STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER M. FOSTER-GARVEY,

Petitioner,

vs. Case No. 16-6982

MCDONALD'S BAM-B ENTERPRISES,
d/b/a MCDONALD'S,

Respondent.
_____/

RECOMMENDED ORDER

An evidentiary hearing was conducted on February 17, 2017, by video teleconference with sites in Orlando and Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Gregory John Millan
Qualified Representative
9 Adler Place
Brooklyn, New York 11208

For Respondent: Paul David Brannon, Esquire
Dixie Daimwood, Esquire
Carr Allison
305 South Gadsden Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On May 10, 2016, Petitioner Jennifer M. Foster-Garvey (Petitioner or Ms. Foster-Garvey) filed with the Florida Commission on Human Relations (FCHR) a Public Accommodation Complaint of Discrimination against Respondent McDonald's Bam-B Enterprises, d/b/a McDonald's (Respondent or McDonald's), alleging that on December 28, 2015, Respondent discriminated against her on the basis of race, color, sex, disability, and national origin.

FCHR conducted an investigation, after which it issued its determination of no reasonable cause on November 4, 2016, finding that Petitioner failed to establish a prima facie case of discrimination and that there was no reasonable cause to believe Respondent engaged in discrimination as charged.

Petitioner timely filed a Petition for Relief, requesting an administrative hearing to contest FCHR's determination. FCHR referred the matter to DOAH for assignment of an Administrative Law Judge to conduct the requested hearing.

The final hearing was scheduled with input from the parties. Petitioner sought to have Gregory John Millan accepted as her qualified representative, but no affidavit was submitted by Mr. Millan attesting to his qualifications. An Order was issued requiring an affidavit from Mr. Millan setting forth his

qualifications. Thereafter, Mr. Millan submitted an affidavit, which was deemed acceptable and an Order was issued accepting Mr. Millan as Petitioner's qualified representative.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation in which they framed the nature of the controversy (narrowed to whether Respondent discriminated against Petitioner on the basis of race/national origin and disability), stipulated to a few facts, and identified their proposed exhibits and witnesses.[1/] To the extent the parties' stipulations are relevant, they are incorporated in the findings below.

At the final hearing, Petitioner testified on her own behalf and also presented the testimony of Eric Vidler, Adam Allegro, Shahanna Owensby, and Robert Millan. Petitioner did not offer any exhibits into evidence. Respondent presented additional testimony by Eric Vidler in its case. Respondent's Exhibits 1 and 2 were admitted in evidence, without objection.

At the conclusion of the hearing, the deadline for the parties to file proposed recommended orders (PROs) was discussed. The parties were informed that the standard deadline provided by rule is 10 days after the transcript is filed at DOAH. Petitioner requested additional time, and it was agreed that the PRO deadline would be 20 days after the filing of the transcript.

The Transcript was filed on March 16, 2017. Petitioner's unopposed motion for an extension of the PRO deadline was

granted. Both parties filed PROs by the extended deadline of April 17, 2017, and their filings have been given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is a McDonald's franchisee operating six McDonald's restaurants in the Orlando area. At issue in this case is the restaurant referred to as the "Lockhart" store.

2. The Lockhart McDonald's is located on Orange Blossom Trail in Orlando, in a high-crime, low-income area. This McDonald's has a history of problems with persons using the restaurant for purposes other than purchasing food and drink there to consume onsite. There has been a wide range of "other purposes" in the Lockhart McDonald's history: sitting at the dining tables without ordering any food or drink; panhandling (asking customers if they have a spare dollar); bringing in drinks purchased elsewhere, topped off with refills stolen from the McDonald's drink station; soliciting restaurant customers for prostitution; and using the bathrooms to ingest or inject illegal drugs, leaving behind used hypodermic needles and other paraphernalia. On two separate occasions, people overdosed on heroin in the bathrooms.

3. To combat these problems, which hurt business, Mr. Vidler enlisted the help of his brother, an Orange County Deputy Sheriff, who conducted drug and prostitution stings to

help clean up the restaurant. In addition, the Lockhart McDonald's adopted a no-loitering policy, a no-solicitation policy, and a policy requiring that only food and drink purchased there may be consumed there. Notices of these policies are prominently displayed on signs at the restaurant.

