STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| CARLOS GOMEZ,<br><br>Petitioner,<br><br>vs.<br><br>VESTCOR COMPANIES, d/b/a MADALYN LANDING,<br><br>Respondent. | ) | Case No. 05-0565 |

RECOMMENDED ORDER

Pursuant to notice and in accordance with Subsection 120.57(1), Florida Statutes (2005), a formal administrative hearing was held in this case on June 8, 2005, in Viera, Florida, before Fred L. Buckine, designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carlos Gomez, pro se
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Palm Bay, Florida 32905

For Respondent: Barry A. Postman, Esquire
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and

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## STATEMENT OF THE ISSUES

The two issues raised in this proceeding are: (1) whether the basis and reason Respondent, Vestcor Companies, d/b/a Madalyn Landings (Vestcor), terminated Petitioner, Carlos Gomez's (Petitioner), employment on June 28, 2002, was in retaliation for Petitioner's protected conduct during his normal course of employment; and (2) whether Vestcor committed unlawful housing practice by permitting Vestcor employees without families to reside on its property, Madalyn Landing Apartments, without paying rent, while requiring Vestcor employees with families to pay rent in violation of Title VII of the Civil Rights Act of 1968, as amended, and Chapter 760.23, Florida Statutes (2002).

## PRELIMINARY STATEMENT

On August 30, 2002, Petitioner, Carlos Gomez, filed a dual housing discrimination complaint with the Florida Commission on Human Relations (FCHR or Commission) and the United States Department of Housing and Urban Development alleging a violation of Title VII of the Civil Rights Act of 1968, as amended, by the Fair Housing Act of 1988, and Chapter 760.23, Florida Statutes (2002). In his housing discrimination complaint, Petitioner alleged he was discriminated against based on his familial status and disability. On February 7, 2003, Petitioner amended his housing discrimination complaint adding a retaliation claim

against his employer. The Commission investigated the complaint filed by Petitioner.

On January 7, 2005, the Commission issued a Notice of Determination: No Cause (Notice), and informed Petitioner of his right to request an administrative hearing by filing a Petition for Relief within 35 days of the date of the Notice and that failure to request an administrative hearing within 35 days of the date of the Notice would result in a dismissal of the administrative claim under Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes (2002), pursuant to Section 760.11, Florida Statutes (2002). Petitioner timely filed his Petition for Relief on February 9, 2005.

This cause was referred on February 15, 2005, to the Division of Administrative Hearing for assignment of an Administrative Law Judge to conduct all necessary proceedings required under the law and to submit recommended findings to the Commission.

On March 3, 2005, a Notice of Hearing scheduling the final hearing for May 4, 2005, was entered. On April 7, 2005, Vestcor filed its Motion for Continuance and by Order of April 24, 2005, the continuance was granted rescheduling the final hearing for June 8, 2005.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of one witness, Nilsa Delgado

f/k/a Nilsa Perez, and offered into evidence ten exhibits (Pet. A through J), one of which (Pet. J, a video tape) was not accepted into evidence.

Vestcor presented the testimony of three witnesses: Kim Taylor, Brain Davies, and Genea Closs, all current and/or former employees of Vestcor. Vestcor offered 23 exhibits (R-1 through R-23), and all were accepted in evidence.

Before taking sworn testimony, the parties were offered an opportunity to address all preliminary matters. Vestcor raised three issues: First, whether Petitioner had standing to claim discrimination based on familial status when Petitioner was never married, but only claimed to be married under common law. Second, whether Petitioner intended to go forward with his claim for discrimination based on disability. And third, whether Petitioner would be permitted to present testimony and evidence regarding his claim for retaliation after he had given sworn testimony during his deposition that he did not intend to pursue his claim for retaliation.

With respect to the common law marriage issue and after inquiry by the undersigned, it was determined Petitioner did not have standing to base a claim on his familial status.[1/] However, Petitioner argued the familial status claim was based upon treatment of other employees who were married and that he should

be able to proceed. In an abundance of caution, he was afforded the opportunity to present the familial status claim.

