

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VICTOIRE MERCERON,)
)
 Petitioner,)
)
 vs.) Case No. 08-6415
)
 THE PARTNERSHIP, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on April 1, 2009, in Port Charlotte, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jennifer Miller-Veal, Esquire
1225 Tamiami Trail, Unit A-10
Port Charlotte, Florida 33953

For Respondent: Peter L. Sampo, Esquire
Allen, Norton and Blue, P.A.
121 Majorca Avenue, Suite 300
Coral Gables, Florida 33134

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated the Fair Housing Act, Section 760.20, et seq., Florida Statutes (2008), by denying Petitioner housing based on her gender (female) and familial status (pregnant).

PRELIMINARY STATEMENT

On or about September 30, 2008, Petitioner, Victoire Merceron, filed a Housing Discrimination Complaint with the Florida Commission on Human Relations, alleging discrimination by Respondent, The Partnership, Inc. Upon review of the Complaint, the Commission entered a Determination: No Cause.

Petitioner then filed a Petition for Relief which was transmitted to the Division of Administrative Hearings ("DOAH") on December 24, 2008. Respondent filed an Answer and Affirmative Defenses to the Petition for Relief. The matter was set for final hearing, and the parties submitted a joint Prehearing Stipulation on March 25, 2009.

At the final hearing held on April 1, 2009, Petitioner relied upon the testimony of three witnesses: Richard Elwood, regional manager for NDC Management; Petitioner, Victoire Merceron; and Arthur Fufidio, manager of The Pines (a low income apartment complex). Petitioner offered one exhibit (a copy of Petitioner's Lease and Addendum with The Pines), which was received in evidence. Respondent presented the testimony of two witnesses: Jacquie Halvax, assistant manager at The Pines; and Beth Manning, property manager at The Pines. Respondent also offered five exhibits, all of which were received in evidence.

At the close of the evidentiary portion of the final hearing, the parties were allowed ten days from the filing of

the hearing transcript at DOAH to file their respective proposed recommended orders. On April 13, 2009, Petitioner filed a Recommended Order [sic] setting forth proposed findings of fact and conclusions of law. The Transcript was filed at DOAH on April 21, 2009.

On May 4, 2009, one day after the proposed recommended orders were due to be filed at DOAH, Respondent filed a motion seeking additional time to file its proposed recommended order. Respondent requested to file its proposed recommended order on May 6, 2009 (three business days after it was initially due). Petitioner objected to Respondent's motion, stating that Respondent should have been more diligent. No specific prejudice was alleged should Respondent's motion be granted. Respondent's motion was granted by the Administrative Law Judge, but Petitioner was given seven days to file a responsive proposed recommended order, if deemed necessary. Petitioner filed a second response to Respondent's motion, claiming that failure to file the proposed recommended order timely was de facto evidence of prejudice against Petitioner. Respondent filed its proposed findings of fact, conclusions of law and legal memorandum on May 6, 2009. Petitioner filed a response to Respondent's proposed findings and conclusions. All post-hearing submissions by the parties were considered in the preparation of this Recommended Order.

All references to Florida Statutes herein shall be to the 2008 version, unless specifically stated otherwise.

FINDINGS OF FACT

1. Petitioner, Victoire Merceron, is a single mother with three children. At all times relevant hereto, she was living at an apartment complex known as The Pines pursuant to a Lease with NDC Management. There was an Employee Lease Addendum dated February 2, 2008, attached to Petitioner's Lease. The Addendum was signed by Petitioner to reflect her status as an employee of NDC Management and, therefore, eligible for a reduction in her monthly rent.

2. Respondent, The Partnership, Inc., is a real estate management company specializing in managing affordable housing properties which are experiencing problems or business difficulties. Respondent began managing The Pines on August 1, 2008. Prior to that time, The Pines had been managed by NDC Management.

3. Petitioner had worked as a leasing consultant with NDC Management at The Pines from October 2007 until July 2008. During that time, she enjoyed the benefit of a 20 percent reduction in her rent (which was provided to all employees of NDC Management who lived in a managed property).

