

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM KLEINSCHMIDT,)
)
 Petitioner,)
)
 vs.) Case No. 04-3873
)
 THREE HORIZONS NORTH)
 CONDOMINIUMS, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on March 31, 2005, in Miami, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: William Kleinschmidt, pro se
1470 Northeast 125th Terrace
Apartment 206
North Miami, Florida 33161

For Respondent: Krista A. Fowler, Esquire
Cole, Scott & Kissane, P.A.
1390 Brickell Avenue, Third Floor
Miami, Florida 33131

STATEMENT OF THE ISSUES

Whether Petitioner is handicapped within the meaning of the Florida Fair Housing Act (Sections 760.20 - 760.37, Florida Statutes) or the Federal Fair Housing Act (42 USCA § 3601 et

seq.).¹ Whether Respondent discriminated against Petitioner in violation of either Act by refusing to waive its no pets policy, which would require Petitioner to remove his "emotional support animals" (two cats) from his condominium unit. Whether Respondent retaliated against Petitioner for his refusal to remove his cats from his condominium unit.

PRELIMINARY STATEMENT

On April 15, 2004, Petitioner filed a complaint of housing discrimination against Respondent with the United States Department of Housing and Urban Development (HUD). The HUD complaint alleged that Petitioner is handicapped within the meaning of the Florida Act and the Federal Act, that his two cats are "emotional support animals" that are necessary to ameliorate his handicapping conditions, and that Respondent failed to make a reasonable accommodation of his handicapping conditions by refusing to waive its no pets policy. HUD referred Petitioner's complaint to the Florida Commission on Human Relations (FCHR), which assigned staff to investigate and evaluate Petitioner's complaint. On September 28, 2004, FCHR issued a document styled "Determination Of No Reasonable Cause" which concluded that reasonable cause does not exist to believe that a discriminatory housing practice had occurred.

Petitioner thereafter filed a "Petition for Relief" with FCHR that was subsequently referred to DOAH and underpins this

proceeding. In addition to the charge of discrimination premised on Respondent's alleged failure to reasonably accommodate his handicapped conditions, Petitioner charged that Respondent retaliated against him on two occasions because he refused to remove his two cats from his unit as ordered by Respondent.

At the final hearing, Petitioner presented the testimony of Ruth Pearson, who is an officer and director of the corporate Respondent. In addition, Petitioner offered 28 sequentially numbered exhibits, but only the following numbered Petitioner Exhibits were admitted into evidence: 1, 6, 8, 9, 11, 12, 14, 17, 18, 19, 21, 25, 26, 27, and 28. Petitioner's Exhibit 26, a composite, is the deposition of Petitioner's physician. Petitioner's Exhibit 27 is the deposition of Petitioner. Respondent presented the testimony of Petitioner's neighbor and offered two exhibits, both of which were admitted into evidence.

A transcript of the proceedings was filed April 20, 2005. The parties filed Proposed Recommended Orders which have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Petitioner owned and resided in Unit 206 of the condominium building

managed by Respondent. Petitioner is a male, born February 5, 1951.

2. Respondent is the Board of Directors of the condominium building in which Petitioner resides. At all times relevant to this proceeding, Respondent had the following written policy (the no pets policy), which it routinely enforced²:

12. No Unit [sic] owner or lessee shall acquire a pet to be maintained in his or her unit, or shall such persons already possessing pets replace them when such pets die or are otherwise disposed of. No unit owner or lessee shall keep visiting pets in their unit.

3. Petitioner bought Unit 206 in January 1999 and has since then lived alone in that unit with two cats. These cats have received no special training and have no special attributes. These cats were born to a cat that Petitioner and his late mother kept as a pet. Since his mother's death in 1996, Petitioner has viewed these cats as his surrogate family.

4. Respondent and Petitioner have engaged in a dispute regarding Petitioner's alleged violation of its no pets policy that began in 1999 and is on-going. This dispute has involved multiple forums, with the current proceeding being the latest development.

5. Respondent has received complaints from other residents of the condominium building that an unpleasant odor comes from

Petitioner's unit and that fleas have been found in the vicinity of his unit.

