

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT MANNARINO,

Petitioner,

vs.

Case No. 16-3465

CUT THE CAKE BAKERY,

Respondent.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),^{1/} on October 27, 2016, by video teleconference sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: Robert Joseph Mannarino, pro se
4961 91st Avenue, 1A
Pinellas Park, Florida 33782

For Respondent: Sharon L. Haller, pro se
Cut the Cake Bakery
1271 U.S. Highway 1792
Longwood, Florida 32750

STATEMENT OF THE ISSUE

The issue in this matter is whether Respondent, Cut the Cake Bakery, violated section 760.08, Florida Statutes, by

discriminating against Petitioner based on his religion; and, if so, the relief to which Petitioner is entitled.

PRELIMINARY STATEMENT

On July 30, 2015, Petitioner filed a Complaint of Discrimination with the Florida Commission on Human Relations (the "Commission") alleging that Respondent, Cut the Cake Bakery ("Cut the Cake"), violated section 760.08 by discriminating against him based on his religion.

On May 11, 2016, the Commission notified Petitioner that it determined that it did not have jurisdiction to investigate Petitioner's complaint. The Commission concluded that Cut the Cake was not a place of "public accommodation" as defined by the Florida Civil Rights Act. See § 760.02(11), Fla. Stat.

On June 15, 2016, Petitioner filed a Petition for Relief with the Commission alleging a discriminatory public accommodation practice. The Commission transmitted the Petition to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on October 27, 2016.^{2/} At the final hearing, Petitioner testified on his own behalf. Petitioner did not offer any exhibits. Cut the Cake's co-owner, Sharon Haller, testified on its behalf. Cut the Cake presented one exhibit which was admitted into evidence. Neither side offered witness testimony.

A court reporter recorded the final hearing. At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the transcript to file post-hearing submittals. A one-volume Transcript of the proceeding was filed on December 12, 2016. Both parties timely filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. On April 14, 2015, Petitioner called Cut the Cake bakery to order a cake. On his cake, Petitioner requested Cut the Cake place the quote, "Homosexuality is an abomination unto the Lord."

2. As detailed below, Cut the Cake did not fulfill Petitioner's order. Petitioner alleges that Cut the Cake refused to make his cake based on his religion.

3. Petitioner lives in Pinellas Park, Florida. Cut the Cake's bakery (at that time) was located approximately 115 miles away in Longwood, Florida. Petitioner testified that he is very selective about the cakes he orders. Petitioner explained that bakeries in his locale do not offer the quality baked products he expects. He identified Cut the Cake after a wide search.

4. Petitioner selected Cut the Cake after viewing its website. Cut the Cake's products looked very appealing, and he decided Cut the Cake was the best place from which to order his cake. Therefore, despite the fact that the bakery was located

over a two-hour drive from his home, Cut the Cake was his choice. Cut the Cake was the only bakery Petitioner contacted to order his cake.

5. Petitioner ordered his cake by telephone. He called the phone number he found on Cut the Cake's website.

6. When Petitioner called Cut the Cake, a woman answered the phone. Petitioner expressed to her his desire to order a cake. He then told her that he would like his cake decorated with a quote. The quote he requested was, "Homosexuality is an abomination unto the Lord" (the "Quote").

7. Petitioner relayed that, once he recited the Quote, the woman on the phone was less than enthusiastic about fulfilling his order. In fact, Petitioner stated that the woman told him that Cut the Cake would charge him \$150 a letter (approximately \$5,850) to make his cake. Petitioner quickly announced that it was illegal for Cut the Cake to knowingly discriminate against someone due to their religious beliefs. Petitioner also told her that he was prepared to initiate legal action against the bakery. The woman promptly hung up the phone.

8. At the final hearing Petitioner testified that he is a Christian. During his phone call with Cut the Cake, however, Petitioner did not reveal that he was a member of any religion or affiliated with a religious organization.

9. Approximately one month later, Petitioner again called Cut the Cake to order a cake. On this occasion, the woman on the phone (different from the first woman) identified herself as Sharon Haller. Using an Asian accent, Petitioner requested a birthday cake with the message, "Happy Birthday Big Boy." Ms. Haller quoted a price of \$35 for the cake. This time, Petitioner promptly hung up the phone.

