STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FREDDIE MITCHELL,

Petitioner,

vs. Case No. 12-3992

BB KING'S BLUES CLUB,

Respondent.
_____/
GENEVIEVE ABAD BECK,

Petitioner,

vs. Case No. 13-0517

BB KING'S BLUES CLUB,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, an evidentiary hearing was conducted in these consolidated cases on January 28, 2014, by video teleconference at sites in Orlando and Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Freddie L. Mitchell, pro se
Post Office Box 23901
Tampa, Florida 33623-3901

For Petitioner: Genevieve Abad Beck, pro se
4116 West Carmen Street
Tampa, Florida 33609

For Respondent: Nicole Alexandra Sbert, Esquire
Jackson Lewis LLP
Suite 1285
390 North Orange Avenue
Orlando, Florida 32802

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent discriminated against Petitioners on the basis of race or national origin at Respondent's place of public accommodation.

PRELIMINARY STATEMENT

On or about May 2, 2012, Petitioner Freddie Mitchell (Petitioner Mitchell) filed with the Florida Commission on Human Relations (FCHR) a Public Accommodation Complaint of Discrimination against Respondent BB King's Blues Club (Respondent or BB King's). Petitioner Mitchell alleged that on December 3, 2011, Respondent discriminated against him because of his race (African-American), when he and his partner were not put on a waiting list and were asked to get up after they seated themselves at a table for four. Petitioner Mitchell claimed that there were Caucasian customers who were not treated the same way.

On or about May 21, 2012, Petitioner Genevieve Abad Beck (Petitioner Beck), the partner referred to in Petitioner Mitchell's complaint, filed with FCHR a separate Public Accommodation Complaint of Discrimination against Respondent. Petitioner Beck alleged that in the same December 3, 2011,

incident described in Petitioner Mitchell's complaint, Respondent had discriminated against her on the basis of her race/national origin (Asian).

On October 26, 2012, FCHR issued a Notice of Determination: Cause, determining there was reasonable cause for Petitioner Mitchell's complaint. The FCHR notice erroneously indicated that Petitioner Mitchell's complaint was for unlawful employment practices by an employer. FCHR informed Petitioner Mitchell of his options for an administrative hearing or civil action. Petitioner Mitchell opted for an administrative hearing by timely filing his Petition for Relief on November 15, 2012. The petition was forwarded to DOAH and assigned to the undersigned to conduct the requested hearing.

After coordination to identify available hearing dates, Petitioner Mitchell's case was set for hearing on March 12, 2013. Shortly thereafter, on January 16, 2013, Respondent initiated written discovery, serving interrogatories and document production requests on Petitioner Mitchell.

Meanwhile, on November 19, 2012, FCHR issued a Notice of Determination: No Cause, determining there was no reasonable cause for Petitioner Beck's complaint. The FCHR notice erroneously indicated that Petitioner Beck's complaint was for unlawful employment practices by an employer.

On December 12, 2012, FCHR issued a Rescission of Notice of Determination: No Cause, replaced with a Notice of Determination: Cause issued by FCHR on January 11, 2013, this time determining there was reasonable cause for Petitioner Beck's complaint. This notice continued the erroneous description of the complaint as directed to unlawful employment practices by an employer. FCHR informed Petitioner Beck of her options for an administrative hearing or civil action, and Petitioner Beck opted for an administrative hearing by filing a Petition for Relief with FCHR on February 12, 2013. Petitioner Beck's case was forwarded to DOAH and assigned to Administrative Law Judge Linzie F. Bogan.

On February 21, 2013, Respondent moved to consolidate the two related proceedings. Petitioner Beck's case was transferred to the undersigned, and a telephonic motion hearing was set for February 27, 2013. On February 26, 2013, Respondent filed a motion to compel discovery from Petitioner Mitchell and an unopposed motion for continuance of the March 12, 2013, hearing to allow Respondent to obtain the written discovery requested from Petitioner Mitchell and to follow up with a deposition. Also on February 26, 2013, Respondent served document production requests and interrogatories on Petitioner Beck.

