**IN THE DISTRICT COURT OF APPEAL**
**OF THE STATE OF FLORIDA, FIFTH DISTRICT**

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DISTRICT COURT OF APPEAL
FIFTH DISTRICT

JENNIFER M. FOSTER-GARVEY, et.al.,

Appellants,

v.

Case No.5D172831

*Lower Tribunal*

Case No.16-6982.

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

Appellee.

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**On Appeal from a Final Order of the State of Florida**
**Division of Administrative Hearings**

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**2nd AMENDED INITIAL BRIEF OF APPELLANT**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing 2nd AMENDED INITIAL BRIEF was forwarded to Paul D. Brannon, Esquire and Dixie Daimwood, Esquire by regular U.S. mail to Carr Allison, 305 South Gadsen Street, Tallahassee, Florida 32301 on January 11th, 2018

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## STATEMENT OF THE CASE AND FACTS

Appellant Jennifer M. Foster-Garvey filed a complaint of discrimination before the State of Florida Commission on Human Relations alleging that the Appellee committed an unlawful public accommodations practice on the bases of Appellee's race (black), color (black), sex (female), national origin (Jamaican) and disability in the manner in which she was treated when at appellee's restaurant. (ALJ 'RO' page 2) The Executive Director issued a determination finding there was not reasonable cause.(ALJ 'RO' page 2) Appellant filed a Petition for relief with the Division of Administration Hearings, requesting a formal hearing; whereas after an evidentiary hearing, the Administrative Law Judge, issued a Recommended Order of dismissal, dated May 11, 2017(ALJ "RO" page 22); whereas the State of Florida Commission on Human Relations declared that the "Administrative Law Judge's findings of fact to be supported by competent substantial evidence.(FCHR Final Order, page 1) The Appellant herein filed a 'Notice of Appeal' with this court alleging that the administrative law judge, relied on the contradictory and unreliable testimony of the 'interested witnesses' notwithstanding, that their testimony was 'unworthy' of belief, thus rendering her 'bias' findings of facts, in favor of the appellee while ignoring 'disconfirmatory' evidence, leading to a decision "unwarranted, or unsubstantiated" by the evidence.

## STANDARD OF REVIEW

Factual findings made by an ALJ ("ALJ") is governed by the Florida Administrative Procedure Act (APA), F.S. 120.68, as such Florida Statutes are reviewed under a competent, substantial evidence standard, whereas conclusions of law in such proceeding are reviewed de novo. *Volusia County School Board v. Volusia Home Builders Association, Inc.*, 946 So.2d 1984, 1089 (Fla. 5$^{th}$ DCA 2006).

## SUMMARY OF ARGUMENT

The Appellant is appealing the decision of the Administrative Law Judge of the Division of Administrative Hearings, as the Appellant has pled a proper cause of action/complaint regarding public accommodation discrimination, breach of due process, spoliation of evidence, confirmation bias, lack of impartiality, and proof that the hearing officer's finding of no discrimination should be set aside on the finding that it is clearly erroneous, or is based on clearly erroneous findings of fact. Whereas, under the statutory requirements of Section §120.68(7)(c) it states that the court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds the agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57.

## PREFACE

The Administrative Law Judge shall be referenced as ALJ, the Division of Administrative Hearings Transcript shall be referenced as D-TRX, all recommended orders shall be referenced as "RO", and the Qualified Representative shall be referenced as "QR", and the Florida Commission on Human Relations shall be reference as "FCHR"

### I. THE DETERMINATION THAT "THERE WAS NO REASONABLE CAUSE TO BELIEVE THAT UNLAWFUL DISCRIMINATION HAD OCCURRED" WAS NOT SUPPORTED BY "REASON AND LOGIC".

Reasonable is defined as "fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rationale; governed by reason; under the influence of reason; agreeable to reason." [1] Rationale is defined as "behavior guided by reasoning and not by emotions. A thinking process that uses 'logical', systematic methods in drawing a conclusion, a person who can draw logical conclusions."[2] Reason is defined as "a faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions." [3] In short, "reason is the soul of the law." (*Ratio est legis anima*)

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[1] *Cass v. State*, 124 Tex.Cr. R. 208, 61 S.W.2d 500

[2] https://thelawdictionary.org/rational/

[3] Black's Law Dictionary 1081 (6th ed 1980).

Thus "nothing that is against reason is lawful." (*Nihil quod est contra rationem est licitum*) Hence, reasonable cause "involves a basis to believe that something is merely possible, that it may be true, that it is not merely fanciful or wishful but conceivable and could well be real, that is based on 'logical' conclusions, which should enable the trier of fact to deduce inferences from the facts or from propositions." Inference "is a rule of 'logic' applied to evidence in a trial, in which a fact is proved by presenting other facts which lead to only one reasonable conclusion, which is based on the science of reasoning, that if A and B are true, then C is. The process is called 'deduction' or 'deductive reasoning' and is persuasive form of circumstantial evidence." [4] Logic is defined as the "science of reasoning, or of the operations of the understanding which are subservient to the estimation of evidence. The term includes both the process itself of proceeding from known truths to unknown, and all other intellectual operations, in so far as auxiliary to this." [5] Moreover, "an inference is a logical and reasonable conclusion of a fact not by direct evidence but which by the process of logic and reason, a trier of fact may conclude exists from the established facts." [6] "Although an inference only satisfies the parties burden of

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[4] http://dictionary.law.com/Default.aspx?selected=951
[5] http://thelawdictionary.org/logic
[6] *Smith v. Seven, Inc.,* 430 S.W.430 S.W.2d 764, 769 (Mo. App.1968).

producing evidence, with regard, to a fact, the trier of fact may accept the assumed fact." [7] One court held "whether the version of events as related by one party is internally consistent and plausible, or whether numerous inconsistencies and conflicting documentary evidence, render the story unreliable." [8] "In using the indirect method of proof, a plaintiff must show that the employer's reason is not credible or factually baseless, and provide evidence that supports the inference that the real reason is discriminatory." [9] Holding that "the fact finder is entitled to infer discrimination from Plaintiff's proof of a prima facie case and showing of pretext without anything more." [10] "As a result, presenting evidence of pretext by showing that the employer's articulated reason, for taking action against the plaintiff is false should get the case to the jury, thus "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." [11]"The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to

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[7] *City of Kansas City v. Ehinger,* 607 S.W.2d 845, 847 (Mo. App.1980).
[8] *Warren v. Halstead Indus., Inc.*, 802 F.2d 746, 753 (4th Cir. 1986)
[9] *Woods v. Boeing Co.*, 355 F. App'x. 206, 212 n. 2 (10th Cir. 2009)
[10] *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994
[11] *EEOC v. Ethan Allen,* 44 F.3d 116, 120 (2d Cir.1994))

show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." [12] The Court explained that proving pretext does not only mean proof that the "employer's explanation for its actions is false but that it was a cover-up for discrimination," "[A] reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." Id. at 515 (quotations and emphasis supplied by the Court). "Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as affirmation evidence of guilt." [13] Moreover, "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation for its decision." [14] Also, to establish a prima facie case, "the plaintiff need not prove that discrimination was the motivating factor, all he must do is raise an inference that such misconduct occurred."[15] The direct method is proof of discrimination either by direct evidence or by showing a "convincing mosaic" of circumstantial evidence that "allows a jury to infer

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[12] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)
[13] *Wright v. West* 505 U.S. 277, 296 (1992)
[14] *Furnco Construction Corp v. Watson*, 438 U.S. 567 (1978)
[15] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

intentional discrimination by the decision maker." [16] Moreover, "Circumstantial evidence is the proof of certain facts and circumstances in a given case, from which jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind." [17] Moreover, "a hearing officer's finding of no discrimination should only be set aside if that finding is clearly erroneous, or is based on clearly erroneous findings of fact….."[18] Hence, the Appellant has provided "reasonable cause" based on the permissible inferences, that the Appellant was a victim of unlawful discrimination, as the version of events as related by the Appellee's witnesses are internally inconsistent and unworthy of credence, as the numerous inconsistencies render their story unreliable, as the ALJ's finding is based on clearly erroneous findings of fact. Notwithstanding that "*lex rejicit superflua, pugnatia, incongrua.*" Therefore, the Executive Director's determination that there was "no reasonable cause to believe that unlawful discrimination had occurred" is not suitable under the circumstances and against the weight of evidence, thus not supported by "logical and reasonable conclusion of a facts," as "nothing that is against reason is lawful."

