STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROLSTAN AND LETITIA HODGE,

Petitioners,

vs. Case No. 14-0437

WATSON REALTY, INC.,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard on July 8, 2014, in Jacksonville, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: William J. Bosch, Esquire
Conner Bosch Law, P.A.
4488 North Oceanshore Boulevard
Palm Harbor, Florida 32137

STATEMENT OF THE ISSUE

Whether Petitioners were subject to discrimination in the rental of a dwelling, or in the terms, conditions, or privileges of rental of a dwelling, based on their race or familial status, in violation of the Florida Fair Housing Act, chapter 760, Part II, Florida Statutes.

PRELIMINARY STATEMENT

On October 28, 2013, Petitioners filed a Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), alleging that Respondent discriminated against them based on their race and familial status. The basis for the claim of discrimination was that Respondent required Petitioner, Rolstan Hodge, to obtain a guarantor as a condition of approval, and Respondent did not allow Petitioner, Leticia Hodge, to act as guarantor.

An investigation of the complaint was made by FCHR. On December 19, 2013, FCHR issued its Determination of No Cause and Notice of Determination of No Cause, concluding that there was no reasonable cause to believe that a discriminatory housing practice had occurred based on either Petitioners' race or familial status.

Petitioners disagreed with FCHR's determination and, on January 24, 2014, filed a Petition for Relief. The petition was forwarded to the Division of Administrative Hearings for a formal hearing.

The case was originally assigned to Judge Barbara Staros. The final hearing was scheduled for April 24, 2014, in Jacksonville, Florida, but was rescheduled to May 22 and 23, 2014, following a prehearing conference conducted by Judge Staros. The hearing date was canceled due to illness of

Petitioners' Qualified Representative and was briefly continued. This case was transferred to the undersigned during its continuance and the final hearing date was rescheduled for July 8, 2014.

At the hearing, Petitioners testified on their own behalf, and offered Composite Exhibits 1 and 2 which were received in evidence. Respondent offered the testimony of Anne Fletchall, Respondent's Application Specialist; and Wendell Davis, Respondent's Executive Vice President. Respondent's Exhibits 1 through 4, 10 through 12, 14, and 16 through 18 were admitted into evidence, as well as the deposition testimony of Heather Cornett.

The parties ordered a copy of the Transcript of the proceedings, which was filed on August 4, 2014. On August 6, 2014, Petitioners filed notice electing not to file a proposed recommended order. Respondent timely filed a Proposed Recommended Order on August 14, 2014, which has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioners, Rolstan and Leticia Hodge, are African-American and currently reside in Virginia Beach, Virginia. Petitioners have six children.

2. Respondent, Watson Realty Corp.,[1/] is a real estate and property management company with offices throughout the state of

Florida and an office in Georgia. Wendell Davis is the company's Executive Vice President in charge of Watson Realty Management Division, including its Jacksonville office located at 4456 Sunbeam Road, Jacksonville, Florida 32257.

3. On June 3, 2013, Petitioners completed applications to rent a property from Respondent located at 2314 Creekfront Drive in Green Cove Springs, Florida (the Property).

4. Petitioners' applications were taken by Gayle Aljets, Secretary at Respondent's Westside office. Ms. Aljets sent, via facsimile transmission, Petitioners' applications, along with copies of their photo identification, social security cards, and proof of income, to Anne Fletchall, Application Specialist in Respondent's Sunbeam office.[2/]

5. Ms. Fletchall entered pertinent information from Petitioners' applications, including personal identification and income information, into a system run by LexisNexis, a company with which Respondent contracted to conduct background, criminal, and financial screening of applicants.[3/]

6. LexisNexis screens applicants based on criteria selected by Respondent. For example, Respondent requires applicants to establish income of three times the rental amount, applies the combined income of multiple applicants for the same property (roommates), and requires criminal background checks on applicants 18 years of age and older. On debt issues,

Respondent screens applicants for legal debts (e.g., judgments) of $1,000 or more within the most recent 48 months; as well as tax liens, landlord debt, and utility debt within the most recent 24 months.

