STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANCISCO COSME,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-1115
	)	
LAKESHORE CLUB OF POLK COUNTY HOMEOWNERS ASSOCIATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 24, 2011, by video teleconference in Tallahassee, Florida, and Lakeland, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Francisco Cosme, pro se
Post Office Box 8118
Fedhaven, Florida 33854

For Respondent: Scott Jackman, Esquire
Cole, Scott & Kissane, P.A.
4301 West Boy Scout Boulevard
Suite 400
Tampa, Florida 33607-5712

STATEMENT OF THE ISSUES

Whether Respondent, Lakeshore Club of Polk County Homeowners Association (Lakeshore Club), violated the Florida

Fair Housing Act, sections 760.20 through 760.37, Florida Statutes (2010).[1/]

PRELIMINARY STATEMENT

On November 24, 2010, Petitioner, Francisco Cosme (Mr. Cosme), filed a complaint with the United States Department of Housing and Urban Development (HUD) against Lakeshore Club, Jim Purdy (Mr. Purdy), and Elizabeth Jewell-Sanford (Ms. Jewell-Sanford) for discriminatory housing practices. Specifically, Mr. Cosme alleged that Lakeshore Club, Ms. Jewell-Sanford and Mr. Purdy had discriminated against him and other Hispanic residents, by requiring that only English be spoken in the homeowners association's office and had treated him disrespectfully. Further, Mr. Cosme raised an issue concerning the nominating process for residents seeking to become members of Lakeshore Club's Board of Directors. HUD transferred the complaint to the Florida Commission on Human Relations (Commission) for an investigation and determination of whether or not a discriminatory housing practice had occurred.

On January 28, 2011, the Commission entered a Notice of Determination of No Cause.

On February 22, 2011, Mr. Cosme filed a Petition for Relief against Lakeshore Club, alleging housing discriminatory practices and violation of the Florida Civil Rights Act of 1992, as amended. The Petition for Relief did not identify

Ms. Jewell-Sanford or Mr. Purdy as Respondents. Moreover, the Petition for Relief abandoned any claims concerning the nominating process for Lakeshore Club's the board of directors positions. In the Petition for Relief, Mr. Cosme alleged "harassment to people that speak Spanish in the office, especially those that file complaints against the manager. Treated with disrespect."[2/]

On March 1, 2011, the Commission transmitted the Petition for Relief to DOAH. On March 2, 2011, Administrative Law Judge James H. Peterson, III, issued an Initial Order. On March 21, 2011, the case was transferred to Administrative Law Judge William F. Quattlebaum. Judge Quattlebaum set the case for final hearing on May 24, 2011. On May 23, 2011, the case was transferred to Administrative Law Judge Thomas P. Crapps for the hearing.

At the onset of the hearing, Lakeshore Club requested a clarification concerning the scope of the hearing. Lakeshore Club argued that the Petition for Relief only named Lakeshore Club as a Respondent; thus, no claims should be heard against Ms. Jewell-Sanford and Mr. Purdy. Further, Lakeshore Club raised the defense that Mr. Cosme's claims occurred in 2005 and 2006; thus, the claims were not timely. In response, Mr. Cosme stated that he intended to bring forward evidence concerning Ms. Jewell-Sanford and Mr. Purdy. Based on the Petition for

Relief, the undersigned ruled that the issue to be resolved would be whether or not Lakeshore Club violated the Florida Fair Housing Act. Further, the undersigned allowed Mr. Cosme to bring forward evidence concerning Ms. Jewell-Sanford and Mr. Purdy, as it was relevant to showing whether or not Lakeshore Club had committed any discriminatory practice.

At the May 24, 2011, final hearing, Mr. Cosme presented the testimony of the following seven witnesses: himself, Virginia Pascual (Ms. Pascual), Ismael Ruiz (Mr. Ruiz), Carol Horneck (Ms. Horneck), Jo-Ann Rucinski (Ms. Rucinski), Sandra Salgado (Ms. Salgado), and Marta Torres (Ms. Torres). Mr. Cosme introduced Exhibits 1, 8, and 9 into evidence. Lakeshore Club did not present any witnesses, but did offer one exhibit into evidence, Exhibit 1, during Mr. Cosme's case.

