

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBORAH FIELDING,

Petitioner,

vs.

Case No. 18-5827

PRESERVATION OF AFFORDABLE
HOUSING, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge Hetal Desai of the Division of Administrative Hearings held a final hearing in this matter in Sebastian, Florida, on February 8, 2019.

APPEARANCES

For Petitioner: Deborah Fielding, pro se
Apartment 302
615 East New Haven Avenue
Melbourne, Florida 32901

For Respondent: Brian C. Costa, Esquire
Alvarez Feltman Da Silva
Suite 1100
2121 Ponce de Leon Boulevard
Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

Whether Respondent discriminated and retaliated against Petitioner because of her disability, in violation of the Florida Fair Housing Act; and, if so, the relief to which Petitioner is entitled. More specifically, the issues raised in this case are:

(1) whether Respondent refused to accommodate Petitioner's disability; and (2) whether Petitioner should be exempt from mandatory meal plan payments as a reasonable accommodation for her Crohn's disease.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination on October 26, 2017 (Charge), with the U.S. Department of Housing and Urban Development alleging Preservation of Affordable Housing, LLC (POAH) had violated the federal Fair Housing Act (FHA). Petitioner specifically alleged Respondent discriminated against her because it failed to exempt her from a mandatory meal plan. The Charge was forwarded to the Florida Commission on Human Relations (Commission), and treated as a complaint under the Florida Fair Housing Act (Florida FHA), pursuant to sections 760.20 to 760.37, Florida Statutes (2018).^{1/}

Petitioner received a "Notice of Determination of No Cause" issued by the Commission on October 2, 2018, finding there was no reasonable cause to believe Respondent had committed a discriminatory housing practice against her and that it attempted to accommodate her by offering her a special diet of foods Petitioner stated she could eat, but Petitioner refused.

On November 5, 2018, Petitioner filed a Petition for Relief with the Commission, which was transmitted to the Division of

Administrative Hearings (DOAH) and assigned to an administrative law judge to conduct a de novo hearing.

After one continuance, a pre-hearing teleconference was held on February 4, 2019. During that hearing the parties discussed the sequence of presentations, the burdens of proof, evidentiary issues, and other practical matters relating to the final hearing. The parties were instructed they must exchange exhibits prior to the hearing.

The final hearing was held on February 8, 2019. Petitioner testified on her own behalf and presented the testimony of C.J. Miles. Petitioner's Exhibits P1 through P5 were admitted into evidence. Respondent presented the testimony of three POAH employees: Mona Wadsworth, Brenda Hernandez, and Lisa Walsh. Respondent's Exhibits R1 through R13 were also admitted into evidence. The undersigned took official recognition of Section 4350.1, Rev-1, Chapter 31, Mandatory Meals, of the U.S. Housing and Urban Development Handbook (1992) (HUD Handbook).

No transcript was prepared or ordered. The parties were advised of a ten-day timeframe following the hearing to file post-hearing submittals. The undersigned considered Respondent's proposed recommended order (PRO) submitted on February 18, 2019, in preparation of this Recommended Order; Petitioner's PRO was untimely, but because there was no objection filed, it has been considered.

FINDINGS OF FACT

1. Petitioner, Deborah Fielding, resides in Trinity Towers South (TTS), located at 615 East New Haven Avenue in Melbourne, Florida.

2. Respondent, POAH, owns and operates low-income senior housing programs authorized and regulated by the United States Department of Housing and Urban Development (HUD). POAH operates these housing projects around the state, including TTS, Trinity Towers East, and Trinity Towers West.

3. TTS, Trinity Towers East, and Trinity Towers West operate as separate housing projects. Each has a separate manager, separate application process, and separate waiting lists.

4. TTS is made up of 162 units. Each unit has a kitchen with refrigerator and stove-top, but no oven. There is a common dining hall where residents are served meals through a mandatory meal plan. Trinity Towers East and Trinity Towers West do not have the mandatory meal plan.

