STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWARD GIVENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-3493
	)	
V.T.F. PROPERTIES, LLC,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case was heard on January 14, 2013, in Macclenny, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward Givens, pro se
604 Joan Street
Macclenny, Florida 32063

For Respondent: Frank E. Maloney, Jr., Esquire
445 East Macclenny Avenue
Macclenny, Florida 32063

STATEMENT OF THE ISSUE

Whether Petitioner was the subject of discriminatory housing practices based on his race or his handicap, in violation of the Florida Fair Housing Act, chapter 760, Part II, Florida Statutes.

PRELIMINARY STATEMENT

On August 15, 2012, Petitioner signed a Housing Discrimination Complaint, which was thereupon served on the Florida Commission on Human Relations (FCHR). The complaint alleged that Respondent discriminated against Petitioner based on his race and his disability. The basis for the claim of discrimination was that Respondent engaged in an incident that constituted unlawful coercion, intimidation, threats, or interference in the exercise of his rights in connection with his tenancy in a rental apartment, and that Petitioner was unlawfully charged for damage related to a broken water pipe, in violation of the Fair Housing Act.

An investigation of the complaint was made by the FCHR. On October 11, 2012, the FCHR issued its Notice of Determination of No Cause, which incorporated its October 8, 2012, investigatory Determination, and which concluded that there was no reasonable cause to believe that a discriminatory housing practice had occurred.

Petitioner disagreed with the 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 December 11, 2012. Respondent requested a continuance of the hearing, but subsequently withdrew the motion.

On the day of the final hearing, the undersigned was taken ill, and was not able to travel to Macclenny. The parties were notified, and the hearing was continued. The hearing was reset for January 14, 2013, and was held as scheduled.

At the hearing, Petitioner testified on his own behalf and offered the testimony of Lucia Gadsby, a Community Behavioral Services Specialist for the Northeast Florida State Hospital; Bianca Gaines-Givens, a Rehabilitation Specialist for the Northeast Florida State Hospital and personal friend of Petitioner; Misty Lee, a personal friend of Petitioner; Jacoby Givens, Petitioner's cousin; and Leroy Givens, Jr., Petitioner's father. Petitioner offered Petitioner's Exhibits P1-P3, which were received in evidence. Respondent presented the testimony of Fred Stivender, Respondent's property manager. Respondent offered Respondent's Exhibits R1-R5, which were received in evidence.

The final hearing was not transcribed. The time for submission of proposed orders was set at ten days from the date of the final hearing. Respondent timely filed its Proposed Order, which has been considered in the preparation of this Recommended Order. Petitioner did not file a proposed order.

References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

1. At all times relevant to this cause, Petitioner was a tenant of a rental apartment located at 284 South First Street, Apartment 6, Macclenny, Florida (the Apartment). Petitioner's tenancy was established by a lease agreement with a final effective date of November 24, 2009. Petitioner moved out of the apartment on May 3, 2012.

2. Respondent is a Florida Limited Liability Company. Among its other holdings, Respondent owns four 4-plex units located on First Street, Second Street, and Third Street in Macclenny, one of which includes the Apartment.

3. The racial make-up of the tenants occupying Respondent's apartments in the vicinity is roughly 50 percent African-American and 50 percent Caucasian.

4. Petitioner is African-American.

5. Petitioner has an unspecified mental condition. He takes medications for management of his symptoms, and receives periodic visits from Ms. Gadsby to ensure that he is complying with his medication regimen. Petitioner does not receive disability benefits from the Social Security Administration.

6. Petitioner holds a bachelor's degree in criminal justice from Benedict College in South Carolina.

7. As part of the application for rental of the Apartment, Petitioner was asked "[h]ave you been arrested or had criminal

charges filed against you? (If yes, please list them)." In response to the application question, Petitioner answered "yes Trepass [sic.]." The trespass charge was related to a misdemeanor incident that occurred at an unspecified time in Fort Lauderdale, Florida. Petitioner failed to disclose a felony conviction for an incident that had occurred in South Carolina. Petitioner stated that he thought the requirement to disclose criminal charges applied only to charges arising from incidents having occurred in Florida. However, nothing in the application can be read to support that limitation. As such, Petitioner materially falsified his lease application.

