STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KENNETH AND LISA ANDUZE,

Petitioners,

vs. Case No. 16-0342

FUND WATERFORD LAKES, LLC,

Respondent.
_______________________________/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),[1/] before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), by video teleconference on May 25, 2016, at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Kenneth R. Anduze, pro se
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For Respondent: Leslie L. Tucker, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, in violation of the Florida Fair Housing Act, chapter 760, part II, Florida Statutes (2014),[2/]

unlawfully discriminated against Petitioners on the basis of race and unlawfully retaliated against them; and, if so, the remedy, if any, to which Petitioners are entitled.

PRELIMINARY STATEMENT

On or about January 19, 2016, Petitioners, Kenneth and Lisa Anduze, filed a Petition for Relief from a Discriminatory Housing Practice with the Florida Commission on Human Relations ("FCHR"), alleging that Respondent, Fund Waterford Lakes, LLC, discriminated against them on the basis of race and retaliated against them, in violation of Florida's Fair Housing Act, chapter 760, part II, Florida Statutes (hereafter "FFHA"). The matter was referred to DOAH for assignment of an ALJ to conduct a hearing pursuant to sections 120.569 and 120.57(1). The final hearing initially was set for March 3, 2016, but pursuant to the parties' motions, was continued and ultimately was scheduled for May 25, 2016.

The final hearing was held on May 25, 2016. Petitioner presented the testimony of Lisa Anduze. Petitioners' Exhibits 1 through 7 and 9 through 17 were admitted into evidence without objection, and Petitioners' Exhibit 8 was admitted over objection. Respondent presented the testimony of Mike Thomas and Lisa Broadus. Respondent's Exhibits 1 through 5 were admitted into evidence without objection, and Respondent's Exhibit 12 was admitted into evidence over objection.

The one-volume Transcript was filed on June 10, 2016. Pursuant to motions, the time for filing proposed recommended orders was extended to June 27, 2016. The parties timely filed their proposed recommended orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioners are African American adults. They currently reside in West Palm Beach, Florida. Starting on or about January 4, 2014, until on or about January 4, 2015, Petitioners leased and resided in Building 4, Unit No. 207 (hereafter, "Unit 4-207") in the Camden Waterford Lakes apartment community (hereafter, "Waterford Lakes") located at 12700 Waterford Willow Lane, Orlando, Florida 32828. Petitioners resided in Unit 4-207 at the time of the events giving rise to this proceeding.

2. Respondent Fund Waterford Lakes, LLC, is, and was at the time of the events giving rise to this proceeding, the owner of Waterford Lakes, including Unit 4-207 and the other units pertinent to this proceeding.

II. Background and Events Giving Rise to this Proceeding

A. Procedural Background

3. On or about September 15, 2015, Petitioners filed a Housing Discrimination Complaint ("Complaint") with the United

States Department of Housing and Urban Development ("HUD"), alleging that Respondent had engaged in actions that constituted unlawful discrimination on the basis of race under the federal Fair Housing Act. HUD forwarded the Complaint to FCHR on or about September 24, 2015.

4. In December 2015, FCHR sent to Petitioners, by certified mail, a Notice of Determination of No Cause, notifying Petitioners that based on its investigation, it had found and concluded that Petitioners had not alleged or shown facts sufficient to establish all elements of a housing discrimination action under the FFHA. FCHR dismissed Petitioners' Complaint. The Notice of Determination of No Cause informed Petitioners that they could file a Petition for Relief with FCHR within a specified period of time.

5. On or about January 19, 2016, Petitioners timely filed a Petition for Relief with FCHR. The Petition for Relief was referred to DOAH and is the subject of this administrative proceeding.

6. In this proceeding, Petitioners allege that Respondent engaged in conduct that discriminates against them on the basis of race, in violation of the FFHA. Specifically, Petitioners allege that Respondent discriminated against them on the basis of their race by allowing non-African American residents to repeatedly engage in activity that interfered with Petitioners'

use and enjoyment of their unit and violated Waterford Lakes lease provisions, with no adverse consequences, while at the same time not renewing Petitioners' lease because they complained about these violations. Petitioners also allege that Respondent discriminated against them on the basis of race by not renewing their lease while renewing the leases of non-African American residents who also had complained about noise and other lease violations.

7. Petitioners further allege that by refusing to renew their lease when they complained to a governmental authority and by divulging their identity to the Waterford Lakes residents about whose conduct Petitioner had complained, Respondents unlawfully retaliated against them, in violation of section 760.37, Florida Statutes.

B. The Events Giving Rise to this Proceeding

8. As noted above, Petitioners moved into Unit 4-207 on or about January 4, 2014.

Petitioners' Complaints About Excessive Noise

9. Beginning in early March 2014, Petitioners often were disturbed by excessive noise, particularly from the tenants in Unit 4-307, directly above them, as well as from the tenants in Unit 4-208, next door to them.

10. Petitioner Lisa Anduze credibly testified that these tenants, who were male college students, held parties, played

loud music, slammed doors, ran up and down the stairs, stomped on the floor——which was the ceiling to Petitioners' unit——and otherwise were extremely noisy. She credibly testified that the noise persisted during all hours of the day and night over a period of months, disturbing Petitioners' quiet enjoyment of their unit and causing Mrs. Anduze to lose sleep and suffer stress, fatigue, panic attacks, chest pains, headaches, and emotional distress.

11. Petitioners believe the tenants in Unit Nos. 4-208 and 4-307 were white. The persuasive evidence establishes that these tenants were of Saudi Arabian nationality.[3/]

12. Throughout their tenancy, Petitioners frequently complained to Waterford Lakes management about excessive noise made by the tenants in Units 4-307 and 4-208. Most of Petitioners' complaints were made verbally in person or over the telephone to Mike Thomas, the manager of Waterford Lakes; to Lisa Broaddus, the assistant manager of Waterford Lakes; or to other staff of Waterford Lakes. Petitioners also lodged numerous complaints in writing. Specifically, Petitioners filed written complaints with Waterford Lakes management on May 9, 19, and 30, 2014; October 14 and 20, 2014; and November 11, 2014, regarding excessive noise made by the tenants in Unit No. 4-307.

13. On several occasions when they felt no relief was forthcoming from Respondent's management's efforts, Petitioners

reported to the Orange County Sheriff's Office ("OCSO") that excessive noise was being made by the tenants in Units 4-307 and 4-208.

14. Mrs. Anduze felt as if Waterford Lakes management did not take seriously Petitioners' repeated complaints about excessive noise. When she complained, she felt as if Thomas considered her complaints unfounded and frivolous.