7. The screening system allows for exceptions, or "overrides," on negative results for specified criteria. For example, if an applicant has a legal debt of $1,000 or more in the most recent 48 months, or a tax lien, landlord debt, or utility debt within the most recent 24 months, the system will return an override code of "800," allowing approval of the applicant with a co-signor, or guarantor. The override determinations were made by Respondent at the time Respondent contracted with LexisNexis.

8. Ms. Fletchall entered Petitioners' information separately as two roommates applying for the Property.

9. LexisNexis reported to Ms. Fletchall that Mr. Hodge had a legal debt of $1,000 or more within the last 48 months, thus failing one of the screening criteria. However, the program assigned an override code of "800," meaning the application could be approved if Mr. Hodge obtained a guarantor.

10. Mrs. Hodge passed all the LexisNexis screening criteria.

11. LexisNexis further reported Petitioners' rent-to-income ratio as 24.73 percent, based on a monthly rent of $1,195.00 and a combined income of $5,055.00.

12. According to the criteria established by Respondent when setting up the screening process, a guarantor must establish an income of three and one-half times the amount of the monthly rent.

13. Mrs. Hodge's individual verified income was approximately $1,400.00, less than three and one-half times the monthly rental amount.

14. Ms. Fletchall sent an email to Heather Cornett, property manager in the Westside office, informing her that Mr. Hodge was approved conditioned upon obtaining a guarantor.

15. Ms. Cornett informed Mr. Hodge by phone that he would need a guarantor in order to qualify to rent the Property. Mr. Hodge asked why a guarantor would be required, but Ms. Cornett was unable to explain. Ms. Cornett informed Mr. Hodge that he would receive a letter from the third-party screening company that explained the details. During that telephone conversation, Mr. Hodge requested a telephone number for LexisNexis.

16. Ms. Cornett did not have the LexisNexis telephone number and informed Mr. Hodge she would have to call him back

with the number. Ms. Cornett obtained the number and made a return call to Mr. Hodge with the telephone number the same day.

17. Through contact with LexisNexis, Mr. Hodge learned that a judgment against him by Freedom Furniture and Electronics had caused him to fail the applicable screening criteria, thus triggering the need for a guarantor.

18. Mr. Hodge contacted Ms. Cornett and informed her that the debt had been satisfied. Ms. Cornett asked Mr. Hodge to obtain a letter from the debtor on the debtor's letterhead verifying the debt had been satisfied.

19. Mr. Hodge subsequently met with Ms. Cornett in her office and presented a letter from Freedom Furniture and Electronics. The letter represented that Mr. Hodge had entered into a payment agreement to satisfy the debt and that, thus far, payments had been made on time.

20. Ms. Cornett faxed the letter to Ms. Fletchall to submit to LexisNexis as additional information.

21. Ms. Fletchall called Ms. Cornett and told her the letter was only proof that payments were being made on the debt, not that the debt had been satisfied.

22. Ms. Cornett called Mr. Hodge and informed him that the letter did not change the status of his application, and a guarantor was still required.

23. Mr. Hodge requested Ms. Cornett submit the matter to a manager for review.

24. Ms. Cornett took the Hodge's applications, the letter, and the LexisNexis report to Terri Brown, Respondent's Regional Manager. Ms. Cornett spoke to Ms. Brown via telephone, who confirmed that a guarantor would still be required for approval. Ms. Cornett again called Mr. Hodge with this information.

25. Mr. Hodge did not obtain a guarantor and did not make another application, or otherwise arrange with Respondent to rent the Property.

26. On June 10, 2013, Respondent received an application from a different set of applicants to rent the Property. The applicants were white and listed on their application that they had three children.[4/]

27. Ms. Fletchall processed two separate applications for the applicants as roommates, just as she did with Petitioners' applications.

28. The LexisNexis report showed that the male applicant failed three of the screening criteria, while the female applicant passed all the criteria. The system assigned an override code of "800" for the male applicant's prior landlord debt, triggering the requirement for a guarantor. The system also assigned an override code of "920" based on the male applicant's prior issue with a personal check, triggering a

requirement that the male applicant pay monthly rent by certified funds.

