

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM KLEINSCHMIDT, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-6167  
 )  
 THREE HORIZONS NORTH )  
 CONDOMINIUM, INC., )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings for final hearing on September 21, 23, 24, and 29, 2010, by video teleconference at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: William Kleinschmidt, pro se  
1470 Northeast 125th Terrace  
North Miami, Florida 33161

For Respondent: Marco D. Commisso, Esquire  
Cole, Scott & Kissane, P.A.  
1645 Palm Beach Lakes Boulevard  
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West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

In this proceeding, the issues are: (1) Whether William Kleinschmidt ("Petitioner" or "Kleinschmidt") possesses or demonstrates a mental or physical impairment that qualifies

Petitioner as a disabled person within the meaning of the Fair Housing Act, and therefore establishes that Petitioner belongs to a protected class of persons whom the Fair Housing Act protects from unlawful discrimination; (2) Whether Three Horizons North Condominium, Inc. ("Respondent" or "Three Horizons"), discriminated against Petitioner by enforcing the no pet restriction policy and requiring Petitioner to remove his cat(s); and (3) Whether Respondent discriminated against Petitioner by failing to properly call a plumber in a timely manner after Petitioner notified Respondent of raw sewage seeping into his unit, No. 206.

#### PRELIMINARY STATEMENT

In a Housing Discrimination Complaint filed on July 6, 2009, and subsequently investigated by the Florida Commission on Human Relations ("Commission"), Kleinschmidt charged that Three Horizons unlawfully discriminated against Petitioner by not allowing him to keep his cats in his condominium unit as an accommodation because he was disabled, and that Respondent retaliated against Kleinschmidt by failing to call a plumber in a timely manner after he notified Respondent of raw sewage seeping into his unit.

The Commission investigated Petitioner's claim and on October 7, 2009, issued a notice setting forth its determination

that reasonable cause did not exist to believe that a discriminatory housing practice had occurred. Thereafter, Petitioner filed a Petition for Relief, which the Commission sent to the Division of Administrative Hearings ("DOAH") on November 10, 2009.

At the final hearing, Kleinschmidt testified on his own behalf and presented five witnesses: Judith Heisler, Alfred Cariano, Ruth Pearson, Jeffrey Humes, and Jacklyn Cue. Petitioner's Exhibits 1 through 12 were offered and admitted into evidence. Respondent offered Exhibits 1 through 8 during its cross-examination and all eight exhibits were received into evidence. Respondent did not otherwise present a case. During the hearing, the undersigned ruled that the Order of Pre-Hearing Instructions dated December 1, 2009, would be adhered to and any exhibits presented at hearing that were not previously disclosed and prefiled would not be admitted into evidence.

On January 7, 2011, the five-volume Transcript of the proceeding was filed with the DOAH. Both parties filed timely Proposed Recommended Orders at DOAH. Petitioner filed Petitioner's Verified Notice of Filing Objections to the Late Served Respondent's Proposed Recommended Order and Affidavit in Support of Same ("Notice"). The Notice is denied and both parties' timely filed Proposed Recommended Orders, have been duly considered in preparation of this order.

## FINDINGS OF FACT

1. In January 1999, Petitioner purchased a condominium ("condo") at Three Horizons. He has resided in Unit 206 continuously since he purchased the condo.

2. Three Horizons Association is the entity responsible for operating and managing the condo property in which Kleinschmidt's unit is located. At all times relevant to this proceeding, Respondent had a no pets policy.

3. When Kleinschmidt moved into Three Horizons, he had two cats. His pet cats are named Princess and Marischa. He keeps the pets in his unit. He considers them to be his family and feels like they are more like his children than cats since he is alone. His pets make him feel good. The pets were trained by his mother.

4. Petitioner wants to keep his cats because they provide companionship and comfort, which makes Petitioner happy. In addition, the cats have made life tolerable for Kleinschmidt. Kleinschmidt has an emotional bond with his cats.

