

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DARRELL ALFORD,

Petitioner,

vs.

Case No. 15-3620

PUBLIX SUPER MARKETS, INC.,

Respondent.

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RECOMMENDED ORDER

A formal hearing was conducted in this case on November 16, 2015, in Orlando, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Darrell Arnither Alford, pro se
1361 Broken Pine Road
Deltona, Florida 32725

For Respondent: Matthew D. Westerman, Esquire
Fisher & Phillips, LLP
Suite 2350
101 East Kennedy Boulevard
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue is whether Respondent, Publix Super Markets, Inc. ("Publix"), violated section 760.08, Florida Statutes (2014),^{1/} by discriminating against Petitioner based on his race, color, sex, and/or handicap.

PRELIMINARY STATEMENT

On or about December 8, 2014, Petitioner, Darrell Alford ("Petitioner"), filed with the Florida Commission on Human Relations ("FCHR") a Public Accommodation Complaint of Discrimination against Publix. Petitioner alleged that he had been discriminated against pursuant to chapters 509 and 760, Florida Statutes, as follows:

I am disabled, black male, and believe I was discriminated against on the bases of race, color, sex and disability/handicap by Publix (pharmacy), store #0667. I was refused service by the respondent on October 25, 2014.^[2/1] On this date, the pharmacy located within the store denied me medication even though I provided a valid script from my doctor.

The FCHR investigated Petitioner's Complaint. In a letter dated May 27, 2015, the FCHR issued its determination that there was no reasonable cause to believe that an unlawful public accommodation practice occurred.

On June 22, 2015, Petitioner timely filed a Petition for Relief with the FCHR. On June 23, 2015, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was originally scheduled for hearing on September 1, 2015. One continuance was granted. The hearing was ultimately held on November 16, 2015.

On July 30, 2015, Publix filed a Motion to Relinquish Jurisdiction contending that Publix is not, and never has been,

a "public accommodation" as that term is defined in section 760.02(11). By Order dated August 21, 2015, the undersigned denied the motion without prejudice to Publix's ability to make a factual showing at the final hearing in support of its contention that it does not meet the statutory definition of a "public accommodation."

At the hearing, Petitioner testified on his own behalf. Petitioner offered no exhibits. Respondent presented the testimony of pharmacist, James MacDonald, and assistant store manager, Christopher Bloyen. Respondent's Exhibit 1, a copy of Petitioner's prescription, was admitted into evidence.

The one-volume Transcript of the hearing was filed at DOAH on December 16, 2015. On December 21, 2015, Publix filed a Motion for Extension of Time requesting a two-week extension of the time for filing proposed recommended orders in light of the impending holidays. By Order dated December 22, 2015, the motion was granted and the deadline was extended to January 11, 2016. Both parties timely filed Proposed Recommended Orders on January 11, 2016.

FINDINGS OF FACT

1. Petitioner is a black male who lives in Deltona, Florida. Despite the assertion in his Public Accommodation Complaint of Discrimination, Petitioner offered no evidence that he has a disability or handicap.

2. Petitioner testified that he had surgery for kidney stones in Daytona Beach on October 20, 2014. Respondent's urologist prescribed Percocet (oxycodone and acetaminophen), a controlled substance, to control Respondent's pain. The prescription from Petitioner's urologist was not placed in evidence.

3. On October 21, 2014, Petitioner went to the emergency room at Fish Memorial Hospital in Orange City and, there, was given a prescription for 12 tablets of Percocet. The prescription directed that the medication be taken once every six hours, meaning that the emergency room physician was prescribing a three-day supply of Percocet. A copy of this prescription was entered into evidence, and the parties agree that this is the prescription that Petitioner later presented to the Publix pharmacy.

4. Petitioner testified that his mother drove him to his surgery and, apparently, to the emergency room. She placed the prescription in her purse for safe keeping.

5. A few days later, when Petitioner wanted to get the prescription filled, his mother could not find the prescription. Petitioner stated that his mother forgot that she had changed purses. When she changed purses again a couple of weeks later, Petitioner's mother found the prescription.

6. On November 15, 2014, Petitioner presented the emergency room prescription to the pharmacy technician at Publix Store 0667 in Deltona. The technician was aware that the pharmacist gave special scrutiny to emergency room prescriptions. The technician therefore took the prescription directly to the pharmacist, James MacDonald.

7. Mr. MacDonald was the pharmacy manager of Store 0667 and at the time of the events at issue had been a pharmacist for 23 years with no record of discipline against his license.

8. Mr. MacDonald testified that, as a general matter, he performs a prospective drug utilization review on every prescription. Simply put, this process insures that the prescription is for a legitimate medical purpose and that it is being filled for the person who presented it at the pharmacy.

