical in maintaining a safe working environment, and it also promotes the efficient delivery of food to the restaurant's customers.

5. Sometime in or around November 2013, Petitioner applied for a job as a line-cook at KeKe's. Prior to being hired, Petitioner was initially interviewed by Mr. Keith Mahen. The interview was conducted in English. Petitioner was next interviewed by Mr. Julio Barbados, the restaurant's kitchen manager. According to Petitioner, his interview with Mr. Barbados was conducted exclusively in Spanish. Mr. Mahen was not present when Petitioner was interviewed by Mr. Barbados. On November 15, 2013, Petitioner was hired by KeKe's to work as a line-cook with egg preparation being his primary area of responsibility.

6. Petitioner, upon commencing his employment at KeKe's, was trained by fellow kitchen employee Mr. Roberto Suriel. Petitioner and Mr. Suriel would always speak Spanish to one another during their training sessions. There is no evidence

that any member of management was present during times when Petitioner received instruction from Mr. Suriel or that Mr. Suriel delivered instruction to Petitioner during times when the cooks' line was active and food was being prepared for consumption by the restaurant's customers.

7. Petitioner, as part of KeKe's new employee orientation process, received an employee handbook that outlined the rules and regulations of his employment relationship with KeKe's. Petitioner signed a "handbook receipt" wherein he acknowledged that he received and read the employee handbook. The handbook receipt also notes that "the Company reserves the right to change the provisions [of the] handbook at any time" and further that "[t]he Company reserves the right to add, delete, or change any portion of the employee handbook with or without notice."

8. The "handbook receipt" shows that Petitioner started his employment relationship with KeKe's on November 15, 2013. The handbook receipt contains a signature and date line for both the employee and the restaurant's manager. While the handbook receipt contains the signature of Petitioner and the restaurant's manager, the handbook receipt does not indicate when the same was signed by either party. Included with the handbook receipt are pages 13 and 14 of the employee handbook and these respective pages are date stamped "11/21/13," which is six days after Petitioner's initial date of employment.

9. Beginning on page 13 of the employee handbook is a section labeled "Language." This section of the handbook provides as follows:

> KeKe's welcomes diversity and prides itself on employing a diverse body of individuals. However, to maintain an efficient, safe, and productive environment, we require that all employees use English as the primary spoken and written language when performing work for KeKe's Breakfast Café. The use of English ensures that both customers and coworkers completely understand all communication, at all times, ensuring efficiency, safety, and accurate communication.

10. The employee handbook also contains a "safety" section which provides, in part, that "KEKE'S BREAKFAST CAFÉ is committed to maintaining a safe workplace for all of [its] employees." The safety section also notes "some basic guidelines and safety rules to always keep in mind." One such basic safety rule states that employees should "[n]ever try to catch a falling knife. Knives are easier to replace than fingers."

11. Petitioner claims that the handbook that he signed for and received did not contain the "Language" section referenced above. Petitioner did not produce as evidence the handbook that he received which purportedly omitted the "Language" section from its contents. According to Mr. Mahen, the restaurant's speak-English-only policy was in effect "many, many years" before Petitioner was hired. Given Mr. Mahen's testimony, along with the fact that pages 13 and 14 of the handbook are dated less than

a week after Petitioner was hired, coupled with the fact that Petitioner did not produce a handbook with the alleged missing pages, the most reasonable conclusion is that the handbook signed for and received by Petitioner contained the "Language" section.

12. On the morning of February 12, 2014, Petitioner was on the cooks' line and was cutting strawberries with a paring knife while conversing in Spanish with a co-worker. While this Spanish-only conversation was occurring, restaurant records indicate that there were approximately 43 customers present and the kitchen was actively involved in the process of preparing food orders. On the day in question, at least one other cook was known to not speak Spanish, the expeditor Brittney was known to not speak Spanish, and Brooke Mahen, Petitioner's supervisor, was also known to not speak Spanish.

13. The Spanish-only conversation between Petitioner and his co-worker was overheard by Ms. Brooke Mahen, one of the restaurant's managers. Upon hearing the conversation, Ms. Mahen approached Petitioner and his co-worker and told them that English is the only language that is to be spoken in the workplace. Petitioner took offense to being told that he could not speak Spanish in the workplace and expressed his discontent to Ms. Mahen.

14. Ms. Mahen immediately went to her father, Keith Mahen, and informed him of the situation. Mr. Mahen then immediately

went to Petitioner and again informed him about the restaurant's speak-English-only policy. When conversing with Mr. Mahen Petitioner said that he found the speak-English-only policy "hurtful" and Mr. Mahen, in response to Petitioner's concerns, said to Petitioner "I'm sorry you feel that way, but for safety and efficiency of the restaurant, we want you to speak English only."

15. Petitioner returned to work and Mr. Mahen went back to his office. Approximately 30 minutes later, Petitioner quit his job at the restaurant in protest of the speak-English-only policy. Respondent took no disciplinary action against Petitioner for violating the restaurant's speak-English-only policy.