5. Petitioner has filed two prior housing discrimination complaints against Three Horizons.<sup>1</sup>

6. From July 5, 2008, to July 6, 2009,<sup>2</sup> Kleinschmidt neither notified Respondent of an alleged handicap nor requested an accommodation either verbally or in writing from Three

Horizons. Specifically during the year, Kleinschmidt never asked for a waiver of Respondent's no pet rule or asked that the Petitioner's cats remain as service animals.<sup>3</sup>

7. Over about a nine-month period, two different main sewer lines backed up raw sewage into Petitioner's unit seven times. Each time a back up occurred in unit 206 and Respondent was notified of the problem, Three Horizons called a plumber and had the main lines and pipes fixed the same day, expending a total of \$2,630.00 for all the repairs.

8. Three Horizons' policy is to maintain and fix the common area of the facilities outside of individual units, and unit owners are responsible to fix any problems within their unit.

9. On October 3, 2008, at around 4:00 p.m. Petitioner first noticed a leak in the main line under his unit in the parking garage. Kleinschmidt informed Ruth Pearson, Three Horizons' day-to-day operations manager and treasurer of the association. Pearson went to look at it and informed Petitioner that she would take care of it.

10. When Kleinschmidt returned home that same day sewage was flowing into his unit from the toilet. Petitioner called Jeffrey Humes ("Humes"), a masonry contractor, and made an appointment for Humes to come to unit 206 the next day, which was on October 4, 2008, at 2:00 p.m. to handle the backflow

problem since it was not a huge amount. During the night, the backflow stopped.

11. On October 4, 2008, Humes reported to unit 206 around 1:00 p.m. and determined that the backflow was a main line problem. Pearson was notified that it was the main line that was causing the problem, and she called Feliz Fera Plumbing Company ("Feliz"). Feliz came out that same evening and fixed the problem by providing "emergency plumbing service to clear main line using K-60 machine and cable."<sup>4</sup> Feliz billed Three Horizons \$320.00.

12. On October 6, 2008, Petitioner had a second backflow of sewage into his unit. Upon discovering it, Kleinschmidt called Pearson and informed her of the problem. Respondent immediately contacted Felix again to work on the main line. Petitioner also called Humes back to assist him with his unit's backflow. To prevent any future backflows into Petitioner's toilet, Humes plugged it and capped it off separating it from the main sewer line so sewage would not come in anymore. Humes also helped Kleinschmidt wet vac and clean up the unit.

13. Three Horizons' invoice from Feliz for October 6, 2008, services stated, "Plumbing service to clear main stoppage line for Unit Number 206 and test the drain in Unit Number 206. All is clear at this time."<sup>5</sup> Respondent was charged \$225.00 for Feliz's services.

14. On or about November 29, 2008, Petitioner's kitchen backflowed from a different main line. His floors and cabinets underneath the sink flooded, and Petitioner reported the sewage back up to Pearson who contacted Felix again to check the main line. Felix repaired the problem the same day and the invoice stated, "Emergency plumbing service to clear stoppage in Apartment 206. After troubleshooting found line to be clear. Called in by Ms. Pearson."<sup>6</sup> The cost to Respondent was \$195.00 for the services.

15. On December 3, 2008, Pearson contacted Felix again after being notified by Petitioner that his sink was backing up with sewage. Felix returned to Three Horizons and fixed the problem outlining the services in the invoice as "Plumbing service to cut 4" cast iron in parking garage for unit #206, installed new clean out and jetted sink stack."<sup>7</sup> Respondent was charged \$950.00 for the service.

16. On May 2, 2009, sewage backed up into Petitioner's kitchen. When Petitioner notified Pearson of the problem she called Felix. That same day, Felix serviced Three Horizons and detailed the services on the invoice stating, "Emergency plumbing service to clear stoppage in kitchen stack per Ruth."<sup>8</sup> Respondent was charged \$295 for the plumbing services.