4. Respondent's witnesses testified, credibly and consistently, that these policies are enforced uniformly and strictly, with the goal being to avoid the problems they have had with persons improperly using the restaurant's facilities. As part of the enforcement procedure, if someone is observed seated at a table without any apparent McDonald's food or drink items, after a few minutes a manager or other staff member will approach that person and politely inquire whether the person intends to make a purchase.

5. Petitioner is a black woman who has been a customer at the Lockhart McDonald's. She and her boyfriend, who is not black,[2/] have gone there on occasion, made purchases, and enjoyed their meals, without incident.

6. On the day in question, December 28, 2015, Petitioner and her boyfriend went to the Lockhart McDonald's for breakfast. The restaurant was not very busy or crowded when they arrived, with perhaps one other customer in line and another customer seated at a table in the separate dining area. Petitioner went

to the dining area, while her boyfriend went to the counter to place their order.

7. The restaurant is fairly large, with physical and visual separation of the area where customers wait in line to place orders, pick up food, and get drinks at the drink station from the area where customers can go to sit at tables to consume their purchases. Behind the ordering counter on the employee side, there is a door used by employees to enter the dining area. Through a small window at the top of the door, a customer waiting in line at the counter might be able to glimpse a small portion of the dining area, but otherwise would not be able to see or hear what is going on in the dining area.

8. Petitioner took a seat at a table by an outside window. She propped both of her feet up on the Corian window ledge and sat there gazing out the window.

9. Eric Vidler, the operations manager of Respondent's six restaurants, was in the Lockhart McDonald's that morning. After Petitioner had taken her place by the window, Mr. Vidler and the Lockhart restaurant manager, Adam Allegroe, entered the dining area together to conduct a cleanliness walk-through. They saw Petitioner, taking note of her unusual positioning, with feet propped up on the windowsill,[3/] staring out the window. They also noted that there was no sign of any McDonald's food or drink purchases on the table or in her hands.

10. After a few minutes, consistent with the restaurant's policies and procedures, Mr. Vidler approached Petitioner and politely inquired whether she intended to make a purchase. She did not answer him.[4/]

11. Mr. Vidler and Mr. Allegroe testified that usually, when they make such an inquiry, the person will respond, but sometimes they do not respond. Since their goal is not to make a scene, offend, or embarrass anyone, under these circumstances they will usually walk away for a short period of time. If the person had no legitimate business there, then the person often will disappear at that point.

12. Mr. Vidler and Mr. Allegroe retreated to the men's and women's bathrooms, where they spent three to five minutes conducting their cleanliness inspection.

13. When Mr. Vidler and Mr. Allegroe returned to the dining area, Petitioner was still seated, positioned the same way, with her feet still propped up on the windowsill. She was still staring out the window, and still had no McDonald's purchases on the table or in her hands.

14. Mr. Vidler went back up to Petitioner, and following up on his prior statement to her, this time he told her, "Ma'am, if you are not going to be making a purchase today, then you are loitering and I need to ask you to leave." Mr. Vidler testified credibly that this is how he always handles the second approach

when the person does not answer his first inquiry. The message, though direct, was delivered in a calm tone. Mr. Vidler did not yell at Petitioner. He did not threaten to call the police or have her arrested.

15. This time, Petitioner responded. She got up, flung a chair in Mr. Vidler's direction with sufficient force so that the chair traveled some distance with all four chair legs four to six inches off the ground, until it fell against and partially on a half-wall that set off that portion of the dining area.[5/]

16. Petitioner also responded verbally, using an elevated voice to express her anger. Mr. Vidler said that she cursed, using a four-letter word. Although more than one year later he did not recall exactly which curse word or words she uttered, he did recall that her words were not nice. Mr. Allegroe corroborated Mr. Vidler's recollection, testifying that Petitioner stood up, "slung" the chair in their direction, and "started speaking profanity." (Tr. 83). She then left the restaurant.

