STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WANDA HUTCHESON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-1087
	)	
ROBERT AND JUSTYN MACFARLAND AND SAND DUNE PROPERTIES,	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

Pursuant to Notice, a formal hearing was held in this matter before Diane Cleavinger, Administrative Law Judge with the Division of Administrative Hearings, on August 6, 2007, in Pensacola, Florida.

APPEARANCES

For Petitioner: Melissa A. Posey, Esquire
Melissa A. Posey, P.A.
201 East Government Street, Suite 36
Pensacola, Florida 32502

For Respondent: Robert and Justyn MacFarland
Sand Dune Properties
7173 Blue Jack Drive
Navarre, Florida 32566

STATEMENT OF THE ISSUE

Whether the Petitioner has been the subject of a discriminatory housing practice.

PRELIMINARY STATEMENT

In 2006, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) claiming housing discrimination against her by the Respondents based on Petitioner's mental disability. Specifically, the charge alleged that Respondents discriminated against her when they withdrew their offer to renew the lease to her apartment and forcibly evicted her from the premises after the lease had terminated. FCHR investigated the charge of discrimination. On February 6, 2007, FCHR issued a finding of No Probable Cause on Petitioner's claim. Petitioner disagreed with FCHR's findings and filed a Petition for Relief. The Petition was based on the earlier Charge of Discrimination.

At the hearing, Petitioner testified in her own behalf and called eight witnesses to testify. Petitioner also offered the deposition testimony of two witnesses and offered 41 exhibits into evidence. Respondents offered seven exhibits into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order on September 6, 2007. Respondents filed a Proposed Recommended Order on September 4, 2007.

FINDINGS OF FACT

1. Several years prior to 2007, Petitioner, Wanda Hutcheson, leased one side of a duplex apartment from LGMS. The apartment was located on 3359 Greenbrier Circle, in Gulf Breeze, Florida. During the time that LGMS owned the property, the property manager found her to be a responsible tenant who paid her rent on time. Indeed, the manager felt that she had improved the look and value of the property because she had done extensive landscaping in her front yard. The increase in value was not shown by the evidence.

2. At the time, Petitioner's landlord knew that she had a mental disorder known as Obsessive Compulsive Disorder (OCD). In part, the extensive yard work done by Petitioner was due to her OCD. She regularly watered her yard with the shared sprinkler system that served both apartments in the duplex. However, the electricity for the water pump that operated the sprinkler system was hooked into the electrical system for the apartment adjoining Petitioner's apartment. The sprinkler system was operated by a switch located either by or in the electrical box for the adjoining apartment and the electrical box for her apartment. Petitioner was frequently in the area of those boxes.

3. Respondent, Sand Dunes Property, LLC (Sand Dunes), is a limited liability company owned and operated by Respondents,

Robert and Justin MacFarland. In 2006, Sand Dunes purchased several parcels of rental property from LGMS, including the apartment leased by Petitioner.

4. In February 2006, prior to Sand Dunes' purchase of the property, the MacFarlands visited the premises they were about to purchase and met Petitioner. At that time, Petitioner told the Respondents that she had OCD. She neither requested nor indicated the need for any special accommodations from the Respondents regarding her lease. The evidence did not show that the Respondents knew or were aware that OCD could be a disability that might significantly interfere with a person's life activities. To them, Petitioner did not seem mentally disabled and appeared able to carry out her daily activities. She appeared to live her life as any other person might. In fact, among other things, Petitioner drove a car, occasionally worked cleaning houses, performed yard work, had the electrical part of her apartment's sprinkler system transferred to her electrical system, paid her lease and cared for other people's children.

5. Around March 2006, subsequent to the purchase of the property by the Respondents, Peter Bouchard moved into the apartment next to Petitioner's apartment. Shortly after he moved in, Petitioner was watering her yard with the sprinkler system. Mr. Bouchard saw her and turned off the sprinkler

system. He told her he did not believe in watering the grass and that he did not want his yard watered. He told her that as long as the pump was hooked to his electrical box that she could not use the sprinkler system since he was paying for the electricity used in its operation. He suggested that she could have the pump transferred to her electrical box if she wanted to continue to use the system.