In the February 27, 2013, telephonic hearing, the undersigned granted the motions to continue Petitioner Mitchell's

hearing and to consolidate the two cases. The parties agreed to a final hearing date of May 9, 2013. The undersigned did not rule on Respondent's motion to compel discovery from Petitioner Mitchell; Mitchell represented that he was completing his responses. The undersigned took the opportunity to inform Petitioners that having invoked the administrative hearing process, they were obligated to follow the governing rules, including the discovery rules of civil procedure. Petitioners were told how to access the governing rules. Petitioners were also told to take seriously their obligations to respond fully and without delay to Respondent's discovery requests, and that if they failed to do so, the final hearing could be delayed and sanctions could be imposed under the discovery rules.

As detailed in numerous motions and orders in the record of these cases, Petitioners failed to provide timely or complete responses to Respondent's discovery requests, despite being given numerous opportunities to correct their failures, despite being put on notice of the specific ways in which they had failed to respond adequately, and despite numerous warnings of the specific sanctions that could be imposed against them if they did not correct their failures. On more than one occasion, Respondent's motions requested that the ultimate sanction of dismissal be ordered as a result of Petitioners' discovery transgressions. The undersigned denied the requests for dismissal as discovery

sanctions. However, Petitioners' non-compliance caused substantial delay and expense to Respondent, as detailed in the docket filings. Accordingly, the undersigned imposed limited sanctions targeting the areas of repeated non-compliance, and also assessed costs against Petitioners to reimburse Respondent, in part, for attorney's fees incurred in attempting to secure discovery responses and enforce orders compelling discovery.[1/]

Ultimately, the consolidated cases were set for hearing on January 28, 2014, in accordance with the parties' joint request, and the hearing went forward as rescheduled.

At the hearing, Petitioner Mitchell testified on his own behalf in his case, and Petitioner Beck testified on her own behalf in her case. Petitioners offered no documentary evidence.

Respondent presented the testimony of Michael Coon, Michael Davis, and Angelina Olivo. Respondent's Exhibits 1 through 4, 6, 8, and 14 were offered and admitted in evidence.

The two-volume Transcript of the final hearing was filed on February 28, 2014. Respondent filed two unopposed motions to extend the time for filing Proposed Recommended Orders, which were granted. Respondent timely filed its Proposed Recommended Order by the extended deadline. Petitioner Beck filed her Proposed Recommended Order after hours on the extended deadline day, but her late filing is accepted. Petitioner Mitchell did not file a proposed recommended order. Due consideration has

been given to the Proposed Recommended Orders filed by Respondent and Petitioner Beck in preparing this Recommended Order.

FINDINGS OF FACT

1. At issue in these consolidated cases are the complaints by Petitioners Mitchell and Beck that they were subjected to discrimination when they visited Respondent's Orlando restaurant on December 3, 2011.

2. Petitioner Mitchell is an African-American male, and Petitioner Beck is an Asian female. They live in Tampa and have been dating for approximately five years. Prior to December 3, 2011, they had visited BB King's in Orlando several times--four or five times, according to Petitioner Mitchell. On each of those occasions, they had enjoyed the restaurant's services and were not subjected to any form of discrimination.

3. BB King's is a southern-style barbecue restaurant and live music venue. Respondent operates four BB King's locations. The Orlando restaurant is the largest, occupying 14,000 square feet spread over two stories, with three bars, a stage, and a dance floor.

4. The restaurants are named after the famous African-American blues musician, B.B. King. At the Orlando restaurant, B.B. King and other blues musicians (such as Ray Charles and Howlin' Wolf, both African-Americans) are portrayed in paintings

and images on the exterior walls, and inside the restaurant on the stage, on the walls, on the menus, and on the glassware.

5. BB King's has a racially diverse clientele. A large majority of Respondent's customers are African-Americans.

6. Respondent has a non-discrimination policy, prohibiting discrimination on the basis of race, color, religion, sexual orientation, ethnicity, or other classification. All of Respondent's employees receive training on the company's non-discrimination policy, as part of the extensive initial-hire training process in the company's policies and procedures.

7. The Orlando BB King's is at its busiest on Saturday nights, particularly between 7:00 p.m. and 10:00 p.m. During this time, there is usually a wait for a table. The waiting time ranges from five minutes to two hours.