8. Petitioner cut hair for members of his church, neighbors, family, and friends at the Apartment, and had done so for the two-and-one-half years of his tenancy. He equipped the Apartment with a barber chair and a small waiting area. He accepted "donations" of food, clothes, and cash for his services. The cash receipts were used to pay his electric and water bills, among other things. Thus, despite its small scale and limited clientele, Petitioner operated what can only be described as a barbershop from the Apartment.

9. The Lease Agreement between Petitioner and Respondent provides that the Apartment was not to be used "for any other purpose than as a private dwelling unit." The Lease Agreement also provides that Petitioner was to comply with all applicable

building and housing codes. The Macclenny Code of Ordinances, Part III, Section 4-105, provides that home occupations are subordinate and incidental to a residential neighborhood, but that certain occupations, including barbershops, "shall not be considered as home occupations under any circumstance." Thus, Petitioner's operation of a barbershop from the Apartment was a violation of the Lease Agreement.

10. There were no apparent landlord/tenant disputes involving Petitioner's tenancy until late 2011. Mr. Stivender testified that he began to receive periodic complaints from tenants in the area regarding the Apartment, including cars being parked on the grass and in the road, loud music, and people milling about the premises. He testified that at least one tenant advised Respondent that she was afraid to venture out of her apartment due to the number of people in the area.

11. The testimony of Mr. Stivender regarding complaints of other tenants would be hearsay if taken for the truth of the matters asserted. However, the undersigned accepts his testimony as evidence, not of the facts surrounding the alleged complaints, but of a non-discriminatory reason for actions to be described herein, most notably the events of March 6, 2012.

12. At the end of October 2011, Petitioner was cited by Respondent for having more than one car regularly parked at the Apartment. Petitioner's car was not in running condition. The

other cars parked at the Apartment belonged to friends or relatives. Petitioner subsequently sold his vehicle, and would borrow his father's or his cousin's car when needed. The incident caused bad feelings between the parties.

13. On November 1, 2011, Respondent sent a notice to each of its tenants in Macclenny. Although the notice was precipitated by the complaints against Petitioner and Respondent's observations of activities in and around the Apartment, the notice was not limited to Petitioner. The notice cited provisions of the common lease agreement regarding the use of the premises and tenant conduct, and advised that excessive noise, driving on the grass, and "loitering" would be cause for eviction. The notice further advised that the landlord would "be patrolling the area on a regular basis at night to check for violations."

14. On March 6, 2012, Mr. Ferreria was driving by the Apartment at approximately 10:30 p.m. There were, along with Petitioner and his daughter, three guests at the Apartment, Bianca Gaines-Givens, Jacoby Givens, and Misty Lee. They were playing music on an electronic keyboard.

15. Mr. Ferreria stopped his car on the side of the road. He called his property manager, Mr. Stivender, and advised him that he was going to go speak with Petitioner about the noise coming from the Apartment.

16. Mr. Stivender works for a gas company, and was at work routing gas trucks. Mr. Stivender advised that he was going to come to the Apartment, and asked Mr. Ferreria to wait for him before speaking with Petitioner.

17. Ms. Gaines-Givens and Mr. Jacoby Givens left the Apartment after Mr. Ferreria's arrival in the neighborhood, and noticed Mr. Ferreria sitting in his vehicle. They drove away from the Apartment, but decided to return shortly thereafter. By the time they returned, Mr. Ferreria and Mr. Stivender were leaving. Thus, they did not witness the confrontation described herein.

