

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAE TENNIE,)
)
 Petitioner,)
)
 vs.) Case No. 09-2402
)
 HIALEAH HOUSING AUTHORITY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 5, 2009, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Stephen Lewis, Esquire
Legal Services of Greater Miami, Inc.
10720 Caribbean Boulevard, Suite 400
Miami, Florida 33189

For Respondent: S. Nicole Bates, Esquire
Hialeah Housing Authority
75 East 6th Street
Hialeah, Florida 33010

J. Frost Walker, III, Esquire
Law Offices of Citrin & Walker
100 West Sunrise Avenue
Coral Gables, Florida 33133

STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner on the basis of handicap in violation of the Florida Fair Housing Act and, if so, the relief to which Petitioner is entitled.

PRELIMINARY STATEMENT

The Florida Commission on Human Relations (FCHR) and the Federal Department of Housing and Urban Development (HUD) administer the Florida Fair Housing Act, Sections 760.20 - 760.37, Florida Statutes¹ (the Florida FHA). On June 2, 2008, Petitioner filed with HUD a complaint against Respondent alleging that she had been injured by a discriminatory act by Respondent. The allegations, succinctly stated, are that Petitioner suffers from a handicap; that she received notification from Respondent that her eligibility was going to be terminated subject to an appeal that had to be requested within ten days; that she requested a chance for an appeal of the decision to terminate her eligibility after the ten days had expired; and that Respondent failed to make a reasonable accommodation of her handicap by denying her right to an appeal after the deadline had expired.

Following an investigation, FCHR issued its "Notice of Determination of No Cause" on March 28, 2009.

On April 30, 2009, Petitioner filed the subject Petition for Relief with the FCHR. On May 6, 2009, the matter was referred to DOAH, and this proceeding followed.

In response to the Pre-Hearing Order entered in this proceeding, the parties filed a Joint Pre-Hearing Statement that contained certain stipulated facts. Those stipulated facts have been incorporated herein as Findings of Fact.

At the formal hearing, Petitioner testified on her own behalf and presented pre-lettered Exhibits A, B, and G. Petitioner's Exhibits B and G were admitted as submitted. Petitioner's Exhibit A consisted of five pages. Only the first page of that exhibit was admitted.

Respondent presented the testimony of Paulette Smith (Assistant Section 8 Director for Respondent). Respondent offered pre-numbered Exhibits 1 and 3-11, each of which was admitted into evidence.

A Transcript of the proceeding, consisting of one volume, was filed November 16, 2009. The parties filled Proposed Recommended Orders, which have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At times relevant to this proceeding, Petitioner, a female born in October 1953, received housing assistance from a federally funded assistance program referred to as the Section 8

Choice Voucher program (the Section 8 program). The Section 8 program relevant to this proceeding is administered by Respondent and has eligibility criteria that a participant must meet. A participant receives a voucher from the Section 8 program that pays part, but not all, of the participant's rent. Petitioner has also received Supplemental Security Income (SSI) at all times relevant to this proceeding. Respondent knew that Petitioner received SSI, but it had no information as to why she qualified to receive SSI.

2. At the times relevant to this proceeding, Petitioner's landlord was named Rupert Phipps. On May 27, 2007, Mr. Phipps issued to Petitioner a notice styled "Three-day Notice for Non-payment of Rent pursuant to Florida Statutes" (Notice). After stating the amount owed and the address of the rented premises, the Notice demanded ". . . payment of the rent or possession of the Premises within three days (excluding Saturday, Sunday and legal holidays). . . ."

3. Petitioner was evicted from her apartment. The date of the eviction was not established.

4. After being advised by Mr. Phipps that Petitioner had failed to pay her rent, Ms. Smith mailed to Petitioner a certified letter dated July 6, 2007, stating that she would be terminated from the Section 8 program effective August 6, 2007. The stated reason for the termination was Petitioner's failure

to pay rent to the landlord, which is considered a serious violation of the lease and, therefore, a violation of 24 C.F.R. § 982,511(4)(c), which prohibits a participant in the Section 8 program from committing any serious or repeated violation of the lease with the participant's landlord. Ms. Smith's letter also contained the following statement:

. . . If you wish to appeal this decision, you have the right to an informal hearing. The request must be submitted to this agency in writing within 10 days from the date of this letter. Your request should be directed to Alex Morales, Executive Director.