8. Respondent's seating policies and procedures were at the heart of the incident of which Petitioners complained. The seating policies and procedures in effect as of December 3, 2011, established through the credible testimony of Respondent's witnesses and corroborating exhibits, are described below.

9. Respondent does not offer reservations in the traditional sense of reserving a table to accommodate a particular number of customers at a particular time. Instead, Respondent offers a variation of traditional reservations, called priority seating. Priority seating arrangements can be made in

advance by telephone, online, or in person, for a particular group expecting to arrive at a particular time. While priority seating does not guarantee that a table will be ready when the group arrives, if an appropriate-sized table is not ready, the group is given first-in-line status, so they would receive the next available table of the size needed to accommodate the group, ahead of any walk-ins who are waiting for the same-sized table.

10. Respondent limits the number of priority seating arrangements it will make for a given time slot. It is common, therefore, for priority seating slots to be filled in advance, particularly for the restaurant's peak days and peak times. When persons request tables for time slots with no more priority seating openings, those persons are told that they are welcome to come to the restaurant as walk-in customers.

11. Through its seating policies and procedures, Respondent seeks to strictly control seating and to discourage customers from seating themselves. That is particularly important when the restaurant is very busy, for several reasons: to maintain order; to rotate the seating of customers among the different server zones so as to evenly spread the work load among the servers; to ensure that priority seating is provided to those who timely avail themselves of that option; and to maximize use of seating capacity when demand is at its peak.

12. To help control seating, upon entering the Orlando BB King's restaurant, customers are informed by a sign at the reception station: "Please Wait To Be Seated." Another "Please Wait To Be Seated" sign tops a pole at the front of the velvet-roped area demarking the line for customers waiting to be seated.

13. To reinforce the message of its "Please Wait To Be Seated" signs, Respondent places "Reserved" signs on each vacant table. Respondent's witnesses acknowledged that these tables are not actually reserved in the traditional sense of being held for a particular group with reservations, although tables may be held for priority seating, a term used interchangeably with reservations.[2/] But the signs are not used for that purpose; instead, the signs are used as a means to discourage impatient customers from trying to seat themselves despite being told to wait to be seated.

14. Another seating policy employed by Respondent is referred to as the 75 percent rule. Under this rule, unless and until 75 percent of a group wanting to sit together at one table is physically present at the restaurant, customers who are part of the group are not seated and are not even put on a waiting list nor provided a pager for a table. In other words, if two customers tell the hostess that they are a part of a group of four and are waiting for two other persons to arrive, those two customers will not be seated at a table for four, nor will they

be put on the wait listing and given a pager for a table for four. Respondent's witnesses credibly explained that this rule served the purpose of maximizing use of available seating capacity, which is particularly important on busy nights during peak hours.

15. The night in question--December 3, 2011--was a Saturday night during tourist season. Petitioners decided to drive from Tampa to Orlando, a prime tourist destination location, to return to the BB King's restaurant they had previously enjoyed.

16. Petitioners did not make seating arrangements in advance. Instead, on the way to the restaurant, Petitioner Beck called BB King's on her cell phone to try to make reservations, between one and two hours before Petitioners expected to arrive. Petitioner Beck spoke with "Robbie," who told her that she could not make a reservation, but that they were welcome to walk in.

17. Respondent's witnesses credibly explained that by the time Petitioners attempted to make seating arrangements, the priority seating limits surely would have been reached. Thus, it was reasonable and consistent with Respondent's seating policies for Petitioner Beck to be told that she could not make a reservation, but that they were welcome to walk in. Petitioner Beck acknowledged that the person with whom she spoke did not know the race or national origin of either Petitioner.

18. Petitioners proceeded on to BB King's, arriving between 8:00 p.m. and 9:00 p.m. The restaurant was very busy. In addition to the normal crowds at this peak time, the restaurant was hosting three special events for Nike: one Nike event was for a group of 50 people, between 6:30 p.m. and 9:00 p.m.; the second Nike event was for a group of 41 people, between 7:00 p.m. and 9:00 p.m.; and the third Nike event was for another group of 50 people, between 7:30 p.m. and 10:30 p.m.

