STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARK TURNER,

Petitioner,

vs. Case No. 15-4721

GOLDEN CORRAL,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final evidentiary hearing was conducted in this case on October 26, 2015, in Miami, Florida, before Robert L. Kilbride, Administrative Law Judge, Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Mark Anthony Turner, pro se
2366 Southeast 12th Court, Unit 121
Homestead, Florida 33055

For Respondent: Arianne B. Suarez, Esquire
Douberley, McGuinness & Cicero
1000 Sawgrass Corporate Parkway, Suite 590
Sunrise, Florida 33323

STATEMENT OF THE ISSUES

Whether Golden Corral discriminated against Mark Turner on the basis of his race at Respondent's restaurant or place of public accommodation, and, if so, what the relief should be.

PRELIMINARY STATEMENT

On or about February 1, 2015, Petitioner, Mark Turner ("Turner"), filed a Public Accommodation Complaint of Discrimination against Respondent, Golden Corral ("Golden Corral"), with the Florida Commission on Human Relations ("FCHR").

Turner alleged that in October 2014, Golden Corral discriminated against him because of his race (African-American), when it expelled him from the Golden Corral restaurant and permanently banned him from the restaurant.

On July 27, 2015, FCHR issued a Notice of Determination: No Reasonable Cause, determining there was no reasonable cause to believe that an unlawful practice had occurred.

FCHR informed Turner of his options for an administrative hearing or civil action. Turner opted for an administrative hearing by timely filing his Petition for Relief on August 13, 2015. The petition was forwarded to DOAH and assigned to the undersigned to conduct the requested hearing.

After coordination to identify available hearing dates, Turner's case was set for hearing on October 26, 2015.

Shortly thereafter, Turner initiated written discovery, serving interrogatories and document production requests on Golden Corral.

Turner subsequently filed a Motion to Continue and Motion to Compel Discovery, both of which were denied by the undersigned after considering the response filed by Golden Corral.

The case proceeded to final hearing on October 26, 2015, as scheduled, without further objection by either party. No objections or issues regarding the Motion to Continue or Motion to Compel were raised by either party at the final hearing.

At the hearing, Turner appeared pro se and testified on his own behalf. He called two additional witnesses, Jim Feliciano and David Gronewoller. He offered one exhibit into evidence, Exhibit 1, which was admitted.

At the conclusion of Turner's case, Golden Corral moved to dismiss the case alleging that Turner had not presented a prima facie case. The motion was denied, and Golden Corral proceeded with its case.

Golden Corral called Jim Feliciano ("Feliciano"), general manager of the Golden Corral in question, and utilized several exhibits, Exhibits 1 through 5, stipulated to by the parties at the beginning of the hearing.

The Transcript of the final hearing was filed on November 13, 2015. Both parties submitted proposed recommended orders (PROs).

Due consideration has been given to the PROs filed by Golden Corral and Turner in preparing this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented, the undersigned makes the following findings of material facts:

1. At the time of the incident, Turner was a 56-year-old African-American. He is married and has a six-year-old daughter.

2. He worked for General Motors for 30 years on the assembly line and also worked as a line coordinator. In 2011, he retired and purchased a condominium in Homestead, Florida, where he lives with his wife and daughter. After he retired, he purchased and now rents several condominium units in Columbia, South America.

3. He visited the Golden Corral restaurant approximately one time each month with his family.

4. The Golden Corral restaurant offers a buffet to its patrons. However, there is a "No Sharing" policy posted on a placard in the lobby. See Resp.'s Ex. 2. The sign states the following:

> Please, no sharing. In the interest of keeping our food prices as reasonable as possible, we ask that you please not share food from the Golden Corral buffet. To-go meals from the buffet are available for purchase. Ask your server.

5. On an unspecified date in October 2014, a customer complained to the staff, that another customer (later identified as Turner) was taking food from the buffet and putting it in

plastic Tupperware containers. The complaining customer was a female African-American.

6. Based on this information, Feliciano watched Turner approach the buffet and put items of food in a Tupperware container. This was also being done by a female identified as Turner's wife.

7. During the first incident, Feliciano took Turner aside to a private room, explained what he had observed, and asked him to leave the property. It was Feliciano's testimony that Turner did not deny taking food. He also told him he was expelled from the restaurant.

