STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VIRGINIA AUSTIN AND
LAURA TOMAYKO,

Petitioners,

vs. Case No. 16-1799

SADDLEBAG LAKE OWNERS
ASSOCIATION, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On June 23, 2016, D. R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this case by video teleconferencing at sites in Orlando and Tallahassee, Florida.

APPEARANCES

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For Respondent: Richard V. Blystone, Esquire
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STATEMENT OF THE ISSUES

The issues are: (1) whether Respondent violated section 760.23(2), Florida Statutes, by discriminating against

Petitioners on the basis of their sex with respect to the provision of housing services or facilities; and (2) whether Respondent violated 760.37 by unlawfully harassing or intimidating Petitioners on the basis of their sex in the exercise of their protected housing rights.

PRELIMINARY STATEMENT

On November 12, 2015, Petitioners filed a Housing Discrimination Complaint (Complaint) with the Florida Commission on Human Relations (FCHR) alleging Respondent, Saddlebag Lake Owners Association, Inc. (Respondent or Association), unlawfully discriminated against them on the basis of their sex in violation of section 760.23(2). The Complaint was amended on January 28, 2016, to add an allegation that Petitioners were unlawfully harassed by the Association on the basis of their sex in violation of section 760.37. The two Complaints also named as respondents Clifford Jensen, the current president of the Association's Board of Directors (Board), and Terry Haven, a resident who also worked as a security guard until March 2015. After the allegations were investigated, on February 19, 2016, the FCHR issued a Notice of Determination of No Cause. On March 22, 2016, a Petition for Relief was filed, and the case was transmitted by FCHR to DOAH with a request that a formal hearing be conducted. The Petition for Relief names only the Association as a respondent.

At the final hearing, Petitioners testified on their own behalf and presented the testimony of five witnesses. Petitioners' Exhibits 1 through 5 were accepted in evidence. Respondent presented the testimony of three witnesses. Respondent's Exhibits 1 through 41 were accepted in evidence. Affidavits submitted by both parties have been accepted in evidence, but the hearsay documents have been considered only to the very limited extent they supplement or explain other competent evidence. Finally, to show a "Chronology of Events," the parties stipulated to certain facts that occurred more than one year before the Complaints were filed.

A two-volume Transcript of the hearing was prepared. The parties filed proposed recommended orders (PROs), which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. Petitioners are gay females, both retirees, who own property and reside at 5305 Saddlebag Lake Road, No. 66 Silversides Street, Lake Wales. The property is located in the Saddlebag Lake Resort, a gated adult recreation vehicle community, which consists of approximately 800 units or lots and has private roads, a private sewer system, swimming pool, and

community center. More than half of the current residents are women, and some residents are gay.

2. Respondent is the homeowners' association for the community. Its primary function is to run the day-to-day business required to maintain the common areas. Each unit/lot owner is a member of the Association and pays dues or assessments, which are used to maintain and operate the common facilities. The Association uses a professional property management company to manage the property. The Association does not receive federal funding.

3. The Association is overseen by a nine-person Board elected by all community members, three of whom were women when this dispute arose. The Association writes rules and regulations for the community.

4. The parties have stipulated that the Complaint was filed with the FCHR on November 12, 2015, and an Amended Complaint was filed on January 28, 2016. By law, this means that only those acts that occurred within the preceding 365 days of each filing can be considered. See § 760.32(2), Fla. Stat. Although the Complaints rely on statutes that prohibit sex discrimination, Petitioners contend that sexual orientation discrimination is per se "sex discrimination" within the meaning of the law. The chronology of events which led to the filing of the Complaints is summarized below.

5. Petitioners first resided in the community as renters from November 2011 until April 2012. In March 2012, they purchased a lot with an existing mobile home. In December 2013, Petitioners decided to purchase a new mobile home. The existing home was removed in February 2014 and replaced with a new one in March 2014. A dispute between the parties arose concerning whether the porch on the new home complied with the Association's building restrictions. There is no credible evidence that the Association's decision to enforce what it believed were valid building restrictions was based on Petitioners' sexual orientation.

6. When the dispute could not be informally resolved, the Association filed a lawsuit against Petitioners seeking a court order requiring Petitioners to comply with applicable building restrictions. Petitioners countersued on the grounds the Association's governing documents had expired. Until that time, it is fair to say that Petitioners and other residents in the community had a harmonious relationship. In fact, the record shows that respondents Jensen and Haven were good friends with Petitioners and sometimes socialized together.