19. Petitioners checked in with the hostess at the front reception station. Petitioners were greeted in a friendly manner by the hostess and were given a pager that would signal when their table was ready. Within five to ten minutes, the pager signal was activated. Petitioners returned the pager to the hostess, who turned Petitioners over to a runner, the BB King's employee who escorts guests from the reception area to their tables and provides them with menus and silverware. The runner led Petitioners to a table for two. However, Petitioners refused the two-seater table offered to them, and informed the runner that they needed a table for four, as they were waiting for another couple who had not arrived yet.[3/]

20. Petitioners must have told the hostess that they were a party of two, not four, when they first checked in, so as to be put on the waiting list and given a pager for a two-seater table. Petitioners failed to explain why they did not inform the hostess

upon checking in that they were waiting for two more persons and needed a table for four, instead of waiting until they saw the table to which they were led to tell the runner that they actually needed a table for four. The logical inference from Petitioners' description (and from Petitioner Beck's evasiveness described in endnote 3) is that Petitioners developed the story that they were expecting another couple after they were led to the table for two, perhaps because they were not happy with the location of the two-seater table and preferred the location of the four-seater tables, or perhaps because they just wanted more elbow room. The credibility of Petitioners' story is undermined by the following facts: Petitioner Mitchell admitted that there was no set time established to meet this other couple at the restaurant; the other couple that was supposed to meet Petitioners never showed up during the hour that Petitioners estimated they were at the restaurant in total; Petitioners did not offer testimony by the other couple to corroborate their story; and Petitioners did not even name the other couple when asked in discovery for names of persons with knowledge of the facts underlying Petitioners' complaints.

21. Ironically, the new information that Petitioners were waiting for another couple, belatedly offered to the runner in an attempt to switch to a four-seater table, triggered the 75 percent rule, which ultimately was the source of Petitioners'

dissatisfaction. The credible evidence establishes that if Petitioners had accepted the two-seater table they were offered, they would have been served, as they had been on prior occasions.

22. Instead, pursuant to the 75 percent rule, Petitioners were escorted by the runner back to the reception area, and were told to let the hostess know when the couple they were waiting for had arrived. Petitioners asked to be put on the waiting list and be issued a pager for a table for four, but the hostess followed the 75 percent rule and reasonably refused to do so.

23. No evidence was offered to prove that the 75 percent rule was used as a means to discriminate against Petitioners because of their race or national origin. Petitioners offered no evidence to prove that any other customers who did not have 75 percent of their group present were seated at tables, or were put on the waiting list and issued pagers. Petitioners offered no evidence to prove that the 75 percent rule was not applied uniformly to all other customers regardless of their race or national origin. Petitioners offered no evidence that the 75 percent rule was waived for any customers who were not members of Petitioners' protected race or national origin classes.

24. After Petitioners were returned to the reception area and told to let the hostess know when the rest of their party arrived, Petitioners went to the bar area to wait. Petitioner Beck ordered a drink, and was served without incident.

25. Petitioners observed an African-American couple seated at a nearby table for four. When the African-American couple was finishing their meal and about to vacate their table, they asked Petitioners if they wanted to be seated at the table, and Petitioners gladly took them up on their offer.

26. The African-American couple who offered Petitioners their table left and Petitioners remained seated at the table for four. Petitioners did not have menus or silverware, because they were not seated by a runner. A server approached the table, but did not stop to take Petitioners' orders. The server seemed upset according to Petitioners, perhaps because they had seated themselves, contrary to Respondent's seating policies and procedures. Then a different server came to the table. According to Petitioners, that server took their orders for drinks and dinner, and brought them drinks.

27. Petitioners believe that the first server must have reported them to the hostess, because the same hostess who had told Petitioners previously to wait until the rest of their group arrived came over to tell Petitioners that they needed to get up from the table.

28. Someone who Petitioners described as a manager also came up to tell Petitioners that they needed to vacate the table because the rest of their group had not arrived. At hearing,

Petitioners testified that they did not know the name of the manager with whom they spoke.

29. Petitioners claim that they told the unidentified manager that they should not have to leave the four-seater table, pointing out that there was a Caucasian couple seated at a four-seater table. According to Petitioners, the manager told them he did not have the heart to ask the other couple to move. Petitioner Beck testified that the manager made this comment while Petitioners were waiting in the bar area before seating themselves. Petitioner Mitchell, on the other hand, claimed that this conversation occurred after the manager asked them to get up from the four-person table. Petitioners' testimony in this regard was not credible.

