STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GERALD CASTELLANOS AND DONNA CASTELLANOS,

Petitioners,

vs.

SB PARTNERS REAL ESTATE CORPORATION AND SENTINEL REAL ESTATE, INC.,

Respondents.

Case No. 01-1113

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on June 13 and July 19, 2001, in Tampa, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Gerald R. Castellanos, pro se
1150 Dartford Drive
Tarpon Springs, Florida 34688

For Respondents: John W. Bencivenga, Esquire
Thompson, Sizemore & Gonzalez
109 North Brush Street
Suite 200
Tampa, Florida 33601

STATEMENT OF THE ISSUES

The issues presented for decision are whether Respondents discriminated against Petitioner Gerald Castellanos[1] because of

his disability in violation of the Fair Housing Act, and whether Respondents retaliated against Petitioner by evicting him from his apartment in response to his filing a discriminatory housing complaint with the United States Department of Housing and Urban Development.

PRELIMINARY STATEMENT

On January 10, 2000, Petitioner filed an Amended Housing Discrimination Complaint (the "Complaint") against Respondents, alleging that he was mentally disabled within the meaning of the Fair Housing Act, Sections 804 and 818 of Title VIII of the Civil Rights Act of 1968, as amended (codified at 42 U.S.C. Sections 3604 and 3617). The Complaint alleged that Respondents had been unwilling to accommodate Petitioner's disabling condition, and made a generic allegation that Petitioner's eviction was in "retaliation." The Complaint was originally filed with the Federal Department of Housing and Urban Development pursuant to 42 U.S.C. Subsection 3610(a)(1)(A), and referred to the Florida Commission on Human Relations (the "Commission") pursuant to 42 U.S.C. Subsection 3610(f).

The Commission conducted an investigation of the Complaint. By letter dated August 21, 2000, the Commission notified Petitioner of its determination that reasonable cause did not exist to believe that a discriminatory housing practice had occurred, and that the Complaint would be dismissed. The

Commission's letter provided notice of Petitioner's right to pursue judicial and administrative remedies.

Petitioner timely filed his Petition for Relief with the Commission. On October 6, 2000, the Commission referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal administrative hearing. The matter was assigned DOAH Case No. 00-4159 and scheduled for hearing on December 6, 2000. On November 6, 2000, Petitioner filed a request that the matter be delayed pending his production of additional information to the Commission. By Order dated November 9, 2000, the file in DOAH Case No. 00-4159 was closed without prejudice to the parties' ability to reopen the matter if it could not be informally resolved.

On February 27, 2001, Petitioner filed a request for formal hearing, stating that it appeared that a formal proceeding would be the only way to resolve the issues presented. The instant case file was opened, and the matter scheduled for hearing on May 22, 2001. The matter was continued to June 13, 2001, on which date the hearing commenced. The hearing was concluded on July 19, 2001.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of Detective Daryl Waterman and Deputy Chuck Gilmore of the Pinellas County Sheriff's

Office; Fred Fallis, an employee of Time Warner Communications; Jamy Magro, Petitioner's former attorney; Gerald Castellanos, Jr., Petitioner's son; Donna Castellanos, Petitioner's wife; and Lisa Dunton, the property manager of Egret's Landing apartments at the times relevant to this proceeding. Petitioner also introduced the deposition testimony of John and Kay Bingham, owners of the moving company that physically removed Petitioner's property from the apartment upon his eviction. Petitioner's Exhibits 1 through 9 were admitted into evidence. Respondents presented the testimony of Stacey Stottlemyre, assistant property manager at Egret's Landing at the times relevant to this proceeding. Respondents' Exhibits 1 through 15 were admitted into evidence.

No transcript of the final hearing was ordered. At the close of the hearing, the parties agreed that their Proposed Recommended Orders would be filed no later than August 20, 2001. Respondents filed a Proposed Recommended Order on the agreed date. Without objection, Petitioner filed a Proposed Recommended Order on August 21, 2001.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following findings of fact are made:

1. The Commission is the state agency charged with investigating complaints of discriminatory housing practices and enforcing Florida's Fair Housing Act, Sections 760.20 through 760.37, Florida Statutes. The Commission is charged with investigating fair housing complaints filed with the Commission and with the federal Department of Housing and Urban Development ("HUD") under the federal Fair Housing Act, 42 U.S.C. Section 3601 et seq.

