STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARMAJENE WISE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-3271
	)	
PROGRESSIVE MANAGEMENT INC. AND DAN D'ONOFRIO,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to Notice, a formal hearing was conducted in this proceeding before Administrative Law Judge Diane Cleavinger of the Division of Administrative Hearings in Milton, Florida, on November 1, 2006.

APPEARANCES

For Petitioner: Carmajene Wise, pro se
22730 Zell Ready Road
Andalusia, Alabama 36421

For Respondent: Dan D'Onofrio, pro se
Progressive Management of America
6598 North West Park Avenue
Milton, Florida 32570

STATEMENT OF THE ISSUE

Whether Petitioner was the subject of discrimination based on her sex or handicap in leasing her apartment from Respondent in violation of Sections 804d and 804d or f of Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of

1988 and the Florida Fair Housing Act, Chapter 760.23(2) (4), Florida Statutes (2006).

PRELIMINARY STATEMENT

Petitioner filed a complaint with the U.S. Department of Housing and Urban Development (HUD) and the Florida Commission on Human Relations (FCHR) on April 4, 2006, alleging that she was discriminated against based on her sex or handicap by the Respondent when the Respondent falsely denied or represented the availability of an apartment, or imposed discriminatory terms, conditions, privileges, or services on Petitioner's lease.

An investigation of the complaint was made by FCHR. The Commission issued its determination that there was no reasonable cause to believe that a discriminatory housing practice had occurred in violation of Section 760.23(1), Florida Statutes (2006), or Sections 804d and 804d or f of Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988. Petitioner disagreed with FCHR's determination and filed a Petition For Relief. The case was forwarded to the Division of Administrative Hearings to conduct a formal hearing on the matter.

At the hearing, Petitioner testified on her own behalf and offered the testimony of one witness. Petitioner also offered two exhibits into evidence. Respondent presented the testimony of two witnesses and offered fourteen exhibits into evidence.

After the hearing, Petitioner and Respondent filed Proposed Recommended Orders on November 15, 2006, and November 11, 2006, respectively.

FINDINGS OF FACT

1. Petitioner resided at Respondent's Thacker I property for at least a year prior to her move to Respondent's Pinewoods Place Apartments located at 5929 Pinewoods Place, Milton, Florida 32570. Petitioner moved to Pinewoods, Apartment 25, around March or April of 2003. Neither Petitioner nor Respondent had any material problems with each other during her residency at Thacker I. Her move to Pinewoods resulted from her request to move to a larger apartment.

2. Pinewoods is a large complex managed by Respondent. Some of the units are subsidized by HUD. A list of tenants in the Pinewood complex reflect 58 tenants. Of the 58 tenants, 34 are female. Eleven of the tenants have a disability. In fact, Respondent contracts with providers who serve the disabled to provide apartments to their clients and provides such apartments regularly.

3. Respondent accommodated Petitioner's request to move to Pinewoods by not requiring a full year's lease since she had already completed a year at Thacker I and by allowing Petitioner to transfer her deposit from the Thacker I apartment to the Pinewoods apartment. Because of these accommodations,

Petitioner was permitted to lease her Pinewoods apartment on a month-to-month lease with an additional deposit of $95.

4. Respondent also accommodated Petitioner in her move by leaving her rent amount the same as it was at Thacker I. Thus, Petitioner paid $400 a month rent instead of the normal $450 a month rent paid by other tenants in comparable apartments.

5. Petitioner did not visit Unit 25 prior to her move to Pinewoods because it was occupied. No other units were available for her to inspect prior to her move. Additionally, HUD inspected the Unit 25 prior to Petitioner's move and found no violations and that the apartment met HUD standards for being mechanically sound and safe. There was no evidence of any representations made by Respondent to Petitioner regarding Unit 25, and Petitioner did not introduce any evidence of such misrepresentations. Clearly, contrary to Petitioner's assertions of misrepresentations about her apartment or her assertion that she looked at her Unit or a model, her apartment was not misrepresented to her prior to her move to Pinewoods, and no discrimination on the basis of sex or handicap occurred.

6. Sometime after her move, Petitioner began to complain about her apartment. The evidence was vague regarding most of her complaints, and Petitioner declined to testify about many of her allegations. For instance, there was a vague complaint about leaves being blown into her yard from the sidewalk when

the maintenance crew would clear the sidewalk of leaves. However, this method of clearing the sidewalk occurred throughout the complex and was not directed toward Petitioner. Likewise, there was a vague complaint about the trash lady disturbing Petitioner's morning coffee by performing her assigned duty of picking up trash around the apartment complex. Again, there was no evidence of any activity being directed at Petitioner based on her sex or handicap.

7. At some point, Petitioner complained to Respondent about her dryer vent not working properly. After several complaints and in an effort to resolve Petitioner's complaint, Respondent's maintenance person put an interior box-style lint trap, in her Unit. Respondent stated he felt this was the best solution because a member of the maintenance staff used the same type lint trap at his home. Petitioner, for a variety of reasons, was not satisfied with Respondent's solution and vented the dryer to the outside herself. There is some dispute over whether Petitioner's repair was safe or done correctly. There is no evidence that indicates Respondent discriminated against Petitioner on the basis of sex or handicap.