30. When Petitioners were asked to vacate the table from which they had seated themselves, after arguing for a brief period, Petitioners ultimately agreed to vacate the table. They then decided to leave the restaurant. Apparently they were allowed to leave without paying for the drinks they had ordered and been served while seated at the table for four, and apparently they abandoned the dinner orders they had placed.

31. It was clear from Petitioners' testimony that they did not understand Respondent's seating policies. Petitioners seemed to be under the misimpression that Respondent had a policy against seating couples at tables for four. Instead, according

to the credible testimony of Respondent's witnesses, couples are often seated at tables for four early in the evening, but that as the evening progresses into the peak hours, the hostess begins to direct couples to two-seater tables, using the four-seater tables for groups of three or four. This maximizes use of the available seating, a reasonable and necessary policy for a busy restaurant/entertainment venue. The testimony of Respondent's witnesses was consistent in this regard, and included the credible testimony of Ms. Olivo, who was the hostess on December 3, 2011, but who has not worked for Respondent since 2012.

32. The credible evidence established that Petitioners were asked to vacate the table for four, not because there were only two of them, but rather, because their story that they were waiting for another couple triggered the 75 percent rule, and because, after they were told to wait until the rest of their group arrived, they chose to ignore those instructions and seat themselves.

33. Petitioners failed to prove that Respondent's practice of sometimes seating couples at tables for four and sometimes directing couples to tables for two was a choice made on the basis of race or national origin, as opposed to a reasonable judgment for maximizing use of seating capacity based on how busy the restaurant is.

34. Petitioners acknowledged that the Caucasian couple they claim to have pointed out to the manager was not the only couple they observed seated at a table for four. To the contrary, Petitioners admit that the couple who made the nice gesture that, unfortunately, was contrary to Respondent's seating policies, of offering Petitioners "their" table as they were getting up to leave was an African-American couple.

35. Petitioners offered no evidence to prove how long either the Caucasian couple or the African-American couple seated at tables for four had been at the restaurant, whether they were seated with all of their party present, whether they were waiting for others to join them, or whether they had improperly seated themselves. These couples might have arrived hours earlier, well before the peak time, and lingered to enjoy their food and the live entertainment. That Petitioners admitted to having observed both a Caucasian couple and an African-American couple at tables for four is evidence that Respondent was not using its seating policies as a means to discriminate, but rather, applied its policies in a non-discriminatory manner to accommodate customers both within and outside the protected classes who were not shown to be similarly situated to Petitioners.

36. In fact, Petitioners admitted that when the two of them previously visited Respondent's Orlando restaurant, they had been seated at tables for four.

37. Petitioners also contend that the unidentified manager who asked them to vacate the table informed them that the table was "reserved" for a group of three Caucasian customers who had priority seating arrangements. According to Petitioners, this threesome arrived at the restaurant after Petitioners.

38. Petitioners do not contend that the three Caucasian customers did not have 75 percent of their group present; mathematically, the threesome being seated at a table for four must have had at least 75 percent of their group present. Moreover, Petitioners offered no evidence that the three customers did not have priority seating arrangements. Accordingly, Petitioners' description does not support Petitioners' assertion of discrimination, but rather, a consistent application of Respondent's seating policies and procedures. Petitioners were not entitled to be seated or to be placed on a waiting list for a table for four, because their claim to be waiting for another couple triggered the 75 percent rule; Petitioners ignored the instructions to wait for the rest of their group, and violated another seating policy by seating themselves. Petitioners did not attempt to make seating arrangements in time to secure priority seating, as the Caucasian threesome apparently had done. Thus, the Caucasian threesome was entitled to priority seating over walk-in customers on the waiting list for a four-seater table. Petitioners had not yet

qualified to be placed on the walk-in waiting list. Consistent with Respondent's seating policies, Petitioners were properly asked to vacate the table at which they had seated themselves.