17. The testimony of Mr. Vidler and Mr. Allegroe describing their two encounters with Petitioner was corroborated by Shahanna Owensby, a guest services department manager for the Lockhart McDonald's. Ms. Owensby was seated at a table in the dining area, working on pricing and tagging merchandise, when she

noticed Petitioner. She observed Mr. Vidler and Mr. Allegroe conducting their cleanliness walk-through. She observed Mr. Vidler's initial approach to Petitioner. She heard Mr. Vidler ask Petitioner if she was going to be making a purchase, and confirmed that Petitioner did not respond. She saw Mr. Vidler and Mr. Allegroe keep walking after that, back in the direction of the bathrooms. She observed Mr. Vidler approach Petitioner a second time, estimated at four to eight minutes later. She heard him tell Petitioner that if she was not making a purchase, he needed to ask her to leave. She saw Petitioner stand up, pick up a chair, and fling, throw, or toss it: "It was up in the air and it was off the ground, by her hand." (Tr. 98).

18. By the time of Petitioner's stormy exit from the restaurant, a family--a woman with some younger children--had entered the dining area and was seated near Ms. Owensby. After Petitioner left, Ms. Owensby apologized to the family, who had witnessed the scene and had been exposed to the profanity used by Petitioner within their hearing range.

19. After Petitioner left the restaurant, her boyfriend walked into the dining area with the food he had purchased. The boyfriend described what happened next:

> A. Jennifer, my wife, was not sitting at the table. I thought she was at the--in the bathroom. I put my tray on the opposite side of the table. I was sitting to the left, I guess, or the right. I was sitting on the

> other side. And that's when I saw Mr. Vidler with a surprised face, you know, like wow--
>
> Q. [Mr. Millan]. Uh-huh.
>
> A. --what happened here. So he approached me and he said that he didn't know--that he didn't know. And I asked him that he didn't know what. He said that he didn't know that she was my wife, that she was there with me. (Tr. 108).

20. At that point, Petitioner (whom Robert Millan clarified is his girlfriend, not his wife) knocked on the restaurant window, signaling for him to come outside. He went out to her and asked what happened. She told him that that person [Mr. Vidler] offended her. When asked how he offended her, Robert Milan said that Petitioner responded as follows:

> She said he told her that what was she doing there, if she was going to buy food or if she was just going to sit there. And those were the same words that he told me that he told her.[6/] And then when I came back inside the store, I went and I asked him, you know, to explain to me what was going on. And he said that. You know, that--he said that he didn't know that she was there with me. . . . And he apologized to me. He asked me if he -- if he could go apologize to my wife, Jennifer. And I really told him that I think that was beyond apology because she was like, you know, angry. So he said, well here, I give you my card and you can call the office and see what, you know, we can do about it. (Tr. 109-110).

21. For some unexplained reason (perhaps a mistake filling the order or perhaps a request for customized food), Petitioner's boyfriend waited ten minutes at the ordering counter, where he

was not able to see or hear the encounters in the separate dining area. He was not even aware that Petitioner had stormed out in anger, although he confirmed that she was, indeed, angry when he went outside.

22. Robert Millan did call Respondent's office, as suggested by Mr. Vidler, and spoke with the owner of the franchise. The owner also offered to apologize to Petitioner, but Robert Millan did not think she wanted to speak to anyone. The owner then offered a $50 gift card. The boyfriend said that he would ask Petitioner, but she refused the gesture.

23. No evidence was presented of any racial statements made directly or indirectly to Petitioner, or of any racial overtones to any of the statements made directly or indirectly to Petitioner.

24. The circumstantial evidence presented does not support an inference that Respondent intentionally discriminated against Petitioner based on her race.

25. Instead, all of the circumstantial evidence supports an inference that Respondent did not discriminate against Petitioner on the basis of her race.

26. Respondent has a no-discrimination, no-harassment policy that is enforced as to its employees, customers and potential customers.

