STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANN HERVAS,

Petitioner,

vs. Case No. 16-1798

POAH CUTLER MEADOWS, LLC,

Respondent.
_____/

AMENDED RECOMMENDED ORDER (AMENDED TO SERVE PETITIONER AT HER CORRECT ADDRESS)

On October 14, 2016, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Ann Hervas, pro se
Apartment A224
11280 Southwest 196th Street
Miami, Florida 33157

For Respondent: Andrew L. Rodman, Esquire
Jon K. Stage, Esquire
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130

STATEMENT OF THE ISSUE

The issue is whether Respondent has unlawfully discriminated against Petitioner on the basis of her

disabilities in connection with her rental of an apartment, in violation of the Florida Fair Housing Act, section 760.23(2), Florida Statutes.

## PRELIMINARY STATEMENT

By a Housing Discrimination Complaint dated September 29, 2015, Petitioner claimed that she suffers from a disability, she applied to Respondent to rent a two-bedroom apartment, and Respondent discriminated against her, on the basis of the disability, by renting two-bedroom apartments to other persons rather than her.

On February 22, 2016, the Florida Commission on Human Relations (Commission) entered a Notice of Determination (No Cause).

On March 22, 2016, Petitioner filed a Petition for Relief asserting largely the same allegations contained in the Housing Discrimination Complaint. The Commission transmitted the petition to DOAH on March 29, 2016. The Administrative Law Judge continued the final hearing twice at the request of Respondent.

At the hearing, Petitioner called one witness, herself, and offered into evidence one exhibit: Petitioner Exhibit 1. Respondent called two witnesses and offered into evidence 19 exhibits: Respondent Exhibits 1-4, 8 (page 3), 14-17, 21, 25, 27, 29, 40, 44, 49, 52, 53, and 55. All exhibits were admitted;

however, Petitioner's exhibit is deemed withdrawn because she failed to file it after the hearing, even though she had been given ten days to do so.

The transcript was filed on November 9, 2016. Respondent filed a proposed recommended order on December 6, 2015.

## FINDINGS OF FACT

1. Petitioner suffers from bipolar disorder, surgically repaired spinal injuries, and a cardiac condition requiring a pacemaker, as well as unspecified environmental allergies. Petitioner thus has a physical or mental impairment that substantially limits one or more major life activities and has a record of having, or is regarded as having, such physical or mental impairment.

2. At all material times, Respondent has managed Cutler Meadows, which is a Section 8 housing community that is part of the Housing Choice Voucher Program administered by the U.S. Department of Housing and Urban Development. Cutler Meadows is a complex of three three-story buildings comprising 225 apartments: 36 two-bedroom units and 189 one-bedroom units. A maintenance person resides in one of the two-bedroom apartments, so only 35 two-bedroom apartments are available for rent. These units are popular and infrequently become available for rent.

3. By application dated September 5, 2000, Petitioner applied for a one-bedroom apartment at Cutler Meadows. Her

application disclosed that Petitioner was disabled. Respondent approved the application, and, in November 2000, Petitioner moved into unit A-108, which is a ground-floor, one-bedroom unit. At the same time, Petitioner's disabled son moved into his own one-bedroom apartment on the third floor of the same building.

4. In March 2010, Petitioner asked to be moved either to a one-bedroom apartment on the third floor or a two-bedroom apartment. Petitioner submitted a physician's note stating that she required a higher floor due to her allergies. A subsequent physician's note asserted that Petitioner's grandson needed to live with her to assist with her activities of daily living. Although her reported medical needs would seem to have required a two-bedroom unit on the third floor, by asking for a unit that satisfied either of these conditions, Petitioner appears to have been content with a higher one-bedroom unit or a lower two-bedroom unit.

5. Prior to Respondent's reassigning Petitioner to another unit, on January 5, 2011, Petitioner's grandson, who had moved in with Petitioner, knifed his father, Petitioner's son, who, as noted above, resided at Cutler Meadows. Respondent commenced a short-lived eviction proceeding against Petitioner, but agreed to drop the matter if the grandson moved out and was not allowed to visit the complex.

6. A couple of weeks after reaching the settlement with Respondent, Petitioner filed an application seeking, again, a two-bedroom unit or a one-bedroom unit on a higher floor. Shortly after filing this application, Petitioner learned that unit A-316, which was vacant, was about to be furnished with new appliances. Petitioner asked to be assigned this apartment, and, two days later, Respondent assigned this apartment to Petitioner.

7. On October 21, 2013, Petitioner requested a two-bedroom apartment. Respondent has a written policy for the assignment of apartments. For the relatively scarce two-bedroom units, Respondent maintains two waiting lists: one for persons with medical needs justifying a two-bedroom unit and one for all other persons. As long as anyone is on the medical-needs waiting list, no one on the other list is assigned a two-bedroom unit.

8. In this case, Respondent implemented its written policy. On receipt of Petitioner's application, Respondent placed her on the medical-needs waiting list, which had four persons ahead of her. Petitioner has failed to prove that any of these persons was not disabled. As each two-bedroom apartment became available, Respondent assigned it to the person at the top of the medical-needs waiting list. When Petitioner reached the top of the list, she received the next available

two-bedroom unit, which, in fact, took place in March 2016 when Respondent assigned her a two-bedroom apartment, unit A-224, and Petitioner moved into the apartment.