A transcript of the proceedings was not ordered or filed with DOAH.

Mr. Cosme filed a Proposed Recommended Order on June 1, 2011, and Lakeshore Club filed its Proposed Recommended Order on June 3, 2011. Both parties' proposals have been considered in the preparation of this Recommended Order. [3/]

FINDINGS OF FACT

1. Since 2004, Mr. Cosme has been a resident and homeowner in the Lakeshore Club of Polk County. He is of Hispanic descent with a national origin of Puerto Rico.

2. Lakeshore Club is a homeowners' association located in Lakeland, Florida. A majority of the residents are Hispanic and of Puerto Rican origin.

3. Ms. Jewell-Sanford, at all times relevant to the complaint, was the manager of Lakeshore Club.

4. The record shows instances in 2005 and 2006 when Ms. Jewell-Sanford had directed that Spanish not be spoken in the homeowners' association office. The record shows that, in 2005 an "English only" sign was posted and removed. Further, it was not disputed that, in 2006 Mr. Cosme had been asked by Ms. Jewell-Sanford to leave the office because he had been speaking Spanish to one of the office secretaries.

5. In March 2010, Mr. Cosme went to the Lakeshore Club's office to pick-up some papers. When Mr. Cosme entered the office, he walked past the receptionist to go to the back of the office. Ms. Jewell-Sanford told Mr. Cosme that he could not walk to the back of the office, because the office had rules. Mr. Cosme felt that action by Ms. Jewell-Sanford had been disrespectful to him.

6. Ms. Horneck, the current president of the Lakeshore Club Board of Directors, credibly testified that Ms. Jewell-Sanford spoke little, if any, to Hispanic members of the homeowners' association.

7. On December 1, 2009, Lakeshore Club sent Mr. Cosme the following letter:

> Dear Mr. Cosme:
>
> This comes in reply to your "packet" of complaint that was given to the Board of Directors against our Association Manager, Elizabeth Jewell.
>
> Our attorney and management consultant both feel this is hearsay and opinion. The past boards were in disagreement with you on this issue as well as a majority of the currently seated board.
>
> We have been advised that should you continue in your harassment of any member of the association, its directors, agents or employees, the Board of Directors will be well advised to seek legal remedies up to and including injunctive relief.
>
> We regret that you have chosen to make this step necessary after coming to the agreement that the President of the Association handle these issues and it is our desire that we work things out peacefully from this point forward.

8. Mr. Cosme felt this letter was threatening, because he feared that the homeowners' association would seek to eject him from the community based on the terms "injunctive relief" contained in the letter.

9. Ms. Horneck credibly testified that she had initialed the letter and that it was her intent that the parties get together and work out any problem.

10. Mr. Cosme did not offer into evidence the information packet that he had provided the Board of Directors, which prompted the December 1, 2009, letter. Further, Mr. Cosme did not bring forward any evidence to show that Lakeshore Club had taken any action to deprive him of his home or any part of the community, or that it had taken any action against him.

11. Ms. Jewell-Sanford had left her job as manager in April 2010.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter, pursuant to sections 120.569 and 120.57, Florida Statutes.

13. As Petitioner, Mr. Cosme has the burden of establishing facts to prove discrimination by a preponderance of the evidence. See §§ 760.34(5) and 120.57(1)(j), Fla. Stat.

14. The Florida Fair Housing Act provides, in relevent part, that:

> (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. § 760.23(2), Fla. Stat.

15. Discrimination covered by the Florida Fair Housing Act 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); see Fla. Dep't. of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991)(the Florida Fair Housing Act is patterned after the federal Fair Housing Act, 45 U.S.C. sections 3601 through 3631; thus, federal case law dealing with the federal Fair Housing Act is applicable). Therefore, 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).[4/]

18. In Savanna Club Worship Services, the federal court addressed the issue of whether a homeowners' association's rule that prohibited all religious activities in the association's common areas violated 42 U.S.C. section 3604(b). Section 3604(b), provided in pertinent part, that it is unlawful "'[t]o 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, religion, sex, familial status, or national origin.'" 456 F. Supp. 2d at 1225-1226. The court recognized that the majority of federal courts had interpreted the federal Fair Housing Act as "not applicable to post-acquisition discrimination in the provision of services, unless the discrimination, somehow, deprives a person of their housing."