6. Petitioner called Respondents and left a message about the need to transfer the electrical connection for the sprinkler system to her electrical box and to make sure it was alright for her to pay to have the system transferred. The evidence did not show that she related the details of Mr. Bouchard's actions to Respondent's. She did not receive a response to her message and eventually paid for the system to be transferred to her electrical box. At some point, even though she did not own the sprinkler systems components, she removed the sprinkler heads from Mr. Bouchard's side of the yard. She capped the pipe where the heads had been and filled the hole. She did not tell anyone that she had removed the sprinkler heads, but kept the sprinkler heads in her apartment.

7. Additionally, during March 2006, Petitioner complained to Santa Rosa Animal Control about Mr. Bouchard's two dogs being abused by him and barking. She also complained about the two dogs of the neighbor who lived behind her, Jodi Henning. Both

of these incidents were investigated by Animal Control and no abuse was discovered. In fact, the dogs never barked or only barked for a short time when the investigator visited the duplex on two occasions. Petitioner's actions appeared to be in retaliation for Mr. Bouchard's refusal to permit her to use the sprinkler system.

8. Finally, at some point, Petitioner while on her front porch saw Mr. Bouchard's son walking to his apartment. She told the boy that she would cause Mr. Bouchard's dogs to be removed for abuse and then would have him removed for the same reason. The comment upset both the boy and Mr. Bouchard.

9. On April 3, 2006, Sand Dunes mailed a written offer to enter into a new lease with Petitioner. The offer was made to Petitioner because her lease would terminate on May 30, 2006. The offer was conditioned upon an increase in the monthly rent on Petitioner's apartment. The offer stated, "Please let us know by May 1st of your decision so that we may set up an appointment to review and sign your new lease agreement." The intent of the letter's language was to not be contractually bound until a new lease was signed by the parties. There was no evidence that Respondents treated any other potentially continuing tenant differently.

10. Around April 4, 2006, Mr. MacFarland left a message for Petitioner regarding a maintenance check on her apartment's

air conditioner. Petitioner returned the call and left a message that she could not be present at the time suggested and asked that the work be performed at another time.

11. Petitioner received the written offer of renewal on April 5, 2006, and attempted to accept the offer by leaving a message on Respondent's telephone. After the first message, Petitioner left town to attend a family function out of state.

12. Around April 6, 2006, air-conditioning maintenance checks were performed on nine of ten units owned by the Respondents in the Greenbrier area.

13. Around April 6 or 7, 2006, Respondents were contacted by Mr. Bouchard. Mr. Bouchard complained about Petitioner to the MacFarlands. He told them that Petitioner had stolen the sprinkler heads out of his side of the yard and that she turned off the electricity to his apartment. He showed them a photograph of the unlocked electrical box to his unit. He also relayed to Respondents that Petitioner had repeatedly accused him of abusing his dogs, not properly vaccinating his dogs and had repeatedly reported him to Animal Control for animal abuse and barking dogs. Apparently, Mr. Bouchard complained enough about Petitioner to Respondents to make them believe that Respondent was a particularly disruptive and vengeful tenant.

14. At some point, Respondents became aware of Jodi Henning's problems with Petitioner. Ms. Henning lived in a

different complex from Petitioner. However, her backyard adjoined Petitioner's backyard. She called the Sheriff's Department on Ms. Hutcheson on a few occasions for problems she had with Petitioner. None of the incidents amounted to an arrest. During an evening in March 2005, Ms. Henning's dogs were inside with her. They had not been outside. Ms. Henning answered the door. Petitioner, who was quite angry, complained about Ms. Henning's dogs and told her that she had made an enemy of Petitioner and that she would make Ms. Henning's life miserable. Ms. Henning called the Sheriff's Department. The 911 operator asked if Petitioner was drunk. Ms. Henning said that Petitioner was not drunk, but just crazy and mean. Petitioner was told by law enforcement personnel that Santa Rosa County Animal Control should be contacted if she had an issue with a neighbor's dog. She then filed a complaint with Santa Rosa County Animal Control about Ms. Henning's dogs. Petitioner made a similar complaint in April 2006. Neither complaint was found to have merit by the investigator for Animal Control.

15. Additionally, Ms. Henning felt that she could not go out in her yard without Petitioner coming out to watch her. Petitioner never engaged in any physically, aggressive behavior. However, Ms. Henning felt she became threatening to the point she was afraid.

