

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD NEY,)
)
 Petitioner,)
)
 vs.) Case No. 12-1945
)
 ROYAL HIGHLANDS PROPERTY)
 OWNERS' ASSOCIATION, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This case was heard on September 11, 2012, in Leesburg, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Leonard Wheeler, Qualified Representative
521 West Seminole Avenue
Eustis, Florida 32726

For Respondent: Erik F. Whynot, Esquire
Katzman, Garfinkel & Berger
300 North Maitland Avenue
Maitland, Florida 32751

STATEMENT OF THE ISSUE

Whether Petitioner was the subject of unlawful discrimination in the provision of services or facilities in connection with his dwelling based on his handicap, and whether Respondent refused to make reasonable accommodations in its rules, policies, practices, or services necessary to afford

Petitioner equal opportunity to use and enjoy a dwelling in violation of the Florida Fair Housing Act, chapter 760, Part II, Florida Statutes.

PRELIMINARY STATEMENT

On February 13, 2012, Petitioner filed a complaint with the U.S. Department of Housing and Urban Development (HUD) and the Florida Commission on Human Relations (FCHR), alleging that Respondent discriminated against him based on his disability. The basis for the claim of discrimination was that Respondent failed to make reasonable accommodations for Petitioner to be able to provide his comments regarding an agenda item at a July 13, 2011 meeting of the Royal Highlands Property Owners Association, Inc. (RHPOA or Respondent), in violation of the Fair Housing Act.

An investigation of the complaint was made by FCHR. On May 14, 2012, FCHR issued its Notice of Determination of No Cause, which incorporated a March 22, 2012 HUD Determination, and which concluded that there was no reasonable cause to believe that a discriminatory housing practice had occurred.

Petitioner disagreed with FCHR's determination and filed a Petition for Relief. The petition was forwarded to the Division of Administrative Hearings for a formal hearing. The final hearing was scheduled for August 10, 2012. Respondent requested

a continuance of the hearing, which was unopposed. The hearing was reset for September 11, 2012, and was held as scheduled.

At the hearing, Petitioner testified on his own behalf and offered the testimony of Susan Hoffman, a member of the RHPOA Board of Directors. Petitioner offered Petitioner's Exhibits P1-P5, which were received in evidence. Respondent presented the testimony of Robert Reichel, a member of the RHPOA Board of Directors; Stacey Peach, an employee of Leland Management, the community association manager for Respondent; Lee Norden, a homeowner in the Royal Highlands community; and John Banahan, current president of the RHPOA Board of Directors. Respondent offered Respondent's Exhibits R1-R7, which were received in evidence.

After the hearing, Petitioner filed a number of documents and requests that the record of the hearing be reopened. By separate orders, the documents were not received in evidence, and the record was not reopened.

A one-volume Transcript of the final hearing was filed on October 4, 2012. On October 8, 2012, a Notice of Filing Transcript was entered that established Monday, October 15, 2012, at 5:00 p.m., as the deadline for filing Proposed Recommended Orders. Petitioner timely filed his Proposed Recommended Order, which has been considered in the preparation

of this Recommended Order. References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is a homeowner in the Royal Highlands community in Leesburg, Florida, and has been a member of the RHPOA since moving into his home in April 2001.^{1/} From September 2010, through February 2011, Petitioner served on the RHPOA Board of Directors.

2. Respondent is a property owners' association, membership in which is limited to property owners in the Royal Highlands residential community in Leesburg, Florida. There are 1,499 homes in the Royal Highlands community. The community is divided into twelve "districts." Respondent's Board of Directors (Board) consists of one representative from each of the twelve districts. Meetings of the Board are held monthly, except for August when community activities are typically sparsely attended.

3. Leland Management is a community association management company that provides management services to the RHPOA along with other community associations.

4. Petitioner alleged that he suffers from a disability because he walks with the use of a cane, and that his ability to speak is impaired as a lingering effect of a 2004 neck surgery

that involved insertion of an endotracheal tube during and immediately after the procedure.

5. During the month of February 2011, Petitioner was running for reelection to the RHPOA Board of Directors. On the day of the election, and prior to the vote of the membership, Petitioner appeared at the RHPOA meeting to make a final statement and thank his supporters. He walked to the front of the community meeting room, known as the Great Hall, but did not want to take the steps up to the elevated stage for fear that he might lose his balance and fall off. Petitioner was given a microphone and he thanked his supporters from the base of the stage. Afterwards, he walked back to his seat. Petitioner was not reelected to the Board, but continued to attend meetings as a member of the RHPOA.

