

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOURDES ALMONTE,

Petitioner,

vs.

Case No. 18-2531

SCOTTISH HIGHLANDS CONDOMINIUM
ASSOCIATION, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH"), in Tavares, Florida, on September 27, 2018.

APPEARANCES

For Petitioner: Lourdes Almonte, pro se
1501 New Abbey Avenue
Leesburg, Florida 34788

For Respondent: James Edgar Olsen, Esquire
Wean & Malchow, P.A.
646 East Colonial Drive
Orlando, Florida 32803

STATEMENT OF THE ISSUE

The issue is whether Respondent violated the Florida Fair Housing Act ("the Act") by failing to provide Petitioner with a reasonable accommodation.

PRELIMINARY STATEMENT

Petitioner, Lourdes Almonte, filed a complaint with the Florida Commission on Human Relations ("the Commission") on August 31, 2017, alleging that Respondent, Scottish Highlands Condominium Association, Inc. ("the Association"), committed an act of discrimination by failing to provide her with a reasonable accommodation. Based on the information provided by Ms. Almonte, the Commission described her complaint as follows:

Complainant Lourdes Almonte possesses a physical and mental disability. Therefore, [Ms. Almonte] belongs to a class of persons whom the Fair Housing Act ("the Act") protects from unlawful discrimination by virtue of disability. [Ms. Almonte] owns a home . . . which is subject to the rules and regulations of SCOTTISH HIGHLANDS CONDOMINIUM ASSOCIATION, INC.

[Ms. Almonte] alleged [that] on September 29, 2016 she was denied reasonable accommodation for her garden bed trellises. [Ms. Almonte] alleged she installed a raised garden bed and trellises along the side of her home. [Ms. Almonte] alleged she received a violation notice from [the Association] stating she needs to remove the garden beds and trellises or they would remove it. [Ms. Almonte] alleged she had medical documentation stating her need for the garden bed and trellises and when she attempted to contact [the Association] regarding her garden bed and trellises but [sic] they didn't want to meet with her and turned her away. [Ms. Almonte] alleged she possesses a physical disability that doesn't allow her to do ground gardening. As such, [Ms. Almonte] alleged because [the Association] failed to provide reasonable accommodation that [Ms. Almonte] has been subjected to

discriminatory [treatment] based [on] her disability.

The Commission conducted an investigation and issued a determination on April 19, 2018, concluding there was no reasonable cause to conclude that the Association violated the Act. While finding that Ms. Almonte is disabled within the meaning of the Act, the Commission also found that she had not satisfied all of the requirements to maintain a claim because she had not requested a reasonable accommodation from the Association.

Ms. Almonte responded by filing a Petition for Relief with the Commission on May 15, 2018.

The Commission transmitted the Petition for Relief to DOAH on May 16, 2018, in order for DOAH to conduct a formal administrative hearing.

The undersigned scheduled the final hearing to occur in Tavares, Florida, on July 23, 2018. After receiving separate communications from both parties indicating they wanted a continuance to explore a potential settlement, the undersigned issued an Order on July 31, 2018, rescheduling the final hearing for September 27, 2018.

The final hearing was commenced as scheduled on September 27, 2018. Ms. Almonte offered the following exhibits that were accepted into evidence: 1 through 7 and 11 through 15.

Ms. Almonte's Exhibits 8 through 10 were deemed irrelevant because they described events that occurred after Ms. Almonte filed her complaint. Ms. Almonte testified on her own behalf and did not call any witnesses.

Respondent's Exhibits 1 through 10 were accepted into evidence. The Association presented the testimony of Fred Almonte and Lanny Greene, the Association's property manager.

The Transcript from the final hearing was filed on October 22, 2018. Only the Association filed a proposed recommended order, and that proposed recommended order was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The following Findings of Fact are based on the oral and documentary evidence adduced at the final hearing, matters subject to official recognition, and the entire record in this proceeding.

1. Scottish Highlands is a deed-restricted community in Leesburg, Florida. The Association is responsible for the daily operations and management of Scottish Highlands.

2. Since at least February 16, 2015, Scottish Highlands' bylaws have provided that "[f]ences and/or continuous hedges are not permitted except along the perimeter of Association property. Approved fencing shall be of pressure treated pine 'shadow box,' not exceeding six (6) feet in height."

