

In the Matter of
THE WESTWIND GROUP OF
OREGON, INC., dba Burger King, Respondent.

Case Number 47-98
Final Order of the Commissioner
Jack Roberts
Issued June 30, 1998.

SYNOPSIS

Where respondent, a public accommodation, operated a fast food restaurant, and where respondent's assistant manager, who was white, ignored and failed to serve complainant, who was black, but then promptly and courteously served a white customer who came to the counter behind complainant, the commissioner found that the assistant manager discriminated against complainant because of her race, in violation of ORS 30.670. The commissioner awarded complainant \$15,000 for her mental suffering caused by respondent's actions. ORS 30.670, 30.675, 30.685.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 30, 1998, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Veta Shamsud-Din (Complainant) was present throughout the hearing. The Westwind Group of Oregon, Inc. (Respondent) was represented by

Emi Anne Murphy, Attorney at Law. Stephen LaBreche was present throughout the hearing as Respondent's representative.

The Agency called the following witnesses: Chet Nakada, Senior Investigator with the Civil Rights Division of the Agency; Jeff Nelson, Portland Police Officer; and Veta Shamsud-Din, Complainant.

Respondent called the following witnesses: Dinshaw Kermani, Respondent's restaurant manager; and Denise Ribbeck, Respondent's district team leader.

Administrative exhibits X-1 to X-6, Agency exhibits A-1 to A-3, and Respondent exhibits R-1 to R-6 were offered and received into evidence. The record closed on April 30, 1998.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

1) On March 26, 1997, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent discriminated against her because of her race/color in that, on January 22, 1997, Respondent's employee, Jim Brusseau, ignored Complainant, who is black, and made no effort to serve her when she entered Respondent's restaurant and then served a white man.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful public accommodation practice (denying service because of race) by Respondent in violation of ORS 659.045.

3) On March 18, 1998, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent denied Complainant the full and equal

enjoyment of Respondent's services because of her race. The Specific Charges alleged that Respondent's action violated ORS 30.670.

4) With the Specific Charges, the forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On April 9, 1998, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated affirmative defenses.

6) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case.

7) A pre-hearing conference was held on April 30, 1998, at which time the Agency and Respondent stipulated to facts that were admitted in the pleadings. Those facts were admitted into the record by the ALJ during the hearing.

8) At the start of the hearing, the attorney for Respondent stated that she had read the Notice of Contested Case Rights and Procedures and had no questions about it.

9) Pursuant to ORS 183.415(7), the ALJ orally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) On June 10, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At times material herein, Respondent was an Oregon corporation and a franchisee of Burger King Corporation operating under the assumed business name, Burger King, and was engaged in the business of selling food and drink to the public, subject to the provisions of ORS 659.010 to 659.435 and 30.670 to 30.685.

2) At times material herein, Respondent was a fast food restaurant offering food and beverages for sale to the public under the assumed business name Burger King located at 1525 SE Grand Avenue, Portland, Oregon.

3) At times material herein, James Brusseau was employed by Respondent as an assistant manager at Respondent's 1525 SE Grand Avenue, Portland, Oregon location.

4) Respondent maintained a "Crew Member Handbook" outlining its major policies and procedures, dated January 1995. The handbook contained guidelines for appropriate customer service. Unacceptable conduct that would result in disciplinary action included, among other things, "Failure to offer the highest degree of service, courtesy and respect to any customer." Brusseau received training about appropriate customer service. His managers thought he followed the customer service policy.

5) On January 19, 1997, Respondent adopted a national personnel policy prohibiting harassment of or discrimination against its employees. It replaced a 1992 policy memorandum prohibiting harassment of employees.

6) Brusseau, who is white, worked at the Grand Avenue restaurant for less than two years. He worked with several black employees. He helped a black employee get a promotion to assistant manager. He hired several black employees. Brusseau's manager got no complaints of discrimination or racism by Brusseau from customers or

employees. The restaurant served around 10,000 customers per week. Around 20 to 30 percent of the customers were black.