6. A monthly meeting of the RHPOA was held on July 13, 2011. The agenda included four items, including an item that would authorize the Board of Directors to retain legal counsel in the event a threatened lawsuit was filed against Bob Fitzpatrick, who was then the president of the RHPOA.

7. The nature of the potential lawsuit was not in evidence, except that it involved a complaint filed with the Lake County Sheriff by Petitioner against Mr. Fitzpatrick. Mr. Fitzpatrick recused himself from the vote, since any legal fees would be expended on his behalf as president. John

Banahan, then the vice-president of the RHPOA, acted as chair during the consideration and vote on the agenda item.

8. The RHPOA allows members to speak regarding any issue on the agenda. Members must sign a "Sign-Up Sheet to Speak to Agenda Item" for each item on which they wish to be heard. Members are allowed three minutes to speak on each issue for which they have signed up.

9. The minutes regarding a particular agenda item typically reflect only whether a motion was made, who seconded the motion, who voted, and the results of the vote. When there is a significant amount of discussion, the minutes may, as did the minutes for the legal counsel agenda item of the July 13, 2011 meeting, include something no more detailed than "[m]uch discussion, residents and Board Members." Neither the comments of property owners nor the discussions of the Board members as to an agenda item are recorded in the minutes of meetings of the RHPOA.

10. When Petitioner was on the Board, he would routinely take notes at meetings, and then destroy the notes after the meeting was concluded. That was consistent with the practice described by other testifying members of the Board.

11. Petitioner attended the July 13, 2011 meeting of the RHPOA with his wife. He entered the meeting room on his own power and without difficulty, though he used a cane, signed up

at the door to speak on the agenda item regarding the Board's proposal to retain legal counsel, and took a seat at one of the tables. Petitioner made no request for assistance of any kind at the time he signed up to speak.

12. Stacey Peach attended the July 13, 2012 meeting as a representative of Leland Management. Ms. Peach periodically attends meetings of the various associations served by Leland Management. Her attendance at the July 13, 2012 RHPOA meeting was coincidental. Ms. Peach was seated at a table in front of Petitioner.

13. When it was his turn to speak on the legal counsel agenda item, Petitioner was recognized by Mr. Banahan. Petitioner announced, without assistance of a microphone, that he could not go to the podium.

14. Mr. Banahan noted "confusion" in the audience, but did not realize what was going on with regard to Petitioner's request to speak on the agenda item, though he understood that Petitioner was unable to come to the podium at the front of the room. Mr. Banahan testified convincingly that he had no problem with Petitioner speaking from his seat. He was aware of at least two other instances in which a microphone was taken to an attendee of a Board meeting so as to allow them to speak while seated, one of which occurred when he was a member of the Board.

15. Ms. Peach heard Petitioner state that he was not able to go to the podium to offer his comments. She thereupon got a portable microphone and handed it to Petitioner.

16. Petitioner asked Ms. Peach if she would speak on his behalf. Petitioner had not spoken with Ms. Peach earlier, and his request caught her off guard. Not knowing what Petitioner wanted her to say, she declined to speak for him. Her refusal was based on surprise and uncertainty, and not on any discriminatory motive.

17. After Ms. Peach declined to speak on Petitioner's behalf, Petitioner took the microphone provided to him, and offered his comments on the agenda item from his seat. Petitioner testified that as long as the microphone was working, he saw no reason why he would not have been heard. Except for Ms. Hoffman, whose testimony is discussed below, the witnesses who were asked indicated they had no problem hearing what Petitioner had to say, though none could remember the substance.

18. Petitioner testified that he made a specific request of Mr. Banahan to allow someone to speak on his behalf, and that Mr. Banahan refused the request. Petitioner's testimony was contradicted by Ms. Peach, who was directly involved in the incident; Mr. Norden, who was seated next to Petitioner; Mr. Reichel, who attended the meeting as a Board member; and Mr. Banahan. The greater weight of the evidence establishes

that no request for another person to speak on Petitioner's behalf was made to any member of the Board, and that the only such request was made, without prior notice, to Ms. Peach.

19. Petitioner's claim that his request was denied by Mr. Banahan was supported only by the testimony of Ms. Hoffman. However, Ms. Hoffman's testimony was undermined by the fact that her overall account of the incident differed in several significant and material respects from the testimony of other witnesses, including that of Petitioner. For example, Ms. Hoffman indicated that Ms. Peach was not asked to speak for Petitioner, that Petitioner asked someone seated next to him to speak, that Petitioner had difficulty reading his notes, that Petitioner was unable to complete his comments, and that Petitioner's speech was, at best, marginal. Whether Ms. Hoffman's description of events was the result of a poor vantage point or of poor memory, it is not credited.

