STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT SUAREZ AND CARIDAD ESPINOSA, Petitioners, vs. HOUSING AUTHORITY OF THE CITY OF MIAMI BEACH AND MIGUEL DEL CAMPILLO, EXECUTIVE DIRECTOR OF THE HOUSING AUTHORITY OF THE CITY OF MIAMI BEACH, Respondents.	)	Case No. 12-1212

RECOMMENDED ORDER

On July 25 and 30, 2012, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Robert Suarez, pro se
Caridad Espinosa, pro se
5055 Northwest Seventh Street
Apartment 209
Miami, Florida 33126

For Respondent: Margaret H. Mevers, Esquire
Jessica N. Pacheco, Esquire
Lydecker | Diaz
1221 Brickell Avenue, 19th Floor
Miami, Florida 33131

Eve Boutsis, Esquire
Figueredo and Boutsis, P.A.
18001 Old Cutler Road, Suite 533
Palmetto Bay, Florida 33157

STATEMENT OF THE ISSUE

The issue is whether either respondent engaged in a discriminatory housing practice against Petitioners, based on their national origin and age, in violation of the Florida Fair Housing Act, sections 760.20-760.36, Florida Statutes.

PRELIMINARY STATEMENT

On November 9, 2011, Petitioners filed a Housing Discrimination Complaint with the Florida Commission on Human Relations. The complaint alleges that Respondents engaged in discrimination based on national origin against Petitioners by "[d]iscriminatory advertising, statements and notices [and] [d]iscriminatory terms, conditions, privileges, or services and facilities."

More particularly, the complaint alleges that Petitioners sought to purchase a home through the Housing Choice Voucher Homeownership Program (Homeownership Program) administered by Respondent Housing Authority. In doing so, Petitioners identified themselves as Hispanics of Cuban descent.

In December 2010, a representative of Respondent Housing Authority allegedly told Petitioners that Petitioner Espinosa, who is Petitioner Suarez's mother and the head of the household,

was on a waiting list for the Homeownership Program. A few weeks later, Respondent del Campillo allegedly told Petitioner Suarez that his mother was not on the waiting list for the Homeownership Program. On March 15, 2011, Respondent del Campillo allegedly told Petitioner Suarez:

> You Cubans want everything done your way. You have to wait like everyone else. You all are not the best. You have to comply with the rules. . . . You want to take advantage of this program, so that when your mother dies, you would remain paying very little for your house. I am not going to permit your mother, at her age, to be responsible for a mortgage payment. You are not going to buy a house even if President Obama comes here.

The complaint alleges that Respondent del Campillo added that he had many friends who could help Petitioners, or not help them. The complaint concludes that Respondents have continued to discriminate against Petitioners in their participation in the Homeownership Program.

After an investigation, on March 5, 2012, the Florida Commission on Human Relations entered a Notice of Determination of No Cause.

By Petition for Relief dated April 2, 2012, Petitioners alleged that Petitioner Suarez had suffered $25 million in damages and Petitioner Espinosa had suffered $30 million in damages. The petition asserts:

> With my best efforts I tried to give evidence of discriminatory statements of Mr. Del Campillo. Please, excuse any errors in the translation of these documents. Or any other error[.]
>
> Because of my emotional state I am not able to continue working on this issue to send the rest of the evidence we have to prove our allegations, I hope I'm sending enough evidences and have the opportunity to present the rest of the evidence in court.
>
> In conclusion I want you to be aware that in Mr. Del Campillo defence there are missing arguments to prove that he did not make discriminatory statements against my family and the rest of the Cuban community.
>
> For example in my statement I mention a security guard and Ms. Vanessa (Mr. Del [C]ampillo's assistant) as witnesses that I had a conversation with Mr. Del Campillo. Neither the investigation nor Mr. Del Campillo got testimonies of these people to declare in this investigation. Therefore, there is no doubt that Mr. Del Campillo made discriminatory statements in violation of the Florida Fair Housing. In addition, Mr. Del Campillo accepted mediation to reach an amicable agreement in this case which demonstrated its willingness to alleviate the damage caused to us with his attitude discriminatory.

Shortly prior to the final hearing, this case was transferred to the undersigned Administrative Law Judge.

On the morning of the hearing, Respondents filed a Motion for Attorneys' Fees and Costs, pursuant to section 120.595(1), on the ground that Petitioners had participated in the proceeding for an improper purpose. Respondents contend that

Petitioners commenced the proceeding to harass Respondents, and their improper purpose may be inferred from the duplicative and frivolous filings. This motion was not addressed at the hearing.

At the start of the hearing, Respondents orally moved for an order in limine to prohibit Petitioners from introducing evidence of discrimination on the grounds of disability and retaliation. The Administrative Law Judge granted the motion.

At the hearing, Petitioners called five witnesses and offered into evidence four exhibits: Petitioners Exhibits 1-4. Respondents called one witness, although they examined certain of Petitioners' witnesses as though Respondents had called them, and offered into evidence ten exhibits: Respondent Exhibits 1-10.

