

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBORAH MARTINDALE,)
)
 Petitioner,)
)
 vs.) Case No. 09-0116
)
 WESTGATE VACATION VILLAS, LLC,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 20, 2009, in Orlando, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Deborah Martindale, pro se
5170 Hickory Hollow Parkway, Unit 115
Antioch, Tennessee 37013

For Respondent: Myrna L. Maysonet, Esquire
Greenspoon Marder, P.A.
201 East Pine Street, Suite 500
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent committed a housing discriminatory practice against Petitioner based on Petitioner's race and gender, in violation of Section 760.23, Florida Statutes (2008).¹

PRELIMINARY STATEMENT

On September 15, 2008, Petitioner, Deborah Martindale (Ms. Martindale), filed a Housing Discrimination Complaint with the Florida Commission on Human Relations (Commission), alleging that Respondent, Westgate Vacation Villas, LLC (Westgate), refused to sell or negotiate for the sale of a timeshare based on Ms. Martindale's race and gender. On December 18, 2008, the Commission issued a Notice of Determination of No Cause to believe that a discriminatory housing practice had occurred.

On January 7, 2009, Ms. Martindale filed a Petition for Relief with the Commission, alleging that Westgate had committed a discriminatory housing practice against her based on her race and gender. The Commission forwarded the Petition for Relief to the Division of Administrative Hearings, which received the Petition for Relief on January 9, 2009. The case was originally assigned to Administrative Law Judge Lawrence P. Stevenson, but was transferred to Administrative Law Judge Susan B. Harrell to conduct the final hearing.

At the final hearing, Ms. Martindale testified in her own behalf. Petitioner's Exhibits 1, 2, and 3 were admitted in evidence. At the final hearing, Westgate called the following witnesses: Alex Silva, Lissette Roman, and Juan Terreforte. Respondent's Exhibits 1 through 4 were admitted in evidence.

The Transcript of the final hearing was filed on April 2, 2009. At the final hearing, the parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. On April 3, 2009, Westgate filed a Motion for Extension of Time in which to file the proposed recommended orders. The motion was heard by telephonic conference call on April 6, 2009. An Order was entered on April 6, 2009, extending the time for filing proposed recommended orders to April 23, 2009. Westgate filed its Proposed Recommended Order on April 23, 2009. Petitioner did not submit a proposed recommended order.

FINDINGS OF FACT

1. Ms. Martindale is an African-American female.
2. Westgate sells timeshare units and vacations. Westgate is the largest privately-owned timeshare developer in the world. It currently has 27 resorts around the United States. There are over 250,000 owners of timeshares sold by Westgate.
3. Westgate has developed a strategy to market its timeshare units. It leases locations in the Orlando area, including space in hotels, and outdoor locations at gas stations and convenience stores. Marketing coordinators are placed in the locations to solicit families and individuals to come and tour Westgate properties in hopes that they will purchase vacations or timeshares. One of the enticements Westgate uses

to get people to tour its properties is a free gift, if the potential customer meets certain qualifications.

4. On July 1, 2008, Ms. Martindale was approached by a Westgate marketing coordinator at a convenience store. The marketing coordinator asked to see Ms. Martindale's driver's license and a credit card. The marketing coordinator also asked her the amount of her annual income. Ms. Martindale was presented with an invitation by the marketing coordinator, who went over the details of the invitation with Ms. Martindale. The invitation was to be used to secure Ms. Martindale's admission to a tour of the Westgate resort at Kissimmee, Florida. Ms. Martindale signed the invitation and initialed the invitation acknowledging that she met the qualifications listed in the invitation for a \$100 cash gift.

5. The invitation states:

Provisions of offer: There is no cost or obligation to purchase anything. No one is excluded from our tour or resort ownership; however, the following requirements must be met in order to receive a gift.