10. At the final hearing Petitioner represented that he was baptized a Christian and was raised in the Catholic church. Currently, however, he does not belong to a specific Christian denomination and rarely goes to church. Instead, Petitioner described his faith as "being Christian rather than acting 'Christian.'" Petitioner stated that he regularly associates with like-minded, Christian acquaintances, including pro-life activists. They gather to converse and collaborate.

11. Petitioner disclosed that the Quote is found in the Book of Leviticus 20:13. Petitioner claimed that the verse is a direct quote from the version of the Bible he was then reading.

12. Petitioner expressed that, despite the fact that he did not announce his religion, Cut the Cake should have known he was a Christian just from hearing the Quote. Petitioner declared that saying, "homosexuality is an abomination unto the Lord" automatically revealed his religious affiliation. Petitioner proclaimed that all Christians believe the Quote.

13. When asked what he intended to do with a cake that read, "Homosexuality is an abomination unto the Lord," Petitioner responded that he planned to use the cake for a celebration with some other pro-life activists.

14. Petitioner testified that he reads the Bible often. When pressed at the final hearing, however, Petitioner was unable to provide another biblical verse from memory. Petitioner was also unaware of the significance of the Torah. Petitioner explained that he chose a quote from Jewish scripture for his cake instead of a quote from Christ because Christians respect the Old Testament as much as the New Testament.^{3/}

15. Petitioner never visited Cut the Cake's business location. His only knowledge of the facility was based on pictures displayed on the bakery's website.

16. Cut the Cake is a custom bakery that specializes in cakes, cupcakes, and desserts. Cut the Cake sells its baked goods for offsite events such as weddings and parties. It conducts its business primarily through telephone orders and scheduled appointments. Once completed, Cut the Cake's products are either delivered to the customer or the customer picks up the order directly from the bakery.

17. Cut the Cake does not hold itself out as a restaurant or dining facility. The bakery does not maintain a designated seating area for customers. Cut the Cake does not advertise or

represent that its customers may eat their cake and dessert products on the premises. During work hours, Cut the Cake typically locks its bakery doors unless it has scheduled an appointment with a customer. Cut the Cake does not expect walk-in customers.

18. Cut the Cake occasionally offers free taste samples to its customers. Customers generally eat these samples at the bakery. However, all food products Cut the Cake sells are intended for off-site consumption.

19. Ms. Haller co-owns Cut the Cake with her daughter, Cyndol Knarr.

20. At the final hearing, Ms. Haller described an incident which she believes motivated Petitioner's actions. Several weeks prior to Petitioner's call, her bakery attracted significant internet and media scrutiny. In early April 2015, a pastor called Cut the Cake and requested a cake with an anti-homosexual message. Ms. Haller, believing the call was a prank, told the caller that her bakery would not make a cake displaying his message. The pastor, unbeknownst to Ms. Haller, recorded the conversation and posted the exchange on the YouTube website. The pastor then encouraged his on-line followers to call Cut the Cake and order cakes with a similar message.

21. Ms. Haller explained that for several weeks following this incident, Cut the Cake's phone rang incessantly with

harassing, sometimes threatening, calls. Ms. Haller expressed that thousands of callers a week called the bakery and placed fake orders. A number of callers announced that the calls were being recorded. Ms. Haller recounted that the calls became so pervasive that she reported the matter to local law enforcement. Ms. Haller testified that she was advised to hang up the phone any time a caller revealed that the call was being recorded.

22. Ms. Haller relayed that her daughter, Ms. Knarr, answered Petitioner's phone call on April 14, 2015. Ms. Haller did not hear or participate in the call. However, she discussed Petitioner's call with her daughter a number of times after she hung up the phone. Ms. Haller conveyed that when her daughter heard the Quote Petitioner requested, she believed that Petitioner was just another prank caller calling to harass the bakery and did not intend to actually order a cake. Therefore, as a "joke," her daughter sarcastically cited an inflated price of \$150 per letter. Then, when Petitioner informed her that he was recording the phone call, Ms. Knarr hung up the phone ending the call before Petitioner's order could be finalized.^{4/}

23. Petitioner declared that he was not aware of the April 2015 incident involving the pastor's order.

24. At the final hearing, Ms. Haller professed that both she and her daughter are Christians. Furthermore, Cut the Cake frequently makes products for customers displaying religious

themes and Bible verses including wedding cakes and Holy Communion cakes. Ms. Haller expressed that Cut the Cake has no problem serving customers of any orientation, race, or religion.