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[16] *Silverman v. Board of Education*, 637 F.3d 729, 733 (7th Cir. 2011).

[17] *Foster v. Union Starch & Refining Co.*, 11 Ill.App.2d 346, 137 N.E., 502.

[18] *Carmichael v. Birminham Saw Works,* 738 F.2d 1126, 1129, 1129 (11th Cir. 1984)

## II. THE ALJ FAILED TO ACKNOWLEDGE AN ADVERSE INFERENCE BASED ON THE APPELLEE'S FAILURE TO PRESERVE EVIDENCE (THE TAPE).

To state a cause of action for spoliation of evidence, Appellant need only allege the following elements: "1) the existence of a potential civil action; 2) a duty to preserve evidence; 3) that is relevant to the potential civil action; 4) the spoliation of that evidence; 5) significant impairment in the ability to prove the lawsuit; 6) a causal relationship between the evidence spoliated, and the inability to prove the lawsuit; and damages." [19] Consistent with that Court's policy of preserving and protecting the "integrity" of the judicial process and the 'Florida Constitutional Right to Access to Courts', Florida Jurisprudence has long recognized a cause of action against any wrongdoer who significantly impairs a plaintiff's prospective civil action. Florida courts have been diligent in "protecting the integrity" of the judicial process from any artifice or unfair tactics that may impair the jury's ability to render and the litigant's right to receive, a verdict based upon the justice of the cause. [20] ("A fundamental principle underlying all legal proceedings is the search for the truth. Once the truth is uncovered, we assume that a remedy can be fashioned.") [21] Notwithstanding that a suppression of truth is equivalent to an

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[19] *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990) rev. den. 598 So. 2d 76 (Fla. 1991)
[20] *Fl. Bar v. Cox,* 794 So. 2d 1278, 1286 (Fla. 2001)
[21] *Gore v. Harris*, 773 So. 2d 524, 527 (Fla. 2000)

expression of falsehood. (*Suppressio veri expressio falsi*). Consistent with that policy, for nearly three decades, "a cause of action for spoliation of evidence" [22] or interference with a prospective civil action has been authorized under Florida law. Thus, the essential underpinnings to remedy a spoliation of evidence is to: "(1) remedy the unfairness caused by the spoliation; (2) punish the spoliator; and (3) deter future spoliation." [23] (citing Steffen Nolte, The Spoliation Tort: An Approach to Underlying Principles, 26 St. Mary's L.I. 351, 355-56 (1995). Consequently, "an injured party's interest in his lawsuit is entitled to legal protection against any party who has wrongfully interfered with that party's ability to prosecute his claim." [24] For example, in *Bondu,* the Third District Court of Appeal carefully considered the various policy considerations and held, "Courts before us have recognized the existence of causes of action for negligent failure to preserve evidence for civil litigation," [25] and for the "intentional interference with prospective civil action by spoliation of evidence." [26] A cause of action for spoliation of evidence is essential to the principles of Article I, Section 21 of the Florida Constitution, which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or

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[22] *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3d DCA 1984).
[23] *Rosenblit v. Zimmerman*, 766 A. 2d 749, 754 (N.J.2001)
[24] *Bondu,* 473 So. 2d at 1313
[25] *Williams v. California*, 34 Cal.3d 18, 192 Cal.Rptr. 233, 664 P.2d 137 (1983)
[26] *Smith v. Superior Court*, 151 Cal.App.3d 491, 198 Cal.Rptr. 829 (1984)

delay." Art. I, § 21, Fla. Const. ...This provision, dating from our 1838 constitution, was intended to give life and vitality to the maxim: "For every wrong there is a remedy." [27] Article I, Section 21 guarantees to every person the right to "free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions." [28] Obstruction charges can also be laid if a person alters, destroys, or conceals physical evidence. (18 U.S. Code § 1519 - Destruction, alteration, or falsification of records). In *Golden Yachts, v. Hall* (2006),[29] the Fourth District allowed an inference instruction to be made against a defendant for failing to preserve evidence even though they lacked a legal duty to do so. That court reasoned, an adverse inference "may arise in any situation" where a party loses potentially self-damaging evidence-including when the party had no duty to preserve it. Moreover, "spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence [.]"[30] Hence, the ALJ should have imposed a 'remedy', such as 1) rendering a decision in favor of the Appellant, 2) or allow/acknowledge an adverse inference, 3) or should have referred the spoliator's counsel to the Florida Bar for possible disciplinary proceedings, as "*qui non obstat quod obstare potest facere videtur.*" The facts show that the Appellee had full

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[27] *Holland v. Mayes*, 155 Fla. 129, 19 So. 2d 709 (1944).

[28] *G.B.B. Investments, Inc. v. Hinterkopf*, 343 So. 2d 899 (Fla. 3d DCA 1977)

[29] *Golden Yachts, Inc. v. Hall,* 920 So.2d 777, 780 (Fla. 4th DCA 2006)

[30] Black's Law Dictionary 1437 (8th ed.2004)

knowledge of pending litigation as he (Mr. Vidler) stated in the DOAH hearing: 1) that they had 24 cameras (Page 153 line 23, D-TRX); 2) that he informed the owner, Mr. Allegroe, that Mr. Robert Millan, the Appellant's spouse (Florida recognizes common law marriages consummated out of state) was going to call him (Page 155, D-TRX); 3) that the video "hold maybe 35 to 50 days, maybe"; (Page 157, D-TRX); 4) and the Appellee had notice of potential litigation as he stated "I (Mr. Vidler) was on the telephone call with not your firm, it was a up in Oak Brook - -the Attorney—because we didn't know about any of this, then I got a phone call from an Attorney that they'd picked up through our insurance company"; (Page 162 and Page 163, D-TRX); and 5) and Counsel for Appellee Mr. Brannon acknowledged "that time was of the essence." (Page 163, D-TRX). Additionally, the destruction of evidence known to be relevant to pending litigation violates the spirit of liberal discovery. Intentional destruction of evidence manifests a shocking disregard for orderly judicial procedures and offends traditional notions of fair play. Consequently, recognizing the Appellee's liability for willfully destroying the video is prima facie proof of an "evil intent", and worthy of being called "a spolier or destroyer," as "*acta exteriora iudicant interiora secreta*". "As it is a maxim of law, bearing chiefly on evidence, but also upon the value generally, of the thing destroyed, that everything most to his disadvantage is to be presumed against the destroyer." (spoliator) "*contra* *spoliatorem omnia praesumuntur.*" [31] Notwithstanding, that the Appellee, (Mr. Robert Allegroe, owner of franchise) was contacted by the QR via phone, and via First Class Mail to not destroy/delete, and to preserve the tape, and opposing counsel Dixie Daimwood, of the law firm Carr Allison was informed of such. Moreover, Shahanna Owensby stated that there was "another gentleman sitting closer to the bathroom." (Page 102 D-TRX) The destroyed tape would have shown this "gentleman" to be white without any McDonald's food or drink, who was also similarly situated as her common law husband was, who did not have any food, as he was in the front counter waiting to make a purchase, and that the Appellant never uttered any profanity or threw a chair, or disturbed the alleged guests. Therefore, the ALJ erred by failing to acknowledge the adverse inference regarding the conduct of the Appellee who failed to preserve evidence, the spoliation/destruction of the video tape. As the maxim acknowledges "*lex punit mendaciam.*"

## III. THE APPELLEE'S WITNESSES ARE NOT "CREDIBLE WITNESSES," OR A "CREDIBLE PERSON" OR "DISINTERESTED WITNESSES".

A credible witness is "one who is competent to give testimony in court." [32] A credible person is "one who is trustworthy and entitled to be believed in law and

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[31] Black's Law Dictionary 1573 (Rev. 4th Ed. 1968).

