STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA COMMISSION ON HUMAN RELATIONS ON BEHALF OF KAREN DAVIS,	)	
Petitioner,	)	
vs.	)	Case No. 11-3320
PAUL TINSLEY,	)	
Respondent.	)	

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on December 8, 2011, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Cheyanne Michelle Costilla, Esquire
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

For Respondent: Paul Tinsley, pro se
3014 Shearwater Drive
Navarre, Florida 32566

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent discriminated against Petitioner based on race regarding the renting of an apartment.

PRELIMINARY STATEMENT

On February 11, 2011, Karen Davis filed a Housing Discrimination Complaint with the Florida Commission on Human Relations (FCHR) against Paul Tinsley, claiming she was the victim of discrimination based upon her race. Following an investigation of Petitioner's allegations, FCHR issued a Notice of Determination (Cause) on April 11, 2011. Ms. Davis elected to have FCHR resolve the charge.

On June 27, 2011, FCHR filed a Notice of Failure of Conciliation and a Petition for Relief on behalf of Ms. Davis. The petition was forwarded to the Division of Administrative Hearings on July 1, 2011.

The Division of Administrative Hearings set this matter for hearing before Administrative Law Judge Robert S. Cohen, on September 13, 2011, in Tallahassee, Florida. Petitioner filed a Motion to Continue on August 31, 2011, which was granted. The hearing was later rescheduled and heard on December 8, 2011.

At the hearing, Petitioner presented the testimony of three witnesses and offered eight exhibits into evidence. Respondent testified on his own behalf and presented the testimony of three witnesses and offered six exhibits into evidence.

A Transcript was filed on January 4, 2012. After the filing of the Transcript, Petitioner and Respondent filed their

proposed findings of fact and conclusions of law on January 17, 2012.

References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. Respondent owns more than 25 residential rental properties in the State of Florida, including the duplex located at 8472 and 8474 Barrancas Street, Navarre, Florida, which he purchased approximately three years ago. In January 2011, Respondent placed an advertisement in the newspaper for the rental of both sides of the duplex, and put a "For Rent" sign in the front yard.

2. On January 27, 2010, Respondent entered into a lease agreement for the rental of Unit 8472 with Jeffery White, who is Caucasian. Respondent had to evict Mr. White for non-payment of rent. Mr. White was cited for leaving garbage and other things stacked around the home. When he moved out around August 2010, Mr. White left Unit 8472 filthy on the inside and out.

3. Petitioner, Karen Davis, was the next person to have a lease on this property, approximately five months later.

4. On January 7, 2011, Ms. Davis, who is African-American, was looking to rent a home and saw Respondent's advertisement in the newspaper for the duplex on Barrancas Street. Ms. Davis called Respondent and set up an appointment to view the duplex

the same day. Ms. Davis and her mother, Sylvienne Pearson, arrived at the property before Respondent, so they walked around the duplex and looked through the windows while they waited. Respondent showed Unit 8472 to Mses. Davis and Pearson. They learned that the hot water heater had insulation coming out of it, the front door knob did not have a lock, the refrigerator was pulled out from the wall, and the unit appeared not to have been cleaned or prepared for a new tenant since the last tenant had moved out. A storage room in the back of the duplex had to be pried open because it was filled with furniture that had been left by a previous tenant. There was garbage around the outside. Respondent indicated that the home was available "as is."

5. Unit 8472 needed to be cleaned and a hole in the door repaired. Respondent told Ms. Davis that he would deduct the reasonable cost of having the carpet cleaned from the rent.

6. Ms. Pearson asked if they could take a look at the adjoining unit, 8474, which she learned was also available to rent. Respondent told Ms. Pearson that the carpet was damaged, and he would not show it to them because he was not going to rent it until the repairs had been made.

7. After viewing Unit 8472, Ms. Davis called her friend, Brigitte Brahms, who is Caucasian and works part-time as a real estate agent. Ms. Brahms did a search on the property and

determined that there was not a lien or foreclosure on it. Ms. Davis described to Ms. Brahms that the front door lock was not working, a lot of belongings were left from a previous tenant, garbage was in the yard, the hot water heater had insulation coming out of it, and that Respondent was not willing to fix any of these items.

8. Respondent's only qualification for a potential tenant in his rental properties is that the tenant has some money. Once Ms. Davis presented Respondent with $350, he determined that she was qualified, and agreed to sign the lease with her. He told Ms. Davis that she would save $80 if she moved into Unit 8272 right away. After Ms. Davis signed the lease and gave him $350, Respondent gave Ms. Davis the keys to the unit. Ms. Davis told Respondent that she did not have all the money required for the rent, and that she would have to get some of it from her family.