8. Petitioner also complained about the sliding glass doors being fogged and wanted them replaced. Respondent explained that the doors were safe and that 55 other residents have fogged glass doors. Respondent refused to replace the

glass doors. The next day Petitioner complained to HUD about the fogged glass door being “non-operable.”

9. Because of the complaint, Robert Youngblood from the HUD office in Milton met Respondent’s maintenance staff at Petitioner’s apartment and discovered that the slider had been knocked off its track. Mr. Youngblood reported to Respondent that it was very clear the door had been sabotaged because he had just inspected that same door just days before because of a prior complaint. Respondent fixed Petitioner’s door again. Additionally, the sliding glass door that Petitioner complained about was inspected by both Santa Rosa Glass and Milton Glass.

10. Petitioner also kept an untagged vehicle in the parking lot and threatened to sue if it were towed. All the Pinewoods’ leases contain a provision that untagged vehicles are not permitted on the premises and will be towed. In order to avoid the vehicle being towed, Petitioner switched the tag from her tagged vehicle to her untagged vehicle and back again as notice was given to her. Petitioner again felt this action was discrimination. Again there was no evidence to support Petitioner’s claim.

11. On January 5, 2006, a little more than two years after she moved to Pinewoods, Petitioner complained, when she came to the office to pay her rent, that her garbage disposal did not work. The staff person who took Petitioner’s rent sent a

maintenance person that day to look at Petitioner's garbage disposal.

12. The maintenance person looked at the alleged disposal location and discovered that Petitioner did not have a garbage disposal. There was no plumbing for one. The evidence showed that many units did not have a garbage disposal and that disposals were removed from each unit as they broke down. Petitioner insisted that she should have a garbage disposal since there was a switch on the wall for one.

13. Because of her actions concerning the garbage disposal, Petitioner was given a Notice of Non-Renewal, dated January 6, 2006. Petitioner refused to pay any rent and refused to vacate the apartment based on her belief that Respondent had discriminated against her based on her sex and handicap. She maintained this belief even though she testified that "everybody had problems getting things fixed." Indeed, her only witness corroborated that men and women, handicapped and non-handicapped have trouble getting things fixed.

14. No reason was given for the non-renewal. Respondent testified that he was tired of Petitioner's actions and deceitfulness.

15. Petitioner chose to withhold her rent when it was due in February 2006, so that Respondent would bring eviction proceedings against her.

16. Respondent eventually brought eviction proceedings against Petitioner. At the eviction hearing, Petitioner told the judge she wanted to be evicted so it would become public record. Respondent was awarded possession of the premises. After Respondent was given possession, the next morning he received a copy of a letter to the judge requesting that he rescind his decision and requesting another judge. Petitioner has since moved to another apartment. As with the other incidents described above, the evidence did not demonstrate that Respondent discriminated against Petitioner on the basis of her sex or handicap. Therefore, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57(1), Fla. Stat. (2006).

18. Under Florida's Fair Housing Act ("Act"), Sections 760.20 through 760.37, Florida Statutes (2006), 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 cases involving a claim of rental housing discrimination, 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, 1013 n.7 (Fla. 1st DCA 1996), aff'd, 679 So. 2d, 1183 (Fla. 1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

20. 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, 120 S. Ct. 2097, 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).

21. "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).

22. "[D]irect 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.").

23. In order to establish the elements of a case of discrimination involving the terms, conditions or privileges related to the non-renewal of a lease, the following must be proven:

> 1) Petitioner belongs to a protected class;
> 2) Petitioner was qualified, ready, willing and able to continue occupancy consistent with the terms and conditions offered by Respondent;
> 3) When did the Respondent notify the Petitioner that the lease would not be renewed, and what explanation was offered by the Respondent for the decisions;
> 4) After the Respondent notified Petitioner of the non-renewal, did the Respondent renew the leases of other similarly situated residents who belonged to a comparable class of person?

24. In order to prove the elements of a case of discrimination in the provision of services or facilities the following must be proven:

> 1) Does the Petitioner belong to a protected class?
> 2) Was the Petitioner qualified, ready, willing, and able to receive services or use facilities consistent with the terms and conditions offered by the Respondent?
> 3) Did the Respondent receive services, or attempt to use facilities consistent with the terms and conditions applicable to all person who were qualified or eligible for services or use of facilities?
> 4) Did the Respondent willfully fail or refuse to provide services, or permit use of the facilities under the same terms and conditions to the Petitioner that were applicable to all person who were qualified or eligible for services or use of facilities? After the Petitioner was denied the services or facilities, did the Respondent provide similar services or facilities to a person from a comparable class of persons?

25. In this case, Petitioner provided no evidence that she was discriminated against on the basis of her sex or handicap. Indeed, the evidence demonstrated that other tenants of any variety either had the same problems she did or had apartment fixtures similar to hers. If anything, the evidence demonstrated that Petitioner’s difficulties were due to her personality and were of her own making. Such personality

difficulties do not constitute discrimination under Florida's Fair Housing Act. Therefore the Petition For Relief should be dismissed.

DONE AND ENTERED this 2nd day of January, 2007, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of January, 2007.

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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.