

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LATELRA LEWIS,

Petitioner,

vs.

Case No. 19-5141

PUBLIX SUPERMARKETS,

Respondent.

_____ /

RECOMMENDED ORDER OF DISMISSAL

This case is before the undersigned on Respondent's Motion for Summary Recommended Order and Incorporated Memorandum of Law ("Motion"), filed November 15, 2019. Through its Motion, Respondent contends that it is not a "public accommodation" as defined by section 760.02(11), Florida Statutes, and therefore is not subject to the terms of the Florida Civil Rights Act of 1992, as amended, section 760.10, Florida Statutes^{1/} ("FCRA").

APPEARANCES

For Petitioner: Latelra Lewis, pro se
Post Office Box 29
Waldo, Florida 32694

For Respondent: Christine E. Howard, Esquire
Brett Purcell Owens, Esquire
Fisher & Phillips, LLP
Suite 2350
101 East Kennedy Boulevard
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The dispositive issue presented is whether Respondent, Publix Super Markets, Inc. ("Publix" or "Respondent"), is a "public accommodation" as defined by section 760.02(11), and is therefore subject to the terms of the FCRA. Having concluded that the Publix location where the alleged discriminatory action took place is not a "public accommodation" as defined by section 760.02(11), it is unnecessary to determine whether the alleged discriminatory action indeed took place.

PRELIMINARY STATEMENT

On October 12, 2018, Petitioner visited Respondent's Store No. 0795, located on Main Street in Gainesville, Florida. The store Petitioner visited is a grocery store. Petitioner was at Respondent's grocery store to buy her son lunch. She planned to take the items she purchased to her son's school.

Petitioner retrieved all of the items she wanted and walked to Respondent's checkout. Petitioner alleges she was verbally threatened by Margaret Nugent, a customer, who was also shopping at Respondent's store. Petitioner has known Ms. Nugent for 10 years and did not anticipate that she would be threatened by Ms. Nugent.

Petitioner was able to purchase all of the items that she wanted from Respondent's grocery store. Teddy Cherena, the customer service manager, spoke to Petitioner regarding the

incident. Petitioner did not ask Mr. Cherena to do anything in response to Ms. Nugent's alleged verbal threats.

Ms. Nugent left the store shortly after allegedly threatening Petitioner. Mr. Cherena walked Petitioner to the store's exit. Petitioner left Respondent's store and chose to call 911. Petitioner alleges she was discriminated against based upon her race because Respondent did not call 911. However, Petitioner admits she knew she could call 911 at any time, was able to purchase each item she wanted, and is not aware of any other customers ever being threatened at Respondent's grocery store.

On March 18, 2019, Petitioner filed a Public Accommodation Complaint of Discrimination with the Florida Commission on Human Relations ("Commission") concerning the events that allegedly transpired on October 12, 2018. Having investigated Petitioner's complaint, on September 13, 2019, the Commission entered its Determination: No Reasonable Cause. Dissatisfied with the Commission's determination, on September 20, 2019, Petitioner filed the Petition for Relief ("Petition") which is the subject of this proceeding. The Petition was referred to the Division of Administrative Hearings ("DOAH") on September 25, 2019, and assigned to the undersigned Administrative Law Judge ("ALJ").

The undersigned scheduled the final hearing for November 15, 2019, but on November 8, 2019, Respondent filed a Motion for Summary Judgment, asserting that the Publix location at issue was not a public accommodation subject to the provisions of FCRA. Attached to the Motion for Summary Judgment was the transcript of Petitioner's deposition, taken on October 28, 2019, by counsel for Publix.

Given the potentially dispositive nature of the motion, the undersigned convened a telephonic motion hearing on November 13, 2019, to hear argument on the motion. Having heard argument from counsel for Publix and from Petitioner, the undersigned entered a written Order that same day, providing in relevant part:

1. The final hearing scheduled for November 15, 2019, is canceled.
2. Ruling is reserved on the Motion for Summary Judgment.
3. Petitioner may file a written response to the Motion for Summary Judgment within 7 days of the date of this Order.
4. Within 14 days of the date of this Order, Respondent may file a supplemental motion for summary recommended order addressing the factual issue of whether, on the date of the incident in question, Respondent was engaged in "selling food for consumption on the premises" and could therefore fall within the definition of a public accommodation under section 760.02(11), Florida Statutes. Should Respondent choose to file a supplemental

motion, Petitioner may file a written response thereto within 7 days of the filing of the supplemental motion.

On November 15, 2019, Respondent filed the Motion for Summary Recommended Order at issue. Attached to this motion was the affidavit of Frank Ammirati, the Assistant Store Manager at the Publix location at issue.

On November 19, 20, and 26, 2019, Petitioner filed voluminous documents with DOAH, all of which relate to the allegations of her alleged mistreatment by Publix, and none of which address the issue of whether Respondent was engaged in "selling food for consumption on the premises" and could therefore fall within the definition of a public accommodation under section 760.02(11).