8. Feliciano testified that Turner was a frequent guest, and, so, Feliciano was able to positively identify him as the person violating the no sharing policy.

9. When Turner and his family left the restaurant, Feliciano noticed that he was carrying re-usable, grocery-type bags with him capable of storing Tupperware containers.

10. Several weeks later, Feliciano observed Turner in line attempting to enter the restaurant. Feliciano approached Turner and reminded him that he had been expelled and instructed him to leave the premises. This was done without incident.

11. Apparently, there was video surveillance available which would have captured some or all of the incidences in

question. However, no photographs or video surveillance were offered into evidence by either party.

12. Feliciano had worked at this restaurant for approximately ten and one-half years. The company grants fairly wide discretion to its managers to take action against customers who violate rules. That discretion ranges from calling the police to expelling patrons under appropriate circumstances.

13. The president and CEO of Golden Corral testified that the company offered general training to staff members related to problem customers. He related that there was "lots of training books and videos" given to general managers and staff regarding how to handle problematic customers and patrons. However, there was no training offered on specific adverse situations.

14. The company does offer "discrimination training" to its staff and general managers during meetings and company conferences. A company named Speilman[1/] out of Winston Salem, North Carolina, provided this training.

15. The president spoke with Turner on the telephone. He told Turner he concurred with the general manager's decision to expel him. During the course of this telephone discussion, Turner did not deny taking food and asked if he could come back to the restaurant "if he stopped." (The context of this comment was if he stopped violating the no sharing policy.) Upon further

inquiry, the president testified that he was absolutely sure that Turner told him this.

16. Feliciano testified that Golden Corral serves people of all races and backgrounds. He stated that the "no sharing" policy was prominently displayed at the restaurant.

17. The customer, who complained about Turner's conduct, said that she watched him fill Tupperware containers with chicken and ribs. She mentioned that this was very upsetting to her.

18. Feliciano also checked the plates being removed from Turner's table and saw that there was "residue" of chicken and/or ribs on the plate, but no empty bones on the plate. (He concluded that since no bones had been left on the plate, this confirmed that the plates had been used to carry food back to the table and then placed in a container or bag.)

19. Feliciano stated that Golden Corral did not deny services to Turner because of his race. He gave an example when two Hispanic women had been expelled for the same conduct.

20. The undersigned reviewed Respondent's Exhibit 4, entitled Investigative Memorandum FCHR number 201500480. The investigation conducted by FCHR appears to be thorough and comprehensive. All parties were interviewed, affidavits were collected, and a witness was interviewed.

21. This is a de novo proceeding. Based upon the evidence presented, there does not appear to be any basis to dispute the

investigative findings and recommendations of the agency, and the evidence presented during the final hearing before the undersigned was consistent with the information collected by FCHR during its investigation.

CONCLUSIONS OF LAW

22. 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 (2015).[2/]

23. Two Florida Statutes come into play in this case, sections 509.092 and 760.08, Florida Statutes.

24. A private restaurant "has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator" so long as that refusal is not based upon "race, creed, color, sex, physical disability, or national origin." § 509.092, Fla. Stat.

25. "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. (Chapter 760, Florida Statutes, is the Florida Civil Rights Act.)

26. 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." § 760.02(11)(a), Fla. Stat.

27. The Golden Corral restaurant, which is the subject matter of this hearing, was a place of "public accommodation" (public restaurant) at all relevant times.

28. 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.

29. Rulings by the federal courts on cases involving alleged discrimination at places of public accommodations provide instructive and useful law, particularly in the absence of any Florida state cases directly on point. See Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

30. Specifically, the substantive civil rights afforded under chapters 590 and 760 operate parallel to and consistent with federal anti-discrimination laws since the Florida act is patterned after Title VII. 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, Schultz v. Bd. of

Trs. of the Univ. of W. Fla., 2007 U.S. Dist. LEXIS 50878 (N.D. Fla. 2007); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); accord, Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1208 (Fla. 1st DCA 1991), and 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).

31. In Stevens, the district court, citing Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir. 1996), held that to prevail under section 509.092, a plaintiff must establish three distinct elements: (1) that he is a member of a protected class; (2) that defendant intended to discriminate against him on that basis; and (3) that defendant's racially discriminatory conduct abridged a right enumerated in the statute. Id. at 887.