7) On January 22, 1997, Jeff Nelson, a white Portland Police Officer, was a customer in Respondent's restaurant between 7:00 and 8:00 p.m. He was in plain clothes. Brusseau was busy with some activity when Nelson came in. Brusseau immediately greeted Nelson and took his order. He was courteous to Nelson and served him quickly. Nelson sat at a table near the service counter. He observed Complainant when she entered Respondent's restaurant and the whole time she was there.

8) On or about January 22, 1997, Complainant was present at Respondent's fast food restaurant.

9) Complainant is a black female.

10) Before Complainant entered the restaurant, she knew she wanted a milkshake. She entered alone. Her daughter, the daughter's boyfriend, and her granddaughter were waiting in her car. The restaurant was not busy. No customer was waiting to be served. When Complainant entered, she walked up to the counter near the cash register. She looked at Brusseau. He was the only employee present behind the counter. He looked at her and looked away. He was moving around behind the counter, wiping down the counter and other things. Complainant was tracking Brusseau and they made eye contact several times. He occasionally glanced at her and looked down or turned his back on her. Complainant was not looking at the menu because she already knew what she wanted. She was waiting for Brusseau to ask to help her.¹ Brusseau didn't say a word to Complainant. She stood there for around a minute. Brusseau was behind the counter the entire time. Complainant felt embarrassed because she was not being helped and Brusseau was ignoring her. Brusseau never took Complainant's order.

11) A white male customer came into the restaurant and stood behind Complainant. The customer did not appear to be in a hurry. Brusseau tilted his head, looked around Complainant, and asked, "May I help you, sir?" to the white customer. The man looked at Complainant, then stepped up beside her. The customer was angry and complained that his last order had been filled incorrectly. Brusseau apologized to the man. Complainant then said to Brusseau that she had been there first and this wasn't fair. Brusseau had an aggressive tone of voice and posture and said, "Oh well," and something that Complainant did not remember because she was upset. Brusseau was not apologizing. Nelson heard Brusseau say to Complainant something to the effect of, "If you don't like it, you can take your business elsewhere." Complainant stepped back, shocked. Complainant said she would spend her money elsewhere and left. She thought Brusseau was a racist.

12) Complainant left the restaurant without purchasing any food or drink items.

13) Jeff Nelson contacted Complainant at her car. She had never seen him before and did not know he was a police officer. She was upset and had tears in her eyes. Nelson told her he had seen what happened in the restaurant. He said it was wrong and that she had been discriminated against. He wrote down his name and phone number for her, in case she wanted him to be a witness. Before Nelson came up to her car, Complainant did not plan to do anything about the incident.

14) While Complainant was talking with Nelson, the white customer came out of the restaurant. His car was parked next to the passenger side of Complainant's car. As the customer was getting in his car, he yelled something to the effect that he thought Nelson was making a mistake or Nelson was blowing it out of proportion. Nelson told the man he was not part of their conversation. The man said an obscenity and left.

15) Complainant then drove up to Respondent's drive-through window and ordered a milkshake. She was served by a Hispanic male. He said the milkshake machine was broken. Complainant asked him the name of the manager and told him the manager had been rude to her. He agreed that the manager was rude.

16) Complainant felt surprised, upset, humiliated, and embarrassed when Brusseau did not help her. The incident hurt her self esteem. She spoke to her pastor about the incident later because she felt depressed and hurt. Up to the time of hearing, she still thought about the incident and was upset by it. She never went to another Burger King restaurant.

17) Complainant's testimony was credible. The ALJ carefully observed her demeanor at hearing, and on that basis found her testimony reliable. Further, her testimony was corroborated by Nelson's testimony, which the forum also found to be credible.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent's restaurant at 1525 SE Grand Avenue, Portland, Oregon, was a place offering to the public accommodations, advantages, facilities or privileges in the nature of goods and services.

2) Complainant is a member of a protected class (race).

3) Respondent's assistant manager denied Complainant the full and equal accommodations, advantages, facilities, and privileges of Respondent's restaurant on account of Complainant's race.