7. As a result of the dispute, an acrimonious relationship developed between the parties. From that point forward, Petitioners blamed unlawful discriminatory animus on the part of

residents, Board members, and employees as the reason for virtually every action they considered objectionable.

8. During the following months, Petitioners lodged various complaints with the Sheriff's Office and sought a stalking injunction against the property manager in circuit court. The complaints were determined to be unfounded by law enforcement and the injunction was denied. In October 2014, Tomayko wrote a letter to the Board complaining about "neighbors go[ing] against neighbors creating casualties among themselves," but she did not mention any specific individuals or incidents or suggest that sexual orientation was the source of this conflict. See Resp. Ex. 14. In February 2015, while the lawsuit was still pending, she wrote a letter to a revitalization proponent complaining about a series of incidents, all stemming from the property dispute. See Resp. Ex. 21. No claim was made that discriminatory animus was the underlying cause of the incidents.

9. For reasons discussed in the Conclusions of Law, incidents occurring more than a year before the Complaints were filed are time-barred. For the purpose of making a complete record, however, the incidents are summarized below.

10. Only two allegations are lodged against Jensen, the current president of the Board, and a Board member since 2012. First, it is alleged that while the building restriction dispute was being discussed at a closed Board meeting on February 27,

2014, Jensen made a derogatory statement about Petitioners' sexual orientation. However, Petitioners did not attend the meeting, and repeated only what they were told by a third party, who did not testify at hearing. Second, Austin testified that while attending a band concert with Jensen in April 2014, he called Tomayko "evil," and Austin assumed this referred to Petitioners' lifestyle. Austin also testified that Jensen told her that Petitioners "will have to answer to God for [their] lifestyle." Jensen denied these assertions, and his testimony is accepted as being more credible. Ironically, Austin admitted at hearing that she never personally heard Jensen make any discriminatory remarks based on a person's sex or sexual orientation.

11. On February 28, 2014, while discussing the property dispute, Board member Braden, now deceased, said words to the effect that people like Petitioners move into a community just to do this. Although Petitioners ascribe a different meaning to the words, there is no evidence that Braden's statement was referring to Petitioners' sexual orientation. More than likely, he was referring to Petitioners' assertion, unpopular with most residents, that the Association's governing documents had expired.

12. In March 2014,[1/] while playing a game of pool, Braden stated in the presence of witness Park that the property dispute

might have been "sorted out" were it not for Petitioners' lifestyle. There is no evidence that the statement was made in Braden's official capacity as a Board member.

13. Other minor incidents included a police report of vandalism to Petitioners' property in June 2014, and a claim by Tomayko in October 2014 that a Board member almost struck her with his automobile while she was standing in the road. There is no evidence to connect these incidents with the charges in the Complaints.

B. The Charges

14. The initial Complaint alleges that, on the basis of their sexual orientation, Board members or employees discriminated against Petitioners with respect to the provision of housing services or facilities in connection with the sale or rental of a dwelling. The Amended Complaint adds a statutory allegation that on the basis of their sexual orientation, Board members or employees unlawfully intimidated or threatened them in order to interfere with their exercise of protected housing rights. Both filings rely on the same underlying charges, which are based on acts occurring more than a year before the Complaints were filed, some that are undated, and some that occurred within the one-year period. Petitioners have requested compensation for medical bills and other damages, as well as reasonable attorney's fees and costs.

15. Before she moved to Florida, Austin was diagnosed with lupus, an autoimmune disease. In October 2014, or more than a year before the Complaints were filed, and again in November 2014, she was hospitalized because of a flare up of her lupus. Austin says the flare up was due to stress caused by unlawful interactions with Board members or employees prior to the hospitalization. No medical testimony supports this charge, and all interactions would have occurred more than a year before the Complaints were filed. Assuming arguendo the charge is true and time-barred events can be considered, the more persuasive evidence supports a finding that the interactions were the result of the acrimonious relationship between the parties that arose when the new home was installed, and not because of Petitioners' sexual orientation.

16. In January 2015, Petitioners and the Board jointly sponsored a town hall-type meeting to discuss their lawsuit, a second lawsuit involving another resident, and the revitalization of the Association's governing documents extinguished by the Marketable Record Title Act (MRTA).[2/] Without revitalization, the Association could not enforce restrictions that had been in effect for many years.