25. Ms. Haller explained that the reason Cut the Cake did not want to fulfill Petitioner's order was not based on his religion, but because of the "mean" and "ugly" message he requested on the cake. Ms. Haller expressed that she did not believe it was right for her bakery to have to partake in "hate on a cake." She finds it really horrible for someone to think that way.

26. Based on the evidence and testimony presented at the final hearing, Petitioner did not demonstrate, by a preponderance of the evidence in the record, that Cut the Cake discriminated against him based on his religion in violation of the Florida Civil Rights Act.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes.

28. Petitioner claims that Cut the Cake discriminated against him in violation of the Florida Civil Rights Act of 1992 ("FCRA"). Petitioner specifically alleges discrimination in a place of public accommodation in violation of section 760.08.

29. Section 760.08, entitled "Discrimination in places of public accommodation," states:

All persons are 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.

30. Section 760.02(11) provides the following definition:

"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:

* * *

(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.

31. The FCRA is patterned after Title VII of the federal Civil Rights Act of 1964, as amended. As such, Florida Courts have held 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).

32. Regarding discrimination in places of public accommodation, Title II of the federal Civil Rights Act prohibits discrimination in language similar to that found in section 760.08. See 42 U.S.C. § 2000a. Both Title II and section 760.08 prohibit discrimination on the ground of religion.^{5/}

33. Petitioner carries the burden of proving by a preponderance of the evidence that Cut the Cake, as a place of "public accommodation," discriminated against him. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

. . .

"Let every person be subject to the governing authorities."

- Romans 13:1 English Standard Version.

34. The first issue to determine in this matter is whether Cut the Cake constitutes a place of "public accommodation" as defined by the FCRA.

35. 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, 2000 WL 133755, at *1 (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").

36. DOAH has also consistently held the same. In Darrell Alford v. Publix Super Markets, Inc., Case No. 15-3620 (Fla. DOAH

Feb. 2, 2016), the Administrative Law Judge ("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; 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. (Although, 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 Commc'n/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.

37. At the final hearing, Cut the Cake credibly and persuasively established that it is not a "public accommodation" for purposes of the FCRA. The bakery 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." Cut the Cake does not hold itself out as serving food to patrons at its business location. Cut the

Cake does not maintain a designated eating area for customers to consume its baked goods on-site. While Cut the Cake does offer free samples of its products to its customers, all cakes, cupcakes, and other food items sold by Cut the Cake are intended for off-site consumption.

38. Petitioner argues (correctly) that the FCRA does not detail the specific amount of food that customers must consume in order for an establishment to be considered a "public accommodation." Therefore, the merest nibble of a cannoli or cupcake at the bakery would bring Cut the Cake within the scope of the FCRA. However, the test to determine whether a facility is considered a "public accommodation" is not whether food can be consumed on the premises, as Petitioner contends. Based on the statute's plain and unambiguous language, FCRA protections only apply if the business is "principally engaged in selling food for consumption on the premises." § 760.02(11), Fla. Stat. The FCRA clearly envisions an establishment whose principal purpose is to provide an area at which its customers may consume food or drink. Because it is clear from the facts in the record that Cut the Cake does not engage in this principal purpose, the undersigned concludes that the bakery is not a place of "public accommodation." Accordingly, based on the competent substantial evidence in the record, Cut the Cake is not subject to the public accommodation provisions of the FCRA.

39. In the alternative, assuming arguendo that Cut the Cake is a "public accommodation" under the FCRA, Petitioner failed to establish a claim of unlawful discrimination based on his religion.

40. Claimants may prove discrimination 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); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate . . .'" will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999) (citations omitted).

41. Petitioner presented no direct or statistical evidence of religious discrimination on the part of Cut the Cake. Petitioner did not offer evidence or elicit testimony that Cut the Cake refused to provide him a baked good specifically because he was a Christian. (In fact, all Cut the Cake did was quote a price for the cake, then hang up the phone without completing his order.)

42. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely upon circumstantial evidence of discrimination to prove his case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. See also Valenzuela, 18 So. 3d at 21-22; and St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458 (Fla. 3d DCA 2011).

43. Due to the scarceness of case law under Title II, federal courts find guidance in the law of Title VII, including the law of the shifting burdens of production of evidence expressed in McDonnell. See Fahim v. Marriott Hotel Serv., 551 F.3d 344, 349 (5th Cir. 2008); Bivins v. Wrap It Up, Inc., No. 07-80159-CIV, 2007 U.S. Dist. LEXIS 77670, at *13 (S.D. Fla. Oct. 18, 2007). Accordingly, in order to prove a prima facie case of unlawful public accommodation discrimination under section 760.08, Petitioner must establish that: (1) he is a member of a protected class (religious affiliation); (2) he attempted to contract for goods and services from a place of "public accommodation"; (3) he was denied those goods and services; and (4) the goods and services were made available to similarly-situated persons outside his protected class. Fahim, 551 F.3d at 350.

44. If Petitioner proves a prima facie case, he creates a presumption of discrimination. At that point, the burden shifts to Cut the Cake to articulate a legitimate, nondiscriminatory reason for denying its goods and services to Petitioner. Texas Dept. of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981); Valenzuela, supra, at 22. The reason for Cut the Cake's decision should be clear, reasonably specific, and worthy of credence. Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). Cut the Cake has the burden of production, not the burden of persuasion, to demonstrate to the finder of fact that the decision was nondiscriminatory. See Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004). This burden of production is "exceedingly light." Holifield, 115 F.3d at 1564. Meeting the burden involves no credibility assessment. Cut the Cake needs only to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (U.S. 1993).

45. If Cut the Cake meets its burden, the presumption of discrimination disappears. The burden then shifts back to Petitioner to prove that Cut the Cake's proffered reason was not its true reason but merely a "pretext" for discrimination. See Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997); Valenzuela, 18 So. 3d at 25. Evidence of pretext reveals

"such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 771 (11th Cir. 2005); Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295 (11th Cir. 2016).

46. In order to satisfy this final step in the process, Petitioner must show "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. Petitioner must prove that the reasons articulated were false and that discrimination was the real reason for the action. City of Miami v. Hervis, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011) (citing St. Mary's Honor Ctr., 509 U.S. at 515) ("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").

47. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253, 101 S. Ct. at 1089, 67 L. Ed. 2d 207; Valenzuela, 18 So. 3d at 22. The demonstration of pretext "merges with the plaintiff's ultimate

burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield, 115 F.3d at 1565.

48. Turning to the facts found in this matter, Petitioner did not meet his burden of proving, by a preponderance of the evidence, a prima facie case of unlawful discrimination.

a. First, the undersigned is mindful that simply saying that one is a Christian does not establish that an individual is affiliated with that religion. Indeed, Petitioner's claim that he is Christian has several weaknesses. For example, Petitioner does not belong to a Christian denomination, nor does he regularly attend church services. In addition, Petitioner displayed questionable knowledge about the Bible. At the final hearing, Petitioner emphatically declared that his Quote was a "direct quote" from the Bible, i.e., Leviticus 20:13. However, the undersigned finds that it is not. The closest Biblical translation the undersigned can identify that matches Petitioner's Quote comes from the Revised Standard Version, which states: "If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them."^{6/} (Although generally consistent, Petitioner's Quote is not a direct quote with this verse.)

b. Despite these weakness however, Petitioner offered enough evidence to meet his burden to prove that he should be considered a Christian. Of primary significance is his testimony that he was

baptized.^{7/} Further, Petitioner testified that he associates with other like-minded Christians.^{8/} Accordingly, Petitioner presented sufficient evidence to meet the first prong of his prima facie case, that he belongs to a protected class.

c. Petitioner met the second prong of the prima facie case in that he attempted to contract for goods and services from Cut the Cake.

d. Petitioner met the third prong of a prima facie case by establishing that Cut the Cake denied him the cake he sought.^{9/}

e. Petitioner did not prove the fourth prong of his prima facie case. Petitioner did not establish that Cut the Cake has offered a cake transcribed with his Quote to similarly-situated persons outside his protected class, i.e., non-Christians. Ms. Haller testified that Cut the Cake has never, nor would it ever, willingly make a food product that displayed Petitioner's Quote for any customer.

