

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

VERNON AND GLENDA SHAW, )  
 )  
 Petitioners, )  
 )  
 vs. ) Case No. 11-5105  
 )  
 EPI TOWNSEND, LLC AND EPOCH )  
 PROPERTIES, INC., )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before W. David Watkins, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Gainesville, Florida, on March 28, 2012, and May 17, 2012. The appearances were as follows:

APPEARANCES

For Petitioners: Vernon and Glenda Shaw, pro se  
4312 Northwest 34th Drive  
Gainesville, Florida 32605

For Respondents: Leslie W. Langbein, Esquire  
Langbein and Langbein, P.A.  
8181 Northwest 154th Street, Suite 105  
Miami Lakes, Florida 33016

STATEMENT OF THE ISSUE

The issue to be resolved is whether Petitioners were the victims of a discriminatory housing practice, by allegedly being

denied the opportunity to renew the lease of an apartment from Respondents, based upon their race.

PRELIMINARY STATEMENT

This proceeding arose upon the filing of a Petition for Relief by Vernon and Glenda Shaw (Petitioners) in which they allege that they were the victims of discriminatory housing practices, by being denied the opportunity to renew the lease on the apartment they occupied, by Respondents' failure to follow up on complaints made by Petitioners in the same manner as for those made by white tenants, and by not being invited to events to which white tenants were invited. Petitioners claim that these alleged discriminatory acts were based upon their race, which is African-American.

Petitioners filed a Complaint with the Florida Commission on Human Relations (Commission) and the matter was investigated. On August 31, 2011, a finding of "No Cause" was made by the Commission and a Petition for Relief was thereafter filed by Petitioners. The matter was then transferred to the Division of Administrative Hearings (DOAH) and a formal proceeding ensued.

The cause came on for hearing, as noticed. Petitioners presented their own testimony, as well as the testimony of Rhonda Hayden, Laqua Morrow, Angelo Caruso, Frances Jackson, Stacy Brown, and Breanne Parks. Petitioners offered 31 exhibits which were received into evidence. Respondents presented the

testimony of Rhonda Hayden, Amanda (Watson) Phelan, Detective Farrah Lormil, and Erin Napolitano, and offered 34 exhibits which were received into evidence.

During the second day of hearing (May 17, 2012), Respondents called witness Tara Kohl, who testified telephonically from on board a cruise ship. However, evidently due to the departure of the ship from port, Petitioners were unable to complete their cross-examination of Ms. Kohl before the telephone connection was lost. In light of Petitioners' inability to complete cross-examination of this witness, the undersigned advised counsel for Respondents that unless she was able to secure Ms. Kohl's attendance, either in person, or telephonically, to complete her testimony, that the testimony previously given by Ms. Kohl would be stricken. Thereafter, on July 10, 2012, counsel for Respondents advised that she had been unable to arrange for the completion of Ms. Kohl's testimony, and on July 12, 2012, the undersigned issued a Notice to the parties that the record was therefore closed, and that the testimony of Ms. Kohl was stricken from the record.

Although a court reporter was present for both days of hearing, no transcript has been filed with the Division. The parties were invited to submit proposed recommended orders, and Petitioners and Respondents availed themselves of that

opportunity. Their post-hearing submittals have been carefully considered in the rendition of this Recommended Order.

All references are to the 2012 version of the Florida Statutes, unless otherwise noted.

#### FINDINGS OF FACT

1. Petitioners Vernon and Glenda Shaw are husband and wife. They and their children are African-Americans.

2. Respondent EPI Townsend, LLC owns an apartment community located in Gainesville, Florida, known as Uptown Village.

3. Respondent Epoch Management, Inc. (Epoch) manages Uptown Village on behalf of EPI Townsend, LLC.

4. On June 25, 2010, Ms. Shaw submitted an application to lease an apartment at Uptown Village. She listed herself, her husband, and her two children as the proposed occupants. Ms. Shaw noted the family had a dog. She provided her email address on the application, as requested.

5. At the time of application, prospective tenants of Uptown Village are given a document entitled "Epoch Management, Inc. Rental Application Approval Criteria." It contains an "Equal Housing Opportunity" statement and displays the "Equal Housing" logo approved by the U.S. Department of Housing and Urban Development ("HUD"). When she submitted her application,

Ms. Shaw acknowledged receipt of the Rental Application Approval Criteria form.

