

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT COWDEN,)
)
 Petitioner,)
)
 vs.) Case No. 07-0498
)
 CHARLES CLOTFELTER AND KING'S)
 GATE CLUB, INC.,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

The final hearing in this case was conducted by telephone conference by Administrative Law Judge Bram D. E. Canter of the Division of Administrative Hearings (DOAH) on April 5, 2007.

APPEARANCES

For Petitioner: Robert Cowden, pro se
31 Castle Drive
Nokomis, Florida 34275

For Respondents: Robert E. Turffs, Esquire
Robert E. Turffs, P.A.
1444 First Street, Suite B
Sarasota, Florida 34236

STATEMENT OF THE ISSUE

Whether Petitioner Robert Cowden was the subject of housing discrimination by Respondents based on Mr. Cowden's physical handicap, in violation of Florida's Fair Housing Act.

PRELIMINARY STATEMENT

Petitioner Robert Cowden and his mother, Alice Cowden, filed a complaint with the Florida Commission on Human Relations (Commission) on July 17, 2006, alleging that Robert Cowden was discriminated against by Respondents because of his physical disability, Acquired Immune Deficiency Syndrome (AIDS). More specifically Petitioner alleged that Respondents failed to make reasonable accommodation for his disability by allowing him to visit his mother in an adult mobile home community in excess of the community's rules that restrict visitation by persons under the age of 55.

The case was referred by the Commission to DOAH showing both Robert Cowden and Alice Cowden as Petitioners. However, the evidence presented at the final hearing established that no allegation was ever made that Alice Cowden was the subject of discrimination. Therefore, the style of the case has been changed for this Recommended Order to remove Alice Cowden as a Petitioner. In addition, the evidence shows that Petitioner's complaint against Charles Clotfelter was in his capacity as general manager of King's Gate Club, which is operated by King's Gate Club, Inc. Therefore, King's Gate Club, Inc., has been added to the case style as a Respondent.

The Commission investigated the complaint and determined that there was no reasonable cause to believe that a

discriminatory housing practice had occurred in violation of state and federal law. Petitioner disagreed with the Commission's determination and filed a Petition for Relief. The case was forwarded to DOAH to conduct a de novo hearing on the matter.

At the hearing, Petitioner testified on his own behalf and offered the testimony of his mother, Alice Cowden. Petitioner's Exhibits 1 and 2 were admitted into evidence. Respondents presented the testimony of Harlan Domber and Charles Clotfelter. Respondents Exhibits 1 through 29 were admitted into evidence. The final hearing was recorded by a court reporter, but a transcript was not filed with DOAH.

Respondents filed a Proposed Recommended Order and Petitioner filed a letter. Attached to Petitioner's letter was a letter from another resident of King's Gate Club. The attached letter was not admitted into evidence, but remains in the record.

FINDINGS OF FACT

1. Petitioner has AIDS, which qualifies him as a person with a handicap under state and federal fair housing laws.
2. Petitioner's mother, Alice Cowden, is a resident of King's Gate Club in Venice, Florida.
3. Charles Clotfelter is the general manager of King's Gate Club. King's Gate Club is an adult mobile home community

operated by King's Gate Club, Inc. The Articles of Incorporation for King's Gate Club, Inc., specify that permanent occupants shall be 55 years old or older. No permanent occupancy is permitted for persons under the age of 55 unless an exemption is granted at the sole discretion of the board of directors and only if granting the exemption will not result in less than 80 percent of the mobile homes in the community having at least one resident aged 55 or older.

4. The rules of King's Gate Club require residents to limit visits by adult guests under age 55 to a maximum of 120 days within any consecutive 12-month period.

5. Petitioner is an adult, but less than 55 years old. In 2005 and 2006, Petitioner was a frequent visitor at his mother's home in King's Gate Club. Several times in 2006, Respondents informed Petitioner's mother that Petitioner's visits had exceeded the community's visitation rule. Mr. Clotfelter, the manager of King's Gate Club, also discussed the visitation rule issue with Petitioner.

6. On May 7, 2006, Mr. Clotfelter sent a letter to Ms. Cowden requesting that Petitioner either vacate the premises or become a member of King's Gate Club. As a member, Petitioner would not be subject to the visitation rule. Becoming a member requires a \$120 application fee and includes a "background check."

7. In June 2006, Petitioner first informed Mr. Clotfelter that Petitioner had AIDS.

8. On July 13, 2006, a certified letter was sent to Ms. Cowden by Harlan Domber, the attorney for King's Gate Club, Inc., informing her that Petitioner's visits exceeded the limits stated in the rules. Mr. Domber advised Ms. Cowden that Petitioner must vacate her premises or she and Petitioner must apply to make Petitioner a co-owner of the mobile home.