49. Therefore, the competent substantial evidence in the record does not support Petitioner's allegation that Cut the Cake treated him differently from other similarly-situated (non-Christian) customers because of his religion. Accordingly, Petitioner failed to prove a prima facie case of discrimination by circumstantial evidence.

50. Going further, even assuming that Petitioner did establish a prima facie case of public accommodation

discrimination, Cut the Cake met its burden of articulating a legitimate, nondiscriminatory reason for not providing the cake to Petitioner. Ms. Haller testified that Cut the Cake did not make the cake Petitioner requested based on two reasons. First, Cut the Cake did not believe that Petitioner genuinely desired to order a cake. Ms. Haller testified that at the time Petitioner contacted the bakery, he was one of "thousands" of phone calls Cut the Cake was receiving requesting a cake with an anti-homosexual message. Ms. Haller expressed that none of these callers actually desired to pay for the food products they ordered. Consequently, Cut the Cake believed that Petitioner's order was just another prank call.

51. Second, Cut the Cake refused to fulfill Petitioner's order, not because he was Christian, but because of what it perceived to be the purpose of his message. Cut the Cake considered Petitioner's message mean-spirited, regardless of his religion or the Quote's source. It did not matter to Cut the Cake Petitioner's religious affiliation, the bakery simply did not desire to make a cake that portrayed the message Petitioner requested. Cut the Cake's contention is bolstered by the finding that the bakery has produced many cakes with Christian themes and Bible verses. Accordingly, Cut the Cake met its burden of producing clear and specific nondiscriminatory reasons for deciding not to fulfill Petitioner's order.

52. Completing the McDonnell Douglas burden-shifting analysis, Petitioner did not prove, by a preponderance of the evidence, that Cut the Cake's stated reasons for not making the cake he ordered were not its true reasons, but were merely a "pretext" for discrimination. The record in this proceeding does not support a finding or conclusion that Cut the Cake's proffered explanation for its decision was false and discrimination was its real reason.

53. Initially, it must be stated that Petitioner did not establish that Cut the Cake knew he was a Christian at the time he placed his order. Petitioner did not inform Cut the Cake of his religious affiliation during his phone call. Even if the Quote is essential to Christian beliefs as Petitioner asserts, any potential customer (or prankster) could have demanded such a quote on a cake--whether they were Christian or not. The undersigned does not conclude that simply reciting a Bible verse unquestionably identifies one as a Christian. (Neither does quoting from the Torah define one as Jewish, or referring to the Quran automatically characterize someone as Muslim.) Consequently, because Petitioner did not prove that Cut the Cake was even aware he was a Christian, Petitioner did not establish that Cut the Cake's decision was motivated by a discriminatory animus.

54. Second, Ms. Haller persuasively testified that Cut the Cake refused to make Petitioner's cake solely based on what she perceived to be an "ugly" message, not because of Petitioner's religious beliefs. Cut the Cake did not refuse to make a cake for Petitioner because he is a Christian. It desisted because of the proclamation Petitioner desired portrayed on the cake. As Ms. Haller succinctly stated, "we just don't like to provide hate on a cake."

55. Accordingly, the more persuasive evidence does not establish that Cut the Cake's stated reasons for not making Petitioner the cake he requested were not its real reasons, but a "pretext" for religious discrimination.

56. In reaching this conclusion, the undersigned does not interpret, as Petitioner would have the Commission do, the protections afforded under the FCRA to imbue Petitioner with a "sword" to intentionally provoke an establishment into producing a product displaying a "religious" message--unless Petitioner proves that Cut the Cake intentionally refused to provide the cake because of his religion. In this matter, the evidence demonstrates that Cut the Cake would readily have made Petitioner a cake (without his Quote) regardless of his religion. Cut the Cake would also have agreed to place a Bible verse on that cake (other than his Quote). Cut the Cake refused to make the cake because of the Quote Petitioner requested, not because he is a

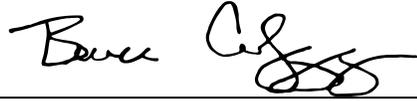
Christian. Accordingly, the competent substantial evidence does not establish that Cut the Cake's action was motivated by its deliberate intent to discriminate against Petitioner's religious beliefs.