5. TTS has operated as a low-income housing community that includes a mandatory meal plan since prior to 1987.^{2/} Participation in the meal plan is required by all TTS residents in order to live and receive a housing subsidy at TTS.

6. The Mandatory Meal Program and payments are regulated by HUD guidelines, and the meals prepared by TTS must comply with state guidelines for food preparation and health standards.

7. Prior to moving into TTS, Petitioner executed an acknowledgment form that she understood the meal plan was mandatory to live at TTS. That form states:

Mandatory Meal Program:

Trinity Towers South has a Mandatory Meal Program. Lunch is served 7 days a week in our dining room. Every day you receive soup, salad, choice of entrée, a starch, and a choice of vegetable, choice of fruit or dessert and drinks for \$5.00 per day. This is a mandatory program, participation is a requirement to live and receive subsidy at this community. Please take this into consideration before applying.

8. On May 16, 2016, Petitioner signed a lease which included an addendum titled "Meals Agreement." That agreement states in relevant part:

A Resident may be exempt from the program for reasons such as outside employment that requires absence from the project during the time period that the meals are served, absence from the project for one or more weeks for hospital care, temporary nursing home care, or vacation. Resident is required to provide advance notice of at least 7 days, except for hospital emergencies.

Exemptions will be granted for a medical conditions [sic] that requires a special diet. If the Resident requires a special diet, management will either provide a special diet or grant an exemption upon receipt of a written request from the

Resident, and verification from the physician and the Resident requires a special diet for medical reasons and description of the special diet. The required forms for this accommodation are available at the management office. Any exemptions will be approved only after review by the Regional Property Supervisor of the community. (emphasis added).

9. POAH has not exempted any resident from the mandatory meal plan, although they have credited residents who have missed more than seven days because of hospitalization.

10. Approximately a year before she applied to live at TTS, Petitioner was diagnosed with Crohn's disease, a digestive disorder that causes abdominal pain, severe diarrhea, fatigue, and weight loss.

11. Prior to moving into TTS, Petitioner had been hospitalized 22 times.

12. To control her Crohn's disease, Petitioner must keep a food diary documenting everything she eats and must know exactly what ingredients are in all the food she is eating. The longer she has had the disease and kept track of her food intake, the more aware she has become of what foods and food combinations "trigger" a Crohn's attack. She also has found that some foods may cause symptoms on certain days, but not on others depending on variations in brands or timing.

13. Petitioner convincingly testified that eating food prepared by TTS exacerbated her diagnosed condition and caused

her to be so ill she was hospitalized. In the two months after moving into TTS and eating in the dining hall, Petitioner was hospitalized twice for symptoms related to her Crohn's disease.

14. In September 2016, Petitioner asked to be exempt from the mandatory meal program and to not be required to pay the \$5 a day fee. She submitted to TTS an undated note from her treating physician, Dr. John C. Turse, M.D., which indicated she "needs to be on a special diet. Please exempt her from the food program at your facility. Please call my office with any questions." The doctor did not describe the special diet or provide a list of foods Petitioner could eat.

15. On September 19, 2016, the TTS Property Manager denied Petitioner's request to be exempt from the meal plan, but offered instead a willingness to work with Petitioner to provide her with a special diet of foods that were acceptable to her.

16. Subsequently, TTS staff met with Petitioner and eventually Petitioner submitted a list of foods she could eat. Based on this list the TTS Executive Chef created a menu for the week of September 26 through October 2, 2016, consisting of items that were on that list of acceptable foods that Petitioner had submitted.

17. There was no evidence Petitioner got sick from eating the special diet TTS had prepared. Nonetheless, Petitioner found the meals inedible, unappealing, and unappetizing. Although she

tried the special meals for two days, she did not eat the specially prepared meals for the rest of the week. Since then, she has not eaten in the TTS dining hall and has prepared her own meals.

18. Petitioner has not been hospitalized for a Crohn's attack for the past two years since she stopped eating in the TTS dining hall.

19. Eventually, Petitioner stopped paying her monthly meal plan payments. Petitioner has not paid because it is a financial hardship for her to pay the monthly meal plan amounts and pay for her groceries.