3. The Association's governing documents also require that "[a]ny and all improvements, alterations, or additions to units by parcel owners" must be reviewed by an architectural review committee. The architectural review committee then recommends to the Board of Directors whether the proposed improvement, addition, or alteration should be allowed. The Board of Directors, within 60 days after the parcel owner's initial request, approves or disapproves the proposal.

4. Ms. Almonte and her husband moved into Scottish Highlands in May of 2010.

5. In 2013, Ms. Almonte was diagnosed with fibromyalgia.

6. Ms. Almonte described her experience with fibromyalgia as follows:

The exact cause of fibromyalgia is not known. Symptoms include widespread pain, fatigue, cognitive difficulties, and migraine headaches. Treatments include medication and lifestyle changes. Many people describe fibromyalgia as feeling like a persistent flu.

I discovered self-care was one of my best options, by exercising regularly, by gardening, using raised bed planters, because I can't do ground level gardening because of my hips, back, and knees. I have had a hip replacement and have broken my knee. Reducing emotional and mental stress by using techniques such as meditation, relaxation, and aromatherapy in my herb garden. By eating a balanced diet, by growing my own organic vegetables, fruits, and herbs [sic].

I see a psychologist, a psychiatrist, a rheumatologist, and my primary care physician on a regular basis. When I have severe flare-ups, I am homebound for days.

7. Stressful situations exacerbate her conditions.

8. The Social Security Administration ruled on May 5, 2016, that Ms. Almonte is disabled.

9. While there was no testimony or documentation describing why the Social Security Administration determined that Ms. Almonte was disabled, an October 14, 2016, letter from Dr. Eleanor Davina of Adult Medicine of Lake County, Inc., states that "due to underlying medical conditions, Ms. Lourdes is unable to do ground level yard work to include gardening or weeding, unless she has raised garden beds."^{1/}

10. It is not surprising that Ms. Almonte uses gardening to mitigate the symptoms of fibromyalgia. Ms. Almonte has over 25 years of experience with gardening. She has been a certified Florida master gardener and a member of the Florida Nursery Growers and Landscape Association. Ms. Almonte is also a founding member of the Scottish Highlands Garden Club.

11. On approximately July 1, 2016, the Almontes paid \$2,850 for 12 planter beds that were placed in their backyard. Each bed is made from pressure-treated lumber and is two feet high and six feet long. Recent photographs indicate that several of the beds include lattices that are considerably higher than the beds

themselves. Initially, Ms. Almonte used 10 of the beds for gardening and the remaining two as a work bench. Depending on what she is growing at any particular time, Ms. Almonte typically has six of the beds in use.

12. Soon after placing the planter beds in their backyard, the Almontes received at least one letter from the Association ordering their removal. Rather than contacting the Association and explaining that the planter beds were part of Ms. Almonte's treatment, the Almontes hired an attorney.

13. Via a letter dated July 28, 2016, the Association invited the Almontes to address the Board of Directors at the Board's next public meeting on September 20, 2016. However, the Association barred the Almontes from bringing their attorney unless they provided a 10-day advance notice that they were doing so.

14. Ms. Almonte declined the Association's invitation because she did not want to discuss her health issues in public.

15. On August 4, 2016, the Association received a "Trespass Warning" from the Almontes stating that it was not "authorized, permitted, or invited to enter or remain on" their property. The Trespass Warning also stated that the Almontes would pursue criminal charges through the Lake County Sheriff's Office if the Association disregarded the warning.

16. On September 26, 2016, the Association filed a Petition for Mandatory Non-Binding Arbitration with the Florida Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes.^{2/}

17. The Almonte's Answer to the Petition stated the following:

The Almontes did not "construct" large wooden planter boxes with 4X8 lattice panels and bamboo curtains. At significant expense, the Almontes hired a professional carpenter to construct several portable wooden planter boxes. The pre-constructed planter boxes were then transported to the Almontes property and situated on their back-yard patio.

Mrs. Almonte is medically disabled and has been diagnosed with an anxiety disorder. Mrs. Almonte is a master gardener who has worked in the gardening industry for over 30 years. Based on her disability and her background, Mrs. Almonte's medical doctor recommend[ed] Mrs. Almonte continue gardening to get physical exercise and to help her relieve the unbearable stress she deals with while coping with her physical and mental disability. Since Mrs. Almonte is no longer able to continuously bend or stoop to the ground to tend to a garden grown on the ground, it was recommended that Mrs. Almonte utilize raised bed gardens to accommodate her disability. Mrs. Almonte's psychologist agrees with her medical doctor's recommendation to utilize gardening as a means to cope with and mitigate the symptoms associated with her disability.