With respect to Petitioner's second claim based upon disability, Petitioner, after inquiry by the undersigned, acknowledged he was voluntarily abandoning his claim based upon disability.

With respect to Petitioner's claim of retaliation against Vestcor, after inquiry by the undersigned, it was determined that Vestcor had been put on notice of this claim with an opportunity to explore the basis thereof and, therefore, Petitioner could proceed on that claim. This determination was made notwithstanding Petitioner's acknowledged relinquishment of this claim during his prior deposition by counsel for Vestcor. In this administrative proceeding alleging discrimination, unduly strict application of procedural rules that result in a summary denial of Petitioner's disputed issue of material facts would be unjust and improper.

No transcript was filed. Vestcor's Proposed Finding of Facts and Conclusions of Law was filed on June 21, 2005, and Petitioner's Proposed Findings of Facts and Conclusions of Law was filed on July 27, 2005. Both documents have been considered in preparation of this Recommended Order.

References to chapters and sections are to Florida Statutes (2002) unless otherwise stated.

## FINDINGS OF FACT

Based upon observation of the demeanor and candor of each witness while testifying, exhibits offered in support of and in opposition to the respective position of the parties received in evidence, stipulations of the parties, evidentiary rulings made pursuant to Section 120.57, Florida Statutes (2002), and the entire record compiled herein, the following relevant, material, and substantial facts are determined:

1. Petitioner filed charges of housing discrimination against Vestcor with the Commission on August 30, 2002.

2. Petitioner alleged that Vestcor discriminated against him based on his familial status and his June 28, 2002, termination was in retaliation for filing the charge of discrimination. Vestcor denied the allegations and contended that Petitioner's termination was for cause. Additionally, Vestcor maintained Petitioner relinquished his claim of retaliation before the final hearing; and under oath during his deposition, asserted he would not pursue a claim for retaliation. Petitioner was permitted to proffer evidence of retaliation because Vestcor terminated his employment.

3. The Commission's Notice was issued on January 7, 2005.

4. The parties agree that Petitioner was hired by Vestcor on June 25, 2001, as a leasing consultant agent for Madalyn Landing Apartments located in Palm Bay, Florida. Petitioner's

job responsibilities as a leasing consultant agent included showing the property, leasing the property (apartment units), and assisting with tenant relations by responding to concerns and questions, and preparing and following up on maintenance orders. Petitioner had access to keys to all apartments on site. At the time of his hire, Petitioner was, as was all of Vestcor employees, given a copy of Vestcor's Employee Handbook. This handbook is required reading for each employee for personal information and familiarity with company policies and procedures, to include the company requirement that each employee personally telephone and speak with his/her supervisor when the employee, for whatever reason, could not appear at work as scheduled, which is a basis and cause for termination.

5. The parties agree that Vestcor's handbook, among other things, contains company policies regarding equal employment; prohibition against unlawful conduct and appropriate workplace conduct; procedures for handling employee problems and complaints associated with their employment; and procedures for reporting illness or absences from work, which include personal notification to supervisors, and not messages left on the answering service. Failure to comply with employment reporting polices may result in progressive disciplinary action.

6. The parties agree that employee benefits were also contained in the handbook. One such employee benefit, at issue

in this proceeding, is the live-on-site benefit. The live-on-site benefit first requires eligible employees to complete a 90-day orientation period, meet the rental criteria for a tax credit property, and be a full-time employee. The eligible employee must pay all applicable security deposits and utility expenses for the live-on-site unit. Rent-free, live-on-site benefits are available only to employees who occupy the positions of (1) site community managers, (2) maintenance supervisors, and (3) courtesy officers. These individuals received a free two-bedroom, two-bathroom apartment at the apartment complex in which they work as part of their employment compensation package. The rent-free, live-on-site benefit is not available for Vestcor's leasing consultant agent employees, such as Petitioner.

