STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY SMITH,

Petitioner,

vs. Case No. 18-5427

7-ELEVEN, INC.

Respondent.
_______________________________/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),[1/] before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), by video teleconference on January 17, 2019, at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Henry Smith, pro se
6845 Northwest 29th Street
Sunrise, Florida 33313

For Respondent: Eric Anthony Welter, Esquire
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Ashburn, Virginia 20147

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated section 760.08, Florida Statutes, of the Florida Civil Rights

Act of 1992 ("FCRA"), by denying Petitioner the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of Petitioner's handicap.

PRELIMINARY STATEMENT

On or about March 28, 2018, Petitioner, Henry Smith ("Smith"), filed a Public Accommodation Complaint of Discrimination with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent, 7-Eleven, Inc. ("7-Eleven"), through its agent, violated section 760.80 by denying him full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of his handicap. Specifically, Petitioner alleged that he had been denied use of the restroom at 7-Eleven Store No. 35031 (hereafter, the "Store"), located at 2099 North State Road 7, Lauderhill, Florida, on the basis of handicap.

On or about September 19, 2018, FCHR issued a "Determination: Reasonable Cause," finding reasonable cause to believe that an unlawful practice occurred. Smith timely filed a Petition for Relief on October 16, 2018, and FCHR referred the matter to DOAH for assignment of an ALJ to conduct a de novo hearing pursuant to sections 120.569 and 120.57(1).

On November 5, 2018, 7-Eleven filed Respondent 7-Eleven, Inc.'s Motion to Dismiss Petitioner Henry Smith's Petition for Relief ("Motion to Dismiss"), contending that Petitioner failed to allege facts that, if true, would establish a prima facie violation of section 760.08. The undersigned denied the Motion to Dismiss on November 19, 2018.

The final hearing initially was set for November 26, 2018, but was continued and rescheduled for January 17, 2019. The final hearing was held on January 17, 2019.

Smith testified on his own behalf and presented the testimony of his wife, Elnora Smith (hereafter, "Mrs. Smith") and his daughter, Sarah Green. Petitioner's Exhibit 1[2/] was admitted into evidence without objection. 7-Eleven presented the testimony of Mavis Steffan, and Respondent's Exhibits 1 through 11[3/] were admitted into evidence without objection.

The one-volume Transcript was filed at DOAH on February 13, 2019, and the parties were given until February 25, 2019, to file proposed recommended orders. Respondent's Proposed Recommended Order was timely filed on February 22, 2019, and was duly considered in preparing this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

I. The Parties

1. Petitioner Smith is an adult male who resides in Sunrise, Florida.

2. Respondent 7-Eleven is a Texas corporation, with its headquarters located at 3200 Hackberry Road, Irving, Texas. Respondent owns, operates, and franchises convenience stores in Florida under the trademarked name "7-Eleven."

II. Procedural Background

3. On or about March 28, 2018, Smith filed a Public Accommodation Complaint of Discrimination with FCHR, alleging that 7-Eleven, Inc., through its agent, violated section 760.80 by denying him full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of handicap.

4. After conducting an investigation, FCHR issued a Determination: Reasonable Cause on or about September 19, 2018, finding reasonable cause to believe that an unlawful practice occurred.

5. Smith timely filed a Petition for Relief on October 16, 2018, asserting that 7-Eleven had discriminated against him in a place of public accommodation on the basis of handicap. This charge, as set forth in the Petition for Relief, is the subject of this de novo proceeding.

III. Events Giving Rise to this Proceeding

6. On September 16, 2017, Smith arrived at the Store to purchase gasoline. He was accompanied by Mrs. Smith and his daughter, Rochelle Smith.

7. At that time, the Store was a franchised 7-Eleven convenience store and gas station. HA&A Enterprises, Inc. ("HA&A"), owned by Sumera Shahzadi ("Shahzadi"), was the franchisee.

8. Immediately upon arriving at the Store, Smith went inside to use the restroom, while Mrs. Smith remained outside to pump gas.

9. Smith testified, credibly, that he had a stroke and, as a result, walks slowly with a visible limp. He testified that he sometimes, but not always, uses a cane to assist him in walking. He was not using a cane when he entered the Store on September 16, 2017.

10. Upon entering the Store, Smith discovered that the restroom was locked. Smith asked Shahzada Hussain ("Hussain"), who was working behind the counter, for the restroom key so that he could use the restroom. Hussain told him that the restroom was out of order and did not give him the key.