20. Not all residents of TTS utilize the mandatory meal plan every day. Those who do skip a meal, however, are not exempt from paying the \$5 a day meal plan fee.

21. Petitioner appealed TTS's denial of her request for an exemption from the meal plan to POAH. As a result, POAH set up a meeting with Petitioner in March 2017. After that meeting TTS requested that Petitioner meet with their newly hired Executive Chef, Lisa Walsh.

22. Petitioner testified that she did not want to meet with Ms. Walsh because she had already met with Ms. Walsh, who told her she would not have time to make special meals for her. Ms. Walsh's testimony was that she did not recall ever talking to Petitioner, but that she had discussed with TTS management that

they could offer Petitioner an ingredient list of all prepared meals, and work with Petitioner to ensure Petitioner's meals only contained the items that Petitioner has listed as acceptable.

23. Ms. Walsh explained the dining hall and meal plan offerings had changed since Petitioner originally moved to TTS. After being hired, Ms. Walsh changed the dining hall from a cafeteria style to a sit-down, restaurant-type dining experience, where the residents pay with meal tickets. The dining experience was also changed so that residents were given a number of options that varied every day, and regular items that were available every day.

24. Ms. Walsh's unrefuted testimony was that she prepares special diets for other residents based on their dietary needs. For example, her staff makes separate coleslaw for one of the residents that cannot or will not eat a certain seasoning found in the regular batch of coleslaw.

25. Ms. Walsh testified TTS has been willing and is still willing to meet with Petitioner on a regular basis to come up with food items she can eat.

26. Based on the demeanor of the witnesses and the documentation provided, the undersigned finds that Ms. Walsh and POAH staff did offer to work with Petitioner to create a special diet based on the information provided by Petitioner at the time.

27. Subsequent to meeting with Respondent and the Commission investigators regarding her appeal, Dr. Turse provided Petitioner two notes, which she never provided to POAH or TTS.^{3/} In those notes, Dr. Turse reiterated that Petitioner requires a strict diet and added for the first time more detail.

Petitioner has followed that diet strictly for the last 2 years and that has kept her from having flares, which has kept her out of the hospital. . . . It is in my medical opinion that she should prepare her own meals as she knows the exact ingredients that are used to cook her food and will not end up eating any food or foods that may contain any ingredients that will cause her to have a Crohn's flare.

This is consistent with the unrefuted testimony provided by Petitioner regarding her hospitalization history, the detailed journaling of her food intake, and preparation of her own meals.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 760.35(3) (b), Florida Statutes.

29. The Division of Administrative Hearings does not stand in an appellate capacity to review the Commission's determination of no cause, "but rather conducts a de novo proceeding and recommends final agency action to the Commission." Wergeles v.

Tregate East Condo Ass'n, Inc., Case No. 09-24042010 Fla. Div. Adm. Hear. LEXIS 1128, at *7 (FCHR June 24, 2010).

30. The Florida FHA makes it unlawful to discriminate against any disabled or handicapped person in connection with housing rental. See § 760.23(1), Fla. Stat. ("It is unlawful to refuse to sell or rent . . . or otherwise to make unavailable or deny a dwelling to any person because of . . . handicap.").

31. To prevail on a failure-to-accommodate claim, Petitioner must establish: (1) she is a person with a disability within the meaning of the Florida FHA; (2) she requested a reasonable accommodation for the disability; (3) the requested accommodation was necessary to afford her an opportunity to use and enjoy the dwelling; and (4) the defendant refused to make the accommodation. See Hunt v. Aimco Props., L.P., 814 F.3d 1213, 1225 (11th Cir. 2016); Bone v. Vill. Club, Inc., 223 F. Supp. 3d 1203, 1210-11 (M.D. Fla. 2016).^{4/}

32. Here, the parties stipulated to the first element--that Petitioner had a disability. Regarding the second element, there was sufficient evidence to find Petitioner requested an accommodation from POAH.