7. On or about July 3, 2001, Petitioner entered into a lease agreement with Vestcor to move into Apartment No. 202-24 located at Madalyn Landing Apartments. The lease agreement ended on January 31, 2002. The lease agreement set forth terms that Petitioner was to receive a $50.00 monthly rental concession, which became effective on September 3, 2001. Although he was eligible for the 25-percent monthly rental concession, to have given Petitioner the full 25 percent of his monthly rental cost would have over-qualified Petitioner based upon Madalyn Landing Apartment's tax credit property status. Petitioner and Vestcor agreed he would receive a $50.00 monthly rental concession,

thereby qualifying him as a resident on the property. Petitioner understood and accepted the fact that he did not qualify for rent-free, live-on-site benefits because of his employment status as a leasing consultant agent. Petitioner understood and accepted Vestcor's $50.00 monthly rental concession because of his employment status as a leasing consultant agent. The rental concession meant Petitioner's regular monthly rental would be reduced by $50.00 each month.

8. On September 1, 2001, Henry Oliver was hired by Vestcor as a maintenance technician. Maintenance technicians do not qualify for rent-free, live-on-site benefits. At the time of his hire, Mr. Oliver did not live on site. As with other employees, to become eligible for the standard 25-percent monthly rental concession benefits, Mr. Oliver was required to complete a 90-day orientation period, meet the rental criteria for a tax credit property, be a full-time employee, and pay all applicable security deposits and utility expenses for the unit.

9. On November 13, 2001, Michael Gomez, the brother of Petitioner (Mr. Gomez), commenced his employment with Vestcor as a groundskeeper. Groundskeepers did not meet the qualifications for rent-free, live-on-site benefits. At the time of his hire, Mr. Gomez did not live on site. As with other employees, to become eligible for the standard 25-percent monthly rental concession benefits, Mr. Gomez was required to complete a 90-day

orientation period, meet the rental criteria for a tax credit property, be a full-time employee, and pay all applicable security deposits and utility expenses for the unit.

10. On November 21, 2001, 81 days after his hire, Mr. Oliver commenced his lease application process to reside in Apartment No. 203-44 at Madalyn Landing Apartments. Mr. Oliver's leasing consultant agent was Petitioner in this cause. Like other eligible Vestcor employees and as a part of the lease application process, Mr. Oliver completed all required paperwork, which included, but not limited to, completing a credit check, employment verification, and income test to ensure that he was qualified to reside at Madalyn Landing Apartments.

11. Fifteen days later, on November 28, 2001, Mr. Gomez commenced his lease application process to reside in Apartment No. 206-24 at Madalyn Landing Apartments. As part of the leasing process, Mr. Gomez, as other eligible Vestcor employees who intend to reside on Vestcor property, completed all necessary paperwork including, but not limited to, a credit check and employment verification and income test to ensure he was qualified to reside at Madalyn Landing Apartments. Included in the paperwork was a list of rental criteria requiring Mr. Gomez to execute a lease agreement to obligate himself to pay the required rent payment, consent to a credit check, pay an application fee and required security deposit, and agree not to

take possession of an apartment until all supporting paperwork was completed and approved. Mr. Gomez's leasing consultant was Petitioner.

12. On December 28, 2001, Petitioner signed a Notice to Vacate Apartment No. 206-24, effective February 1, 2002. The Notice to Vacate was placed in Vestcor's office files. Petitioner's reasons for vacating his apartment stated he "needed a yard, garage, more space, a big family room, and some privacy."

13. Thirty-four days later, February 1, 2002, Mr. Gomez moved into Apartment No. 206-24 at Madalyn Landing Apartments without the approval or knowledge of Vestcor management.