6. On December 23, 2003, Dr. Seth Gottlieb, Petitioner's physician, wrote the following: "To: Whom It May Concern:"

William Kleinschmidt is a patient of mine. Mr. Kleinschmidt has a long-time severe physical disability and it is medically necessary that he his [sic] emotional support companion animals - his cats, to control the frequency and severity of his physical disability.

7. By letter to Respondent's president dated January 10, 2004, Petitioner asserted the following:

While I realize that the Board and I disagree as to the interpretation of the condominium rules regarding pets, as my interpretation is based on the plain reading of the language within the common meaning of the said words, is that if a potential unit owner already has pets, they are acceptable and that no replacement pets will be brought in after the purchase.

I may add that as a pre-condition to purchase of my unit, the board DID [sic] agree to my companion animals for my physical disability - the witnesses are both the buyer and the seller real estate brokers and others.

I am requesting a special waiver of the pet rules as the board currently views them be made in my situation due to my disability.

Please find attached a letter from my physician Seth Gottlieb, M.D., certifying that my companion animals are "medically necessary" for my disability.

Please advise me in writing whether or not we have a special waiver as a reasonable accommodation.

8. Although Respondent had been trying to force Petitioner to remove his cats from his unit since 1999, the letter of January 10, 2004, was the first time that Petitioner asserted that he was disabled and it was the first time he requested a waiver of the no pets policy to accommodate his disability. Prior to that letter, Respondent did not know and had no reason to know that Petitioner believed himself to be disabled.

9. On April 19, 2004, Dr. Gottlieb wrote the following:

"To: Whom It May Concern:"

William Kleinschmidt is my patient, who has a significant emotional disability, as well as a long history of significant asthma. His asthma unfortunately has not been currently under good control. William clearly has a significant emotional component to his asthma, that is, his asthma is easily exacerbated by emotional triggers.

William has companion animals which greatly help his emotional status. If he is not able to keep these companion animals there is a great likelihood that the emotional distress this will bring will significantly worsen his asthma. Therefore, it is medically necessary for William to have these emotional support animals to control the severity and frequency of his asthmatic disability.

10. Dr. Gottlieb has no special training in psychiatry or psychology, and he did not treat or diagnose Petitioner's anxiety. Dr. Gottlieb recommended to Petitioner that Petitioner seek professional help from a clinical psychologist or a psychiatrist. Petitioner refused to follow that recommendation.

11. Petitioner has multiple allergens, one of which is cat dander. Dr. Gottlieb recommended to Petitioner that Petitioner seek professional help from an allergist. Petitioner refused to follow that recommendation.

12. Dr. Gottlieb's letters of December 23, 2003, and April 19, 2004, were written at Petitioner's request and were based on statements made to him by Petitioner and on his observations of Petitioner. Dr. Gottlieb testified that he had never known Petitioner to be without his cats and he had no way of knowing what the consequences would be if Petitioner was unable to keep his cats. Dr. Gottlieb's testimony does not establish that it is medically necessary for Respondent to waive its no pets policy as a reasonable accommodation of Petitioner's handicapping conditions.

13. Petitioner is a person with a handicap within the meaning of the Acts.³ At all times relevant to this proceeding, Petitioner has suffered from persistent asthma and emotional problems. There was no expert testimony as to the nature and extent of Petitioner's emotional problems, but it is clear from the evidence that his emotional problems are debilitating. Petitioner is receiving no treatment for his emotional problems. Petitioner is receiving treatment from Dr. Gottlieb for his asthma. His asthma responds to medication prescribed by Dr. Gottlieb, but his asthma is not controlled by that

medication and he suffers periodic asthma attacks of undetermined frequency and severity.

14. Petitioner failed to establish that his two untrained cats are necessary for him to have equal opportunity to use and enjoy his dwelling within the meaning of either of the Acts. Petitioner's cats are pets and while they undoubtedly provide emotional support as any pet should, they are not service animals⁴ and they have no special training that would enable them to assist Petitioner to overcome limitations imposed by his handicaps. Whether Petitioner's cats help him avoid anxiety attacks, which could, in turn, trigger an asthma attack, is speculative.