33. There was also evidence that it was necessary for Petitioner to be accommodated with a special diet. It is unclear, however, as POAH argued at the hearing, whether being exempt from the mandatory meal plan is necessary for Petitioner to use and

enjoy living at TTS. Both the FHA and the Florida FHA reasonable accommodation provisions require “only those accommodations that may be necessary . . . to afford equal opportunity to use and enjoy a dwelling.” Schaw v. Habitat for Human. of Citrus Cty., Inc., 272 F. Supp. 3d 1319, 1325 (M.D. Fla. 2017) (quoting Schwarz v. City of Treasure Island, 544 F.3d 1201, 1226 (11th Cir. 2008)).

34. In Schaw, the plaintiff was a quadriplegic who applied to receive a home from a Habitat for Humanity housing program. He sued under the FHA and Florida FHA after being denied housing because he did not meet the financial requirements for receiving special housing under this program. The court addressed a similar request that an accommodation was necessary because of the resident’s financial condition. In finding an exemption from the financial requirements was not a reasonable accommodation for his disability the court noted:

This is a novel issue to which the Eleventh Circuit has not spoken. But persuasive authority from other circuits supports each party’s position. Compare Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998); and Schanz v. Vill. Apartments, 998 F. Supp. 784 (E.D. Mich. 1998) (“[I]t is plaintiff’s financial situation which impedes him from renting an apartment at The Village, and it is plaintiff’s financial situation which he is requesting that defendants accommodate. The [Act] does not require that this be done.”); with Giebeler v. M & B Assocs., 343 F.3d 1143 (9th Cir. 2003) (reversing summary judgment

in favor of an apartment complex because the plaintiff's disability prevented him from being able to earn an income that allowed him to meet the minimum income requirement); and Fair Hous. Rights Ctr. in Se. Pennsylvania v. Morgan Properties Mgmt. Co., LLC, No. CV 16-4677, 2017 U.S. Dist. LEXIS 55249, 2017 WL 1326240 (E.D. Pa. Apr. 11, 2017) (holding that a landlord violated the FHA by not allowing an SSDI recipient to pay rent late, and explaining, "An SSDI recipient may need to be afforded preferential treatment in order to provide them with an equal opportunity to obtain housing.").

This Court is most persuaded with the reasoning of the Second Circuit in Salute, which parallels the holdings of the Eleventh Circuit in other FHA failure to accommodate cases. The Salute court reasoned that the FHA does not require accommodations for economic discrimination that is practiced without regard to disability. 136 F.3d at 301-02. This is similar to the Eleventh Circuit's reasoning in Schwarz that, "If accommodations go beyond addressing these needs and start addressing problems not caused by a person's handicap, then the handicapped person would receive not an 'equal,' but rather a better opportunity to use and enjoy a dwelling, a preference that the plain language of this statute cannot support."

* * *

Taken together, the Court concludes the law of this Circuit does not require accommodations for a disabled person's financial condition when those accommodations would not have been made for a non-disabled person.

Schaw, 272 F. Supp. 3d at 1326-27.

35. Here, unlike in Schaw, it is unclear from the evidence at the hearing whether a tenant who does not pay for the mandatory meal plan would still be eligible to receive the housing subsidy and placement at TTS. Exemptions to the meal plan, however, are required by the HUD Handbook and the Meals Agreement in limited circumstances, including the need for a special diet; exemptions are discretionary under other circumstances such as financial hardship.

31-6. MANDATORY EXEMPTIONS

An owner must grant an exemption if a tenant meets one of the following criteria. Any exemption granted to a tenant will remain valid as long as the tenant meets the condition(s) for which the exemption was originally granted.

* * *

Exemptions must be granted to tenants for the following reasons:

- a. A medical condition that requires a special diet. The owner must either provide the special diet or grant the tenant a medical exemption within ten working days upon the tenant's request and receipt of physician's documentation (if owner requests such documentation). The owner may require a physician to document the following before granting an exemption:
 - o A tenant requires a special diet for medical reasons, and
 - o A description of the special diet.

NOTE: If the owner decides to provide the special diet, it must be provided at no increased cost to the tenant.