6. The Shaws' application was approved, and Ms. Shaw subsequently signed a one-year lease ("the Lease") agreement on June 26, 2010. Soon thereafter Ms. Shaw moved into Apartment 2-201 of Uptown Village with her children and their dog. Mr. Shaw was living in Alabama at the time and planned on moving to Gainesville at a later date to join his family.<sup>1/</sup>

7. At the time the Shaws began their tenancy at Uptown Village, Rhonda Hayden served as the property manager and Stacy Brown as the assistant property manager for Epoch. Both were experienced property managers and both had received Fair Housing training.

8. Ms. Hayden and Ms. Brown testified that Epoch tries to create a sense of community among its tenants. Its efforts include hosting monthly breakfasts and other events for tenants. Information about upcoming community events is sent to all tenants with email addresses on file via Constant Contact, an on-line social and business networking platform. The email address provided on Ms. Shaw's rental application was entered into Epoch's Constant Contact list.

#### The Uptown Village Lease

9. The Lease contained several provisions intended to ensure a safe and peaceful living environment for tenants.

For example, paragraph 4 of the Lease provided that a resident shall “. . . not permit any disturbance, noises or annoyance whatsoever detrimental to the comfort and peace of any of the inhabitants of the community or its Landlord.” Similarly, paragraph 30(G) provided that the “Resident shall ensure that the pet(s) does not, at any time, disturb any other Resident of the apartment community.” The Lease reserved to Epoch the right to determine, in its sole discretion, whether a pet was disturbing residents.

10. The Lease also incorporated a code of community rules (“the Rules”) for Uptown Village, which provided in pertinent part, “all garbage, refuse and other types of waste shall be placed in garbage receptacles” and that “loud and boisterous noise or any other objectionable behavior by any Resident or guests is not permitted.” The Rules also noted that the “quiet time” hours of the complex were from 10:00 p.m. to 8:00 a.m.

11. Paragraph 12 of the Lease provided that a tenant must give 60 days’ advance notice of his or her intent not to renew the Lease. If notice was not given, then the Lease would renew on a month-to-month basis at the then current market rate, plus \$50.00.

#### The Shaws' Neighbors

12. The Alcubilla family, who are Hispanic, lived across from Petitioners’ apartment, in Apartment 2-202. The Alcubilla

family included a husband and wife, as well as the wife's mother (Mrs. Alcubilla), who spoke little English.

13. A Caucasian graduate student, Amanda Watson, lived on the third floor of the building directly above the Shaws in Apartment 3-201.

14. A Hispanic tenant, Angelo Caruso, lived with his girlfriend on the same floor as Ms. Watson.

15. In October 2010, four months after the Shaws became residents, the Kohl family moved into Apartment 2-101, the first floor apartment directly beneath the Shaws' apartment.

#### Trouble in Paradise

16. The Shaws' first rent check, dated July 9, 2010, was returned for insufficient funds. This was a Lease violation.

17. On July 14, 2010, Epoch issued a reminder to Ms. Shaw advising her that a neighbor had complained about her dog barking all hours of the day. This was a violation of the Lease and the Community Rules.

18. Mr. Shaw joined his family at Uptown Village on or about August 8, 2010. On the day he moved in, Epoch leasing agent Breanne Parks was conducting a survey of the community grounds and noticed empty boxes outside the Shaws' apartment on the walkway, as well as trash outside another tenant's apartment. She issued a warning notice to the Shaws and the

other tenant in the building. Leaving trash outside of an apartment is a violation of the Lease and Community Rules.

19. On August 20, 2010, the Shaws' rent check was returned for insufficient funds. This was a Lease Violation.

20. On October 8, 2010, the Shaws were notified by Epoch that they were being assessed a late fee for failure to pay their rent on time. One week later, on October 15, 2010, Epoch sent the Shaws notification about an outstanding balance on their account. The notices concerned Lease violations.

21. On October 21, 2010, Ms. Watson complained to the office about loud arguments and sounds emanating from the Shaws' apartment the night before. One of the noises sounded like someone or something had been thrown against a wall. Though she feared that someone was being physically abused due to the intensity of the impact, she decided not call the police.

22. In response to Ms. Watson's complaint, Epoch posted a notice on the Shaws' door for a second time warning them about noise and asking them to be considerate of their neighbors. The noise violation was considered a violation of the Lease and Community Rules.

23. The same day Epoch posted the noise violation notice on the Shaws' door, Ms. Shaw called the management office and lodged a retaliatory noise complaint against Ms. Watson. As a consequence of this complaint, a warning notice was sent by



Epoch to Ms. Watson. The noise violation was considered a violation of the Lease and Community Rules.