9. Mr. MacDonald stated that he is not required to fill every prescription that is presented to him and that he declines to fill prescriptions seven to ten times per week. The chief reasons for declining to fill prescriptions are the pharmacist's inability to verify the prescription with the prescribing physician and the pharmacist's determination that the prescription calls for a type or quantity of a controlled substance that is inappropriate to the patient's condition.

10. Mr. MacDonald testified that during the two years prior to November 2014, nearby pharmacies at CVS and Walgreens

had stopped filling prescriptions for controlled substances, which placed an added burden on Publix to fill these prescriptions. There were several doctors in the area writing prescriptions for large amounts of controlled substances. Mr. MacDonald was also being presented with many prescriptions for controlled substances from people he did not know. All these factors contributed to his caution in filling prescriptions for controlled substances.

11. Mr. MacDonald testified that a prescription from an emergency room visit usually provides for enough medication to get the patient through the emergency period, two or three days, after which the patient is instructed to see his primary care physician. Mr. MacDonald tended to decline to fill emergency room prescriptions that were presented more than a few days after the emergency room visit.

12. When the technician presented him with Petitioner's prescription, Mr. MacDonald told the technician that he would not fill it because it was more than three weeks old. The technician walked to the front window to convey this response to Petitioner, who did not take it well. Mr. MacDonald could hear Petitioner raising his voice and so went to the front to speak with Petitioner directly.

13. Mr. MacDonald testified that the pharmacy was very busy, that he had customers ahead of Petitioner, and that having

to come around and deal personally with Petitioner was putting him even farther behind in his work.

14. Mr. MacDonald explained to Petitioner that the prescription was issued by an emergency room physician and was for a three-day supply of Percocet. He told Petitioner that he would have filled the prescription if he had presented it within a week of his emergency room visit, but that it was now three weeks later and this was clearly no longer an emergency situation.

15. Petitioner testified that he told Mr. MacDonald that the prescription had been misplaced in his mother's purse. Mr. MacDonald did not recall this explanation.

16. Mr. MacDonald offered to call the emergency room physician and verify the prescription. Petitioner insisted that Mr. MacDonald either call the physician or fill the prescription immediately, and stated that he would not move from the pharmacy window until Mr. MacDonald had complied with his ultimatum. Mr. MacDonald stated that he had customers ahead of Petitioner and could not drop everything to please him at that moment.

17. In light of Petitioner's persistence, Mr. MacDonald reiterated his refusal to fill the prescription. He handed the prescription back to Petitioner and threatened to call the police if Petitioner did not leave. Petitioner was unmoved. Mr. MacDonald did not call the police but did page the assistant

store manager, Christopher Bloyen, to intercede in the situation.

18. Mr. Bloyen testified that he came to the pharmacy. He saw that Petitioner seemed very upset and was speaking very loudly. Petitioner complained that Mr. MacDonald would not fill his prescription. Mr. Bloyen spoke briefly with Mr. MacDonald, who explained why he was refusing to fill the prescription.

19. At the hearing, Mr. Bloyen explained that the pharmacy in any Publix store is an autonomous department and that, as a store manager, he lacks the training or expertise to second-guess the decision of his pharmacist. Publix relies on the professional expertise and discretion of its pharmacists to determine whether or not to fill a prescription.

20. Mr. Bloyen informed Petitioner that he was going to support the decision of Mr. MacDonald not to fill the prescription. At this point, Petitioner left the store.

21. Neither Mr. MacDonald nor Mr. Bloyen had met Petitioner before this incident. Petitioner did not disclose to them that he had any disability or handicap, and none was visibly apparent.

22. Mr. MacDonald testified that his decision not to fill Petitioner's prescription was not based on Petitioner's race, color, or sex. In fact, Mr. MacDonald's initial decision not to fill the prescription was made and announced to the technician

before Mr. MacDonald laid eyes on Petitioner. Petitioner's race, color, sex, and alleged handicap or disability played no part in Mr. MacDonald's decision not to fill the prescription.

23. Mr. MacDonald did not make any disparaging remarks about Petitioner during their exchange, and no employee of Publix made racially derogatory or racially related comments to Petitioner.

24. Petitioner testified that he was able to get the prescription filled at a Winn-Dixie pharmacy shortly after this incident. Therefore, Petitioner suffered no economic loss or quantifiable damages as a result of Publix's refusal to fill his prescription. Petitioner testified that he seeks only an apology from Publix.

25. Publix Store 0667 does not contain a restaurant or lunch counter and there is no designated area for customers to consume food on the premises. The store does contain a deli, but the food items sold from the deli are not intended for on-site consumption at Publix. The store has no picnic tables or other seating at which customers might consume food on the premises.

26. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reasons given by Publix for refusing to fill his prescription.

27. Petitioner offered no credible evidence that the stated reasons for not filling the prescription were a pretext for discrimination based on Petitioner's race, color, sex, handicap, or disability.

28. Petitioner offered no credible evidence that Publix discriminated against him in violation of section 760.08.

CONCLUSIONS OF LAW

29. 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. (2015).

