STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOAO DANIEL FONSECA,

Petitioner,

vs. Case No. 18-5521

DUFFY'S OF COCONUT CREEK, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On December 20, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Christopher Donnelly, Esquire
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For Respondent: Jennifer A. Schwartz, Esquire
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STATEMENT OF THE ISSUE

The issue is whether, in violation of section 760.08, Florida Statutes, Respondent deprived Petitioner of full and equal enjoyment of Respondent's bar and restaurant due to

discrimination based on Petitioner's nation of origin, which is Brazil.

PRELIMINARY STATEMENT

By Complaint of Discrimination filed on October 20, 2017, Petitioner alleged that, on September 25, 2017, during a visit to Duffy's Sports Grill located in Coconut Creek, the bartender announced that he would not serve Petitioner anymore due to Petitioner's previous criticism of the bartender's service. When Petitioner asked him to explain, the bartender allegedly replied that Petitioner was not welcome because he had been "bad mouthing" him in Petitioner's "shit language," meaning Portuguese. After allegedly obtaining no relief from the general manager, Petitioner was allegedly asked to leave the restaurant.

Following an investigation, the Florida Commission on Human Relations issued a Determination: No Probable Cause.

By Petition for Relief filed on October 17, 2018, Petitioner largely restated the allegations of the Complaint of Discrimination. The Florida Commission on Human Relations transmitted the file to DOAH on October 18, 2018.

At the hearing, Petitioner called two witnesses and offered into evidence ten exhibits: Petitioner Exhibits 1 through 10. Respondent called three witnesses and offered into evidence ten exhibits: Respondent Exhibits 1 through 10. All exhibits were admitted without objection.

The court reporter filed the transcript on January 23, 2019. The parties filed proposed recommended orders on February 1, 2019.

FINDINGS OF FACT

1. Petitioner is a native of Brazil. He is fluent in English and Portuguese, which is the national language of Brazil.

2. Respondent owns and operates Duffy's Sports Grill in Coconut Creek, Florida (Duffy's). Duffy's is a place of public accommodation serving food and beverages, including alcoholic beverages, to customers who may be seated indoors or outdoors. There is no indication of any difference in the availability of food and beverages between the indoor and outdoor area, but the outdoor area offers customers the option of smoking.

3. At all material times, Petitioner was a member of the Duffy's MVP Club, which awards points for purchases, evidently to be used for future purchases. Records of Petitioner's MVP Club activity reveal nearly 50 visits to Duffy's from June 2013 through the summer of 2016. Petitioner agreed that he had been to Duffy's many times, invariably sat outside so he could smoke, and was often served by bartender, Kevin Carr. Petitioner also testified that, on many of these visits, he was in the company of Brazilian friends, who had spoken Portuguese while being served by Mr. Carr, and there had never been any problems. It is thus clear that Petitioner enjoyed Duffy's outside bar, and the retail

relationship between Petitioner and Mr. Carr was functional and met with the general satisfaction of the bartender and the customer.

4. Late in the afternoon of Friday, September 15, 2017, Petitioner visited Duffy's with his cousin, who is from Brazil. During this visit, Petitioner and his cousin sat at the outside bar and generated a tab of about $60 consisting of three or four beers each and a shared appetizer. Petitioner denied that he and his cousin ever reached a state of crapulence, but they clearly consumed enough alcohol to lower their conversational inhibitions.

5. At one point, the cousin tried to place an order with Mr. Carr, but felt that Mr. Carr had ignored him. The cousin and Petitioner had previously noticed a sewer smell, possibly emanating from a nearby waste line, which may have put the cousin in a foul mood about his Duffy's experience. In any event, feeling slighted by Mr. Carr, the cousin said to Petitioner in Portuguese that the service was "unprofessional." It is unclear what Petitioner said, but, in short order, the cousin added that Mr. Carr was a "piece of shit," and a female bartender was a "prostitute." These latter comments will be referred to as the September 15 Vulgarities.