17. Because Petitioners were concerned there might be an incident at the meeting, they contacted the Polk County Sheriff's Office to request assistance. Deputies from that

office attended the meeting, encountered no problems, and left without incident. Austin testified that during the meeting, she encountered "hostility" from other participants and had a verbal argument with one Board member, but no derogatory comments were directed at her by any attendee. After the meeting, a picnic was held, which was attended by Petitioners.

18. The revitalization issue was a significant one and caused a split in the residents of the community. One Board member estimated that around 90 percent of the residents supported revitalization, while only ten percent opposed it. In light of the pending lawsuit between the parties, many in the community believed that Petitioners opposed revitalization. In fact, Petitioners described the divide on the issue as "us" versus "them."

19. On February 18, 2015, proponents of revitalization sponsored a parade. Approximately 250 golf carts participated in the event, as well as a number of residents on foot, all in support of revitalization. Many carried signs urging a yes vote on the issue. Tomayko testified that when the large parade crowd passed her home, horns were blown and the participants yelled and booed. Because of the noise, she could not understand what they were saying. She did hear "go to hell" one time, but she has no idea who made the comment and acknowledged no comments of a sexual nature were made. She admitted that the

parade participants probably thought Petitioners were opposed to revitalization and this may have prompted the jeers. Tomayko testified she was "frightened" by the crowd. However, Petitioners were invited by parade participants to a picnic later that day, which they attended.

20. At the picnic, Austin became involved in a verbal argument with a female Board member, who Austin says called her "evil." During the encounter, Austin grabbed the Board member by her shoulders and began violently shaking her. The Board member filed criminal charges against Austin, who was arrested for violating section 784.03(1)(a)1., a first degree misdemeanor. The victim later agreed to withdraw her complaint and the charges were dropped. Austin acknowledged that people in the community might be wary of associating with her after finding out about the assault.

21. While at home on the evening of February 20, 2015, Tomayko heard someone trying to open her door, and then observed someone running down the stairs with a flashlight. That individual was never identified, and Petitioners did not report the incident to the police.

22. Around 3:00 a.m. on February 21, 2015, a wooden cross was set on fire in Petitioners' yard. Apparently believing that the Association had more resources than law enforcement in finding the culprit, Petitioners complained that the Association

provided no assistance in discovering who was responsible, a "service" to which they were entitled. However, law enforcement was called and an investigation was conducted by multiple members of the Sheriff's office. The Association did not deny Petitioners a "service" by relying on law enforcement to find the culprit, rather than undertaking its own investigation. No suspect was identified and no charges were ever filed. Based on speculation, Austin believes a female resident, not a Board member or employee, was responsible for the cross burning, but there is no evidence that any Board member, employee, or even a resident participated in, or had knowledge about, the incident. Both Petitioners say they felt intimidated and frightened by the incident.

23. On February 27, 2015, the Board, Petitioners, and another resident with a pending lawsuit mediated a global settlement of their lawsuits. As a part of the settlement, the Association agreed to pay Petitioners' costs in their lawsuit and to terminate the employment of its property manager. A condition in the agreement required that Petitioners not oppose revitalization.

24. Austin testified that after the mediation, two neighbors, Bob Amick and Terry Haven, occasionally stood in Amick's porch across the street "yelling stuff at us" and

laughing. Neither was a Board member or employee at the time, and the content of the "stuff" being yelled is unknown.

25. Tomayko was one of a group of 16 residents, consisting of four males and 12 females, who regularly played pinochle at the community center every Thursday. No player was a Board member or employee. The card game is a voluntary endeavor by pinochle enthusiasts and an activity over which the Association has no control. The Association merely handles or assists with reservations for the use of the clubhouse, and nothing more.

26. A female member of the group decided to move the game scheduled on April 6, 2015, to a private home. She notified every member except Tomayko, who arrived at the community center that day expecting to join her group. Tomayko considers that action to be a denial of a "service" available to all other residents, and contends the change in location was made because of her sexual orientation. No credible evidence supports this assertion.

27. While attending a pinochle game on another occasion, Tomayko testified that when she sat down at a table, a male player got up and left. No derogatory statements of a sexual nature were made.

28. Tomayko regularly attended a "Koffee Klatch," a group of residents who met periodically for coffee and conversation. Like the card games, the Klatch is something over which the

Association has no control. In April 2015, she sat down at a table and a "couple [of] people got up and walked away." Another unnamed female "got up and left," presumably to sit elsewhere. Tomayko acknowledged, however, that no derogatory comments of a sexual nature were directed towards her by any person at the Klatch.