The portable planter boxes are not positioned in a straight line and do not have the appearance of a fence or a continuous hedge. Instead, they are positioned and repositioned

on the patio according to the type of plant growing in a particular planter and the time of year. As plants mature and the weather changes, the planter boxes are repositioned on the patio to where the plants can thrive. Planter boxes with plants that require their growth to be supported are equipped with wood lattice panels until the growth has died or the plants are harvested. There are no "bamboo curtains" on the Almontes' property. They did, at one time, have a single bamboo curtain screening part of their property from their neighbor's property. However, that curtain has long since been removed.

The planter boxes were professionally constructed of pressure treated pine. Many members of the community have commented on how beautiful the planters (and plants) are and how they add beauty to the community. The Almontes' neighbor even wrote a letter stating that she thought the planter boxes are beautiful and aesthetically pleasing to view.

As stated above, the planter boxes do not constitute a fence or a continuous hedge. However, if said planter boxes were considered a fence or a hedge, which they are not, fences, raised planter boxes, and continuous hedges already exist throughout the community.

* * *

Under the governing documents, the Almontes are not required to seek approval from the Board of Directors because their planter boxes are not an improvement, alteration or addition to their unit. An "improvement" to real property is synonymous with a "fixture" to real property. Fixtures are typically affixed to the land and become part of the real property. Alterations alter the land in some way. And additions are typically fixtures that are added to the real property that become part of the land. Here, the

planter boxes are not affixed to the real property in any way. In fact, the planter boxes are regularly moved about the Almontes' back patio depending on the growing season. Therefore, the planter boxes are not an improvement, alteration, or addition to the real property. Accordingly, the Almontes were not required to seek approval to bring in the planter boxes.^[3/]

18. On November 16, 2016, Ms. Almonte filed a complaint with the Department of Housing and Urban Development ("HUD"), and the complaint was ultimately referred to the Commission.

Ultimate Findings

19. The unrebutted evidence demonstrates that Ms. Almonte's major life activities of bending, stooping, kneeling, and rising from one's knees have been substantially limited. Therefore, the undersigned finds that Ms. Almonte proved by a preponderance of the evidence that she is disabled within the meaning of the Act.

20. While there is insufficient evidence to support a finding that Ms. Almonte expressly requested a reasonable accommodation from the Association prior to her complaint being received by HUD and the Commission,^{4/} the Almonte's Answer to the Association's Petition for Arbitration was sufficient to demonstrate by a preponderance of the evidence that the Association was on notice that Ms. Almonte wanted a reasonable accommodation.

21. The preponderance of the evidence demonstrates that:
(a) the planter beds were a reasonable accommodation; and

(b) those planter beds were necessary to afford Ms. Almonte an opportunity to use and enjoy her home in Scottish Highlands. The planter beds were a reasonable accommodation because they cost the Association nothing and did not materially impact any of the other residents. The planter beds were a necessary accommodation because they were an important aspect of Ms. Almonte's efforts to mitigate the effects of fibromyalgia.

22. There is no dispute that the Association objected to Ms. Almonte having the planter beds in her backyard.

23. The Association has not articulated a legitimate, non-discriminatory reason for withholding approval of the planter beds.

CONCLUSIONS OF LAW

24. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017).^{5/}

25. The Act is codified in sections 760.20 through 760.37, Florida Statutes, and prohibits discriminatory housing practices. A "discriminatory housing practice" means an act that is unlawful pursuant to section 760.23(2), (8) and (9).

26. Section 760.23(8) and (9) provides:

(8) 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 with such dwelling, because of a handicap of:

(a) That buyer or renter;

(b) A person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

(c) Any person associated with the buyer or renter.

(9) For purposes of subsections (7) and (8), discrimination includes:

* * *

(b) A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

27. A complaint under the Act "must be filed within 1 year after the alleged discriminatory housing practice occurred." While the complaint must be in writing and state the allegations that supposedly amount to a discriminatory housing practice, "[a] complaint may be reasonably and fairly amended at any time." § 760.34, Fla. Stat.