29. On June 21, 2013, the new applicants entered into a lease for the Property. The tenants obtained a guarantor who signed a lease guarantee which was incorporated into the lease.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57(1), Fla. Stat. (2014).

31. Florida's Fair Housing Act, sections 760.20 through 760.37, Florida Statutes (2013),[5/] makes it unlawful to discriminate against any person in the provision of rental housing because of race or familial status. In that regard, section 760.23(1), provides as follows:

> (1) It is unlawful to refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or rental of, or otherwise to make unavailable or deny a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.

32. It is likewise unlawful to discriminate against any person in the terms, conditions, or privileges of rental housing. In that regard, section 760.23(2), provides as follows:

> (2) 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.

33. In cases involving a claim of rental housing discrimination, the burden of proof is on the complainant. § 760.34(5), Fla. Stat.

34. 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. Savannah Club Worship Serv. v. Savannah 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. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Milsap 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).

35. 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, Petitioners 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, Petitioners would have to come forward with evidence that they were treated differently than similarly-situated tenants. Id. (citing Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th Cir. 2008) and Hallmark Dev., Inc. v. Fulton Cnty., 466 F.3d 1276, 1286 (11th Cir. 2006)).

36. In establishing that they were the subject of discrimination based upon their race, Petitioners could either produce direct evidence of discrimination that motivated disparate treatment in the provision of services to them, 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).

37. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Alb., 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).

38. Petitioners presented no direct evidence of discrimination by Respondent related to its processing and action on Petitioners' rental applications. There were no statements or acts of any kind that could have been construed to have been directed to Petitioners' race or familial status.

39. 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 Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Boykin v. Bank of Am. Corp., 162 Fed. App'x. 837, 838; 2005 U.S. App. LEXIS 28415 (11th Cir. 2005); see also Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1476 n.6 (11th Cir. 1993); Sec'y, U.S. Dep't of Hous. & Urban Dev. on behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990); Savannah Club Worship Serv., 456 F. Supp. 2d at 1231-32.

40. Under the three-part test, Petitioners have the initial burden of establishing a prima facie case of unlawful discrimination. McDonnell Douglas, 411 U.S. at 802; Burdine,

450 U.S. at 252-253; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Valenzuela v GlobeGround N. Am., LLC., 18 So. 3d 17, 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, 162 F. App'x. at 838-39, (citing Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123 (11th Cir. 1993)).

41. If Petitioners are 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. 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. Chandler, 582 So. 2d 1183. This burden of production is "exceedingly light." Holifield, 115 F.3d at 1564; Turnes v. Amsouth Bank, 36 F.3d 1057, 1061 (11th Cir. 1994).

42. If Respondent produces evidence that the basis for its action was non-discriminatory, then Petitioner must establish that the proferred reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-18 (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 proferred reason for the employment decision is not worthy of belief." Chandler, 582 Co. 2d at 1186 (citing Burdine, 450 U.S. at 252-56). Pretext can be shown by inconsistencies and/or contradictions in testimony. Reeves v. Sanderson Plumbing Prods., 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." Holifield, 115 F.3d at 1565.

43. Failure 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), aff'd, 679 So. 2d 1183 (Fla. 1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

44. As applied to this case, the standard established in McDonnell-Douglas requires Petitioners to establish in their prima facie case that: (1) they belong to a protected class; (2) Respondent was aware of it; (3) they were ready, willing, and able to rent the Property; and (4) Respondent refused to allow them to rent the Property. Jackson v. Comberg, Case No. 8:05-cv-1713-T-24TMAP, 2006 U.S. Dist. LEXIS 66405, *9 (M.D. Fla. 2006).

Discrimination based on Race

45. Petitioners are African American, and are thus members of a protected class. Respondent was also aware of Petitioners' race.[6/] Thus, Petitioners satisfied the first two prongs to establish a prima facie case.