11. The evidence does not establish that Hussain was aware of any disability or handicap that Smith may have.[4/]

12. Because Smith was unable to use the restroom, he was forced to urinate outside, in the front of the Store. Smith had difficulty pulling down his pants, and he urinated on himself. He testified, credibly, that other persons were present at the Store and saw him urinate on himself.

13. Mrs. Smith assisted Smith in pulling up his pants, then went inside the Store and asked Hussain for the key to the restroom. Hussain gave her the key. She went into the restroom and found it to be in working order. She also noticed that no "out of order" sign was posted on the restroom door.

14. Mrs. Smith then took numerous photographs of various documents on the wall of the Store. These documents included: a Broward County Local Business Tax Receipt for the period of October 1, 2016, to September 30, 2017, showing the business name as "7-Eleven #35031" and the business owner as "7-Eleven Inc. & HA&A Enterprises, Inc."; the 2016 Florida Annual Resale Certificate for Sales Tax issued to 7-Eleven Store #35031, HA&A Enterprises, Inc.; a Florida Department of Environmental Protection Storage Tank Registration Placard, 2015-2016, issued to 7-Eleven, Inc., Store #35031; a National Registry of Food Safety Professionalism certificate issued to Shahzada Hussain; a Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, Temporary License/Permit; a document titled "Notice," with the name

“7-Eleven” handwritten as the business authorized to engage in the money transmission business; a Department of Agriculture and Consumer Services Liquefied Petroleum Gas License issued to 7-Eleven Store #35031; and a ServSafe Certification issued to Sumera Shahzadi. The photographs, along with a written description of each document depicted in the photographs, were admitted into evidence at the final hearing.

15. At that time, Mrs. Smith also photographed the Store’s restroom door, on which signs reading “MEN” and “WOMEN” were hung. Each of these signs depicted a wheelchair symbol, presumably indicating that the restroom was handicapped-accessible. The restroom door did not have a sign posted indicating that it was out of order.

16. Mrs. Smith also photographed Shazhadi and Hussain as they were working behind the counter of the Store. Mrs. Smith referred to Shazhadi and Hussain as “the owners” of the Store in her testimony at the final hearing regarding the September 16, 2017, incident.[5/]

17. Shortly after the incident, the police arrived at the Store on an unrelated matter. At the direction of the police officer investigating the unrelated matter, the Smiths did not purchase gasoline at the Store that day, and went to another store to purchase gas. Mrs. Smith testified that she frequently

patronized the Store, both before and after the September 16, 2017, incident.

18. As noted above, Smith credibly testified that other persons present at the Store saw him urinate on himself. Smith is a member of the clergy of a local church and, thus, is a well-known person in his neighborhood, where the Store is located. The credible evidence establishes that Smith was extremely embarrassed and humiliated, and experienced emotional distress as a result of having urinated on himself in public view. He testified that this incident so embarrassed him that he may move from the community or from the state. No evidence regarding any quantified or quantifiable injury or damages that Smith may have incurred as a result of the incident was presented.

19. On or about November 14, 2017, the Smiths filed a complaint regarding their September 16, 2017, experience at the Store through 7-Eleven's complaint hotline. Mrs. Smith testified that in one of the telephone conversations with the 7-Eleven corporate office, they were given an incident claim number.

20. On or about November 19, 2017, Mavis Steffan, the 7-Eleven corporate field consultant for the subgroup of 7-Eleven stores that includes the Store, contacted the Smiths and spoke to them regarding the September 16, 2017, incident at the Store.

Mrs. Smith testified that when the Smiths spoke with Steffan on November 19, 2017, she (Steffan) told them that on the date of the incident, the Store was a private franchise, and that on October 23, 2017, the Store "became corporate"——meaning that 7-Eleven, Inc., began operating the Store. Steffan apologized for the incident, invited the Smiths to patronize the Store again, and told them that Smith was free to use the restroom at the Store.

IV. Relationship between the Store and 7-Eleven

21. Steffan testified at the final hearing regarding the relationship between the Store and 7-Eleven, as it existed on September 19, 2017.

22. 7-Eleven and HA&A entered into a 7-Eleven, Inc. Florida Individual Store Franchise Agreement (hereafter, "Franchise Agreement" or "Agreement"), effective March 23, 2016, regarding the Store.