4) Complainant suffered mental distress because of Respondent's action.

CONCLUSIONS OF LAW

- 1) ORS 30.675(1) provides:

"A place of public accommodation * * * means any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise."

At all times material, Respondent was a place of public accommodation subject to the provisions of ORS 30.670 to 30.685 and 659.010 to 659.110. ORS 659.010(8), (13), (15).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practice found. ORS 659.045, 659.050, 659.060.

- 3) ORS 30.670 provides:

"All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race * * *."

ORS 30.685 provides:

"It is unlawful for any person to aid or abet any place of public accommodation, as defined in ORS 30.675 or any person acting on behalf of such place to make any distinction, discrimination or restriction on account of race * * *."

Respondent violated ORS 30.670.

4) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 30.670 to 30.685, 659.010 to 659.110 and 659.400 to 659.545, to perform any act or series of acts reasonably calculated to carry

out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of the Complainant and other persons similarly situated.

OPINION

Prima Facie Case

The Agency has the burden of proving that Complainant's protected class membership was the reason for Respondent's alleged unlawful action. OAR 839-005-0010(5). To present a prima facie case in this matter, the Agency must present evidence to establish the following four elements:

- (1) The Respondent is a Respondent as defined by statute;
- (2) The Complainant is a member of a protected class;
- (3) The Complainant was harmed by an action of the Respondent;
- (4) The Respondent's action was taken because of the Complainant's protected class.

OAR 839-005-0010(1). The Agency has established a prima facie case. The credible testimony of Agency witnesses was accepted and relied upon herein. Regarding the first three elements:

- (1) Respondent stipulated that it was engaged in the business of selling food and drink to the public, subject to the provisions of ORS 659.010 to 659.435 and 30.670 to 30.685
- (2) Respondent stipulated that Complainant is a black female. Thus, she is a member of a class protected by ORS 30.670.
- (3) Complainant's credible testimony established that she suffered mental distress because of Respondent's treatment of her.

Regarding the fourth element, that is, the causal connection between Respondent's action and Complainant's membership in the protected class, comparative evidence established this element. Credible evidence on the record showed that Brusseau treated Nelson, a white person, and the customer who came in after Complainant, another white person, differently than he treated her. Brusseau served both the white customers quickly and courteously. He stopped his other work to

serve them immediately. In comparison, he did not serve Complainant quickly or at all. He did not stop his other clean-up activities to help her. All the credible evidence in the record shows that he ignored her, despite her apparent readiness for service.

Furthermore, his demeanor towards Complainant was completely different than it was toward the white customers. He was prompt and courteous to them. He was apologetic to the white customer with a complaint. However, he was rude and unhelpful to Complainant, and he responded to her complaint with a comment to the effect of "If you don't like it, take your business somewhere else."

These facts permit a reasonable inference that Respondent's assistant manager treated Complainant differently than other customers (who were not members of Complainant's protected class) because of her protected class.

Respondent's Defenses

In its answer, Respondent claimed it maintained a strict policy prohibiting any discrimination or unequal treatment of its customers because of race. Respondent presented two versions of its crew or team member handbook. It also provided two versions of its employment harassment and discrimination policies. The forum reviewed the two handbooks and failed to find such a specific policy. The handbook dated January 1995 contained many statements requiring the highest standards of customer service, but no specific policy prohibiting discriminatory treatment of customers because of race. The second handbook was dated July 1997. Therefore, it was not in existence at times material and the forum gave it no weight. The two discrimination policies prohibit employment discrimination, not discrimination against Respondent's customers. Respondent's two witnesses testified credibly that Respondent had a policy prohibiting discrimination against customers because of race and requiring equal treatment of all customers. Thus, while Respondent's written policies in the record don't evidence its

alleged antidiscrimination policy concerning customers, the forum believes that Respondent did train its employees to treat all customers equally, without regard to race.

