

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

HORACE BARNES,

Petitioner,

vs.

Case No. 22-0729

JTS ENTERPRISES OF TAMPA, LTD., D/B/A
CASPER'S COMPANY, A/K/A MCDONALD'S
STORE NO. 5470,

Respondent.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), on May 11, 2022, in Tampa, Florida.

APPEARANCES

For Petitioner: Horace Barnes, pro se
Apartment 4
5544 Terrace Court
Tampa, Florida 33617

For Respondent: Kevin D. Johnson, Esquire
Colby Ellis, Esquire
Johnson Jackson LLC
100 North Tampa Street, Suite 2310
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in this case is whether JTS Enterprises of Tampa, Ltd., d/b/a Caspers Company, a/k/a McDonald's Store No. 5470 (Respondent), discriminated against Horace Barnes (Petitioner), on the basis of his race, in violation of the Florida Civil Rights Act (FCRA).

PRELIMINARY STATEMENT

On August 6, 2021, Petitioner filed a Public Accommodation Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (Commission), alleging that he was the victim of discrimination on the basis of sex. On February 4, 2022, the Commission notified Petitioner that no reasonable cause existed to believe that Respondent committed unlawful discrimination on the basis of sex.

On March 8, 2022, Petitioner filed a Petition for Relief with the Commission in which he alleged that Respondent committed a discriminatory public accommodation practice on the basis of his race, not sex, as indicated in the Complaint. The Commission transmitted the Petition for Relief to DOAH to conduct a chapter 120 evidentiary hearing.

At the final hearing, the undersigned sought clarification from Petitioner regarding the basis for his claim—that is, whether his claim was based on sex or race discrimination. Petitioner made clear that his Complaint was solely based on race discrimination, as can be seen in the quote from the final hearing Transcript below:

JUDGE LIVINGSTONE: Okay. All right. One second. All right. Mr. Barnes, I reviewed all the documents. Well, not all the documents. Again, I am not the Florida Commission on Human Relations, so I don't have all the information that you may have provided to them when they were investigating your claim. But I saw that you filed a public complaint of -- or a complaint of public accommodations discrimination, and you also filed a petition for relief. In your notes, I noticed a claim of sex discrimination and race discrimination. Do you intend to proceed today to try to prove both of those claims, or just one?

MR. BARNES: Oh, no. Well, really -- Judge -- talking about the investigator was the one wrote

the report. You know, I ain't never tell him about no sex, nothing about that. You know, I just filed a complaint. I got all my documents right here to show that it is not a sexual complaint.

JUDGE LIVINGSTONE: Okay. So, are you saying today that your complaint of discrimination is based solely on race? So only on your race?

MR. BARNES: Yes.

JUDGE LIVINGSTONE: Okay. So not sex discrimination, only discrimination based on your race?

MR. BARNES: Yes.

At the final hearing, the parties' Joint Exhibit 1 was admitted into evidence. Petitioner testified on his own behalf and called James Walker (Mr. Walker) as a witness. Petitioner's Exhibits 1 through 8 were admitted into evidence. Respondent called Michelle Canty (Ms. Canty), Laquan Jerger, Nyris Lily Perez, and Rebecca Boamah as witnesses.

At the close of the hearing, the parties requested a 20-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals.¹ On June 14, 2022, the one-volume Transcript of the final hearing was filed with DOAH. Respondent timely submitted a Proposed Recommended Order, which was duly considered in preparing this Recommended Order. Petitioner did not submit a post-hearing submittal.

All statutory references are to the 2021 version of the Florida Statutes. Relevant provisions of chapter 760, Florida Statutes, have been unchanged since 2015, prior to any alleged discriminatory acts.

¹ By agreeing to an extended deadline for post-hearing submissions beyond ten days after the filing of the transcript, the parties waived the 30-day timeframe for issuance of the Recommended Order. *See* Fla. Admin. Code R. 28-106.216.

FINDINGS OF FACT

1. Petitioner is a black man who lives in Tampa, Florida.
2. Respondent owns and operates several McDonald's franchises in the Tampa, Florida area, including a restaurant located at 2006 50th Street, in Tampa, that is known as the "Broadway" location.
3. Petitioner has visited the Broadway McDonald's to purchase food on several occasions.
4. On or about May 22, 2021, at approximately 6:00 a.m., Petitioner drove to the Broadway McDonald's drive-through to purchase breakfast with his friend, Mr. Walker. Petitioner drove the vehicle; Mr. Walker sat in the passenger seat.
5. When a customer's vehicle is stopped at the Broadway McDonald's drive-through speaker box to place an order, the restaurant employee taking the order cannot see the driver. There is no continuous video feed available that would allow the order taker to see the customer.
6. The drive-through has a camera that takes still-image pictures of the sides of cars coming through the drive-through lanes. The pictures taken are of the side, roof, and hood of the vehicle coming through the drive-through.
7. The purpose of the pictures is to allow the employees working in the drive-through windows to match orders with the vehicles. The driver cannot be viewed from the still-image picture.
8. Petitioner testified that when he pulled into the drive-through to place his order, an employee said "shut up, sissy," through the drive-through's two-way speaker box, before he was even able to begin to place his order.
9. Petitioner testified that he parked and entered the lobby with Mr. Walker and asked to speak to the manager. Petitioner claims that thereafter, an employee approached the front counter and said "I'm the one called you a sissy," and "you need to get out my store, drunk."
10. Petitioner testified that the employee who called him a drunk and a sissy was Ms. Canty.

11. Mr. Walker testified that he and Petitioner left the store and called the police, but the police declined to respond because of COVID-19 restrictions.

