STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARNOLD MITCHELL, SR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-5313
	)	
EZ FOOD MART/CHEVRON,	)	
	)	
Respondent.	)	
_____	)	
	)	
GLORIA MITCHELL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-5314
	)	
EZ FOOD MART/CHEVRON,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on March 1, 2007, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Michael Massey, Esquire
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McIntosh, Florida 32664

For Respondent: Robert A. Rush, Esquire
Marian Rush, Esquire
Rush & Glassman
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STATEMENT OF THE ISSUE

Whether Petitioners were denied access by Respondent to a public accommodation so as to render Respondent liable for any claims pursuant to Article VI of the Gainesville City Municipal Code.

PRELIMINARY STATEMENT

Subsequent to entering a Determination of Reasonable Cause to believe that a discriminatory act had occurred, the City of Gainesville Human Rights Board referred each of these cases to the Division of Administrative Hearings, on or about December 22, 2006, for the purpose of conducting a due process hearing, pursuant to the City's contract with the Division. See § 120.65, Fla. Stat.

On January 1, 2007, the prior Administrative Law Judge consolidated the cases, and a Notice of Hearing for March 1, 2007, together with an Order of Pre-hearing Instructions, was entered.

On February 22, 2007, Respondent filed its Pre-hearing Statement. On February 23, 2007, Petitioner's Pre-hearing Stipulation [sic] and Incorporated Motion to Strike Respondent's

Pre-hearing Statement was filed. On February 26, 2007, Respondent filed its Motion for Sanctions for Failure to Serve Answers to Interrogatories and Request for Production was filed. On February 27, 2007, Petitioners' Response to Respondent's Motion for Sanctions was filed. The day before final hearing, a pre-hearing conference by telephonic conference call was conducted by the undersigned, at which time all pending motions were waived.

The final hearing was held in Gainesville, Florida, on March 1, 2007.

Petitioners presented their own oral testimony and that of Jay Patel, Sunil Patel, Gira Patel, and Annie Pickens and had two exhibits admitted in evidence.

Respondent presented the oral testimony of Beverly Craig, Dale Warren, and Gira Patel and had Composite Exhibit R1A-F (photographs) and Composite Exhibit R2-A-C admitted in evidence.

On March 9, 2007, Petitioners' Proposed (Recommended) Order was filed prematurely.

On March 16, 2007, the Transcript was filed, and a Post-hearing Order giving notice of that filing and explaining how to prepare a proposed recommended order was entered.

On March 26, 2007, Respondent filed its Written Closing Argument, a document not provided for or recognized by Chapter 120, Florida Statutes, or by the Gainesville Municipal Code.

On March 27, 2007, Respondent's Proposed Recommended Order (to the City of Gainesville Human Rights Board) was filed.

On March 27, 2007, Petitioners' Amended Proposed Order was filed, without leave of the Administrative Law Judge, and on March 29, 2007, Petitioners' Notice of Filing Second Amended Proposed Order and second amended Recommended Order to City of Gainesville Human Rights Board was filed. None of these pleadings is provided for or recognized by Chapter 120, Florida Statutes, or by the Gainesville Municipal Code.

Neither party moved to strike the unauthorized materials, so all have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioners Gloria Jean Mitchell and Arnold Mitchell are husband and wife. They are African-American.

2. Sunil and Gira Patel are husband and wife. They are not African-American. There was no testimony as to their race. By observation, it appears that they are Caucasians originating in the Indian sub-continent. They own Respondent facility EZ Food Mart/Chevron, which qualifies as a "place of public accommodation." EZ Food Mart/Chevron is a combination gas station and convenience store, with a unisex restroom, which is open for business from 7:00 a.m. to 9:00 p.m. each day.

3. Mr. and Mrs. Sunil Patel employ one female clerk and one male clerk, Jay Patel.[1/] Jay Patel's race was not testified-to, but his race appears to be the same as Mr. and Mrs. Sunil Patel's race. Jay Patel speaks English with some confusion, sometimes using "he" for "it", and does not understand everything that is said to him in English. However, having observed his candor and demeanor while testifying, it is found that Jay Patel has, to a degree, selective understanding, so that he comprehends more questions that permit generally exculpatory answers, than questions about particular events on the days at issue herein.

4. Despite Jay Patel's testimony that he had been employed at the store only since April 2006, Mr. and Mrs. Sunil Patel and Dale Warren place Jay Patel's commencement of employment at the EZ Food Mart/Chevron approximately two years earlier, when Mrs. Patel ceased to go into the store as regularly as she had before. Their dating of Jay Patel's arrival is supported by other parts of Jay Patel's testimony and is accepted as more accurate than Jay Patel's first stated date of April 2006.

5. The majority of the residents of the neighborhood in which EZ Food Mart/Chevron is located are African-American. The majority of Respondent's clients are African-American.