32. For our purposes, these three elements must be proven in this case for Turner to prevail. The burden of proof is on Turner, the party asserting a demand for affirmative relief. See generally Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

33. The Stevens court, and the district court in Schultz, supra, followed the familiar McDonnell Douglas burden-shifting analysis for public accommodation cases.

34. The McDonnell Douglas framework allows the plaintiff to make out a prima facie case (a case consisting of sufficient evidence) without having "direct evidence" of racial discrimination, which is often unavailable (e.g., direct statements or documents showing that the company intended to discriminate against African-Americans). Rather, parties without "direct evidence" of racial discrimination often rely upon "circumstantial evidence" to prove their case (e.g., a collection of circumstances which, in combination, infer or tend to prove racial discrimination). When this is done in a discrimination case, the McDonnell Douglas framework of burden shifting applies and comes into play.[3/]

35. Turner failed to prove the second and third elements of the test outlined in Stevens. There was no persuasive or credible direct or circumstantial evidence offered to show that Golden Corral intended to discriminate against Turner on the basis of his race when they expelled him and barred him from the premises.

36. Rather, the evidence revealed that they barred Turner because they determined, or reasonably believed, that he had violated Golden Corral's "No Sharing" policy. See Resp.'s Ex. 2.

37. There was no credible evidence presented to prove that the "No Sharing" policy was only applied against African-Americans. A practice that affects all races in the same manner

does not prove a racially discriminatory intent (the second element under Stevens). Brown v. Am. Honda Motor Co., Inc., 939 F.2d 946, 952 (11th Cir. 1991).

38. There was also no proof presented to show that Turner was treated any differently than similarly-situated, non-protected customers. In fact, there was proof that Golden Corral had banned several Hispanic females for a similar violation of the "No Sharing" policy. See generally Akfhami v. Carnival, 305 F. Supp. 2d 1308 (S.D. Fla. 2004).

39. None of what occurred here was because of Turner's race or color. What occurred may have baffled, upset, or offended Turner, but that does not convert otherwise legitimate business practices into an illegal, discriminatory practice.

40. Moreover, even if Turner's suggestion that their barring him was a case of "mistaken identity," that mistake, and the resulting consequences, is not sufficient proof of racial discrimination. A good faith belief that action is warranted, even when based on mistaken facts or identity, does not, without more, constitute discrimination. See generally Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1339 (11th Cir. 2000)("A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by race."); Wolf v. Buss (Am.) Inc., 77 F.3d 914, 919 (7th Cir. 1996)("Pretext means more than a mistake on the part of the

employer; pretext means a lie, specifically a phony reason for some action."); and Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991).

41. Thus, even if Turner had established a prima facie case of discrimination, which he did not, Golden Corral articulated a legitimate, non-discriminatory reason for the refusal to serve, which the undersigned has found to be credible, legitimate, and not pretextual.

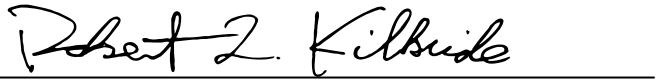
42. Since Golden Corral offered a legitimate, non-discriminatory reason for barring Turner from the restaurant, Turner was obligated under the law to rebut or prove that this reason was untrue or a pretext for racial discrimination. Turner failed to do so.

43. Therefore, Turner did not carry his burden of proving that Golden Corral's action in expelling him or permanently disbarring Turner violated sections 509.092 or 760.08.

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 Turner's Petition for Relief.

DONE AND ENTERED this 30th day of November, 2015, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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 30th day of November, 2015.

ENDNOTES

[1/] The spelling of the company is provided as pronounced.

[2/] References to Florida Statutes are to the 2015 version, unless otherwise indicated.

[3/] In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court of the United States outlined 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).

Under the burden shifting test, 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 1996), 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 out a prima facie case, then the burden shifts to the defendant to articulate a

legitimate, non-discriminatory reason for its complained-of conduct.

Finally, if the defendant carries this burden of rebutting or explaining the plaintiff's prima facie case, then the burden shifts back to the plaintiff to 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 disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

Mark Anthony Turner
2366 Southeast 12th Court, Unit 121
Homestead, Florida 33055
(eServed)

Arianne B. Suarez, Esquire
Douberley, McGuinness & Cicero
1000 Sawgrass Corporate Parkway, Suite 590
Sunrise, Florida 33323
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

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.