24. On November 4, 2010, the Shaws' rent check was returned for insufficient funds. This was a Lease violation.

25. Epoch allows sworn officers from the Gainesville Police Department to reside on the premises in exchange for services to the community as a Courtesy Officer. At some point during the Shaws' tenancy, Courtesy Officer Farah Lormil, an African-American female police detective, noticed a car belonging to the Shaws parked in an area that was not a designated parking space. This was a violation of Community Rules. Detective Lormil testified that she left a note on the car asking the owner to move the vehicle because "your car doesn't belong here." Detective Lormil also included her name and badge number on the note. At hearing, Ms. Shaw testified that the note read "you don't belong here." Inasmuch as Petitioners did not offer the note in evidence, and given the context in which the note was written (a parking violation), the testimony of Detective Lormil as to the actual wording of the note is the more credible.

26. On December 27, 2010, leasing agent Erin Napolitano wrote a memo to Ms. Parks reporting that Mrs. Alcubilla's daughter, Mater Alcubilla, had come to the management office the prior weekend to complain about an incident involving Ms. Shaw.

Consistent with her memo, Ms. Napolitano testified that Mater Alcubilla had told her that Ms. Shaw had screamed at her family, followed them up and down the stairs to their apartment, and loudly knocked on their door. Mater Alcubilla also accused Ms. Shaw of stating that she knew what type of vehicles the Alcubillas drove and dared them to call the police. The memo recorded Ms. Alcubilla's daughter as stating the police were called but when they arrived at Building 2, Ms. Shaw already was gone and therefore, no enforcement action was taken.

Ms. Napolitano ended her memo to Ms. Parks with a personal observation: "I just don't know what to do about all of this but it certainly seems to be escalating." Whatever the source of the friction between the two families, Ms. Napolitano testified that she had no reason to believe there was any racial animus on the part of the Alcubillas.

27. On December 30, 2010, Ms. Hayden invited Mater Alcubilla to the office to discuss the incident with Ms. Shaw. Following their meeting, Ms. Hayden notated the date of the meeting and substance of their discussion in the Alcubilla's resident conversation log. Ms. Hayden recorded in her own handwriting: "Resident very frightened, Resident plans on moving at the end of her lease-Resident claimed Ms. Shaw yelled at her and threatened her and told her she needed to return to her

country." Ms. Hayden considered this to be an interpersonal dispute between the Alcubillas and Ms. Shaw.

28. Also on December 30, 2010, Ms. Hayden and Ms. Parks invited Ms. Shaw to the management office to discuss the Alcubillas' complaints. Ms. Hayden recorded in the Alcubilla's resident log that Ms. Shaw denied the Alcubillas' accusations, became upset and told Ms. Hayden and Ms. Parks that her neighbors needed to mind their own business. Ms. Hayden also noted that the meeting ended when Ms. Shaw got up, stated, "you wait" and left the office. Based on what she perceived as a threat by Ms. Shaw of continuing trouble with the Alcubillas, Ms. Hayden recorded her intent to notify a Courtesy Officer of the situation.

29. On February 15, 2011, the Shaws received a three-day notice from Epoch for failure to pay rent, and a notice of an outstanding balance due. This was a Lease violation.

30. Three weeks later, on March 4, 2011, the Shaws were issued another three-day notice for failure to pay rent. This concerned a Lease violation.

31. Ms. Watson continued to hear the Shaws' dog barking and loud voices and other noises, included stomping and footsteps, emanating from the Shaws' apartment. On one occasion, the Shaws left Gainesville for the weekend and placed their dog out on the balcony because it barked continuously.

The noise and barking interfered with Ms. Watson's ability to study and to enjoy her residence.

32. On March 5, 2011, Epoch posted a letter on the Shaws' door regarding complaints received from the Shaws' neighbors about the dog barking for hours at a time, often late at night and in particular on March 3, 2011. This concerned a Lease violation.

33. The loud barking, stomping, and talking within the Shaws' apartment did not abate, and on March 9, 2011, Epoch sent the Shaws a "Seven Day Notice to Cure Lease Violation" which cited their violation of Lease Provision 30 and Community Rule Y.

34. On March 17, 2011, Epoch send the Shaws an "Urgent Outstanding Balance Due" notice regarding their outstanding unpaid utility bill. This concerned a Lease violation.