23. The Franchise Agreement terminated on October 23, 2017, and, as of that date, 7-Eleven, Inc., began operating the Store.[6/]

24. Therefore, the Store was a franchised store on September 19, 2017, the date of the incident. As discussed above, HA&A was the franchisee.

25. Pursuant to the Franchise Agreement, HA&A was an independent contractor. The Agreement provided that the

franchisee——here, HA&A——controlled the manner and means of the operation of the franchised store, and exercised complete control over and responsibility for the conduct of its agents and employees, including the day-to-day operations of the franchised store. The Agreement expressly provided that the franchisee's agents and employees could not be considered or held out to be agents or employees of 7-Eleven, and could not incur any liability in the name of, or on behalf of, 7-Eleven. The Agreement further provided that all employees of the franchised store were solely those of the franchisee, and that no actions taken by the franchisee, its agents, or its employees would be attributable to 7-Eleven.

26. As part of the Franchise Agreement, HA&A also agreed to comply with 7-Eleven's Operations Manual ("Manual"). Provisions in the Manual stated that the franchisee was solely responsible for setting the policies and procedures to operate his or her store in accordance with the laws of the legal jurisdiction in which the store was located, and that the franchisee was solely responsible for the actions of its employees while on the job.

27. Additionally, training materials provided by 7-Eleven to franchisees for use in training franchisee employees expressly informed those employees that they were not "in any way considered to be an employee, agent[,] or independent

contractor of 7-Eleven, Inc.," and that 7-Eleven did not "assume any liability for providing you these training materials."

28. Consistent with these provisions, Steffan testified that the franchisee——here, HA&A——was solely responsible for the overall operations of the Store, including supervising, hiring, firing, promoting, and disciplining Store employees. HA&A also was solely responsible for enforcing workplace rules, policies, and procedures for the Store.

29. Based on this evidence, it is determined that HA&A was solely responsible for the actions of its employees and agents, including Hussain's actions on September 16, 2017, toward Smith. Stated another way, the evidence establishes that 7-Eleven was not responsible for Hussain's actions in the Store, including his actions on September 16, 2017, toward Smith while he (Smith) was in the Store.

CONCLUSIONS OF LAW

30. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569, 120.57(1), Fla. Stat.

31. The FCRA is codified at sections 760.01 through 760.11, Florida Statutes.

32. Section 760.08, titled "Discrimination in places of public accommodation," states: "[a]ll persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of

public accommodation without discrimination or segregation on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion." This provision prohibits discrimination against protected classes, including handicapped persons, in places of public accommodation.

33. Section 760.02(11) defines "public accommodations" to include gasoline stations among the places of public accommodation to which the FCRA applies. Accordingly, the Store is a place of "public accommodation" for purposes of section 760.08.

I. Responsible Person/Entity

34. It is well-established that a franchisor is not liable for the actions of an independent contractor franchisee or franchisee employees unless there is a factual demonstration of an agency or employment relationship between them. See Pona v. Cecil Whitaker's, Inc., 155 F.3d 1034, 1036 (8th Cir. 1998); West v. LQ Mgmt., LLC, 156 F. Supp. 3d 1361, 1370 (S.D. Fla. 2015); Cain v. Shell Oil Co., 994 F. Supp. 2d 1251, 1252 (N.D. Fla. 2014); Howell v. Chick-Fil-A, Inc., 1993 U.S. Dist. LEXIS 19030, at *5 (N.D. Fla. Nov. 1, 1993). To this point, the mere use of franchised logos does not necessarily indicate that the franchisor has any actual or apparent control over any substantial aspect of the franchisee's business or employment decisions. Cain, 994 F. Supp. 2d at 1253. The key question is

whether the terms of a franchise agreement create an agency relationship by contract. Id.

35. As discussed above, the Franchise Agreement, Manual, and training materials make abundantly clear that HA&A's agents and employees could not be considered or held out to be agents or employees of 7-Eleven, and could not incur any liability in the name of, or on behalf of, 7-Eleven. Pursuant to these documents, all employees of HA&A were solely those of HA&A and not 7-Eleven, and no actions taken by HA&A, its agents, or its employees would be attributable to 7-Eleven. These documents also expressly provided that HA&A was solely responsible for setting the policies and procedures to operate the Store in accordance with Florida law; that HA&A was solely responsible for the actions of its employees while on the job; and that HA&A employees were informed that they were not in any way considered to be employees or agents of 7-Eleven, Inc. Additionally, Steffan's credible testimony confirmed that under the Franchise Agreement, HA&A was solely responsible for the overall operations of the Store, including supervising, hiring, firing, promoting and disciplining franchised store employees, and also was solely responsible for enforcing all workplace rules, policies, and procedures for the Store.