[32] *Burleson v. State,* 131 Tex.Cr.R. 576, 100 S.W. 2d 1019,1020

legal proceedings, and one who is entitled to have his oath or affidavit accepted as reliable, not only on account of his good reputation for veracity, but also on account of his intelligence, knowledge of the and 'disinterested relation' to the matter in question." [33] As *"non est arctius vinculum inter hominess quam jusjurandum."* A "disinterested witness" is one who has no interest in the cause or matter in issue, and who is lawfully competent to testify."[34] In short, a credible witness, must be someone "who has no interest in the cause or matter in issue," "is worthy of belief" and whose testimony is "entitled to credit" and "can be trusted." 1) Mr. Eric Vidler, is the Director of Operations, and has worked for Bam B. Enterprises d/b/a McDonald's, a total of "twenty-eight years." (Page 3, D-TRX). Moreover, he corroborates Shahanna's testimony regarding the numbers of patrons in the seating area as he stated "two." (Page 45, D-TRX). 2) Adam Robert Allegroe, is the General Manager, and has worked for Bam B. Enterprises d/b/a McDonald's, "10 years", (Page 90, D-TRX) and is the owner's 'grandson.' However, he could not recall how many patrons were in the seating area, notwithstanding, it was alleged he was with Mr. Vidler, when Mr. Vidler confronted the Appellant, when she was told that she was loitering. (Page 86, D-TRX). 3) Shahanna Owensby, is the Guest Service Department Manager and has

[33] *Burleson v. State,* 131 Tex.Cr.R. 576, 100 S.W. 2d 1019,1020
[34] Black's Law Dictionary (6th ed. 1990)

worked for Bam B. Enterprises d/b/a McDonald's "close to six years. A little over five years." (Page 95, D-TRX). Moreover, Shahanna Owensby corroborated the testimony of Mr. Vidler regarding the number of patrons in the seating area were "two." (Page 102, D-TRX). 4) The fact that Adam Allegroe could not recall how many people were in the seating area, notwithstanding the testimony of Mr. Vidler and Ms. Owensby, that he was with Mr. Vidler when Mr. Vidler approached the Appellant, supports the testimony of the Appellant, who stated, that it was Mr. Vidler and Ms. Owensby who approached her, and accused her of loitering, thus Adam Allegroe, was not present during this encounter, as he was either in the counter area, or someplace else, and was informed that she did not throw a chair, as he previously stated "I wouldn't say she threw it up in the air." (Page 83, D-TRX). In *Elwood,* Judge Rapallo said, "that a witness, although unimpeached, may have such an interest in the question at issue as to affect his credibility," and, having found that the witnesses in that case had an interest to protect, the court held that their relation to the subject-matter in controversy "was of itself sufficient to take from the court the right to dispose of the case upon their evidence." [35] Therefore, the Appellee's witnesses are not "disinterested witnesses" because they "have an interest in the cause and matter in issue," "are not worthy of belief", "whose testimonies are not entitled to credit" and cannot be

[35] *Elwood v. Western Union Telegraph Co.*, 45 N. Y. 549 (1871)

"trusted;" therefore are not "credible" or "credible persons" or "credible witnesses;" and that their relation to the subject-matter in controversy is "of itself sufficient to take from the court the right to dispose of the case upon their evidence." Notwithstanding that their testimonies are replete with inconsistent and contradictions, thus lacking logical reasoning, and credibility. Moreover, "the hearing version of competent substantial evidence involves the question of the quality (character, convincing power, probative value or weight) of the evidence as to each essential element) and as the legality and admissibility of that evidence."[36] Thus, the concurring opinion of Judge Cowart defined 'competent substantial evidence' differently. He defined the term by stating "competent substantial evidence does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence." [37] So, based on this opinion, the 'quantity' of evidence produced by the Appellee was lacking any probative value, while the

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[36] Concurring opinion of Judge Cowart in Dunn v. State, 454 So.2d 641, 649 n.11 (Fla. 5th DCA 1984) as reported by *Longeran v. Estate of Budahazi,* 669 So.2d 1062, 1064 (Fla. 5th DCA 1996)

[37] Concurring opinion of Judge Cowart in Dunn v. State, 454 So.2d 641, 649 n.11 (Fla. 5th DCA 1984) as reported by *Longeran v. Estate of Budahazi,* 669 So.2d 1062, 1064 (Fla. 5th DCA 1996)

'quantity' value of the character of the Appellant, was not impeached, as her testimony under oath, was not contradictory, but consistent, as it 'tended to prove' with 'convincing power' that she was a victim of disparate treatment by the Appellee; as the 'quantity' of the evidence supports the inference of discrimination as the Appellees' testimony was internally replete with numerous inconsistencies and implausible, thus rendering their story unreliable, and not supported by reason and logic. Notwithstanding, that the Appellees' witnesses' testimonies fail "to strengthen, to add weight or credibility" nor did it provide any "additional and confirming facts or evidence," as their testimonies were uncorroborated as it was shown "that each representation to the other witnesses did not comport with some facts otherwise known or established."

## IV. FINDINGS OF FACTS REGARDING MR. VIDLER'S INCONSISTENT AND CONTRADICTORY TESTIMONY CONCERNING APPELLANT THROWING THE CHAIR AND VISITING THE LOCKHART STORE.

Mr. Vidler testified that "In one fell swoop she grabbed that chair, swung the chair my way." (Page 53, D-TRX). "She took the chair and she threw it" (Page 65, D-TRX). "The chair ended up and over the half-wall." (Page 65, D-TRX). "And if it didn't hit the wall it would have went all the way over." (Page 66, D-TRX). "It went from where she was sitting at the table and it went across." (Page 66, D-TRX). However, Mr. Brannon in his opening statement stated, "There was a low wall in the seating area and the chair hit the wall. It did not strike Mr. Vidler nor strike Mr. Allegroe." (Page 33, D-TRX). However, this is contradicted by Mr. Vidler, who under oath testified, "the chair ended up and over the wall." (Page 65, D-TRX)., and "the chair went up in the air "four inches, six inches," (Page 66, D-TRX). That statement is illogical, as it is less that the average size of a "female's hand size." [38]

| Average Hand Size (Length) | |
|---|---|
| **Male** | **Female** |
| 189 mm (7.44 inches) | 172 mm (6.77 inches) |

During 'discovery' the 'QR' measured the "half wall" which measured from the base to the top to be exactly "37 inches which equal 939.8000mmm"[39] Now, regarding his inconsistent statements visiting the Lockhart McDonald's store, Mr. Vidler testified "I am in that store minimally -- minimally once to twice a week." (Page 43, D-TRX). "I am in that store every day." (Page 153, D-TRX). "I could visit for say, the Lockhart restaurant upwards of two to three times a day, depending upon what happens." (Page 42, D-TRX) While Adam Allegroe, who testified under oath stated, "Usually he (referring to Mr. Vidler) will come by on a weekly basis to go over cleanliness and other issues in the restaurant." (Page 80 D-

[38] http://www.theaveragebody.com/average_hand_size.php
[39] http://www.metric-conversions.org/length/inches-to-millimeters.htm

TRX). Mr. Vidler stated, "there was a manager in the and I don't know if you wanted to answer that or not." (Page 47 and Page 48, D-TRX) Mr. Vidler now stated, "okay. So Shahanna..." (Shahanna the Mgr. is in the lobby). (Page 48, D-TRX) Mr. Vidler subsequently stated, "so she (Shahanna) was sitting on the same side as the one guest, all the way in the back." (Page 48, D-TRX). The above testimony contradicts his prior testimony where he claimed Shahanna was in the lobby. (Page 48, D-TRX). Mr. Vidler subsequently stated, "Shahanna, our department, Mgr. was probably two tables up, and she witnessed that also, sir." (Page 66, D-TRX) Now, Shahanna is no longer "sitting on the same side as the one guest all the way in the back." (Page 48, DOA TRX). However, this contradicts the testimony of Shahanna Owensby, who stated, "we were in the aisle..." (Page 100, D-TRX). Thus, Appellees' witnesses fail "to strengthen, to add weight or credibility" "or comport with some facts otherwise known or established."