17. On or about July 7, 2009, Petitioner's unit had a back up of sewage again. Kleinschmit contacted Pearson about the

problem, and Pearson called Felix, but the company had other jobs and could not get to Three Horizons immediately. After several hours of not having a response, Petitioner called Pearson again. Pearson became impatient because Felix had not arrived immediately and called Enzo Bellanca ("Bellanca"), Three Horizons' maintenance man,<sup>9</sup> to come check out the problem. Bellanca fixed the common line plumbing problem on the same date and wrote on the invoice, "Obstruction in drain line, 4" undercover parking lot. Remove 2 feet of cast iron pipe replaced with P[V]C pipe 4" and clean sn[ake]d, thru all pipe drainage s[ys]tem and clean up the blockage."<sup>10</sup> Bellanca charged Three Horizons \$385.00 for labor and materials.

18. When Petitioner notified Pearson of another sewage back up in unit 206 on July 15, 2009, Pearson called Bellanca back again. Another stoppage had occurred under unit 206. Bellanca fixed the problem and detailed his services on the invoice as "Drainage systems for Apartment 206 under cover parking area, remove elbow four inch clear blockage, replace a new P[V]C four inch elbow, plus a [clear-[out] Labor and materials, \$260.00"<sup>11</sup>

19. Petitioner's doctors are Drs. Gottlieb and Siegal. Kleinschmidt takes medicine daily.

20. Kleinschmidt receives Social Security benefits.



21. Kleinschmidt has asthma and was once told that he had post traumatic stress. However, no evidence was presented that Kleinschmidt's life activities are substantially limited or that he is incapable of performing all life activities he chooses.

#### CONCLUSIONS OF LAW

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

23. As the person complaining of discrimination in this administrative proceeding, Kleinschmit has the burden of proving by a preponderance of the evidence that he was discriminated against by Three Horizons on the basis of his handicap. See § 760.34(5) ("In any proceeding brought pursuant to this section [Section 760.34] or s. 760.35, the burden of proof is on the complainant").

24. 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) (relying on Am. Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997), quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

25. Petitioner has the burden of proving that Respondent violated either of the Acts<sup>12</sup> by failing to waive its no pets policy as a reasonable accommodation. See Fla. Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

26. Section 760.34, provides in pertinent part:

(4) If, within 180 days after a complaint is filed with the commission or within 180 days after expiration of any period of reference under subsection (3), the commission has been unable to obtain voluntary compliance with ss. 760.20-760.37, the person aggrieved may commence a civil action in any appropriate court against the respondent named in the complaint or petition for an administrative determination pursuant to s. 760.35 to enforce the rights granted or protected by ss. 760.20-760.37 .

. . .

27. Florida recognizes handicap-based housing discrimination. Section 760.23(8)(b), provides:

(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:

\* \* \*

(b) A person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or . . . .

28. 42 U.S.C. section 3602(h) provides, in pertinent part, the following definition of the term "handicap" for purposes of the Federal Act:

- (h) "Handicap" means, with respect to a person--
  - (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
  - (2) a record of having such an impairment,
  - or
  - (3) being regarded as having such an impairment . . .

29. "Handicap" is defined in the Florida Act in section 760.22(7) (a), 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;

30. 42 U.S.C. section 3604(f) (3) (B), provides that the following constitutes housing discrimination within the meaning of the Federal Act:

- (f) (3) (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 . . .

31. The Florida Act has a similar provision. Section 760.23(9), provides as follows:

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.

32. Kleinschmidt asserts that Three Horizons discriminated against him by enforcing the pet restrictions policy and requiring Petitioner to remove his cats.