2. Petitioner, Gerald Castellanos, was a resident at the Egret's Landing apartments in Palm Harbor from October 1997 until April 1999. He lived there with his wife, Donna, and his son, Gerald Castellanos, Jr. Gerald and Donna Castellanos executed an apartment lease for the term September 1, 1998 through August 31, 1999, that set forth the conditions of their tenancy for the period in controversy.

3. The Respondent in interest is Sentinel Real Estate, Inc. ("Sentinel"), an entity that manages real estate investments for Sentinel Real Estate Fund, a group trust comprising a number of investor pension funds. The nominal property owner of Egret's Landing is Sentinel Real Estate Fund.

4. Petitioner alleged that he suffered from a mental disability that impeded his ability to pay his monthly rent in a timely manner. Petitioner alleged that Sentinel refused to accommodate this disability, and evicted his family from Egret's

Landing in retaliation for his filing a fair housing complaint with HUD.

5. The evidence admitted at the hearing established that at the time of his eviction, Petitioner was under the care of a psychologist for a depressive mood disorder. Petitioner was taking at least four different prescription drugs for his condition.

6. Petitioner offered no medical evidence or testimony to establish the manner in which his disorder impaired or limited his major life activities, or the degree to which his condition was disabling. Petitioner testified that he functions "pretty well" when he takes his medication, though he experiences some problems with short-term memory.

7. Petitioner conceded that he did not directly ask Sentinel to provide an accommodation for his disability. Petitioner's case rested on the theory that the course of dealing between Sentinel and him should have placed Sentinel on notice that he was suffering from a mental disability and caused Sentinel to accede to his request that he be allowed to pay his rent late on a regular basis.

8. On or about December 12, 1998, Petitioner paid his overdue rent to Lisa Dunton, the manager of Egret's Landing. In a handwritten note accompanying his rent check, Petitioner stated that he had been in the hospital and "under heavy

medication" recently. He also wrote: "Apparently, the sleep deprivation caused over the last year, due to you know what, activated a serious chemical imbalance in my brain and in fact even to my cells throughout my body." The note went on to discuss the large amount of money Petitioner was paying and would continue to pay for medications, "with no end in sight."

9. Petitioner testified as to prior conversations with Ms. Dunton about his mental condition. He stated that he offered to put her in touch with his psychologists to verify his statements about his condition. He implied that the "due to you know what" statement in his note referred to these earlier conversations with Ms. Dunton about his mental condition.

10. Ms. Dunton recalled no such conversations. She assumed that "sleep deprivation . . . due to you know what" in the note referred to noisy neighbors that Petitioner had been complaining about for a period of months. Petitioner admitted under cross-examination that "you know what" referred to the noisy neighbors. Ms. Dunton had no recollection of Petitioner or his wife ever asking for an accommodation related to his disability.

11. Lisa Stottlemyre, the assistant manager at Egret's Landing, recalled no conversations with Petitioner regarding his mental disability. She recalled no accommodation request from Petitioner or his wife.

12. Petitioner's wife, Donna Castellanos, never told anyone about her husband's disability and never requested that Sentinel make any accommodation for her husband's condition.

13. In light of the testimony from other witnesses, Ms. Dunton's testimony is credited. It is found that Petitioner did not discuss his mental condition with Ms. Dunton, aside from whatever mental distress was caused by the noisy neighbors. To satisfy Petitioner, who was the only resident complaining about noise, Ms. Dunton moved the neighbors to a different apartment in the same complex.

14. Petitioner testified that he was reticent about discussing his condition because of the stigma associated with having a mental disability. While continuing to maintain that he had discussed his condition with Ms. Dunton, Petitioner admitted that he did not directly request any accommodation related to his disability. Petitioner argued, paradoxically, that his reticence to discuss his condition placed a higher burden of sensitivity on the employees of Sentinel to divine his mental state without assistance.

15. Petitioner requested that Sentinel allow him to pay his rent late on a regular basis, but presented this request in terms of cash flow difficulties, unrelated to his disability. Sentinel presented uncontested evidence that it does not allow tenants to pay rent late on a regular basis, and that any

exceptions to this policy cannot be authorized by on-site employees such as Ms. Dunton and Ms. Stottlemyre, but require the approval of a district or regional manager. As indicated below, Sentinel was in practice more forbearing of Petitioner's repeated late rent payments than was required by the terms of the lease.