6. As luck would have it, seated beside Petitioner was Caluvio Ferreira, who is Brazilian and fluent in Portuguese and

English; a friend of Mr. Carr, whom he has visited at his home; and a high-minded man who is unafraid to confront others who fail to meet his standards of conduct and speech.

7. Having suffered in silence the loud speech of Petitioner and his cousin, upon hearing the September 15 Vulgarities, Mr. Ferreira immediately left the bar to go to the restroom. As he returned to his seat at the bar, he paused beside Petitioner and his cousin and advised them to be careful about what they said because someone could understand them, even speaking Portuguese. Mr. Ferreira added that he knew Mr. Carr, his wife, and their daughter and had been to their home, and he knew the female bartender. Mr. Ferreira declaimed that Petitioner and his cousin had no right to make the comments that they had made about Mr. Carr and the female bartender.

8. Petitioner replied that they had had bad service. Mr. Ferreira answered that bad service did not excuse their crudities, but should be brought to the attention of the manager, who would address it. Obviously angry, Mr. Ferreira, who is a large man, warned the men, "I hope you don't do that again. Maybe I'll have a problem with you." At this point, Petitioner cashed out, and he and his cousin left the premises.

9. Having seen his friend speaking angrily to Petitioner and his cousin, Mr. Carr approached Mr. Ferreira a few minutes later and asked him what that had been about. Mr. Ferreira told

Mr. Carr that Petitioner had spoken the September 15 Vulgarities. Petitioner has credibly denied making the statements, and it would seem more likely that they would come from his cousin, who had felt slighted by Mr. Carr, than Petitioner, who was a regular customer of Mr. Carr. It is likely that Mr. Ferreira was mistaken as to which of the men seated next to him made the statements, but Mr. Carr reasonably believed, based on what his friend had told him, that Petitioner had insulted him and his coworker.

10. Ten days later, Petitioner reappeared at Duffy's. He was in the company of two friends, one of whom lived in Brazil. They took seats at the outside bar, but no one served them. Having seen Petitioner approaching the outdoor bar, Mr. Carr had gone inside to speak to the manager. After recounting the September 15 Vulgarities, Mr. Carr asked for permission not to serve Petitioner, and the manager granted the request. Mr. Carr asked whether he or the manager should inform Petitioner, and the manager said Mr. Carr should.

11. Authorized to deny Petitioner service at the outside bar, Mr. Carr approached the party and loudly denounced Petitioner for having spoken badly about him in his "shit language," meaning Portuguese. Mr. Carr identified the September 15 Vulgarities, which Petitioner denied having spoken. Mr. Carr demanded to know what exactly Petitioner had said, but Petitioner

never admitted that he or his cousin had said anything of the sort. During this exchange, Mr. Carr angrily repeated the word "shit," although in other contexts not having anything to do with Petitioner's national origin. The initial vulgar reference to Portuguese will be referred to as the September 25 Vulgarity, and all of the vulgarities spoken by Mr. Carr will be referred to cumulatively as the September 25 Vulgarities.

12. Realizing that Mr. Carr was adamant, Petitioner went inside and appealed to the manager, who backed his bartender, but offered to seat Petitioner and his friends inside. Petitioner declined and left the premises.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction. §§ 120.569(1), 120.57(1), and 760.11(1) and (7), Fla. Stat. (2018).

14. All persons are entitled to the "full and equal enjoyment" of the goods or services of any "public accommodation" without discrimination based on national origin, among other categories. § 760.08. The federal counterpart to section 760.08 is 42 U.S.C. § 2000a(a), which provides similarly.

15. Duffy's is a "public accommodation" owned and operated by Respondent. § 760.02(11). The record does not establish that Duffy's is "principally engaged in selling food," as required by section 760.02(11)(b), but Respondent bears the burden of proving that it is not a "public accommodation," Solomon v. Miami Woman's

Club, 359 F. Supp. 41 (S.D. Fla. 1973), and Respondent has produced no evidence on the point. (Obviously, the definitional perspective is on the seller, so it is irrelevant whether Petitioner was principally engaged in buying food at Duffy's.)