9. Instead, Petitioner responded by filing a complaint with the Commission. Petitioner claims that Respondents were required to allow him to visit his mother at King's Gate Club as often as he wanted as a reasonable accommodation for his disability.

10. Petitioner testified that he takes medications and receives treatments for his AIDS, but that he has no physical limitation that requires him to use any assistive device, such as a wheelchair, or assistive technology. He also testified that he does not need the care of his mother for his disability.

11. Petitioner never requested that King's Gate Club provide any particular accommodation for his disability. Based on his understanding of the fair housing laws, Petitioner assumed that when he informed Mr. Clotfelter that he had AIDS, Mr. Clotfelter would understand that King's Gate Club could not require Petitioner to comply with the visitation rule. As

explained in the Conclusions of Law, Petitioner's understanding of the law was mistaken.

12. Nevertheless, following Petitioner's complaint to the Commission, the board of directors of King's Gate Club decided not to enforce its visitation rule against Petitioner, and he now visits his mother at King's Gate Club as often as he wishes. This action by the board does not make the case moot, however, because the board could change its position.

CONCLUSIONS OF LAW

13. DOAH 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 (2006).¹

14. Under Florida's Fair Housing Act ("the Act"), Sections 760.20 through 760.37, Florida Statutes, it is unlawful to discriminate in the sale or rental of housing. Subsection 760.23(1), Florida Statutes, states in pertinent part:

It is unlawful to . . . make unavailable or deny a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.

15. Subsection 760.22(7)(a), Florida Statutes, defines "handicap" as "a physical or mental impairment which substantially limits one or more major life activities." Respondents argue that Petitioner does not have a handicap as

defined in the Act, because Petitioner admits to having no current physical impairment as a result of AIDS.

16. In interpreting and applying the Act, the Commission and the Florida courts regularly seek guidance from federal court decisions interpreting similar provisions of federal fair housing laws. Federal court decisions have recognized persons with AIDS to have a handicap subject to the protections of the Fair Housing Amendment Act of 1988, 42 U.S.C. § 3601, et seq. (FHAA). See, e.g., McGary v. City of Portland, 386 F.3d 1259 (9th Cir. 2004). The undersigned declines to resolve whether under Florida law, some persons with AIDS are protected by the housing laws and others are not, based on the degree of the disease's debilitating effects on the person. This case can be resolved by focusing on the question of what physical limitations Petitioner had because of his AIDS and whether Respondents failed to make reasonable accommodation for those physical limitations.

17. Subsection 760.23(9), Florida Statutes, states in relevant part that discrimination in housing includes:

(b) A refusal to make reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

18. In cases involving a claim of housing discrimination, the complainant has the burden of proving a prima facie case of

discrimination by a preponderance of the evidence. To establish a prima facie case of failure to make a reasonable accommodation under the similar provision of federal law, 42 U.S.C. Section 3604(f)(3)(B), Petitioner must show:

- a) that he suffers from a handicap;
- b) that Respondent 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) that Respondent refused to make such an accommodation.

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

19. 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).

20. If, however, the complainant 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)).

21. Petitioner did not meet his burden to establish a prima facie case of discrimination. Petitioner failed to prove that King's Gate Club, Inc., refused to permit him to visit his mother under the same terms and conditions of visitation that were applicable to all guests. Petitioner also failed to prove that he required an accommodation in order to have an equal opportunity to use and enjoy his mother's home in King's Gate Club.

22. By his own admissions, Petitioner is not in need of an accommodation to overcome a physical limitation.² Persons with handicaps are a protected class, not a privileged class. Petitioner is not seeking protection of his right to an equal opportunity to visit his mother. He is seeking the privilege of having greater visitation rights than other guests at King's Gate Club. The Act does not require King's Gate Club, Inc., to grant him such a privilege.

23. For the reasons set forth above, the actions of Respondents that Petitioner complained of do not constitute

discrimination under the Act. Therefore, the Petition for Relief should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Petition for Relief be dismissed.

DONE AND ENTERED this 5th day of June, 2007, in Tallahassee, Leon County, Florida.

S

BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of June, 2007.

ENDNOTES

^{1/} All references to the Florida Statutes are to the 2006 codification.

^{2/} Petitioner's request for the accommodation was apparently based only on his personal financial needs. Some federal court decisions strongly suggest that the FHAA does not contemplate financial or economic accommodations. Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 302 (2d Cir. 1998). See

also Schantz v. Village Apartments, 998 F. Supp. 784 (E.D. Mich. 1998)(Landlord's no co-signer policy did not have to be waived to accommodate a person with a disability.) In any event, Petitioner did not show a connection between his financial needs and his disability.

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.