30. 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.

31. Section 760.08, titled "Discrimination in places of public accommodation," provides:

All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion.

32. Section 760.02(11), provides the following definition:

"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:

(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence.

(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.

(c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.

(d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.

33. Not all establishments that are open to the public constitute places of "public accommodation" under the Act. See, e.g., Baker v. Maycom Commc'n/Sprint-Nextel, Case No. 08-5809 (Fla. DOAH Dec. 22, 2008; Fla. FCHR Order No. 09-026, Mar. 16, 2009) (fact that retail stores are not specifically listed in

section 760.02(11), Florida Statutes, reflects legislative intent that the statute does not encompass such establishments). See also Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1204-05 (11th Cir. 2007) (affirming dismissal of public accommodation discrimination claim against a medical facility because the "narrow definition" of "public accommodation" in section 760.02(11), Florida Statutes, does not include medical facilities).

34. In Morales v. Winn-Dixie Stores, Inc., Case No. 81-5166 (Fla. DOAH Dec. 24, 2008; FCHR Order No. 09-024 Mar. 16, 2009), the Commission held that a grocery store was not a place of public accommodation under the facts presented. In that case, the petitioner alleged that he was discriminated against when attempting to pay for groceries at a Winn-Dixie grocery store. The Commission adopted the administrative law judge's conclusion of law that the grocery store was not subject to the public accommodation requirements of the Act, though it did not exclude the possibility that a grocery store could be a public accommodation under a different set of facts.

35. In denying Publix's Motion to Relinquish Jurisdiction, the undersigned did not directly reference Morales, but relied on a similar rationale, having found cases in which the presence of an "eating area" inside or outside of a grocery store was deemed sufficient to establish that the store was a public

accommodation. See Pena v. Fred's Stores of Tenn., Inc., 2009 U.S. Dist. LEXIS 121360, *1-*2; Amiri v. Safeway, Inc., 1999 U.S. Dist. LEXIS 933, *3 (D. D.C. 1999); Thomas v. Tops Friendly Mkts., 1997 U.S. Dist. LEXIS 15887 (N.D. N.Y. 1997). The motion was denied without prejudice to Publix's ability to develop facts at the hearing sufficient to establish that Publix Store 0667 was not a public accommodation.

36. The evidence presented at the final hearing established that Publix Store 0667 is not a "public accommodation" for purposes of the Act. The store does not contain a "restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises." The store does not contain any seating area that customers can use to consume food on the premises. All food sold at Publix Store 0667 is intended for off-site consumption.

37. Based on the facts presented, Publix is not subject to the public accommodation provisions of the Act and the Petition for Relief should be dismissed.

38. In the alternative, if Publix were to be considered a place of public accommodation, Petitioner has failed to establish a prima facie case of discrimination under the Act.

39. 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, 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 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.

40. Under the McDonnell analysis, as modified for the context 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 the 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.

41. 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 the protected class; (2) he attempted to contract for the 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.

42. Petitioner has not proven a prima facie case of unlawful public accommodation discrimination. Petitioner established that he is a member of a protected group, in that he is black. Petitioner offered no evidence to establish that he is disabled or has a handicap, or that the alleged discrimination was based on his sex. Assuming that Publix Store 0667 was a place of public accommodation, Petitioner did attempt to avail himself of the services offered by the Publix pharmacy and was denied those services.

43. However, Petitioner failed to establish that the services he sought were made available to similarly-situated persons outside his protected class. He offered no evidence that any other patron of Publix was treated any better than he was under similar circumstances. Having failed to establish the

disparate treatment element, Petitioner has not established a prima facie case of public accommodation discrimination.

44. Even if Petitioner had met his burden, Publix presented evidence of legitimate, non-discriminatory reasons for its refusal to fill Petitioner's prescription. Mr. MacDonald testified that he decided to not fill the prescription because it was from an emergency room and was more than three weeks old. Mr. MacDonald's decision was based on his long-standing practice to not fill emergency room prescriptions that are more than a week old. Mr. McDonald even offered to contact the emergency room physician and perhaps fill the prescription at a later time, but Petitioner refused his offer. Thus, Respondent has established a legitimate, non-discriminatory reason for refusing to fill Petitioner's prescription.

45. Petitioner did not present any evidence to establish that Publix's stated reason for its decision was merely pretext for discrimination.

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 finding that Publix Super Markets, Inc., is not a public accommodation under the facts of this case or, in the alternative, that Publix Super Markets, Inc., did not commit

any unlawful acts of public accommodation discrimination and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 2nd day of February, 2016, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of February, 2016.

ENDNOTES

^{1/} All references to Florida Statutes are to the 2014 edition.

^{2/} At the hearing, Petitioner conceded that the date he presented the prescription to the Publix pharmacy was November 15, 2014.

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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.