39. As with the 75 percent rule, no credible evidence was offered to prove or suggest that the do-not-seat-yourself rule, announced to all customers by the sign at the reception station, was applied in a discriminatory fashion. Respondent's witnesses credibly testified that it is common for customers to try to skirt the seating policies by seating themselves when a table is vacated, particularly on a busy Saturday night, such as on December 3, 2011. Management and staff are all on alert to look for tell-tale signs, such as customers sitting at a table without menus or silverware. When this occurs, the hostess or a manager will inform these customers that they cannot seat themselves, and they are asked to leave the table. The credible testimony established that customers of all races and national origins are asked to leave tables when they violate the seating policies by seating themselves.

40. Petitioners also argue that the use of the word "reserved" on signs placed on tables is inconsistent with Respondent's seating policy that does not allow tables to be reserved in the traditional sense. However, Respondent reasonably explained its seating policies and procedures, including its use of the "reserved" signs. Whether Respondent's

seating policies are clear or confusing, good or bad, or make sense to Petitioners are not questions for determination in this proceeding. Instead, the question is whether Respondent's actions taken pursuant to its seating policies and procedures were motivated by intentional discrimination. Petitioners did not prove that Respondent used "reserved" signs as a means to discriminate against Petitioners because of their race or national origin.

41. Petitioners do not contend that they were subjected to any form of direct discrimination, such as racial or ethnic slurs or derogatory comments of any kind. Instead, Petitioners Mitchell and Beck proved only that they are African-American and Asian, respectively; that they could have enjoyed all of the benefits offered at BB King's had they accepted the table for two they were offered; that they were not seated at a table for four because they claimed to be waiting for another couple to join them; and that they were asked to leave a table at which they had seated themselves. No credible proof was offered from which to infer that Respondent's actions were motivated by intentional discrimination based on race and national origin.

42. For reasons explained in a series of motions and Orders (see endnote 1), the undersigned exercised the authority provided in section 120.569(2)(f), Florida Statutes (2012), and Florida Rule of Civil Procedure 1.380(b)(2), to assess costs against each

Petitioner in connection with sanctions imposed for their discovery violations. By Order issued July 11, 2013, Petitioner Mitchell was ordered to pay $1,067.50 to Respondent to reimburse a portion of the reasonable attorney's fees incurred in attempting to obtain discovery and enforce orders compelling discovery. By separate Order issued July 11, 2013, Petitioner Beck was ordered to pay $1,098.00 to Respondent to reimburse a portion of the reasonable attorney's fees incurred in attempting to obtain discovery and enforce orders compelling discovery. As of the final hearing, these assessments had not been paid.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11(6), Fla. Stat. (2013).

44. The Florida Civil Rights Act of 1992, codified in chapter 760, Florida Statutes, prohibits discrimination in the workplace and in places of public accommodation.

45. Section 760.08 proscribes discrimination in places of public accommodation, as follows:

> 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 chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion.

46. Respondent is a "public accommodation," as defined in section 760.02(11), which provides in pertinent part:

> "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.
>
> (c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.

47. BB King's sells food for consumption on the premises, and it also provides entertainment. While no evidence was offered to prove whether Respondent's primary business is selling food or providing entertainment, that determination need not be made, because either way, BB King's is a public accommodation as statutorily defined.

48. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, prohibits discrimination in places of public accommodation, in language identical to that found in section

760.08, except for the omission of certain protected classes not at issue in this case. Accordingly, federal cases interpreting the similar federal civil rights law apply. See Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

49. Due to the relative lack of Title II cases, federal courts routinely find guidance in the more extensive case law developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000. Federal courts have extended to public accommodation cases the shifting-burden analysis adopted by the U.S. Supreme Court for employment discrimination cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). See Fahim v. Marriott Hotel Servs., 551 F.3d 344, 349 (5th Cir. 2008), and cases cited therein. This same analysis has been adopted in FCHR public accommodation cases. See, e.g., Inman v. Jian Deng Bao, d/b/a China Gardens Restaurant, Case No. 11-5602 (Fla. DOAH Feb. 12, 2012; Fla. Comm'n on Hum. Rel. Apr. 23, 2012).