12. Ms. Canty is a black woman. She has been employed by Respondent for approximately ten years and has worked at the Broadway location for approximately five years. She currently serves as the guest services manager.

13. As the guest services manager, Ms. Canty is responsible for resolving customer complaints and training other employees on how to provide good customer service, in addition to other tasks.

14. Ms. Canty denied calling Petitioner a drunk or a sissy and denied interacting with him, at all, on May 22, 2021. She denied ever seeing or interacting with Petitioner, prior to the day of the hearing.

15. At hearing, the undersigned had the opportunity to observe the testimony and demeanor of Petitioner and Ms. Canty. The testimony of Ms. Canty is credited and is more persuasive than the testimony of Petitioner, which was not credible or persuasive.

16. The undersigned finds that Ms. Canty did not call Petitioner a drunk or a sissy.

17. Based on Petitioner's version of events, a McDonald's employee called him a sissy before seeing or speaking to him, as Petitioner was not visible to McDonald's employees prior to the initial alleged "sissy" comment.

18. Assuming arguendo, that a McDonald's employee did call Petitioner a sissy, the employee did so before knowing Petitioner's race.

19. Petitioner failed to meet his burden of proving that Respondent committed an unlawful discriminatory practice against him in violation of the FCRA.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes. *See also* Fla. Admin. Code R. 60Y-4.016.

21. Section 760.11(7) permits a party for whom the Commission determines that there is no reasonable cause to believe that a violation of the FCRA has occurred to request an administrative hearing before DOAH. Following an administrative hearing, if the Administrative Law Judge (ALJ) finds that a discriminatory act has occurred, the ALJ "shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." § 760.11(7), Fla. Stat.

22. Petitioner alleges Respondent discriminated against him, based on his race, in violation of the FCRA.

23. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996). The standard of proof is preponderance of the evidence. *See* § 120.57(1)(j), Fla. Stat.

24. The FCRA prohibits discrimination in places of "public accommodation," based on race. *See* § 760.08, Fla. Stat.

25. It is undisputed that Respondent is a "public accommodation" as defined by section 760.02(11)(b).

26. The FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Florida courts hold that federal decisions construing Title VII are applicable when considering claims under the FCRA. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d DCA

2009); and *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

27. Discrimination may be proven by direct, statistical, or circumstantial evidence. *Valenzuela*, 18 So. 3d at 22. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the employment decision without any inference or presumption. *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001); *see also Holifield v. Reno*, 115 F.3d 1555, 1561 (11th Cir. 1997). "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999).

28. Petitioner presented no direct evidence of discrimination. Similarly, the record in this proceeding contains no statistical evidence of discrimination by Respondent.

29. Instead, Petitioner relies on circumstantial evidence of discrimination to prove his case. *See Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1140-41 (9th Cir. 2006) (noting that, while direct evidence of racial discrimination could support a finding of discriminatory intent, it is not required, and circumstantial evidence alone may be sufficient).

30. Claims of discrimination in public accommodations under the FCRA, relying on circumstantial evidence, apply the same prima facie standards and burden of proof as employment discrimination claims under Title VII and the FCRA. *See LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1368, 1370 (S.D. Fla. 1999) (finding public accommodation claims under the FCRA have "the same prima facie standards and burdens of proof as do employment discrimination claims under Title VII."); *see also Solomon v. Waffle House, Inc.*, 365 F. Supp. 2d 1312, 1331 (N.D. Ga. 2004).

31. As such, in public accommodation discrimination cases, Florida courts follow the three-part, burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

32. Under the *McDonnell Douglas* framework, Petitioner bears the initial burden of establishing a prima facie case of unlawful discrimination based on his race. If this burden is met, Respondent has the burden of articulating a legitimate non-discriminatory basis for its action.

33. If Respondent satisfies its burden, Petitioner must then prove that the legitimate reason asserted by Respondent is a mere pretext for unlawful discrimination. *Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1231 (S.D. Fla. 2005).

34. To establish a prima facie case of public accommodation discrimination, Petitioner must demonstrate that he: (1) is a member of a protected class; (2) attempted to afford himself the full benefits and enjoyment of a public accommodation; (3) was denied the full benefit or enjoyment of a public accommodation; and (4) such services were available to similarly situated persons outside his protected class who received full benefits or who were treated better. *Laroche*, 62 F. Supp. 2d at 1382; *see also Solomon*, 365 F. Supp. 2d at 1331.

35. Respondent concedes that Petitioner, a black man, is a member of a protected class. Petitioner proved that he attempted to patronize Respondent's establishment in May 2021 when he visited to purchase breakfast. Petitioner failed to prove all other elements of the prima facie case.

36. Petitioner failed to present any persuasive or credible evidence to find that Ms. Canty (or any other employee of Respondent) called him a sissy while he attempted to order through the drive-through. Further, he failed to prove that Ms. Canty called him a sissy and a drunk, when he later entered the restaurant's lobby.

37. Most importantly, even if called a sissy or drunk (alleged facts which he did not prove), Petitioner also failed to provide *any* evidence to support the allegation that it occurred because of his race.

38. Because Petitioner failed to establish a prima facie case under the *McDonnell Douglas* framework, the claim fails and no analysis regarding pretext is required.

39. Petitioner failed to prove that he was subjected to public accommodation discrimination; and, as such, his Petition for Relief must be dismissed.

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 dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 25th day of July, 2022, in Tallahassee, Leon County, Florida.



JODI-ANN V. LIVINGSTONE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2022.

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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.