16. Both Ms. Dunton and Ms. Stottlemyre testified that if a person with a handicap asks for a reasonable accommodation, Sentinel will work with the person and do the best they can to assist the person. Both Ms. Dunton and Ms. Stottlemyre, as agents for Sentinel, they have reasonably accommodated individuals with disabilities and/or handicaps in accordance with the Fair Housing Act.

17. The rental agreement provided that rent of $960.00, plus pet and garage charges, was due without demand on the first day of each month, with no grace period. If the rent was not paid on or before the third day of the month, $25.00 would be added to the rent.

18. Petitioner was chronically late in paying his rent. Sentinel sent a "Three Day Notice to Pay Rent or Give Possession" to Petitioner on six separate occasions: September 8, 1998; December 8, 1998; December 28, 1998; February 12, 1999; February 17, 1999; and March 5, 1999. The evidence established that at least one of these late payment

situations was due to a bank error rather than any fault of Petitioner, and that Sentinel initially displayed patience and a willingness to work out problems with Petitioner.

19. Petitioner's rent for March 1999 was not paid as of March 16, 1999. Petitioner told Ms. Stottlemyre that the money had been sent to the wrong account, and that the rent would be paid the next day. Three days later, March 19, the rent still had not been paid. When Ms. Stottlemyre inquired about the rent, Petitioner directed her to an attorney who he said would handle payment of the rent. On March 23, Ms. Stottlemyre contacted the attorney, who was unaware of any such arrangement. Ms. Stottlemyre spoke again with Petitioner, who said that he would no longer speak with her about the matter.
Ms. Stottlemyre consulted her supervisor, Ms. Dunton, who advised her to forward the matter to Sentinel's local attorney.

20. On March 24, 1999, Sentinel commenced eviction proceedings against Petitioner by filing a complaint in the county court for Pinellas County. Petitioner filed an answer with the court on April 2, 1999. The answer averred, "It is my perception that a certain animus exists against Defendant, because of his race." Petitioner is of Hispanic descent. The answer also stated: "The Department of Housing and Urban Development will be contacted, regarding the total lack of insensitivity [sic], training (diversity) and lack of

supervision of [Sentinel's] agents." The answer made no mention of Petitioner's alleged mental disability.

21. The final hearing in the eviction proceeding was held on April 19, 1999. On that date, the court entered a final judgment giving Sentinel possession of the apartment and ordering Petitioner and his family to vacate the premises. Pursuant to the judgment, a writ of possession was issued on April 22, 1999, directing the sheriff to remove all persons from the property and place Sentinel in full possession of the property.

22. Subsequent to April 19, 1999, Petitioner took no steps to vacate the premises, despite advice from Jamy Magro, his counsel in the eviction proceeding, that the eviction was final and he should make arrangements to change his residence. On April 23, 1999, Detective Daryl Waterman of the Pinellas County Sheriff's Office posted a writ of possession notice on the door or window of the apartment, informing Petitioner that he had 24 hours to vacate the premises. Petitioner apparently removed the notice, because Mrs. Castellanos knew nothing about the result of the April 19 eviction proceeding until April 27, when the physical eviction took place.

23. On the morning of April 27, 1999, Detective Waterman and Deputy Chuck Gilmore arrived to secure the premises for Sentinel. They were dismayed to discover that Petitioner was

still in the apartment and had taken no steps to move out his belongings. They contacted Ms. Dunton, who was at a doctor's appointment, and waited for her to arrive before taking any further steps.

24. Ms. Dunton testified that this situation was unique in her experience. She stated that when residents are evicted, they generally take their belongings and leave the premises.

25. Petitioner recalled that Ms. Dunton arrived at his apartment at around 10 a.m., that he spoke with her, that they agreed to "let the lawyers handle it," and that nothing would be done immediately to move Petitioner's property out of the apartment. Petitioner testified that he told Ms. Dunton that he was in no condition to deal with the matter at that time.

26. Ms. Dunton had no recollection of a morning conversation with Petitioner. She recalled arriving at Egret's Landing and calling her district manager and Sentinel's local legal counsel for advice on how to proceed. Both of these people advised her to have Petitioner's property removed from the apartment and placed outside the boundary of Egret's Landing's property. Ms. Dunton did not wish to do this to Petitioner, and called Sentinel's general counsel in New York, who told her to follow the advice she was getting locally.