15. Petitioner asserts that two incidents prove that Respondent harassed him and retaliated against him because of his refusal to remove his cats from his unit. The first incident occurred in 2001 while Respondent was attempting to serve Petitioner with a subpoena during an arbitration proceeding. Because Respondent had difficulty serving a subpoena on Petitioner, Respondent had the arbitrator issue an order authorizing Respondent to have a locksmith open the door to Petitioner's unit so the subpoena could be left in the unit. On September 21, 2001, Respondent hired a locksmith who unlocked the front door to Petitioner's unit by drilling the lock on the door. A representative of Respondent thereafter entered

Petitioner's unit and left the subpoena for Petitioner inside the unit. An armed police officer was present when the door was opened and when Respondent's representative entered the unit, left the subpoena, and exited the unit. These events occurred before Respondent had any reason to believe that Petitioner considered himself disabled or that he considered his cats to be emotional support animals. Respondent established that it was acting on advice of counsel and pursuant to the arbitrator's order on September 21, 2001. Petitioner failed to establish that the events of September 21, 2001, were done to harass him or retaliate against him for asserting his rights under either Act.

16. The second incident occurred in October 2003, when Respondent failed to give Petitioner proper credit for a maintenance assessment Petitioner had made. As a result of the error, Respondent wrote Petitioner a dun letter which reminded Petitioner that the failure to pay maintenance assessments could result in the imposition of a lien against his unit. Respondent failed to properly credit Petitioner's payment as the result of a bookkeeping error. Respondent corrected the error as soon as Respondent's bookkeeper discovered it. Soon thereafter, Respondent provided a written explanation of the error to Petitioner and apologized to him for the error. Petitioner failed to establish that the events of October 23, 2003, were

done to harass him or retaliate against him for asserting his rights under either Act.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

18. Petitioner has the burden of proving that Respondent violated either Act by failing to waive its no pets policy as a reasonable accommodation of his handicap. See Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Petitioner failed to meet that burden.

19. 42 U.S.C.A. Section 3602(h) provides, in pertinent part, the following definition of the term "handicap" for purposes of the Federal Act:

- (h) "Handicap" means, with respect to a person --
 - (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
 - (2) a record of having such an impairment, or
 - (3) being regarded as having such an impairment ...

20. The Florida Act has a similar definition. Section 760.22(7)(a), Florida Statutes, provides as follows:

(7) "Handicap" means:

(a) A person [who] has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment . . .

21. 42 U.S.C.A. Section 3604(f)(3)(B), provides that the following constitutes housing discrimination within the meaning of the Federal Act:

(f)(3)(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . . .

22. The Florida Act has a similar provision. Section 760.23(9)(b), Florida Statutes, provides as follows:

(9(b) A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

23. To prevail in this proceeding under either Act, Petitioner would have to prove that he is handicapped within the meaning of that Act, that his requested accommodation is necessary to afford him the equal opportunity to use and enjoy his unit, and that his requested accommodation is reasonable.

24. Petitioner proved that he is handicapped within the meaning of both Acts.

25. Petitioner failed to prove that his requested accommodation is necessary to afford him the equal opportunity to use and enjoy his unit within the meaning of either Act. There was no direct linkage between being able to keep his cats and being able to use and enjoy his unit. Any such linkage was, at best, speculative. Compare Bryant Woods Inn, Inc. v. Howard County, Md., 124 F.3d 597 (4th Cir. 1997). Because Petitioner refused to seek evaluation and treatment from a psychologist or a psychiatrist, there was no expert testimony as to what would occur if Petitioner had to remove his cats from his unit.⁵

26. Because Petitioner failed to prove that his requested accommodation is necessary, he was unable to prove that the requested accommodation was reasonable under either Act.

27. Petitioner's claims of retaliation are without merit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 25th day of, May 2005, in
Tallahassee, Leon County, Florida.

S

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of May, 2005.