Respondent then contended that Jim Brusseau complied with this policy during his encounter with Complainant. Respondent's evidence included Brusseau's unsworn statement and character evidence about Brusseau from his managers. Brusseau's statement says that Complainant arrived at the counter, mid-way down (that is, not in front of the cash register), and that she "was still deciding as she was intently reading the menu board." He claimed he went to the register and waited. Then the other customer approached and was in a hurry. Brusseau claimed that since Complainant was still looking at the menu, "I decided to help this gentleman." He also described his brief conversation with Complainant. Brusseau's description of the event and the conversation was contradicted by the sworn testimony of Complainant and Nelson. Nelson was a trained observer and an unbiased witness. His testimony was clear and reliable, and it corroborated Complainant's testimony about the incident. The Agency's evidence was more persuasive and reliable than Respondent's, and the forum found Brusseau's statement unreliable and not credible. Respondent's character evidence about Brusseau was insufficient to overcome the Agency's credible evidence about the actual incident.

Respondent also suggested a non-discriminatory reason for Brusseau's treatment of Complainant. It alleged that Brusseau was unable to serve Complainant while she was reading the menu board and deciding what to order. It claimed that Complainant left the establishment before Brusseau could take her order. Respondent again relied on Brusseau's statement. For the reasons given above, this evidence is not credible.

Respondent's evidence failed to rebut the Agency's prima facie case. The forum concludes that a preponderance of the evidence on the whole record proves that Respondent's treatment of Complainant was due to her race.

Damages

The Agency requested \$15,000 to compensate Complainant for her mental suffering resulting from Respondent's unlawful practice. Such an award is authorized by ORS 659.060 (3) and OAR 839-003-0090(1)(b).

In previous cases where a complainant has been denied equal treatment by a place of public accommodation because of race, the commissioner focused on three points when determining a monetary award.

First, the battle against race discrimination has been at the front line of civil rights. Discrimination in public accommodation impairs a "person's basic right to move about freely in society and to be recognized thereby as a part of his or her community." It is particularly "insidious and devastating."

Second, suffering in such cases is usually mental, rather than physical or financial, making it difficult to measure. However, to follow the mandate of the statute to "eliminate the effects" of discrimination, a compensatory award must be measured in terms of mental suffering.

Third, because such discrimination is particularly devastating, it is important to emphasize that the duration of the discrimination does not determine either the degree or duration of the effects of discrimination, "and it is these effects which damages awarded are meant to compensate." *In the Matter of Joseph Gaudry*, 1 BOLI 235, 241-43 (1980), *affirmed in part, reversed and remanded as to posting in other establishments operated by respondent, Gaudry v. Bureau of Labor and Industries*, 48

Or App 589, 617 P2d 668 (1980). See also *In the Matter of Joseph Gaudry*, 3 BOLI 32, 37-38 (1982); *In the Matter of The Pub*, 6 BOLI 270, 284-86 (1987).

Here, the discriminatory episode lasted only a couple of minutes. Complainant's upset lasted during the episode, the remaining evening, and for a long time thereafter. She consulted her pastor and attorneys as a result. Indeed, she testified credibly that the long term negative effects lasted to the date of hearing. In cases of race discrimination, the courts and the Commissioner have inferred that the complainant suffered impaired human dignity, and that inference is justified here. See, for example, *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979).

The forum is therefore awarding the sum of \$15,000 to compensate Complainant for her mental distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and to eliminate the effects of the unlawful practice found in violation of ORS 30.670, as well as to protect the lawful interest of others similarly situated, The Westwind Group of Oregon, Inc. is hereby ORDERED to:

1) And has delivered to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street # 32, Suite 1010, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for Veta Shamsud-Din, in the amount of Fifteen Thousand Dollars (\$15,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice in violation of ORS 30.670 found herein;

2) Cease and Desist from engaging in practices that discourage or deny persons the full and equal accommodations, advantages, facilities, and privileges of

your public accommodation by discriminating or imposing distinctions and restrictions based upon race.

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¹Complainant had once worked at a McDonald's restaurant, and she was trained to ask the customers if she could help them.