15. Mrs. Anduze testified that several other non-African American tenants in Waterford Lakes Building 4 told her that they, too, had complained to Waterford Lakes management about excessive noise, and that they, too, had been told that they were the only ones who had complained. Petitioners also provided documentary evidence showing that the tenants in Unit 4-103 had complained to the OCSO about excessive noise from tenants in Building 4 during the period in which Petitioners were tenants at Waterford Lakes. Even though the undersigned finds Mrs. Anduze's testimony credible, neither the testimonial nor documentary evidence that Petitioners presented on this point constitutes competent substantial evidence on which a finding of fact that other non-African American tenants complained also about noise can be based.[4/]

16. Thomas testified that each time Petitioners complained of noise, either someone from the Waterford Lakes management office or Brian Bercaw, the after-hours courtesy officer,

investigated the complaint. According to Thomas, Respondent was unable to verify, through an independent third party, that the tenants in Unit 4-307 were excessively noisy. He further contended that no one else in Building 4 had complained about the tenants in Unit 4-307 being excessively noisy.

17. On May 9 and 30 and October 14, 2014, Respondent issued notices of lease violation, which were affixed to the door of Unit 4-307, citing them for excessive noise and other violations. According to Thomas, these actions were taken to build a "paper trail" in order to be able to evict the tenants, in the event that the alleged excessive noise or other violations were verified by third parties as having occurred.

18. Notwithstanding that Petitioners found it necessary to repeatedly report excessive noise from Units 4-307 and 4-208 over a period of months, both Thomas and Broaddus took the position that Waterford Lakes management always had immediately and adequately addressed Petitioners' noise-related complaints.

Petitioners' Complaints about Car Repairs

19. Mrs. Anduze credibly testified that beginning in or around September 2014, Petitioners observed Caucasian men repairing cars in a garage proximate to Building 4. She testified that the men engaged in this activity after 6:00 p.m., when the Waterford Lakes management office was closed.

20. According to Mrs. Anduze, the tenants in Units 4-307 and 4-208 were "involved with" the men making the repairs. However, there was no evidence presented showing that the tenants in Units 4-307 and 4-208 were themselves repairing cars in the garage.

21. Mrs. Anduze testified that she saw the persons who were performing the car repairs using blowtorches, tires, and tools; that she was afraid that there would be an explosion; and that she was in fear for her life.

22. She testified, credibly, that she reported the car repair activity to Thomas, who told her that other tenants had not reported such activity but that he would look into it.

23. On or about October 30, 2014, Petitioners again reported to Waterford Lakes management that car repairs were being performed in the garage.

24. Thomas testified that the first time he was made aware of Petitioners' complaints regarding car repairs being performed onsite was on October 31, 2014, when he reviewed a report from Bercaw that Petitioners had called the Waterford Lakes after-hours contact center during the previous evening to report the activity. However, on cross-examination, Thomas acknowledged that he had been informed of the car repairs by Petitioners when they first reported such repairs——which is shown by the

credible, persuasive evidence to have been in early September 2014.

25. On October 31, 2014, Thomas spoke to one of the garage renters, who admitted to having performed car repairs in the Waterford Lakes garage. Thomas asked the renter to stop such activity and issued a notice, dated October 31, 2014, to all garage renters in the block. The notice stated in pertinent part: "Please keep in mind that as a resident of Camden Waterford Lakes, you are not permitted to make repairs of your vehicles or perform any type of work on your vehicle within the community as stated in the Master Lease under Section 32 - Parking."

26. Thomas testified that he was not able to corroborate, and was not aware of, any car repairs being performed after he issued the notice.

27. Petitioners presented evidence in the form of an email dated November 8, 2014, from Elizabeth Hopkins, an employee of Waterford Lakes, to Thomas, informing him that Petitioners had reported to her, by phone, that car repairs were again being conducted in the garage that evening, and that Bercaw was going to speak with the tenant.

28. In response to a report lodged by Petitioners with the Orange County Code Enforcement Division ("OCCED") on or about November 8, 2014, OCCED performed an onsite inspection at

Waterford Lakes some time thereafter to determine whether car repairs were being conducted in violation of Orange County Code provisions.

29. On December 12, 2014, a staff person from OCCED communicated with Petitioners by electronic mail ("email") regarding the outcome of the OCCED inspection conducted in response to Petitioners' November 8, 2014, report. The email cites provisions of the Orange County Code, states that "auto repair is not a permitted use," and states that the action required is to "cease all auto repair." The email further states: "please see the information below [referring to a table setting forth the information stated above] on this violation and the actions that need to take place to bring it in compliance." This statement[5/] indicates that car repairs were being performed in a garage at Waterford Lakes on the date OCCED performed an inspection. Notably, this was after Thomas issued the October 31, 2014, notice.

30. On November 23, 2014, Petitioners once again contacted Waterford Lakes management to report that car repairs were being performed in the garage. According to an email sent by Bercaw to Thomas in response to Petitioners' report, Bercaw drove by the garage and observed a tenant making car repairs. Bercaw reported that he observed a tenant making repairs and car parts

scattered in the road, but did not observe a blowtorch being used.

31. Thomas acknowledged that the tenant who acknowledged performing the car repairs on October 30, 2014, a white male, had not been evicted. He also acknowledged that the tenant who was seen performing the car repairs by Bercaw on November 23, 2014, a white male, was not evicted. The evidence does not establish that the same tenant performed the repairs on both occasions.

32. Thomas testified that he did not know of any policy that Respondent had regarding car parts being scattered in the road.[6/] However, this testimony is contradicted by the October 31, 2014, notice Thomas distributed to garage renters, which specifically stated that making repairs or performing any type of work on a vehicle in the community was not permitted under the terms of the Waterford Lakes Master Lease.

33. Thomas explained that in order to evict a tenant on the basis of lease violations, the violations must be verified.[7/]

Alleged Retaliatory Actions

34. Petitioners allege that Respondent retaliated against them for complaining about illegal activity.

35. Mrs. Anduze testified at the final hearing that she believed Waterford Lakes' management retaliated against

Petitioners for complaining about the tenants in Units 4-307 and 4-208.

36. Specifically, she testified that Waterford Lakes staff revealed to the tenants residing in those units that Petitioners had complained about them. She believed that in retaliation, those tenants had kicked and punched Petitioners' unit's door and had placed at their door a copy of one of the violation notices for excessive noise that Respondent's management had posted on the door of Unit 4-307. She testified that Petitioners became afraid for their safety. She also believed that the tenants in Unit 4-307 had purposely flooded Petitioners' unit by leaving the water in their bathtub running such that it flowed through the ceiling of Petitioners' unit.

