

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA COMMISSION ON HUMAN)
RELATIONS, on behalf of IDA)
HEAPS,)
)
Petitioner,) Case No. 04-1593
)
vs.)
)
BARBARA STRICKLAND,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to Notice, this case came on for formal hearing before Administrative Law Judge Diane Cleavinger, on July 22, 2004, in Tavares, Florida.

APPEARANCES

For Petitioner: Vicki D. Johnson, Esquire
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

For Respondent: John Merrit, Esquire
1500 East Orange Avenue
Eustis, Florida 32726-4399

STATEMENT OF THE ISSUE

Whether the Respondent discriminated against Ida Heaps in violation of the Fair Housing Act and entitlement to any award therefor.

PRELIMINARY STATEMENT

On September 15, 2002, Ida Heaps filed a complaint with Florida Commission on Human Relations (FCHR) and with the U.S. Department of Housing and Urban Development (HUD) alleging that, Respondent Barbara Strickland, discriminated against her, on the basis of race, in violation of Section 760.23(1), Florida Statutes, and 42 U.S.C. Section 3604(a). An investigation of the complaint was made by FCHR. On January 15, 2004, the Commission issued its determination that there was reasonable cause to believe that a discriminatory housing practice had occurred in violation of Section 760.23(1), Florida Statutes. On April 26, 2004, FCHR issued a Notice of Failure of Conciliation. On April 26, 2004, the FCHR filed a Petition for Relief on behalf of Ms. Heaps. The case was forwarded to the Division of Administrative Hearings to conduct a formal hearing on the matter.

At the hearing, the Petitioner presented four witnesses and offered five exhibits into evidence. The Respondent presented three witnesses, but did not offer any exhibits into evidence.

After the hearing, both Petitioner and Respondent filed Proposed Recommended Orders on August 10, 2004, and August 11, 2004, respectively.

FINDINGS OF FACT

1. Respondent Barbara Strickland owns several houses in Sorrento, Florida. She has rented these houses for the past 15 to 20 years. During the entire period of time that Ms. Strickland has rented property, she has rented to Hispanics, but she has never rented to African-Americans.

2. Ms. Strickland placed an advertisement in the July 3, 2002, Triangle Shopping Guide. The advertisement listed a four-bedroom, doublewide mobile home for rent, for \$500 per month and a \$500 deposit. The subject house is located on Church Street in Sorrento. Ms. Strickland and her husband had lived in the house until 1997. It had recently been renovated and had new carpet installed in preparation for renting the home.

3. On July 4, 2002, Ida Heaps, who is white, and her boyfriend, Al Greene, who is black, saw the ad in the newspaper while shopping at a grocery store in Sorrento. Ms. Heaps went to a pay phone at the grocery store, called the telephone number listed in the ad and spoke with Ms. Strickland. Ms. Heaps held the telephone so that Mr. Greene could hear the conversation.

4. Ms. Heaps and Mr. Greene live together and have a long-term family relationship. They have four children ages 5 years, 2 and 1/2 years, 14 months, and 3 months.

5. During this phone conversation, Ms. Strickland gave Ms. Heaps information about the house, including the address.

Ms. Heaps testified that Ms. Strickland asked whether Ms. Heaps was black; and Ms. Strickland stated, "I do not rent to blacks," or words to that effect. Ms. Heaps told Ms. Strickland that she was not black, but that her boyfriend was. Mr. Greene heard this comment, became upset and walked away from the telephone. He was no longer interested in the house because of Ms. Strickland's comments about race. Ms. Heaps persuaded him to, at least, go by to see the house.

6. Ms. Heaps and Mr. Greene drove to the address where the subject house is located. The house was spacious, with enough room for Mr. Greene to have an office for his lawn care business and a large fenced yard that they felt would be ideal for their small children. The house also was located in a central area that provided easy access to major roadways and the areas where Mr. Greene's lawn care customers are located.

7. Because of the home's attributes Ms. Heaps talked Mr. Greene into attempting to rent the house because she was hoping that Ms. Strickland would see that "we were good people" and would rent to them. Indeed, Ms. Heaps' and Mr. Greene's rental history shows that they have rented houses for at least five years before changing locations and have been at their current residence for at least 2 years. Ms. Heaps returned to the store to call Respondent. Ms. Heaps told Ms. Strickland she had seen the house and was very interested in renting the house

and was prepared to give Ms. Strickland a deposit on the house immediately. However, because Ms. Strickland had to take a family member to a medical appointment she could not meet with Ms. Heaps that day. Ms. Heaps told Ms. Strickland she would be going out of town for a few days and she would call Ms. Strickland upon her return to see if the house was still available.

