

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITIZENS FOR PETS IN CONDOS,)
INC.; AND M. B. F.,)
)
 Petitioners,)
)
vs.) Case No. 11-6398RU
)
FLORIDA COMMISSION ON HUMAN)
RELATIONS,)
)
 Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on April 24, 2012, in Tallahassee, Florida, before Administrative Law Judge Jessica E. Varn of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are: (1) whether three forms used by the Florida Commission on Human Relations are unpromulgated rules; (2) whether Petitioners, M.B.F. and Citizens for Pets in Condos, Inc., are substantially affected by the forms they seek to challenge as unpromulgated rules; and (3) whether, if Petitioners prevail, they are entitled to attorney's fees and costs pursuant to section 120.595(4), Florida Statutes (2011).^{1/}

PRELIMINARY STATEMENT

Petitioners filed a Petition to Determine Invalidity of Administrative Rules on December 14, 2011. Petitioners alleged that three forms used by the Florida Commission on Human Relations (FCHR) constitute unpromulgated rules, in violation of section 120.54(1)(a). Petitioners also alleged that the forms were invalid because they violated the Federal and Florida Fair Housing Acts codified at 42 U.S.C. sections 3601-3619, and sections 760.20-760.47, Florida Statutes, respectively. On December 21, 2011, Petitioners filed a Request for Official Recognition, requesting that official recognition be taken of a Charge of Discrimination filed with the Department of Housing and Urban Development, a Joint Statement of the Department of Housing and Urban Development and the Department of Justice, and a Final Rule adopted by the Department of Housing and Urban Development

in October, 2008. An order dated January 11, 2012, denied the Motion for Official Recognition, explaining that the documents were irrelevant to this proceeding because the sole issue to be decided was whether the three forms used by FCHR were rules by definition, and if so, whether their existence violated section 120.54(1)(a).

On December 21, 2011, Petitioners filed a Motion for Summary Final Order, which was opposed by FCHR. On December 29, 2011, FCHR filed a motion to dismiss, which was opposed by Petitioners. Both motions were denied.

A hearing was originally scheduled for January 10, 2012. Based on agreement of the parties, the hearing was rescheduled twice; the first time the hearing was rescheduled for February 13, 2012, and the second time the hearing was rescheduled for April 24, 2012.

At the final hearing, Petitioners presented the testimony of M.B.F. and Marcy LaHart; Petitioners' Exhibits A-G and J-P were admitted into evidence. Respondents presented the testimony of Larry Kranert, Lisa Sutherland, Cole Kekelis, and Cheyanne Costilla; Respondents' Exhibits 1-6 were admitted into evidence. An unopposed motion to strike M.B.F.'s testimony was granted during the final hearing. A two-volume Transcript of the hearing was filed on May 9, 2012. The parties filed Proposed Final

Orders on May 21, 2012, which were considered in preparation of this Final Order.

FINDINGS OF FACT

The Parties

1. Petitioner Citizens for Pets in Condos, Inc., (CPC), is a not-for-profit corporation, dedicated to the education of the public about the health benefits of living with companion animals, with an emphasis on helping individuals change or obtain a waiver from no-pet policies that restrict housing opportunities for individuals with pets. CPC seeks to educate individuals who may benefit from companion animals regarding their housing rights.

2. CPC works to ensure equal housing opportunities for individuals with disabilities that are benefitted by living with assistive animals. CPC helps those individuals acquire waivers based on their disability, where the housing entity has a no-pet policy.

3. CPC's resources are scarce. These resources are diverted, and CPC's organizational mission has been frustrated, when individuals are sent the FCHR forms at issue and CPC is asked to assist these individuals through the housing discrimination process with FCHR. CPC has had to spend resources to educate individuals over their privacy rights, and ensure that complainants understand the use of the FCHR forms.

4. On August 17, 2011, Petitioner M.B.F. filed a housing discrimination complaint with FCHR. The forms at issue in the present case were sent to M.B.F.; he did not execute the FCHR forms. On September 29, 2011, a no cause determination was issued by FCHR. It stated:

Complainant failed to return the signed Authorization to Release Medical Information so that a Medical Certification Form could be submitted by his doctor. Therefore, it could not be established that Complainant belongs to a class of persons whom the Fair Housing Act protects from lawful discrimination, based on handicap.

