

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUNBEACH APTS. CORP.,

Petitioner,

vs.

Case No. 12-3287F

FLORIDA COMMISSION ON HUMAN
RELATIONS,

Respondent.

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in this case on April 24, 2013, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in sections 120.569 and 120.57(1), Florida Statutes.

APPEARANCES

For Petitioner: Juan Zorrilla, Esquire
Zorrilla & Associates, P.L.
Penthouse 10
2600 Douglas Road
Coral Gables, Florida 33134

For Respondent: David A. Organes, Esquire
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding is whether Petitioner should be awarded attorney's fees and costs pursuant to section 57.111, Florida Statutes(2011).^{1/}

PRELIMINARY STATEMENT

On October 30, 2012, the Florida Commission on Human Relations ("Commission" or "Respondent") entered a Final Order, adopting the Findings of Fact and Conclusions of Law contained in the Recommended Order entered by the undersigned in DOAH Case No. 11-3975 ("the underlying proceeding"). In that Recommended Order, the undersigned found that Petitioner Judith Amadiz failed to establish a reasonable accommodation claim of housing discrimination.

On October 9, 2012, Sunbeach Apts. Corp. ("Sunbeach" or "Petitioner") filed a Motion for Award of Attorneys' Fees and Costs against Respondent, seeking an award of attorney's fees and costs as a prevailing small business party, pursuant to section 57.111(4) (a).

On October 9, 2012, the case was referred to the Division of Administrative Hearings ("DOAH"). The instant case was assigned DOAH Case No. 12-3287F. On December 4, 2012, the hearing was scheduled for March 1, 2013. On February 7, 2013, an unopposed Motion to Continue was filed, which the undersigned granted, and the hearing was rescheduled for April 24, 2013.

The final hearing commenced as rescheduled. At the formal hearing, Petitioner presented the testimony of Michael Scaglione. Petitioner's Exhibits 2 and 4 were offered and admitted into evidence. Respondent presented the testimony of two witnesses: Cole Herbert Keklis and Sara Juliette Purdy Stewart. Respondent's Exhibits 1 through 7 were offered and admitted into evidence. At hearing, the parties stipulated that Sunbeach is a small business party and was also the prevailing party in the underlying proceeding. In addition, the undersigned took official recognition of the record in the underlying proceeding.

The proceeding was recorded and transcribed. The Transcript of the final hearing was filed with DOAH on May 9, 2013. The undersigned granted Petitioner, Sunbeach's Motion for Three-Day Enlargement of Time to Submit its Proposed Recommended Order over Respondent's objection and extended the proposed final order deadline to June 3, 2013. The undersigned considered Petitioner's one-day, late-filed Proposed Final Order in preparation of this Final Order since Respondent did not object to the late filing, and the Final Order had not been finalized at the time of Petitioner's submission.

FINDINGS OF FACT

1. On August 11, 2010, Judith Amadiz ("Amadiz") filed a complaint of housing discrimination with the United States

Department of Housing and Urban Development ("HUD") alleging disability discrimination.

2. The Commission conducted an investigation of the complaint. During the investigation, the investigator obtained statements and documents from both parties. The investigator's final investigative report ("Determination") (Petitioner's Composite Exhibit numbered 2) detailed numerous materials submitted by the parties for review during the investigation. Some of the materials referenced included a Medical Certification Form submitted on September 3, 2010, from Carlos Segin, M.D.; a copy of Complainant's Lease Application dated December 8, 2009; and six letters including a copy of correspondence from Complainant dated April 27, 2010, requesting steam cleaning, and a copy of correspondence from Complainant dated May 17, 2010, requesting steam cleaning.

3. The Determination dated October 20, 2010, concluded that there was reasonable cause to believe that a discriminatory housing practice occurred.

4. The Commission forwarded the Determination to a staff attorney to review for legal sufficiency. The Commission's staff attorney reviewed the report and, on November 15, 2010, issued a Legal Concurrence: Cause citing both statutory and case law supporting the Determination. The Legal Concurrence concluded

that there is reasonable cause to believe that Respondent discriminated against Complainant.

5. On or about November 17, 2010, the Commission issued a Notice of Determination (Cause), charging Respondent with engaging in discriminatory housing practices in violation of the Fair Housing Act, reflecting the October 20, 2010, findings of the Determination.

6. On or about March 2, 2011, the Commission filed a Notice of Failure of Conciliation after a conciliation agreement had not been entered into with Sunbeach, and the complaint had not been withdrawn.

7. On or about January 26, 2011, Amadiz elected to have the Commission represent her and seek relief in the proceeding and resolve the charge in an administrative proceeding before DOAH.

8. On or about March 3, 2011, the Commission filed the Petition for Relief before DOAH on Amadiz's behalf.

9. On December 12, 2011, the Commission moved to withdraw from the underlying proceeding, citing "significant and irreconcilable differences." On December 13, 2011, after a hearing on the motion, the undersigned entered an Order allowing the Commission's withdrawal. The Order also cancelled the final hearing scheduled for December 14, 2011, and provided Amadiz until January 23, 2012, to obtain new counsel to represent her in the matter.

10. Amadiz subsequently notified DOAH of her intent to proceed pro se. Amadiz proceeded to hearing without counsel.

11. The final hearing was held before the undersigned on May 9, 2012. The undersigned entered a Recommended Order on August 16, 2012, recommending the dismissal of Amadiz's Petition for Relief in its entirety.