6. Mrs. Mitchell frequently purchases gas at EZ Food Mart/Chevron. On April 26, 2006, she filled her car's gas tank

at the pump and entered the convenience store to pay for the gas. When she got to the cash register operated by Jay Patel, she asked to use the restroom. He told her, "No, you can't use it. It's out of order." Mrs. Mitchell had no trouble understanding Jay Patel and had observed on many trips to the EZ Food Mart/Chevron that he understood others speaking English. On her way out, she observed a blonde Caucasian man rush in and ask to use the restroom and further observed that the blonde Caucasian man was handed a key. Mrs. Mitchell's testimony did not specify which clerk handed the key to the blonde, Caucasian man. The blonde Caucasian man was not a customer. Mrs. Mitchell did not see the condition of the restroom that day and assumed there was one restroom for women and one restroom for men. There is no clear evidence as to what time of day this all occurred or which clerk handed the key to the blonde Caucasian man, but it was a very busy time of day with many customers standing in line at the cash registers. There is no evidence of the actual condition of the restroom on April 26, 2006.

7. On April 28, 2006, Arnold Mitchell was accompanying his wife on errands. After their car gas tank was filled, Mr. Mitchell went into Respondent's convenience store to pay for the gas. Mr. Mitchell has a medical condition involving the need to urinate frequently and urgently. When he paid Jay Patel for the gas, Mr. Mitchell explained his medical condition and

requested to use the restroom. Jay Patel refused to let him use the restroom, saying something to the effect that, "It's out of order. Because you live in the neighborhood, you can go home and use the restroom." There also was another clerk working in the store at that time.

8. On April 28, 2006, Mr. Mitchell went out and told his wife what had happened. At that point, Mrs. Mitchell realized Respondent's facility only had one unisex restroom and assumed that she had been discriminated against on the basis of her African-American race on April 26, 2006, by receiving inferior treatment than had the Caucasian male who had been permitted to use the restroom after she had been denied.

9. Mr. and Mrs. Mitchell did not see Respondent's unisex restroom on April 28, 2006. They had no idea what condition it was in at that time. There is no clear evidence of the condition of Respondent’s restroom on April 28, 2006.

10. No one connected with Respondent on either April 26, 2006, or April 28, 2006, made any racial comment to either Petitioner. No racial or discriminatory comment was made in their presence at any time by anyone connected with Respondent. However, both Petitioners were hurt, humiliated, and embarrassed by what they perceived on April 28, 2006, to be discriminatory disparate treatment on April 26, and April 28, 2006.

11. The Mitchells live two miles or five minutes' drive away from the EZ Food Mart/Chevron, but on April 28, 2006, they chose not to go home so that Mr. Mitchell could use the restroom. As a result, Mr. Mitchell suffered some bladder pain. They wanted to get to their dry cleaner before that business closed, and they got there in time. This evidence puts the incident at Respondent's establishment on April 28, 2006, at close to the end of the average business day, between 5:00 and 6:00 p.m. Mr. Mitchell urinated on himself. The evidence is not clear as to why he did not use the dry cleaner's restroom, but it may have been out of order. The next place Petitioners stopped also had a restroom that was out of order, so he could not use it. The third stop, a bus station, let Mr. Mitchell use its restroom. Mr. Mitchell suffered stress and embarrassment from this chain of events.[2/]

12. On May 2, 2006, Mr. and Mrs. Mitchell returned to Respondent's store with a TV20 news crew and camera. First, Mr. Mitchell went into the store, bought something, and asked a female clerk if he could use the restroom. She told him he could not. He then asked the male clerk, Jay Patel, who also told Mr. Mitchell he could not use the restroom. There was no reference to race by anyone. There was a reference by Jay Patel to Mr. Mitchell living in the neighborhood, but exactly what was

said about neighborhood residence is unclear. Mr. Mitchell returned to the parking lot and conferred with the TV20 people.

13. Ten to 15 minutes later, TV20 sent a Caucasian female into the store. When she asked to use the restroom, she was given the key immediately by store personnel. The TV20 Caucasian female telecaster returned outside a little while later. Then the whole TV20 news crew and the Mitchells returned inside and confronted Jay Patel.[3/]

14. There is no clear evidence concerning the actual condition of the restroom on May 2, 2006. There is no credible evidence that the restroom was cleaned or was not cleaned during the 10-15 minutes that elapsed between the time Mr. Mitchell was denied access to the restroom on May 2, 2006, and the time the Caucasian telecaster was granted access.

15. Photographs in evidence document that at some time the store's restroom was unsanitary. "Filthy" would not be too strong a descriptive adjective. The photographs were purportedly taken at least two days, and possibly a week, before May 2, 2007. This places the restroom’s documented filthy condition as being sometime between April 26 and April 30, 2006. However, Respondent provided no explanation as to why the photographs of the restroom had been taken before the first date of alleged discrimination ever presented any reason to make a photographic record.