57. For the reasons set forth herein, the evidence on record does not support Petitioner's claim that Cut the Cake refused to make his cake because of his religion. Rather, the more persuasive evidence establishes that the bakery did not serve Petitioner based on two nondiscriminatory reasons. Consequently, Petitioner failed to meet his burden of proving that Cut the Cake discriminated against him in violation 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, Cut the Cake Bakery, is not a place of "public accommodation" under the facts of this case. Or, in the alternative, the Commission find that Respondent did not unlawfully discriminate against Petitioner's religion in deciding not to make a cake displaying the quote, "Homosexuality is an abomination unto the Lord." The Petition for Relief filed in this matter should be dismissed.

DONE AND ENTERED this 9th day of February, 2017, in
Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of February, 2017.

ENDNOTES

^{1/} Unless otherwise stated, all statutory references are to the 2016 codification of the Florida Statutes.

^{2/} The final hearing was originally scheduled for August 25, 2016. Petitioner moved to continue the hearing date which the undersigned granted based on good cause shown.

^{3/} Indeed, Jesus frequently incorporated and quoted Jewish scripture in proclaiming his message. A story from Jesus' early ministry describes that, "as was his custom, he went to the synagogue on the Sabbath day, and he stood up to read. And the scroll of the prophet Isaiah was given to him. He unrolled the scroll and found the place where it was written, "The Spirit of the Lord is upon me, because he has anointed me to proclaim good news to the poor." Luke 4:16-18 ESV. Jesus also specifically referred to the Book of Leviticus. For example, in describing God's greatest commandment to several Sadducee scribes, Jesus first cited the Shema Israel ("Hear, O Israel: The Lord our God, the Lord is one." Deuteronomy 6:4 ESV). Then (perhaps unexpectedly and possibly radically), Jesus referred to Leviticus 19:18 and imparted, "The second is this: 'You shall love your neighbor as yourself.' There is no other commandment greater than these." Mark 12:31 ESV.

4/ Cut the Cake suggested that it did not actually refuse to make Petitioner's cake because the phone call ended before Petitioner finalized payment for his order. However, the undersigned finds that Cut the Cake purposefully terminating the phone call before Petitioner could consummate his order effectively prevented him from completing his purchase. Consequently, the evidence establishes that Cut the Cake refused to provide Petitioner "enjoyment of the goods [and] services" it offered.

5/ The language of 42 U.S.C. § 2000a(a) states:

Equal access. 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 section, without discrimination or segregation on the ground of race, color, religion, or national origin.

6/ See also,

King James Version: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood *shall be* upon them."

New International Version: "If a man lies with a man as one lies with a woman, both of them have done what is detestable."

New Living Translation: "The penalty for homosexual acts is death to both parties."

International Children's Bible: "A man might have physical relations with another man as a man does with a woman. If he does, these two men have done a hated sin."

7/ Baptism holds a powerful significance in Christianity as the entry rite into the religion. See Matthew 28:19-20 ESV, which records Jesus' "Great Commission" to the apostles to "Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all that I have commanded you." In addition, religious denominations consider those baptized as "marked as Christ's own forever." See, e.g., Episcopal Church. (1979). The Book of common prayer and administration of the

sacraments and other rites and ceremonies of the church: together with the Psalter or Psalms of David according to the use of the Episcopal Church. New York: Seabury Press, p. 308.

^{8/} See e.g., the Book of the Acts of the Apostles which tells that the first followers of Jesus "devoted themselves to the apostles' teaching and to the fellowship, to the breaking of bread and to prayer." Other early Christian activities included, "On the first day of the week we came together to break bread." Acts 2:42 and 20:7 NIV.

^{9/} As stated above, Cut the Cake suggested that it never actually refused to make Petitioner's cake because it ended the phone call before Petitioner made arrangements to pay for the cake. However, the undersigned does not find this argument persuasive. Cut the Cake purposefully hung up on Petitioner, thereby preventing Petitioner from completing his order. Following that call, Cut the Cake never offered to make Petitioner the cake he requested.

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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.