14. On January 9, 2002, a "Corrective Action Notice" was placed in Petitioner's employee file by his supervisor, Genea Closs. The notice cited two violations of Vestcor's policies and procedures. Specifically, his supervisor noted Petitioner did not collect administration fees from two unidentified rental units, and he had taken an unidentified resident's rental check home with him, rather than directly to the office as required by policy. As a direct result of those policy violations, Ms. Closs placed Petitioner on 180 days' probation and instructed him to re-read all Vestcor employees' handbook and manuals. Petitioner acknowledged receiving and understanding the warning. At the time she took the above action against Petitioner, there is no evidence that Ms. Closs had knowledge of Petitioner's past or

present efforts to gather statements and other information from Mr. Gomez and/or Mr. Oliver in anticipation and preparation for his subsequent filing of claims of discrimination against Vestcor.

15. Also, on January 9, 2002, Petitioner was notified that his brother, Mr. Gomez, did not qualify to reside at Madalyn Landing Apartments because of insufficient credit. Further, Petitioner was advised that should Mr. Gomez wish to continue with the application process, he would need a co-signer on his lease agreement or pay an additional security deposit. Mr. Gomez produced an unidentified co-signer, who also completed a lease application. On January 30, 2002, the lease application submitted by Mr. Gomez's co-signor was denied.

16. As a result of the denial of Mr. Gomez's co-signor lease application, Vestcor did not approve Mr. Gomez's lease application. When he was made aware that his co-signor's application was denied and of management's request for him to pay an additional security deposit, as was previously agreed, Mr. Gomez refused to pay the additional security deposit. As a direct result of his refusal, his lease application was never approved, and he was not authorized by Vestcor to move into any Madalyn Landing's rental apartment units.

17. At some unspecified time thereafter, Vestcor's management became aware that Mr. Gomez had moved into Apartment

No. 206-24, even though he was never approved or authorized to move into an on site apartment. Vestcor's management ordered Mr. Gomez to remove his belongings from Apartment No. 206-24. Subsequent to the removal order, Mr. Gomez moved his belongings from Apartment No. 206-24 into Apartment No. 103-20. Mr. Gomez's move into Apartment No. 103-20, as was his move into Apartment No. 206-04, was without approval and/or authorization from Vestcor's management. Upon learning that his belonging had been placed in Apartment No. 103-20, Mr. Gomez was again instructed by management to remove his belongings. After he failed and refused to move his belongings from Apartment No. 103-20, Vestcor's management entered the apartment and gathered and discarded Mr. Gomez's belongings. As a leasing contract agent, Petitioner had access to keys to all vacant apartments. His brother, Mr. Gomez, who was a groundskeeper, did not have access to keys to any apartment, save the one he occupied. Any apartment occupied by Ms. Gomez after his Notice to Vacate Apartment No. 103-20 was without the knowledge or approval of Vestcor and in violation of Vestcor's policies and procedures. Therefore, any period of apartment occupancy by Mr. Gomez was not discriminatory against Petitioner (rent-free and/or reduced rent), but was a direct violation of Vestcor's policies.

18. On February 10, 2002, Mr. Oliver signed a one-year lease agreement with Vestcor. Mr. Oliver's lease agreement

reflected a 25-percent employee rental concession. Throughout Mr. Oliver's occupancy of Apartment No. 203-64 and pursuant to his lease agreement duration, Mr. Oliver's rental history reflected his monthly payment of $413.00. There is no evidence that Mr. Oliver lived on site without paying rent or that Vestcor authorized or permitted Mr. Oliver to live on site without paying rent, as alleged by Petitioner.

19. On June 2, 2002, Ms. Closs completed Petitioner's annual performance appraisal report. Performance ratings range from a one -- below expectations, to a four -- exceeds expectations. Petitioner received ratings in the categories appraised as follows: Leasing skills -- 4; Administrative skills -- 2, with comments of improvement needed in paperwork, computer updating, and policy adherence; Marketing skills -- 4, with comments that Petitioner had a flair for finding the right markets; Community awareness -- 3, with no comment; Professionalism -- 2, with comments of improvement needed in paperwork reporting; Dependability -- 2, with comments of improvement needed in attendance; Interpersonal skills -- 3, with no comments; Judgment/Decision-making -- 3, with no comments; Quality of Work -- 2, with comments that work lacked accuracy; Initiative -- 4, with no comment; Customer service -- 3, with no comments; Team work -- 2, with comments of improvement needed in the area of resident confidence; Company loyalty -- 2, with

comments of improvement needed in adherence to company policy and procedures; and Training and development -- 3, with no comments. Petitioner's Overall rating was 2.5, with comments that there was "room for improvement."