16. Dale Warren, an African-American male, is a uniformed Alachua County Deputy Sheriff. He lives next door to the EZ Food Mart/Chevron. He testified that on one occasion, apparently quite some time before April 26, 2006, he had asked to use the restroom and Jay Patel told him he could not. Mr. Warren asked why he could not use the restroom. Jay Patel told him to go look at it. There is no evidence that Mr. Warren had to unlock the restroom at that time. Mr. Warren has no trouble understanding Jay Patel, and apparently, Jay Patel is able to understand Mr. Warren's English. Mr. Warren observed the restroom to "have a whole bunch of toilet tissue and like paper napkins and it was filthy and he [referring to Jay Patel] said he needed to clean it and get some work done." At that time, Mr. Warren gently warned Jay Patel to get the restroom fixed or someone in that African-American neighborhood would file a discrimination suit. Jay Patel let Mr. Warren use the clean restroom on a later day. Mr. Warren further claimed that a young man comes each day, in the afternoons, between 4:30 and 7:30 p.m. and cleans the restroom on a routine basis for Jay Patel.

17. Jay Patel did not mention in his testimony that anyone else had ever come in to clean the EZ Food Mart/Chevron restroom. Rather, Jay Patel's testimony and that of Mr. and Mrs. Sunil Patel suggested that Jay Patel cleaned it himself.

Jay Patel did testify that on May 2, 2006, he had locked the restroom door from 6:00 p.m. to 8:00 p.m. and that at other times he had locked the restroom door and told people who wanted to use the restroom that they could not use it. The times Jay Patel claimed to have locked the restroom and prohibited everyone, regardless of race, from using it were when the restroom was clean but the store was very busy, like during "rush hour," which he defined as between 6:00 p.m. and 8:00 p.m., or when the restroom was already filthy.[4/]

18. When neither Mr. or Mrs. Sunil Patel was on the premises, they left the entire running of the store to Jay Patel. Shortly before April 26, 2006, Sunil Patel had a conversation with Jay Patel to the effect that the entire running of the store was in Jay Patel's hands, including getting the messy restroom "under control."

19. At all times material, Mr. and Mrs. Sunil Patel had no clear anti-discrimination policy in place and none was posted for the benefit of employees or patrons.

20. The events of May 2, 2006, led to a demonstration with picketers marching in front of the EZ Food Mart/Chevron. Gira Patel arrived on the scene and inquired of Mr. Mitchell how she could make the picketers stop. He asked that she terminate Jay Patel's employment. She refused.

21. At some unspecified time thereafter, Mr. and Mrs. Patel did terminate Jay Patel as a result of this situation. However, based on observation at hearing, it is found that the three remain in contact and are on cordial terms. In his testimony, Jay Patel continued to refer to Sunil Patel as "my employer" in the present tense. The Patels stated they saw nothing wrong with Jay Patel's actions.

22. All three Patels denied any racial animus or aversion to persons of any race.

23. Mrs. Mitchell conceded that in the past she had been waited-upon by Mrs. Patel in other stores with no hint of racial discrimination and that no one at the EZ Food Mart/Chevron had ever made any racial or derogatory statements or reference to her. Mr. Mitchell agreed that no overt racial comments or observations had ever been made to, or about, him at the EZ Food Mart/Chevron.

24. Annie Pickens, an African-American female, who has lived in the neighborhood of the EZ Food Mart/Chevron for 30 years, testified that on one occasion in March 2006, she had requested to use the store's restroom and was denied access by Mrs. Patel. Although Mrs. Patel denied that she was working in the EZ Food Mart/Chevron in March 2006, Jay Patel testified that when Mrs. Patel did work in the store, it was from 1:00 p.m. to 4:00 p.m. It is also possible that Ms. Pickens confused Mrs.

Patel with a female clerk. In any case, the female behind the counter told Ms. Pickens in March 2006, that the restroom was out of order. Ms. Pickens had no personal knowledge whether or not the restroom was soiled, out of order, or just fine on the date her request was denied. The time of day she made her request is not in evidence.

25. Beverly Craig, an African-American female, who does not live in the neighborhood, testified that she has used Respondent's restroom numerous times. Ms. Craig has known Mr. and Mrs. Patel and has patronized the EZ Food Mart/Chevron for eight years.

26. At hearing, all three Patels testified that neither race nor neighborhood residence governed whom they let use the store restroom. All three Patels testified they had no reason to deny Petitioners access to their restroom based on any prior problems with Petitioners. Jay Patel testified that he did not keep a list of persons who soiled the restroom so as to preclude them from using the restroom again.[5/]

27. At all times material, Mr. Mitchell has been totally disabled and unemployed. There is no evidence of Mrs. Mitchell being employed at any time material.