## V. FINDINGS OF FACTS REGARDING MR. VIDLER'S INCONSISTENT AND CONTRADICTORY TESTIMONY CONCERNING THE FOUL LANGUAGE UTTERED BY THE PETITIONER.

Mr. Brannon, Counsel for the Appellee, in his opening statement stated, "And she also uttered an obscenity. Neither Mr. Allegroe, nor Mr. Vidler specifically recall what that was, but they recall there was an obscenity and it was directed at them." (Page 33, D-TRX). Take note that during the above volley of questions between Mr. Vidler and the Appellant's QR Mr. Millan, Mr. Vidler stated the following:

"My recollection was a four-letter curse word," then questioned if he knew the word now, Mr. Vidler stated, (Page 52, D-TRX). "No, I said my recollection," then Appellant's QR asked if he was not sure, he subsequently stated, (Page 52, D-TRX). "No, I know it wasn't nice", then Mr. Vidler stated with respect to the curse word (Page 52, D-TRX) "There was loud utterings, I assume or presume of not nice nature." (Page 149, D-TRX). In using the indirect method of proof, the Appellant has shown that the Appellee's reason is not credible and is factually baseless, and provides evidence that supports the inference that the real reason is discriminatory, as "*lex plus laudatur quandy ratione probatur.*" Moreover, a factfinder's conclusion that the Appellee's reasons were pre-textual can be supported by inconsistencies in their testimony, as "*ratio est legis anima.*" "It has been held that the maxim "*falsus in uno, falsus in omnibus*" may be fallacious when understood as a mandatory rule of inference." [40] However, "it retains validity as a basis for a permissive inference." [41] In summation, the testimony of Mr. Vidler is not "worthy of belief", as his testimony is replete with inconsistencies, contradictory statements, indicative of an "interest to protect", "not plausible", not "entitled to credit" and "not trustworthy," "not credible and is factually baseless" as the Appellee's reasons "were pre-textual and can be supported by

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[40] *Dicenso v. Michaels*, 668 F.2d 633, 634 (1st Cir.1982)

[41] *Kanawha & M.R. Co. v. Kerse* 239 U.S. 576, 581, 36 S.Ct. 174, 60 L.Ed. 448 (1916)

inconsistencies in their testimony." Therefore, because of the numerous inconsistencies in the Appellee's testimony, the ALJ should have invoked the doctrine of *"falsus in uno, falsus in omnibus."* In addition, "once the plaintiff (Appellant) proves that all the defendant's (Appellee's) proffered reasons for the adverse actions to be pretextual, the plaintiff is entitled to judgment as a matter of law." [42] As such, *"allegans contraria non est audiendus."* Notwithstanding, that Mr. Vidler has run afoul of the following Florida Statutes; Florida Statute 837.02 enumerates what constitutes perjury in an official proceeding: (1) Except as provided in subsection (2) Whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter, commits a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084, (3) Knowledge of the materiality of the statement is not an element of the crime of perjury under subsection (1) or subsection (2), and the defendant's mistaken belief that the statement was not material is not a defense. 837.021 proscribes perjury by contradictory statements: (1) Except as provided in subsection (2) Whoever, in one or more official proceedings, willfully makes two or more material statements under oath which contradict each other, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s.

[42] *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992)

775.084. Thus, the Appellee's witnesses had committed perjury according to Florida Statute 837.02 and 837.021.

## STANDARD OF REVIEW

Factual findings made by an ALJ ("ALJ") is governed by the Florida Administrative Procedure Act (APA), F.S. 120.68, as such Florida Statutes are reviewed under a competent, substantial evidence standard, whereas conclusions of law in such proceeding are reviewed de novo. *Volusia County School Board v. Volusia Home Builders Association, Inc.*, 946 So.2d 1984, 1089 (Fla. 5th DCA 2006)

## VI. THE APPEELEE HAS NOT PROVIDED ANY CORROBORATING EVIDENCE

Corroborating evidence is "evidence supplementary to that already given and tending to strengthen or confirm it; additional evidence of a different character, to the same point." [43] Corroborate means "to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence," [44] as "the testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established." [45] Mr. Vidler, stated the Appellant threw the chair and "the chair ended up and over the wall." (Page 65, D-TRX). Then he subsequently stated, "and if it didn't hit the wall it would have went all the way all the way over." (Page 66, D-TRX). However, Adam Allegroe, the grandson of the owner,

[43] *Gildersleeve v. Atkinson,* 0 N. M. 250, 27 Pac. 477
[44] *Still v. State* (Tex. Cr. R.) 50 S. W. 355
[45] Black's Law Dictionary (6th Ed. 1990)

who testified under oath and provided conflicting testimony "I wouldn't say that she threw it up in the air…" (Page 83, D-TRX). Shahanna, also provided uncorroborated and conflicting testimony as she testified under oath and stated, "Well she stood up and grabbed the chair with one of her hands and kind of picked it up off the ground, because the chair was ajar. It lifted off the ground. Yeah." (Page 97 and 98, D-TRX) Thus, the testimonies of the Appellees' witnesses fail "to strengthen, to add weight or credibility" nor did it provide any "additional and confirming facts or evidence," as the testimonies of the witnesses were uncorroborated as it was shown "that each representation to the other witnesses did not comport with some facts otherwise known or established." The issue is "whether the version of events as related by one party is internally consistent and plausible, or whether numerous inconsistencies and conflicting documentary evidence render the story unreliable." [46] Hence, the conflicting and contradictory testimony render their story unreliable, and as such, are a text-book example of "fraud on the court," in which the 5th District so eloquently described as it being reasonably straightforward. In short, the requisite "fraud on the court" occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the

[46] *Warren v. Halstead Indus.*, Inc., 802 F.2d 746, 753 (4th Cir. 1986)

trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." [47] Moreover, "fraud on court may exist where witness and attorney conspire to present perjured testimony." [48] In *Lee* the maxim "*fraus est celare fraudem,*" was applied by the court.[49] Mr. Brannon of the law firm Carr Allison, Counsel for the Appellee, stated in this opening statement that "Mr. Vidler then interacted with Mr. Millan (Appellant's Common Law Spouse) before he left that day and wrote down the phone number of the guest service manager, Mr. Eric Vidler." (Page 35, D-TRX) However, this spurious claim is contradicted by Mr. Vidler, the Operations Mgr., who stated, when asked by the QR, "and you gave Mr. Millan a business card to call." Mr. Vidler now stated, "Yes, sir." (Pages 154-155 D-TRX). Moreover, Mr. Brannon now acknowledged that it was Mr. Robert Allegroe, the owner, who Mr. Robert Millan (Appellant's Common Law Spouse) spoke to, regarding the incident, and not Mark Allegroe as he stated, "Did the owner tell you that he was sorry and offer a gift certificate and offer to call Ms. Foster-Garvey himself to speak with her?" (Page 115, D- TRX). (The above is an 'spontaneous exclamation' within the res gestae rule, by Appellee's Counsel, Mr. Brannon). The main reason the Appellee's Counsel of Record statements are