27. Ms. Dunton commenced calling moving companies to get bids on moving Petitioner's belongings off the property. At

some time early in the afternoon, she gave the job to John Bingham, owner of A-1 Movers in Palm Harbor.

28. Ms. Dunton phoned Petitioner at his cellular number and informed him that the movers would be putting his possessions on the exterior of the Egret's Landing property. Petitioner replied that he was in St. Petersburg and would not be able to come for his property. He told Ms. Dunton that HUD would make Sentinel "replace everything."

29. Ms. Dunton assumed the reference to HUD related to Petitioner's earlier allegation of a "certain animus" against Petitioner because of his race. She placed no great importance on the statement, aside from a degree of resentment at the allegation because she is also Hispanic.

30. To minimize the cost of the move, which would ultimately be billed to Petitioner, Ms. Dunton assigned her maintenance supervisor to pack small items in boxes while Mr. Bingham took care of loading larger items into his truck.

31. Late on the afternoon of April 27, Mr. Bingham deposited the contents of Petitioner's former apartment on the curb outside the back entrance of Egret's Landing. It is undisputed that passersby stole most of those contents. Petitioner's insurance ultimately reimbursed him for the loss, which the insurance company classified as "theft." Petitioner alleged that this "theft" classification established that

Sentinel stole his property, but did not support this allegation with evidence.

32. Petitioner alleged that Ms. Dunton was involved in the theft of jewelry and other valuables during the move. Petitioner testified that he managed to recover items that Ms. Dunton had stored in the garage of the apartment, but that these were of little value, and he theorized that Ms. Dunton or her employees had stolen the valuable items while packing the apartment. Ms. Dunton credibly testified that Petitioner found items in the garage because the garage door was closed at the time of the move and she did not know the items were there. Ms. Dunton did not personally participate in the packing or moving of Petitioner's belongings.

33. Petitioner also made much of Mr. Bingham's deposition testimony that it appeared people were waiting outside the Egret's Landing boundary when he unloaded Petitioner's belongings. Petitioner claimed that this testimony established that Ms. Dunton or someone else working for Sentinel had accomplices who had been tipped off that his valuables would be there for the taking when Mr. Bingham unloaded them. Petitioner's theory is completely at odds with the evidence. Sentinel gave Petitioner more time than the law required to remove his belongings from the apartment. Even on the day of the physical eviction, Ms. Dunton phoned Petitioner and warned

him about what was happening. Petitioner did nothing, save make his cryptic warning about HUD.

34. Petitioner alleged that the manner of his eviction was in retaliation for his having filed a housing discrimination claim with HUD. There was no evidence that such a claim was filed prior to the entry of the eviction judgment on April 19, or that anyone working at Egret's Landing was aware of such a claim as of April 27, the date of the physical eviction. The only record evidence concerning a HUD complaint was a copy of an envelope addressed to HUD by Petitioner, postmarked April 20, 1999, the day after the eviction judgment. Petitioner's attorney during the eviction proceeding, Mr. Magro, had no independent knowledge of filing a HUD complaint, and only recalled faxing copies of the postmarked envelope to Sentinel's local counsel two days after entry of the judgment. Petitioner failed to produce the actual HUD complaint, which in any event would have had no bearing on Sentinel's decision to evict Petitioner, because the eviction proceeding was commenced on March 24, 1999.

35. As noted above, Mrs. Castellanos was unaware of the result of the eviction proceeding when she went to work on the morning of April 27. At 2:30 p.m., she received a phone call from her son, who had come home from school and been unable to get into the apartment because the locks had been changed.

Shortly thereafter, she received a phone call from Petitioner, who asked her to meet him and their son at a restaurant after work. They met at the restaurant, then went to a Quality Inn motel where the family stayed for a time following their eviction.

36. Mrs. Castellanos was well aware of her husband's condition, yet she told no one about it and continued to acquiesce in Petitioner's handling of the family's finances, including dealing with Sentinel. It was unclear how much Mrs. Castellanos knew of the repeated late rent payments and the eviction proceedings. Mrs. Castellanos held a responsible job with the Pinellas County School Board and gave every indication of being an intelligent, reasonable person, but could offer no rational explanation for why she did not at least monitor her husband's actions to ensure that basic family responsibilities such as rent payments were being fulfilled. She expressed only some anxiety that she might have injured her husband's pride by taking over his handling of financial matters.