456 F. Supp. 2d at 1228. Consequently, the court noted that "[t]his definition has resulted in the conclusion that if the challenged discriminatory activity occurs after a buyer has already purchased his or her home, and if such activity is not one which results in either an actual or constructive deprivation of that property, then such activity is not prohibited by the FHA." Id.; see also Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1142-1143 (S.D. Fla. 2004). The Savanna Club Worship Service court, however, distinguished the line of cases that appeared to require "a bright-line rule which holds that the FHA does not reach any post-acquisition discrimination." 456 F. Supp. 2d at 1229. The Savanna Club Worship Service court, recognized that in Florida many planned communities are governed by the Florida Homeowner's Association Act, and that most communities have "common areas which are maintained and regulated by the community's homeowners' association for use by the homeowner members." Id. at 1229-1230. Consequently, the court held that, "in the context of planned communities, where association members have rights to use designated common areas as an incident of their ownership, discriminatory conduct which deprives them of exercising those rights would be actionable under the FHA." 456 F. Supp. 2d at 1230, citing Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472 (11th Cir. 1993). See also Geisel, et al. v. City of Marathon, City of

Marina, Case No. 11-0035 (March 11, 2011), remanded for factual determination, FCHR Order No. 11-044 (June 7, 2011)(where Administrative Law Judge Robert Meale's well-reasoned Recommended Order recommended that the Commission clarify the law as to whether or not to extend the Florida Fair Housing Act to post-acquisition discrimination and, if the Commission recognized post-acquistion housing, that the Commission limit "post-acquisition discrimination to the extent that it is both direct and it deprives the aggrieved person of substantial enjoyment of his/her dwelling. As in cases of post-acquisition housing discrimination by homeowner insurers, see, e.g., Ojo v. Farmers Group, 600 F.3d 1205, 1208 (9th Cir. 2010); home improvement or refinancing lenders, see, e.g., Beard v. Worldwide Mortgage Corp., 354 F. Supp. 2d 789, 809 (W.D. Tenn. 2005)." [5/]

19. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001). Direct evidence of discrimination is "evidence that, if believed, proves the existence of a fact without inference or presumption." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004) (citation and quotation marks omitted). ". . . if the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven

discrimination." Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor . . . [i]f an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997). Because direct evidence of intent is often unavailable, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

20. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, "the Supreme Court's shifting-burden analysis adopted in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), . . . is applicable." Laroche v. Denny's Inc., 62 F. Supp. 2d 1375, 1382 (S.D. Fla. 1999); see also Head v. Cornerstone Residential Mgmt., 2010 U.S. Dist. Lexis *99379, 19-20 (S.D. Fla. Sept. 22, 2010). "Under this framework, the [complainant] has the initial burden of establishing a prima

facie case of discrimination. If the [complainant] meets that burden, then an inference arises that the challenged action was motivated by a discriminatory intent. The burden then shifts to the [respondent] to 'articulate' a legitimate, non-discriminatory reason for its action. If the [respondent] successfully articulates such a reason, then the burden shifts back to the [complainant] to show that the proffered reason is really pretext for unlawful discrimination." Schoenfeld, 168 F.3d at 1267 (citations omitted). If, however, the complainant fails to establish a prima facie case of discrimination, the matter ends. See, e.g., Nat'l Indus., Inc. v. Comm'n on Human Rel., 527 So. 2d 894 (Fla. 5th DCA 1988).

21. Mr. Cosme, in establishing his prima facie case of discrimination under McDonnell Douglas, discrimination is required to show: (1) that he is a member of a protected class; (2) that he suffered an injury because of the alleged discrimination; and (3) that, based on his claimed class of national origin, he was denied the provision of services protected by the Fair Housing Act, which were available to other homeowners who were not Hispanic or of Puerto Rican national origin.