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[47] *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 986 (4th Cir. 1987)
[48] 4-1.2(d). Florida Rules of Professional Conduct
[49] *Lee v. Kirkpatrick*, 14 N.J. Eq. 264, 267 (N.J. Ch. 1862)

contradictory and inconsistent is because "*Mentiri est contra mentem ire.*" Moreover, "Just as an employee might be closely questioned as to his or her account of discrimination, so too will an employer's justification for its actions be scrutinized for inconsistencies, including whether that such justification shifts or changes over time." [50] Incidentally, it is obvious what they have attempted to do was engage in subornation of perjury. However, it is well settled "*nullus commodum capere potest ex sua injuria propria*," and "*fictio cedit veritati,*" *thus*, "*fictio juris non est, ubi veritas.*" What they have done unfortunately, and unsuccessfully, was to replicate the elements of Florida Statue 509.142 regarding "Conduct on premises; refusal of service." That statute states than an operator of a public lodging establishment or public food service establishment may refuse accommodations or service to any person whose conduct on the premises of the establishment displays intoxication, profanity, (the interested witnesses claim she used profanity) lewdness, or brawling (throwing the chair), who indulges in language or conduct such as to disturb the peace or comfort of other guests (the Appellee's witnesses claim there were other guests who heard the alleged profanity, notwithstanding the testimony of Shahanna Owensby and Mr. Vidler, who testified under oath that there were only two patrons in the seating area, (the Appellant and "the one guest, all the way in the back"), who engages in illegal or

[50] *EEOC v. Ethan Allen* 44 F.3d 116, 120 (2d Cir.1994)

disorderly conduct; who illegally possesses or deals in controlled substances, or whose conduct constitutes a nuisance (this would include all the allegations), or undesirable to the owner. (propping her feet on the window sill). As the Latin maxims states "*fraus est celare fraudem*," and "*fraus et jus nunquam cohabitant.*"

## STANDARD OF REVIEW

Factual findings made by an ALJ ("ALJ") is governed by the Florida Administrative Procedure Act (APA), F.S. 120.68, as such Florida Statutes are reviewed under a competent, substantial evidence standard, whereas conclusions of law in such proceeding are reviewed de novo. *Volusia County School Board v. Volusia Home Builders Association, Inc.*, 946 So.2d 1984, 1089 (Fla. 5th DCA 2006)

## VII. CORROBORATING AND NON-CONFLICTING TESTIMONY

Appellant testified to the following; "Two people came out from the McDonald's door and they were talking to each other. They said, I looked like I'm loitering and trespassing. A heavy-set woman (Shahanna) and a man (Mr. Vidler) that she was speaking to. So, suddenly, the woman said, yeah, you are loitering there. The man says -- I said to the man, I'm waiting on my boyfriend for the food. And he said you better get out. Out of here. Or else I will call the police. He said I was just sitting in there and I'm trespass and loitering." (Page 71, D-TRX). "So, I walked out right away and disappeared into the van that my boyfriend had." (Page 72, D-TRX). "My boyfriend then, must have was in the store, wondering where I was. So, I was outside in his van, sitting down, waiting for him. So, when the food -- when he got the food and he -- and I saw him in the store I knock on his window to tell him in I'm in the van, sitting down. He asked me what happened. I said if I was in there I am loitering, and they would throw me out and call the police." (Page 72, D-TRX). Notwithstanding the fact that Shahanna stated, "I can't recollect when she first walked in and sat down, so I don't know how long she was there." (Page 101, D-TRX). The reason she could not "recollect when she first walked in and sat down" was because it was her and Mr. Vidler who were the "Two people (who) came out from the McDonald's door and they were talking to each other. They said, I looked like I'm loitering and trespassing. A heavy-set woman (Shahanna) and a man (Mr. Vidler) that she was speaking to." (Page 71, D-TRX).

## VIII. APPELLANT'S TESTIMONY CORROBORATED BY THE APPELLEES' TESTIMONIES

After an assiduous and unremitting assessment of the transcript, and redaction of the convoluted, inconsistent, incongruent, and the implausible testimony of the Appellees' "interested witnesses" you are left with the truth. As the greatest maxim known to man is "we have the best witness, a confessing defendant," "*habemus optimum testem confitentem reum.*" The Appellant's testimony, which stands as consistent, unconvoluted, congruent, plausible, and unimpeached, as she was not cross-examined by Appellee's counsel, that "two people came out from the McDonald's door and they were talking to each other. They said, I looked like I'm loitering and trespassing. A heavy-set woman (Shahanna) and a man (Mr. Vidler) that she was speaking to." (Page 71, D-TRX). (This means "they" were in the aisle). Mr. Vidler acknowledged the following, when asked by Appellant's QR Mr. Millan, what were you doing when you first saw her, (Page 46, D-TRX) Mr. Vidler testified under oath, "We were walking out of the door." (Page 45, D-TRX). "We were doing a cleans travel path." (Page 46, D-TRX) Mr. Vidler, when asked by Appellant's QR Mr. Millan "Ok. and then after you saw her, what did you do?" Mr. Vidler stated, "So as I walked out of the door (Page 45 D-TRX) we turned left, and we are going 'down the aisle way'. I notice her sitting in the - - just looking out the window. So, it seemed very odd apparent. Also with the feet up on the windowsill is kind of a - - I don't want to say disrespectful, but it just - - it's not normal seating position for a restaurant. So, I walked over to her and I did ask her, ma'am would you be purchasing something today." (Page 46 and Page 47, D-TRX) And Shahanna Owensby, who stated, "we were in the aisle." (Page 100, D-TRX). The above testimony acknowledges two facts, the word "we" is plural, which buttresses the testimony of the Appellant who stated, "Two people came out from the McDonald's door and they were talking to each other. They said, I looked like I'm loitering and trespassing. "A heavy-set woman (Shahanna) and a man (Mr. Vidler) that she was speaking to and they told me (the Appellant) "I looked like I'm loitering and trespassing." The three statements, one provided by the Appellant and the other two by Mr. Vidler, and Shahanna Owensby, Appellee's witnesses, buttresses the Appellant's testimony, that Mr. Vidler and Ms. Owensby were in the aisle as their testimony under oath 'swears to it', and the unimpeached testimony of the Appellant stands as uncontradicted, consistent and truthful. Notwithstanding the inability of Adam Allegroe, the owner's grandson who could "not recall how many patrons were in the seating area." (Page 86, D-TRX). Moreover, his testimony that the *alleged* throwing of the chair did not occur in the seating area, as he testified under oath that "Ms. Foster-Garvey got upset, stood up, slung a chair across the lobby in our direction," (Page 83, D-TRX) and "I wouldn't say she threw it up in the air." (Page 83, D-TRX).

## STANDARD OF REVIEW

Factual findings made by an ALJ ("ALJ") is governed by the Florida Administrative Procedure Act (APA), F.S. 120.68, as such Florida Statutes are reviewed under a competent, substantial evidence standard, whereas conclusions of law in such proceeding are reviewed de novo. *Volusia County School Board v. Volusia Home Builders Association, Inc.*, 946 So.2d 1984, 1089 (Fla. 5th DCA 2006)

## IX. ERIC VIDLER, EMPLOYEE OF THE APPELLEE, VIOLATION OF COMPANY POLICY, FEDERAL AND STATE LAWS, WERE THE PROXIMATE AND ACTUAL CAUSE OF NEGLIGENCE, NEGLIGENCE PER SE, AND PROOF OF DISCRIMINATORY CONDUCT