16. Addressing the determinative issue, Petitioner contends that he was denied service in the outside bar of Duffy's due to an act of discrimination against him on the ground of his national origin. Petitioner's proof fails for two reasons. First, the person who uttered the September 25 Vulgarity was not the person who denied Petitioner service at the outside bar. See, e.g., Evans v. McClain, Inc., 131 F.3d 957, 962 (11th Cir. 1997). Knowing the limits of his authority, Mr. Carr sought out the manager to obtain his approval for denying Petitioner service. It is unclear whether the manager knew Petitioner's national origin, and there is no evidence that, even if he did know that Petitioner was from Brazil, the manager denied Petitioner service at the outside bar on the basis of his national origin.

17. Second, even if Mr. Carr were the decisionmaker, there is no causal connection between his utterance of the September 25 Vulgarity, which reveals a focus on Petitioner's national origin, and the decision to deny Petitioner service at the outside bar. The September 25 Vulgarity was one among several September 25 Vulgarities, which, together, reveal a state of anger, but not

necessarily discriminatory intent. Discriminatory intent is negated by Mr. Carr's long, untroubled retail relationship with Petitioner; Mr. Carr's personal friendship with Mr. Ferreira, who is also Brazilian; and, most importantly, Mr. Carr's good faith understanding that Petitioner had uttered the September 15 Vulgarities, which is what drove the decision to deny Petitioner outside service.

18. It is possible to analyze the facts within the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which properly is reserved for determining whether a plaintiff or a defendant has presented sufficient evidence to justify a trial. See, e.g., Wall v. Trust Co. of Ga., 946 F.2d 805, 809-10 (11th Cir. 1991). However, the McDonnell Douglas framework provides a convenient list of elements of proof for a circumstantial case of discrimination based on inference.

19. As applied to a case of alleged discrimination in hiring, the McDonnell Douglas burden-shifting scheme requires the plaintiff to prove a prima facie case of discrimination by showing that he belongs to a protected class, he applied and was qualified for a job for which the defendant was hiring, he was rejected despite his qualifications, and the defendant continued to seek applications from persons of the plaintiff's qualifications. McDonnell Douglas, 411 U.S. at 802. Upon such a

showing, the defendant must show some legitimate, nondiscriminatory reason for rejecting the plaintiff's application. McDonnell Douglas, 411 U.S. at 802. The defendant is not required to make this showing by a preponderance of the evidence; it is required only to raise a genuine issue of fact as to whether it discriminated against the plaintiff. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 254 (1981). If the defendant makes such a showing, the presumption of discrimination raised by the plaintiff's prima facie case is rebutted, and the plaintiff has the burden of showing that the proffered reason is a pretext for discrimination. Burdine, 450 U.S. at 253-56.

20. Courts apply a modified burden-shifting framework in cases of alleged discrimination in public accommodation. See Callwood v. Dave & Buster's, Inc., 98 F. Supp. 2d 694, 704 (D.C. Md. 2000) (claims of discrimination in public accommodations under 42 U.S.C. §§ 1981 and 2002a); Solomon v. Waffle House, Inc., 365 F. Supp. 2d 1312, 1321-22 (N.D. Ga. 2004) (same). Discrimination in employment differs from discrimination in providing public accommodation in terms of transactional legibility: the hiring and firing of employees is well-documented compared to the ephemeral nature of the retail relationships between customers and, say, bartenders. For this reason, plaintiffs in public accommodation cases will rarely have evidence to prove better treatment of equally obnoxious customers

who do not share the plaintiffs' personal characteristics, such as national origin. Callwood, 98 F. Supp. 2d at 705-06.