18. After Ms. Gaines-Givens and Mr. Jacoby Givens drove off, Mr. Ferreria, disregarding Mr. Stivender's request, went to the Apartment and knocked on the door. It was, by then, approximately 10:45 p.m. When Petitioner answered the door, the two immediately began a heated discussion over the music and the cars.

19. Ms. Lee went to the back of the Apartment when Mr. Ferreria arrived. She heard yelling, but heard nothing of a racial nature.

20. Shortly after Mr. Ferreria arrived at the Apartment, Mr. Stivender arrived on the scene. Mr. Stivender is a solidly built man, and could be an intimidating presence under the right circumstances. These were the right circumstances.

21. Mr. Stivender physically moved Mr. Ferreria out of the way, and came between Mr. Ferreria and Petitioner. He was primed for a confrontation. He had his hand in his pocket, but testified convincingly that he was not armed.[1/] He and Petitioner had a loud and angry exchange of words, and Mr. Stivender forcefully suggested to Petitioner that it would probably be best if he moved out of the Apartment.

22. After Mr. Stivender appeared on the scene, Ms. Lee came out from the back of the Apartment. She recognized Mr. Stivender as Respondent's "office manager." She noted that Mr. Stivender had his hand in his pocket, and was talking loudly and pointing his finger in Petitioner's face.

23. Ms. Lee went outside and spoke with Mr. Ferreria. She testified that Mr. Ferreria indicated that some of the neighbors were afraid of Petitioner because of the noise and the number of people who hung around the Apartment.

24. The confrontation ended with Mr. Ferreria and Mr. Stivender leaving the premises. The police were not called.

25. The next morning, Petitioner called Ms. Gadsby. Petitioner frequently called Ms. Gadsby when he was feeling "stressed." She went to see him that morning, and testified that he was very upset over the events of the previous evening. She returned that afternoon for a "well-check," and he was doing better.

26. On March 15, 2012, Petitioner called the Baker County Sheriff's Office to report the March 6, 2012, incident. A deputy went to the Apartment, spoke with Petitioner and Ms. Lee, took their sworn statements, and prepared an offense report. The description of the incident as reflected in the report, including statements made by Petitioner and Ms. Lee, did not contain any account of racial threats or epithets, or any allegation of discriminatory intent based on race or handicap.[2/]

27. Other than Mr. Stivender's statement made in the heat of the March 6 argument, Respondent made no effort to evict or otherwise remove Petitioner from the Apartment.

28. On March 31, 2012, Petitioner noticed water coming from behind a wall of the Apartment. He called Respondent, and Mr. Stivender came to the Apartment to inspect. Mr. Stivender first suspected that the air-conditioning unit was leaking. The air conditioner was turned off and Mr. Stivender left, intending to contact an air-conditioning repair service.

29. By 6:00 p.m. on March 31, 2012, the rate of the leak was such that it was determined that a water pipe had burst under the foundation of the Apartment. Petitioner did not know where the shut-off valve was located, and was unable to stop the flow, which began to cover the floor in several rooms of the Apartment. Mr. Stivender returned to the Apartment, and determined that a car owned by one of Petitioner's guests was

parked on the grass, and was over the meter box with the shut-off valve. The car was moved, and the water turned off.

30. Respondent called a plumber to fix the pipe. Since the pipe was under the foundation, and in order to avoid breaking up the slab, the repair was accomplished by re-routing the pipe in the wall of the Apartment. The repair entailed cutting an access hole in the drywall. That hole was not immediately repaired.

31. Respondent also called Servpro to perform water cleanup services. The standing water was vacuumed up, and large fans and dehumidifiers were placed in the Apartment to dry it out.

32. While the repairs and drying activities were ongoing, Respondent paid for Petitioner and his daughter to stay in a motel in Macclenny. They were there for three to four days. Respondent paid Petitioner's power bill for the days that Petitioner was unable to use the Apartment.

33. Petitioner returned to the Apartment, and stayed there for some time. He was upset that the access hole for the pipe repair had not been closed up, and that the baseboards had not been replaced in some areas.