22. Turning to the facts in the instant case, the record shows that Mr. Cosme failed to bring forward evidence showing a violation of the Florida Fair Housing Act.

23. At the onset, the record shows that much of Mr. Cosme's evidence concerned events that occurred in 2005 and 2006. The underlying complaint in this case was not brought forward until November 24, 2010. At the final hearing, Lakeshore Club raised the statute of limitations defense. Consequently, facts concerning events that occurred one year before November 24, 2010, are untimely and not considered by the undersigned. § 760.35, Fla. Stat.

24. Further, a review of the record, does not show any direct evidence of discrimination. Moreover, the record shows that Mr. Cosme failed to introduce evidence satisfying the second or third prongs of the McDonnell Douglas case, that he suffered an injury because of discrimination, because he was Hispanic, or because of his national origin, or that he was denied the provision of services protected by the Fair Housing Act, which were available to other homeowners, who were not Hispanic or of Puerto Rican national origin.

25. The timely factual allegations consisted of Ms. Torres' and Mr. Cosme's testimony that they believed that Ms. Jewell-Sanford treated Hispanics and Mr. Cosme disrespectfully and that Ms. Jewell-Sanford informed Mr. Cosme in one instance, he could not walk to the back of the homeowners' association office. In addition, Mr. Cosme's complaint concerning the December 1, 2009, letter sent to him is considered

timely. Applying the rule of law from Savanna Club Worship Services, none of the testimony shows that Mr. Cosme had been restricted from accessing a common area owned by the homeowners' association based on his national origin, or that other individuals who were not Hispanic or national origin of Puerto Rico were treated differently than him. For example, there was no evidence that other individuals, who were not Hispanic or of Puerto Rican national origin, that were allowed unfettered access to the homeowners' association office. At best, Mr. Cosme presented his subjective belief that he had been treated disrespectfully. Therefore, Mr. Cosme failed to establish a prima facie case of discriminatory intent.[6/]

26. The last line of inquiry concerns whether the December 1, 2009, letter from Lakeshore Club to Mr. Cosme constituted a violation of section 760.37.

27. Section 760.37, provides that:

> [i]t is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise of, or on account of her or his having exercised, or on account of her or his having aided or encouraged any other person in the exercise of any right granted under [Florida Fair Housing Act].

28. Section 760.37 is substantially identical to the federal Fair Housing Act, 42 U.S.C. section 3617. Loren v. Sasser, 309 F.3d 1296, 1299 n.9 (11th Cir. 2002). Thus, federal case law is instructive in interpreting section 760.37.

29. Federal case law has recognized that, in 42 U.S.C. section 3617, retaliation claims require a "plaintiff to demonstrate that the defendant,"exercised their powers with a discriminatory animus," in order to survive summary judgment. Campbell v. Robb, 162 Fed. Appx. 460, 473, 2006 U.S. App. Lexis *622 (6th Cir. 2006), citing Mich. Prot. & Advocacy Serv, 18 F.3d 337, 347 (6th Cir. 1994); see also United States v. City of Birmingham, 727 F.2d 560, 565-66 (6th Cir. 1984) (modifying injunction preventing any conduct interfering with plaintiffs' exercise of rights under the Fair Housing Act to prohibition only of conduct interfering "because of race or with discriminatory motive on account of race"); East-Miller v. Lake Cnty Hwy Dep't, 421 F.3d 558, 563 (7th Cir. 2005) ("We hold that a showing of intentional discrimination is an essential element of a § 3617 claim."); Gonzalez v. Lee Cnty Hous. Auth., 161 F.3d 1290, 1300 (11th Cir. 1998)(stating that section 42 U.S.C. section 3617, like 42 U.S.C. section 1985(3), requires a showing of discriminatory intent"); Sofarelli v. Pinellas Cnty., 931 F.2d 718, 722 (11th Cir. 1991)(requiring plaintiffs to demonstrate "that race played some role" in defendants' actions alleged to have violated 42 U.S.C. section 3617). But see Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 54 (2d Cir. 2002)(requiring only evidence that a defendant acted with a retaliatory motive, rather than a discriminatory one to

make out a prima facie case under 42 U.S.C. section 3617.); San Pedro Hotel Co., Inc. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998).