37. Although Mrs. Anduze's testimony on these points was earnest and she clearly was distressed about what Petitioners perceived as disruptive and threatening actions by the tenants in Unit 4-307, Petitioners did not provide any direct or persuasive circumstantial evidence to substantiate Mrs. Anduze's belief that Respondent had informed the tenants in Units 4-307 or 4-208 that Petitioners had complained about them.

38. Mrs. Anduze also testified that Respondent's management retaliated against Petitioners by contacting AT&T and having them repeatedly call Petitioners regarding setting up numerous new telephone service accounts for units at Waterford

Lakes. She surmised this on the basis of conversations she had with AT&T service representatives, who told her that the Waterford Lakes management office was responsible for contacting AT&T to set up new service accounts. Mrs. Anduze repeatedly reported the problem to Waterford Lakes management, to no avail. Petitioners continued to receive telephone calls, totaling approximately 40 over a three-month period. Finally, Mrs. Anduze was able to arrange a meeting with an AT&T service representative at the Waterford Lakes management office, where she confronted Thomas about the ongoing problem. Thereafter, the calls stopped.

39. Thomas acknowledged that it had taken some time for Petitioners' telephone issues to be resolved. However, he testified, credibly, that Waterford Lakes management had only given Petitioners' telephone number to AT&T representatives to them let know that Petitioners' number was incorrectly associated with several different accounts. Petitioners did not provide any direct or circumstantial evidence substantiating Mrs. Anduze's belief that Waterford Lakes management had given out Petitioners' telephone number for the purpose of subjecting them to harassing calls.

40. After Petitioners received the notice of nonrenewal of their lease, Petitioners' daughter tried three times, unsuccessfully, to pay the rent for Unit 4-207. Mrs. Anduze

felt that Respondent was attempting to create circumstances that would justify evicting Petitioners from their apartment. She reported the problem to assistant manager Lisa Broaddus. Broaddus testified, credibly, that there had been a system-wide problem with the preauthorized payment program, so that the rent for all tenants of all Camden properties who had paid through that program was shown as not having been paid. She testified, credibly, that Petitioners had not been charged a late-rent fee and that Respondent had not intentionally sabotaged Respondent's efforts to timely pay their rent in order to be able to evict them.

Petitioners' Contact with FCHR

41. Mrs. Anduze credibly testified that Petitioners contacted FCHR in early October 2014, to report that they believed they were being treated differently than other Waterford Lakes tenants on the basis of their race. She further testified, credibly, that she informed Thomas that Petitioners were going to contact FCHR before they did so, that she informed him when they did so, and that she informed him when they received a response from FCHR.

42. Thomas testified that Petitioners never informed him, during their tenancy, that they believed they were treated differently than other Waterford Lakes tenants because they were African American.[8/] He claimed that he did not know that

Petitioners had contacted FCHR until he received a certified copy of the Housing Discrimination Complaint that Petitioners had filed with HUD in September 2015.

Nonrenewal of Petitioners' Lease

43. On or about October 20, 2014, Respondent notified Petitioners, by posting a letter on the door of Unit 4-207, that Respondent was "exercising its right to Terminate [Petitioners'] Apartment Rental Contract." The notice letter did not specify the reason for Respondent's decision not to renew Petitioners' lease.

44. Mrs. Anduze credibly testified that when Respondent notified Petitioners that it was not renewing their lease, she contacted the regional manager, who expressed surprised, and that when the regional manager called Mrs. Anduze back, she informed her that Thomas had said he was tired of Petitioners' complaints and wanted them out immediately.[9/]

45. Petitioners contend that Respondent did not renew their lease because they are African American and they complained about violations of Waterford Lakes community rules committed by white tenants. In support of this contention, Mrs. Anduze testified that the tenants in Units 4-307 and 4-208 about whom they had complained were white and that those tenants' leases had been renewed.[10/]

46. She further testified that she had spoken to other tenants who were white or Hispanic and who also had complained to management about excessive noise, and that these tenants had told her that their leases had been renewed. Although the undersigned finds Mrs. Anduze's testimony credible, this evidence is hearsay that does not fall within an exception to the hearsay rule and comprises the sole evidence on this point. Accordingly, this testimony does not constitute competent substantial evidence on which a finding of fact regarding Respondent's renewal of non-African American tenants' leases can be based.[11/]

47. Thomas stated that Respondent elected not to renew Petitioners' lease because "we felt that we had dealt with every one of their issues and concerns throughout the lease term immediately," and "it became obvious that there was nothing that we would be able to do to make them happy." Thomas further testified that other tenants in Building 4 felt as if they were being harassed because management contacted them on a regular basis regarding the complaints lodged by Petitioners. Thomas stated that "at the end of the day, it was a business decision that I was risking losing several residents from that building, or I could not renew Apartment 207."

48. Thomas testified, credibly, that other African-Americans were tenants at Waterford Lakes during the period in

which Petitioners were tenants. Respondent provided a copy of the rent roll for Waterford Lakes showing the tenancy of the community as of October 1, 2014. Thomas identified 36 units that were leased by African American tenants as of that date.[12/] Thomas credibly testified that of the leases held by African American tenants at that time, only Petitioners' lease had not been renewed.

49. The undisputed evidence shows that Petitioners did not commit any lease violations during the period of their tenancy at Waterford Lakes, and Respondent does not allege that they did so or cite such violations as a basis for not renewing their lease.

50. The undisputed evidence shows that Petitioners did not wish to move out of Waterford Lakes Unit 4-207, and would have renewed their lease had they been given the opportunity to do so.

Remedies Sought

51. As stated in the Petition for Relief, Petitioners seek damages in the form of a year's worth of back rent payments "for pain and suffering from retaliation, coercion, harassment, and constructive eviction" and "compensation for Mrs. Anduze [for] physical and emotional harm by tenants."

52. Petitioners did not present evidence regarding the amount of rent they paid for the year during which they were tenants at Waterford Lakes.

53. Petitioners have not requested to be reinstated as tenants at Waterford Lakes.

54. Petitioners did not present evidence quantifying any physical or emotional damages alleged to have been suffered by Mrs. Anduze as a result of Respondent's alleged discriminatory and retaliatory behavior.

55. Petitioners did not present evidence quantifying the cost of obtaining alternative housing.

III. Findings of Ultimate Fact

A. Discrimination

56. As noted above, the undersigned found Mrs. Anduze a credible witness. Her testimony was earnest, compelling, sincere, and precise on many key details. There is no question that throughout Petitioners' tenancy at Waterford Lakes, they felt that their concerns and complaints were not taken seriously or adequately addressed by management.