20. On June 27, 2002, while on 180 days' probation that began on January 9, 2002, Petitioner failed to report to work and failed to report his absence to his supervisor, Ms. Closs, by a person-to-person telephone call. This conduct constituted a violation of Vestcor's policy requiring all its employees to personally contact their supervisor when late and/or absent from work and prohibited leaving messages on the community answering service machine.

21. On June 28, 2002, Petitioner reported to work. Ms. Closs, his supervisor, informed Petitioner of his termination of employment with Vestcor for failure to report to work (i.e. job abandonment) and for probation violation, as he had been warned on January 9, 2002, what would happen should a policy violation re-occur. It was after his June 28, 2002, termination that Petitioner began his personal investigation and gathering of information (i.e., interviews and statements from other Vestcor employees) in preparation to file this complaint.

22. Considering the findings favorable to Petitioner, he failed to establish a prima facie case of retaliation by Vestcor, when they terminated his employment on June 28, 2002.

23. Considering the findings of record favorable to Petitioner, he failed to establish a prima facie case of housing and/or rental adjustment discrimination by Vestcor, based upon familial status of himself or any other employer.

24. Petitioner failed to prove Vestcor knowingly and/or intentionally permitted, approved, or allowed either Mr. Gomez or Mr. Oliver to live on site without a completed and approved application followed by appropriate rent adjustments according to their employment status and keeping within the tax credit requirement, while requiring Vestcor employees with families (or different employment status) to pay a different monthly rent in violation of Title VII of the Civil Rights Act of 1968.

25. Petitioner failed to prove his termination on June 28, 2002, was in retaliation for his actions and conduct other than his personal violation, while on probation, of Vestcor's policies and procedures.

## CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 760.11(7), Florida Statutes (2004).

27. Just as the Fair Housing Act of 1988, 42 U.S.C. Section 3604(b), makes it unlawful to discriminate against any person in terms, conditions, or privileges of sale, rental of a dwelling,

or in the provision of services of facilities in connection therewith because of race, color, religion, sex, familial status, or national origin, so does Subsection 760.23(2), Florida Statutes (2002).

28. Statutory construction in Florida recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the federal courts to the extent the construction is harmonious with the spirit of the Florida legislation. O'Loughlin v. Pinchback, 579 So. 2d 788, 790 (Fla. 1st DCA 1991), citing Kidd v. City of Jacksonville, 97 Fla. 297, 120 So. 556 (1929); Massie v. University of Florida, 570 So. 2d 963 (Fla. 1st DCA 1990); Holland v. Courtesy Corp., 563 So. 2d 787 (Fla. 1st DCA 1990).

29. To establish a prima facie case of discrimination based on familial status, Petitioner must establish, by a preponderance of the evidence, each of the following: (1) he is a parent domiciled with an individual who has not attained the age of 18 years; (2) he was qualified to receive rent-free benefits; and (3) despite his qualification, he was denied free rent because of his familial status. See Martin v. Palm Beach Atlantic Association, 696 So. 2d 919 (Fla. 4th DCA 1997).

30. There is no credible evidence of record that Petitioner was qualified to receive free rent, that he was a parent domiciled with an individual not yet 18 years of age, or that he

was qualified to receive free rent. Indeed, the evidence is to the contrary. Petitioner, because of his employment position, was entitled, after the appropriate period of 180 days, to a standard reduction in his rent. Petitioner was not employed in the position of a property manager, maintenance supervisor, or a courtesy officer, all of whom rent-free entitlement was a part of their respective compensation package. Petitioner knowingly agreed to a $50.00 monthly rental deduction that he might qualify to live on Vestcor's tax credit property.