28. There was no evidence of any actual damages incurred by either Petitioner. There was no evidence concerning lost wages, psychiatric or physical disability, medical bills, or any

other resultant expenses, and no evidence of any inability to enjoy life that resulted from the April 26, April 28, or May 2, 2006, incidents.

29. Respondent denied any liability, but the parties stipulated that a reasonable attorney's fee would be $250.00, per hour and that Petitioner's attorney had worked 32.9 hours up to the commencement of the three and a half-hour hearing, and that Respondent's attorney had worked 21 hours up to that point. The Transcript reveals that the hearing herein lasted three and a half hours. No evidence of costs incurred was offered in evidence by either party and no party requested that the record be left open for that type of evidence.

30. There was considerable indecisiveness, speculation, lack of memory, and vacillation within the testimony of all the principals herein. Indeed, in some instances, witnesses contradicted themselves as well as other witnesses. This sort of immaterial “human error” occurs in every case, and is not necessarily indicative of untruthfulness. It is a common occurrence to be considered and weighed by the finder of fact, who is in the best position to reconcile testimony as much as possible and to assess the credibility of all witnesses. However, where there are major and material discrepancies among witnesses’ respective testimonies, the credibility issue is more important. In making the foregoing Findings of Fact 1-29, the

undersigned has made every effort to reconcile testimony and exhibits so that each witness may be found to speak the truth. However, where major and material conflicts existed, the credibility issue has been resolved on the characteristics listed in the Florida Civil Jury Instructions. Generally, where the foregoing Findings of Fact diverge from the construction of events related by any particular witness(es), it is because that witness or those witnesses were not found entirely credible and no further discussion of those credibility factors beyond the discussion incorporated here and/or within those Findings of Fact is necessary. On the other hand, certain elements of the testimony/evidence are clearly incredible, unreliable, less reliable than other evidence, or otherwise undermine a party's theory of the case, and those specific elements are discussed with regard to the shifting burden(s) of proof within the following Conclusions of Law.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction of this cause, pursuant to a contract with the City of Gainesville. See § 120.65, Fla. Stat., Article III, Section 8-51 and Article IV, Section 8-67 of the City of Gainesville Municipal Code. This cause was conducted pursuant to Section 120.57(1), Florida Statutes.

32. Petitioners filed their complaint pursuant to Article IV, Section 8-67 of the City of Gainesville Municipal Code, which provides, in pertinent part, as follows:

> 8-67 Prohibition of discrimination in places of public accommodation, equal access.
>
> (a) 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 sexual orientation, race, color, gender, age, religion, national origin, marital status or disability.
>
> (b) . . . each of the following establishments which serves or holds itself out as serving the public is a place of public accommodation . . . including but not limited to:
>
> * * *
>
> (5) Any gasoline station, retail establishment, convenience store, beauty parlor, barbershop, styling salon and laundries;
>
> * * *

33. Although Code Article IV does not specifically state that it has been enacted pursuant to Chapter 509, Florida Statutes, that Article bears a footnote reading, "Cross reference-Housing, Ch. 13," and:

> State law references -- Discrimination on the basis of race creed, color, sex, physical disability or national origin in public lodgings and food service establishments, F.S. §§ 509.092, 509.141,

> 509.142; discrimination based on religion in advertising for public accommodations, F.S. § 871.04.

34. Also, Code Article III, Section 8-51(k) [amended February 28, 2005], provides, in pertinent part,

> . . . In interpreting the provisions of this article, the hearing officer may consider administrative and judicial interpretations of substantially equivalent provisions of state or federal laws.

Article III Section 8-51, also has been adopted by reference at Article III, Section 8-70 (ord. No. 980524, § 16, 12-14-98). Therefore, it is appropriate to apply herein the duty to go forward, the shifting burdens of proof, and the substantive statutory and case law applicable to other similar anti-discrimination legislation, both federal and state.

35. However, if Petitioners prevail, because the City of Gainesville has been explicit in setting out the type of damages which may be awarded to a successful Petitioner if discrimination is proven under the City's foregoing anti-discrimination ordinance scheme, only those types of damages specifically listed in the City's Code may be awarded to Petitioners. See Article III, Section 8-51, which provides, in pertinent part:

> (l). . . If the hearing officer finds that a discriminary practice has occurred or is about to occur the hearing officer may recommend affirmative relief from the effects of the practice, including actual

> damages, equitable and injunctive relief and reasonable attorneys fees and costs.

36. The common law standard is that each party bears its own attorney’s fees and costs. It is long-established law that "an award of an attorney fee to any litigant is in derogation of the common law and it is allowed only when provided for by contract or statute." Rivera Deauville Hotel v. Employers Service Corp., 277 So. 2d 265, 266 (Fla. 1973). Accordingly, attorney's fees and costs, being creatures of statute, rule, or ordinance, and there being no specific authority granted thereby to the undersigned for the award of fees or costs to a prevailing Respondent, this Recommended Order may not create that jurisdiction, authority, or power. Therefore, if Respondent prevails, Respondent may not be awarded attorney’s fees or costs.