34. On April 9, 2012, Petitioner wrote to Respondent about the effects of the water leak. After thanking Respondent for the "compassion" shown to Petitioner and his family during the

event, he complained about the damage to his personal property resulting from the water leak, and an odor "suggesting the presence of mold." He stated his belief that his daughter's preexisting asthma was aggravated by the smell in the Apartment.

35. In his April 9, 2012, letter, Petitioner also stated that "due to my mental health condition, I am on prescribed medicine that has now been adjusted to assist me through this stressful situation." Petitioner's statement, which was not accompanied by any form of medical evidence, was not sufficient to place Respondent on notice that Petitioner had a record of having, or was regarded as having, any form of mental disability.

36. Mr. Stivender testified that no one ever advised Respondent that Petitioner had a mental disability, and that Respondent had no such knowledge. The April 9, 2012, letter being insufficient on its own to convey such information, Mr. Stivender's testimony is credited.

37. On May 3, 2012, Petitioner moved out of the Apartment. He had been served with no eviction notice or other written request to vacate. Petitioner gave no notice to Respondent, but dropped off his key at Mr. Ferreria's business on the day he moved out.

38. Mr. Stivender testified that Petitioner left the Apartment in a filthy, deplorable condition. As a result,

Respondent withheld Petitioner's $400.00 security deposit to offset the costs of returning the Apartment to rentable condition. Petitioner testified that the Apartment was not in poor condition when he moved out, and that some of the damage was the result of the pipe leak. However, Petitioner did not testify, or even suggest, that the decision to withhold the deposit was the result of any racial hostility or animus, or of any reaction to his handicap.

39. Petitioner failed to introduce any evidence that he was treated differently under similar circumstances than were tenants of Respondent who were not African-American, or who did not have comparable mental disabilities.

Ultimate Findings of Fact

40. There was no competent, substantial evidence adduced at the hearing that Respondent undertook any act pertaining to Petitioner's occupancy of the Apartment based on Petitioner's race.

41. Petitioner failed to prove that Respondent knew of Petitioner's mental disability or handicap, or that Respondent regarded Petitioner as having any such mental disability or handicap.

42. Petitioner failed to prove that Petitioner's race or handicap caused or contributed to the March 6, 2012, confrontation. Rather, the evidence demonstrates that the

confrontation resulted from noise, issues with cars and parking, and complaints directed to Petitioner by other tenants.

43. Petitioner failed to prove that he was ready, willing, and able to continue to rent the Apartment, but that Respondent refused to allow him to do so.

44. Petitioner failed to prove that Respondent took any action to evict him from the Apartment, or to otherwise intentionally interfere with Petitioner's occupancy of the premises. To the contrary, the evidence supports a finding that Respondent took reasonable and appropriate steps to repair and remediate the Apartment after the water line break, and provided no-cost accommodations to Petitioner while the Apartment was not habitable. The repairs may not have been completed to Petitioner's satisfaction, but any such deficiency was not the result of discrimination against Petitioner based on his race or his handicap.

45. Petitioner failed to prove that Respondent's decision to withhold his security deposit was based on Petitioner's race or handicap.

46. In sum, 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 race or his handicap.

CONCLUSIONS OF LAW

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

48. 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 the persons' race or handicap. 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.

49. Subsection 760.23(7) provides, in pertinent part, that "[i]t is unlawful to discriminate in the sale or rental of . . . a dwelling to any buyer or renter because of a handicap of (a) [t]hat buyer or renter . . . ."

50. Subsection 760.23(8) provides, in pertinent part, that "[i]t is unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, . . . because of a handicap of: (a) That buyer or renter . . . ."

51. 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).

52. Petitioner has the burden of proof to establish that Respondent violated the Florida Fair Housing Act. § 760.34(5), Fla. Stat.; Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

53. Petitioner proved that he was African-American, a protected class under the Fair Housing Act.

54. Subsection 760.22(7), Florida Statutes, defines the term "handicap," in pertinent part, as "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." That definition

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

55. 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 "major life activities" means "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.)