57. The competent, credible, and persuasive evidence shows that Petitioners were subjected to excessive noise disturbances from other tenants in Building 4, particularly the tenants living directly above them in Unit 4-307, over a period of months during their tenancy.

58. As noted above, Thomas and Broaddus testified that Waterford Lakes' management promptly investigated Petitioners' noise-related and other complaints, but were unable to independently verify that the actions giving rise to the complaints had actually occurred.

59. It is not clear whether Waterford Lakes staff's inability to address ongoing noise and other problems on multiple occasions was due to lack of diligence in investigating Petitioners' complaints and failing to make consistent, concerted, or effective efforts to address these issues,[13/] or simply being unable to catch the offending tenants "in the act." In any event, the credible, persuasive evidence supports Petitioners' assertions that they were disturbed on numerous occasions due to excessive noise made by the tenants living above them or next door to them, and that they repeatedly reported car repairs being made in violation of Respondent's Master Lease.

60. Although Respondents failed to adequately address Petitioners' complaints, the evidence does not establish that Respondent treated Petitioners differently than other similarly-situated Waterford Lakes tenant due to their race.

61. Specifically, Petitioners did not show, by the greater weight of the evidence, that Respondent declined to terminate the tenancy of the residents of Units 4-307 and 4-208 because

they were not African American.[14/] Rather, the persuasive evidence shows that Respondent did not terminate these tenants' leases because Respondent did not, or was unable to, independently verify that these tenants were frequently excessively noisy or engaged in other lease violations that may have justified eviction.[15/]

62. With respect to the car repairs performed in the garage at or near Building 4, the competent, credible evidence establishes that such repairs were performed on three occasions,[16/] that Thomas was made aware that the repairs had been performed, that the repairs violated Respondent's Master Lease, and that Thomas knew the repairs violated Respondent's Master Lease. The evidence also establishes that even after Thomas requested tenants, who were white males, to stop performing the repairs in the garage, they continued to do so but were not subject to eviction or lease nonrenewal. This evidence indicates that Waterford Lakes management may not have adequately investigated Petitioners' complaints or consistently enforced community rules, but it does not establish that white tenants who repaired cars in the garage were allowed to continue to reside in Waterford Lakes because they were white.

63. As further evidence of Respondent's disparate treatment of Petitioners on the basis of their race, Petitioners contend that non-African American tenants who also had

complained to management about excessive noise and car repairs were invited to renew their leases, while Petitioners were not. As discussed above, although the undersigned found Mrs. Anduze's testimony regarding her conversations with these tenants credible, her testimony is hearsay and is the only evidence in the record on this point; thus, there is no competent substantial evidence in the record on which to base a finding that non-African American tenants who also complained were able to renew their leases.

64. As noted above, Thomas testified to the effect that Petitioners' lease was not renewed because they frequently complained about other tenants, and that as a result, those tenants felt harassed to the extent that Respondent was concerned about losing them as Waterford Lakes residents. In so testifying, Thomas articulated a legitimate, non-discriminatory basis for Respondent's nonrenewal of Petitioners' lease.

65. Petitioners did not present persuasive evidence showing that this articulated reason was a mere pretext for Respondent's discrimination against them on the basis of their race.

B. Retaliation

66. As discussed above, the credible, persuasive evidence establishes that Petitioners contacted FCHR in early October 2014, to complain about being treated differently on the

basis of race. The credible, persuasive evidence also shows that Mrs. Anduze informed Thomas that Petitioners were going to contact FCHR before they did so and when they did so. Accordingly, the credible, persuasive evidence establishes that Thomas knew that Petitioners intended to complain to FCHR, or had complained to FCHR, before Respondent notified Petitioners on October 20, 2014, that their lease was not being renewed.

67. As more fully discussed below, proximity in time between a complainant's protected activity and adverse action against the complainant can give rise to the inference that a causal connection exists between the protected activity and the adverse action.

68. Here, although the exact dates on which Mrs. Anduze informed Thomas of Petitioners' intention to contact FCHR and when Petitioners' contacted FCHR are not definitively established, the evidence does show that Petitioners contacted FCHR in early October 2014, and that they informed Thomas before they did so. Approximately three weeks later, Respondent notified Petitioners that their lease was not being renewed. Under these circumstances, a causal connection between Petitioners' protected activity and Respondent's adverse action in not renewing their lease is inferred.

69. Thomas' testimony to the effect that Petitioners' lease was not renewed due to their frequent complaints and his

concern about losing tenants as a result articulated a non-retaliatory basis for Respondent's nonrenewal of Petitioners' lease.

70. However, the undersigned finds that the close proximity in time between Petitioners contacting FCHR and Respondent's nonrenewal of their lease is sufficient to rebut the non-retaliatory reason articulated by Respondent as the basis for not renewing Petitioners' lease.

C. <u>Remedy</u>

71. As discussed above, Petitioners did not show, by a preponderance of the competent evidence, that Respondent discriminated against them on the basis of race by not renewing their lease for Unit 4-207.

72. However, Petitioners did show, by the competent, credible, and persuasive evidence, that Respondent engaged in retaliation.

73. As discussed above, Petitioners have not requested that they be reinstated as tenants at Waterford Lakes. Rather, they have requested a year's worth of back rent as damages for pain and suffering Petitioners alleged they suffered as a result of Respondent's alleged "retaliation, coercion, harassment, and constructive eviction" and as "compensation for Mrs. Anduze [for] physical and emotional harm by tenants."

74. As addressed in greater detail below, Florida law expressly requires that damages sought under the FFHA be "quantifiable." Here, Petitioners did not provide any evidence on which their alleged damages may be quantified for purposes of determining how much, if any, damages to which they are entitled. Also as discussed in greater detail below, Florida law does not authorize an administrative entity, such as DOAH or FCHR, to award damages for emotional distress or pain and suffering.

75. Accordingly, although Petitioners have shown that Respondent engaged in unlawful retaliation in violation of the FFHA by not renewing their lease, they have not established that they are factually or legally entitled to an award of damages in this proceeding.

CONCLUSIONS OF LAW

76. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

77. The FFHA, sections 760.20 through 760.37, Florida Statutes, makes it unlawful to discriminate in sale or rental of housing and to retaliate against engaging in protected activity under the FFHA. Specifically, section 760.23(2) makes it unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling,

in the provision of services or facilities in connection therewith. Section 760.37 also makes it unlawful to coerce, intimidate, threaten, or interfere with——that is, retaliate against——any person in the exercise of, or on account of, her or his having exercised any right granted under the FFHA.