27. The Lockhart McDonald's has a very diverse staff. A comparison of the number of restaurant employees who are members of the classes of white, black, or Hispanic, the largest category represented by the restaurant's employees is black; the next-largest category is Hispanic; white employees are in the minority. As to gender, female employees outnumber male employees. Manager positions are spread among white and black males, and white, black, and Hispanic females. The operations manager in charge of Respondent's six restaurants, Mr. Vidler, is a white male as is the restaurant's manager, Mr. Allegroe. The other employee testifying at hearing, Ms. Owensby, is the restaurant's guest services manager and she is a black female. The diversity of the restaurant's staff is circumstantial evidence, though not particularly weighty evidence, suggesting a general absence of intent to discriminate on the basis of race.[7/]

28. More compelling circumstantial evidence was provided by Mr. Vidler, who is the individual accused of discriminating against Petitioner because she is black. Mr. Vidler testified with great sincerity that Petitioner's accusation is not only unfounded, but it hits a particular sore spot with him. Although he is a white male, his daughter is half-black. He has experienced the pain of discrimination based on race, with unkind questions, or worse, directed to him or to his daughter, because their races do not match. This personal fact shared by

Mr. Vidler is compelling circumstantial evidence giving rise to a inference that he would not intentionally discriminate against Petitioner based on her race.

29. The evidence strongly supports a finding, and it is so found, that Mr. Vidler's December 28, 2015, encounters with Petitioner were the reasonable implementation of Respondent's reasonable policies for its Lockhart restaurant to ensure that persons using the restaurant's facilities are there for the purpose of purchasing and consuming food and drink. The credible, consistent testimony of Mr. Vidler and Respondent's other employees who testified is that the no-loitering policy is applied uniformly to all persons, regardless of race, nationality, gender, disability, or any other classification, who are not apparently customers in that they have no McDonald's food or drink purchases. These persons are asked whether they intend to make a purchase, and if they do not respond in some fashion that they are indeed there to purchase food and/or drink, they are told that if they are not there to make a purchase, they are loitering and will have to be asked to leave.[8/]

30. Petitioner has only herself to blame for not making clear to Mr. Vidler that she was there with her boyfriend, who was in line at the counter ordering their breakfast. That would have ended the matter. That Mr. Vidler only took the action he did because he did not know Petitioner was there with her

boyfriend was perhaps most convincingly established by Robert Millan's testimony describing the utter surprise on Mr. Vidler's face when he realized that Petitioner had, in fact, been waiting for someone who had been purchasing food.

31. The undersigned finds as a matter of ultimate fact that Respondent did not intentionally discriminate against Petitioner based on her race (the only protected class proven at hearing) or any other classification that might have applied to Petitioner but was not proven at hearing.[9/]

CONCLUSIONS OF LAW

32. 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. (2016).[10/]

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

34. 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.

35. Section 509.092, Florida Statutes, provides the following clarification regarding a public accommodation discrimination claim under the Florida Civil Rights Act:

> 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, pregnancy, 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.

36. Section 509.101(1) is also germane. This statute provides that places of public accommodation "may establish reasonable rules and regulations for the management of the establishment and its guests and employees;" and that each guest is required to abide by those rules and regulations while at the establishment, so long as notice of the rules is posted in English in a prominent place in the establishment.

37. The parties stipulated, and the undersigned concludes, that Respondent is a "public accommodation," as defined in section 760.02(11), as a restaurant principally engaged in selling food for consumption on the premises.

38. 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).

39. 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 analysis has been adopted in FCHR public accommodation cases. See, e.g., Inman v. Jian Deng Bao, d/b/a China Gardens Rest., Case No. 11-5602 (Fla. DOAH Feb. 12, 2012; FCHR Apr. 23, 2012).

40. Under the McDonnell analysis as adapted to public accommodation discrimination cases, Petitioner has the burden of proving by a preponderance of the evidence a prima facie case of unlawful discrimination. If Petitioner establishes 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 of

production, then the burden shifts back to Petitioner 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).

41. The ultimate burden is on Petitioner to prove that she was the victim of intentional discrimination. Laroche, 62 F. Supp. 2d at 1383.