29. Austin testified that around "once a week" from November 2014 until March 2015, Terry Haven, who lives catty-corner from Petitioners and also worked as a security guard during that period of time, yelled at Petitioners while driving past their home in a golf cart. Austin acknowledged that she would yell sarcastic things back to him. She says Haven sometimes used profanity and called them "dykes." However, no specific dates were provided, and it is highly unlikely the name-calling occurred while he was working his midnight shift. There is no evidence that Petitioners reported Haven's use of the word "dykes" to the Board.

30. Tomayko testified that Haven would purposely drive by their home and cause the golf cart engine to backfire. On one occasion, he threatened to poison their dogs. She also stated that in December 2015, he stood across the street and took some photographs of their home, and this upset her. No evidence was presented that linked this conduct to the charges in the Complaints.

31. There is no evidence that Petitioners were treated differently because they are women.

32. Other gay persons reside in the community, both male and female. There is no evidence that any other gay residents have been subjected to discriminatory treatment because of their sexual orientation.

33. In sum, the record shows a few isolated instances in 2014 and 2015 where actions by residents might arguably be perceived by Petitioners as being objectionable and based on discriminatory animus. The more persuasive evidence supports a finding that these actions were motivated by Petitioners' opposition to revitalization, the pending lawsuit, or personality conflicts, and not because they were gay. Even assuming arguendo the actions were based on discriminatory animus, which they were not, the FCHR has no authority to dictate how neighbors choose to treat one another. And there is nothing in the law that imposes a duty on a homeowner association to intervene in a neighbor-to-neighbor dispute.

34. Assuming that Haven called Petitioners "dykes" on several occasions between November 2014 and March 2015, this more than likely occurred when he was off-duty and not in his capacity as an employee. All other incidents were attributable to the lawsuit, revitalization, or personality disputes and were not based on Petitioners' sexual orientation.

C. Damages

35. To support their damages claim, Petitioners submitted Composite Exhibit 1, mostly hearsay, consisting of 66 pages of Austin's personal notes; medical, dental, and drug bills; housekeeping charges; veterinary bills for Austin's dog; and mileage charges. The bills total $15,950.01, mainly those not covered by insurance. Austin contends Association-induced stress was the cause of all of these charges and required her (and her dog) to seek medical and dental treatment and other services to alleviate a flare-up of lupus, depression, and other ailments triggered by the Association's actions. Some charges, not distinguished from others, were incurred before November 12, 2014. Notably, there is no credible evidence to establish a nexus between any of the bills and the acts of Board members or employees.

CONCLUSIONS OF LAW

36. Section 760.23(2) provides that "it is unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, national origin, sex, handicap, familial status, or religion." There is no reference in the statute to sexual orientation.

37. Section 760.37 provides that it is unlawful to coerce, intimidate, threaten, or interfere with any person on the basis of their sex, in the exercise of, or on account of her or his having exercised, any right granted under the Fair Housing Act. There is no reference in the statute to sexual orientation.

38. In interpreting and applying Florida's Fair Housing Act, the FCHR and Florida courts regularly seek guidance from federal court decisions interpreting similar provisions of federal fair housing laws. See, e.g., Loren v. Sasser, 309 F. 3d 1296 n.9 (11th Cir. 2002)("the facts and circumstances that comprise the federal and state fair housing claims are the same"); Bhogaita v. Altamonte Heights Condo. Ass'n, Inc., 765 F.3d 1277, 1285 (11th Cir. 2014)("The FHA and Florida Fair Housing Act are substantively identical, and therefore the same legal analysis applies to each.").

39. Petitioners have the burden of proving a prima facie case of discrimination by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. A failure to establish a prima facie case of discrimination ends the inquiry.

40. Three issues will be addressed before reaching the merits of the case. The first issue is whether a claim of discrimination based on sexual orientation is actionable under chapter 760. The second issue is whether acts occurring more than a year before the Complaints were filed can be considered.

The third issue, raised for the first time in their PRO, is whether Petitioners are entitled to relief on the theory that the Association created a hostile housing environment that unreasonably interfered with the use and enjoyment of their home. Petitioners argue that all questions should be answered in the affirmative.