8. Sometime in early July 2002, Ms. Strickland was at the Eagle Club, a social club, talking with her friend Carol Ann Stone. Ms. Stone told her that she knew a lady, by the name of Pat Williams Torres, who was looking for a place to rent. Ms. Stone felt Ms. Torres was very responsible and would make a good tenant for the Church Street house.

9. Ms. Strickland, Ms. Stone, and Ms. Torres met at the house on July 8, 2002, so that Ms. Torres could see the house. Ms. Torres was interested in renting the house, but had to leave town to check on her property in South Dakota that was being threatened by a large wild-fire. Ms. Strickland, tentatively, agreed to hold the house for her.

10. Ms. Strickland agreed to hold the house for Ms. Torres because she was not in a hurry to rent it since her son had taken the air conditioner out of the house and she needed to replace it. Ms. Strickland also preferred renting to Ms. Torres instead of Ms. Heaps because she felt Ms. Torres would take

better care of the house. Ms. Strickland testified she was reluctant to rent to Ms. Heaps because Ms. Heaps "had small children." Ms. Strickland testified that she did not know it was illegal to discriminate against families with children. However, no contract or deposit was placed on the house. Therefore, Ms. Strickland felt free to rent the house to another interested party.

11. Ms. Heaps and Mr. Greene stayed in Georgia for several days. After returning from Georgia, on July 11, 2002, Ms. Heaps called Ms. Strickland to inquire about the house. Ms. Heaps was at home when she made this call. Also present at the house were Mr. Greene, and Ms. Heaps' mother, Marlene Heaps. Ms. Heaps testified that Ms. Strickland told her and kept stressing that she was holding the house for a lady named "Pat Torres," whose mother or sister was in a wheelchair. After speaking with Ms. Strickland, Ms. Heaps talked with her mother and stated she was suspicious of the reasons that Ms. Strickland was giving about the house. Approximately 15 minutes after the first call Ms. Heaps asked her mother if she could use her cell phone to call Ms. Strickland back. Ms. Heaps called Ms. Strickland on the cell phone, disguised her voice, identified herself as Marlene and asked about the house. Ms. Strickland gave her information about the house, including the address, and that the house was available to rent. The cell phone records for

Ms. Heaps' mother's cell phone corroborate that Ms. Heaps call to Ms. Strickland was made on July 11, 2002, at 11:26 a.m.

Ms. Heaps' mother also corroborated the cell phone call and ensuing conversation. Ms. Heaps then called Ms. Strickland immediately back on her home phone and informed Ms. Strickland that she had just called using Marlene's phone and stated that Ms. Strickland did not want to rent to her because her boyfriend was black. She told Ms. Strickland she would not get by with it. Ms. Heaps was upset and hung up the phone.

12. About one week after July 11, 2002, Ms. Heaps went on the Internet and obtained information about housing discrimination on HUD's website. Ms. Heaps testified that she submitted information to HUD and that several months later HUD informed her that the case was being referred to FCHR for investigation.

13. Ms. Torres left in late July 2002 and came back to Florida in mid-August. Ms. Torres testified that while she was in South Dakota, she had an unexpected truck repair. This unexpected expense is the reason Ms. Torres did not have the money to rent the house from Ms. Strickland.

14. Ms. Strickland testified Ms. Heaps called her several times after returning from Georgia inquiring about the house. She thought the calls involving the cell phone occurred in August. However, Ms. Strickland had also told the investigator

for FCHR that the cell phone call had occurred in July. After Ms. Heaps called inquiring about the house, Ms. Strickland "got to thinking" that maybe she should check with Ms. Torres to see if Ms. Torres still wanted to rent the house. Ms. Strickland testified she had misplaced Ms. Torres' phone number so she had to call Ms. Stone to get the number. After getting the phone number Ms. Strickland called Ms. Torres, who told her she could not rent the home. Ms. Strickland testified that about 15 minutes later, she received a call from "Marlene."