78. In cases involving claims of rental housing discrimination and retaliation, the burden of proof is on the complainant——here, Petitioners——to establish, by a preponderance of the evidence, the conduct comprising the alleged unlawful discrimination and the conduct comprising the alleged retaliation. See § 760.34(5), Fla. Stat. The "preponderance of the evidence" standard means the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at issue. Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

79. The FFHA is patterned after Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988 (hereafter "federal Fair Housing Act"). Accordingly, discriminatory and retaliatory acts prohibited under the federal Fair Housing Act also are prohibited under the FFHA, and federal case law interpreting the federal Fair Housing Act is applicable to proceedings brought under the FFHA. See Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1224 n.1 (S.D. Fla. 2005); Brand v. Fla. Power Corp., 633 So. 2d

504, 509 (Fla. 1st DCA 1994) (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). See also Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

80. When bringing a claim of discrimination based on race under the FFHA, a complainant may proceed under a theory of disparate impact, disparate treatment, or both. Head v. Cornerstone Residential Mgmt., 2010 U.S. Dist. LEXIS 99379 (S.D. Fla. 2010).

81. To prevail in a disparate impact case, the complainant must present evidence proving the existence of an adverse or disproportionate impact on them as members of a protected class of persons resulting from facially neutral acts or practices by the respondent. See Blaz v. Barberton Garden Apartment, 1992 U.S. App. LEXIS 18508 (6th Cir. 1992)(a facially neutral practice is one that does not entail different treatment of a protected class, but the act nonetheless has a disproportionate impact on that class).

82. By contrast, to prevail on a disparate treatment in housing claim, the complainant must show that he or she was treated differently than similarly-situated tenants, and that such differential treatment was based on a characteristic protected under the applicable anti-discrimination statute.

See Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th Cir. 2008); Blaz, 1992 U.S. App. LEXIS 18508 at *7.

83. Here, Petitioners have alleged facts giving rise to a claim of disparate treatment on the basis of race. As discussed above, Petitioners specifically allege that Respondent treated them differently compared to similarly-situated non-African American residents of Waterford Lakes, because: (1) Respondent did not terminate the tenancies of non-African American tenants who violated community rules, but did not renew Petitioners' lease because they complained of the violations; and (2) Respondent renewed the leases of non-African American tenants who had complained about the violations, while at the same time not renewing Petitioners' lease because they complained.

84. In establishing that they were subject to discrimination by disparate treatment based on race, Petitioners either may present direct evidence of discrimination, or they may present circumstantial evidence sufficient to enable 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).

85. Direct evidence is evidence that, if accepted as true, would prove the existence of discriminatory intent without the need to 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" constitute direct evidence of discrimination. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999).

86. In this case, Petitioners do not allege, and the evidence does not show, that Respondent's employees made blatantly racially discriminatory remarks that would constitute direct evidence of discrimination by Respondent.

87. Petitioners instead rely on circumstantial evidence to establish their discrimination claim. Circumstantial evidence is evidence of some collateral fact from which the existence or non-existence of a fact in question may be inferred as a probable consequence. Black's Law Dictionary 712 (7th ed. 1990).

88. To establish a prima facie case of discriminatory treatment on the basis of circumstantial evidence, Petitioners must, on the basis of the evidence in the record, establish the existence of facts sufficient for the trier of fact (here, the ALJ) to infer that discrimination has occurred. See King, 21 F. Supp. 2d at 30.

89. When a housing discrimination case is based on circumstantial evidence, the burden-shifting analysis set forth

in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) applies.[17/] Molina v. Aurora Loan Servs., LLC, 635 Fed. Appx. 618, 625 (11th Cir. 2015). Under the McDonnell Douglas test, Petitioners have the initial burden of establishing a prima facie case of unlawful discrimination.[18/] McDonnell Douglas Corp., 411 U.S. at 802; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Valenzuela v. GlobeGround N Am. LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009).

90. For Petitioners to establish a prima facie case[19/] of housing discrimination by Respondent on the basis of race in this case, they must show that: (1) Petitioners are members of a protected class under the FFHA; (2) Respondent treated similarly-situated non-African American tenants differently than it treated Petitioners with respect to the terms, conditions, or privileges of the rental of their unit at Waterford Lakes; and (3) as a result of Respondent's conduct, Petitioners suffered a distinct and palpable injury. See Hous. Rights Ctr. v. Sterling, 404 F. Supp. 1179, 1190 (C.D. Cal. 2004); Hicks v. Makaha Valley Plantation Homeowners Ass'n, 2015 U.S. Dist. LEXIS 8299 (D. Haw. 2015); Simms v. First Mgmt., 2003 U.S. Dist. LEXIS 9650 at *12-13 (D. Kan. 2003) quoting Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995)(a plaintiff makes out a prima facie case of intentional discrimination under the

Federal Fair Housing Act merely by showing that a protected group has been subjected to explicitly differential treatment).

91. If Petitioners do not establish a prima facie case of discrimination, the discrimination complaint must be dismissed. 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 Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

92. However, if Petitioners succeed in establishing a prima facie case of unlawful discrimination, 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. 248, 255 (1981); Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). Respondent has only a burden of production, not a burden of persuasion, to articulate to the trier of fact that its action upon which the complaint was made was non-discriminatory. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997). Respondent is not required to prove the existence of this non-discriminatory basis. See Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

93. If Respondent articulates a legitimate, non-discriminatory basis for its actions, the burden shifts back to Petitioners to prove that the articulated reason was a mere pretext for discrimination. An articulated basis is a pretext

if it is unworthy of credence or belief. Marx v. Schnuck Mkts., 76 F.3d 324, 317 (10th Cir. 1996); Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995); U.S. Dep't of Hous. v. Blackwell, 908 F.2d 864, 871 (11th Cir. 1990).

The Discrimination Claim

Protected Class

94. The undisputed evidence establishes that Petitioners are African American and therefore are within a class protected under the FFHA from discrimination in the terms, conditions, or privileges of the rental of a dwelling or the provision of services or facilities in connection therewith on the basis of race. See § 760.23(2), Fla. Stat.

Disparate Treatment

95. In this case, the appropriate comparators for purposes of the disparate treatment analysis are the non-African American tenants at Waterford Lakes who Petitioners allege were treated differently than they were on the basis of race.

96. With respect to the tenants in Units 4-307 and 4-208, although the persuasive evidence indicates that these tenants likely were excessively noisy, the evidence does not persuasively show that Respondent definitively knew that was the case. As discussed above, the evidence shows that whether through failing to diligently and consistently investigate Petitioners' complaints, or simply failing to catch the tenants

in the act of being excessively noisy, Respondent did not, or was not able to, verify that these tenants engaged in such conduct, and, thus, violated their leases such that they were in a position to evict these tenants or decline to renew their leases.