5. The ten-day period for the appeal is part of Respondent's written policies and is consistent with the requirements of 24 C.F.R. § 982.554(a), that require an agency such as Respondent to have a written appeals process.

6. Respondent has consistently treated the failure of a participant to pay his or her share of the rent as a serious violation of a lease.

7. Petitioner was familiar with Respondent's appeal process because she had successfully appealed a prior notice of termination of her participation in the Section 8 program.

8. Ms. Smith's letter was received by Petitioner on July 7, 2007.

9. At some undetermined time between July 7 and July 19, 2007, Ms. Tennie called Ms. Smith and told Ms. Smith that she

was sick. Ms. Smith told Ms. Tennie that she would have to follow the instructions set forth in the letter and respond in writing if she wanted an informal appeal.

10. On July 19, 2007, Petitioner sent the following letter to the attention of Ms. Smith and Mr. Morales:

Would you give me Mae Tennie another hearing because I got the letter to [sic] late and I was in the hospital due to an aneurism [sic] stroke at the brain their [sic] was blood on my head and I'm still rehabilitating the after affects [sic] of this serious condition. In the case of my Section 8 voucher being terminated I plead for another hearing due to the terms [sic] of my hospitalization.

11. Respondent received Petitioner's letter on July 23, 2007. Petitioner's written request for an appeal was after the ten-day deadline for filing the request.

12. By letter signed by Mr. Morales and dated July 25, 2007, Respondent denied Petitioner's request contained in her letter dated July 19 as follows:

I am in receipt of your letter requesting a hearing. Please be advised that your request for a hearing cannot be granted because your request was not made within the required 10 day period. For this reason, your case will remain closed.

13. No further action was taken by either party to this proceeding until December 2007, when Petitioner sought the services of Legal Services of Greater Miami, Inc. On

December 20, 2007, Mr. Lewis, as counsel for Petitioner, sent the following letter to Mr. Morales:

This office represents Ms. Mae Tennie regarding her participation in the Section 8 program administered through the Hialeah Housing Authority ("HHA"). Ms. Tennie has been a participant of Section 8 through HHA for the past 25 years.

On July 6, 2007, HHA served Ms. Tennie with notice of its intent to terminate her Section 8 assistance on the basis that she violated one of her obligations under the program. The notice informed Ms. Tennie of her right to appeal the decision and to attend an informal hearing. The written request was to be submitted to HHA within 10 days of the date of the letter. Ms. Tennie faxed her written request for an appeal on July 19, 2007. A copy of Ms. Tennie's letter is attached as "Attachment A." In her request, she notified HHA that she was unable to submit her request within the time required because she [had] been, and still was, recovering from a brain aneurism.^[2] On or about July 31, 2007, HHA notified Ms. Tennie that her request was denied because it was submitted too late. Ms. Tennie requests that HHA reconsider its denial and provide Ms. Tennie with an informal hearing to appeal the termination.

Ms. Tennie is an elderly woman in failing health. In June 2007, Ms. Tennie was hospitalized twice at Jackson South Community Hospital as a result of suffering an "intracranial hemorrhage."^[3] I have attached copies of supporting medical documentation as "Attachment B." As a result of this very serious medical condition, Ms. Tennie's cognitive abilities were significantly diminished. Ms. Tennie was bed-bound and only able to communicate under great strain.

The Fair Housing Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973, prohibits [sic]

any agency or landlord receiving federal funds to deny equal access for individuals with disabilities to housing or other program benefits and services. To ensure individuals with disabilities have equal access to those services and benefits, an agency or landlord is required to provide reasonable accommodations to that person's disability. One form of reasonable accommodations is the modification of a program rule or policy.