50. Under the McDonnell analysis as adapted to public accommodation discrimination cases, Petitioners have the burden of proving by a preponderance of the evidence a prima facie case of unlawful discrimination. If Petitioners establish a prima facie case, then the burden shifts to Respondent to articulate legitimate non-discriminatory reasons for the alleged discriminatory conduct. If Respondent meets this burden, then

the burden shifts back to Petitioners to prove that the articulated reasons are a mere pretext, and that the actions were, in fact, motivated by unlawful discriminatory reasons. Laroche v. Denny's Inc., 62 F. Supp. 2d 1375, 1382-1383 (S.D. Fla. 1999); Wells v. Burger King Corp., 40 F. Supp. 2d 1366, 1368 (N.D. Fla. 1998).

51. "The ultimate burden is on [Petitioners] to prove that they were the victims of intentional discrimination." Laroche, 62 F. Supp. 2d at 1383.

52. To establish a prima facie case, Petitioners must prove the following: (1) Petitioners are members of a protected class; (2) Petitioners attempted to contract for services and to afford themselves the full benefits and enjoyment of a public accommodation; (3) Petitioners 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. Laroche, 62 F. Supp. 2d at 1382.

53. Petitioners proved, and Respondent did not dispute, that they were members of protected racial and/or national origin classes, in that Petitioner Mitchell is African-American and Petitioner Beck is Asian.

54. Petitioners proved by a preponderance of the evidence that they went to BB King's in Orlando for the purpose of obtaining services and affording themselves full benefits and enjoyment of this public accommodation. The undersigned acknowledges the testimony of Respondent's three witnesses, all of whom were on duty on December 3, 2011, during the time Petitioners visited the restaurant, but none of whom recognized the Petitioners or recalled any encounters with Petitioners that night over seating arrangements. Nonetheless, as all witnesses acknowledged, the restaurant was very busy that night, and the type of incident described by Petitioners, in which they were asked to get up from a table at which they had seated themselves, was a very common occurrence and not remarkable or memorable.

55. Although Petitioners met their burden of proving the first two elements of their prima facie case, Petitioners failed to meet their burden of proof with regard to the third and fourth elements of their prima facie case.

56. Based on the findings of fact above, Petitioners did not prove that they were denied the right to contract for services and, thus, denied full benefits or enjoyment of BB King's. Instead, the more credible evidence established that Petitioners refused to accept the two-seater table offered to them at which they would have been served. Petitioners outsmarted themselves by inventing a story in an attempt to

receive preferential treatment over other customers, and when Respondent's seating policies thwarted that attempt, Petitioners violated another seating policy by improperly seating themselves at a table at the suggestion of an African-American couple that was vacating a table for four. Respondent's non-discriminatory application of its seating policies and procedures did not deny Petitioners the right to contract for services at BB King's. See, e.g., Stevens v. Steak N Shake, Inc., 35 F. Supp. 2d 882, 891 (M.D. Fla. 1998) ("[S]ervice contingent on prepayment without racial discrimination is not tantamount to a refusal of service."). When Petitioners were told that they were required to follow Respondent's seating policies by vacating the table at which they seated themselves and waiting until the arrival of the couple they claimed to be waiting for, Petitioners chose instead to leave voluntarily.

57. With regard to the fourth element of their prima facie case, Petitioners failed to prove that any other customers at BB King's that night were similarly situated, period. No evidence was offered to prove that the 75 percent rule, which thwarted Petitioners' attempt to secure a better table, was waived for any other customer, within or outside of Petitioners' protected classes. Moreover, no evidence was offered to prove that any other customer, within or outside of Petitioners' protected classes, was permitted to violate the two different seating

policies by not waiting for 75 percent of their group and by seating themselves and being allowed to remain at the table at which they seated themselves. Accordingly, Petitioners necessarily failed to prove that other similarly situated persons not in the same protected classes were treated better than Petitioners or were given full benefits or enjoyment of this public accommodation while those same benefits/enjoyment were denied to Petitioners.

58. If Petitioners had met their burden of proving a prima facie case, Respondent articulated legitimate non-discriminatory reasons for its actions, by explaining its reasonable seating policies and procedures. Petitioners offered no evidence to suggest that Respondent's seating policies and procedures were mere pretexts.