97. With respect to the tenants who engaged in unauthorized car repairs in the garage onsite, the evidence shows that this conduct violated the Master Lease, and that the tenant or tenants who engaged in this conduct were not evicted or subject to nonrenewal of their lease(s). Although Thomas explained the basis for Respondent not evicting or declining to renew these tenants' leases, the fact remains that Respondent did treat Petitioners differently than these tenants by not renewing their lease, while renewing the leases of the non-African American tenants who engaged in conduct that was shown to violate Respondent's Master Lease.

98. With respect to non-African American tenants who Petitioners contend also complained about the other tenants' violations and whose leases nonetheless were renewed, although the undersigned found Mrs. Anduze's testimony on this point credible, it is hearsay and there is no other competent evidence in the record that this evidence supplements or explains. Accordingly, this group cannot be considered as a comparator

when determining whether Respondent treated Petitioners differently in not renewing their lease.

99. Based on the foregoing, the evidence establishes that Respondent treated some similarly-situated non-African American tenants——i.e., those who engaged in car repairs onsite——differently than it treated Petitioners, in that Respondent did not evict or decline to renew their leases even though they violated the Master Lease, but did not renew Petitioners' lease for complaining about those violations.

Distinct and Palpable Injury

100. As a result of Respondent not renewing Petitioners' lease, Petitioners had to move out of Waterford Lakes Unit 4-207 at the end of their lease term. As discussed above, Petitioners did not want to move out of Unit 4-207, and would have continued to lease that unit had their lease been renewed. Accordingly, as a result of Respondent's conduct in not renewing Petitioners' lease, they suffered a distinct and palpable injury.

101. Based on the foregoing, it is concluded that Petitioners established a prima facie case of discrimination on the basis of race.

Articulated Non-Discriminatory Basis

102. Once Petitioners established a prima facie case of discrimination, the burden shifted to Respondent to articulate a legitimate, non-discriminatory basis for its decision to not

renew Petitioners' lease. As discussed above, this is a very light burden for Respondent to meet.

103. As found above, Thomas stated that Respondent did not renew Petitioners' lease because of their frequent complaints, Respondent's inability to address those complaints, and Respondent's concern that it would lose other tenants as a result of Petitioners' frequent complaints.

104. Additionally, as discussed above, Respondent articulated a non-discriminatory reason for not evicting or declining to renew the leases of the tenant or tenant who engaged in car repairs in violation of the Master Lease.[20/]

105. Petitioners may disagree whether Respondent's articulated reason was fair or whether it justified allowing the offending tenants to retain their tenancy; however, they did not prove, by a preponderance of the evidence, that this reason was a simply a pretext or "cloak" for Respondent's discrimination against them on the basis of race.[21/] Accordingly, it is concluded that Petitioners did not show that Respondent's articulated reason for not renewing their lease was a mere pretext.

106. Based on the foregoing analysis, it is concluded that Petitioners did not show, by the greater weight of the evidence, that Respondent discriminated against them on the basis of race in violation of section 760.23(2).

C. Retaliation

107. As noted above, the FFHA makes it unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise of, or on account of her or his having exercised, or on account of her or his having aided or encouraged any other person in the exercise of any right granted under the FFHA. § 760.37, Fla. Stat.

108. As with claims of housing discrimination, in cases involving retaliation claims, the burden of proof is on the complainant to establish the alleged unlawful retaliation by a preponderance of the evidence. § 760.34(5), Fla. Stat.

109. Prevailing on a claim of discrimination is not a prerequisite to maintaining a retaliation claim under the FFHA. See Marks v. Bldg. Mgmt., 2002 U.S. Dist. LEXIS 7506 at *30 (S.D.N.Y. 2002); Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 242 (E.D.N.Y.)

110. Retaliation claims under the FFHA also are analyzed under the McDonnell Douglas burden-shifting framework. Walker v. City of Lakewood, 272 F.3d 1114, 1128 (9th Cir. 2001); E.E.O.C. v. Total Sys. Servs., Inc., 234 F.3d 501, 511 n.10 (11th Cir. 2000). To establish a prima facie case of retaliation, a complainant must show that: (1) he or she engaged in a protected activity under the FFHA, of which the defendant was aware; (2) the defendant subjected the complainant

to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. Howard v. Walgreen Co., 605 F.3d 1239, 1244 (11th Cir. 2010). See Fernandez v. Orlando Hous. Auth., 2016 U.S. Dist. LEXIS 63468 at *14 (Fla. M.D. 2016).

111. If a complainant establishes a prima facie retaliation claim, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its decision. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464-65 (10th Cir. 1994). If the defendant articulates such a reason, the complainant must demonstrate that the articulated reason was merely a pretext for a discriminatory motive. Id.

The Retaliation Claim in this Case

Protected Activity

112. Here, the persuasive evidence establishes that Petitioners informed Thomas that they were going to contact the FCHR about their belief that they were being treated differently on the basis of their race, and they did contact FCHR in early October 2014. Accordingly, the evidence establishes that Petitioners engaged in protected activity and that Respondent, through its agent, Thomas, was aware of that protected activity.

Adverse Action

113. On October 20, 2014, shortly after Petitioners contacted FCHR, and after they had informed Thomas of their

intention to do so, Respondent notified Petitioners that it was not renewing their lease. As discussed above, the evidence shows that Petitioners wished to remain in their unit and did not want to have to move out. Accordingly, the evidence establishes that Respondent subjected Petitioners to an adverse action in not renewing their lease.

Causal Connection

114. Case law holds that the causal link element of retaliation is to be construed broadly. Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001). Accordingly, a complainant merely has to show that the protected activity and the adverse action were not completely unrelated. Olmstead v. Taco Bell Corp., 141 F. 3d 1457, 1460 (11th Cir. 1998).

115. As noted above, case law holds that a showing of adverse action shortly after a complainant engaged in a protected activity constitutes circumstantial evidence of a causal connection between the two events. Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990); Taylor v. Cardiovascular Specialists, P.C., 2013 U.S. Dist. LEXIS 186090, *93-94 (N.D. Ga. 2013). If temporal proximity is the only evidence of causation to support the logical inference that the two events are related, the adverse action must follow almost immediately after the protected activity to support the logical inference that the two events are related. Taylor, 2013 U.S.