Ms. Strickland stated that the house was now available, and she informed "Marlene" of the home's availability. Ms. Strickland testified that a few minutes after this call, Ms. Heaps called back and told her that her sister or mother, "Marlene," had just called. However, Lisa Sutherland, the investigator for FCHR, reviewed Ms. Strickland's phone bills for the months of June, July, and August 2002. There were no records of a long-distance call to South Dakota in any of the reviewed months' bills.

Given the cell phone records, Ms. Heaps' mother's corroboration of Ms. Heaps' testimony, the conflicting statements made by Ms. Strickland regarding the time of these calls and the lack of any records of a call to South Dakota, Ms. Strickland is not credible in regard to either the sequence of events regarding the cell phone call or the continued holding of the house for

Ms. Torres. Her rationale for the change in the availability of the house in between the calls is simply pretextual.

15. Ms. Strickland's husband met Aaron Hoffman, who worked at an air-conditioning company. In September 2002, Ms. Strickland rented the house to Mr. Hoffman. Mr. Hoffman is white. After Mr. Hoffman moved out, Ms. Torres began renting the subject house from Ms. Strickland for \$510 in rent.

16. In September 2002, Ms. Heaps found a two-bedroom house in Tavares that she rented for \$620 per month and paid a \$580 deposit. Her family continues to rent this property. Ms. Heaps testified that if she had rented the house from Ms. Strickland, she planned to live there for several years. The Tavares house is not as large, costs more to rent, does not have a fenced yard, and is about eight miles farther away from the areas where Mr. Greene's customers are located. Ms. Heaps is entitled to the difference in rental and deposit values between the two properties for the period of time she would have reasonably rented Ms. Strickland's property. However, the evidence did not demonstrate that the eight-mile difference had any significant impact on the mileage otherwise driven by Ms. Heaps or Mr. Greene. No other compensable damages were shown by the evidence.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceedings. § 120.57(1), Fla. Stat.

18. Under Florida's Fair Housing Act ("Act"), Sections 760.20 through 760.37, Florida Statutes, it is unlawful to discriminate in the sale or rental of housing. Section 760.23 states, in part:

(1) It is unlawful to refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or rental of, or otherwise to make unavailable or deny a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.

* * *

19. In the instant case, Ms. Heaps has alleged, that Ms. Strickland discriminated against her by declining to rent to her because of her long-term family relationship with her boyfriend, who is black.

20. In cases involving a claim of rental housing discrimination on the basis of race, such as this one, the complainant has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. A prima facie showing of rental housing discrimination can be made by establishing that the complainant applied to rent an available unit for which he or she was qualified, the application was

rejected, and, at the time of such rejection, the complainant was a member of a class protected by the Act. See Soules v. U.S. Dept. of Housing and Urban Development, 967 F.2d 817, 822 (2d Cir. 1992). Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d, 1183 (1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

21. If, however, the complainant sufficiently establishes a prima facie case, the burden then shifts to the Respondent to articulate some legitimate, nondiscriminatory reason for its action. If the Respondent satisfies this burden, then the complainant must establish by a preponderance of the evidence that the reason asserted by the Respondent is, in fact, merely a pretext for discrimination. See Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1476 n.6 (11th Cir. 1993), cert. denied, 513 U.S. 808, 115 S. Ct. 56, 130 L. Ed. 2d 15 (1994)("Fair housing discrimination cases are subject to the three-part test articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)."); Secretary, U.S. Dept. of Housing and Urban Development, on Behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)("We agree with the ALJ that the three-part burden of proof test developed in McDonnell Douglas [for claims brought under

Title VII of the Civil Rights Act] governs in this case [involving a claim of discrimination in violation of the federal Fair Housing Act]."). Pretext can be shown by inconsistencies and/or contradictions in testimony. Blackwell, supra; Woodward v. Fanboy, L.L.C., 298 F.3d 1261 (11th Cir. 2002); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 S. Ct. 2097, 2108 147 L. Ed. 2d 105 (2000). "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001).

22. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." King v. La Playa-De Varadero Restaurant, No. 02-2502, 2003 WL 435084 (Fla. DOAH 2003)(Recommended Order).