35. Also on March 17, 2011, an email was generated by Epoch's answering service which reported that Tara Kohl of Apt. 2-101 had called. The generated message stated Ms. Kohl's complaint as, "Apt. Above Very Noisy/Heavy Walking Again."

36. On March 19, 2011, Ms. Napolitano printed off the email note and called Ms. Kohl to get more information about the complaint. Ms. Napolitano recorded hand-written notes about the conversation on a printed copy of the email which read: "Last couple nights-beating down on floor-jumping/walking. 3-4 am can

hear them all the time." The email with Ms. Napitano's handwritten notes was placed in the Kohl's tenant file.

37. Immediately following Ms. Kohl's complaint, Ms. Shaw wrote the following note and faxed it to the management office:

To Uptown Village

On Saturday night, March 19, 2011, I noted a very loud bumping noise coming from my floor. I was home alone and very afraid. I even feared calling the office or security in fear of retaliation. From past experiences when I have voiced a complaint, I receive notes on my door alleging that my dog was barking, that I had trash beside my door, we were stomping, we were too loud and have even found handwritten notes on my car. My family and I can no longer live in such turmoil. Please accept this letter as a formal complaint regarding harassment. If these occurrences continue, I will have no other choice than to contact HUD. Thank you in advance for your help.

Glenda Shaw

38. Prior to the date of the faxed letter neither Petitioner had ever complained about discrimination of any kind to anyone at Epoch.

39. Ms. Hayden and Ms. Brown discussed the content of Ms. Shaw's fax and how to handle its allegations. They viewed Ms. Shaw's complaint against the Kohls as retaliation against the Kohls for making a complaint about noise from the Shaws' apartment the day before, and therefore a personal dispute. They also considered whether to respond to Ms. Shaw's allegation

of harassment by Epoch, and decided that any response would just be viewed by Ms. Shaw as evidence of further harassment. They decided to place the faxed letter in the Shaw's tenant file and take no other action.

40. It was a normal business practice of Epoch to generate a list of tenants whose leases were due to expire within the following 90 days. The list was used to create flyers reminding those tenants to contact the management office regarding renewal. Flyers were sent to each tenant on the list regardless of whether the tenant was in default of the lease or potentially a candidate for non-renewal. A renewal flyer was placed on the Shaws' door in late March and a second renewal flyer was posted on the Shaws' door the following month. Neither renewal notice elicited a response from the Shaws.

41. On March 25, 2011, Epoch sent the Shaws an "Urgent Outstanding Balance Due Notice" regarding their overdue utility bill. This concerned a Lease violation.

42. Just prior to Easter, 2011, an Uptown Village tenant asked the management office for permission to hold a private Easter egg hunt for their friends on the community's volleyball court. Epoch approved the request. Uptown Village residents were not notified of the event through Constant Contact because

the Easter egg hunt was not an Epoch-sponsored event. The individual who organized the event made the decision whom to invite.

43. On May 10, 2011, Ms. Shaw came to the management office and was assisted by Ms. Brown. Ms. Shaw accused Brian Kohl of confronting her daughter and calling her "two-faced." Ms. Shaw demanded that Epoch take action against Mr. Kohl and stated that if Epoch would not do anything about the situation, she was going to call the police or the Florida Department of Children and Families. Before Ms. Shaw left, Ms. Brown asked about the Shaws' intentions to remain residents upon the expiration of their Lease. Ms. Shaw did not give a definitive answer. Ms. Brown then told Ms. Shaw that if the Shaws decided not to renew, Epoch would not hold them to the 60-day advance notice required by the Lease.

44. Three days after this meeting, Ms. Brown notified Ms. Shaw that Epoch could not send a notice of violation to Mr. Kohl because the accusations against him were not Lease violations. However, Ms. Brown offered to discuss the allegations with Mr. Kohl, a truck-driver who was often on the road.

45. On May 18, 2011, Ms. Brown met with Brian Kohl to discuss Ms. Shaw's complaint. Mr. Kohl gave his side of the

story. After he left, Ms. Brown entered the following note in the Kohl's resident conversation log:

Brian came in wanting to break lease b/c [because] daughter is being harassed by girls in 2-111 and 2-101<sup>2/</sup> so badly that she won't go outside. Told him that one 2-111 should be finish soon (they are on NTV [Notice to Vacate] and the other may too, (2-101) lease expires 6/25. Otherwise would do what I can and to give us the opportunity to help before he moves.