37. Even assuming that he suffered from a mental handicap, Petitioner nonetheless produced no evidence to establish a causal connection between his mental condition and his ability to pay rent in a timely manner. Petitioner offered no explanation as to why he did not have his wife take over paying the rent during his incapacity. Petitioner produced no evidence

that he requested an accommodation from Sentinel based upon his disability. Petitioner produced no evidence that his eviction was for any reason other than his failure to pay the rent due to Egret's Landing.

38. Petitioner failed to demonstrate that Sentinel or its agents failed to follow the law during the eviction proceedings, or that Sentinel or its agents committed theft of his property during the physical eviction. Sentinel's management may have been harsh in ordering Ms. Dunton to clear Petitioner's belongings from the apartment and place them off the Egret's Landing property, but Petitioner's failure to make provision for moving out or even to inform his wife of the eviction judgment left Sentinel with little option to secure its property pursuant to that judgment.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Subsection 120.57(1), Florida Statutes.

40. Petitioner's Complaint alleges two causes of action: that Sentinel failed to accommodate his disability, and that Sentinel retaliated against him for exercising his right to file a housing discrimination claim with HUD.

41. Subsection 760.23(2), Florida Statutes, provides:

> It is unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, national origin, sex, handicap, familial status, or religion.

42. Subsection 760.23(8), Florida Statutes, provides:

> It is unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of:
>
> (a) That buyer or renter;
>
> (b) A person residing in or intending to reside in that dwelling after it is sold, rented or made available; or
>
> (c) Any person associated with the buyer or renter.

43. Subsection 760.23(9), Florida Statutes, provides, in relevant part:

> For purposes of subsections (7) and (8), discrimination includes:
>
> * * *
>
> (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.

44. 42 U.S.C. Subsection 3604(f)(3)(B) defines unlawful discrimination to include a refusal to make reasonable

accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling.

45. To establish a prima facie case of failure to make a reasonable accommodation under 42 U.S.C. Subsection 3604(f)(3), Petitioner must show:

> a) that he suffers from a handicap;
>
> b) that Sentinel knew of the handicap;
>
> c) that an accommodation of the handicap was necessary to afford Petitioner an equal opportunity to use and enjoy the housing in question; and
>
> d) Sentinel refused to make such an accommodation.

Schanz v. Village Apartments, 998 F.Supp. 784, 791 (E.D. Mich. 1998); U.S. v. California Mobile Home Park Mgmt Co., 107 F.3d 1374, 1380 (9th Cir. 1997).

46. A Fair Housing Act retaliation claim is analyzed under the same standards that are applied to retaliation claims brought under Title VII of the Civil Rights Act of 1964, as amended, and other employment discrimination statutes. Texas v. Crest Asset Management, Inc., 85 F.Supp.2d 722, 733 (S.D. Tex. 2000); Broome v. Biondi, 17 F.Supp.2d 211, 218-129 (S.D. N.Y. 1997).

47. As with other anti-discrimination statutes, if there is no direct evidence of retaliation, "the plaintiff bears the

burden of proving that the defendant's actions were motivated by the considerations prohibited by the statute." Crest Asset, 85 F.Supp.2d at 733 (citing Hypes v. First Commerce Corp., 134 F.3d 721, 726 (5th Cir. 1998)).

48. The three-part burden-of-proof test developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), governs in the retaliation portion of this case. Under that test:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action. Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact mere pretext. Pollitt v. Bramel, 669 F. Supp. 172, 175 (S.D. Ohio 1987)(Fair Housing Act claim) (quoting McDonnell Douglas, 411 U.S. at 802, 804, 93 S.Ct. at 1824, 1825)(citations omitted).

U.S. Department of Housing and Urban Development v. Blackwell, 908 F.2d 864, 872 (11th Cir. 1990).

49. Petitioner's claim that Sentinel improperly failed to make a "reasonable accommodation" in violation of state and federal housing law fails all four prongs of the test set forth above. First, Petitioner failed to establish that he suffers from a handicap as defined in Section 760.22, Florida Statutes,

and related statutes, set forth below. Second, Petitioner failed to establish that Sentinel knew or should have known about his alleged disability. Third, Petitioner failed to demonstrate how the accommodation of late rent payment is necessary to afford him an equal opportunity to use and enjoy the housing in question. Fourth, Petitioner failed to demonstrate that Sentinel denied him an accommodation.