9. The next morning, January 8, 2011, Ms. Davis called Respondent to ask to see Unit 8474. Respondent's wife answered the telephone and indicated that Unit 8474 had already been promised to someone else. A short time later, Ms. Brahms, posing as a potential tenant, called Respondent, and asked about the availability of Unit 8474. Respondent indicated that it was available, and Ms. Brahms told him that she would call back later. Ms. Davis went to Ms. Brahm's house and called

Respondent again on speakerphone while Ms. Brahms listened. Respondent again told Ms. Davis that Unit 8474 was not available because it had already been rented, and he would not show it to her. An hour later, Ms. Brahms called Respondent to verify that Unit 8474 was available, and Respondent offered to show it to her the same day.

10. Mses. Davis, Pearson, and Brahms went to the duplex before the appointment with Respondent and walked around Unit 8472 so Ms. Brahms would be able to compare it with Unit 8474. Ms. Brahms noted that Unit 8474 was in much better condition than Unit 8272; everything was cleaned up; the unit had been vacuumed; the kitchen was set up properly; the storage unit was empty; and there was no garbage left out in the yard. The carpet was stained and there was a small strip of carpet that was missing between the master bedroom and the living room, but Respondent did not indicate that he would change the carpet or make any repairs. The problems with Unit 8474 were minor in comparison with the problems with Unit 8472, and Unit 8474 was in much better condition than Unit 8472.

11. Respondent did not tell Ms. Brahms that there was anything that had to be repaired before he would rent Unit 8474 to her, and he did not indicate that it was being held for someone else. Instead, when Ms. Brahms asked if Unit 8474 was

available to rent, Respondent indicated that she could rent it that very day.

12. January 8, 2011, knowing that Respondent had shown Unit 8474 to Ms. Brahms after refusing to show it to her, Ms. Davis told Respondent that she was no longer interested in renting Unit 8472; tried to return the key to him; and requested a refund of the $350 deposit. Respondent refused, so Ms. Davis sent the key to him in a letter on January 13, 2011, again requesting the refund of the $350 deposit. Respondent has never returned Ms. Davis' $350 deposit.

13. Ms. Davis never actually moved into the duplex. After she decided not to rent Unit 8472 from Respondent, he next rented the unit to a Caucasian on February 25, 2011, then later to another Caucasian followed by a Hispanic tenant.

14. Towards the end of January 2011, Ms. Davis located another rental and moved in on February 1, 2011. Since she never moved into Respondent's duplex, she paid $80 to keep her furniture in storage for a month until she found a new place to live. She paid a $400 deposit and a $300 pet fee for two dogs.

15. Respondent provided several reasons for not showing Unit 8474 to Ms. Davis. Respondent testified that Ms. Davis never asked to see Unit 8474. Instead, he alleges that she simply asked if it was empty, to which Respondent indicated that it was empty and available for rent, but that the unit needed

several repairs, and it had not been cleaned. However, Respondent later testified that the previous tenants had left Unit 8474 in such a condition that it only required minor "TLC" from him and was ready to be rented. Additionally, Respondent admitted that he was willing to show Unit 8474 to Rita Davis (no relation to Petitioner), who is Caucasian, despite the fact that he had not repaired the carpet or cleaned Unit 8474. Respondent stated that he had agreed to hold Unit 8474 for an unidentified person until Monday, January 10, 2011, but admitted that he had not received a deposit to hold the unit.

16. Respondent explained that many times he has allowed his tenants to transfer to another one of his properties, even months later, without penalty or charges of any kind. Respondent admitted he did tell Ms. Brahms that Unit 8474 was available for rent and showed it to her, but states that had she actually offered to rent it, he would have told her that it still needed work that she would have had to complete herself. Also, she would only have been allowed to rent that unit if the other person for whom he was holding it did not come up with a deposit. Respondent testified that if a prospective tenant is likely to get into one of his rental properties and tear it up, he will not rent to that person. No evidence was produced to prove that Ms. Davis had a prior record of not caring for apartments or places where she lived.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.35(3), Fla. Stat.

18. Under Florida's Fair Housing Act, sections 760.20 through 760.37, Florida Statutes, it is unlawful to discriminate in the sale or rental of housing. Section 760.23 states, in pertinent part:

> (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.