Ms. Brown also made an entry in the Shaws' resident conversation log regarding Mr. Kohl's allegation that the Shaws' daughter was bullying the Kohl's daughter.

46. The following day, May 19, 2011, Ms. Watson came to the management office and gave notice that she was moving out of Uptown Village when her lease expired in August 2011. She was asked to complete a form entitled "Notice to Vacate from Resident." In her own handwriting, she wrote the reason for vacating as "loud tenants." The Notice to Vacate from Resident was placed in Ms. Watson's tenant file as part of Epoch's regular business practices. At hearing, Ms. Watson testified that she and her fiancé had considered living in her apartment after they married and decided they could not live there due to the continued noise and disturbances emanating from the apartment below.

47. With Ms. Watson's notice to vacate, Ms. Hayden and Ms. Brown came to the realization that three tenants in



Building 2 had levied complaints against the Shaws and two had made decisions to move out in whole or in part due to the Shaws' conduct. Ms. Hayden and Ms. Brown then conducted a more thorough review of the Shaws' tenant history, and discussed whether the Shaws should continue to reside at Uptown Village. They called Epoch's attorneys to get legal advice and left a message.

48. On May 29, 2011, Epoch received a handwritten letter from Tara Kohl making numerous complaints against the Shaws, including loud noises late at night, and the Shaws parking one of their cars in a handicapped parking space.

49. On June 8, 2011, the management office received a hand-written letter from Brian Kohl giving notice of his family's intent to break their lease and move out. The reasons given all centered on the noise being generated in the Shaws' apartment, and alleged threats that had been made by Ms. Shaw against Ms. Kohl.

50. On June 17, 2011, Ms. Shaw called the management office and spoke with Ms. Brown. Ms. Shaw asked for a copy of her lease, inquired about the shortest lease term possible, and the amount of any rent increase. Ms. Brown did not commit that the Shaws' lease would be renewed nor did she quote a renewal rate. Ms. Shaw continued to press the issue and Ms. Brown

finally stated that a normal rent increase on renewal was \$100 a month.

51. On June 20, 2011, Ms. Hayden and Ms. Brown spoke to Epoch's attorneys regarding options for ending the Shaws' tenancy. A decision was made to non-renew their lease as that would cause the least disruption to the Shaws. Ms. Hayden prepared a non-renewal letter, and it was posted on the Shaws' door the same day.

52. Later that afternoon, Mr. and Ms. Shaw came to the management office, met with Ms. Brown, and demanded to know the reason why their Lease would not be renewed. Ms. Shaw insisted that Ms. Brown had told her their Lease would be renewed at a rate of \$937.00. Ms. Brown denied she made this statement. Ms. Brown asked Ms. Hayden to intervene in the dispute.

53. Ms. Hayden explained that Epoch had a right to issue a non-renewal notice and that the decision was based on the numerous complaints received about the Shaws. Ms. Shaw insisted that if there were grounds to terminate the Lease for cause, Epoch should issue them a seven-day notice to vacate. Ms. Hayden explained that they had decided to issue a non-renewal notice rather than a notice to vacate to allow the Shaws more time to make arrangements and to foster an amicable parting.

54. Epoch has sent non-African-American, White and Hispanic tenants notices of violation regarding excessive noise and non-payment of rent and fees, and also has terminated leases (through eviction) on these bases. There is no competent substantial evidence in this record to even suggest that the decision to non-renew the Shaws' lease was in any way related to their status as African-Americans.

55. On June 23, 2011, Mr. Caruso's girlfriend was walking their dog outside Building 2 off leash (in violation of the Rules) when it began to chase the Shaws' son. The dog nipped at their son's leg but did not draw blood or break his skin. When Mr. Caruso learned of the incident, he came to the Shaws' apartment to apologize. He later returned and asked to take a photo of their son's leg because he feared Ms. Shaw might bring legal action against him, given her hostility after he had offered her a bag to clean up her dog's waste on a previous occasion. Ms. Shaw refused to allow Mr. Caruso to photograph her son's leg. Instead, she told him if he did not leave she would call the police, and if his dog ever attacked again she would report him and have the dog put to sleep.

56. On June 27, 2011, a second non-renewal letter was posted on the Shaws' door to ensure that Petitioner's understood their lease would not be renewed. The following day the Shaws returned to the management office and insisted that at the end

of the June 20th meeting, they had been told their lease would be renewed. Ms. Hayden denied this and reiterated that their lease was being non-renewed based on complaints from neighbors. As the meeting continued, Ms. Shaw became increasingly agitated; she turned to Ms. Brown and asked if Ms. Brown found her to be confrontational. Ms. Brown responded that she thought Ms. Shaw had a "strong personality." To that, Ms. Shaw replied, "It's my culture."