Dist. LEXIS at 94, quoting Soloski v. Adams, 600 F. Supp. 2d 1276, 1362 (N.D. Ga. 2009). A time gap of less than three months between the protected activity and the adverse action may establish a causal connection.[22/]

116. Here, the time gap between Petitioners' engagement in protected activity in contacting FCHR (of which Thomas was aware) and Respondent's adverse action in not renewing their lease was only a few weeks. The undersigned concludes that this is sufficient to determine that there was a causal connection between Petitioners' protected activity and Respondent's adverse action.

117. Based on the foregoing, it is concluded that Petitioners established a prima facie case of retaliation, in violation of section 760.37.

Articulated Non-retaliatory Basis

118. As discussed above, Respondent contends that it decided not to renew Petitioners' lease because it was unable to address their complaints to their satisfaction and it was concerned about losing other tenants due to Petitioners' complaints.

119. If believed, this articulated basis would constitute a non-retaliatory basis for Respondent's adverse action. However, under the circumstances, the undersigned finds this stated basis implausible and unpersuasive, and, therefore,

insufficient to overcome the inference that, at least in part, Respondent did not renew Petitioners' lease because Petitioners contacted, or stated that they were going to contact, FCHR.

120. Based on the foregoing, the undersigned finds that Respondent engaged in unlawful retaliation against Petitioners, in violation of section 760.37, when it did not renew Petitioners' lease after they indicated their intent to contact and contacted FCHR regarding what they perceived as Respondent's discriminatory treatment of them on the basis of race.

Remedy

121. Section 760.35(3)(b) authorizes the ALJ, if he or she finds that a discriminatory housing practice has occurred, to issue a recommended order to FCHR "recommending affirmative relief from the effects of the practice, including quantifiable damages." § 760.35(3)(b), Fla. Stat. (emphasis added). The term "discriminatory housing practice" is defined in section 760.22(3) to mean an act that is unlawful under the terms of sections 760.20 through 760.37.

122. As discussed above, Petitioners did not demonstrate, by a preponderance of the evidence, that Respondent engaged in unlawful discrimination on the basis of race in violation of section 760.23. However, they did demonstrate, by the preponderance of the evidence, that Respondent engaged in unlawful retaliation in violation of section 760.37.

123. As noted above, Petitioners have not requested that they be reinstated as tenants at Waterford Lakes. Rather, they have requested a year's worth of rent as damages for pain and suffering Petitioners alleged they suffered as a result of Respondent's alleged "retaliation, coercion, harassment, and constructive eviction" and as "compensation for Mrs. Anduze [for] physical and emotional harm by tenants."

124. The undersigned is not authorized by law to award the relief that Petitioners have requested for three reasons.

125. First, awarding a year's back rent would only be appropriate if Respondent's actions had constructively evicted Petitioners from their unit for their year-long lease term. Here, the evidence shows that while the excessive noise and the unauthorized car repairs did interfere with Petitioners' use and enjoyment of their unit, they resided in their unit for the entire term of their lease. Although constructive eviction can result from interference with the use and enjoyment of leased premises,[23/] a key element of constructive eviction is that the tenant must actually abandon the premises within a reasonable time of the landlord's offending conduct. Richards v. Dodge, 150 So. 2d 477, 481 (Fla. 2d DCA 1963); Kaplan v. McCabe, 532 So. 2d 1354 (Fla. 5th DCA 1988)(abandonment of premises within reasonable amount of time after landlord's wrongful act is necessary element of constructive eviction). As noted, here,

Petitioners did not abandon their unit, so were not constructively evicted for purposes of being eligible for an award of damages on that basis.

126. Second, for an ALJ to be able to award damages pursuant to section 760.35(3)(b), the damages must be quantifiable. Case law holds that damages for pain and suffering and emotional distress are not quantifiable and therefore cannot constitutionally be awarded in an administrative proceeding such as this one. Metro. Dade Cnty. Fair Hous. & Emp't Appeals Bd. v Sunrise Vill. Mobile Home Park, 511 So. 2d 962, 965-66 (Fla. 1987)(administrative entity not constitutionally empowered to award non-quantifiable damages for mental distress); Broward Cnty. v. LaRosa, 505 So. 2d 422, 424 (Fla. 1987)(awarding damages for non-quantifiable injuries is strictly a judicial function that cannot constitutionally be performed by an administrative body). As discussed above, Petitioners did not present evidence regarding any specific damages amount they sought for these alleged injuries, but even if they had, the undersigned is not legally authorized to award damages for pain and suffering or emotional distress.[24/]

127. Third, in any event, Petitioners did not present evidence regarding potentially quantifiable damages, such as the cost to them in securing alternative housing. Because such

evidence was not presented at the hearing, there is no factual basis for awarding damages on that basis.

RECOMMENDATION

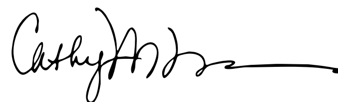
Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order:

1. Determining that Respondent did not engage in unlawful discrimination against Petitioners on the basis of race in violation of the FFHA;

2. Determining that Respondent engaged in unlawful retaliation against Petitioners in violation of section 760.37, Florida Statutes.

3. Declining to award damages or other relief as not supported by the record or applicable law.

DONE AND ENTERED this 31st day of August, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2016.

ENDNOTES

[1/] Because this proceeding was conducted in May 2016, before the 2016 codification of Florida Statutes went into effect, the 2015 version of chapter 120, Florida Statutes, applies to this proceeding.

[2/] Because the actions alleged to be discriminatory and retaliatory took place between mid-2014 and January 2015, the 2014 version of chapter 760, which was in effect during that period, applies to this proceeding.

[3/] Regardless of whether the tenants in Unit Nos. 4-307 or 4-208 were "white" or not, there is no dispute that they were not African American. Thus, they are outside of the protected class at issue in this proceeding.

[4/] This evidence is hearsay because it consists of out-of-court statements——here, made by persons who did not testify at the final hearing——that were offered into evidence for the truth of the matter asserted in those statements. See § 90.801(1)(c), Fla. Stat. (2016). Pursuant to section 120.57(1)(c), hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. Put another way, hearsay evidence cannot constitute the sole evidentiary basis for a finding of fact unless it falls within one of the exceptions to exclusion set forth in sections 90.803 or 90.804, Florida Statutes. Here, Petitioners' evidence that other tenants of Waterford Lakes also complained about noise consists solely of hearsay that does not fall within one of the exceptions set forth in sections 90.803 or 90.804. Accordingly, the undersigned cannot make findings of fact that tenants of Waterford Lakes Building 4, other than Petitioners, also complained about noise.