50. Section 760.22, Florida Statutes, provides in relevant part:

> (7) "Handicap" means:
>
> (a) A person 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; or
>
> (b) A person has a developmental disability as defined in s. 393.063.

This definition is virtually identical to those found in the federal Fair Housing Act, 42 U.S.C. Subsection 3602(h)(defining "handicap"); the Americans with Disabilities Act, 42 U.S.C. Subsection 12102(2)(A)(defining "disability"); and the Rehabilitation Act, 29 U.S.C. Subsection 705(9)(B)(defining "disability"). Under the term "handicap" or "disability," each of these laws provides relief only to a person with an impairment that substantially limits a major life activity.

51. The United States Supreme Court has addressed the definition of "disability" in the context of a case brought pursuant to the Americans with Disabilities Act. In Sutton v. United Airlines, 527 U.S. 471, 119 S.Ct. 2139, 2143, 114 L. Ed. 2d 450 (1999), the Court held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."

52. The Court in Sutton relied as well on the definitions of "substantially limits" and "major life activities" contained in the regulations of the Equal Employment Opportunities Commission, as follows:

> The term "substantially limits" means, among other things, "[u]nable to perform a major life activity that the average person in the general population can perform;" or "[s]ignificantly restricted as to the condition, manner, or duration under which the average person in the general population can perform that same major life activity" [Citation omitted.] Finally, "[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." [Citation omitted.]

Sutton, 119 S.Ct. at 2145.

53. The Court in Sutton observed that, in determining whether a person with a physical impairment is disabled under the Americans with Disabilities Act, the proper inquiry is whether the person is substantially limited in one or more major

life activities, when the impairment is corrected or mitigated through the use of medication or corrective devices. According to the Court, the Americans with Disabilities Act requires that this determination be made for each individual with an impairment:

> A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not "substantially limi[t]" a major life activity.

Id. at 2146-47. See also Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 119 S.Ct. 2162, 2168, 144 L. Ed. 2d 518 (1999)(Error for lower court to hold that a "mere difference" in ability met the statutory definition: "By transforming 'significant restriction' into 'difference,' the court undercut the fundamental statutory requirement that only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities.")

54. In the instant case, the evidence established that Petitioner suffered from a depressive mood disorder and took prescription medications to treat it. Petitioner himself

admitted that he functions "pretty well" when he takes his medications. The evidence was insufficient to establish that Petitioner was substantially limited in his ability to perform a major life activity and therefore disabled in terms of the relevant statutes. Thus, Petitioner's claim fails to meet the first prong of the prima facie "reasonable accommodation" test set forth in the cases applying 42 U.S.C. Subsection 3604(f)(3).

55. Even if the evidence had been sufficient to demonstrate that Petitioner suffered from a disability, Petitioner did not present persuasive evidence that Sentinel or its agents were aware of his disability, thus failing to meet the second prong of the "reasonable accommodation" test. The only evidence that even hinted of disclosure of any illness was Petitioner's December 12, 1998, note discussing his medical condition, which he attributed to lack of sleep due to noisy neighbors. The evidence established that Ms. Dunton addressed the problem of the noisy neighbors. Petitioner admitted that he was reticent about discussing his condition, and Mrs. Castellanos testified that she never discussed it outside the family. Petitioner also admitted that he never requested any accommodation related to his disability. Petitioner's argument that his condition placed the burden on Sentinel to ascertain its existence without being told is rejected.

56. Petitioner's claim also fails to meet the third and fourth prongs of the "reasonable accommodation" test. Petitioner failed to demonstrate through any persuasive evidence how the accommodation of late rent payment was necessary to afford him an equal opportunity to use and enjoy the housing in question, or how his alleged handicap was even related to the payment of rent in a timely fashion. Even accepting that Petitioner was incapacitated during the time in question, Petitioner offered no credible explanation for why his wife could not have assumed the responsibility for paying the rent on time. Finally, Sentinel cannot be held to have denied Petitioner an accommodation that was never requested in terms of Petitioner's alleged handicap. Petitioner merely told Sentinel's representatives that he had a cash flow problem that necessitated paying his rent late on a regular basis, and Sentinel denied his request to do so, in keeping with its policy and in accordance with the express terms of the lease agreement.