57. As the meeting continued, Ms. Shaw began to inject the issue of race into the conversation. For example, in response to Ms. Hayden's remark that the decision to non-renew was not personal, since she would not even recognize Ms. Shaw if she saw her at a mall, Ms. Shaw stated that "white people think we all look alike." As the conversation was taking an uncomfortable turn, Ms. Hayden ended the meeting and referred the Shaws to Epoch's attorneys if they had any further questions or concerns.

58. In early July 2011, Mr. Caruso was returning to Building 2 after walking his dog on leash and encountered Mr. Shaw. Mr. Shaw told Mr. Caruso to keep his dog away or he would kick it.

59. On July 11, 2011, Ms. Shaw complained to the management office about Mr. Caruso's dog charging at her while it was on a leash. She noted this was the second incident involving the dog. Ms. Brown told Ms. Shaw she would look into

the matter, since this would be considered a violation of the Lease and Community Rules. On July 12, 2011, Ms. Brown spoke with Mr. Caruso's girlfriend and cautioned her to keep the dog under control. Ms. Brown noted their conversation in both the Shaws' and Mr. Caruso's resident conversation log.

60. On August 4, 2011, Ms. Watson completed a "Move Out Survey" and in response to a question about what could have been done by management to encourage her to stay, wrote in her own hand-writing: "Dealt with loud neighbors more consistently and effectively . . ." She added that her reason for leaving was "loud, inconsiderate tenants."

61. The Shaws refused to move out by the date given in their non-renewal notice and stopped paying rent.

62. On August 3, 2011, the Shaws dual-filed a charge of housing discrimination (race and color) with the Commission and the Federal Department of Housing and Urban Development. The charge alleged that Epoch had refused to rent to them, made discriminatory statements, and had offered them less favorable terms, conditions, privileges, services or facilities than other non-African-American tenants. The facts supporting their charge were that they were not invited to the Easter egg hunt; that they had been told their lease would be renewed yet it was not; and that Ms. Hayden had made racist statements.

63. The Shaws did not pay rent for July 2011,<sup>3/</sup> and on August 4, 2011, were sent a "Notice to Pay Rent" by Epoch.

64. The Commission investigated the Shaws' charge of housing discrimination and issued a determination on August 31, 2011, finding there was no probable cause to support the claims.

65. On September 29, 2011, the Shaws filed a Petition for Relief from an alleged discriminatory housing practice, giving rise to the instant proceeding. During the pendency of this matter, the Shaws were evicted from Uptown Village for non-payment of rent.

#### CONCLUSIONS OF LAW

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

67. Petitioners have alleged that Respondents violated the Florida Fair Housing Act, sections 760.20-760.37, Florida Statutes. Section 760.23(2), prohibits discrimination against persons, in the terms, conditions, or privileges of rental of a dwelling, or in the provision of services or facilities in connection with rental of a dwelling, because of that person's race.

68. In all respects material here, the language in section 760.23(2) is identical to that in Title 42, section 3604(b), United States Code, which is part of the Federal Fair Housing

Act, as amended. "If a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same construction as placed on its federal prototype, insofar as such interpretation is harmonious with the spirit and policy of the Florida Legislation." See Brand v. Florida Power Corp., 633 So. 2d 504, 509-510 (Fla. 1st DCA 1994).

69. Petitioners herein have the ultimate burden of proving that a discriminatory housing practice was committed by Respondents, based upon the Petitioners' race (African-American). See § 760.34(5), Fla. Stat. In the absence of direct evidence of intentional discrimination, of which there is none in this record,<sup>4/</sup> the following well-established, three-part burden of proof analysis, derived from McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), is used in analyzing cases brought under the Federal Fair Housing Act:

First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for its action. Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact mere pretext.

See U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 872 (11th Cir. 1990) (quoting Pollitt v. Bramel, 669 F. Supp. 172, 175 (S.D. Ohio 1987)).

70. In accord with the burden-shifting analysis of McDonnell-Douglas, referenced above, Petitioners must establish a prima facie case, but still retain the ultimate burden of persuasion concerning the discrimination claim, after showing a prima facie case, by coming forward with evidence to show that any legitimate, non-discriminatory reason put forth by Respondents is pre-textual. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

71. Circumstantial evidence of discriminatory animus may be provided in the form of proof that the charged party treated persons outside of the protected class, who were otherwise similarly situated, more favorably than the complainant was treated. U.S. Dep't. of Hous. & Urban Dev. v. Blackwell, 908 F. 2d 864, 871 (11th Cir. 1990).