4. The Pines is owned by Punta Gorda Pines, Ltd. It is a 336-unit apartment complex which provides low income housing

(affordable housing) for qualified persons. One hundred percent of the units at The Pines are set aside for low income residents. Of the 336 units, 202 units (60 percent) have a rental amount which does not exceed 60 percent of the area median income. One hundred and one units (33 percent) have an even lower rental amount. The rental amounts and number of units is established annually by the Florida Housing Finance Corporation.

5. Respondent was contacted by the owner of The Pines at some point in 2008 concerning the assumption of management of The Pines due to problems existing at the property. Respondent visited the property in July and met with some of the existing staff and management. Respondent then assumed management of The Pines on August 1, 2008. At that time, approximately 40 percent of the units at The Pines were not under lease to a tenant, i.e., the property was only 60 percent occupied. Sixty percent occupancy is evidence of a "problem affordable property" from Respondent's perspective.

6. When Respondent took over management of The Pines, it terminated some of NDC Management's employees and retained some other employees. Petitioner was not retained by Respondent as an employee.

7. The Employee Lease Addendum to Petitioner's Lease at The Pines included a clause that required Petitioner to vacate

her apartment within 15 days of termination of her employment with NDC Management. Petitioner was terminated as of July 31, 2008.

8. Upon termination of her employment, Petitioner requested from Respondent that she be allowed to remain in her current apartment beyond the 15-day extension period. That request was granted by Respondent, and Petitioner was ultimately allowed to stay in the apartment through the end of August 2008.

9. As of July 31, 2008, Petitioner had two children and was pregnant with a third. Inasmuch as she would need a home for her family, Petitioner asked Respondent to consider her as a new, non-employee tenant.

10. Respondent agreed to consider Petitioner's request and asked Petitioner to provide proof of income so that a predetermination review could be conducted. It was Respondent's policy to do a predetermination review prior to the formal application process. The stated reason for this practice was that Respondent did not want an applicant to have to pay the non-refundable application fee, if the applicant was unlikely to be qualified to obtain an apartment.

11. Respondent made its predetermination of eligibility using an Income and Rental Rates Chart which Respondent had developed. The chart indicates the income necessary for rental of different size apartments within the complex.

12. In response to Respondent's request for income verification, Petitioner provided Respondent with a form (or letter) indicating that she had applied for payment of unemployment compensation for a two-week period. The form indicated that Petitioner would receive \$225.00 per week for that two-week period. Petitioner represented to Respondent's agents that she had been approved for up to six months of unemployment compensation at \$225.00 per week.¹ There was, however, no competent evidence of that fact presented to Respondent (or introduced into evidence at the final hearing).

13. Respondent calculated the amount of Petitioner's anticipated income based on the stated unemployment compensation payments to be made. Two-hundred and twenty-five dollars per week for an entire year (52 weeks) would be a total of \$11,700.00. However, inasmuch as Petitioner only represented that she might receive up to six months of unemployment compensation, her anticipated annual income would be one-half that amount, or \$5,850.00. That amount of income was not sufficient to warrant approval for even the lowest priced units available at The Pines, i.e., \$10,660.00 per year.²

14. Based upon its predetermination review, Respondent denied Petitioner's initial inquiry concerning eligibility for an apartment at The Pines. That being the case, Respondent did not provide Petitioner a formal application to fill out. It

would have been a fruitless exercise based on Petitioner's stated level of income.

15. Respondent does not appear to discriminate on the basis of gender or familial relationship when renting to other residents. In its Rent Roll from March 31, 2009, Respondent can point to over 70 single women with children living at The Pines. A large number of those women were at The Pines when Respondent took over management. Others became residents during Respondent's tenure as manager.

16. Respondent based its decision to deny Petitioner's inquiry solely on the information provided by Petitioner. Petitioner did not suggest to Respondent that she was receiving child support, alimony, or any other kind of support from a third party. However, Petitioner maintains that the fathers of her children would provide support on an as-needed basis (but since Respondent didn't ask her about such support, she did not volunteer the information). In January 2008, when Petitioner filled out a Residency Application to obtain an apartment at The Pines, she said she was not receiving any alimony or child support, nor had any such support been court ordererd.³ Petitioner did not present any evidence at final hearing as to the amount or frequency of child support she received from her children's fathers. It is, therefore, impossible to impute any

certain amount for the purpose of determining Petitioner's eligibility for an apartment at The Pines.