42. To establish a prima facie case, Petitioner must prove the following: (1) Petitioner is a member of a protected class; (2) Petitioner attempted to contract for services and to afford herself the full benefits and enjoyment of a public accommodation; (3) Petitioner was denied the right to contract for those services and, thus, was 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.[11/] Laroche, 62 F. Supp. 2d at 1382.

43. Petitioner proved, and Respondent did not dispute, that she is a member of a protected racial class because she is black. Petitioner did not prove that she is also a member of a protected class with regard to national origin or with regard to an alleged

handicap/disability, as no evidence was offered on either of these subjects during the evidentiary hearing.

44. Petitioner arguably proved that she went to McDonald's on the day in question for the purpose of obtaining services and affording herself full benefits and enjoyment of this public accommodation. Nonetheless, Petitioner failed to express this intent to Mr. Vidler when he asked if she intended to make a purchase.

45. Based on the findings of fact above, Petitioner did not prove that Respondent denied her the right to contract for services, thereby denying her full benefits or enjoyment of McDonald's, nor did Petitioner prove that she was subjected to markedly hostile conduct that a reasonable person would find objectively unreasonable under circumstances giving rise to an inference of discrimination.

46. Instead, the more credible evidence established that Petitioner unreasonably failed to respond to Mr. Vidler's reasonable initial query of whether she intended to make a purchase, and Petitioner unreasonably erupted when Mr. Vidler came back several minutes later to tell her that if she did not intend to make a purchase, she was loitering and needed to leave. If Petitioner had simply responded by telling Mr. Vidler that her boyfriend was at the counter purchasing food, that would have

ended the inquiry and the couple could have enjoyed their breakfast.

47. Respondent's non-discriminatory, non-hostile application of its no-loitering policy did not deny Petitioner the right to contract for services at McDonald's. Instead, Petitioner's own refusal to respond to a reasonable inquiry caused the disruption of the couple's full enjoyment of their purchased breakfast and the accommodations to consume it on the premises. 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.").

48. Petitioner failed to prove that any other similarly situated person at McDonald's was treated more favorably that day or any other day. Instead, Respondent's witnesses testified consistently and credibly that they enforced their no-loitering policy uniformly to all persons, regardless of race, nationality, or any other factor, by approaching anyone who has been sitting at a table for a few minutes without any apparent McDonald's food or drink items and politely inquiring whether the person intends to make a purchase. Most people respond in some fashion. Petitioner did not. For those who do not respond, the inquiring manager will walk away for a few minutes, and most of the non-responding persons are gone before the manager comes back.

Petitioner was not gone (as she was waiting for her boyfriend, unknown to Mr. Vidler). For those like Petitioner who do not disappear before the manager's return, they are uniformly met with the same follow-up comment that Petitioner received: if the person does not intend to make a purchase, they are loitering and need to leave.

49. Petitioner contends that her boyfriend, Robert Millan, was a similarly situated person who is not a member of Petitioner's protected class and was treated more favorably that day. Although Petitioner proved that her boyfriend is not a member of Petitioner's protected racial class, the evidence establishes that he was not similarly situated. He was not seated at a table alone over a ten-minute span with no apparent McDonald's purchases, so as to invite Mr. Vidler's inquiries; instead, he was at the ordering counter the whole time, ordering their breakfast.

50. No evidence was offered to prove that the no-loitering policy has not been applied uniformly to all persons regardless of race, gender, nationality, disability, or any other factor, who are seated at a table in the restaurant without purchased food or drink. No evidence was offered to prove that the no-loitering policy was waived for any other person within or outside of Petitioner's protected class. Accordingly, Petitioner failed to prove that other similarly situated persons not in her

same protected class were treated better than Petitioner or were given full benefits or enjoyment of this public accommodation while those same benefits/enjoyment were denied to Petitioner.

51. Even if Petitioner had met her burden of proving a prima facie case, Respondent articulated legitimate non-discriminatory reasons for its actions, by explaining its reasonable policy to inquire of the intentions of persons seated in the restaurant without any apparent food or drink items purchased at McDonald's. Respondent reasonably explained its particular need for vigilance in enforcing this policy at this particular restaurant, in a high-crime, low-income area, where there has been a history of problems caused by persons in the restaurant for purposes other than purchasing items sold by McDonald's for consumption there.