72. To establish housing discrimination through circumstantial evidence, a party ordinarily must establish (1) he/she belong to a protected class; (2) he/she was qualified to reside in housing; (3) he/she was denied housing or treated differently than others who were not in the protected class. 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).

73. If a prima facie case is established, then the burden shifts to the landlord to articulate a legitimate business reason for its actions. Head v. Cornerstone Residential Mgmt., Inc., 2010 U.S. Dist. LEXIS 99379 (S.D. Fla. 2010). Once a landlord articulates a legitimate business reason for its actions, then the complaining party must establish that the reason given by the landlord is pretextual. To prove pretext, Petitioners must show that the reasons offered for an adverse action are not the true reasons behind it. This is accomplished by pointing to such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the decision-makers proffered legitimate reasons that a reasonable fact finder could find them unworthy of credence. Comparator evidence can be raised as a part of a showing of pretext. Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1276 (11th Cir.) (citing for one, McDonnell Douglas, 411 U.S. at 804), reh'g denied, 285 F. App'x 741 (11th Cir. 2008).

74. Petitioners' charge of discrimination is predicated upon the three factual allegations set forth in their Petition for Relief: (1) Petitioners were illegally denied the opportunity to renew the lease on the apartment they occupied because of their race; (2) Respondents failed to follow-up on complaints made by Petitioners in the same manner as for those

made by white tenants; and (3) Petitioners were not invited to events to which white tenants were invited.

#### Non-Renewal of Lease

75. A prima facie case of housing discrimination in the context of a refusal to rent can be established through circumstantial evidence by showing that 1) Petitioners are members of a protected class and Respondents knew it; 2) they were qualified to renew their lease, i.e., ready, willing and able to renew their lease; 3) they were denied renewal of their lease. Soules v. U.S. Dep't of Hous. & Urban Dev., 967 F.2d 817, 822 (2d Cir. 1992); Head v. Cornerstone Residential Mgmt., Inc., *supra*; Jackson v. Comberg, 2006 U.S. Dist. LEXIS 66405 (M.D. Fla. 2006); Cavalieri-Conway v. Buttermann & Assoc., 992 F. Supp. 995 (N.D. Ill. 1998). The first and third elements of Petitioners' prima facie case was uncontested by Respondents. Remaining for determination is whether Petitioners were qualified to renew their lease and if so, whether they proved that Respondents' articulated business reasons are a pretext for race discrimination.

76. Nothing in this record supports a conclusion that the Petitioners were ready or willing to accept a one year lease renewal at the standard renewal increase of \$100 per month. However, even assuming this conclusion could be drawn; it would not lead to a like conclusion that the Shaws continued to be

qualified to lease. To the contrary, the overwhelming competent substantial evidence established that Respondents were not qualified to continue as residents of Uptown Village. Management experienced ongoing issues with the Shaws throughout their tenancy which constituted violations of the Lease and Community Rules. These included repeated bounced rent checks, unpaid utility bills and repeated complaints from the Shaws' neighbors about loud noise, aggressive behavior and inconsiderate and vexatious conduct. Petitioners also failed to pay rent from July 2011, through the date of their eviction. Failure to abide by lease terms during a lease, including payment of all rental amounts due, can render a tenant unqualified for renewal. See, e.g., Hobson v. HSC Real Estate, Inc., 2011 U.S. Dist. LEXIS 24587 (W.D. Wash. 2011) rev. in part 2012 U.S. App. LEXIS 10299 (9th Cir. 2012) [reversal on § 1981 claim required by direct evidence of discriminatory comments]; Diaz v. Panama City Hous. Auth., Case No. 10-3164 (Fla. DOAH Aug. 9, 2010; Fla. FCHR Oct. 26, 2010). Petitioners did not show that others outside their protected status were treated more favorably for similar types of lease violations.