17. When Petitioner was working at The Pines and a person seeking an apartment did not qualify financially, Petitioner would ask the person whether he or she could get someone to co-sign for him/her, guarantee his/her rent, etc., or whether he or she could receive child support. It is not clear at what point in the application process (i.e., during predetermination or upon filing of a formal application form) Petitioner would make this inquiry.

18. It appears Respondent did not seek further financial information from Petitioner after the predetermination review indicated she would not qualify. However, there is no evidence that Respondent had a policy to make such inquiries.

19. There is no evidence in the record that Petitioner re-applied to Respondent with an updated or amended statement of income after she was denied.

20. Upon being denied a new apartment, Petitioner remained in her then-current apartment for some time after her lease was terminated. Petitioner owed slightly over \$1,000.00 in rent and fees for the apartment when she finally vacated it, but Respondent did not pursue payment of that arrearage.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

22. Florida's Fair Housing Act (the "Act") is codified in Sections 760.20 through 760.37, Florida Statutes. Subsection 760.23, Florida Statutes, reads in pertinent part:

Discrimination in the sale or rental of housing and other prohibited practices.--

(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 of 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.

(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.

23. Petitioner has the burden of proving by a preponderance of the evidence that Respondent violated the Act by discriminating against her as alleged. §§ 120.57(1)(j) and 760.34(5), Fla. Stat.

24. There is a well-established three-prong test used to analyze cases brought under the Act, which is set forth in

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This

test is stated as follows:

First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by preponderance that the legitimate reasons asserted by the defendant are in fact mere pretext.

25. United States Department of Housing and Urban Development v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990), quoting Pollitt v. Bramel, 669 F. Supp. 172, 175 (S.D. Ohio 1987).

26. A prima facie showing of housing discrimination simply requires Petitioner to show she attempted to lease an apartment from Respondent, that her request was denied, and that she was a member of a protected class. See Soules v. United States Department of Housing and Urban Development, 967 F.2d 817, 822 (2d Cir. 1992). Petitioner, a single mother of three children, is a member of a protected class. Petitioner established a prima facie case.

27. The burden then shifts to Respondent to show that the action it took--denying Petitioner's request--was based on a legitimate, non-discriminatory reason. As shown, Respondent

based its denial on Petitioner's failure to even minimally meet the income requirement for the lowest priced apartment available at The Pines.

28. That being the case, the burden then shifts back to Petitioner to prove that Respondent's reasons were mere pretext and that the real reason for denial was discrimination. There is no evidence in the record to support that contention. Respondent clearly leases to single mothers and expressed interest in leasing to Petitioner, but for her failure to meet the income requirement.

29. Petitioner did not meet her burden of proof in this matter. There is no improper pretext for Respondent's treatment of Petitioner's request for an apartment. The rejection of Petitioner's request is based upon clearly established financial considerations.

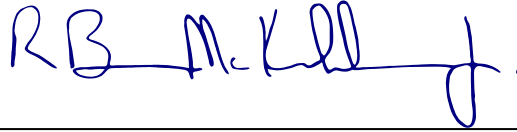
30. Respondent did not discriminate against Petitioner.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations upholding its Determination: No Cause and dismissing Petitioner, Victoire Merceron's, complaint.

DONE AND ENTERED this 21st day of May, 2009, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of May, 2009.

ENDNOTES

^{1/} It is unclear from the record whether the amount of the unemployment compensation was \$225.00 or \$275.00 per week. However, inasmuch as neither amount would be sufficient to qualify Petitioner for the apartment she was seeking, the exact amount is not material to the discussion herein.

^{2/} Respondent calculated Petitioner's eligibility on the basis of Petitioner and her two existing children. The fact that Petitioner was pregnant meant that Respondent could have considered her as needing an apartment for four people, but that eligibility threshold would have been even higher.

^{3/} Petitioner says that as of the date she filled out the application, that statement was true. However, once her children were living full time with her, their fathers agreed to "help out," when necessary.

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.