57. Petitioner has also failed to prove his "retaliation" claim, as he has not satisfied his burden to prove that Sentinel's actions were motivated by considerations prohibited by the statute. Petitioner failed to demonstrate that Sentinel was even aware that a Housing Discrimination complaint was filed. Both Ms. Stottlemyre and Ms. Dunton credibly testified that they had no knowledge of any HUD Complaint at the time of

the eviction. No contemporaneous HUD Complaint was produced in evidence. The testimony and evidence indicate that no notice of any HUD action was provided to Sentinel prior to the April 19, 1999, eviction proceeding. Further, the only notice provided to Sentinel prior to Petitioner's physical removal on April 27, 1999, from Egret's Landing was a copy of an envelope postmarked April 20, 1999, one day after the judgment of eviction and nearly a month after the eviction proceedings were initiated by Sentinel.

58. Even if it were granted that Sentinel was notified of the HUD Complaint prior to the eviction, Petitioner failed to produce any persuasive evidence that Sentinel acted improperly. The evidence established that after the entry of judgment in favor of Sentinel, the Clerk of the Court issued a Writ of Possession to the Sheriff and the Sheriff's Office properly posted the Writ. The Writ was posted at Petitioner's apartment on April 23, 1999, and the landlord could have legally removed Petitioner and his family on April 24, 1999. Sentinel waited until April 27, 1999, before actually executing the Writ of Possession and removing Petitioner's property from the apartment.

59. Section 83.62, Florida Statutes, provides:

> (1) In an action for possession, after entry of judgment in favor of the landlord, the clerk shall issue a writ to the sheriff

describing the premises and commanding the sheriff to put the landlord in possession after 24 hours' notice conspicuously posted on the premises.

(2) At the time the sheriff executes the writ of possession or at any time thereafter, the landlord or the landlord's agent may remove any personal property found on the premises to or near the property line. Subsequent to executing the writ of possession, the landlord may request the sheriff to stand by to keep the peace while the landlord changes the locks and removes the personal property from the premises. When such a request is made, the sheriff may charge a reasonable hourly rate, and the person requesting the sheriff to stand by to keep the peace shall be responsible for paying the reasonable hourly rate set by the sheriff. Neither the sheriff nor the landlord or the landlord's agent shall be liable to the tenant or any other party for the loss, destruction, or damage to the property after it has been removed. (Emphasis added)

60. Section 83.64, Florida Statutes, provides:

(1) It is unlawful for a landlord to discriminatorily increase a tenant's rent or decrease services to a tenant, or to bring or threaten to bring an action for possession or other civil action, primarily because the landlord is retaliating against the tenant. In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith. Examples of conduct for which the landlord may not retaliate include, but are not limited to, situations where:

(a) The tenant has complained to a governmental agency charged with responsibility for enforcement of a building, housing, or health code of a

suspected violation applicable to the premises;

(b) The tenant has organized, encouraged, or participated in a tenants' organization; or

(c) The tenant has complained to the landlord pursuant to s. 83.56(1).

(2) Evidence of retaliatory conduct may be raised by the tenant as a defense in any action brought against him or her for possession.

(3) In any event, this section does not apply if the landlord proves that the eviction is for good cause. Examples of good cause include, but are not limited to, good faith actions for nonpayment of rent, violation of the rental agreement or of reasonable rules, or violation of the terms of this chapter.

(4) "Discrimination" under this section means that a tenant is being treated differently as to the rent charged, the services rendered, or the action being taken by the landlord, which shall be a prerequisite to a finding of retaliatory conduct. (Emphasis added)

61. Pursuant to Subsection 83.62(2), Florida Statutes, Sentinel was not liable for any loss that occurred after Petitioner's property was removed. Further, pursuant to Subsection 83.64(3), Florida Statutes, Sentinel's action is protected from a retaliation claim because eviction for nonpayment of rent is statutorily identified as an example of a "good cause" eviction.

62. Finally, because Petitioner failed to establish that Sentinel knew of any HUD complaint, Petitioner could not prove that Sentinel carried out the eviction "because of" the protected activity, i.e., the filing of a HUD complaint. Without evidence of a causal connection or nexus, Petitioner's retaliation claim fails.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Complaint and Petition for Relief.

DONE AND ENTERED this 28th day of August, 2001, in Tallahassee, Leon County, Florida.

____

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of August, 2001.

ENDNOTE

1/ Though Donna B. Castellanos is named as a Petitioner in this case, the alleged disability is solely that of Gerald Castellanos. The term "Petitioner" employed throughout this Recommended Order references Gerald Castellanos.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.