ENDNOTES

^{1/} All references to Florida Statutes are to Florida Statutes (2004). All references to U.S.C.A. are to the version published as of the date of this Recommended Order. For ease of reference, the Florida Fair Housing Act will be referred to as the Florida Act and the Federal Fair Housing Act will be referred to as the Federal Act. Collectively, they will be referred to as the Acts.

^{2/} At the formal hearing, Petitioner argued that Respondent waived its no pets policy prior to his closing on his unit. In support of his waiver argument, Petitioner introduced a tape of a message left on his telephone answering machine by his real estate salesperson. The message was, at best, misleading. The greater weight of the credible evidence established that Petitioner knew of Respondent's no pets policy prior to the closing on his unit, but he did not tell Respondent that he had two cats. Respondent did not know about Petitioner's cats prior to closing, and it did not waive its no pets policy. Petitioner's waiver argument is rejected as being contrary to the greater weight of the credible evidence. In addition to his waiver argument, Petitioner argued that the no pets policy was not enforceable against him based on his construction of the

policy. Petitioner's arguments based on his construction of Respondent's no pets policy are rejected as being without merit.

^{3/} In reaching this finding, the undersigned has considered that Petitioner has been able to perform the activities of daily living without assistance when he was not in the throes of an asthma attack, but that his ability to do so has been impaired, primarily by his untreated emotional disorder. The undersigned has also considered that he has been unable to work for the past 25 years and he has been accepted as being disabled by both the Social Security Administration and Medicaid.

^{4/} The term "service animal" is not defined by the Federal Act or its accompanying regulations. As used herein, the term is meant to include an animal individually trained to do work or perform tasks for the benefit of an individual with a disability. This definition, taken from Section 2 of the Americans with Disabilities Act, 42 U.S.C.A. Section 1210, et seq., was relied upon by the court in Prindable v. Assoc of Apt. Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245 (D. Hawaii 2003), a case with facts analogous to the pending matter.

^{5/} For the same reason, there was no expert testimony as to whether there are better ways for Petitioner to control his anxiety than relying on his two cats.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Krista A. Fowler, Esquire
Cole, Scott & Kissane, P.A.
1390 Brickell Avenue
Miami, Florida 33131

William Kleinschmidt
1470 Northeast 125th Terrace, Apartment 206
North Miami, Florida 33161

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

WILLIAM KLEINSCHMIDT,

HUD Case No. 04-04-0737-8

Petitioner,

FCHR Case No. 24-90885H

v.

AT

DOAH Case No. 04-3873 ^{CA} closed

THREE HORIZONS NORTH
CONDOMINIUMS, INC.,

FCHR Order No. 05-097

Respondent.

2005 AUG 24 1:41
ADMINISTRATIVE HEARINGS
DIVISION

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM A DISCRIMINATORY HOUSING PRACTICE**

Preliminary Matters

Petitioner William Kleinschmidt filed a housing discrimination complaint pursuant to the Fair Housing Act, Sections 760.20 - 760.37, Florida Statutes (2003), alleging that Respondent Three Horizons North Condominiums, Inc., committed discriminatory housing practices on the basis of Petitioner's disability (asthma) by refusing to waive its "no pets" policy, which would require Petitioner to remove his "emotional support animals" (two cats) from his condominium unit, and by retaliating against Petitioner for his refusal to remove his cats from his condominium unit.

The allegations set forth in the complaint were investigated, and, on September 28, 2004, the Executive Director issued a determination finding that there was no reasonable cause to believe that a discriminatory housing practice had occurred.

Petitioner filed a Petition for Relief from a Discriminatory Housing Practice and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held in Miami, Florida, on March 31, 2005, before Administrative Law Judge Claude B. Arrington.

Judge Arrington issued a Recommended Order of dismissal, dated May 25, 2005.

Pursuant to notice, public deliberations were held on August 18, 2005, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Petition for Relief.

