STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA COMMISSION ON HUMAN RELATIONS ON BEHALF OF ROSE MARIE OWENS,	)	
Petitioner,	)	
vs.	)	Case No. 09-0396
LONGBOAT HARBOUR OWNERS ASSOCIATION, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on May 27, 2009, in Sarasota, Florida.

APPEARANCES

For Petitioner: Ebony D. Tucker, Esquire
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 200
Tallahassee, Florida 32301

For Respondent: Scott H. Jackman, Esquire
Cole, Scott & Kissane, P.A.
Bridgeport Center, Suite 750
5201 West Kennedy Boulevard
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STATEMENT OF THE ISSUES

The issues are whether Respondent engaged in a discriminatory housing practice, in violation of the Florida Fair Housing Act, Sections 760.20 through 760.37, Florida

Statutes (2007),[1] by refusing to grant an accommodation which would have allowed Ms. Rose Marie Owens to keep a comfort cat in her condominium, and, if so, the amount of damages suffered by Ms. Owens.

PRELIMINARY STATEMENT

On March 25, 2008, Ms. Owens filed a Housing Discrimination Complaint (Complaint) with the United States Department of Housing and Urban Development (HUD). The Complaint alleges that Respondent discriminated against her on the basis of an alleged handicap in violation of state and federal law.

The Florida Commission on Human Relations (Commission) investigated the Complaint. On July 28, 2008, the Commission issued a Notice of Determination of Reasonable Cause (Reasonable Cause Determination) to believe a discriminatory housing practice had occurred in violation of Subsection 760.23(a).

Ms. Owens elected to have the Commission act on her behalf pursuant to Subsection 760.35(3)(a) and Florida Administrative Code Rule 60Y-7.001(8)(b)7. On January 26, 2009, the Commission filed a Petition for Relief and referred the matter to DOAH to conduct an administrative hearing.

At the hearing, Petitioner presented the testimony of three witnesses and submitted 11 exhibits for admission into evidence. Respondent called two witnesses and submitted one exhibit for admission into evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the Transcript of the hearing filed with DOAH on June 5, 2009. Petitioner and Respondent timely filed their respective Proposed Recommended Orders on June 15, 2009.

FINDINGS OF FACT

1. Ms. Owens was a resident owner of a condominium in Longboat Harbour Condominiums (Longboat Harbour) during the alleged unlawful housing practice. Ms. Owens was a seasonal resident of the condominium from sometime in July 1987 through March 2007. Ms. Owens still owns the condominium at Longboat Harbour with Mr. Hank Airth, her husband. However, Ms. Owens and Mr. Airth purchased a second condominium after the alleged unlawful housing practice, and Ms. Owens and Mr. Airth no longer reside in the Longboat Harbour condominium.

2. Longboat Harbour is a covered, multifamily dwelling unit within the meaning of Subsection 760.22(2). The Longboat Harbour condominium owned by Ms. Owens and Mr. Airth was a dwelling defined in Subsection 760.22(4) at the time of the alleged unlawful housing practice.

3. Respondent is the entity responsible for implementing the rules and regulations of the Longboat Harbour condominium association. Relevant rules and regulations prohibit residents from keeping cats in their condominiums.

4. Sometime in May 2006, Ms. Owens requested Respondent to permit her to keep a comfort cat, identified in the record as "KPooh," as an accommodation for an alleged handicap. Respondent refused the requested accommodation, and this proceeding ensued.

5. In order to prevail in this proceeding, Petitioner must first show that Ms. Owens is handicapped. Neither Petitioner nor Ms. Owens made a prima facie showing that Ms. Owens is handicapped within the meaning of Subsection 760.22(7).

6. Cross-examination of Ms. Owens showed that Ms. Owens suffers from a cardiovascular ailment, osteoarthritis, and a trigeminal nerve condition. Surgery performed sometime in the 1990s improved the nerve condition. After the surgery, all of the medical conditions of Ms. Owens have been successfully treated with various medications, with no significant modification of the medications before and after Ms. Owens acquired KPooh in 2000.

7. The testimony of Ms. Owens during cross-examination shows that Ms. Owens has never been diagnosed as suffering from depression. Nor does that testimony show that Ms. Owens has ever been diagnosed with panic disorders or panic attacks. Finally, the testimony of Ms. Owens during cross-examination shows that Ms. Owens has never been diagnosed with an emotional or psychiatric condition.

8. A preponderance of the evidence does not show that any of the health problems suffered by Ms. Owens substantially limits one or more major life activities. Nor does Respondent regard Ms. Owens as having a physical or mental impairment.

9. Ms. Owens and others testified concerning the medical conditions of Ms. Owens. None of that testimony showed that the medical conditions substantially limit one or more major life activities for Ms. Owens.

10. Mr. Airth drives the vehicle for Ms. Owens most of the time and prepares most of the meals at home. However, Mr. Airth performs both life activities because he wishes to perform them. Neither Mr. Airth nor Ms. Owens testified that Ms. Owens is unable to perform either life activity.

11. Part of the therapy medically prescribed for Ms. Owens is a special bicycle for exercises that will improve some of the medical conditions of Ms. Owens. However, as Ms. Owens testified, "I have not submitted to that . . . [because] I hate exercise." Ms. Owens admits that exercise therapy would improve some of her medical conditions.

12. Ms. Owens first took possession of KPooh in 2000. KPooh was a stray cat that showed up at the primary residence of Ms. Owens and Mr. Airth in Maryland. KPooh was hungry. Ms. Owens gave KPooh food and adopted KPooh.

13. Petitioner attempts to evidence the alleged handicap of Ms. Owens, in relevant part, with two letters from the primary care physician for Ms. Owens. Each letter was admitted into evidence without objection as Petitioner's Exhibits 3 and 4.