- 1) After meal, you must attend a 90 minute sales presentation. If married, husband and wife must attend together. If cohabitating, both parties must be present.
- 2) You must speak fluent English or Spanish.
- 3) If married, husband or wife must be between the ages of 23-65 with a valid photo I.D. or passport to qualify with a combined gross annual household income of \$50,000.

- 4) Single persons (single constitutes never married, divorced, widowed; single does not constitute separated) must be between the ages of 23-65 with a valid photo I.D. or passport and a \$50,000 gross annual income.
- 5) Florida residents of Brevard, Volusia, Lake, Orange, Polk, or Seminole Counties do not qualify for this offer.
- 6) Must have spent prior night in a motel, hotel, resort, condo or vacation rental in the Orlando area and are not staying in a campground, driving an R.V. or with family/friends.
- 7) Subject to the above qualifications, this offer is available to all permanent residents and citizens of the United States. This offer may not be available to citizens and residents of some countries. I/we have confirmed our eligibility for the gift with the Marketing Representative prior to arranging for my/our tour.

6. When Ms. Martindale received the invitation, she understood that she would not receive the free gift if she did not meet the qualifications listed in the invitation. She also understood that she did not have to meet the qualifications in order to take the tour and that she could purchase a timeshare unit without meeting the qualifications.

7. Ms. Martindale took the invitation and went to the Westgate property for a tour and her free gift. At the time that Ms. Martindale signed the invitation and presented herself for the tour and free gift, she was a resident of Orlando, Orange County, Florida.

8. When Ms. Martindale arrived at the Westgate property, she stopped at the tour check-in desk. Again she was asked to

present her driver's license and a major credit card. She was asked the amount of her annual income. The employee at the check-in desk told Ms. Martindale to proceed to the reception area where she would be greeted by another employee and taken on a tour.

9. Ms. Martindale stayed in the reception area for about ten minutes when she was greeted by a salesperson who took her to a larger reception area in which there were hundreds of people of varying nationalities and gender, including African-American women. The reception area contained a buffet, and the salesperson told Ms. Martindale that she could enjoy the buffet. The man then began to ask her questions about her annual income. He told her that he did not believe her and left to get Lissette Roman, who was the assistant manager resort liaison. He returned with Ms. Roman.

10. When a potential customer does not appear to meet the financial qualifications for the free gift, Ms. Roman is asked to assist in determining if there is any way in which the potential customer may qualify for the free gift. Ms. Roman's duties include asking questions concerning the amount and sources of income the potential customer has. Ms. Roman receives a commission for each timeshare unit that is sold.

11. Many times potential customers who do not qualify for the free gift become upset, and it is Ms. Roman's job to calm

the potential customer and to avoid a confrontation. If the potential customer becomes antagonistic, Ms. Roman will call security.

12. Ms. Roman asked Ms. Martindale questions about Ms. Martindale's income. Ms. Martindale felt that Ms. Roman was rude to her, and she felt humiliated by Ms. Roman's questions regarding her income. According to Ms. Martindale, Ms. Roman called her a liar, wrote cancelled on the invitation, and asked Ms. Martindale to leave the premises. Ms. Roman does not recall the incident involving Ms. Martindale; however, she does not believe that she called Ms. Martindale a liar because such conduct could result in her being terminated from her job. Based on the evidence presented, it is found that Ms. Roman did not call Ms. Martindale a liar, but that, based on the questions that Ms. Roman was asking relating to Ms. Martindale's income, Ms. Martindale felt that the veracity of her response regarding the amount of her annual income was being impugned. Ms. Roman did write "cancel tour" on the invitation and asked Ms. Martindale to leave. Ms. Roman's actions had nothing to do with Ms. Martindale's gender or race. Based on the evidence presented, the conversation between Ms. Martindale and staff from Westgate was escalating into a confrontational situation in a room with hundreds of potential customers. The removal of

Ms. Martindale from the premises was a means of avoiding a scene in front of other potential customers.