Negligence is defined as "conduct that falls below the standards of behavior established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or she has departed from the conduct expected of a reasonable prudent person acting under similar circumstances. To establish negligence as "cause of action" under the law of Torts, a plaintiff must prove that the defendant had a duty to the plaintiff, the defendant breached that duty by failing to conform to the required standard of conduct, the defendant's negligent conduct was the cause of the harm to the plaintiff, and the plaintiff was, in fact, harmed or damaged."[51] Negligence per se is defined as an act that is negligent "because it violates a law that has been designed to protect the public."[52] Negligence per se, eliminates the "duty" and "breach" aspects of a negligence claim. In other words, there is no need to demonstrate how the defendant's conduct was careless if you are relying on negligence per se. Either the law was violated, or it wasn't. If the law was violated, the discussion turns to whether, the violation was the proximate cause of damages or injury. Proving a negligence per se claim in a personal injury case usually means the plaintiff needs to establish the following: Whether it was a violation of a "Public Duty or Law." [53] In this case, the Appellee violated law(s) Title VI of the Civil Rights Act of 1964, which is a civil rights law that prohibits discrimination based on race, color, or national origin. Simply stated, all persons must be treated equally without regard to their race, color, or national origin. Fla.Statute.760.08, Florida Civil Rights Act 1992, Sections 509.092 and 760: Florida Civil Rights Act of 1992,

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[51] http: www. legal-dictionary-the freedictionary.com/negligence
[52] https://legal-dictionary.thefreedictionary.com/negligence+per+se
[53] http://www.alllaw.com/articles/nolo/personal-injury/ negligence-per-se.html

Sections 509.092 and 760.1, which prohibits discrimination in the treatment of persons; minority representation by any "person" which includes an "individual", association, or "corporation." More specifically "the general purposes of the Florida Civil Rights Act of 1992 is to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state." [54] Fact 1) The ALJ acknowledged in her "RO" "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 members will approach that person and politely inquire whether the person intends to make a purchase." (Page 5, ALJ's "RO''). Fact 2) Mr. Vidler testified "So as I walked out of the door (side lobby door), (Page 45, D-TRX) we turned left, and we are going down the aisle way. I notice her sitting in the - - just looking out the window. So, it seemed very odd apparent. Also with the feet up on the windowsill is kind of a - - I don't want to say disrespectful, but it just - - it's not normal seating position for a restaurant. So, I walked over to her

[54] Florida Civil Rights Act of 1992

and I did ask her, ma'am would you be purchasing something today." (Page 46, and Page 47, D-TRX). Fact 3) This provides proof of a violation of the company's policy and several civil rights laws; proof of disparate treatment, and an adverse inference; as the ALJ acknowledged in her "RO," "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 members will approach that person and politely inquire whether the person intends to make a purchase." (Page 5, ALJ'S "RO''). Fact 4) So based on the facts, Mr. Vidler violated McDonald's "Enforcement Procedure" as he testified under oath, "So as I walked out of the door (side lobby door), (Page 45, D-TRX) we turned left, and we are going down the aisle way. I notice her sitting in the - - just looking out the window. So, it seemed very odd apparent. Also with the feet up on the windowsill is kind of a - - I don't want to say disrespectful, but it just - - it's not normal seating position for a restaurant. So, I walked over to her and I did ask her, ma'am would you be purchasing something today." (Page 46, and Page 47, D-TRX). Fact 5) Therefore, he did not wait "after a few minutes," before he approached the Appellant, thus he was negligent, negligent per se as the Appellee's employee, violated the aforementioned 'civil rights' laws. Therefore, the Appellee was not in compliance with McDonald's "Enforcement Procedure," and Federal and State anti-discrimination laws, which is prima facie proof of discrimination and must be viewed as an adverse inference due to the disparate treatment received by the Appellant by the Appellees' employees.

## X. THE APPELLANT WAS DENIED DUE PROCESS BY THE ALJ, WHO ALLOWED PERJURED TESTIMONY TO GO UNCORRECTED.

"Due Process has been defined as law in its regular course of administration through courts of justice." [55] "Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection, of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." [56] "Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. This means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution." [57] Due Process is guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, as each contain a Due Process

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[55] *Wynehamer v. The People*, 13 N.Y. 378 (N.Y. 1856)
[56] Black's Law Dictionary 2nd ed.
[57] http://thelawdictionary.org/due-process-of-law.

Clause. Due process deals with the administration of justice and thus the Due Process Clause acts as a safeguard from arbitrary denial of life, liberty, or property by the government outside the sanction of law. The States interprets the clauses as providing four protections: procedural due process, substantive due process, a prohibition against vague laws, and as the vehicle for the incorporation of the Bill of Rights. In layman's term, it is conduct of legal proceedings, according to established principles and procedures, to ensure a fair trial for every accuse. More simply, due process of law means the government may not limit freedom without good reason. These safeguards are to prevent the corrupting impact of false testimony on the justice system, which is profound and corrosive. As such the safeguards are an "sine qua non" in the search for truth. Notwithstanding that the "law abhors perjury." [58] False testimony cases thus always present a violation of a legal duty and the corruption of the trial process. Hence, the Appellant has "demonstrated the improper use of false testimony, and is entitled to relief as there is a reasonable likelihood that the false testimony affected the outcome." [59] That Court recognized that the government's failure to correct false testimony could violate due process, even though no one acting for the government, knew the testimony was false. In comparison, the ALJ, who was

[58] *See,* 18 U.S.C § 1621 (2006)[58]
[59] *Giglio v. United States* 405 U.S. 150 (1972)

the 'trier of fact' had actual knowledge of perjury, by having presided over the case, notwithstanding having the "D-TRX," and having carefully review and assessing the "Petitioner's (now the Appellant) "RO", which provided compelling evidence of perjury, as enumerated by Florida's Perjury Statutes. In *Napue* the Court has also signaled that the falsity requirement is not as demanding as some lower court decisions suggest recognizing that any false or misleading testimony may corrupt the truth-finding process and render the trial unfair. [60] The Court has made it clear that "a defendant (in this case the Appellant) need not establish perjury to prevail in a false testimony case." [61] Moreover, even the use of testimony that is merely misleading may violate due process. [62] In *Alcorta* the Court recognized that the prosecution's failure to correct misleading testimony violated the defendant's right to due process. The Court introduced the term "materiality" into this line of cases in *Brady*,[63] stating that suppression of exculpatory evidence by the prosecution (In this case, Appellees' Counsel of Record/and/or/ALJ) "violates due process, where the evidence is material either

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[60] *Napue v. Illinois,* 360 U.S. 264, 265 (1959) (granting relief based on the prosecution's failure to correct false testimony, which was relevant only to impeach the witness' credibility)
[61] *Lacerta v. Texas*, 355 U.S. 28, 31 (1957) (granting relief based on the prosecution's failure to correct misleading testimony, despite the fact, that the testimony was not clearly false)
[62] *Alcorta v. Texas,* 355 U.S. 28 (1957)
[63] *Brady v. Maryland*, 373 U.S. 83 (1963)

to guilt or to punishment." "It is clear, that the knowing use of perjured testimony violates the defendant's (in the case the Appellant's) right to due process." [64] Notwithstanding, after receiving the "Petitioner's (now the Appellant) Recommended Order" both were provided with 'compelling evidence' of perjury, contradictory, and inconsistent testimonies. Hence, the ALJ and opposing counsel now had indisputable proof of 'fraud on the court,' as such, 'notice of perjury' was given. The corrupting impact of the false testimony is just as great when it is unknown to the prosecutor (or in this case, Appellee's Counsel of Record/and/or the ALJ), as the Court has consistently stated due process protects against unfairness in the proceeding, not merely against prosecutorial (or in this case, Appellee's Counsel of Record/and/or ALJ) wrongdoing, prosecution knowledge should not be required to establish a due process violation; as acknowledged "*Judicis est judicare secundum allegata et probata.*" Therefore, the Appellant was denied safeguards, which failed to protect against unfairness in the proceeding, notwithstanding the Appellant's rights against discrimination. Moreover, the ALJ's and/or Appellee's Counsel of Record intentional failure to correct misleading and perjured testimony, led to the "unfairness" in the DOAH hearing; by allowing the knowing use of perjured testimony which violated the

[64] *Jenkins v. Artuz*, 294 F.3d 284, 293-94 (2d Cir. 2002) (finding violation due to knowing use of perjured testimony).