30. Applying the law to the facts, Mr. Cosme failed to establish that the December 1, 2009, letter constituted a violation of section 760.37. Mr. Cosme did not introduce into evidence the "packet" containing his complaints against Ms. Jewell-Sanford that he provided to the Lakeshore Club Board of Directors. Similarly, Mr. Cosme did not testify about the contents of the "packet" of information that the Board of Directors references in sending Mr. Cosme the letter. Consequently, there is no record evidence that Mr. Cosme was exercising any right under the Florida Fair Housing Act.

31. Even if one assumed that Mr. Cosme had brought forward evidence showing that he was exercising a right under the Florida Fair Housing Act when he initially wrote the Lakeshore Club Board of Directors, the record does not show any discriminatory animus on behalf of Lakeshore Club or that he suffered any injury. There was no evidence that, the December 1, 2009, letter that was sent to Mr. Cosme was based on a discriminatory intent concerning his national origin or Hispanic descent. Therefore, there is no tie between the letter and the complaint of a discriminatory act. Furthermore, the letter on its face does not contain language that is coercive,

intimidating, or threatening. Rather, the letter informs Mr. Cosme that the Board may seek legal remedies, if he continued to harass its members. The letter further states that, Lakeshore Club wanted to "work things out peacefully from this point forward." This interpretation was supported by the testimony of Ms. Horneck, a member of the Lakeshore Club Board of Directors, that she initialed the letter and that it was her intent in the letter that the parties get together and work things out. Consequently, Mr. Cosme failed to bring forward any evidence showing a violation of section 760.37.

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 the Petition for Relief.

DONE AND ENTERED this 7th day of July, 2011, in Tallahassee, Leon County, Florida.

THOMAS P. CRAPPS
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 7th day of July, 2011.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

[2/] The Petition for Relief here identified Lakeshore Club as the only Respondent. Further, the Petition for Relief claimed both a housing discriminatory practice and a violation of the Florida Civil Rights Act of 1992, as amended. The Petition for Relief and Mr. Cosme's evidence at the final hearing focused on his allegations concerning the English only sign, and actions that he considered disrespectful by Ms. Jewell-Sanford. Because the instant case does not involve an allegation of an unlawful employment issue or discrimination concerning a public accommodation, Mr. Cosme's checking the box on his Petition for Relief that claims a violation of the Florida Civil Rights Act appears to be an error. Consequently, Mr. Cosme's allegation that a discriminatory housing practice occurred will be reviewed under the Florida Fair Housing Act.

[3/] Mr. Cosme in his Proposed Recommended Order stated that he regretted "not having the opportunity to question Mrs. Jewell, Mr. Jim Purdy and Mr. Andy Andreu . . ." Further, Mr. Cosme stated that tactics used by opposing counsel "prevented me from bringing Mrs. Jewell and Mr. Purdy to testify, even though they were in the outer room waiting." Mr. Cosme did not present these witnesses for testimony. Consequently, Mr. Cosme cannot be heard to complain that he did not have an opportunity to present his case.

[4/] The language in section 760.23(2) is identical to the language in 42 U.S.C. section 3604(b), the federal Fair Housing Act.

[5/] The federal court in applying rule of law to the facts in Savanna Club Worship Service, determined that plaintiff had failed to show that "it was denied access to use of facilities or common areas available to other homeowners based upon religion as contemplated by the FHA." 456 F. Supp 2d at 1232.

[6/] If the undersigned applied the rule of law that restricts Fair Housing Act claims to only those involving acquisition of housing, not acts of post-acquisition discrimination, then Mr. Cosme's claims would fail because they all occurred after he had purchased his home.

COPIES FURNISHED:

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

Francisco Cosme
Post Office Box 8118
Fedhaven, Florida 33854

Scott H. Jackman, Esquire
Cole, Scott & Kissane, P.A.
4301 West Boy Scout Boulevard
Suite 400
Tampa, Florida 33607-5712

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.