41. Petitioners, both women, offered no credible evidence that they were treated differently because they were women. They contend they were discriminated against because they are gay, and therefore, they were subjected to sex discrimination. They cite no FCHR or state court decision, or Eleventh Circuit decision, which supports their claim that discrimination on the basis of sexual orientation is actionable under chapter 760. Rather, they rely primarily on a 2015 administrative ruling by the Equal Employment Opportunity Commission (EEOC) involving an allegation that the Federal Aviation Administration (FAA) denied a gay air traffic controller a promotion based on his sexual orientation. Although the FAA dismissed the complaint as being untimely and did not address the merits of the claim, it advised the claimant he could process the claim as a grievance under the FAA's internal procedures concerning sexual orientation discrimination. The claimant elected instead to appeal that ruling to the EEOC, which concluded the complaint was timely. It also held that "sexual orientation is inherently a 'sex-based

consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Baldwin v. Foxx, 2015 EEOPUB LEXIS 1905 at *13 (EEOC July 16, 2015). The EEOC remanded the complaint back to the FAA "for further processing for a determination on the merits." Id. at *30.

42. Petitioners rely on sexual orientation as the sole basis for discrimination. No FCHR or state court decision holds that a sexual orientation claim is actionable under chapter 760. Without controlling authority from the Eleventh Circuit, the question of whether sexual orientation discrimination claims are cognizable under federal law is "an open one." Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. Oct. 29, 2015). Federal trial courts in this circuit have answered the "open" question in different ways. See, e.g., Mowery v. Escambia Cnty. Utils. Auth., 2006 U.S. Dist. LEXIS 5304 at *23 (N.D. Fla. Feb. 10, 2006)("Title VII permits no cause of action when the alleged harassment is based solely on one's sexual orientation or perceived sexual orientation"); Evans v. Ga. Reg'l Hosp., 2015 U.S. Dist. LEXIS 120618 at *3-4 (S.D. Ga. Sept. 10, 2015)("Although the Eleventh Circuit has not addressed this issue, every court that has done so has found that Title VII was not intended to cover discrimination against homosexuals."); Burrows v. Coll. of Cent. Fla., 2015 U.S. Dist.

LEXIS 64897 at *26 (M.D. Fla. July 13, 2015)("Plaintiff's claim, although cast as a claim for gender stereotype discrimination, is merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII."); Rodriguez v. Alpha Inst. of S. Fla., Inc., 2011 U.S. Dist. LEXIS 124584 at *15-16 (S.D. Fla. Oct. 27, 2011)(where the vast majority of comments made to plaintiff pertained to his sexual orientation, they cannot form the basis of a Title IX claim); Thomas v. Osegueda, 2015 U.S. Dist. LEXIS 77627 at *12-13 (N.D. Ala. Sept. 16, 2015)(allegations of discrimination based on sexual orientation, and not gender non-conformity, are outside the scope of the Fair Housing Act's sex discrimination protection). On the other hand, in denying a motion to dismiss an allegation of perceived discrimination based on sexual orientation, one trial court recently acknowledged that the law was "in a state of flux," and concluded that the view that "discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination -- is persuasive to this Court." Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'r, 2016 U.S. Dist. LEXIS 80036 at *26 (N.D. Fla. June 20, 2016).

43. As the Seventh Circuit Court of Appeals succinctly put it, "[p]erhaps the writing is on the wall" to reconsider legal precedent and expand the meaning of sex discrimination, but

"[u]ntil the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent." Hively v. Ivy Tech Cmty. Coll., 2016 U.S. App. LEXIS 13746 at *55 (7th Cir. July 28, 2016). Here, absent any "writing on the wall," until the Eleventh Circuit, Supreme Court, or a Florida state court holds otherwise, or new legislation is enacted, the undersigned will follow prior precedent which holds that a discrimination claim based on sexual orientation is not actionable under chapter 760.[3/] Therefore, the Petition for Relief should be dismissed, with prejudice.

44. Although it is unnecessary to reach the second issue, by statute, only those acts occurring within one year preceding the filing of a complaint can be considered. See § 760.32(2), Fla. Stat. ("[a] complaint under [this section] must be filed within 1 year after the alleged discriminatory housing practice occurred"). See also Plaisime v. Marriott Key Largo Resort, Case No. 02-2183 (Fla. DOAH Feb. 14, 2003; FCHR Nov. 21, 2003) ("the Commission is without jurisdiction to find that events occurring outside of the 365-day filing period are 'actionable' unlawful employment practices"), aff'd, 876 So. 2d 1211 (Fla. 3d DCA 2004). Compare § 42 U.S.C. 3610 (§ 810) (an aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file

a complaint with the Secretary alleging such discriminatory housing practice. If the 365-day period has lapsed, agency has no jurisdiction.).