20. Mr. Banahan testified that if Petitioner had been unable to speak, he would have allowed someone to read a statement on his behalf.^{2/} However, Mr. Banahan testified that he was not asked to make such an accommodation, and that Petitioner was able to comment on the agenda item from his seat. Mr. Banahan's testimony is credible and is accepted.

21. Mr. Banahan testified that he has known Petitioner from his service as a member of the Board and never perceived

him as having a handicap. Mr. Banahan knew that Petitioner walked with a cane. However, Mr. Banahan's wife walks with a cane and he does not consider her to have a handicap.

22. Petitioner provided Respondent with no medical records, letters from his physicians, or competent evidence of any kind to establish that he had a disability or that he required an accommodation in order to participate in the July 13, 2011 meeting, nor did he produce any such evidence at the hearing. At the hearing, based upon the undersigned's observation, Petitioner had little or no difficulty walking or speaking.

23. Petitioner failed to prove that he has a physical impairment that substantially limits one or more major life activities, or that he was regarded by any director or member of the RHPOA as having any such physical impairment. To the contrary, the greater weight of the evidence demonstrates that Petitioner does not suffer from a handicap as defined in the Fair Housing Act.

Ultimate Findings of Fact

24. There was no competent, substantial evidence adduced at the hearing that Petitioner suffered from a handicap that hindered his ability to actively participate in the July 13, 2011 RHPOA meeting. There was no competent, substantial evidence adduced at the hearing that Respondent knew of any

alleged handicap or regarded Petitioner as being handicapped. There was no competent, substantial evidence adduced at the hearing that Respondent failed to reasonably accommodate Petitioner when he asserted that he would not be able to walk to the podium. The evidence adduced at the hearing established that Petitioner made no direct request to any member of the RHPOA Board of Directors to allow someone to speak on his behalf. The evidence adduced at the hearing established that Petitioner was able to clearly state his comments on the legal representation agenda item by using the portable microphone provided to him by Ms. Peach. The evidence did not establish that Petitioner was the subject of unlawful discrimination in the provision of services or facilities in connection with his dwelling based on his handicap, or that Respondent refused to make reasonable accommodations in its rules, policies, practices or services necessary to afford Petitioner equal opportunity to use and enjoy his dwelling.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57(1), Fla. Stat. (2012).

26. Petitioner has the burden of proof to establish that Respondent violated the Florida Fair Housing Act. § 760.34(5), Fla. Stat.

27. Florida's Fair Housing Act, sections 760.20 through 760.37, Florida Statutes, makes it unlawful to discriminate against persons in matters incident to a dwelling on the basis of a handicap, or to fail make reasonable accommodations to allow such persons to use and enjoy the benefits of a dwelling. In that regard, subsection 760.23(2), provides that:

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.

28. Subsection 760.23(8) 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 with such dwelling, because of a handicap of:

(a) That buyer or renter;

(b) A person residing in or intending to reside in that dwelling after it is sold, rented or made available; or

(c) Any person associated with the buyer or renter.

29. Subsection 760.23(9) provides, in pertinent part:

For purposes of subsections (7) and (8), discrimination includes:

* * *

(b) A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

30. The Florida Fair Housing Act is patterned after Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988, and discrimination covered under the Florida Fair Housing Act is the same discrimination prohibited under the Federal Fair Housing Act. Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1224 (S.D. Fla. 2005); see also Loren v. Sasser, 309 F.3d 1296, 1300 (11th Cir. 2002). When "a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Millsap v. Cornerstone Residential Mgmt., 2010 U.S. Dist. LEXIS 8031 (S.D. Fla. 2010); Dornbach v. Holley, 854 So. 2d 211, 213 (Fla. 2d DCA 2002); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

31. 42 U.S.C. Subsection 3604(f)(3)(B) defines unlawful discrimination to include a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling.

32. In order to prevail on a claim of failure to make a reasonable accommodation under 42 U.S.C. § 3604(f)(3),

Petitioner must show that:

- a) he suffers from a handicap;
- b) Respondent knew of the handicap;
- c) an accommodation of the handicap was necessary to afford Petitioner an equal opportunity to use and enjoy his dwelling; and
- d) Respondent refused to make such an accommodation.