23. "Direct evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997). However, proof that, in essence, amounts to no more than mere speculation and self-serving belief on the part of the complainant concerning the motives of the Respondent is insufficient, standing alone, to establish a prima facie case of intentional

discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001)("The record is barren of any direct evidence of racial animus. Of course, direct evidence of discrimination is not necessary. However, a jury cannot infer discrimination from thin air. Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.")(citations omitted.); Reyes v. Pacific Bell, 21 F.3d 1115 (Table), 1994 WL 107994 *4 n.1 (9th Cir. 1994)("The only such evidence [of discrimination] in the record is Reyes's own testimony that it is his belief that he was fired for discriminatory reasons. This subjective belief is insufficient to establish a prima facie case."); Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991)("Little points to his own subjective belief that age motivated Boyd. An age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value."); Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983)("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief."); Jackson v. Waguespack, 2002 WL 31427316 (E.D. La. 2002)("[T]he Plaintiff has no evidence to show Waguespack was motivated by racial animus. Speculation and belief are insufficient to create a fact issue as to pretext nor can

pretext be established by mere conclusory statements of a Plaintiff that feels she has been discriminated against. The Plaintiff's evidence on this issue is entirely conclusory, she was the only black person seated there. The Plaintiff did not witness Defendant Waguespack make any racial remarks or racial epithets."); Coleman v. Exxon Chemical Corp., 162 F. Supp. 2d 593, 622 (S.D. Tex. 2001)("Plaintiff's conclusory, subjective belief that he has suffered discrimination by Cardinal is not probative of unlawful racial animus."); Cleveland-Goins v. City of New York, 1999 WL 673343 (S.D. N.Y. 1999)("Plaintiff has failed to proffer any relevant evidence that her race was a factor in defendants' decision to terminate her. Plaintiff alleges nothing more than that she 'was the only African-American man [sic] to hold the position of administrative assistant/secretary at Manhattan Construction.' (Compl.¶ 9.) The Court finds that this single allegation, accompanied by unsupported and speculative statements as to defendants' discriminatory animus, is entirely insufficient to make out a prima facie case or to state a claim under Title VII."); Umansky v. Masterpiece International Ltd., 1998 WL 433779 (S.D. N.Y. 1998)("Plaintiff proffers no support for her allegations of race and gender discrimination other than her own speculations and assumptions. The Court finds that plaintiff cannot demonstrate that she was discharged in circumstances giving rise to an

inference of discrimination, and therefore has failed to make out a prima facie case of race or gender discrimination."); and Lo v. F.D.I.C., 846 F. Supp. 557, 563 (S.D. Tex. 1994)("Lo's subjective belief of race and national origin discrimination is legally insufficient to support his claims under Title VII.").

24. Under the direct evidence standard, a discriminatory statement will support a finding of discrimination if there is a causal link or nexus between the statement, and the prohibited conduct, and the statement is not vague, ambiguous or isolated. Peters v. Lincoln Elec. Co., 285 F.3d 456, 478 (6th Cir. 2002). A discriminatory statement may also be used as indirect evidence of discrimination. Hasham v. California State Bd. of Equalization, 200 F.3d 1035, 1049-50, (7th Cir. 2000). In Hasham, the defendant argued that the manager's comment that he couldn't understand the accent of a person from Pakistan was too ambiguous to prove intentional discrimination. The Court stated the defendant's argument might have some merit if it was solely a direct proof case because remarks must be related to the employment decision to evidence discriminatory intent. But, in an "indirect" evidence case, "no one piece of evidence need support a finding of "discrimination, but rather the court must take "the facts as a whole." Id., citing Futrell v. JJ. Case, 38 F.3d 342, 350 (7th Cir. 1994). Furthermore, in a circumstantial evidence case, a discriminatory comment by a non-

decision maker, along with the other evidence in the case could lead a jury to conclude, by a preponderance of the evidence that the defendant engaged in unlawful discrimination. Maggard v. Danka Office Imaging Co., 2000 WL 34030863 * 1 (N.D. Iowa 2000), Madel v. FCI Marketing, Inc., 116 F.3d 1247, 1251 (8th Cir. 1997), Hardin v. Hussmann Corp., 45 F.3d 262, 266 (8th Cir. 1995). Unlike the employment situation involving frequent and consistent contacts, in the housing context "where the parties do not have such frequent and consistent contracts, in the housing context," a so-called "isolated" remark is more probative of racial animus than it might be in other situations." Green v. Westgate Village, 2000 WL 562331 (N.D. Ohio 2000)(manager made comment to white tenant that his friend was a "black whore"). See also Harris v. Itzhaki, 183 F.3d 1043, 1054-55 (9th Cir. 1999) (landlord's unpaid assistant made comment that landlord did not rent to blacks).