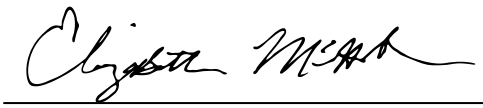
52. Petitioner offered no evidence to suggest that Respondent's policies and procedures were mere pretexts. Instead, Respondent proved that its policies and procedures were reasonable and were not pretexts for engaging in discrimination.

53. Petitioner did not meet her ultimate burden of proving that she was a victim of intentional discrimination based on race or any other classification. Instead, Petitioner was subjected only to Respondent's reasonable policies and procedures that were applied in non-discriminatory fashion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Petitioner Jennifer M. Foster-Garvey.

DONE AND ENTERED this 11th day of May, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of May, 2017.

ENDNOTES

[1/] The Joint Pre-hearing Stipulation also set forth Petitioner's position that issues to be determined included whether FCHR erred by considering affidavits submitted on Respondent's behalf that were allegedly not in proper form, and whether Petitioner was entitled to a "default judgment" based on Respondent's failure to answer the complaint. These contentions were addressed at the outset of the hearing, to ensure that Petitioner's representative understood that the hearing was de novo, not a review of FCHR's investigation, and that "default judgments" are not authorized because no answer is required. (Tr. 9-11).

[2/] Petitioner is described by her race/skin color, as observed at hearing. In Petitioner's PRO, she is described as "Jamaican of

African Descent or of African Descent." No evidence was presented that Petitioner's nationality is Jamaican; nonetheless, it might be inaccurate to describe Petitioner as "African-American." Likewise, no evidence was presented regarding Petitioner's boyfriend's race, ethnicity, or national origin. In Petitioner's PRO, Petitioner's representative goes to some lengths to argue from the boyfriend's surname (Millan, the same as the representative's surname), that he is Hispanic. Argument based on possible name origins cannot substitute for actual evidence; these questions could have been asked, but were not. Nonetheless, based on observation, Petitioner's boyfriend did not appear to be a member of the black race. His classification is relevant only insofar as Petitioner's representative argued that the boyfriend was a similarly situated person who is not of the same protected class as Petitioner and who was more favorably treated. The undersigned accepts that the boyfriend is not a member of the same protected class as Petitioner.

[3/] Mr. Vidler described Petitioner's positioning as "very odd . . . with the feet up on the windowsill is kind of a--I don't want to say disrespectful, but it just--it's not a normal seating position for a restaurant." (Tr. 46). Although Mr. Vidler was hesitant to say that sitting at a restaurant table with both feet propped up on the windowsill is disrespectful, he certainly could have said that it was disrespectful of McDonald's property, of the people who have to clean windowsills, and of the customers who might assume that a Corian window ledge would be a clean and appropriate place to put down a purse or a shopping bag. Putting one's feet on a window ledge in a restaurant is inappropriate, unsanitary, and disrespectful.

[4/] The undersigned acknowledges that at hearing, Petitioner testified that she told Mr. Vidler that she was waiting for her boyfriend to bring food. Petitioner's testimony in this regard was not credible and is not credited. Instead, Mr. Vidler's testimony was the more credible version of this conflicting point. As Mr. Vidler said several times, with great sincerity, if Petitioner had only said yes, her husband (or boyfriend) is ordering food, the inquiry would have ended. Mr. Vidler said (again, with great sincerity) that even if Petitioner had responded by saying "hey, shut up, get away from me, don't be rude, my husband's up there buying food" (Tr. 60), he would have backed off immediately, as his goal of confirming that Petitioner was there for an appropriate purpose would have been met. It is noted that Ms. Owensby corroborated Mr. Vidler's testimony that Petitioner did not respond when asked if she intended to make a purchase. Ms. Owensby's testimony was also credible.