United States v. Hialeah Hous. Auth., 418 Fed. Appx. 872, 875 (11th Cir. 2011); Hawn v. Shoreline Towers Phase I Condo. Ass'n., 347 Fed. Appx. 464, 467 (11th Cir. 2009); Dubois v. Ass'n of Apt. Owners, 453 F.3d 1175, 1179 (9th Cir. 2006).

33. Petitioner has alleged that the "refusal" of the RHPOA to allow Ms. Peach, or someone else, to speak for him at the July 13, 2011 meeting constituted discrimination in the provision of services or facilities in connection with his dwelling based on his handicap, and that the RHPOA refused to make reasonable accommodations to allow him to participate in the RHPOA meeting. Petitioner's claims fail for several reasons.

34. Petitioner's claim that the RPHOA failed to make reasonable accommodation suffers at a jurisdictional level because participation at a meeting of a property owners'

association meeting, without more, bears little relationship to "the terms, conditions, or privileges of sale or rental of a dwelling, or . . . the provision of services or facilities in connection therewith."

35. If a property owners' association has sufficient control over the services and facilities associated with home ownership, a circumstance particularly evident in planned communities, actions on the part of an association may be actionable under the Fair Housing Act. Savannah Club Worship Serv. v. Savannah Club Homeowners' Ass'n, 456 F. Supp. 2d at 1229-1230. However, Petitioner introduced no evidence of the scope of authority or the duties of the RHPOA, and how the activities of the RHPOA in the conduct of its meetings might affect the provision of services or facilities in connection with Petitioner's home ownership. Without some non-hearsay evidence of the authority of the RHPOA, the applicability of Savannah Club Worship Serv. to this case is limited. The lack of evidence regarding the scope of the RHPOA's control over the services and facilities in the Royal Highlands community notwithstanding, the undersigned has determined it to be appropriate to proceed with a substantive review of the actions of the RHPOA towards Petitioner to determine if those actions constitute a violation of the Florida Fair Housing Act.

36. As to the first element of the analysis, subsection 760.22(7), Florida Statutes, provides that:

(7) "Handicap" means:

(a) A person has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment; or

(b) A person has a developmental disability as defined in s. 393.063.

That definition is virtually identical to that found in the federal Fair Housing Act, 42 U.S.C. subsection 3602(h).

37. The Fair Housing Act does not define the term "major life activities." However, "noting congressional intent that provisions of [the Fair Housing Act] related to disability be read similarly to provisions in [the Americans with Disabilities Act]," the Middle District of Florida has applied the ADA definition to the Fair Housing Act, holding that:

the term is defined in the Americans with Disabilities Act (ADA) as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."

McKay v. S. Seas E. Condo Apts. of Marco Island, Inc., 2012 U.S. Dist. LEXIS 96495, *10, fn.6 (M.D. Fla. 2012.)

38. An impairment that substantially limits one or more major life activities must be more than an inconvenience. Under

the Fair Housing Act, "someone who walks, sits, stands or sleeps 'moderately below average' is not disabled under the Act."

Wells v. Willow Lake Estates, Inc., 390 Fed. Appx. 956, 958 (11th Cir. 2010). In that case, the complainant, under the Fair Housing Act, contended that he "cannot bend over or move easily." The Court held that "[w]e agree with the district court that [the complainant] has not adequately pleaded that he is a handicapped individual." Id.

39. In the instant case, the evidence established that Petitioner walked with a cane, though he was able to enter the meeting room for the July 13, 2011 RHPOA meeting under his own power. Petitioner testified to an unspecified restriction on speaking, though he was able to clearly make his comments at the July 13, 2011 RHPOA meeting. Petitioner offered absolutely no medical evidence to establish his disability. See Taggart v. Associated Estates Realty Corp., 2011 U.S. Dist. LEXIS 101509, *7-8 (S.D. Ohio, 2011); McCree v. Lexington Vill. Apts. & Amurcon Corp., 2010 U.S. Dist. LEXIS 22873, *17-18 (E.D. Mich. 2010); Hawn v. Shoreline Towers Phase I Condo. Ass'n., 2009 U.S. Dist. LEXIS 24846, *16-17 (N.D. Fla. 2009). Petitioner's appearance and participation at the final hearing provided no suggestion of any significant limitation on either his ability to walk or speak. The documentary and testimonial evidence in this case was insufficient to establish that Petitioner was

substantially limited in his ability to perform a major life activity and therefore disabled as defined in the relevant statutes. Thus, Petitioner's claim fails to meet the first element of the reasonable accommodation test.