19. In interpreting and applying Florida's Fair Housing Act, FCHR and the Florida courts regularly seek guidance from federal court decisions interpreting similar provisions of federal fair housing laws. In cases involving a claim of housing discrimination, the complainant has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. See U.S. v. California Mobile Home Park Mgmt.,

107 F.3d 1374, 1380 (9th Cir. 1997); Schanz v. Village Apts., 998 F. Supp. 784, 791 (E.D. Mich. 1998).

20. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1013, n. 7 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (Fla. 1996). If, however, the complainant establishes a prima facie case, the burden then shifts to the respondent to articulate some legitimate, nondiscriminatory reason for its action. If the respondent satisfies this burden, then the complainant must establish by a preponderance of the evidence that the reason asserted by the respondent is, in fact, merely a pretext for discrimination. See Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1476, n. 6 (11th Cir. 1993), cert. denied, 513 U.S. 808 (1994) (Fair housing discrimination cases are subject to the three-part test articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

21. Pretext for discrimination may be found when the totality of the evidence presented leads the finder of fact to conclude that the "proffered explanation is unworthy of credence." Ventura v. State Equal Opportunity Comm'n, 517 N.W.2d 368, 378 (Neb. 1994) (quoting Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 256 (1981)). "Pretext can be found where there are weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the housing provider's

proffered legitimate reasons for its action . . . ." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) (citing Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996)); Simms v. First Mgmt., Inc., 2003 U.S. Dist. LEXIS 9650, at *9 (D. Kan. May 20, 2003); U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 871 (11th Cir. 1990).

22. The plaintiff's prima facie case, combined with sufficient evidence to find that the defendant's asserted justification is false, may permit the trier of fact to conclude that the defendant unlawfully discriminated. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (U.S. 1993). The ultimate question of whether a plaintiff has been unlawfully discriminated against can only be resolved by looking at the particular facts of a case. Woodard v. Fanboy, L.L.C., 298 F.3d 1261 (11th Cir. 2002); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1291 (D.C. Cir. 1998) ("[T]he plaintiff's attack on the employer's explanation must always be assessed in light of the total circumstances of the case"). A showing that a defendant has lied about the reasons for his acts can be strong evidence that a defendant has acted with discriminatory intent. Id.

23. "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." § 760.23(1), Fla. Stat.; 42 U.S.C. § 3604(a). In order to establish a prima facie case of disparate treatment housing discrimination in violation of section 760.23(1), a complainant must establish that: (1) he or she is a member of a protected class; (2) he or she applied for and was qualified to purchase or rent certain property or housing; (3) he or she was rejected; and (4) the housing or rental property remained available. Gonzalez v. Sunrise Lakes Condo. Apts. Phase III, Inc. 4, 2007 U.S. Dist. LEXIS 59409, at *7 (S.D. Fla. Aug. 14, 2007) (citing Blackwell, 908 F.2d at 870).

24. The Fair Housing Act prohibits an outright denial to rent or sell and also makes it unlawful to "otherwise make a dwelling unavailable." 42 U.S.C. § 3604(a); § 760.23(1), Fla. Stat. The Middle District Court of Florida has interpreted "otherwise make unavailable" as prohibiting any housing practice that affects the availability of housing because of a protected classification. Dewlawter-Gourlay v. Forest Lake Estates Civic Ass'n of Richey, Inc., 276 F. Supp. 2d 1222, 1229 (M.D. Fla. 2003) (order vacated after settlement); see also U.S. v. City of Parma, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980) ("This broadly drafted section reaches every practice which has the effect of making housing more difficult to obtain on prohibited

grounds."), aff'd in part, rev'd in part, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); Davis v. The Mansards, 597 F. Supp. 334, 343 (N.D. Ind. 1984) (finding a section 804(a) violation where defendants discouraged plaintiffs from applying for housing by misrepresenting the availability of units); U.S. v. Youritan Constr. Co., 370 F. Supp. 643, 648 (N.D. Cal 1973) aff'd in part, remanded in part, 509 F.2d 623 (9th Cir. 1975). Steering African-Americans to a particular area in an apartment complex effectively denies them access to equal housing opportunities. U.S. v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978). Steering is evidence of the intent to influence the choice of the renter on an impermissible racial basis. Id. The petitioner would only have to establish that race was a consideration and played some role in the real estate transaction. Id. Where a landlord has no uniformly applied policy with objective standards of rejecting prospective tenants, the landlord violates 42 U.S.C. section 3604(a) by telling a prospective African-American tenant that there was someone else who was interested in the apartment when, in fact, no one had yet filled out an application or put down a deposit on such apartment and telling a prospective Caucasian tenant that such apartment was still available. Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977).

25. The Fair Housing Act protects against discrimination in the sale or rental of housing and makes it "unlawful to represent to any person because of race, color, national origin, sex, handicap, familial status, or religion that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." § 760.23(4), Fla. Stat.; 42 U.S.C. § 3604(d). In order to establish a prima facie case of discrimination predicated upon section 760.23(4), the plaintiff must "show that (1) the defendant represented to them (2) because of race, color, religion, sex, or national origin (3) that an apartment was not available for rent (4) when the apartment in fact was available for rent." Metro Fair Hous. Servs., Inc. v. Morrowood Garden Apts., Ltd., 576 F. Supp. 1090, 1093 (N.D. Ga. 1983).