[5/] At the hearing, Petitioner was present and heard Mr. Vidler testify about what she did with the chair. He was aggressively questioned by Petitioner's representative about: whether the chair was "thrown," "flung," or, as suggested by the representative, perhaps it was "more like a shove, then" (Tr. 66); how high in the air the chair traveled; how far the chair traveled; and whether it just hit the half-wall, went part of the way over the half-wall, or went all the way over the half-wall. The representative's questions, particularly his suggestion that the chair was maybe just shoved by Petitioner instead of being thrown up in the air, seemed to acknowledge that Petitioner caused something untoward to happen to the chair. Yet Petitioner, who testified only briefly (spanning less than two transcript pages, from page 70, line 18 to page 72, line 13), after Mr. Vidler testified about the chair, was never asked about what she did to the chair, nor did she volunteer one word about the chair. In keeping with his aggressive hearing strategy, Petitioner's representative spent the bulk of the PRO attempting to pick apart the testimony of Mr. Vidler and Respondent's other witnesses, offering dictionary definitions of the various words they used to describe the incident, and then arguing from those definitions that their testimony was wildly inconsistent. This effort was wholly unpersuasive. The subsequent attempt to parlay the so-called inconsistencies into a claim that Respondent's witnesses committed perjury was over the top, unwarranted, and inappropriate. Contrary to Petitioner's argument, the undersigned finds the testimony of Respondent's witnesses regarding the events on the day in question to be generally consistent, credible, and persuasive. And with respect to their testimony regarding the airborne chair, the testimony stands unrefuted by Petitioner, who had every opportunity to address what was said on the subject, but chose not to respond.

[6/] Robert Millan was sequestered from the hearing room at the request of Petitioner's representative, who asked for sequestration of all witnesses besides Petitioner and Mr. Vidler as Respondent's representative. Robert Millan's testimony was credible and notable in its consistency with Respondent's witnesses and its inconsistency with Petitioner's testimony. In particular, contrary to Petitioner's hearing testimony, immediately after the encounters with Mr. Vidler, Petitioner did not tell her boyfriend that Mr. Vidler yelled at her, threatened to call the police, or threatened to have her arrested. Surely, if that is what Mr. Vidler did and said, Petitioner would have included those details when she told her boyfriend what Mr. Vidler did to offend her.

[7/] Petitioner's representative lodged a disingenuous post-hearing attack on one of Respondent's exhibits, offered and admitted into evidence without objection for the purpose of showing the restaurant's employees by date of hire and job classification, referred to on the exhibit as "department," i.e., whether the employee is in a managerial or crew position. (R. Exh. 2). Respondent's other exhibit reflects the same list of employees, whether the employee is male or female, and whether the employee is black, white, or Hispanic. (R. Exh. 1). The post-hearing attack was directed to Respondent's Exhibit 2, because Respondent's counsel identified the exhibit (correctly) by the heading at the top of the document, "Employee Pay/Dept." As Mr. Vidler testified, the document was generated from Respondent's computer records. A column on the exhibit, labelled Pay/Rate, is blank, apparently having been redacted. Petitioner's representative, in Petitioner's PRO, made the wholly unwarranted and inflammatory assertion that counsel for Respondent committed a fraud on the tribunal by reciting the heading of the document (presumably because someone not looking at the information on the document might think there is pay/rate information there). He also argued, without any basis, that the evidentiary value of the document is undermined by the omission of the pay/rate information. The argument is, apparently, that even though Respondent's exhibits reflect impressive diversity at the Lockhart restaurant, one cannot really know whether Respondent discriminates without also knowing whether equal pay is provided. This argument is baseless. Perhaps if this was an action by an employee claiming employment discrimination as to the pay provided, the information Petitioner's representative belatedly says is important might actually be relevant. Instead, this argument comes across as a concession that Respondent's exhibits show an impressively diverse staff, such that Petitioner's representative felt compelled to lodge such an unwarranted attack. There was no fraud on this tribunal, nor was the exhibit misrepresented in any way; the exhibit was offered for the relevant information shown. Had Respondent preserved this argument by timely objecting to the introduction of the exhibit at hearing, Respondent would have been able to explain why the pay rate information was taken out of the exhibit, but Petitioner's belated attack deprives Respondent of that opportunity. By these unwarranted and inflammatory post-hearing accusations, not preserved by a timely objection at hearing, Petitioner's representative has come dangerously close to violating the standards of conduct to which qualified representatives must adhere in this tribunal. See Fla. Admin. Code R. 28-106.107(3)(a), (b).