37. Additionally, it is noted that, although the City Code specifies that an injunction may be recommended by the undersigned to the City of Gainesville Human Rights Board, neither party has proffered any citation to seminal law which would permit the City of Gainesville Human Rights Board to carry out such a recommendation, the authority to enter injunctions having been reserved to courts created under Article V of the Constitution of the State of Florida.

38. Section 509.092, Florida Statutes (2006), provides:

> Public lodging establishments and public food service establishments are private enterprises, and the operator has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator, but such refusal may not be based upon race, creed, color, sex, physical disability, or national origin. A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action pursuant to s. 760.11.

39. The court in LaRoche v. Denny's Inc., 62 F. Supp. 2d 1375, 1382-1383 (S.D. Fla. 1999), a case dealing with racial discrimination, set forth the analysis which should be used in public accommodation cases in Florida:

> Under the McDonnell Douglas [Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (S. Ct. 1973)] framework, as further elucidated in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), the Plaintiffs must prove by a preponderance of the evidence a prima facie case of discrimination. Specifically, the Plaintiffs must prove that: (1) they are members of a protected class; (2) they attempted to contract for services and to afford themselves the full benefits and enjoyment of a public accommodation; (3) they were denied the right to contract for those services and thus, were denied the full benefits or enjoyment of a public accommodation; and (4) such services were available to similarly situated persons outside the protected class who received full benefits or enjoyment or were treated better. United States v. Landsowne Swim Club, 894 F.2d 83, 88 (3rd Cir. 1990).

> Once the Plaintiffs meet this burden, they establish a presumption of intentional discrimination. Hicks, 509 U.S. at 506, 113 S.Ct. 2742. The effect of this presumption shifts the burden to the Defendant to produce evidence of a legitimate, non-discriminatory reason for the challenged action. Id. at 506-507, 113 S.Ct. 2742; McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. 1817; Burdine, 450 U.S. at 254, 101 S.Ct. 1089. The Defendant's burden of production is a light one. Batey v. Stone, 24 F.3d 1330, 1334 (11th Cir. 1994).
>
> When a defendant meets its burden of production, the presumption of discrimination which the McDonnell Douglas framework creates, "drops from the case" and "the factual inquiry proceeds to a new level of specificity." Burdine, 450 U.S. at 255, n. 10, 101 S.Ct. 1089. The burden then shifts back to the Plaintiffs to demonstrate that the Defendant's actions were not for the proffered reason, but were, in fact, motivated by race. Hicks, 509 U.S. at 507-08, 113 S.Ct. 2742; Burdine, 450 U.S. at 253, 101 S.Ct. 1089. Plaintiffs may prove this fact either by means of affirmative evidence that race played an impermissible role in [Respondent's] action, or by showing that the proffered non-discriminatory reason does not merit credence. Id. at 256, 101 S.Ct. 1089. The ultimate burden is on the Plaintiffs to prove that they were the victims of intentional discrimination.
>
> [Bracketted material has been provided for clarity.]

40. Petitioners may make a prima facie showing of discrimination sufficient to meet the first part of the three-part McDonnell Douglas burden of proof test by establishing that they applied to use the restroom; they were denied use of the

restroom; and, at the time of such rejection, they were members of a protected class. See Soules v. United States Department of Housing and Urban Development, 967 F.2d 817, 822 (2nd Cir. 1992), a housing discrimination case.

41. The prima facie case presented herein by Petitioners' case-in-chief shows that: Mr. and Mrs. Mitchell are African-Americans. On April 26, 2006, Mrs. Mitchell was denied access to Respondent's unisex restroom and immediately afterward, a Caucasian was granted access. It further shows that on April 28, and May 2, 2006, Mr. Mitchell was denied access and immediately after the May 2, 2006 denial, a Caucasian female was granted access. Clearly, the definitive factor in the denial of access appears to be the Mitchells' African-American race. Therefore, Petitioners have established their prima facie case.

42. At hearing, Respondent stated two separate and distinct non-discriminatory reasons for denying access to the Mitchells. The reasons given at trial were that access was denied because either the restroom was filthy or because it was clean and Jay Patel did not want it to become filthy from use during the rush hour. Those non-discriminatory reasons, as stated at the hearing, fall apart for several reasons. First, which of these two reasons supposedly occurred on either date was not affirmatively demonstrated by Respondent, and whether or not the May 2, 2006, event occurred at rush hour was not

affirmatively demonstrated. Even if one or both of these defenses stated at hearing had been clearly established, the evidence still shows that the Caucasians were given a key to the restroom and the option of choosing to use, or not use, the (purportedly filthy) restroom, while the African-Americans were denied a similar chance to choose to use, or not use, the restroom.