59. Petitioners did not meet their ultimate burden of proving that they were victims of intentional discrimination based on their race and national origin. Instead, Petitioners were subjected only to Respondent's reasonable seating policies and procedures that were applied in a non-discriminatory fashion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED as follows:

In DOAH Case No. 12-3992, that the Florida Commission on Human Relations enter a Final Order:

(1) dismissing the Petition for Relief filed by Petitioner Freddie Mitchell; and

(2) assessing $1,067.50 against Petitioner Mitchell for discovery violations, to be paid to Respondent, pursuant to the Order entered on July 11, 2013; and

In DOAH Case No. 13-517, that the Florida Commission on Human Relations enter a Final Order:

(1) dismissing the Petition for Relief filed by Petitioner Genevieve Abad Beck; and

(2) assessing $1,098.00 against Petitioner Beck for discovery violations, to be paid to Respondent, pursuant to the Order entered on July 11, 2013.

DONE AND ENTERED this 14th day of May, 2014, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of May, 2014.

ENDNOTES

[1/] Detailed accounts of Respondent's discovery efforts, Petitioners' failures to timely or completely respond, and the resulting sanctions ultimately imposed are set forth in Respondent's discovery-related motions to compel or for sanctions, filed on February 26, 2013; March 5, 2013; April 10, 2013; April 11, 2013; and May 17, 2013; and in the following Orders: Order issued on March 28, 2013 (compelling discovery from Petitioner Mitchell, issued after a telephonic motion hearing); two Orders issued on April 12, 2013 (compelling discovery from Petitioner Beck, and denying motion to dismiss as discovery sanction, but granting motion for continuance and giving Petitioners the opportunity to complete discovery responses by April 30, 2013); Order issued on April 30, 2013 (granting motion for extension until May 10, 2013, to complete discovery, filed by Petitioners' new counsel, who was later allowed to withdraw based on "irreconcilable differences" after unsuccessfully attempting to complete discovery, serving only incomplete responses after the extended deadline); Order issued on June 5, 2013 (denying motion to dismiss, but imposing discovery sanctions and assessing costs including attorney's fees against Petitioners); and two Orders issued on July 13, 2013 (assessing costs against each Petitioner to reimburse Respondent for a portion of its attorney's fees expense incurred in efforts to obtain discovery). As the docket reflects, Petitioners never responded in opposition to any of Respondent's motions to compel discovery or to impose sanctions, nor did Petitioners file written responses or objections to Respondent's cost affidavits, as they were told to do if they disagreed.

[2/] As a practical matter, the difference between priority seating and traditional reservations is that priority seating affords greater leeway for Respondent to guess wrong and plan for more rapid turnover of table use than would be the case if customers stay at tables longer than predicted. With traditional reservations, a restaurant commits to having tables ready for arriving guests with reservations, so that the restaurant might plan conservatively for slower table turnover, erring on the side of leaving tables empty longer. With priority seating, if customers linger at a table longer than anticipated, Respondent can still meet its priority seating commitment by giving arriving priority-seating guests first-in-line status, with priority over walk-ins for the next available table.

[3/] Petitioner Mitchell clearly recounted the facts regarding their initial reception at BB King's, including checking in with

the hostess, being issued a pager, waiting five to ten minutes, and then being led by a runner to a table for two, at which point they refused the table and told the runner they needed a table for four because they were waiting for another couple. Petitioner Beck's testimony, however, was evasive; she was unwilling to acknowledge that they had checked in with the hostess, had been given a pager, and were led to a table for two. Yet, at the same time Petitioner Beck claimed to not know that the runner was taking Petitioners to a table for two ("[W]e don't know where he's taking us"), she admitted that she and Petitioner Mitchell "mention[ed] that we need more--a bigger table because . . . two more people [were] coming." (Tr. 105).

[4/] Petitioners may have spoken with someone else whom they inaccurately described as a manager, as they had similarly described others who were not managers. For example, in Petitioner Beck's Proposed Recommended Order, she stated that the person with whom she spoke when she telephoned BB King's for reservations was "the manager." At hearing, Petitioner Beck said that this person's name was Robbie. Respondent's records in evidence confirm that an employee named Robbie was on duty December 3, 2011, but he was a runner, not a manager.

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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.