25. In this case, there is direct evidence that Ms. Strickland made a discriminatory statement. Both Ms. Heaps and Mr. Greene testified that, during the initial call to Ms. Strickland, Ms. Strickland asked, "Are you black?" and said she did not rent to blacks.

26. The record also contains indirect evidence sufficient to establish the four elements of a prima facie case of unlawful discrimination: 1) Ms. Heaps' boyfriend is a member of a

protected class; 2) Ms. Heaps applied for and was qualified to rent the home; 3) Ms. Strickland did not approve the rental to Ms. Heaps; and 4) The house remained available or was rented to a person not in the protected category. See Blackwell, 908 F.2d at 870.

27. There is undisputed testimony that Ms. Heaps wanted to rent the house and offered to put a deposit on the house when she spoke with Ms. Strickland. Ms. Heaps and Mr. Greene have been making monthly rent payments of \$620 since September 2002; therefore, they were clearly qualified to rent Ms. Strickland's house, which would have cost \$120 per month less. It is also undisputed that Ms. Strickland did not rent to Ms. Heaps and Mr. Greene and ultimately rented the house to a white person.

28. Finally, Ms. Strickland's assertion that she was holding the subject property for Ms. Torres, who had indicated an interest in the property is not credible and is pretextual based on the inconsistencies in the evidence, the corroboration of Ms. Heaps' testimony and the lack of phone records regarding a long-distance call to Ms. Torres. The evidence both direct and circumstantial demonstrates that Ms. Strickland discriminated against Ms. Heaps in violation of Chapter 760, Florida Statutes. Therefore, Ms. Heaps is entitled to recover any damages that she may have incurred as a result of Ms. Strickland's discriminatory behavior. See Woods-Drake v.

Lundy, 667 F.2d 1198, 1201 (5th Cir. 1982)(ruling that whites have a cause of action when discriminatory actions are taken against them because of their association with blacks;

Blackwell, 908 F.2d at 873 (holding white tenants to whom vendor leased his house after refusing to close purchase with black purchasers were aggrieved persons under Fair Housing Act and were entitled to recover damages).

29. FCHR seeks, on behalf of Ms. Heaps: 1) damages to compensate Ms. Heaps for her economic loss; 2) attorney's fees and costs; and 3) injunctive and equitable relief prohibiting Ms. Strickland from violating the Fair Housing Act. Section 760.35(3)(b), Florida Statutes, authorizes an award of affirmative relief from the effects of a discriminatory practice, including quantifiable damages and reasonable attorney's fees and costs in addition to prohibition of further discrimination.

30. Petitioner has shown that Ms. Heaps suffered economic loss as a result of the discrimination. By denying Ms. Heaps the opportunity to rent the subject house, Ms. Heaps was forced to find alternative housing, which was less desirable and which cost more in monthly rent and the required deposit. The evidence demonstrated that since September, 2002, Ms. Heaps has paid \$120.00 more in rent than she would have paid had she been able to rent Ms. Strickland's home. Ms. Heaps also had to pay

\$80.00 more as a deposit on her current home. Based on Ms. Heap's rental history, she would have more likely than not have stayed at Ms. Strickland's home for at least five years. Therefore, Ms. Heaps should be awarded damages in the amount of \$7,200, which represents the monthly rent differential for 5 years plus \$80 for the additional deposit. The evidence did not reflect that the difference in location caused Ms. Heaps or Mr. Greene to incur more mileage or vehicle expenses than they otherwise would have. Therefore, no award should be made for mileage.

31. Petitioner is also entitled to an award of attorney's fees and costs. Jurisdiction is reserved to determine attorney's fees and costs should the parties be unable to agree on such an award.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter an order finding Respondent guilty of a discriminatory housing practice against Ida Heaps in violation of Section 760.23(1), Florida Statutes, and prohibiting further unlawful housing practices by Respondent; and directing Respondent to pay to Ida Heaps within 30 business days from the date of the final order \$7,280.00.

DONE AND ENTERED this 28th day of September, 2004, in
Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 28th day of September, 2004.

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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.