28. The Act is patterned after the Federal Fair Housing Act ("the FHA"). Federal court decisions interpreting the FHA provide guidance in determining whether a violation of the Act has occurred. Dornbach v. Holley, 854 So. 2d 211, 213 (Fla. 2d DCA 2002); Solodar v. Old Port Cove Lake Point Tower Condo. Ass'n, 2013 U.S. Dist. LEXIS 104996, *25 n.7 (S.D. Fla. 2013).

29. A petitioner has the burden of proving by a preponderance of the evidence that a respondent violated the Act by failing to provide a reasonable accommodation for the petitioner's disability. U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990).

30. In evaluating fair housing, reasonable accommodation claims, courts apply the burden-shifting analysis developed in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this approach, a petitioner must first establish a prima facie case of discrimination. If the petitioner is successful in doing so, then the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its action.

31. If the respondent satisfies its burden, the petitioner must then prove that the legitimate reasons asserted by the respondent are a mere pretext for discrimination. Secretary, HUD on behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990); Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1231 (S.D. Fla. 2005); Vassar v. Gulfbelt Props., L.L.C., 2011 U.S. Dist. LEXIS 36241, *8-11 (S.D. Ala. 2011).

32. To establish a prima facie case of failure to provide a reasonable accommodation under the FHA, a petitioner must demonstrate that: (1) he or she is disabled within the meaning

of the FHA; (2) a reasonable accommodation was requested; (3) that such accommodation was necessary to afford him or her an opportunity to use and enjoy the dwelling; and (4) the respondent refused to make the requested accommodation. Bhogaita v. Altamonte Heights Condo. Ass'n, 765 F.3d 1277, 1285 (11th Cir. 2014).

Ms. Almonte Is "Handicapped" Within the Meaning of the Act

33. With regard to the first element of a prima facie case, a person has a disability within the meaning of the FHA if he or she has "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h). The Act has similar language.

34. Neither the FHA nor the Act defines the term "major life activity." However, the Americans With Disabilities Act's ("the ADA") definition of "disability" is virtually identical to the FHA's definition of "handicap," and the ADA expressly defines the term "major life activities." Because Congress intended for the terms "handicap" and "disability" in the FHA and the ADA to be interpreted similarly, the ADA's definition of major life activities is instructive in assessing the meaning of "major life activities" in the FHA. See McManus v. Cherry, 2010 U.S. Dist. LEXIS 140300, *12 (N.D. Fla. 2010) (noting that the definition of "handicap" in the FHA "is virtually identical to that used in the Americans with Disabilities Act, (ADA), 42 U.S.C. § 12102, and it

was the intent of Congress that these provisions be interpreted similarly.”).

35. Title 42 U.S.C. § 12102(2) provides that “major life activities” include, but are not limited to, the following: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

36. In the instant case, the Association attempts to frame the legal issue between the parties as whether gardening, as a matter of law, is a major life activity within the meaning of the FHA.

37. However, gardening is not the major life activity at issue. The testimony and evidence demonstrate that gardening is merely a method Ms. Almonte uses to cope with fibromyalgia. The testimony and evidence further demonstrate that Ms. Almonte is unable to engage in ground-level gardening due to the condition of her hip, back, and knee. As noted above, Ms. Almonte has broken her knee and had one hip replaced. In addition, an October 14, 2016, letter from Dr. Eleanor Davina of Adult Medicine of Lake County, Inc., states that “due to underlying medical conditions, Ms. Lourdes is unable to do ground level yard work to include gardening or weeding, unless she has raised garden beds.” Also, the symptoms of fibromyalgia, such as

chronic pain and fatigue, would exacerbate Ms. Almonte's difficulties performing ground-level gardening. Therefore, rather than gardening, the major life activities at issue in the instant case are those that would enable one to perform ground-level gardening, and those activities include bending, stooping, kneeling, and rising from one's knees, i.e., standing.

38. The analysis then turns to whether Ms. Almonte's major life activities of bending, stooping, kneeling, and rising from one's knees have been substantially limited.

39. Title 29 C.F.R. § 1630.2 is among the regulations that implement the ADA, and it sets forth extensive guidance regarding how to construe the term "substantially limits," and that guidance expressly states that the term "shall be construed broadly in favor of expansive coverage" 29 C.F.R. § 1630.2(j)(1)(i).

40. For instance, 29 C.F.R. § 1630.2(j)(1)(ii) provides that "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."

41. Title 29 C.F.R. § 1630(2)(j)(1)(iii) states that:

[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue

of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

42. Title 29 C.F.R. § 1630(2)(j)(3)(ii) provides that:

Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

43. Considering the guidance in 29 C.F.R. § 1630.2 and the un rebutted evidence presented at the final hearing, the undersigned finds that Ms. Almonte has satisfied the first element of a prima facie case for being a disabled person within the meaning of the FHA because she has a physical or mental impairment which substantially limits one or more of her major life activities.