14. The first letter, identified in the record as Petitioner's Exhibit 3, is dated May 4, 2006. The text of the letter states in its entirety:

> Mrs. Owens has been a patient of mine since 1990. I know her very well. It is my opinion that she would suffer severe emotional distress if she were forced to get rid of her cat. I request an exception to the "No Pet" rule in her particular case. I understand that the cat is confined to her home, and that it is not allowed outside to disturb other residents.

Petitioner's Exhibit 3 (P-3).

15. The first letter contains no diagnosis of an existing physical or mental impairment. Nor does the first letter evidence a limitation of a major life activity that is caused by a physical or mental impairment.

16. The first letter opines that Ms. Owens, like many pet owners, would suffer severe emotional distress if she were required to get rid of her pet. However, the letter contains no evidence that the potential for severe emotional distress, if it were to occur, would substantially limit one or more major life activities for Ms. Owens.

17. The second letter, identified in the record as Petitioner's Exhibit 4, is dated January 2, 2007. The text of the letter consists of the following three paragraphs:

> Mrs. Rose Marie Owens is my patient. She has been under my care since 1990. I am very familiar with her history and with her functional limitations imposed by her medical conditions. She meets the definition of disability under the various Acts passed by the Congress of the United States since 1973.
>
> Mrs. Owens has certain limitations related to stress and anxiety. In order to help alleviate these limitations, and to enhance her ability to live independently, and to use and enjoy fully the unit she owns at Longboat Harbour Condominium, I have prescribed her cat, K-Pooh, as an emotional support animal. This should assist Mrs. Owens to cope with her disability.
>
> I am familiar with the literature about the therapeutic benefits of assistance animals for people with disabilities. Should you have questions concerning my recommendation for an emotional support animal for Mrs. Owens, please contact me in writing.

P-4.

18. The second letter does not identify a specific physical or mental impairment. The letter does not disclose what health conditions comprise Ms. Owens "medical conditions." The letter does not describe the "functional limitations" that the doctor concludes, as a matter of law, satisfy the legal definition of a disability. Nor does the letter specify what

major life activities are limited by the patient's medical conditions.

19. The second letter opines that KPooh will enhance the ability of Ms. Owens to live independently. The letter does not opine that KPooh is necessary for Ms. Owens to live independently. There is no evidence that KPooh is trained as a service animal.

20. The two letters from the primary care physician of Ms. Owens are conclusory and invade the province of the trier-of-fact. The two letters do not provide specific and precise factual accounts of the medical conditions of Ms. Owens and the limitations that those conditions impose on major life activities.

21. The two letters deprive the fact-finder of the opportunity to review and evaluate the specific and precise facts underlying the medical and legal opinions reached by the doctor. The two letters deprive the ALJ of the opportunity to independently decide the legal significance of any medical findings, which are not disclosed in either of the letters.[2]

22. Petitioner called as one of its witnesses a member of the Board of Directors (Board) for Respondent who had recommended that the Board approve the accommodation requested by Ms. Owens. Petitioner presumably called the witness, in relevant part, to bolster the two letters from the treating

physician for Ms. Owens. The witness testified that his recommendation placed great weight on the fact that the doctor who authored the two letters is a psychiatrist. The undisputed fact is that the doctor specializes in internal medicine, not psychiatry.

23. Petitioner attempted to show that Respondent's stated reasons for denial of the accommodation were a pretext. Petitioner relied on evidence that arguably showed Respondent did not adequately investigate the alleged handicap of Ms. Owens before denying her request for an accommodation.

24. Respondent made adequate inquiry into the alleged handicap when Ms. Owens requested an accommodation. Respondent requested a letter from the treating physician, which resulted in the letter that became Petitioner's Exhibit 3. Finding that letter less than instructive, Respondent requested a second letter that became Petitioner's Exhibit 4. Respondent properly determined that letter to be inadequate.

25. In any event, this proceeding is not an appellate review of the past conduct of Respondent. This proceeding is a de novo proceeding. Counsel for Respondent fully investigated the medical conditions and alleged handicap of Ms. Owens prior to the final hearing. The investigation included pre-hearing discovery through interrogatories and requests for medical records.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the subject matter of and the parties to this proceeding. §§ 760.20 through 760.37, 120.569, and 120.57(1), Fla. Stat. (2008). DOAH provided the parties with adequate notice of the final hearing.

27. Petitioner has the burden of proof in this proceeding. Petitioner must submit evidence sufficient to establish a prima facie case of discrimination. See Massaro v. Mainlands Section 1 and 2 Civic Association, Inc., 3 F.3d 1472, 1476 n.6 (11th Cir. 1993)(fair housing discrimination is 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 of the United States Department of Housing and Urban Development on Behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(three-part burden of proof test in McDonnell governs claims brought under Title VII of the Civil Rights Act).

28. For reasons stated in the Findings of Fact, Petitioner failed to make a prima facie showing that Ms. Owens is handicapped. Petitioner's focus on the issue of whether Respondent adequately investigated the alleged handicap before denying the request for an accommodation is misplaced. The fact-finder does not reach the issue of alleged pretext until Petitioner makes a prima facie showing of discrimination.

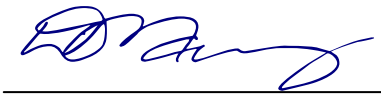
Without evidence establishing a handicap, there is no prima facie showing of discrimination, and the alleged pretext is moot.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 26th day of June, 2009, in Tallahassee, Leon County, Florida.



DANIEL MANRY
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of June, 2009.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2007), unless otherwise stated.

[2/] The opinion that the “medical conditions” and “functional limitations” of Ms. Owens satisfy the legal definition of a disability is a legal opinion that exceeds the scope of the doctor’s expertise.

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.