Appellant's right to due process, and was in violation of established principles and procedures. As such, Appellant was not afforded due process, for the reasons; therefore "*justitia nemini neganda est.*" Moreover, 'he who does not prevent what he is able to prevent is considered as committing the thing," "*Qui non obstat quod obstare potest facere videtur.*"

## XI. THE ALJ INTENTIONALLY VIOLATED FEDERAL AND STATE JUDICIAL CANONS BY "ENGAGING IN BEHAVIOR THAT COULD BE REASONABLY INTERPRETED AS PREJUDICE OR BIAS"

A Judge must "act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities."[65] The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias." [66] "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex,

[65] Code of Conduct for United States Judges Under Canon 2
[66] www.uscourts.gov/judgesjudgeships/code-conduct-united-states-judges.

religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding." [67] Hence, showing a nexus with the above cannons, Mr. Brannon, Counselor for the Appellee stated, "And recall, they had already approached her and asked her whether she intended to make a purchase and she made no response whatsoever. Mr. Vidler again approached her and said, ma'am, if you won't be making a purchase -- words to the effect of, ma'am, if you will not be making a purchase we're going to have to ask you to leave." (Page 32, and Page 33, D-TRX) Mr. Millan, QR of the Appellant, asked Mr. Vidler. "Okay. And then after you saw her, what did you do?" Mr. Vidler, then testified "So as I walked out of the door we turned left, and we were going down the aisle way. I noticed her sitting in the -- just looking out the window. So, it just seemed very odd apparent. Also 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. So, I walked over to her and I did ask her, ma'am, would you be purchasing something today." (Page 46, and Page 47, D-TRX). ALJ McArthur, then admonished the witness by saying, "Mr. Vidler, let me just interject. You were here and listened to counsel's opening statement, but that wasn't testimony that I can consider." Mr. Vidler then stated "Okay." Then the

[67] www.floridasupremecourt.org/decisions/ethics/canon3.shtml

ALJ McArthur stated, "So, don't assume that what he said – that you are building on what he said." (evidence of bias) Mr. Vidler then stated, "Yes, ma'am." (Page 47, D-TRX) Mr. Vidler just contradicted the testimony of Mr. Brannon, who stated in his opening statement, "And recall, they had already approached her and asked her whether she intended to make a purchase and she made no response whatsoever. Mr. Vidler again approached her and said, ma'am, if you won't be making a purchase -- words to the effect of, ma'am, if you will not be making a purchase we're going to have to ask you to leave." However, Mr. Vidler testified under oath, "So as I walked out of the door we turned left, and we were going down the aisle way. I noticed her sitting in the -- just looking out the window. So, it just seemed want to say disrespectful, but it just – it's not a normal seating position for a restaurant. So, I walked over to her and I did ask her, ma'am, would you be purchasing something today." (Page 46, and Page 47, D-TRX) Thus, Mr. Vidler testified he did not approach her "again" or waited "after a few minutes" as alleged by Mr. Brannon in his opening statement, but "walked over to her and I ask her, ma'am, would you be purchasing something today," immediately upon seeing her because she "seemed very odd apparent." (Page 46, and Page 47, D-TRX). Moreover, in Respondent's "RO", Appellee counsel acknowledged, "As Mr. Vidler and Mr. Allegroe were walking through the store, they entered the dining area and noticed Ms. Foster-Garvey at a table. She was alone and had no food or drink on the table. She was seated sideways in her chair, with her feet on the store's windowsill, looking out the window. Both Mr. Vidler and Mr. Allegroe considered this unusual behavior for an adult customer and Mr. Vidler made the decision to approach Ms. Foster-Garvey to ask whether she intended to purchase food, pursuant to the policy. Mr. Vidler, approached Ms. Foster-Garvey and said "Ma'am, will you be purchasing something today," (see Respondent's "RO" Pages 3-4). Thus, Counsel for the Appellee acknowledged that Mr. Vidler did not wait "after a few minutes" as alleged by the ALJ in her "RO", "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 members will approach that person and politely inquire whether the person intends to make a purchase." (Page 5, ALJ's "RO"). In short, the Appellees' 'interested' witnesses assumed that she was either at McDonald's to solicit restaurant customers for prostitution; panhandling (asking customers if they have a spare dollar); or to use the bathroom to "ingest or inject illegal drugs." (Page 4, 'ALJ's RO') Hence, the ALJ violated Federal and State Judicial Canons by engaging in behavior that could be "reasonably interpreted" as "prejudice or bias," by failing in the "performance of her official duties, because her words "manifested conduct that can be reasonably interpreted as bias," thus providing 'prima facie' proof that the ALJ "acted in a manner that failed to promote public confidence in the integrity and impartiality of the judge's adjudicative and administrative responsibilities." Therefore, the ALJ intentionally violated Federal and State Judicial Cannons by engaging in behavior that could be "reasonably interpreted as prejudice and bias." Moreover, there are probable links between the ALJ and opposing counsel which may be social, political, financial or ideological. The ALJ "Elizabeth McArthur is a founding shareholder of the law firm Radey Thomas Yon & Clark, in Tallahassee, Florida. This "firm specializes in labor and employment law." [68] Dixie Daimwood, counsel for the Appellee "is a shareholder in the law firm Carr Allison, in Tallahassee, Florida office, and Dixie's extensive practice includes labor and employment defense." [69] Thus, providing an inference of 'social, political, financial or ideological links'. The court in *Oberholzer v. Commission on Judicial Performance,* set forth the following factors relevant to a finding of misconduct: "repeated error, bias, abuse of authority, disregard for fundamental rights, *intentional disregard of the law*, or any purpose other than the faithful discharge of judicial duty." [70]

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[68] www.radeylaw.com
[69] www.carrallison.com
[70] *Oberholzer v. Commission on Judicial Performance,* 20 Cal.4th 371, 84 Cal.Rptr.2d 466

## XII. THE ADMINISTRATVE LAW JUDGE DISPLAYED "CONFIRMATION BIAS".

In the field of psychology, the phenomenon known as "confirmation bias," is a "ubiquitous phenomenon in human nature" [71] "that causes people to selectively seek information that is consistent with prior beliefs, expectations, or desired outcomes, to disregard, deny, devalue or dismiss information that is inconsistent or disconfirmatory, or to interpret ambiguous information in a manner that confirms (or disconfirms) a person's perceived beliefs or expectations." [72] The ALJ in her "RO", stated that "Robert Millan's testimony was credible and notable in its consistency with Respondent's witnesses and its inconsistency with Petitioner's testimony. 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." (Page 24, ALJ's "RO"). The ALJ failed to recognize that "traumatic events are the main risk factor for PTSD, but some people can go through such events and not experience PTSD. Studies estimate that 6 - 30% or more of trauma survivors develop PTSD, with children and young people being among those at the high end

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[71] Nickerson, 2008

[72] Dror & Mackenzie, 2005; Lilienfeld, 2010; Wiener, Bornstein, & Voss, 2006

of the range. Women have the twice the risk of PTSD as men." [73] "Anxiety is mentally draining, and can make it harder to remember and recall information, leading to memory issues. The more severe your anxiety, the more this occurs. Moreover, "Anxiety is a condition that not only affects you mentally - it affects you physically as well. When you have anxiety, you go through brain chemistry changes and hormone changes that could, in theory, change the brain and lead to issues with memory loss." [74] Additionally, "stress anxiety or depression can cause forgetfulness, confusion, difficulty concentrating and other problems that disrupt daily activities and memory." [75] The ALJ accepted the testimony of Mr. Vidler, Shahanna Owensby, and Adam Allegroe, as credible, notwithstanding that their testimony was not "worthy of belief", as their testimonies was replete with inconsistencies, contradictory statements, indicative of an "interest to protect", "not plausible", not "entitled to credit" and "not trustworthy," "not competent to give testimony in court" and is "factually baseless" as the Appellee's reasons "were pre-textual, which is supported by inconsistencies in their testimony," Thus "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Also, the ALJ in her "RO" Page 5,