33. To prevail in this proceeding under either of the Acts, Petitioner has the burden of proving: (1) he suffered from a handicap within the meaning of the Florida Fair Housing Act, (2) the Association knew or should have known that he was handicapped, (3) a reasonable accommodation was necessary to afford him or her an opportunity to use and enjoy his dwelling, and (4) the Respondent refused to make the requested accommodation. See Giebler v. M & B Assoc., 343 F.3d 1143, 1147 (9th Cir. 2003).

34. Based on the facts as found herein, Petitioner has failed to prove by a preponderance of the evidence that he is "handicapped" as defined in section 760.22(7)(a). Even though Petitioner established that he received Social Security benefits at the times pertinent to this proceeding, this is not sufficient, as a matter of law, to prove that he was handicapped under the the Acts.

35. In addition, Kleinschmidt failed to demonstrate that he even informed Three Horizons that he was handicapped or requested a reasonable accommodation. Further, based on the

findings of fact herein, Kleinschmidt failed to prove by the greater weight of the evidence that he was entitled to a reasonable accommodation under the Acts. In the absence of proof of the nature and extent of a physical or mental condition and of the manner in such a condition substantially limited a major life activity, it is a legal impossibility for a person to prove that an accommodation is "necessary to afford him [or her] an opportunity to use and enjoy his dwelling." Schwarz v. City of Treasure Island, 544 F.3d 1201, 1218-19 (11th Cir. 2008). See § 760.22(7).

36. Based on the legal principles discussed above, as applied to the findings of fact herein, Kleinschmidt failed to meet his burden of proving the first three elements of a claim of discrimination on the basis of handicap. Petitioner, therefore, failed to prove by a preponderance of the evidence that the Three Horizons discriminated against him because of a handicap.

37. Finally, Petitioner's claims of retaliation are without merit. The greater weight of evidence shows that each time Petitioner contacted Three Horizons regarding a back up of sewage in his unit that Three Horizons took care of the matter in a timely manner by notifying a plumber to check and fix the main line problems. Therefore, Petitioner failed to establish

that any of Three Horizons actions were harassing or retaliatory in nature based on the previous cases filed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 26th day of April, 2011, in Tallahassee, Leon County, Florida.



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JUNE C. MCKINNEY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of April, 2011.

ENDNOTES

<sup>1</sup> William Kleinschmidt v. Three Horizons North Condominiums, Inc., Case No. 04-3873 (Fla. DOAH May 25, 2005; Fla. FCHR Aug. 23, 2005), William Kleinschmidt v. Three Horizons North Condominiums, Inc., Case No. 06-2251 (Fla. DOAH Nov. 21, 2006; Fla. FCHR Feb. 15, 2007).

<sup>2</sup> The only relevant time period for factual evidence to be considered in this case is between July 5, 2008, and July 6,

2009, pursuant to section 760.11(1), Florida Statutes, which restricts any complaint of the alleged discriminatory housing practice to be within 365 days of the alleged violation(s).

<sup>3</sup> The consistent testimony of Three Horizons Board members Judith Heisler, Alfred Cariano, and Ruth Pearson each of which stated that Petitioner failed to inform Respondent of a handicap and failed to request a waiver of the no pet policy, is found to be more credible than Petitioner's testimony.

<sup>4</sup> Respondent's Exhibit 1. Kleinschmidt asserts that the invoice is fraudulent. The undersigned finds the invoice to be credible.

<sup>5</sup> Respondent's Exhibit 2.

<sup>6</sup> Respondent's Exhibit 3.

<sup>7</sup> Respondent's Exhibit 4.

<sup>8</sup> Respondent's Exhibit 5.

<sup>9</sup> Three Horizons had utilized Bellanca's plumbing services previously and he had resolved the previous problem.

<sup>10</sup> Respondent's Exhibit 6.

<sup>11</sup> Respondent's Exhibit 7.

<sup>12</sup> For ease of reference, the Florida Fair Housing Act will be referred to as the Florida Act and the Federal Fair Housing Act will be referred to as the Federal Act. Collectively, they will be referred to as the Acts.

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.