The right to a hearing to appeal the termination of Section 8 assistance is a benefit that Ms. Tennie, as a participant, was entitled to. Ms. Tennie made clear in her letter to HHA that she was unable to comply with HHA's time requirement because of her disabling medical condition. Ms. Tennie also asked that the policy be modified to accommodate her disability. HHA should have reasonably accommodated Ms. Tennie's disability by simply modifying the time period by adding 3 extra days for her to submit her request for a hearing. By failing to do so, HHA effectively denied Ms. Tennie equal access to federal benefit under the Section 8 program, that of having a hearing to appeal her termination.

Ms. Tennie is therefore renewing her request to HHA for reasonable accommodations to her disability by modifying the time limit to request a hearing. For the above reasons, Ms. Tennie requests that HHA reconsider its denial and provide Ms. Tennie a hearing to challenge her termination from Section 8.

Please do not hesitate to contact me with any questions or additional information at [telephone number omitted.]
[Footnotes omitted.]

14. By letter dated December 26, 2007, Respondent denied the request set forth in Mr. Lewis's letter. Thereafter, Petitioner filed the complaint with HUD that culminated in this

proceeding as described in the Preliminary Statement of this Recommended Order.

15. Ms. Tennie was hospitalized June 7, 2007, and discharged June 14, 2007. Mr. Lewis attached to his letter a discharge summary from Jackson Memorial Hospital, which contained the following diagnoses on discharge:

1. Intracranial hemorrhage with intraventricular extension secondary to uncontrolled hypertension.
2. Diabetes.

16. The discharge summary reflects that Petitioner had fallen the Saturday before admission and had hit her head on a doorknob. The discharge summary reflects that on discharge she was awake, alert, and oriented times three. She had fluent speech and she was able to ambulate without difficulty. She was instructed to make an appointment with her primary care doctor in one week and to follow up in the Jackson Memorial's Stroke Clinic in 4 to 8 weeks. Petitioner was discharged to home in a stable condition. Petitioner scheduled an appointment with Milton R. Bengoa, M.D., and on June 18, 2007, she kept that appointment. No finding is made as to Petitioner's physical status as determined by Dr. Bengoa because nearly all of his notes of that meeting are illegible.

17. In response to questions from her attorney, Petitioner testified as follows beginning at page 27, line 12:

Q. And Ms. Tennie, can you please describe what your current health conditions are?

A. Right now it's not very good, because after I had the aneurism I have been having problems walking and problems breathing and I have seizures that I never had before until I had the aneurism and I take all kinds of medicines. And I just found out last week I have a brain mass and they don't know if it is cancer or what, because the blood that was left in my head was still there so I have excruciating headaches.

Q. And could you please explain what your health condition was at or about the time you suffered the stroke or shortly after you had suffered the stroke?

A. Well, shortly after I suffered the stroke I had to try and walk all over again, because my memory where I had the stroke at, the neurologist said that it was so deep in my brain that they couldn't do surgery and that it was going to mess my motor skills up. So I had to learn how to swallow. I forgot how to swallow meat and stuff, so I started eating soft food. I had problems breathing, so when I come [sic] home I had a breathing machine - oxygen machine there. My daughter had to help me try to walk all over again.

Q. And so I take it you had someone helping you?

A. Yes. My daughter. I moved home with my daughter, because they wanted to put me out at Purdue, it is a nursing facility, but she wanted me to come home with her, so that is what I did. I went home with my daughter and I stayed there for six months. Then I found the place down the street, close to her, which was a two bedroom.

Q. Now, prior to suffering the stroke, how was your - can you describe what your health condition was.

A. Before I had the stroke, I was sick too. I have congestive heart failure, so I kept going back and forth into the hospital because of my breathing. When the water

built up around my heart it had [sic] me to where I can't breathe. So I have to go in and let them pull the water off. And I was sick before I had the stroke.

18. Petitioner also testified that she could not timely request a hearing and blamed that inability on her general medical condition. Petitioner's testimony as to her medical condition shortly after the hospitalization is unconvincing because it contradicts the description of her medical condition as described by her treating physician in the discharge notes. The evidence established that Petitioner received Ms. Smith's letter dated July 6, 2007, and understood its contents. Petitioner's testimony is insufficient to establish that her medical condition caused her failure to timely request an informal hearing to appeal of the termination of her participation in the Section 8 program.