31. As a leasing consultant and like other employees, Petitioner was entitled to a 25-percent monthly rental concession. To have given him more would have over-qualified Petitioner and prevented his living on site at Madalyn Landing Apartments.

32. To establish a prima facie case of retaliation under Title VII, Petitioner must establish by a preponderance of the evidence that he: (1) was engaged in a statutorily-protected activity; (2) suffered adverse employment action; and (3) the adverse employment action was causally related to the protected activity. See Coutu v. Martin County Board of Commissioners, 47 F.3d 1068, 1074 (11th Cir. 1995).

33. An employee is protected from discrimination if (1) he has opposed any practice made an unlawful practice by this sub-chapter (opposition clause), or (2) he has made a charge,

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter (participation clause). 42 U.S.C. § 2000e-(3)a.

34. Petitioner must establish that he was engaged in a statutorily-protected activity and must show that while doing so, he possessed a good faith reasonable belief that Vestcor was engaged in unlawful employment practice. See Little v. United Tech., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997), citing Rollins v. State of Fla. Dept. of Law Enforcement, 868 F.2d 397 (11th Cir. 1989).

35. In this proceeding, Petitioner was not qualified to receive a rent-free unit in Vestcor's apartment complex. Petitioner's ineligibility resulted from his employment position (i.e., leasing consultant) and not any other activity in which he engaged.

36. In this proceeding, Petitioner was qualified to receive a 25-percent monthly rental concession; however, such a concession would have removed him from the tax credit status. It was by Petitioner's agreement with his employer that he exchanged his 25-percent monthly rental concession to a flat $50.00 monthly rental reduction.

37. Petitioner proffered no evidence that Vestcor, at any time pertinent to these proceedings, knowingly engaged in unlawful employment practice with Mr. Gomez, Mr. Oliver, or any

other employee either in their respective employment or the terms and conditions of their housing rental rate and accommodations.

38. Petitioner proffered no evidence that Vestcor, at any time pertinent to these proceedings, knowingly engaged in unlawful discrimination and/or unlawful employment practice in the treatment of its married employees that was different from the treatment he received during his employment.

39. On June 27, 2002, while on 180 days' probation that began on January 9, 2002, Petitioner failed to report to work and failed to report his absence to his supervisor, Ms. Closs. Petitioner's termination on June 28, 2002, was for cause, after warning.

40. Assuming arguendo that Petitioner erroneously believed that Vestcor provided rent-free apartments to Messrs. Oliver and Gomez and that Petitioner set about gathering statements from them regarding their apartment rental agreements with Vestcor for future use in litigation, Petitioner failed to produce evidence that Vestcor was actually aware that Petitioner was gathering statements at the time Vestcor terminated his employment on June 28, 2002. Put differently, Petitioner failed to produce evidence to satisfy the "causal link," that his termination was taken in retaliation for his prior conduct (i.e., engaged in a statutorily-protected activity) of securing information to be used in future litigation. See Goldsmith v. City of Atmore, 996

F.2d 1155, 1163 (11th Cir. 1993). Petitioner has not established the third prong for establishing a prima facie case for retaliation.

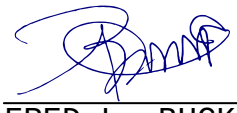
41. Petitioner produced no credible evidence of record that Vestcor's legitimate non-discriminatory reason for his termination, hereinabove found, is pretext.

## RECOMMENDATION

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

RECOMMENDED the Florida Commission on Human Rights enter a final order dismissing the Petition for Relief alleging discrimination filed by Petitioner, Carlos Gomez.

DONE AND ENTERED this 29th day of August, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2005.

## ENDNOTE

[1/] Chapter 741.211, Florida Statutes (2002), provides that "[n]o common law marriage entered into after January 1, 1998, shall be valid, except that nothing contained in this section shall affect any marriage which, though otherwise defective, was entered into by the party asserting such marriage in good faith and in substantial compliance with this chapter." See Gonzales-Jimenez de Ruiz v. U.S., 378 F.3d 1229 (11th Cir. 2004).

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.