46. However, Petitioners failed to establish by a preponderance of the evidence that they were ready, willing, and able to rent the Property, or that Respondent refused to allow them to rent the Property.

47. Mr. Hodge was required to obtain a guarantor, which he did not obtain. While Mrs. Hodge was approved without conditions, she did not qualify to rent the Property based on her income alone. Petitioners met the income qualification based on their combined income.

48. Conditional approval of Mr. Hodge's application was not a refusal to rent, or to negotiate for rental of the Property, and did not otherwise make the Property unavailable to rent. Petitioners needed only to satisfy the condition of approval in order to rent the Property.

49. Thus, Petitioners failed to establish a prima facie case of discrimination based on race.

50. Assuming, arguendo, Petitioners established a prima facie case, Respondent met the burden to demonstrate that the condition imposed, provision of a guarantor, was a legitimate,

non-discriminatory rental condition. Mr. Hodge clearly failed the criteria of an outstanding legal debt of $1,000 or more within the last 48 months, triggering the requirement for a guarantor. Respondent's refusal to waive the guarantor requirement upon review of the letter from Freedom Furniture and Electronics was also legitimate and non-discriminatory. The preset screening criteria is any "legal debt within the previous 48 months" regardless of whether the debt has been satisfied.

51. Further, Petitioner failed to demonstrate that the condition was mere pretext for unlawful racial discrimination. The next applicants for the Property, who did not belong to a protected class, were likewise subjected to the guarantor requirement because one of the applicants failed a similar debt criterion.

Discrimination based on Familial Status

52. Petitioners alternately argue that Respondent discriminated against them by disallowing Mrs. Hodge to act as the guarantor on the account because Petitioners are married persons.

53. Petitioners are married and have children, and Respondent was aware of Petitioners' familial status. Thus, Petitioners satisfied the first two prongs to establish a prima facie case of discrimination based on familial status.

54. However, Petitioners did not prove by a preponderance of the evidence that Mrs. Hodge was ready, willing, and able to act as guarantor for the rental. There was no credible evidence that Petitioners requested Mrs. Hodge to be the approved guarantor. The record was devoid of any evidence that Mr. Hodge ever inquired whether Mrs. Hodge could serve as the required guarantor or that he otherwise put her forward as the guarantor. In fact, Mr. Hodge testified that he did not attempt to obtain a guarantor.

55. Assuming, arguendo, that Petitioners established a prima facie case of discrimination based on familial status, Respondent met the burden to demonstrate a legitimate non-discriminatory reason for disapproving Mrs. Hodge as guarantor. Mrs. Hodge did not have the required income of three and one-half times the monthly rent to act as the guarantor. The record is devoid of evidence that Mrs. Hodge would have been disapproved based on her marital or familial status.

56. For the reasons set forth herein, Petitioners have failed to prove that Respondent discriminated against them by refusing to rent, refusing to negotiate for the rent, or otherwise making unavailable to rent, the subject Property, based on either their race or familial status. Likewise, Petitioners failed to prove Respondent discriminated against them in the terms, conditions, or privileges of rental of the

Property based on either their race or familial status, 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. 2014H0082.

DONE AND ENTERED this 25th day of September, 2014, in Tallahassee, Leon County, Florida.

Suzanne Van Wyk
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 2014.

ENDNOTES

[1/] Respondent is incorrectly identified in the case style as Watson Realty, Inc.

[2/] Both the Westside and Sunbeam offices are located in Jacksonville, Florida.

[3/] The screening operations of LexisNexis have since been purchased by First Advantage.

[4/] The deposition transcript of Heather Cornett is the only evidence introduced to support a finding that the second applicants were white. Statements contained in the deposition transcript are hearsay exceptions, pursuant to section 90.803(22), Florida Statutes.

[5/] All citations to the Florida Statutes herein are to the 2013 version, unless otherwise noted.

[6/] Ms. Fletchall's testimony that she was not aware of Petitioners' race when processing their rental applications is not accepted as credible. The information faxed to Ms. Fletchall from Ms. Aljets to process Petitioners' application included copies of Petitioners' driver's licenses.

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.