The Motion for Summary Recommended Order invokes the procedure in section 120.57(1)(i), Florida Statutes, which provides as follows:

When, in any proceeding conducted pursuant to this subsection, a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. An order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to

subsection (2), if appropriate, but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge. An order entered by an administrative law judge relinquishing jurisdiction to the agency based upon a determination that no genuine dispute of material fact exists, need not contain findings of fact, conclusions of law, or a recommended disposition or penalty.

The undersigned has determined from the pleadings, deposition transcript, and affidavit on file that no genuine issue as to any material fact exists with regard to the dispositive issue raised by the Motion for Summary Recommended Order, and that, based on the undisputed facts, the Petition should be dismissed.

While it is recognized that, per section 120.57(1)(i), this Order "need not" contain findings of fact, conclusions of law, and recommended disposition, the undersigned chooses to do so here, to fully explain the bases for these determinations and to offer the legal analysis leading to the recommended disposition.

FINDINGS OF FACT

1. On October 12, 2018, Petitioner visited Respondent's Store No. 0795, located on Main Street in Gainesville, Florida. The store Petitioner visited is a grocery store.

2. Petitioner was at Respondent's grocery store to buy her son lunch. She planned to take the items she purchased to her son's school. Typically, when she goes to Respondent's grocery

store, she buys groceries to take back to her house or to her son's school.

3. Petitioner has known Margaret Nugent for over 10 years. In the past Ms. Nugent has upset Petitioner.

4. Ms. Nugent uses a motorized red chair to traverse Respondent's premises.

5. Petitioner walked in Respondent's entrance to get her son lunch for school. As Petitioner entered the store, she saw Ms. Nugent, and said "Hi, Ms. Nugent, Ms. Nugent."

6. Petitioner continued picking up the items that she was purchasing for her son, and then walked to Respondent's checkout.

7. Donna, the cashier, waited on Petitioner. Petitioner acknowledged that Donna did everything in the checkout process correctly.

8. While Petitioner was waiting to buy her items, Ms. Nugent pulled to the back of the checkout and said "You want to know a secret?" Petitioner said no, and then Ms. Nugent said, "The next time you call my name out like this, I'm gonna cut your throat and kill you." Ms. Nugent then took off in her motorized chair.

9. Hearing this exchange, Donna contacted Mr. Cherena, the customer service manager, and asked him to come to the register. Petitioner told Mr. Cherena what Ms. Nugent had said to her.

Mr. Cherena thanked Petitioner for letting him know and told her they would keep an eye out.

10. Petitioner was able to purchase all of the items that she wanted from Respondent's store.

11. Mr. Cherena walked Petitioner to an exit of the store and pointed to the other exit because Ms. Nugent was utilizing the same to exit the store.

12. Petitioner did not ask Mr. Cherena to do anything in response to what Ms. Nugent said to her. Petitioner knew she could call 911 if she wanted to, and in fact, she did so upon exiting the store. The police then arrived at the store and the investigating officer discussed the matter with Petitioner.

13. Petitioner believes Ms. Nugent thought she was a threat because Petitioner was visiting a mutual friend and Ms. Nugent thought that Petitioner was selling their friend prescription pain pills.

14. Petitioner is alleging she was discriminated against based on her race (Black) because Respondent failed to call the police.

15. Petitioner did not have any indication that Ms. Nugent was going to threaten her. Petitioner also admits that Respondent would not have had any idea that Ms. Nugent would threaten Petitioner on October 12, 2018.

16. Petitioner is not aware of any other customers in the past being threatened at the store.

17. Petitioner admits that no one at the store made any remarks or slurs regarding her race.

18. Frank Ammirati is the assistant store manager at Publix Store 0795.

19. Publix Store 0795 is a grocery store that is principally engaged in selling packaged food, consumer goods, and other items for consumption and use at off-site locations not located on the premises of the store.

20. Publix Store 0795 does not have any designated areas for customers to consume food on the premises. Likewise, there are no restaurants, lunchrooms, cafeterias, cafés, or designated tables at the store for customers to consume food that they have purchased at the store.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes. In her initial complaint of discrimination against Publix, Petitioner claims that she was "discriminated against based on my race (Black). While shopping at Publix on 10/12/2018, I was harassed, and my life was threatened by

another customer (White-female). Publix failed to do anything regarding this matter and failed to call the police.”

Publix is not a Public Accommodation under the FCRA

22. The first issue to determine in this matter is whether Publix constitutes a place of “public accommodation” as defined by the FCRA.

23. Section 760.08 provides: “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 without discrimination or segregation on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion.” Fla. Stat. § 760.08. The threshold question in this matter is whether Respondent is a place of public accommodation as defined by section 760.02(11).

24. Section 760.02(11) defines “public accommodations” narrowly to include only the following:

(11) “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.