16. According to Mr. Mahen, KeKe's speak-English-only policy, as interpreted on February 12, 2014, allowed an employee to speak a language other than English when the employee was taking a break from work, and in instances where the employee was "not on the cooks' line or not subject to an English only speaking manager or supervisor in [the employee's] vicinity" while at the restaurant. Petitioner's act of cutting fruit on the day in question was within the zone-of-safety covered by Respondent's speak-English-only policy. Mr. Mahen's interpretation of the speak-English-only policy is consistent with the evidence presented, given that it is undisputed that the

single instance when Petitioner was instructed to only speak in English was when he was working with a knife on the cooks' line. The facts establish that KeKe's applied the speak-English-only policy under circumstances where warranted by business necessity.

17. KeKe's speak-English-only policy, as applied in the instant case, furthered the restaurant's legitimate business interest of promoting a safe and efficient working environment.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57, and 760.11, Fla. Stat. (2014).[1/]

19. Section 760.10(1) states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of national origin.

20. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

21. Petitioner alleges in his Charge of Discrimination that Respondent discriminated against him on the basis of national origin when it imposed upon him a requirement that he speak only English while in the workplace.

A. 29 C.F.R. § 1606.7

22. Petitioner contends that Respondent's speak-English-only policy requires employees to speak English at all times and therefore constitutes, as a matter of law, a violation of 29 C.F.R. § 1606.7 (EEOC guidelines), and by necessary inference, Title VII, and the Florida Civil Rights Act of 1992. The cited EEOC guidelines set forth the agency's interpretation of national origin discrimination as it relates to "speak-English-only" rules.

23. Second, it is well established that the EEOC guidelines do not possess the force of law. General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401 (1976). The EEOC guidelines provide that a speak-English-only policy that is applied at all times is "presumed" to violate Title VII and will be closely scrutinized, and when such a rule is applied only at certain times it will be permitted if "the employer can show" that the rule is justified by business necessity. Under either scenario, as one court has observed, "[t]he EEOC guidelines provide that an employee meets his or her burden of proving a prima facie case in a disparate impact cause of action merely by proving the existence of the English-only policy." Long v. First Union Corp., 894 F. Supp. 933, 940 (E.D. Va. 1995), aff'd 86 F.3d 1151 (4th Cir. 1996). The court in Long went on to note, however, that it was not bound by EEOC guidelines and expressly refused to

adopt that portion of the EEOC guidelines which allows a plaintiff to establish a prima facie case by merely showing the existence of an English-only policy. Id. at 940 (citing Garcia v. Spun Steak, 998 F.2d 1480 (9th Cir. 1993)). "Even under the EEOC guidelines, however, the English-only rule may be justified by business necessity." Prado v. L. Luria & Son, 975 F. Supp. 1349, 1354 (S.D. Fla. 1997).

24. In the instant case, the evidence does not establish that Respondent required its employees to speak English at all times. Even if, however, the evidence did support such a finding, Respondent's speak-English-only policy, even under "close scrutiny," furthered the restaurant's legitimate business interest of promoting a safe and efficient working environment. Respondent's speak-English-only policy comports with the requirements of 29 C.F.R. § 1606.7.

B. Disparate impact claim

25. Though not precisely stated, Petitioner asserts a theory of recovery based on disparate impact. In order to establish a prima facie case of disparate impact, Petitioner must identify a seemingly neutral practice that has a significant adverse impact on persons of a protected class. Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525 (1982).

26. It is well established that "[a]n English-only rule by an employer does not violate Title VII as applied to bilingual

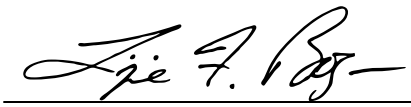
employees so long as there is a legitimate business purpose for the rule." Prado v. L. Luria & Son, 975 F. Supp. 1349, 1354 (S.D. Fla. 1997) (citing Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980), cert. den., 449 U.S. 1113, 101 S. Ct. 923 (1981); Gonzalez v. The Salvation Army, 1991 U.S. Dist. LEXIS 21692, aff'd, 985 F.2d 578 (11th Cir. 1993), cert. den., 508 U.S. 910, 113 S. Ct. 2342 (1993)). The court in Prado also noted that in Garcia v. Gloor, the court of appeals "specifically rejected the argument that an English-only policy has a disparate impact finding instead that choice of language, like other behaviors, is a matter of individual preference." Id. at 1354.
In Long v. First Union Corporation, 894 F. Supp. 933, 941 (E.D. Va. 1995), aff'd, 86 F.3d 1151 (4th Cir. 1996), the court held that "[t]here is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job."

27. Petitioner is bilingual and admits that he regularly speaks English while at work. Respondent, regardless of whether Petitioner established a prima facie case of national origin discrimination, proved that it had a legitimate business purpose for enforcing its speak-English-only policy against Petitioner on February 12, 2014. Respondent's speak-English-only policy did not discriminate against Petitioner on the basis of national origin.[2/]

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 finding that Respondent, KeKe's Breakfast Café, Inc., did not commit an unlawful employment practice as alleged by Petitioner, Juan Monsalvo, and denying Petitioner's Employment Charge of Discrimination.

DONE AND ENTERED this 20th day of March, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of March, 2015.

ENDNOTES

[1/] All statutory references are to 2014 Florida Statutes, unless otherwise indicated.

[2/] Petitioner's failure to prove national origin discrimination is fatal to his claim of constructive discharge. See Smith v. Mt. Sinai Med. Ctr., 36 F. Supp. 2d 1341, 1347 (S.D. Fla. 1998)("A plaintiff claiming constructive discharge must show more than just a Title VII violation by her employer.").

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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.