[8/] Throughout this proceeding, from the Petition for Relief through the PRO, Petitioner's representative has attempted to argue that Respondent must demonstrate the elements of the crime of loitering or trespass in order to apply its no-loitering policy to persons at the restaurant. That argument is rejected. Respondent is not seeking to prosecute Petitioner or anyone else for a crime, and its business policies are not subject to determination as if one were interpreting and applying a criminal statute in a penal proceeding. The policies themselves are not at issue; instead, the only question is whether the policies are a pretext to cover up intentional discrimination. Curiously, although for virtually every other word used by Respondent's witnesses, Petitioner's representative resorted to dictionary definitions, Petitioner's representative did not consider the ordinary meaning of the term "loiter," which means: "To remain in an area for no obvious reason," as in teenagers loitering in the parking lot, according to Merriam-Webster's online dictionary at www.merriam-webster.com; or "To stand idly about; linger without any purpose" according to the American Heritage online dictionary at www.ahdictionary.com. Respondent's no-loitering policy is consistent with the ordinary meaning of loitering as gleaned from dictionaries. More to the point, Respondent proved that is no-loitering policy is uniformly applied, and is not used as a pretext for intentional discrimination.

[9/] Petitioner alleged in her Petition for Relief that she was subjected to discrimination not only because of her race/skin color, but also, because of her national origin, alleged to be Jamaican, and because of her handicap/disability. Petitioner did not offer any proof of her national origin, nor did Petitioner offer any proof to establish that she has a handicap or disability within the meaning of the Florida Civil Rights Act. Indeed, these omissions were noted as Petitioner was concluding her brief testimony, and her representative was given the opportunity to ask additional questions directed to the alternative theories of discrimination. He elected not to do so. It was acknowledged that Petitioner's race had been established and that the claimed discrimination would be limited to the classification that had been proven. Despite this record discussion, Petitioner's PRO was replete with references to Petitioner's alleged national origin and to Petitioner's alleged handicap/disability. No citation to any record evidence was provided, and none could be provided. Instead, the PRO included improper references to material extraneous to the record evidence. As was made clear to Petitioner's representative at hearing, findings of fact must be based exclusively on the

evidentiary record. See § 120.57(1)(j), Fla. Stat. Thus, the references to matters outside of the record were not considered.

[10/] References to Florida Statutes are to the 2016 codification. The discrimination laws cited herein were not amended in 2016.

[11/] In a recent administrative case involving alleged public accommodation discrimination, a somewhat different test was used for whether a prima facie case was established. In Ferrer v. Pepito's Plaza, Case No. 16-0589 (Fla. DOAH Oct. 27, 2016; FCHR Jan. 19, 2017), the Administrative Law Judge borrowed what he described as "a workable test" for a claimant's prima facie case from a Iowa federal district court decision in Kirt v. Fashion Bug # 3253, Inc., 479 F. Supp. 2d 938 (N.D. Iowa 2007). The test requires proof of the following elements: (1) the claimant is a member of a protected class; (2) the claimant sought to enjoy the accommodations, advantages, facilities, services, or privileges of a "public accommodation"; and (3) the claimant did not enjoy the accommodations, advantages, facilities, services, or privileges of the "public accommodation" in that (a) she was refused or denied the accommodations, advantages, facilities, services, or privileges of the "public accommodation" under circumstances giving rise to an inference of discrimination, or (b) she was allowed to use the accommodations, advantages, facilities, services, or privileges of the "public accommodation," but was otherwise discriminated against in the furnishing of those accommodations, advantages, facilities, services, or privileges by being subjected to markedly hostile conduct that a reasonable person would find objectively unreasonable under circumstances giving rise to an inference of discrimination. Id. at 963. FCHR adopted the recommended conclusions of law in its Final Order, although FCHR has also adopted the alternative articulation of the test for establishing a prima facie case in the Inman decision cited above. The alternative "markedly hostile conduct" test is addressed herein.

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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.