25. It is well settled that not all establishments that are open to the public will constitute a place of "public accommodation" under the FCRA. Moreover, governing case law establishes that not all businesses that make food products available to the public are included in the FCRA's definition of "public accommodation." See Pena v. Fred's Stores of Tenn., Inc., 2009 U.S. Dist. LEXIS 121360, at *6 (N.D. Fla. Dec. 31, 2009) (A retail store chain that sold pre-packaged food and beverage items that were not specifically sold for consumption on the premises (as there was no eating area) was not a "public

accommodation" under the FCRA.); Amiri v. Safeway, Inc., 1999 U.S. Dist. LEXIS 933, *2-3 (D.D.C. Jan. 26, 1999) ("A grocery store . . . does not fall within the definition of public accommodation."); Jones v. Wal-Mart, 2010 U.S. Dist. LEXIS 9801, at *5 (W.D. La. Jan. 14, 2010) (Retail stores, food markets and the like are not within the ambit of 42 U.S.C. § 2000a.); Gigliotti v. Wawa, Inc., 2000 U.S. Dist. LEXIS 1021, (E.D. Pa. Feb. 2, 2000) (A retail store "was not principally engaged in selling food for consumption on premises where store sold food which was ready to eat but had no facilities for consumption of food on premises."); Morales v. Whole Foods Mkt. Cal., Inc., 2015 U.S. Dist. LEXIS 165174, at *9 (N.D. Cal. Dec. 9, 2015) (The ability to purchase food ready-to-eat at a grocery store and to eat it on or near the property does not convert the location into a restaurant or other public accommodation within the meaning of 42 U.S.C. § 2000a.); but cf. Thomas v. Tops Friendly Mkts., 1997 U.S. Dist. LEXIS 15887 (N.D. N.Y. 1997) (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").

26. In addition to the above-cited federal cases, based upon the doctrine of expressio unius est exclusio alterius, the fact that retail stores, such as the one at issue in this proceeding, are not specifically listed in section 760.02(11),

reflects a legislative intent that the statute does not encompass such establishments. Fabiano v. Target Corp., Case No. 08-5858 (Fla. DOAH Apr. 6, 2009; Fla. FCHR July 1, 2009) (FCRA excludes retail stores).^{2/} In Darrell Alford v. Publix Super Markets, Inc., Case No. 15-3620 (Fla. DOAH Feb. 2, 2016), the ALJ concluded that a grocery store was not a "public accommodation" without some evidence of an "eating area" on the premises. In Morales v. Winn-Dixie Stores, Inc., Case No. 08-5166 (Fla. DOAH Dec. 24, 2008; Fla. FCHR Mar. 16, 2009), the Commission adopted the ALJ's conclusion that the Winn-Dixie grocery store at issue was not a place of public accommodation under the facts presented, stating that "the Commission did not exclude the possibility that a grocery store could be a 'public accommodation' under a different set of facts." In Baker v. Maycom Communications/Sprint-Nextel, Case No. 08-5809 (Fla. DOAH Dec. 22, 2008; Fla. FCHR Mar. 16, 2009), the ALJ observed that the FCRA "only prohibits discrimination by statutorily-defined 'public accommodations'; it does not prohibit discrimination in all business contexts." The ALJ concluded that the omission of retail stores from the public accommodations specifically listed in section 760.02(11) reflects a legislative intent that the statute does not encompass such establishments.

27. The undisputed facts establish that the Publix store at issue is not a "public accommodation" for purposes of the

FCRA. The grocery store does not contain a "restaurant, cafeteria, lunchroom, lunch counter, [or] soda fountain." Neither is it "principally engaged in selling food for consumption on the premises." Publix does not hold itself out as serving food to patrons at its Main Street location, nor does it maintain a designated eating area for customers to consume its retail goods on-site. Accordingly, based on the competent substantial evidence in the record, Publix Store No. 0795 is not subject to the public accommodation provisions of the FCRA.

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 Respondent, Publix Super Markets, Inc. (Store No. 0795) is not a place of "public accommodation" under the facts of this case. Accordingly, the Petition for Relief filed in this matter should be dismissed.

DONE AND ENTERED this 27th day of January, 2020, in
Tallahassee, Leon County, Florida.



W. DAVID WATKINS
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 27th day of January, 2020.

ENDNOTES

^{1/} Citations shall be to Florida Statutes (2019) unless otherwise specified. Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

^{2/} While ALJ R. Bruce McKibben's Recommended Order was adopted in toto, the Commission observed that "in our view, if a food establishment as described in the statute, above, is located within a "retail store," the "retail store" would be a "public accommodation" by definition, regardless that the statute does not specifically say that "retail stores" are public accommodations. This possible exception does not apply under the facts sub judice.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
(eServed)

John Bateman, Esquire
Publix Supermarket, Inc.
Post Office Box 407
Lakeland, Florida 33802

Latelra Lewis
Post Office Box 29
Waldo, Florida 32694

Brett Purcell Owens, Esquire
Fisher & Phillips, LLP
Suite 2350
101 East Kennedy Boulevard
Tampa, Florida 33602
(eServed)

Christine E. Howard, Esquire
Fisher & Phillips LLP
Suite 2350
101 East Kennedy Boulevard
Tampa, Florida 33602
(eServed)

Cheyenne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
(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.