45. Petitioners argue, however, that under the "continuing violation" doctrine, acts outside the one-year jurisdictional period may be considered when there is a fixed and continuing practice of unlawful acts both before and during the limitations period. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1981). Under this theory, the plaintiff must show that an illicit act did not occur just once, but rather in a series of separate acts. But the evidence does not show that unlawful acts by Board members or employees were fixed and continuing both before and during the limitation period. Even accepting the premise that the four-month exchange between Haven and Austin occurred once a week during the wee hours of the morning while Haven was on duty, there is no credible evidence that a string of unlawful acts occurred before the limitation period.

46. The facts of this case do not support a conclusion that the Association or its employees engaged in a policy and practice of discrimination prior to and during the limitation period. The doctrine does not apply, and even if a sexual orientation complaint were actionable, which it is not, only those actions occurring within one year before the Complaints were filed could be considered.

47. In their PRO, Petitioners appear to contend that they are entitled to relief because the Association created a hostile housing environment that interfered with the use and enjoyment of their home. They essentially argue that the Association tolerated and ratified harassment motivated by discriminatory animus and failed to stop it. But the Eleventh Circuit has not recognized a cause of action under the federal Fair Housing Act for a hostile housing environment. See, e.g., Lawrence v. Courtyards at Deerwood Ass'n, Inc., 318 F. Supp. 2d 1133, 1146 (S.D. Fla. 2004). There is no cause of action under chapter 760 on the facts presented.

48. Even assuming that sexual orientation were actionable under chapter 760, Petitioners claim must be denied. To establish a prima facie case for a violation of section 760.23(2), Petitioners must show that: (1) they are an aggrieved party; (2) they suffered an injury because of the alleged discrimination; and (3) based on the alleged discrimination, they were denied provision of services protected by the Fair Housing Act that were available to other homeowners. See, e.g., Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1232 (S.D. Fla. 2005).

49. Petitioners failed to establish a prima facie case of discrimination under section 760.23(2). While not clearly alleged, the grounds for this claim appear to be three-fold.

First, Tomayko attempted to play pinochle with a group she had previously played with, but the card game was moved to a different location without notifying her. Second, Petitioners contend that the Board denied them a service by failing to conduct its own investigation of the cross burning, rather than relying on law enforcement. Third, Petitioners argue that the Association should have taken steps to prevent or curtail the hostility exhibited by other residents after the property dispute arose. On all three charges, which amount to no more than neighbor-to-neighbor disputes, Petitioners failed to adduce evidence of a prima facie case.

50. To establish a prima facie case of discrimination under section 760.37, Petitioners must show that because of discriminatory animus the Board or its employees coerced, intimidated, threatened, or interfered with: (a) their exercise of a right under the law; (b) their enjoyment of a housing right after exercise of that right; or (c) their aid or encouragement to a protected person to exercise or enjoy a housing right. Lawrence, 318 F. Supp. 2d at 1143-44. As to this charge, Petitioners failed to adduce evidence of a prima facie case.

51. Finally, while the Association acknowledges that the Fair Housing Act does not directly speak to whether a prevailing respondent is entitled to reimbursement of reasonable attorney's fees and costs, it points out that federal law allows such

reimbursement. Accordingly, it requests that it be reimbursed for these fees and costs. The undersigned will defer this issue to the FCHR. Cf. § 760.11(7), Fla. Stat.

52. Given the foregoing considerations, the Petition for Relief should be dismissed, with prejudice.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing, with prejudice, the Petition for Relief.

DONE AND ENTERED this 15th day of September, 2016, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of September, 2016.

ENDNOTES

[1/] At hearing, Tomayko testified that the statement was made in December 2014, or within the limitation period. However, witness Park testified that Braden made the statement about two weeks after the new home was moved into the community. Tr. at 91. Petitioners' PRO also uses the March 2014 date.

[2/] Under the MRTA, the covenants and restrictions governing residential homeowners' associations, including Respondent, expire after a period of 30 years unless the association takes steps to preserve those covenants and restrictions prior to the end of the 30-year period. Once expired, the association, through a member vote, must "revitalize" the governing documents under a process described in chapter 720. In this case, the community apparently failed to act within the 30-year time period, and its restrictions expired. Accordingly, a revitalization effort was undertaken by the Association and remains pending at this time.

[3/] In its investigative report, the FCHR also took the position that a claim based on sexual orientation was not actionable under chapter 760. It further concluded that incidents occurring more than a year before the Complaints were filed were time-barred. See Resp. Ex. 36.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.