77. Even assuming that Petitioners had proved their qualification to renew their lease (in the sense that they continued to meet the objective Rental Application Approval

Criteria), their claim also fails because they did not establish that Respondents' articulated legitimate business reasons for non-renewal were pretextual. Petitioners failed to show that Respondents' managers and employees did not hold an honest (and in this case, well-founded) belief that Petitioners' rental history and continuing course of inconsiderate conduct made them undesirable tenants. Morgan v. Orange County, Florida, 2012 U.S. App. LEXIS 10335 (11th Cir. 2012). Petitioners' denials of the Lease violations and re-characterization of their conduct merely substitutes their own judgment for that of Respondents; this tack does not prove pretext. Frazier v. Doosan Infracore Int'l, Inc., 2012 U.S. App. LEXIS 12995 (11th Cir. 2012); Cavalieri v. Buttermann & Assoc., 1999 U.S. App. LEXIS 851 (7th Cir. 1999).

#### Discriminatory Failure to Follow Up on Complaints

78. Petitioners' "failure to follow-up" claim seems to rely on two particular incidents. The first relates to Ms. Shaw's March 19, 2011, fax to the management office and the second, her May 10, 2011, complaint about Brian Kohl.

79. What Ms. Shaw described as "harassment" in her March 19, 2011, fax references the several lease violation notices she received from Epoch prior to that date, and a complaint of the Kohls banging on her floor (their ceiling). Nothing offered by Petitioners leads to a conclusion that the

reason why Uptown Village managers and staff failed to follow up on Ms. Shaw's complaint against the Kohls was racially motivated or that the managers and staff's explanation--that they believed the complaint to be simple retaliation by Ms. Shaw for the prior complaint of Tara Kohl--was pretextual. Indeed, Respondents offered evidence which demonstrated that Ms. Shaw had reacted in a similar fashion to the complaint made by the Alcubillas. Further, Petitioners failed to meet their burden of proof to show that Uptown Villages' managers and staff did not have a good faith belief, based on personal observations or the complaints of surrounding tenants, that Petitioners were disruptive and inconsiderate neighbors. The mere fact that Petitioners are members of a protected class under the Fair Housing Act is not sufficient, by itself, to prove racial motivation. See, e.g., Woods v. Von Maur, Inc., 2011 U.S. Dist. LEXIS 94747 (N.D. Ill. 2011).

80. Even assuming, arguendo, that prima facie evidence shifted the burden to Respondents, Petitioners presented no persuasive evidence that Respondents' explanations were pretextual. Petitioners likewise failed to meet their burden to establish disparate treatment in the manner in which Respondents handled Ms. Shaw's personal dispute with Brian Kohl.

### The Easter Egg Hunt

81. Petitioners failed to meet their burden to establish that Respondents subjected them to differing terms, conditions or privileges based on their race/color when they were not invited to the Easter egg hunt. No evidence was presented that Respondents organized or sponsored the Easter egg hunt. Rather, Petitioners were treated no differently than any other Uptown Village resident who did not receive an invitation to the event from the individual who organized and held it. No other evidence or testimony established that Epoch excluded Petitioners from management sponsored events, whether noticed through Constant Contact, or otherwise.

### Conclusion

82. There simply has been no preponderant, persuasive proof that racial animus on the part of Respondents had any part to play in Petitioners' failure to secure a lease renewal of the subject premises. Similarly, the greater weight of the evidence does not support Petitioners' claims that their complaints against neighbors were handled any differently than any other complaints, or that Respondents discriminated against them in any way. Petitioners' opinion or good-faith belief, standing alone, cannot carry Petitioners' ultimate burden of persuasion and constitute competent evidence of discrimination. Swanson v. General Serv. Admin., 110 F.3d 1180, 1186 (5th Cir. 1997);

Little v. Republic Refining, Co., 924 F.2d 93, 96 (5th Cir. 1991); and Elliott v. Group Med. and Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983).

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations, determining that Respondents did not commit a discriminatory housing practice based upon Petitioners' race and that the Petition be dismissed in its entirety.

DONE AND ENTERED this 3rd day of October, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of October, 2012.

ENDNOTES

<sup>1/</sup> Mr. Shaw signed the lease on August 11, 2011.

<sup>2/</sup> At hearing, Ms. Brown testified that she mistakenly wrote "2-101" when she meant to write "2-201," the Shaws' apartment number.

<sup>3/</sup> Although the Shaws' lease was not renewed, they were permitted to "hold over" on a month-to-month basis until they could locate other housing.

<sup>4/</sup> Petitioners did not establish that Respondents' managers or employees made statements which indicated a preference or limitation based on color or race. Alleged statements concerning Ms. Shaw's personality "being too strong" also do not indicate a racial preference or limitation, as nothing in this record suggests that such comments were race-related.

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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.