13. Ms. Martindale wrote a letter to Westgate complaining about the incident. She did receive a telephone call from a representative of Westgate concerning the letter, and she may have been offered a tour of the resort. She was not interested in touring the resort at that time and does not want to tour the resort now. Ms. Martindale never made an offer to purchase a timeshare unit from Westgate.

14. Westgate gives free gifts to males and females of varying nationalities, including African-Americans, if the potential customers meet the qualifications listed on the invitation. Westgate gives tours and sells to males and females of varying nationalities, including African-Americans, regardless of whether the potential customers meet the qualifications for the free gifts. Usually, if the potential customer does not qualify for the free gift, the potential customer does not care to take the tour. However, there have been potential customers who have not met the free-gift qualifications, have taken the tour, and have purchased timeshare units.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2008).

16. Ms. Martindale has alleged that Westgate committed a discriminatory housing practice in violation of Section 760.23, Florida Statutes, which provides:

(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.

(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.

17. Discrimination covered by the Florida Fair Housing Act, Sections 760.20 through 760.37, Florida Statutes, is the same discrimination as is prohibited under the Federal Fair Housing Act. Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223 (S.D. Fla. 2005). Thus, federal cases involving discrimination in housing are instructive and persuasive in interpreting Section 760.23, Florida Statutes. See Dornbach v. Holley, 854 So. 2d 211, 213 (Fla. 2d DCA 2002).

18. As the complainant, Ms. Martindale has the burden of establishing facts to prove a prima facie case by a preponderance of the evidence. If she establishes a prima facie case, the burden shifts to Westgate to articulate some legitimate, nondiscriminatory reason for its action. If Westgate satisfies this burden, Ms. Martindale must establish by a preponderance of the evidence that the reasons asserted by Westgate are merely pretextual. McDonnell Douglas Corp. V. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); U.S. Department of Housing and Urban Development v. Blackwell, 908 F.2d 864 (11th Cir. 1990).

19. For Petitioner to prove her prima facie case, she must establish that: (a) she is a member of a protected class; (b) she applied for and was qualified to tour the resort and purchase a timeshare unit owned by Westgate; (c) Westgate denied Ms. Martindale a tour and would not sell a timeshare unit to Ms. Martindale; and (d) timeshares were sold to less qualified individuals. Gonzalez v. Sunrise Lakes Condo. Apts. Phase III, 2007 U.S. Dist. LEXIS (S.D. Fla. 2007); Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003); Selden Apartments v. U.S. Dept of Housing and Urban Development, 785 F.2d 152 (6th Cir. 1986).

20. Ms. Martindale did establish that she is a member of a protected class. She is a female African-American. She did not establish that she was qualified to purchase a timeshare or that

she made an offer to purchase a timeshare. No evidence was presented that Westgate declined to sell a timeshare to Ms. Martindale. Evidence was presented that Ms. Martindale's tour was cancelled, but no evidence was presented to establish that the reason for the cancellation was related to either Ms. Martindale's race or gender. Ms. Martindale failed to establish that timeshares were sold to less qualified individuals. The evidence established that tours were given to African-American females, and timeshares were sold to African-American females.

21. Ms. Martindale relies on her subjective belief that she was mistreated because she is a female African-American. Her speculation, standing alone, is insufficient to establish discrimination. Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir 2001); Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983).


22. The evidence did establish that the cancellation of the tour had nothing to do with Ms. Martindale's race or gender. Rather, the evidence established that the cancellation of the tour was due to the confrontation between Ms. Martindale and staff of Westgate. The evidence did establish that a few days after the incident, Westgate did offer to give Ms. Martindale a tour of the resort, but that Ms. Martindale did not want to take a tour.

23. Ms. Martindale has failed to establish a prima facie case of discrimination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered dismissing Ms. Martindale's Petition for Relief.

DONE AND ENTERED this 30th day of April, 2009, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2009.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2008 version.

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.