56. Petitioner offered little medical or psychiatric 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 limitations based on his disability. Although he was occasionally hesitant in his speech, the evidence in this case was insufficient to establish that Petitioner was

substantially limited in his ability to perform a major life activity.

57. Petitioner did offer the testimony of Ms. Gadsby, a community behavioral services specialist who assisted Petitioner in keeping up with medications prescribed for controlling symptoms of an unspecified mental disability. Therefore, there was evidence, scant though it may have been, that Petitioner has a record of having a mental impairment. Thus, Petitioner met his initial burden of proving that he suffered from a handicap as defined in the relevant statutes.

58. A plaintiff may proceed under the Fair Housing Act under theories of either disparate impact or disparate treatment, or both. Head v. Cornerstone Residential Mgmt., 2010 U.S. Dist. LEXIS 99379 (S.D. Fla. 2010). To establish a prima facie case of disparate impact, Petitioner would have to prove a significantly adverse or disproportionate impact on a protected class of persons as a result of Respondent's facially neutral acts or practices. Head v. Cornerstone Residential Mgmt., supra, citing E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1278 (11th Cir. 2000). To prevail on a disparate treatment in housing claim, Petitioner would have to come forward with evidence that he was treated differently than similarly-situated tenants. Head v. Cornerstone Residential Mgmt., supra (citing Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th

Cir. 2008)) and Hallmark Dev., Inc. v. Fulton County, 466 F.3d 1276, 1286 (11th Cir. 2006).

59. In establishing that he was the subject of discrimination, Petitioner could either produce direct evidence of discrimination that motivated disparate treatment in the provision of services to him, or prove circumstantial evidence sufficient to allow the trier of fact to infer that discrimination was the cause of the disparate treatment. See King v. Auto, Truck, Indus. Parts & Supply, 21 F. Supp. 2d 1370, 1381 (N.D. Fla. 1998).

60. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate. . .' will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(citations omitted).

61. Petitioner presented no direct evidence of discrimination by Respondent related to its rental of the Apartment to Petitioner. There were no statements or acts of any kind that could be construed to have been directed to Petitioner's race or handicap.

62. When there is no direct evidence of discrimination, fair housing cases are subject to the three-part test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981). Boykin v. Bank of America Corp., 162 Fed. Appx. 837, 838; 2005 U.S. App. LEXIS 28415 (11th Cir. 2005); see also Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1476 n.6 (11th Cir. 1993); Secretary, U.S. Dept. of Hous. and Urban Dev., on Behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990); Savannah Club Worship Serv. v. Savannah Club Homeowners' Ass'n, 456 F. Supp. 2d at 1231-1232.

63. Under the three-part test, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. McDonnell Douglas Corp. v. Green, at 802; Texas Dep't of Cmty. Aff. v. Burdine, at 252-253; Burke-Fowler v. Orange Cnty., Fla., 447 F.3d 1319, 1323 (11th Cir. 2006); Valenzuela v GlobeGround North America, LLC., 18 So. 3d at 22. "The elements of a prima facie case are flexible and should be tailored, on a case-by-case basis, to differing factual circumstances." Boykin v. Bank of America Corp. 162 Fed. Appx. at 838-839, citing Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123 (11th Cir. 1993).

64. If Petitioner is able to prove a prima facie case by a preponderance of the evidence, the burden shifts to Respondent

to articulate a legitimate, non-discriminatory reason for its actions. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 255; Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). Respondent has the burden of production, not persuasion, to demonstrate to the finder of fact that its action as a landlord, upon which the complaint was made, was non-discriminatory. Dep't of Corr. v. Chandler, supra. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

65. If Respondent produces evidence that the basis for its action was non-discriminatory, then Petitioner must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-518 (1993). In order to satisfy this final step of the process, Petitioner must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Dep't of Corr. v. Chandler, 582 So. 2d at 1186, citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. at 252-256. Pretext can be shown by inconsistencies and/or contradictions in testimony. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); Blackwell, supra; Woodward v. Fanboy, L.L.C., 298 F.3d

1261 (11th Cir. 2002). The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." (citations omitted); Holifield v. Reno, 115 F.3d at 1565.