43. Respondent submits, post-hearing, that it was Petitioner's obligation to prove that Respondent's restroom was not cleaned-up between a denial of access to one of the African-American Petitioners and the time a Caucasian was permitted to enter it. This is legal nonsense. Even with a shifting burden of proof, Petitioners are not required to prove a "double negative." Although Respondent's burden is exceedingly light and is a burden of production only and not of either proof or persuasion (see Burdine supra) Respondent must do something more than state, without any credible supporting evidence, that the allegedly discriminatory act was done for a non-discriminatory purpose.

44. The record shows that on April 26, 2006, a Caucasian was immediately given the restroom key while Mrs. Mitchell was still in the store after having been denied restroom access by Jay Patel at the counter. That day, too short a period of time had elapsed for Jay Patel to have abandoned his cash register,

in front of which a line of people was apparently still waiting, gone to the restroom, cleaned it, and returned to the counter. On May 2, 2006, Jay Patel was still behind the counter and could not have had time (10 to 15 minutes) to clean the restroom between the time he denied access to the African-American customer, Mr. Mitchell, and the Caucasian customer was admitted. Also, Jay Patel at no time testified to the presence, during those short periods on April 26, 2006, or May 2, 2006, or indeed even to the existence, of the "young man" whom Deputy Sheriff Walden alleged regularly cleans the restroom. Also, clean or filthy, Respondent's restroom was made available to Caucasians and was not made available to African-Americans.

45. Respondent's post-hearing filings suggest that it makes some difference that neither Mr. or Mrs. Mitchell specifically stated whether Jay Patel or the female clerk handed a restroom key to either Caucasian, but this argument is a "red herring", designed to detract from material matters.[6/] Both Mr. and Mrs. Mitchell were clear that they were denied access by Jay Patel, and Mr. Mitchell testified he was denied access by the female clerk as well. Therefore, it is of no significance that the female clerk may have been the one to give the restroom key to the Caucasian on either date. Mrs. Mitchell testified Jay Patel denied her access on April 26, 2006. Mr. Mitchell testified that Jay Patel denied him access on April 28, 2006 and

on May 2, 2006. Jay Patel never clearly and credibly denied giving the key to the Caucasian female on May 2, 2006.

46. No credible reason was given by Jay Patel for taking the photographs of the restroom on or about the time Mrs. Mitchell was first denied access to the restroom. Nothing on the photographs themselves dates them. Nothing ties the date of the photographs, as given by Jay Patel, to Deputy Sheriff Warren's apparently much earlier warning about possible discrimination suits. It is more likely these photographs were taken after May 2, 2006, in anticipation of litigation, when the Respondent's theory of the case changed, as described below in Conclusions of Law 50-55.

47. The denial of access to Ms. Pickens, an African-American neighbor, is noted. It is more likely that Deputy Sheriff Warren, an African-American male, was given admission to the restroom by Jay Patel because of his uniformed employment status and the proximity of his home to the EZ Food Mart/Chevron, than because the EZ Food Mart/Chevron's restroom was open to one and all on a non-discriminatory basis. The access granted the non-neighbor, African-American Mrs. Craig is remote in time from the charges herein, and sends mixed messages based on Respondent's shifting theories of the case.

48. Based on the Supreme Court's clear statement in its majority opinion in Hicks v. St. Mary's Honor Center, 970 F.2d

487 (8th Cir. 1992), read together with the dissenting opinions, it appears that the Hicks Court was unanimous that disbelief of the Respondent's proffered reasons, together with the prima facie, case is sufficient circumstantial evidence to support a finding of discrimination. See Combs v. Plantation Patterns, Meadowcraft, Inc. 106 F.3d 1519 (11th Cir. 1997). Therefore, Petitioners should prevail.

49. However, assuming, arguendo, but not ruling, that Respondent's case-in-chief succeeded in shifting the burden of proof back to Petitioners, so that Petitioners had to show that Respondent's articulated reason(s) for the allegedly discriminatory act of denying them restroom access were pretextual, it is concluded that pretext has been demonstrated and Petitioners still should prevail.

50. Where different non-discriminatory explanations are articulated by a respondent over time, a reasonable trier of fact may infer from the discrepancies that the reasons given at trial are pretextual, developed over time, to counter the evidence as it is uncovered or subsequently presented. See DeMarco v. Holy Cross High School, 4 F.3d 166 (2nd Cir. 1993), stating that pretext inquiry takes into consideration "whether the putative non-discriminatory purpose was stated [by the respondent] only after the allegation of discrimination;" Schmitz v. St. Regis Paper Co., 811 F.2d 131, 132 (2nd Cir.