Respondent provided a copy of correspondence from Nancy Lee Greenfield, M.D., stating Complainant has a [redacted medical diagnosis]. Dr. Greenfield stated it is important for Complainant to always have his service dog, Jake, available for him. Dr. Greenfield's letter did not state what major life functions were substantially limited by Complainant's disability. Although Respondent knew or should have known that Complainant had a disability, Respondent did not know or should not have known that Complainant was a disabled person within the meaning of the Act.

5. On October 20, 2011, FCHR issued a Notice of Determination of No Cause to M.F.K.

6. FCHR is the Florida enforcing agency for the Fair Housing Act.

The Forms

7. FCHR sends, to every individual who has filed a housing discrimination case, two forms. A cover letter that comes with the two forms states:

Dear _____,

Attached is a medical release form. Please complete this form with the contact information of the doctor who treats you for your disability. Then sign and date the form. Please return it to our office with your Diary of Events and supporting documentation. We need this medical release form so that we can send a medical certification form to your treating doctor in order to verify that you are disabled within the meaning of the Fair Housing Act.

Also attached is an Authorization for the Use and Disclosure of Protected Health Information. Please complete this form and return it to our office with your Diary of Events and supporting documentation.

8. The first form, titled "Authorization to Release Medical Information," releases "medical records and any medical certification required for my Disability status with reference to my Complaint of Housing Discrimination" to FCHR.

9. The second form, titled "Authorization for the Use and Disclosure of Protected Health Information," gives FCHR permission to share health information which substantiates the Complainant's medical condition relating to a claim of discrimination with third parties listed by a Complainant. It also states that refusal to sign the authorization will not

affect the Complainant's ability to obtain treatment, payment or eligibility for benefits.

10. The third form is one sent to medical providers, and can only be sent if the first form sent to the Complainant is signed. This third form is titled, "Medical Certification Form." It explains to the provider that the Complainant, a patient of the provider, has requested a housing accommodation. It goes on to state:

In order to consider whether the request is reasonable, it is necessary that we have the following information from you as the physician who treats Complainant.

The Florida and Federal Fair Housing Acts define "disability" with respect to a person as a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment.

The form then defines physical and mental impairments, and defines "major life activities" as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The form then asks a series of seven questions:

1. Are you the Complainant's treating medical professional with knowledge of Complainant's medical condition and history?
_____ YES _____ NO

2. Does the Complainant have a physical or mental impairment as described above?
_____ YES _____ NO

3. What is the expected duration of the impairment?

_____ PERMANENT _____ TEMPORARY

4. Does the impairment substantially limit one or more of the Complainant's major life activities?

_____ YES _____ NO

If yes, please indicate which major life activity is affected and describe how it affects Complainant. Check all that apply.

_____ Breathing:

_____ Caring for Oneself:

_____ Concentrating:

_____ Hearing:

_____ Interacting with Others:

_____ Learning:

_____ Lifting:

_____ Performing Manual Tasks:

_____ Reaching:

_____ Seeing:

_____ Sitting:

_____ Sleeping:

_____ Standing:

_____ Walking:

_____ Working:

_____ Other:

5. In your professional, medical opinion, is the above-described modification or accommodation **necessary**, in order for Complainant to have an equal opportunity to use and enjoy a dwelling as a person without a disability?

_____ YES _____ NO

If yes, please describe how the requested modification or accommodation lessens the effects of Complainant's ability to function.

6. Would you be willing to provide a deposition regarding your treatment of Complainant and your medical opinion concerning Complainant's disability?

_____ YES _____ NO

If no, please explain why.

7. Would you be willing to testify in court regarding your treatment of Complainant and your medical opinion concerning Complainant's disability?

_____ YES _____ NO

If no, please explain why.

I swear under penalty of perjury that
the above statements are true.

[Signature and date lines]

11. Each housing discrimination complaint filed with FCHR is assigned to an FCHR investigator. Prior to an investigator's reviewing the file, the two forms are generated by the "intake" process, and automatically sent to every complainant in a housing discrimination case.

12. Although these forms are sent out in every housing discrimination case, they are not used in every case by the investigator assigned to each individual case. Each investigator has discretion in whether to use the forms. If the file contains medical information that defines the disability and accommodation needed, and answers all the necessary questions, than the forms are not needed.

13. The forms are not mandatory; complainants are not required to complete the forms in order to establish or verify their disability claim. Third-party verification of a complainant's disability and need for an accommodation is necessary, and Complainants may establish their disability and need for an accommodation through letters from their doctors, licensed social workers, or psychologists.