12. On October 9, 2012, Sunbeach filed a Motion for Award of Attorneys' Fees and Costs against the Commission.

13. On October 30, 2012, the Commission entered a Final Order Dismissing Petition for Relief from Discriminatory Housing Practice, adopting the undersigned's Recommended Order and dismissing the action of Amadiz.

14. Sunbeach was represented by counsel, a 30-year AV-rated lawyer, who defended the underlying action for a period of over two years. Sunbeach's counsel billed 75.8 hours of service at \$150.00 per hour. The amount of attorney's fees claimed in this matter is \$10,460.00 and costs of \$2,277.47 for a total of \$12,737.47, which is being sought in the matter.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 57.111(4)(b)1, 120.569, and 120.57, Florida Statutes.

16. In this matter, Respondent has stipulated that Petitioner is a small business party and that Petitioner is the

prevailing party in the underlying action. Therefore, the only issues remaining for resolution are whether Respondent initiated the underlying action and if Respondent's action against Petitioner was "substantially justified." § 57.111(4)(a), Florida Statutes.

17. Section 57.111(3)(b) provides:

- (b) The term "initiated by a state agency" means that the state agency:
1. Filed the first pleading in any state or federal court in this state;
 2. Filed a request for an administrative hearing pursuant to chapter 120; or
 3. Was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

18. In the underlying proceeding, on March 3, 2011, the Commission filed a request for an administrative hearing pursuant to chapter 120 with its Petition for Relief. Hence, the plain meaning of section 57.111(3)(b) is met in that, by filing the request, the Commission initiated this matter.

19. A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency. § 57.111(3)(e), Fla. Stat.

20. It is Respondent's burden to show that its initiation of an administrative action was substantially justified as envisioned by section 57.111(4)(e). "It is the agency which must affirmatively raise and prove the exception."

21. When dealing with license disciplinary actions, in order to determine whether there was substantial justification for filing an administrative complaint against a licensee, the focus is upon the information before the probable cause panel at the time it found probable cause and directed the filing of an administrative complaint. Fish v. Dep't of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002); Dep't of Bus. & Prof'l Reg. v. Toledo Realty, 549 So. 2d 715, 716 (Fla. 1st DCA 1989); Kibler v. Dep't of Prof'l Reg., 418 So. 2d 1081 (Fla. 4th DCA 1982).

22. The basis for proceeding at the time the Administrative Complaint was authorized must be solid but not necessarily correct.

To sustain a probable cause determination there must be some evidence considered by the panel that would reasonably indicate that the violation had indeed occurred. The evidence, however, need not be as compelling as that which must be presented at formal administrative hearing on the charges to support a finding of guilt and the imposition of sanctions.

Fish, 825 So. 2d 423(citations omitted); Toledo Realty.

23. Even though the Commission does not utilize probable cause panels, its process of investigating and evaluating evidence to determine whether the information provides reasonable cause to believe a violation has occurred is parallel to license disciplinary actions. Hence, applying the Fish test in this matter is appropriate.

24. In this case, the Commission's Legal Concurrence: Cause, which was based on the Determination, detailed both a reasonable basis in law and fact to direct the charges in the Notice of Determination (Cause). The Commission considered evidence such as the final investigative report, statutory authority, and case law indicating that a discriminatory action had occurred. Therefore, the Commission had "some evidence [it] considered . . . that would reasonably indicate that the violation had indeed occurred." Fish, 825 So. 2d at 423.

25. Petitioner points to the letters Amadiz provided to Sunbeach, which the Commission used as part of its foundation of the Commission's factual determination that the discriminatory practice of failing to provide a reasonable accommodation had occurred as the same letters the undersigned used in the underlying case to establish that a prima facie case had not been met. Further, Petitioner argues that the evidence presented to the Commission was virtually the same as that presented at formal hearing, after which the undersigned recommended dismissal of the charges. The deficiencies cited by Petitioner go to weight and credibility.

26. While the Commission only considers whether some evidence exists to proceed, the burden at hearing is determining whether the evidence supports an alleged violation. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The two cannot be

equated. That the evidence presented at hearing was not sufficient to ultimately sustain the charges does not mean that it was insufficient to initiate the proceedings.

27. Moreover, it cannot be said that the Commission had all of the same information presented at formal hearing. The undersigned had the benefit of testimony of Petitioner's expert. Moreover, all witnesses who testified at the underlying proceeding were subjected to cross-examination. The Commission does not have the opportunity or the responsibility to weigh the strengths and weaknesses of each party's position, but rather simply to determine if some evidence exists to support the conclusion that a violation has occurred. Ag. for Health Care Admin. v. Gonzalez, 657 So. 2d 56 (Fla. 1st DCA 1995); Gentele v. Dep't of Prof'l Reg., Bd. of Optometry, 513 So. 2d 672 (Fla. 1st DCA 1987). Here, the Commission performed that function. The fact that the charges in the action were ultimately dismissed does not form a basis for fees and costs pursuant to section 57.111.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Motion for Attorneys' Fees and Costs is denied, and Sunbeach shall recover nothing in the action. The file of the Division of Administrative Hearings is closed.

DONE AND ORDERED this 2nd day of July, 2013, in Tallahassee,
Leon County, Florida.

June C. McKinney

JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of July, 2013.

ENDNOTE

^{/1} References to Florida Statutes are to the 2011 version, unless
otherwise indicated.

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.