The parties did not order a transcript. Respondents filed a proposed recommended order on August 8, 2012.

FINDINGS OF FACT

1. Petitioners are Hispanics of Cuban descent. Petitioner Espinosa is the mother of Petitioner Suarez. The record fails to disclose the age of Petitioner Espinosa, but she appears to be in her seventies.

2. Petitioner Suarez lives with Petitioner Espinosa. At all material times, as head of a household, Petitioner Espinosa has participated in Respondent Housing Authority's Section 8

Housing Choice Voucher Program (Section 8 Program), which provides her financial assistance with which to pay her rent.

3. Twenty years ago, Respondent Housing Authority started the Financial Self Sufficiency Program (FSS Program). The purpose of this program is to provide training and support to low-income persons participating in the Section 8 Program, so that the participants may achieve financial self-sufficiency and no longer require public assistance.

4. In 2004, the governing board of Respondent Housing Authority adopted Resolution No. 2004-23, which created the Homeownership Program. In general, a participant in the Section 8 Program, upon completion of the Homeownership Program, converts his or her rental voucher into a mortgage voucher, so the program pays for part of the participant's mortgage payment.

5. Since its creation, the Homeownership Program has always been filled to capacity with participants and has always had a waiting list. Resolution No. 2004-23 provides that participation in the FSS Program is not a prerequisite for participation in the Homeownership Program, but also provides that, if applications to the Homeownership Program exceed a specified threshold, as they always have, participants in the FSS Program will have a preference for admission into the Homeownership Program.

6. In turn, at all material times, the FSS Program has always been filled to capacity with participants and has always had a waiting list. There are a set number of slots in the FSS Program. For each participant who fails to complete the program, Respondent Housing Authority fills his or her slot with someone on the FSS Program waiting list. However, for each participant who completes the FSS program, one slot is forever removed from the FSS Program. The FSS Program ends when its final slot is removed, at which time the FSS Program preference will no longer be available in the Homeownership Program.

7. The FSS Program is a five-year program. Generally, participants in the FSS Program must be employed, but this requirement is waived for persons who are unable to work. The participants set their own goals for the FSS Program. These goals include purchasing a home, acquiring an education, obtaining a job, rehabilitating credit, opening a small business, and learning English.

8. Due to the unexpected timing of openings in the FSS Program--i.e., through the withdrawal of existing participants from the program--it is impossible to project the length of time that applicants may remain on the FSS Program waiting list. Although one applicant was accepted into the program in as little as three months, one to two years is more common.

9. Petitioner Espinosa applied for the Homeownership Program in 2008 and for the FSS Program on February 11, 2009. She has been on the waiting lists for both programs ever since.

10. Three years is a little longer than usual for a person to wait to be admitted to the FSS Program, but this fact does not establish discrimination against either petitioner. The record is not entirely clear, but Petitioner Suarez's part-time employment seems to have been an impediment to his participation in Homeownership Program, although it is unclear why this would delay the acceptance of his mother (and possibly him) into the FSS Program.

11. In any event, the relatively long duration that Petitioners have been on the waiting list for the FSS Program is no basis on which to infer some form of discrimination. The Homeownership Program and, thus, the FSS Program are popular programs that have served many persons of Petitioners' national origin and Petitioner Espinosa's age.

12. Additionally, there is no evidence in the record that Respondent del Campillo made the remarks that he is alleged to have made to Petitioner Suarez. The only testimony on the point is from Respondent del Campillo, who himself is of Cuban descent. Respondent del Campillo testified that he never uttered anything resembling what Petitioner Suarez has alleged

about Petitioners' national origin and Petitioner Espinosa's age. Respondent del Campillo's testimony is credited.

CONCLUSIONS OF LAW

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

14. Petitioners' attempt to broaden the scope of the case to include claims of discrimination on the bases of disability and retaliation was improper under the authority of Scholz v. RDV Sports, 710 So. 2d 618, 622 (Fla. 5th DCA 1998). Addressing the same issue in a case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., the Scholz court stated:

> As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in her EEOC charge. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47, 94 S. Ct. 1011, 1019, 39 L. Ed. 2d 147 (1974). This rule serves the dual purpose of affording the EEOC and the employer an opportunity to settle the dispute through conference, conciliation, and persuasion, Id. at 44, 94 S. Ct. at 1017, and of giving the employer some warning of the conduct about which the employee is aggrieved. Rush v. McDonald's Corp., 966 F.2d 1104, 1110 (7th Cir. 1992); Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989). Although the rule is not jurisdictional, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392, 102 S. Ct. 1127, 1131, 71 L. Ed. 2d 234 (1982), it is a condition precedent with which Title VII plaintiffs must comply. Babrocky v.