[73] www.nytimes.com/health/guides/disease/post-traumatic-stress-disorder.
[74] www.calmclinic.com/anxiety/symptoms/memory-problems
[75] https://www.mayoclinic.org/diseases conditions/.../in.../memory-loss/art-20046326?pg..

stated “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.” However, the evidence does not support this, as “Mr. Millan, QR of the Appellant, asked Mr. Vidler. “Okay. And then after you saw her, what did you do?” Mr. Vidler, then testified under oath “So as I walked out of the door we turned left, and we were going down the aisle way. I noticed her sitting in the -- just looking out the window. So, it just seemed very odd apparent. Also 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. So, I walked over to her and I did ask her, ma'am, would you be purchasing something today.” (Page 46, and Page 47, D-TRX). ALJ McArthur, now admonishes the witness by saying, “Mr. Vidler, let me just interject. You were here and listened to counsel's opening statement, but that wasn't testimony that I can consider.” Mr. Vidler then stated “Okay.” Then, the ALJ McArthur stated, “So, don't assume that what he said – that you are building on what he said.” (evidence of bias, and in violation of Federal and State Judicial Cannons) Mr. Vidler then stated, “Yes, ma'am.” (Page 47, D-TRX), thus he did not wait a few minutes as alleged by the ALJ, in her “RO”. The ALJ in her “RO”, Paragraph 11, 12, 13, and 14 are contrary to the facts as Mr. Vidler testified “So as I walked out of the door we turned left, and we were going down the aisle way. I noticed her sitting in the -- just looking out the window. So, it just seemed very odd apparent. Also 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. So, I walked over to her and I did ask her, ma'am, would you be purchasing something today." (Page 46, and Page 47, D-TRX). ALJ in her "RO" paragraph 15 stated, "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. This however contradicts the testimony of Mr. Vidler who stated under oath, the "Appellant threw the chair" and "the chair ended up and over the wall." (Page 65, D-TRX). While Adam Allegroe testified "I wouldn't say she threw it up in the air." (Page 83, D-TRX). It is obvious that the ALJ's conduct is a mirror image of what Forensic science pioneer Luke May (1936), noted that "the eyes see in things only what they look for, and they look only for what is already in the mind. Often the most significant piece of evidence is overlooked or misinterpreted because someone has jumped to a premature conclusion." 3 (p. 59).[76] Moreover, the ALJ stated "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

[76] May, Luke (1936) *Crime's Nemesis.* Landisville, PA: Coachwhip Publications.

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 D-TRX) (Page 24 ALJ'S, "RO"), 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." The ALJ failed to acknowledge that direct examination is usually performed to elicit evidence in support of facts which will satisfy a required element of a party's claim or defense. In direct examination, one is generally prohibited from asking leading questions. This prevents a lawyer from feeding answers to a favorable witness. An exception to this rule occurs if one side has called a witness, but it is either understood, or becomes clear, that the witness is hostile to the questioner's side of the controversy. The techniques of direct examination are taught in courses on trial advocacy. "Each direct examination is integrated with the overall case strategy through either a theme and theory or, with more advanced strategies, a line of effort." [77] Moreover, since the Appellant was not labeled a 'hostile witness' there was no need to ask questions that might elicit evidence unfavorable that would not support the Appellant's claim, as the blame should be on the opposing counsel who failed to cross examine the witness, which is nothing short of ineffective counsel. Therefore, ALJ had displayed confirmation bias which "often leads to case building instead of fact gathering, where the

[77] *The Art of Cross-Examination* by Francis L. Wellman, The Macmillan Company.

investigator filters their perspective of the evidence in a case through the lens provided by a conclusion of guilt." [78] In summation, the ALJ's "belief is unwarranted, or unsubstantiated by evidence," [79] which was "detrimental to evidence based reasoning and efficient decision making," [80] as she did "reach a decision quickly,"[81] thereby demonstrating a "rigidity of thought and reluctance to consider view's other than her own." [82] However, it is the Appellant's belief that this Appellate Court "despite the problematic of human decision making and cognitive errors" [83] of the ALJ, will use "logical reasoning to override such psychological biases." [84]

## CONCLUSION

### THE ALJ'S FINDING OF FACTS WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

"Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or] . . . such relevant evidence as a reasonable mind would accept as adequate to support a

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[78] Nickerson, R.S (1998) Confirmation bias: A ubiquitous phenomenon in many guises. Review of General Psychology, Page 175
[79] Nickerson, R.S. (2004) Cognition and chance: The psychology of probabilistic reasoning. Mahwah, NJ: Erlbaum.
[80] Ruscio 2006
[81] Schrackmann and Oswald (2014)
[82] Schrackmann and Oswald (2014)
[83] Schrackmann and Oswald (2014)
[84] Snook & Cullen, 2005

conclusion, while substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." [85] "Substantial' requires that there be ... real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element ...."[86] Here, the testimonies of the Appellees' employees failed "to correspond with the representation of some other witness, or to comport with some facts otherwise known or established." Relevant evidence is evidence tending to prove or disprove a material fact. "To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) and must not be excluded for other countervailing reasons." [87] Competent evidence, "In employing the adjective 'competent' to modify the word 'substantial,' "that the evidence relied upon to sustain the

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[85] *De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1991)*
[86] Concurring opinion of Judge Cowart in *Dunn v. State* 454 So.2d 641, 649 n.11 9fla. 5th DCA 1984)
[87] 90.401 F.S. and *Sims v. Brown*, 574 So.2d 131, 134 (Fla. 1991)

ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be 'competent."[88] "Competent substantial evidence must be reliable". [89] Hence, 'reliable evidence must be "trustworthy", "worthy of confidence," "worthy of belief", and "entitled to credit." Thus, the Appellee is not someone "who is trustworthy and entitled to be believed in law and legal proceedings", or "who is entitled to have his/her oath or affidavit accepted as reliable", because of the disreputable testimony and lack of veracity,  and no "disinterested relation" "to the matter in question." As the Appellees "have such an interest in the question at issue as to affect their credibility", and is "of itself sufficient to take from the court the right to dispose of the case upon their evidence." Therefore, the ALJ's findings of facts are not supported by competent substantial evidence as her conclusion was based "on solely unreliable evidence," Notwithstanding, that "the law ought not to fail in dispensing justice to those with a grievance," (*Lex non debet conquerentibus in*

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[88] *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957) (citations omitted) as cited by *Verizon Florida, Inc. v. Jaber*, 889 So.2d. 712, 721, fn.1 (Fla. 2004)
[89] *Florida Rate Conference v. Florida R. R. & Pub. Utilities Comm'n*, 108 So.2d 601, 607 (Fla. 1959) ("Although the terms 'substantial evidence' or "competent substantial evidence' have been variously defined, past judicial "interpretation indicates that an order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient"

*justitia exhibenda"*) Wherefore, pursuant to Florida Statute 120.68, Appellant is seeking that the court "set aside the final order of the administrative law judge or remand the case to the administrative law judge, if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding," and order the prescribed awarding of damages under Section 102 of the Civil Rights Act of 1991 which makes compensatory and punitive damages available for intentional violations of 1993] [90]Civil Rights Act of 1991 for humiliation, mental distress, and harm to plaintiff's reputation, thus Appellant is entitled to 100,000 in compensatory damages and and100,000 in punitive damages as Bam B. Enterprises d/b/a McDonald's owns 6 (six) McDonald's franchises and employs more than 101 employees but fewer than 201 employees and reasonable attorney fees.

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[90] Section 102 of the Civil Rights Act of 1991 makes compensatory, and punitive damages available and attorney's fees for intentional violations of Title VII, Disparate treatment claim, non-governmental employer, no mixed motives, all forms of equitable relief.

## CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this 2nd AMENDED INITIAL BRIEF of Appellant is submitted in Times New Roman, 14-point font, and complies with the font requirements of Rule 9.210(a), Fla. R. App. P.

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