16. Petitioner had told both Ms. Henning and Mr. Bouchard that she had OCD. However, based on their observation of her, neither thought that Petitioner was disabled by her condition. They both thought that she was simply nosy and mean. On the other hand, there were former neighbors who thought Petitioner was a nice person and a good neighbor. However, the evidence did not demonstrate that these neighbors' opinions were known to the Respondents during the time the offer to lease was outstanding.

17. Mr. MacFarland obtained copies of "call reports" received by Animal Control regarding Ms. Henning and Mr. Bouchard's dogs. Those reports consisted of complaints in March 2005 about Ms. Henning's two dogs, and in March 2006 concerning Ms. Henning's two dogs and Mr. Bouchard's two dogs.

18. On April 10, 2006, Respondents sent a letter on Sand Dunes' stationary revoking the earlier offer to lease her apartment after expiration of her lease. Based on the Respondents limited knowledge about Petitioner during the time the offer to lease was outstanding, their conclusion was neither unreasonable nor discriminatory. Thereafter, the Respondents were entitled to rely on the expiration of the lease by its terms and the peaceful return of the premises.

19. Petitioner received the revocation letter around April 12, 2007, when she returned home from out of state. No

explanation was given in the letter for the withdrawal of the offer to lease.

20. Petitioner called Mr. MacFarland on the date she received the revocation letter. She was very distraught and tearful. During the long conversation, the only explanation Respondent recalled from Mr. MacFarland as to why Respondents withdrew their offer was that he did not like her. Petitioner also was told to communicate with their lawyer, Keri Anne Schultz, Esquire.

21. Petitioner went to Ms. Schultz's law office to discuss the situation with her. Ms. Shultz was not in the office. Petitioner was told by the receptionist that she could not wait in the office for Ms. Schultz to return. Ms. Hutcheson wanted to write Ms. Schultz a note regarding renting the duplex. Mr. Bordelon, Ms. Schultz's partner, threatened to call the police if Petitioner remained at the office. Petitioner left the office.

22. Thereafter, the only communication from the MacFarlands or their attorney was legal notices to vacate the premises. Petitioner did attempt to send them information on OCD. The evidence was not clear whether the Respondents received the information or reviewed it.

23. Petitioner refused to vacate the premises and an eviction action was filed in June 2006. A hearing was held in

the Circuit Court in June and July of 2006. By court order dated August 17, 2006, Respondents were awarded possession of the property on August 31, 2006, at 11:59 p.m.

24. Unfortunately, Petitioner, due to ill health, did not begin to vacate the premises until a few days prior to forcible removal. She was not finished moving on September 5, 2006, five days after the Respondents were to be put in possession of the property. The Respondents had the Sheriff's Deputy remove Petitioner from the premises, telling her that she should have been out a long time ago. The MacFarlands, with a little help from Mr. Bouchard, removed the rest of Petitioner's possessions to the curb. During the removal, the bottom of a box Mr. Bouchard was carrying came undone and some of the contents fell onto the pavement. One jar of food was broken. All of these events were very distressful to Petitioner.

25. Upon learning that she would be evicted, Petitioner began seeing Dr. Bingham in May 2006. Eventually, she was involuntarily committed for a short time and has been seeing Dr. Bingham every two or three weeks for the last year.

26. The apartment remained vacant for several months after the eviction. Eventually, Mr. Bouchard moved into the unit at a lower rate of rent than he paid for his old apartment but higher than the amount Petitioner would have paid if the new lease had taken effect.

27. As indicated, between February 2006 and April 2006, Mr. and Mrs. MacFarland's only contact with Petitioner was a visit to her duplex apartment with the realtor selling the property and some voice mails exchanged between them concerning the sprinkler and air conditioning systems. Respondents had little knowledge regarding Petitioner. Even though the evidence demonstrates that Respondents could have acted more kindly and could have better informed themselves about the circumstances of Petitioner, there was no evidence that the withdrawal of the offer to renew was made based on an intent to discriminate against Petitioner because of her mental disability. Therefore, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

29. Section 760.23, Florida Statutes (2001), part of Florida's Fair Housing Act, provides in pertinent part:

> (2) 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.
>
> * * *

> (8) 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 with such dwelling, because of a handicap of:
>
> (a) That buyer or renter
>
> * * *
>
> (9) For purposes of subsections (7) and (8), discrimination includes:
>
> * * *
>
> ((b) A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

30. Petitioner has the burden of proving by a preponderance of the evidence that Respondents violated the Florida Fair Housing Act. See §§ 760.34(5) and 120.57(1)(j), Fla. Stat. (2001).