1987) (per curiam), holding that a shift in justifications given at trial which indicated an after-the-fact rationalization by the defendant could be sufficient to prove pretext) (citation omitted); see also Washington v. Garrett, 10 F.3d 1421, 1434 (9th Cir. 1993) ("In the ordinary case, such fundamentally different justifications for an employer's action . . . give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that . . . the official reasons [were not] the true reasons."); Castleman v. Acme Boot Co., 959 F.2d 1417, 1422 (7th Cir. 1992),("A jury's conclusion that an employer's reasons were pretextual can be supported by inconsistencies in . . . the decision maker's testimony.") On all points supra, see also the discussion in Equal Employment Opportunity Commission v. Ethan Allen, Inc., 44 F.3d 116 (2nd Cir. 1994).

51. Herein, Respondent's February 22, 2007, Pre-hearing Statement advanced the following theory of the case:

> A clerk who was working at the store, who no longer works at the store, denied people that he believed lived in the neighborhood who were using the bathroom as their own private bathroom access to the bathroom.

It further stated that:

> There was a clear non-discriminatory reason given at the time why access was denied in that he believed the Mitchells lived in the

neighborhood and were abusing the bathroom privilege.

52. A shift in enunciated non-discriminatory reason at any point will "raise the specter of a rationalization intended to conceal the true facts." See Burdine, supra, 450 U. S. 248, at 252-256, 101 S. Ct. 1089 (1981). A shift in enuciated non-discriminatory reason after investigation begins is enough to undermine credibility. See Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993). A shift in enunciated non-discriminatory reason at trial affects, at the very least, credibility. See Schmitz, supra.

53. Jay Patel testified, however disjointedly, that generally he locked the restroom so he would not have to clean it or because it was filthy. He also clearly testified, contrary to Respondent's pre-hearing statement herein, that he did not lock the door to keep residents of the neighborhood/abusers of restroom cleanliness out, and that he did not keep a list of abusers of restroom cleanliness. All of his excuses at hearing were contrary to Respondent's original defense to the Human Rights Board and contrary to its Pre-hearing Statement in this forum. Therefore, language difficulty or not, Jay Patel was not a credible witness even as to his understandable responses. Also, contrary to their prior legal position, Mr. and Mrs. Patel denied that neighborhood residency

had any bearing on the case, and this shift as to neighborhood residency also affects credibility.

54. Respondent's shift in justification for denying the two African-American Petitioners access to the EZ Food Mart/Chevron restroom from "exclusion of neighborhood residents" and "exclusion of those on an enemies list of filthy restroom users" to an excuse that the restroom was locked to all types of customers throughout the entire rush hour and/or whenever the restroom was filthy, suggests a belated revision of the defense, based on discovery that a blanket exclusion of all neighborhood residents in a predominantly African-American neighborhood could help to prove “pattern discrimination” or "disproportionate impact discrimination”, instead of merely “disparate treatment discrimination.”

55. Therefore, having assumed, arguendo, but not ruling, that Respondent established rebuttable reason(s) for its apparently discriminatory actions, that reason(s) is deemed rebutted by Petitioners having shown that the non-discriminatory reasons asserted in Respondent's case-in-chief were pretextual. There is sufficient evidence to satisfy Petitioners' burden to show that Respondent's employee's decision to deny Petitioners access to the restroom was racially motivated. Laroche v. Denny's Inc., supra at 1384.

56. Respondent submits in its post-hearing proposal that "there was insufficient evidence to impute any liability to the owners of the Chevron." It is true that Sunil and Gira Patel did testify that they abhorred racial discrimination and had no knowledge with regard to any racially discriminatory practices at the store, but that testimony does not end their liability. Although many discrimination cases provide relief for those employers who publish and display anti-discrimination policies or who instruct and take pro-active steps to insure that their middle managers do not discriminate, that scenario does not exist here. While the situation may fall short of the Title VII "known or should have known" standard, Sunil Patel clearly had a conversation with Jay Patel shortly before Jay Patel's refusals of access began to escalate and accumulate. During that conversation, Sunil Patel, as an owner, authorized Jay Patel, the clerk, to do whatever the clerk felt would "control" the restroom. The owners are responsible for their employee's actions under such circumstances. See Brown v. Capital Circle Hotel Company d/b/a Sleep Inn, DOAH Case No. 01-3882 (RO: October 17, 2002; FO: March 10, 2003), and the general principles of the law of agency. See also Restatement 2nd of Agency Section 219(1); Restatement 3d of Agency Sections 7.01 and 7.03 (2006). Moreover, the evidence herein does not support a conclusion that Mr. and Mrs. Patel terminated Jay Patel's

employment as a remedial measure against discrimination. Their termination of Jay Patel appears to have been timed to assist litigation.