> Jewel Food Co., 773 F.2d 857, 864 (7th Cir. 1985). For allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would frustrate the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. Cheek [v. Western & Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994)]. Notwithstanding the liberal construction afforded the Title VII presuit procedure,n.2 its requirements cannot be overlooked. In this regard, Title VII claims set forth in a complaint are cognizable only if they encompass allegations which are like or reasonably related to the allegations contained in an EEOC charge. Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 167 (7th Cir. 1976) (en banc) (quoting Danner v. Phillips Petroleum Co., 447 F.2d 159, 162 (5th Cir. 1971)), cert. denied, 429 U.S. 986, 50 L. Ed. 2d 598, 97 S. Ct. 506 (1976). See also Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466. The Jenkins test is satisfied if: (a) there is a reasonable relationship between the allegations in the EEOC charge and the claims in the complaint, and (b) the claims in the complaint can reasonably be expected to grow out of an investigation into the allegations in the EEOC charge. Cheek, 31 F.3d at 500. "This means that the EEOC charge and the complaint must, at minimum, describe the same conduct and implicate the same individuals." Id. (emphasis in original).
>
> [n2 It is well established that the Title VII procedure should be user-friendly and that substance should prevail over form. See Sanchez v. Standard Brands, Inc., 431 F.2d 455, 465 (5th Cir. 1970).]

15. Retaliation is not the same conduct as the underlying discrimination and is necessarily separated in time from the underlying discrimination, so that an investigation into the

claims in the Housing Discrimination Complaint concerning discrimination based on national origin and age would not reasonably have led to the claim of retaliation. Disability is a closer issue, but Petitioners provided no details of discrimination based on disability to the Florida Commission on Human Relations or Respondents. There is no relationship between the charges of discrimination based on national origin and age and a later charge of discrimination based on disability, such that a robust investigation would have reasonably encompassed this charge of discrimination based on disability. For these reasons, the Administrative Law Judge granted the motion in limine.

16. Section 760.23(2) provides:

> 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.

17. The framework for evaluating most claims of housing discrimination borrows from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), which recognizes that, once the plaintiff proves a prima facie case of discrimination, the burden shifts to the defendant to prove a legitimate, nondiscriminatory reason for the complained-of act, after which

the burden shifts to the plaintiff to show that the proffered reason is pretextual.

18. In a housing discrimination case, a plaintiff makes a prima facie showing of discrimination by showing that he or she is a member of a protected class, he or she sought and was qualified for the sale or rental services at issue, and he or she was rejected. Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003).

19. National origin, but not age, is a protected class under the Florida Fair Housing Act. Thus, Petitioner Espinosa's age claim must be rejected on this ground.

20. Even assuming that age were a protected class, Petitioners have failed to show that they were qualified to participate in the Homeownership Program. The preponderance of the evidence suggests that they remained on the waiting list for both programs for legitimate, nondiscriminatory reasons, including that their turn had not yet come up and possibly an issue with Petitioner Suarez's part-time employment. On this record, there is no evidence whatsoever that national origin or age played any role in the fact that Petitioners have not yet been accepted into the FSS Program or Homeownership Program.

21. The Administrative Law Judge has given careful consideration to Respondents' claim for attorneys' fees and costs under section 120.595(1), Florida Statutes, which

authorizes an award of fees and costs, if the Administrative Law Judge determines that Petitioners participated in this case for an "improper purpose." Having studied the demeanor of each Petitioner at the hearing, it is far from clear that either of them possessed an understanding of how the FSS Program or Homeownership Program worked. Each Petitioner was easily capable of inferring from his or her lack of admission into these programs over the periods of time involved that the decisionmaking was tainted by some form of discrimination, when a clearer understanding of program requirements and eligibility determinations would have revealed that the decisionmaking was entirely free of discrimination.

22. Also, it is far from clear that either Petitioner possessed an understanding of how to litigate, even in the more forgiving administrative forum. Neither Petitioner had any idea how to prepare a motion or a response to a motion. Instead, their pleading style reflected an abundance of caution, in which all issues were always restated in every pleading, so as, one supposes, not to miss or waive anything. Of course, this had the unfortunate effect of forcing opposing counsel (and the Administrative Law Judge) to spend inordinate amounts of time trying to figure out what Petitioners were trying to say.

23. On these facts, it is impossible to determine that Petitioners participated in this case for an improper purpose or

to harass Respondents. Respondents' Motion for Attorneys' Fees and Costs is therefore denied.

RECOMMENDATION

It is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition of Relief dated April 2, 2012.

DONE AND ENTERED this 17th day of August, 2012, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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 17th day of August, 2012.

COPIES FURNISHED:

Eve A. Boutsis, Esquire
Figuredo and Boutsis, P.A.
18001 Old Cutler Road
Palmetto Bay, Florida 33157
eboutsis@fbm-law.com

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
Tallahassee, Florida 32301
violet.crawford@fchr.myflorida.com

Roberto Suarez
Caridad Espinosa
Apartment 209
5055 Northwest 7th Street
Miami, Florida 33126
toknelusa@yahoo.com

Margaret H. Mevers, Esquire
Lydecker | Diaz
19th Floor
1221 Brickell Avenue
Miami, Florida 33131
mhm@lydeckerdiaz.com

Miguel del Campillo, Executive Director
Housing Authority of the City of Miami Beach
200 Alton Road
Miami Beach, Florida 33139-6742

Lawrence F. Kranert, Jr., Gen. 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.