19. Petitioner failed to establish that she required an extension of the expired deadline to request an informal hearing as a "reasonable accommodation" of her condition.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

21. Petitioner, who is asserting the affirmative of the issues in this case, has the burden of proving by a

preponderance of the evidence that Respondent discriminated against her as alleged in the Petition. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) and Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

22. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

23. Section 760.23(8)(a), Florida Statutes, provides as follows:

(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. . . .

24. In order to prevail in her claim of discrimination, Petitioner must prove (1) that she is handicapped as defined in the Florida FHA; (2) that Respondent knew or reasonably should have known of her handicap; (3) that she requested a reasonable accommodation under Respondent's rules and regulations necessary to afford her an equal opportunity to use and enjoy her apartment; and (4) that Respondent refused to provide the reasonable accommodation. See United States v. California

Mobile Home Park Management Co., 107 F.3d 1374, 1380 (9th Cir. 1997). Petitioner's burden is to prove all four prongs of this analysis by a preponderance of the evidence.

25. Section 760.23(9)(b), Florida Statutes, provides that for the purposes of Section 760.23(8)(a), Florida Statutes, 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.

26. 42 U.S.C. § 3604(3)(f)(3)(B), which is part of the Federal Fair Housing Act, contains the provisions identical to those set forth in Subsections 760.23(8)(a) and (9)(b), Florida Statutes.

27. Section 760.22(7), Florida Statutes, defines the term "handicap" as follows:

(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.

28. Petitioner does not suffer a developmental disability. Whether she suffers a "handicap" must be decided utilizing the definition of Section 760.22(7)(a), Florida Statutes.

29. Because of the similarity of definitions, federal law is used for guidance in evaluating the merits of claims arising under the Florida FHA. In determining whether Petitioner has a physical or mental impairment "which substantially limits one or more of major life activities," it is appropriate to utilize the following definition found in 42 U.S.C. § 12102, which is part of the Americans with Disabilities Act:

(2) Major life activities.

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

30. Petitioner established that she is a handicapped person within the meaning of Section 760.23, Florida Statutes. Petitioner testified that she suffers congestive heart failure which causes difficulty with her breathing. She testified that she has recurring headaches and she has difficulty walking. While the fact that she receives SSI does not prove that she is

a handicapped person, it is evidence that can and has been considered in evaluating the evidence.

31. It is not necessary to evaluate whether Respondent knew or should have known that Petitioner was handicapped because Petitioner has failed to establish the third prong of the analysis. Petitioner failed to prove by a preponderance of the evidence that her handicap caused her failure to timely request an appeal of her termination and, consequently, that an extension of the expired deadline would have been a reasonable accommodation of her handicap.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Florida Commission on Human Relations enter a final order finding Respondent not liable for the acts of discrimination alleged in the subject Petition for Relief.

DONE AND ENTERED this 16th day of December 2009, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of December 2009.

ENDNOTES

- ^{1/} All statutory references are to Florida Statutes (2009).
- ^{2/} Both Mr. Lewis and Ms. Tennie refer to Ms. Tennie as suffering from a brain aneurism. The hospital records reflect that she had intracranial hemorrhage, uncontrolled hypertension, and diabetes.
- ^{3/} Ms. Tennie was initially admitted to Jackson South hospital in Miami. She was transferred to Jackson Memorial Hospital because of its neurology department. The discharge summary attached to Mr. Lewis's letter was from Jackson Memorial Hospital.

COPIES FURNISHED:

S. Nicole Bates, Esquire
Hialeah Housing Authority
75 East 6th Street
Hialeah, Florida 33010

J. Frost Walker, III, Esquire
Law Offices of Citrin & Walker
100 West Sunrise Avenue
Coral Gables, Florida 33133

Stephen Lewis, Esquire
Legal Services of Greater Miami, Inc.
10720 Caribbean Boulevard, Suite 400
Miami, Florida 33189

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.