9. When asked, Petitioner could not say how Respondent discriminated against her on the basis of any of her disabilities. The crux of her case seems to turn on one or two misconceptions. Petitioner complained that a two-bedroom apartment was vacant because its tenant resided in southwest Florida, but she clearly lacked sufficient understanding of the facts of that transaction to establish any wrongdoing on Respondent's part. Petitioner seems to think that other persons, besides the four ahead of her on the medical-needs waiting list, obtained two-bedroom units before she did, but Petitioner has no evidence to support this opinion, which appears to be incorrect. Petitioner badly undermined her own judgment when she complained, at an earlier time, when Respondent assigned a higher one-bedroom apartment to someone whose home had burned, rather than to her.

10. In sum, Petitioner has provided no direct evidence of discrimination, nor any basis whatsoever for an inference of discrimination. Petitioner has failed to provide any evidence even suggestive of unfair treatment of her by Respondent.

## CONCLUSIONS OF LAW

11. DOAH has jurisdiction of the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2016).

12. Section 760.23 provides:

> (1) It is unlawful to refuse to . . . rent after the making of a bona fide offer, to refuse to negotiate for the . . . 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.
>
> (2) It is unlawful to discriminate against any person in the terms, conditions, or privileges of . . . 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.
>
> * * *
>
> (7) It is unlawful to discriminate in the . . . rental of, or to otherwise make unavailable or deny, a dwelling to any . . . renter because of a handicap of:
>
> (a) That . . . renter;
>
> (b) A person residing in or intending to reside in that dwelling after it is . . . rented . . . or made available; or
>
> (c) Any person associated with the . . . renter.
>
> (8) It is unlawful to discriminate against any person in the terms, conditions, or privileges of . . . rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of:
>
> (a) That . . . renter;
>
> (b) A person residing in or intending to reside in that dwelling after it is . . . rented . . . or made available; or

> (c) Any person associated with the . . . renter.

13. Section 760.22(7)(a) defines a person with a "handicap" as person who has "a physical or mental impairment which substantially limits one or more major life activities, or . . . has a record of having, or is regarded as having, such physical or mental impairment."

14. Petitioner bears the burden of proving the material allegations by a preponderance of the evidence. Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990); § 120.57(1)(j).

15. A party seeking to prove housing discrimination may proceed under the three-part framework set forth in McDonnell Douglas Corp. v. Green Corp., 411 U.S. 792 (1973), by proving a prima facie case of discrimination and then proving that any legitimate nondiscriminatory explanation offered by the opposing party is merely pretext. Herron, supra at 870. More recently, the Eleventh Circuit has described the proof required for a prima facie showing to consist of the following: 1) the claimant is a member of a protected class; 2) the claimant attempted to enter into a covered transaction and was eligible to do so; 3) the opposing party declined to enter into the transaction despite the claimant's qualifications; and 4) the opposing party continued to engage in the same type of transaction with persons not in the claimant's class, but with

similar qualifications. Molina v. Aurora Loan Servs., LLC, 635 Fed. Appx. 618, 625 (11th Cir. 2015).

16. Under McDonnell Douglas, a claimant may prove a prima facie case by direct evidence or circumstantial evidence that is sufficient to support an inference of discrimination. See, e.g., Lindsay v. Yates, 578 F.3d 407, 415 (6th Cir. 2009). The three-part framework of McDonnell Douglas is not inflexible, so, in determining whether a claimant has proved sufficient facts to support an inference of discrimination, the key question is whether she has established an inference of discrimination, not whether she has satisfied a particular evidentiary test. Id. at 416; compare Kilgore v. Trussville Dev., LLC, 646 Fed. Appx. 765, 773 (11th Cir. 2016) (circumstantial evidence in case involving claim of employment discrimination) (citing Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) (citing Silverman v. Bd. of Educ., 637 F.3d 729, 733-34 (7th Cir. 2011)).

17. Petitioner has proved that she meets the definition of a person with a handicap. She has offered no direct evidence of discrimination, nor has she provided any evidence that would support an inference of discrimination. In the language of the McDonnell Douglas test, Petitioner has failed to prove that she was qualified for a two-bedroom apartment that Respondent rented to someone who was not disabled. More broadly, Petitioner has

failed to prove that Respondent was guilty of any act or omission even suggestive of discrimination on the basis of disability.

## RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed on March 22, 2016.

DONE AND ENTERED this 21st day of April, 2017, in Tallahassee, Leon County, Florida.

Robert E. Meale
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of April, 2017.

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

Ann Hervas
Apartment A224
11280 Southwest 196th Street
Miami, Florida 33157

Andrew L. Rodman, Esquire
Jon K. Stage, Esquire
Stearns Weaver Miller Weissler
Alhadeff and Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
(eServed)

Kara S. Nickel, Esquire
Stearns Weaver Miller Weissler
Alhadeff and Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
(eServed)

Cheyanne Costilla, General Counsel
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399
(eServed)

## 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.