21. The Callwood court stated the requirements for a prima facie showing of alleged discrimination in providing service at a restaurant as follows: 1) the plaintiff is a member of a protected class; 2) the plaintiff has made himself available to receive and pay for services provided by the defendant to all members of the public in the way that they are normally provided; and 3) the plaintiff did not enjoy the benefits of the contracted-for experience under factual circumstances that rationally support an inference of unlawful discrimination because: a) the plaintiff was deprived services while similarly situated persons outside of the protected class were not deprived of those services or b) the plaintiff received services in a markedly hostile manner and in a manner that a reasonable person would find objectively unreasonable. Callwood, 98 F. Supp. 2d at 707.

22. Paragraph 3.b is the major modification to the burden-shifting framework of McDonnell Douglas. When the plaintiff cannot find similarly situated persons outside of the protected class, he must proceed under paragraph 3.b by proof that the defendant's policy supports a rational inference of discrimination because it is so profoundly contrary to its manifest financial interests, so far outside of widely accepted

business norms, or so arbitrary on its face. O'Neill v. Gourmet Sys. of Minn., Inc., 213 F. Supp. 2d 1012, 1021 (W.D. Wisc. 2002) (claims of discrimination in public accommodation under 42 U.S.C. §§ 1981 and 2002a).

23. Obviously, Petitioner has met the requirements of paragraphs 1 and 2 above. His nation of origin is Brazil, and he presented himself at the outdoor bar in the usual manner to obtain and pay for food and beverages. Paragraph 3.a is not at issue due to the absence of evidence of how Respondent treats customers, not sharing Petitioner's national origin, who make obnoxious comments similar to the September 15 Vulgarities. But Petitioner cannot satisfy paragraph 3.b. In light of the September 15 Vulgarities, denying Petitioner service at the outside bar, but offering him service inside, was not profoundly contrary to Respondent's manifest financial interests, far outside of widely accepted business norms, or arbitrary on its face. Thus, Petitioner failed even to make a prima facie showing of discrimination in providing a public accommodation.

24. Rather than use the burden-shifting framework of McDonnell Douglas, a plaintiff may rely on direct evidence of discrimination. A major difference in the two methods of proof is that, if a plaintiff produces direct evidence of discrimination, the defendant must then rebut the plaintiff's

prima facie proof by a preponderance of the evidence. See, e.g., Wall, 946 F.2d at 809; Evans, 131 F.3d at 962.

25. However, evidence of a focus on a material personal characteristic, such as national origin, is not direct evidence of discrimination, absent evidence that this focus caused the adverse action, such as a denial of service at the outside bar. For instance, in Evans, 131 F.3d at 961-62, a supervisor revealed his focus on race when he said that the plaintiff was a "very large, very strong, very muscular black male," who was trying to intimidate smaller or overweight white men. This evidence was insufficient to establish a discriminatory basis for the supervisor's failure to promote and eventual discharge of the plaintiff.

26. Only the most blatant of remarks--such as a management memo stating, "Fire Charley; he is too old"--constitutes direct evidence of discriminatory action. If the statement merely suggests discriminatory action, the statement is not direct evidence, although it may support an inference of discriminatory action. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081-82 (11th Cir. 1990). In other words, direct evidence of discrimination comprises evidence of a discriminatory attitude and evidence that the discriminatory attitude bore directly on the adverse action. Fulmore v. England, 2009 U.S. Dist. LEXIS 50101 n.6 (D.C.S.C. 2009). Given Mr. Carr's knowledge of

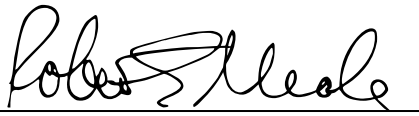
the September 15 Vulgarities, the September 25 Vulgarity--even if treated as evidence of a discriminatory attitude--does not comprise evidence of the motivation driving the decision to deny Petitioner outside service, even if Mr. Carr had been the decisionmaker.

RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 5th day of February, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.