57. Petitioners testified to suffering outrage and humiliation on April 28, and May 2, 2006. While it is clear that Mr. Mitchell's urinating on himself on April 28, 2006, must have been embarrassing, he partly created that problem by not going home to use the restroom before continuing to the drycleaning establishment. There is no corroboration, within reasonable medical certainty, of any psychological or physical impairment or disability arising from Respondent's proven discriminatory acts on either date, and no evidence that either Petitioner suffered any continuing emotional upheaval after those dates. Compensation for the brief bad feelings of April 28, and May 2, 2006, is not recoverable under the Gainesville City Code or the administrative hearing procedures of Chapters 590 and 760, Florida Statutes.

58. There is no proof that Petitioners lost any income. Mr. Mitchell testified that he is totally disabled from gainful employment. There is no evidence concerning Mrs. Mitchell's employment or any loss of wages.

59. Indeed, there is no proof of any "actual damages" suffered by Petitioners as a result of the three dates at issue herein.

60. The only measures of damages provided for by the Gainesville Code are "affirmative relief from the effects of the practice, including actual damages, equitable and injunctive relief, and reasonable attorneys fees and costs." The parties have stipulated to a reasonable fee for Petitioners' attorney being $250 per hour for 32.9 hours, which, including trial time for 3.5 hours, amounts to 36.4 hours or $9,100.00. There is no competent record evidence as to any other costs or attorney's fee. (See Finding of Fact 29.)

RECOMMENDATION

Upon the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the City of Gainesville Human Rights Board enter a final order that:

(1) Finds Respondent discriminated against Gloria Mitchell based on her race (African-American);

(2) Finds Respondent discriminated against Arnold Mitchell based on his race (African-American);

(3) Orders Respondent to post and display a printed anti-discrimination policy that accords with the language employed at Article IV, Section 8-67 of the City of Gainesville Ordinance and which provides an address and telephone number where the owners or their agent can be reached to report any alleged discrimination on their premises;

(4) Authorizes the Gainesville City Attorney to apply to a Circuit Court for an injunction that prohibits any further discrimination in accommodation by the Respondent; and

(5) Awards from Respondent to Petitioners' attorney $9,100.00, in fees.

DONE AND ENTERED this 29th day of May, 2007, in Tallahassee, Leon County, Florida.

S

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2007.

ENDNOTES

1/ Despite the same last name, there is no evidence that the clerk, Jay Prakash Patel, is related to the owners.

2/ The discrepancy between parts of Mr. and Mrs. Mitchell's testimony on the number of restroom stops and denials of access is minor and immaterial. Memories of husbands and wives are not always carbon copies.

Mr. Mitchell's testimony that he had been convicted of a felony "two-three" times has not been overlooked, but this is a corrected statement not a vacillating one, as represented by Respondent. There is no evidence that any of Mr. Mitchell's

felony convictions related to a “crime involving dishonest or false statements” so as to erode Mr. Mitchell’s credibility. If Respondent wanted to know more or required a more precise answer, Respondent should have asked Mr. Mitchell what type of felony or felonies he had been convicted of and precisely how many times had he been convicted.

3/ There was considerable confusion as to whether either Mr. or Mrs. Mitchell were positioned outside the store so as to see this event occur and whether the key was given to the Caucasian female at this time by a female clerk or by Jay Patel, but Mr. Mitchell was clear that he heard the request for the key by the Caucasian female and the transfer of the key to her over a wire she was wearing, and additionally, both Petitioners and Respondent proposed, in their respective Proposed Recommended Orders, that the undersigned find as fact that the key was given to the Caucasian female from TV20 at this point in time. Moreover, Jay Patel never clearly denied handing the key to the TV20 Caucasian female. His "denial" was essentially to fall back on his language problems and an inability to remember anything that occurred on May 2, 2006, before the TV20 news crew and others returned en masse to the store after the Caucasian female came out.

4/ Respondent's unilateral Pre-hearing Statement, filed six days before the hearing on March 1, 2007, and long after the event was investigated by the Gainesville Human Rights Board, is diametrically different than this trial testimony. The Pre-hearing Statement states, as part of Respondent’s Statement of Position, that "A clerk who was working at the store, who no longer works at the store, denied people that he believed lived in the neighborhood who were using the bathroom as their own private bathroom access to the bathroom." It further states that “There was a clear non-discriminatory reason given at the time why access was denied in that he believed the Mitchells lived in the neighborhood and were abusing the bathroom privilege.”

5/ This evidence is again totally different than Respondent’s initial production of a non-discriminatory reason for alleged disparate treatment. See n.4.

6/ Respondent appears to desire the inference that if the female clerk gave the restroom key to Caucasians, she did so as a mistake due to not understanding Jay Patel's "lock all customer out policy" or because she alone knew the restroom was suddenly clean. This would not be a reasonable inference even

had it been affirmatively established that the female clerk gave out the key each time.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

Pursuant to Article III Section 8-51(l) of the City of Gainesville Municipal Code each party shall have 15 days from the date of this Recommended Order to submit written exceptions to the City of Gainesville Human Rights Board.