14. The forms are sent with an offer for mediation or conciliation to both parties, so that the parties are aware that during the course of the proceedings, the parties have a right to request that the claim be mediated or conciliated by FCHR, at no charge to the parties.

15. The failure to complete and return the forms is not fatal to a complainant's housing discrimination claim; the forms exist simply to assist the complainant in gathering the information to establish the need for an accommodation.

16. Since the FCHR forms are optional, do not confer any rights to those who use them, or penalize those who choose not to use them, the forms do not constitute rules by definition. Standing alone, the forms do not create rights, require compliance, and do not have the effect of law.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § 120.56(4), Fla. Stat.

18. Petitioners initiated this proceeding pursuant to section 120.56(4)(a) and (b), which place the burden of proof on Petitioners to prove that they have standing to bring this challenge and the burden of proving that the challenged forms constitute rules that were required to be promulgated in accordance with section 120.54. If Petitioners meet their burden

on these two items, then the burden shifts to FCHR, to prove that rulemaking is not feasible or practicable. § 120.56(4)(b). The standard of proof is by a preponderance of the evidence.

§ 120.57(1)(k).

19. In order to establish standing to challenge the forms as unadopted rules, Petitioners must prove that they are "substantially affected by [the challenged] agency statement[.]" § 120.56(4)(a). The "substantially affected" test in section 120.56 is a two-part test: Petitioners must establish that (1) the agency statement will result in a real or immediate injury in fact; and (2) the asserted interest is arguably within the "zone of interest" intended to be protected or regulated by the statutory scheme at issue. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

20. As to Petitioner M.B.F., his receipt of a no cause determination, based in part on his failure to complete the FCHR forms at issue, satisfies the first prong of the standing test. The no cause determination constitutes a real or immediate injury sustained by M.B.F. As to the second prong, M.B.F.'s asserted interest, of acquiring a housing accommodation based on a disability, is intended to be protected and regulated by FCHR, which is responsible for ensuring that housing entities comply with the Fair Housing Act.

21. As to Petitioner Citizens for Pets in Condos, Inc., the evidence established that the corporation's resources are scarce and have to be redirected when attempting to help individuals obtain waivers to no-pet policies, specifically, having to educate individuals as to their privacy rights and the use of the FCHR forms. This redirection of resources, and the frustration of its mission, satisfies the first prong of the standing test. As to the second prong, CPC's mission is to assist individuals who would like to live with assistive animals, and often must acquire a waiver of a no-pet policy in order to do so. A denial of a waiver can lead those individuals to file a complaint alleging housing discrimination before FCHR. CPC's interest in assisting individuals with housing complaints before FCHR was shown to be within the zone of interest sought to be protected by the Fair Housing Act.

22. Although Petitioners did demonstrate standing, they did not meet their burden of proving that the FCHR forms are unpromulgated rules.

23. A "rule" is an "agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or existing rule." § 120.52(16) (emphasis added). This

interpretation has been consistently interpreted to include only "those statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." Ag. for Health Care Admin. v. Custom Mobility, Inc., 995 So. 2d 984, 986 (Fla. 1st DCA 2008), (quoting McDonald v. Dep't. of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977)) (emphasis added).

24. The FCHR forms are sent to every complainant in a housing discrimination case filed with FCHR. However, the forms are not required to be used; the forms are simply one manner in which complainants can establish their disability, and their need for a housing accommodation related to that disability. Complainants can provide this information without ever using the forms.

25. In M.B.F.'s case, the no cause determination issued by FCHR was based only in part on his failure to file the forms; the determination also stated that the letter from M.B.F.'s doctor, which was provided to the investigator, did not provide sufficient information so as to satisfy the need to verify disability and the need for a housing accommodation. FCHR reviews all documentation submitted by complainants; a failure to complete the forms is not fatal to a complainant's discrimination claim.

26. The FCHR forms, standing alone, have no impact on complainants' rights. The forms do not require compliance and do not deny a complainant a cause determination if they are not completed. They do not have the effect of law.

27. Accordingly, the FCHR forms do not constitute unpromulgated rules, and Petitioners are not entitled to recover attorney's fees and costs.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition to Determine Invalidity of Administrative Rules is dismissed.

DONE AND ORDERED this 11th day of June, 2012, in Tallahassee, Leon County, Florida.



JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
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this 11th day of June, 2012.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2011 codification.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.