36. Based on the evidence and pertinent case law, it is concluded that 7-Eleven was not an agent or employee of HA&A on

September 16, 2017, and, therefore, is not liable for the actions of HA&A or its employees, including Hussain's actions toward Smith, that occurred at the Store on that date.

37. The fact that 7-Eleven had a complaint hotline number posted in the Store did not render it an apparent agent of HA&A for purposes of liability for Hussain's actions toward Smith on September 16, 2017.

38. For a franchisor to have apparent agency for purposes of liability to third parties, three elements must be met: (1) a representation by the purported principal——here, 7-Eleven; (2) a reliance on that representation by a third party; and (3) a change in position by the third party in reliance on that representation. Mobil Oil Corp. v. Bransford, 648 So. 2d 119 (1995).

39. The evidence also does not establish the existence of an apparent agency relationship between 7-Eleven and HA&A on September 16, 2017.

40. The posting of a complaint hotline number, by itself, cannot be interpreted as constituting a representation that 7-Eleven operated or controlled the operation of the Store—— particularly considering that almost all of the other documents, including the licenses and certificates, posted in the Store either identified HA&A as the owner/operator of the Store or identified the owner as franchised store "No. 35031."

The totality of the evidence does not establish that 7-Eleven represented that it operated the Store or controlled its operation or employees.

41. Because there was no representation by 7-Eleven that it operated the Store or controlled its operation or employees, Smith could not have relied, and changed his position in reliance, on such representation.

42. For these reasons, it is concluded that 7-Eleven is not the responsible party for——and, therefore, not liable for——any potentially discriminatory action taken by HA&A's employee, Hussain, toward Smith on September 16, 2017, in the Store.

43. This conclusion is consistent with case law holding that franchisors are not owners or operators of independent contractor franchised stores, and, thus, were not liable for the alleged discriminatory acts of independent contractor franchisees or franchisee employees. See, e.g., Neff v. Am Dairy Queen Corp., 58 F.3d 1063, 1068 (5th Cir. 1995)(restaurant franchisor did not operate franchised restaurant so not liable for disability discrimination in place of public accommodation); A.C. v. Taurus Flavors, Inc., 2017 U.S. Dist. LEXIS 16644 (N.D. Ill. Feb. 7, 2017)(franchisor restaurant did not control franchisee's facilities so not liable for discrimination in place of public accommodation); Houston v. 7-Eleven, Inc., 2015 U.S. Dist. LEXIS 43553, at *26 (M.D. Fla.

2015); DiPilato v. 7-Eleven, Inc., 662 F. Supp. 2d 333, 347-48 (S.D.N.Y. 2009)(franchisee is independent contractor, so its employee is not employed by franchisor); Singh v. 7-Eleven, Inc., 2007 U.S. Dist. LEXIS 16677 (N.D. Cal Mar. 8, 2007)(franchisor not liable for employment discrimination because not employer of franchisee or its agents); Brooks v. Collins Foods, Inc., 365 F. Supp. 2d 1342, 1351 (N.D. Ga. 2005)(franchisor was not franchisee's agent so not liable for discrimination in place in place of public accommodation); United States v. Days Inns of Am., Inc., 22 F. Supp. 2d 612, 617 (E.D. Ky. 1998)(franchisor's control over franchisee not sufficient to render franchisor "operator" for purposes of disability discrimination liability); Bahadirli v. Domino's Pizza, 873 F. Supp. 1528, 1537 (M.D. Ala. 1995)(franchisor not liable under Title VII for national origin discrimination by franchisee because franchisee was not agent of franchisor).

II. Discrimination in Place of Public Accommodation

44. Furthermore, it is concluded that Hussain's action toward Smith on September 16, 2017, did not constitute discrimination on the basis of handicap in a place of public accommodation, in violation of section 760.08.

45. The FCRA is modelled after Title II of the Civil Rights Act of 1964 ("Civil Rights Act"), 42 U.S.C. § 2000a, and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e.

Thus, case law interpreting these federal anti-discrimination statutes is applicable to proceedings under the FCRA.