66. The failure of Petitioner 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)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

67. As applied to this case, the standard established in McDonnell-Douglas requires Petitioner to establish in his prima facie case that (1) he belongs to a protected class; (2) Respondent was aware of it; (3) Petitioner was ready, willing, and able to rent the apartment; and (4) Respondent refused to allow him to do so. Jackson v. Comberg, Case No. 8:05-cv-1713-T-24TMAP, 2006 U.S. Dist. LEXIS 66405, *9 (M.D. Fla. 2006).

68. Petitioner did not meet his burden to establish a prima facie case of discrimination. Although he proved that he was a member of a protected class based on his race and his handicap, Petitioner failed to prove that any actions on the part of Respondent were discriminatory in nature.

69. Petitioner failed to prove that Respondent knew that Petitioner suffered from a mental handicap, and Mr. Stivender testified convincingly that Respondent had no such knowledge.

70. The evidence demonstrated that Petitioner vacated the Apartment for reasons unrelated to issues involving his race or handicap. Furthermore, there was no evidence that Respondent had initiated steps to evict Petitioner. However, if actions to evict Petitioner had been taken, they would have been warranted due to the falsification of the rental application and Petitioner's operation of a barbershop from the Apartment.

71. There may have been residual issues related to the condition of the Apartment resulting from the water leak. Nonetheless, Petitioner failed to present even a scintilla of evidence that he was discriminated against on the basis of his race or handicap.

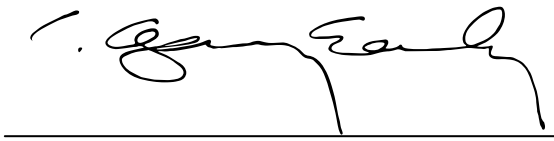
72. The evidence demonstrated that Respondent, V.T.F. Properties, LLC, did not commit a discriminatory housing practice as to Petitioner, Edward Givens, in violation of the Florida Fair Housing Act, chapter 760, Part II, Florida Statutes. Therefore the Petition for Relief should be dismissed.

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. 2013H0034.

DONE AND ENTERED this 7th day of February, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2013.

ENDNOTES

[1/] Mr. Stivender testified that he lawfully carried several firearms in his vehicle, but did not have one on his person. His testimony is credited.

[2/] The undersigned acknowledges that the police report admitted in evidence is hearsay. However, since this case is not criminal in nature, the report falls within the public records hearsay exception in section 90.803(8).

The public record exception is limited to "matters observed pursuant to duty imposed by law as to matters which there was a duty to report." The officer who wrote the report did not observe the altercation being reported upon. Records that are not based on the observations of the public official, but "rely on information supplied by outside sources" do not fall within the public records and reports exception to the hearsay rule. Lee v. Dep't of HRS, 698 So. 2nd 1194, 1201 (Fla. 1997); see also M.S. v. Dep't of Child. & Fams., 6 So. 3d 102, 104 (Fla. 4th DCA 2009).

As with certain other statements made in this proceeding, the undersigned is not accepting the police report to prove the truth of any statement reported by the deputy. Rather, the report is used as evidence that the witnesses did not identify race or handicap as a factor leading up to or involving the incident.

As to the sworn witness statements of Petitioner and Ms. Lee, which were made within a week of the March 6, 2012, incident, the undersigned is not relying on either statement to prove the truth of any statement therein. Rather, the undersigned is using the statements to demonstrate the lack of any allegation of discriminatory intent, either based on race or handicap. Thus, for the purpose used, the statements are not hearsay as defined in section 90.801, Florida Statutes.

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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.