Preliminary Motions

Petitioner filed a motion received by the Commission on August 11, 2005, requesting that the August 18, 2005, Commission deliberation be continued until the resolution of allegations of retaliation, and requesting permission to tape record the deliberation hearing in lieu of a court reporter. Petitioner also filed a motion received by the Commission on August 17, 2005, entitled, "Emergency Motion to Include (if not already included) All Retaliatory Charges [in the] Commission Deliberations."

Upon oral argument of the parties, both of Petitioner's motions are denied.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner Exceptions and Exhibits to Division of Administrative Hearings ("DOAH") Recommended Order." The document consists of 3 volumes, one containing 37 pages of exceptions, plus exhibits, and two containing exhibits.

The exceptions on pages 1 through 4, pages 8 through 9, and page 14 argue that Petitioner's cats could serve as emotional support animals. While the Administrative Law Judge concluded that Petitioner's cats were not "service animals" (Recommended Order, ¶ 14), the Administrative Law Judge did not conclude that animals that were not "service animals" could not be a reasonable accommodation to a person with a handicapping condition. See, generally, Gabor v. Bay Country Club Condominium Association, Inc., FCHR Order No. 01-022 (May 22, 2001), (in which a Commission panel remanded a case to an Administrative Law Judge for analysis of whether given the circumstances of that case a pet dog substantially helped Petitioners' daughter adjust to the difficulties of living with insulin-dependent diabetes, and a determination of whether Petitioners' request to keep the dog met the requirements of showing that the desired accommodation would affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability.) Rather, in the instant case, the Administrative

Law Judge found that “[w]hether Petitioner’s cats help him avoid anxiety attacks, which could, in turn trigger an asthma attack, is speculative.” Recommended Order, ¶ 14.

The exceptions on pages 5 through 7 discuss the issue of knowledge of a Petitioner’s disability by a Respondent, and argue that Respondent was required to provide Petitioner a reasonable accommodation. The Administrative Law Judge did not conclude that Respondent did not have to provide a reasonable accommodation to disabled residents, but rather concluded that, “Petitioner failed to prove that his requested accommodation is necessary to afford him the equal opportunity to use and enjoy his unit...” (Recommended Order, ¶ 25), and that “[b]ecause Petitioner failed to prove that his requested accommodation is necessary, he was unable to prove that the requested accommodation was reasonable...” (Recommended Order, ¶ 26).

Collectively, the exceptions found on pages 9 through 13, pages 15 through 17, and pages 19 through 37, take exception to the facts found, facts not found, and inferences drawn from the evidence presented. The Commission has stated, “It is well settled that it is the Administrative Law Judge’s function ‘to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge’s role to decide between them.’ Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986).” Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999). Accord, Gatewood v. Department of Children and Family Services, FCHR Order No. 05-069 (June 15, 2005).

The exceptions found on page 18 argue that Petitioner was prejudiced by the substitution of a new Administrative Law Judge to conduct the hearing on the merits. The Administrative Procedure Act gives the Division of Administrative Hearings the authority to assign a new Administrative Law Judge to a case, stating, “If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.” Section 120.57(1)(a), Florida Statutes (2005).

Based on the foregoing, Petitioner’s exceptions are rejected.

Dismissal

The Petition for Relief and Housing Discrimination Complaint are DISMISSED with prejudice.

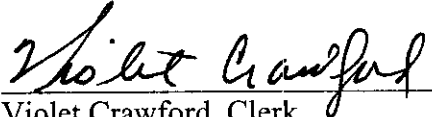
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right

to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 23rd day of August, 2005.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rita Craig,
Panel Chairperson;
Commissioner Keith Roberts; and
Commissioner Aletta Shutes

Filed this 23rd day of August, 2005,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301

Copies furnished to:

William Kleinschmidt
1470 Northeast 125th Terrace
Apartment 206
North Miami, FL 33161

Three Horizons North Condominiums, Inc.
c/o Krista A. Fowler, Esq.
Cole, Scott & Kissane, P.A.
1390 Brickell Avenue, Third Floor
Miami, FL 33131

Claude B. Arrington, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 23rd day of August, 2005.

By: *Violet Crawford*
Clerk of the Commission
Florida Commission on Human Relations