46. Additionally, Title II of the Civil Rights Act prohibits discrimination in places of public accommodation in language substantially similar to that in section 760.08. Due to the relative dearth of case law under Title II, federal courts find guidance in the case law under Title VII, including the law of shifting evidentiary burdens, in interpreting Title II. See Fahim v. Marriott Hotel Serv., 551 F.3d 344, 349 (5th Cir. 2008). The United States Supreme Court's evidentiary model applicable to employment discrimination established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), has been extended to discrimination in places of public accommodation. Fahim, 551 F.3d at 349-350.[7/]

47. Under the McDonnell analysis, Smith has the burden of proof in this proceeding to establish, by the greater weight of the evidence, a prima facie case of unlawful discrimination on the basis of handicap. If Smith establishes a prima facie case, then the burden shifts to 7-Eleven to rebut this showing by presenting evidence that the alleged discriminatory action was taken for some legitimate, non-discriminatory reason. If 7-Eleven is successful in rebutting Smith's prima facie case, the burden shifts back to Smith to show, by the greater weight

of the evidence, that 7-Eleven's offered reason was a mere pretext. Id. at 802-03.

48. To establish a prima facie case of unlawful discrimination in a place of public accommodation under section 760.08, the petitioner——here, Smith——must show, by the greater weight of the evidence, each of the following elements: (1) he is a member of a protected class; (2) he attempted to avail himself of the services of a place of public accommodation; (3) he was denied those services; and (4) those services were made available to similarly situated persons outside of his protected class. Fahim, 551 F.3d 344, 349-50 (5th Cir. 2008).

49. Here, the evidence does not establish that Smith falls within the class of handicapped persons protected under section 760.08.

50. Florida courts have interpreted the term "handicap" in chapter 760 in accordance with the definition of "disability" in the federal Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA") and case law interpreting that statute. See, e.g., St. Johns Sch. Dist. v. O'Brien, 973 So. 2d 535, 540 (Fla. 5th DCA 2007); Green v. Seminole Elec. Coop., 701 So. 2d 646, 647 (Fla. 5th DCA 1997); Brand v. Fla. Power Corp., 633 So. 2d 504, 510 n.10 (Fla. 1st DCA 1994).

51. A "disability," as defined in the ADA, is: (1) a physical or mental impairment that substantially limits one or

more of the major life activities of such individual; (2) a record of such impairment; or (3) regarded as having such impairment. 42 U.S.C. § 12102(2).

52. Walking is identified as a "major life activity" under the ADA. 29 C.F.R. § 1630.2(i).

53. Case law interpreting the term "disability" under the ADA holds that an individual who, due to impairment, walks moderately below average speed is not considered "disabled" for purposes of the ADA. Turner v. The Saloon, Ltd., 595 F.3d 679 (7th Cir. 2010). Walking with difficulty also is not considered an impairment that rises to the level of a disability under the ADA. Squibb v. Mem'l Med. Ctr., 497 F.3d 775, 784 (7th Cir. 2007). Periodic or sporadic use of a cane to assist in walking also does not rise to the level of a disability under the ADA. Moore v. Hillsborough Cnty. Bd. of Cnty. Comm'rs, 544 F. Supp. 2d 1291, 1301 (M.D. Fla. 2008). Experiencing moderate difficulty while walking does not rise to the level of a disability under the ADA. Penny v. United Parcel Serv., 128 F.3d 408, 415 (6th Cir. 1997). See also Rossblach v. City of Miami, 371 F.3d 1354, 1358 (11th Cir. 2004)(someone who walks, sits, stands or sleeps moderately below average is not disabled under the ADA).

54. Here, the evidence establishes that as a result of suffering a stroke, Smith walks slowly and with a limp.

However, Smith testified that he does not use a cane every day, and that he was not using a cane on September 16, 2017, when he entered the Store. This evidence indicates that although Smith may be moderately impaired in his ability to walk, his impairment does not rise to the level of a "disability" under the pertinent case law.

55. Accordingly, the evidence does not establish that Smith is handicapped for purposes of being a member of a protected class under section 760.08.

56. The evidence does establish that the other elements of a prima facie case of unlawful discrimination in a place of public accommodation are met. Smith attempted to avail himself of the services——specifically, use of the restroom——in the Store. He was denied access to that service, and his wife, who does not have any impairment with respect to walking, was given access to use the restroom at the Store.

57. However, all of the elements, discussed above, must be met in order to establish a prima facie case of unlawful discrimination in a place of public accommodation. Fahim, 551 F.3d 344, 349-50 (5th Cir. 2008).

