

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA COMMISSION ON HUMAN)
RELATIONS, ON BEHALF OF)
DIANA ARGUINZONI DEL TORO,)
)
Petitioner,)
)
vs.) Case No. 05-3364
)
WATERFORD CROSSING COMMUNITY)
ASSOCIATION, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida, on December 5, 2005.

APPEARANCES

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

For Respondent: Thomas F. Luken
1290 East Oakland Park Boulevard
Suite 200
Fort Lauderdale, Florida 33334

STATEMENT OF THE ISSUE

The issue is whether Respondent has committed unlawful housing discrimination against Petitioner.

PRELIMINARY STATEMENT

By Petition for Relief dated September 13, 2005, Petitioner alleged that Respondent committed an unlawful housing practice against Petitioner. The petition alleges that Respondent is a corporation consisting of the owners of 81 townhomes in the development known as Waterford Crossing in Broward County, Florida. The petition alleges that each resident receives one resident parking sticker and one guest parking sticker and that cars bearing either sticker may lawfully be parked on the property, but cars bearing neither sticker may be towed. The petition alleges that, from time to time, based on residents' complaints, Respondent orders the towing of illegally parked cars, and William Shaw, one of the members of Respondent's Board of Directors, has personally directed the tow truck operator to remove specific cars.

The petition alleges that Diana Arguinzoni del Toro is a single female, who has owned and resided in a townhouse at Waterford Crossing since 1997. The petition alleges that Mr. Shaw made a sexual advance to Ms. del Toro in the summer of 2002, but she rebuffed him. The petition alleges that, on March 25, 2004, Sal's Towing towed Ms. del Toro's car from a guest-parking area, ostensibly because it lacked a parking sticker. The petition alleges that Mr. Shaw selectively

enforced the parking regulations against Ms. del Toro because she had rebuffed his sexual advance.

On March 16, 2005, Petitioner issued a Notice of Determination: Cause and Issuance of an Administrative Charge.

At the hearing, Petitioner called seven witnesses and offered into evidence 19 exhibits: Petitioner Exhibits 1-19. Respondent called two witnesses and offered into evidence eight exhibits: Respondent Exhibits 1-6 and 15-16. All exhibits were admitted except Petitioner Exhibit 6, which was proffered.

The parties did not order a transcript. Each party filed a proposed recommended order by December 15, 2005.

FINDINGS OF FACT

1. Waterford Crossing is a development comprising 80 townhomes in Broward County, Florida. Respondent is a homeowners' association consisting of the owners of the 80 townhomes. Respondent is governed by the homeowners and their elected Board of Directors and the officers appointed by the Board. At all relevant times, William Shaw has been the Vice President of Respondent.

2. Diana Arguinzoni del Toro is a female who purchased a townhome at Waterford Crossing in 1997 and has lived there continuously since that time. At all relevant times, Mr. Shaw resided in a townhome across the street from the townhome of Ms. del Toro.

3. Parking is limited at Waterford Crossing. Illegally parked cars, which may consist of vehicles parked outside of marked parking areas or vehicles in marked parking areas, but without the appropriate permit, pose a serious problem. At times, emergency vehicles have been unable to access parts of Waterford Crossing due to illegally parked vehicles.

4. From time to time, Respondent hires a towing company to tow illegally parked vehicles from Waterford Crossing. Immediately after so-called "towing nights," residents and guests tend to comply with applicable parking rules, but, over time, compliance lessens. When the number of parking complaints rises sufficiently, Respondent hires a towing company to conduct another "towing night."

5. It is unnecessary to consider in detail the parking rules of Waterford Crossing. On the evening of March 24, 2004, Ms. del Toro's car was legally parked, as the parking rules have been applied, in a guest space near her townhome. This happened to be a "towing night," although this fact was unknown to Ms. del Toro. As is its practice, Respondent's Board of Directors advised an employee of its property manager to conduct a towing night, and the property manager requested the towing company to tow illegally parked vehicles from Waterford Crossing that night.

6. The diligence and care exercised by the towing company in conducting towing nights left something to be desired. Routinely, the company would tow fewer than all of the vehicles illegally parked at Waterford Crossing, as it proceeded to other sites to serve the towing needs of more profitable customers. From time to time, the company would tow a legally parked vehicle, such as a vehicle parked in a marked space and bearing a suitable parking permit.

7. On the evening in question, towing company's lack of diligence and care combined to result in the towing of Ms. del Toro's car, despite the fact that it bore a suitable parking permit and was legally parked, and in the failure to tow other vehicles that were illegally parked. The removal of Ms. del Toro's car resulted from the failure of the tow truck operator to notice her parking sticker. The failure to remove illegally parked vehicles resulted from the operator's decision to begin and end towing night with the removal of Ms. del Toro's car.

8. Ms. del Toro attributed the improper towing of her car to Mr. Shaw because, in the summer of 2002, he had made an unwelcome sexual advance to her while in her home. At that time, while they were alone, Mr. Shaw twice pulled the front of her blouse, in the vicinity of her breasts, in an apparent attempt to embrace or kiss her. Ms. del Toro firmly rebuffed

him, and she and Mr. Shaw, who had previously maintained a neighborly relationship, no longer spoke to each other.

9. Ms. del Toro subsequently perceived another instance of discriminatory treatment in the maintenance of her landscaping, but the evidence provides no basis to attribute this to Mr. Shaw. The evidence does not link Mr. Shaw to any shortcomings in the maintenance of vegetation on Ms. del Toro's lot, as compared to the maintenance of vegetation on the lots of other owners.

10. Similarly, there is no more basis to attribute the towing incident to Mr. Shaw than to the incompetence of the tow truck operator, which was later fired by the property manager due to its inability to tow sufficient vehicles on "towing nights." Mr. Shaw was at work at Miami International Airport on the night of the towing incident. Additionally, the passing of nearly two years between the unwelcome sexual advance and the claimed retribution--without earlier proved instances of retribution by Mr. Shaw--militates strongly against the interpretation of the towing incident offered by Ms. del Toro and shared by Petitioner.

11. However, Mr. Shaw's longtime status as an officer of Respondent, his unwelcome sexual advance, and his personal involvement in at least one previous "towing night," coupled with the incompetence of the towing company in improperly

removing Ms. del Toro's car, constitute a reasonable basis in law and fact supporting the theory of Ms. del Toro and Petitioner that Mr. Shaw had discriminated against Ms. del Toro, Although their theory proved unsupported by the evidence, Petitioner's commencement of this proceeding was substantially justified, so as to preclude the award of attorney's fees against Petitioner.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 760.35(3)(a), Fla. Stat.

13. Section 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.

14. Section 760.37, Florida Statutes, provides:

It is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise of, or on account of her or his having exercised, or on account of her or his having aided or encouraged any other person in the exercise of any right granted under ss. 760.20-760.37. This section may be enforced by appropriate administrative or civil action.

15. Petitioner has proved that Mr. Shaw made an unwelcome sexual advance upon Ms. del Toro, but has failed to prove the

discriminatory act that it alleged ensued from his rejection by Ms. del Toro. Ms. del Toro's car should not have been towed, but her car was improperly towed due to the incompetence of the towing company, not any act of Mr. Shaw.

16. Respondent is not entitled to an award of attorney's fees and costs, pursuant to Section 57.111(4)(a), Florida Statutes, because the actions of Petitioner were substantially justified due to the facts set forth above. It is thus unnecessary to consider whether special circumstances also preclude the award of fees and costs under Section 57.111, Florida Statutes.

RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 13th day of January, 2006, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of January, 2006.

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 must be filed with the agency that will issue the final order in this case.