40. If Petitioner had been successful in establishing that he had a handicap -- which he was not -- the second element necessary for Petitioner to prevail on his claim of a lack of reasonable accommodation was show that the RHPOA knew of his handicap. As applied to this case, the RHPOA:

"cannot be liable for refusing to grant a reasonable and necessary accommodation if [it] never knew the accommodation was in fact necessary." Other circuits have held that this means that the defendant must know or reasonably be expected to know of the existence of both the handicap and the necessity of the accommodation." (citations omitted)

Hawn v. Shoreline Towers Phase I Condo. Ass'n., 347 Fed. Appx. at 467.

41. Petitioner must have "actually request[ed] an accommodation and be refused in order to bring a reasonable accommodation claim under the FHA." Without such a request, the RHPOA "cannot be liable for refusing to grant a reasonable and necessary accommodation if [it] never knew the accommodation was in fact necessary." United States v. Hialeah Hous. Auth., 418 Fed. Appx. at 875 (citing Schwarz v. City of Treasure Island, 544 F.3d 1201, 1219 (11th Cir. 2008)). In that regard:

the duty to make a reasonable accommodation does not simply spring from the fact that the handicapped person wants such an accommodation made. Defendants must instead have been given an opportunity to make a final decision with respect to Plaintiffs' request, which necessarily includes the ability to conduct a meaningful review of the requested accommodation to determine if such an accommodation is required by law.

Schwarz v. City of Treasure Island, 544 F.3d at 1219 (citing Prindable v. Ass'n of Apt. Owners, 304 F. Supp. 2d 1245, 1258 (D. Haw. 2003)).

42. Petitioner offered no evidence that he ever advised Respondent of his alleged handicap, or of the need for any accommodation. Mr. Banahan served on the Board with Respondent for six months, and never noted an inability of Respondent to participate in the meetings. During the February 2011 RHPOA election, Respondent walked to the front of the Great Hall and addressed the members. When he signed in to speak at the July 13, 2011 RHPOA meeting, Petitioner advised no one that he would need assistance making his presentation.

43. It was not until he was called to speak on the legal representation agenda item that Petitioner claimed to be unable to walk to the podium or speak on the item. The evidence establishes that the statement that he was unable to walk to the podium was made without the assistance of a microphone, and that the assertion of his inability to speak was made, without prior

notice, to Ms. Peach and not to Respondent. Given the absolute lack of forewarning, Ms. Peach's reaction to Petitioner's request -- an odd request in itself given that Petitioner's wife was seated next to him -- was understandable, and provided no evidence of discrimination on the part of Ms. Peach, Leland Management, or the RHPOA.

44. Petitioner did not present persuasive evidence that the RHPOA or its agents were aware of his disability. Thus, Petitioner's claim fails to meet the second element of the reasonable accommodation test.

45. Finally, Petitioner failed to demonstrate that the RHPOA refused to provide reasonable accommodation designed to allow him to make his concerns regarding the legal representation agenda item known. Petitioner was provided with a microphone at his seat, and made his comments in a clear and understandable way. Thus, Petitioner's claim fails to meet the final elements of the reasonable accommodation test.^{3/}

46. Petitioner did not meet his burden to establish a prima facie case of discrimination. Petitioner failed to prove that he suffered from a handicap, that Respondent was aware of the alleged handicap, or that Respondent failed to reasonably accommodate Petitioner's alleged handicap.

47. For the reasons set forth herein, Petitioner has failed to prove that Respondent discriminated against him in the

provision of services or facilities in connection with his dwelling based on his handicap, or that Respondent refused to make reasonable accommodations in its rules, policies, practices, or services necessary to afford Petitioner equal opportunity to use and enjoy his dwelling in violation of the Florida Fair Housing Act, chapter 760, Part II, Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the Petition for Relief filed in FCHR No. 2012H0158.

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



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of October, 2012.

ENDNOTES

^{1/} Petitioner purchased his lot in Royal Highlands prior to April, 2001, and was likely a member of the RHPOA as a result. However, Petitioner considers himself to have been an active member beginning when he moved into his home in April 2001.

^{2/} Mr. Norden indicated that he would have been willing to read a statement on Petitioner's behalf if asked. In addition, Petitioner's wife attended the meeting and was seated with Petitioner throughout. Why Petitioner did not consider his wife to be a suitable spokesperson if, in fact, he was having difficulty speaking was not explained.

^{3/} That no one could remember the substance of Petitioner's comments may be evidence of disinterest, but it is not evidence of discrimination.

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.