58. Because Smith did not prove, by the greater weight of the evidence, that he is a member of a protected class, he did not establish that his being denied use of the restroom at the

Store on September 16, 2017, constituted unlawful discrimination in a place of public accommodation.

III. Damages

59. Section 760.11(6), which governs remedies that may be awarded in administrative proceedings under sections 120.569 and 120.57(1), states, in pertinent part:

> If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay.

§ 760.11(6), Fla. Stat.

60. This provision does not authorize the ALJ or FCHR to award monetary damages for non-quantifiable damages such as emotional distress, embarrassment, or humiliation. Inman v. Jian Deng Bao, d/b/a China Gardens Rest., Case No. 11-5602 (Fla. DOAH Feb. 16, 2012), modified in part on other grounds, Case No. 2011-1219 (FCHR Apr. 23, 2012). See Broward Cnty. v. LaRosa, 505 So. 2d 423-24 (Fla. 1987)(holding that the ability to award damages for personal injuries in the form of humiliation and embarrassment is purely a judicial function, so that an ALJ is not authorized to award damages for such injuries).

61. Here, the credible, persuasive evidence established that as a result of having urinated on himself in a public

place, Smith suffered emotional distress, embarrassment, and humiliation. However, these injuries are not the type for which monetary damages can be awarded in this proceeding. As noted above, no evidence was presented regarding any quantified or quantifiable damages that Smith may have suffered as a result of urinating on himself.

62. Thus, even if Smith had established that he was a victim of unlawful discrimination on the basis of handicap in a place of public accommodation, he would not be entitled to an award of monetary damages in this proceeding.

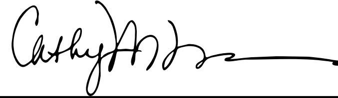
IV. Conclusion

63. For the reasons discussed above, it is found and concluded that Petitioner, Henry Smith, did not prove, by the greater weight of the evidence, that Respondent, 7-Eleven, Inc., engaged in unlawful discrimination against him on the basis of handicap in a place of public accommodation, in violation of section 760.08.[8/]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the Petition for Relief.

DONE AND ENTERED this 12th day of March, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of March, 2019.

ENDNOTES

1/ All references to Florida Statutes are to the 2018 version unless otherwise stated.

2/ Petitioner's Exhibit 1 is a composite exhibit consisting of "Evidence 1," "Petitioner's Evidence," and "Evidence 2," filed on the docket of this proceeding prior to the final hearing.

3/ Respondent's Exhibit 11 is a composite exhibit consisting of photographs taken by Mrs. Smith on September 16, 2017. It was admitted into evidence at the final hearing and filed with DOAH shortly after the final hearing was adjourned.

4/ Additionally, both Smith and Mrs. Smith testified that Hussain walked with a pronounced limp that they described as "worse" than Smith's slow walk or limp. The fact that Hussain had a walking impairment similar to Smith's creates the inference that Hussain did not possess discriminatory intent when he did not give Smith the key to the restroom and told him that it was out of order. See Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1471 (11th Cir. 1991).

5/ In the Technical Assistance Questionnaire for Public Accommodation Complaints, dated February 20, 2018, that Smith submitted to FCHR, he described the "owner" of the Store as an

"older Arabian disability cripple male"——referring to Hussain. The evidence established that Shahzadi and Hussain were siblings, rather than a married couple, as the Smiths had assumed.

6/ The evidence establishes that the termination of the Franchise Agreement was a "mutual termination."

7/ Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). In Schoenfeld, the court explained that direct evidence of discrimination is composed of only the "most blatant remarks," the intent of which could be nothing other than to discriminate on the basis of some impermissible factor. Here, no evidence was presented that Hussain verbalized that he was refusing to allow Smith to use the restroom on the basis of handicap. Here, Smith asserts a claim of disparate treatment on the basis of circumstantial evidence, rather than direct evidence. Accordingly, the McDonnell analysis, as adapted for alleged discrimination in the public accommodations context, applies to this case.

8/ The undersigned is sympathetic to the emotional distress, humiliation, and embarrassment that Smith suffered as a result of being denied use of the Store's restroom, forcing him to urinate in a public place, and causing him to urinate on himself. However, the undersigned is required to base her decision on the evidence presented and the applicable law, which, as discussed above, do not support the conclusion that 7-Eleven discriminated against Smith on the basis of handicap in a place of public accommodation.

COPIES FURNISHED:

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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.