[5/] Although the statements in this electronic mail are hearsay with respect to the point that car repairs being performed at Waterford Lakes violated certain provisions of the Orange County Code, they are not hearsay for the purpose of supporting an inference that car repairs were being performed at Waterford Lakes. See F.T. v. State, 146 So. 3d 1270, 1272-73 (Fla. 3d DCA 2001)(when an out-of-court assertion is not offered for the proof of the matter asserted but for an independently relevant purpose, the assertion is not hearsay).

[6/] Additionally, the Waterford Lakes Master Lease, paragraph 21, subparagraph (x), prohibits residents and guests from bringing or storing "hazardous materials" in an apartment unit or in the community. Thomas credibly testified that he did not know if scattered car parts were "hazardous." Under any circumstances, it is likely that although scattered car parts in the road may well have constituted a hazardous condition, there was no evidence showing that the car parts, in and of themselves, constituted hazardous materials expressly prohibited under the lease.

[7/] See note 15, below.

[8/] Broaddus also testified that Petitioners did not inform her, at any point during their tenancy, that they believed they were being treated differently on the basis of their race. The undersigned notes that Mrs. Anduze did not testify that Petitioners told Broaddus that they believed they were being treated differently on the basis of their race.

[9/] Thomas testified that the decision not to renew Petitioners' lease was jointly made by Thomas and Respondent's regional manager. However, this testimony was contradicted by Mrs. Anduze's credible testimony that Respondent's regional manager was surprised to learn of the nonrenewal of Petitioners' lease.

[10/] Thomas confirmed that the leases for the tenants in Unit Nos. 4-307 and 4-208 had been renewed, and that at the time of the final hearing, those tenants continued to reside in those units.

[11/] As addressed in note 4 above, hearsay evidence that does not fall within an exception to the hearsay rule cannot form the sole basis of a finding of fact. § 120.57(1)(c), Fla. Stat.

[12/] Although Petitioners disputed the accuracy of the rent roll and the truthfulness of Thomas' testimony regarding African American tenants identified on the rent roll, they did not present evidence showing that the rent roll was inaccurate or that Thomas' testimony was untruthful.

[13/] Petitioners may have been able to maintain an action for breach of lease or constructive eviction, assuming they were able to prove the elements of these causes of action in a court of competent jurisdiction. Regardless, the failure of Respondent to fully comply with its lease obligations does not

convert Respondents actions (or inaction) into discrimination against Petitioners on the basis of race.

14/ See note 3, above.

15/ This finding is not inconsistent with the determination that Petitioners were justified in their numerous complaints to Waterford Lakes management. Whether through lack of diligent investigation of Petitioners' complaints or by simply being unable to catch the offending tenants "in the act," the evidence shows that Respondent did not believe it had adequate grounds on which to evict these tenants. Under any circumstances, it was reasonable for Respondent to require independent verification of Petitioners' complaints before evicting these tenants, since eviction entails legal action by the landlord, who either must establish that there is a basis in fact and law for evicting a tenant, or risk being subject to an action by the tenant for damages on the basis of wrongful eviction. See, e.g., Bielek v. Drs. Bielek, Birely, and Salerno, P.A., 366 So. 2d 44 (Fla. 4th DCA 1978).

16/ The credible, competent evidence shows that car repairs were performed in the garage proximate to Building 4 on October 30, November 8, and November 23, 2014.

17/ In cases based on circumstantial evidence, the McDonnell Douglas test is applied in order to determine whether there is intent to discriminate, a requirement to establish discrimination on the basis of disparate treatment. Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 538-39 (6th Cir. 2014).

18/ In Florida, administrative cases typically are decided using the McDonnell Douglas test as the analytical paradigm, even though, technically, that test is applicable to determine whether a discrimination or retaliation claim is able to survive a motion for summary judgment——a procedural issue that is not pertinent to administrative proceedings under the Florida Administrative Procedure Act, chapter 120, Florida Statutes (the "APA"). In cases tried under the APA, the ALJ does not dismiss claims for failure to establish a prima facie case, but instead decides whether, based on the preponderance of the evidence, the petitioner has proved discrimination or retaliation. See Green v. Sch. Bd. of Hillsborough Cnty., 25 F.3d 974, 978 (11th Cir. 1994)(where ALJ does not halt the proceedings for lack of a prima facie case and the action is fully tried, the relevant inquiry focuses on the ultimate factual issue of discrimination

or retaliation). As noted, the McDonnell Douglas test provides a useful analytical structure for analyzing the evidence and determining the ultimate issue of discrimination and/or retaliation.

19/ The elements of a prima facie case are flexible and should be tailored on a case-by-case basis to fit different factual circumstances. Boykin v. Bank of America Corp., 162 Fed. Appx. 837, 838; 2005 U.S. App. LEXIS 28415 (11th Cir. 2005) at 838-839 (citing Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123 (11th Cir. 1993)).

20/ See E.E.O.C. v. Flasher Co., 986 F.F2 1312, 1318 (10th Cir. 1992)(stating that the McDonnell Douglas test does not require a defendant to explain the differences in treatment between the complainant and others, but only requires that the defendant articulate a legitimate, non-discriminatory basis for its treatment of the complainant) questioned on other grounds, Kline v. TVA, 128 F.3d 337 (6th Cir. 1997).

21/ See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999)(noting that courts are not concerned with whether a decision is fair or prudent but only whether it was motivated by unlawful discriminatory animus).

22/ Even if a time gap of more than three months exists between the protected activity and the adverse action, if a causal connection can be established through additional evidence tending to show causation, a delay between the protected activity and the adverse action is not fatal to a finding of causal connection. Ramirez v. Bausch & Lomb, 546 Fed. Appx. 829, 832 (11th Cir. 2013). Here, the period between protected activity and adverse action is substantially less than three months.

23/ For a landlord's conduct to constitute constructive eviction, it must be so severe that it renders the premises unfit for occupancy or deprives the tenant of the beneficial enjoyment of the premises. See Griffin Indus., LLC v. Dixie Southland Corp., 162 So. 3d 1062 (Fla. 4th DCA 2015); Hankins v. Smith, 138 So. 2d 494 (Fla. 1932). If constructive eviction can be established, the usual measure of damages is the value of the unexpired term of the lease, less the amount of any rent withheld by the tenant. See Ardell v. Milner, 166 So. 2d 714, 716 (Fla. 3rd DCA 1964).

[24/] Courts, which are part of the judicial branch of Florida government, are constitutionally empowered to award damages for unquantifiable injuries such as pain and suffering and mental distress. LaRosa, 505 So. 2d at 423-24.

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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.