26. The record contains evidence sufficient to establish a prima facie case of disparate treatment housing discrimination. Ms. Davis is protected by the Fair Housing Act because she is African-American.

27. Respondent explained that the only qualification he imposes on a prospective tenant for any rental property is that they have some money. Once Ms. Davis brought him $350, Respondent determined that she was qualified to rent Unit 8472. She would have been equally qualified to rent Unit 8474.

28. Respondent had never previously rented either side of the duplex on Barrancas Street to an African-American. When Ms. Davis and her mother showed an interest in viewing or renting Unit 8474, which appeared to be in better condition, Respondent refused to show it to them. He told them that it was empty at the time, but that significant repairs had to be completed before he would show it to a prospective tenant. Ms. Brahms, who is Caucasian, called about Unit 8474 the same day, posing as a prospective tenant. Respondent was willing to show her the home immediately and said nothing about any repairs that would have to be completed before she could view it. Ms. Brahms even testified that Respondent indicated that she could move in that same day.

29. Unit 8474 remained empty more than one month after Respondent refused to show it to Ms. Davis on January 8, 2011, until he rented it to Caucasian tenants on February 25, 2011.

30. It is Respondent's position that he did not reject Ms. Davis as a tenant or refuse to show her Unit 8474. He alleged that Ms. Davis never asked to see Unit 8474, but instead asked whether it was empty, to which he replied that it was empty, but needed a lot of repair work and cleaning. This is in direct contradiction to the testimony of Mses. Davis, Pearson, and Brahms, who all stated that Ms. Davis called and asked to see Unit 8474, but Respondent refused to show it to her.

Ms. Pearson testified that she had also asked if her daughter could see Unit 8474 because it appeared to be empty and she felt her daughter should have her choice, but Respondent told her that due to the amount of work that still needed to be done on that unit, he was not showing it right now. Respondent contradicted his own testimony when he stated that the previous tenants had left Unit 8474 in such a condition that it only required minor "TLC" from him and was ready to be rented. Further, he told Ms. Davis he was holding the property for an unnamed person who did not leave a deposit. Regardless of his stated reasons for not showing Unit 8474 to Ms. Davis, Respondent showed Unit 8474 to Ms. Brahms and Rita Davis, who are both Caucasian, without completing any of the supposed repairs that kept him from showing it to Ms. Davis.

31. The testimony of Mses. Davis, Pearson, and Brahms is more credible than that of Respondent. His purported reasons for not showing Ms. Davis the second side of the same duplex when asked are not believable in light of the totality of the evidence presented. The inevitable conclusion here is that Petitioner has shown that Respondent discriminated against Ms. Davis on the basis of race.

32. Section 760.35(3)(b) provides that upon a finding that Respondent has violated the Fair Housing Act, an administrative law judge shall issue a recommended order to FCHR prohibiting

the discriminatory practice and recommending relief, including quantifiable damages and reasonable attorney's fees and costs. An administrative agency cannot award non-quantifiable damages, such as pain and suffering or humiliation and embarrassment. Broward Cnty. v. La Rosa, 505 So. 2d 422, 424, n. 5 (Fla. 1987).

33. Respondent has violated the Fair Housing Act through conduct that has caused actual, compensable damages to Ms. Davis. A deposit of $350 was paid by Ms. Davis to Respondent. After he discriminated against her, Respondent refused to return the money to Ms. Davis. Since Ms. Davis was not able to take her furniture out of storage and move into Respondent's duplex, she had to pay $80 in storage fees that she otherwise would not have incurred. Ms. Davis then had to pay a second deposit and pet fee on the trailer home in which she is currently residing due to Respondent's discriminatory actions. However, she would have had to pay a deposit to secure any apartment or home she leased so she is not entitled to double recovery of her deposit. The same is true of the pet deposit which was required for both the Barrancas Street duplex and the home Petitioner ultimately rented. Therefore, the total amount of damages awarded to Ms. Davis is limited to the $350.00 deposit that was not returned by Respondent and the $80 storage fee.

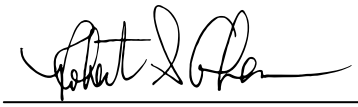
34. Upon approval of the Recommended Order, FCHR is authorized to seek its attorney's fees and costs for litigating the case. § 760.35(3)(b), Fla. Stat. Fees and costs may only be awarded in a separate action brought before the Division of Administrative Hearings following entry of the final order by FCHR.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Respondent discriminated against Karen Davis in violation of section 760.23(1) and (4), Florida Statutes; prohibiting further unlawful housing practices by Respondent; and directing that Respondent submit a cashier's check to Karen Davis within 10 business days from the date of the final order in the amount of $430.00.

DONE AND ENTERED this 18th day of May, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 18th day of May, 2012.

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.