31. To establish a prima facie case of housing discrimination, Petitioner must show:

> a) that she suffers from a handicap;
>
> b) that Respondents 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) Respondent refused to make such an accommodation.

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

32. Section 760.22, Florida Statutes, provides in relevant part:

> (7) "Handicap" means:
>
> (a) A person has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment; or
>
> (b) A person has a developmental disability as defined in s. 393.063.

33. "The Fair Housing Act defines 'handicap' to be 'a physical or mental impairment which substantially limits one or more of such person's major life activities'." Elliott v. Sherwood Manor Mobile Home Park, 947 F. Supp. 1574, 1577. This definition is virtually identical to those found in the federal Fair Housing Act, 42 U.S.C. Subsection 3602(h)(defining "handicap"); the Americans with Disabilities Act, 42 U.S.C. Subsection 12102(2)(A)(defining "disability"); and the Rehabilitation Act, 29 U.S.C. Subsection 705(9)(B)(defining "disability"). Under the term "handicap" or "disability," each of these laws provides relief only to a person with an impairment that substantially limits a major life activity. See

§760.22(7), Fla. Stat. Id. at 1577-78; see also Godwin v. State, 593 So. 2d 211, 215, 219 (Fla. 1992).

34. The United States Supreme Court has addressed the definition of "disability" in the context of a case brought pursuant to the Americans with Disabilities Act. In Sutton v. United Airlines, 527 U.S. 471, 119 S.Ct. 2139, 2143, 114 L. Ed. 2d 450 (1999), the Court held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."

35. The Court in Sutton relied as well on the definitions of "substantially limits" and "major life activities" contained in the regulations of the Equal Employment Opportunities Commission, as follows:

> The term "substantially limits" means, among other things, "[u]nable to perform a major life activity that the average person in the general population can perform;" or "[s]ignificantly restricted as to the condition, manner, or duration under which the average person in the general population can perform that same major life activity" [Citation omitted.] Finally, "[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." [Citation omitted.]

Sutton, 119 S. Ct. at 2145.

36. The Court in Sutton observed that, in determining whether a person with a physical impairment is disabled under

the Americans with Disabilities Act, the proper inquiry is whether the person is substantially limited in one or more major life activities, when the impairment is corrected or mitigated through the use of medication or corrective devices. According to the Court, the Americans with Disabilities Act requires that this determination be made for each individual with an impairment:

> A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not "substantially limi[t]" a major life activity.

Id. at 2146-47. See also Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 119 S. Ct. 2162, 2168, 144 L. Ed. 2d 518 (1999)(Error for lower court to hold that a "mere difference" in ability met the statutory definition: "By transforming 'significant restriction' into 'difference,' the court undercut the fundamental statutory requirement that only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities.").

37. In this case, Petitioner has failed to establish a prima facie case of discrimination in that she has failed to demonstrate that she is handicapped within the meaning of the Fair Housing Act. The fact that she has OCD does not mean that she is handicapped for purposes of the Fair Housing Act. Her OCD must impair her in some major life activity and that impairment must be significant.

38. The evidence showed that Petitioner functioned fairly well in her life. She got along with some neighbors and did not get along with others. She drove, occasionally worked, cooked, cleaned, and solved problems that occurred in her life. Indeed she handled the affects of her OCD fairly well. There was no reason for the Respondents to assume that she was handicapped simply because she has OCD, no accommodation was requested and there was no duty to investigate her condition further prior to Respondents' decision not to enter into a lease with Petitioner. Moreover, in this case, there was evidence to support the Respondents withdrawal of their offer to lease. There were at least two neighbors complaining about the actions of Petitioner towards them. At that point, Respondents were entitled to decide not to enter into a lease agreement with Petitioner once her current lease terminated. After withdrawal of the offer to lease, Respondents could rely on the terms of the contract, peaceful vacation of the premises and to use Florida's Landlord

Tenant Act to enforce their right to possession of the property. Since Petitioner has not established a prima facie case of discrimination, the Petition for Relief should be dismissed.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 7th day of December, 2007, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of December, 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.