Ms. Almonte Requested a Reasonable Accommodation

44. The Almonte's Answer to the Association's Petition for Arbitration was sufficient to put the Association on notice that Ms. Almonte wanted a reasonable accommodation. The pleading stated that Ms. Almonte "is medically disabled and has been

diagnosed with an anxiety disorder.” It also stated that Ms. Almonte’s physician recommended that she continue gardening to “relieve the unbearable stress she deals with while coping with her physical and mental disability.”

45. While the pleading did not use the term “reasonable accommodation,” the circumstances of the instant case put the Association on notice that Ms. Almonte was seeking one. See Hunt v. Aimco Props., L.P., 814 F.3d 1213, 1226 (11th Cir. 2016) (noting that “a plaintiff can be said to have made a request for accommodation when the defendant has enough information to know of both the disability and desire for an accommodation. We agree with the Third Circuit that circumstances must at least be sufficient to cause a reasonable housing provider to make appropriate inquiries about the possible need for an accommodation.”) (internal citations omitted); U.S. v. Hialeah Hous. Auth., 418 Fed. Appx. 872, 877 (11th Cir. 2011) (concluding that “at least the statements made during the court-ordered mediation are sufficient to allow a reasonable jury to find that Mr. Rodriguez made a specific demand for an accommodation.”); Nazarova v. Hillcrest E. No. 22, Inc., 2018 U.S. Dist. LEXIS 111990, *12 (S.D. Fla. 2018) (stating that “[f]or a demand to be specific enough to trigger the duty to provide a reasonable accommodation, the defendant must have enough information to know of both the disability and desire for an accommodation, or

circumstances must at least be sufficient to cause a reasonable landlord to make appropriate inquiries about the possible need for an accommodation."); Ely v. Mobile Hous. Bd., 2014 U.S. Dist. LEXIS 64250 n.7 (S.D. Ala. 2014) (noting that a request for a reasonable accommodation does not have to utilize "magic words").

The Planter Beds Were Reasonable and Necessary to Allow Ms. Almonte to Enjoy Her Home

46. "A reasonable accommodation is one that is both efficacious and proportional to the costs to implement it. A necessary accommodation is one that is directly linked to the equal opportunity to be provided to the disabled person" Costello v. Johnson, 2011 U.S. Dist. LEXIS 96752, *10 (E.D. Va. 2011) (internal citations omitted).

47. The preponderance of the evidence demonstrated that the planter beds were a reasonable and necessary accommodation.

The Association Refused to Allow Ms. Almonte to Have the Planter Beds

48. There is no dispute that the Association does not approve of the planter beds. Also, the Association did not articulate a legitimate, non-discriminatory reason for not approving the planter beds.

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 finding that Scottish Highlands

Condominium Association, Inc., violated the Florida Fair Housing Act by failing to provide Lourdes Almonte with a reasonable accommodation, and requiring Scottish Highlands Condominium Association, Inc., to provide Ms. Almonte with a reasonable accommodation.

DONE AND ENTERED this 26th day of November, 2018, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2018.

ENDNOTES

^{1/} The May 5, 2016, ruling from the Social Security Administration and the letter from Dr. Davina are hearsay, but they supplement or corroborate Ms. Almonte's testimony. Therefore, they were admissible. See § 120.57(1)(c), Fla. Stat. (2018) (providing that "[h]earsay 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 unless it would be admissible over objection in civil actions.").

^{2/} Section 718.1255, Florida Statutes (2018), establishes an alternative dispute resolution process for resolving disputes between condominium owners and condominium associations.

^{3/} The record does not describe the outcome of the arbitration proceeding.

^{4/} According to Ms. Almonte, the attorney wrote a letter to the Association giving notice of her condition and requesting a reasonable accommodation. However, Ms. Almonte did not attempt to move a copy of that letter into evidence, and her testimony regarding the letter's content lacked any meaningful detail. Therefore, the undersigned does not find that the letter provided the Association with notice of Ms. Almonte's condition or of her desire for a reasonable accommodation.

^{5/} Unless stated otherwise, all statutory citations will be to the 2017 version of the Florida Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.