* * *

31-7. DISCRETIONARY EXEMPTIONS.

An owner may grant a discretionary exemption to a tenant for the following reasons: dietary practices (e.g., religious-based dietary practice), financial hardship, or other good cause determined by the owner.

NOTE: An owner who does not provide an exemption for a religious-based dietary practice must offer an alternative menu that does not conflict with the tenant's religious dietary practice.

36. Because the Mandatory Meal Program and Meals Agreement provisions contemplate exemptions, Petitioner has established the third element that an exemption is a reasonable accommodation to allow her to live at TTS.

37. Finally, there is no evidence as to the last element: that POAH refused to accommodate Petitioner. Under the federal and state housing laws, a resident is not entitled to the accommodation of his or her choice, but is only entitled to a reasonable accommodation depending on specific circumstances. See Floyd v. City of Sanibel, 2017 U.S. Dist. LEXIS 158242 at *16-17 (citing Weiss v. 2100 Condo. Ass'n, Inc., 941 F. Supp. 2d 1337, 1343 (S.D. Fla. 2013)). Whether a requested accommodation is reasonable is "highly fact-specific, requiring a case-by-case

determination.” Loren v. Sasser, 309 F.3d 1296, 1302 (11th Cir. 2002) (quotation marks omitted).

38. Under the facts of this case, POAH attempted to accommodate Petitioner based on the limited medical and other information regarding what she could eat that she provided to POAH. Although she may have been justified in not wanting to risk trying out various meals, it did not help the process that Petitioner refused to meet with Ms. Walsh and did not provide documentation from her doctor that justified a need for the self-prepared diet from her physician until the final hearing. Regardless, although there is now documentation that a special diet by TTS will not accommodate Petitioner’s Crohn’s disease but her own preparation of her meals will, POAH cannot be said to have violated the Florida FHA based on the information it had at the time it made the decision to deny her request.

39. Nonetheless, as of the date of the final hearing, POAH now has documentation from Petitioner’s physician that she requires a special diet consisting of meals made by Petitioner. In Chahil v. Episcopal Church Home Friendship, Inc., Case No. 10-cv-418(RLW), 2012 U.S. Dist. LEXIS 126891, at *4 (D.D.C. Sept. 7, 2012), the court denied dismissal of a reasonable accommodation claim similar to that of Petitioner in this case. There, the plaintiff was a blind diabetic resident of a group home that had a mandatory meal plan. After the plaintiff tried to participate in

the group home meal plan, his doctor provided documentation rejecting the preparation of a special diet as inappropriate for Chahil's diet, noting "Unfortunately, in [Chahil's] eating arrangement at [the home] it has been almost impossible for him to adhere to this diet, which is a concern for me." Id. at *18.

40. In notes never previously provided to POAH or TTS, Dr. Turse has now stated, like the doctor in Chahil, that Petitioner has not needed hospitalization since she stopped eating at the TTS dining hall, and her special diet is one where she should prepare her own meals. Respondent provided no evidence contradicting Dr. Turse's opinion or his recommendation. As such, now that Petitioner has provided the specific verification outlined in the HUD Handbook and in the Meals Agreement, if Petitioner were to resubmit her request to be exempt from the meal plan, POAH should grant her request as a reasonable accommodation for her Crohn's disease.

41. The undersigned makes no finding as to whether Petitioner would still qualify for the HUD, federal, or other subsidies that allow her to live at TTS if she does not pay for the mandatory meal plan, only that exemptions are contemplated by HUD regulations and lease documents.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human

Relations issue a final order finding that Respondent, Preservation of Affordable Housing, LLC, did not commit a discriminatory housing practice against Petitioner, Deborah Fielding. If Petitioner has resubmitted or resubmits her request with the physician verification she now has, it should be granted.

DONE AND ENTERED this 28th day of February, 2019, in Tallahassee, Leon County, Florida.



HETAL DESAI
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 28th day of February, 2019.

ENDNOTES

^{1/} Unless otherwise stated, all statutory and administrative rule references are to the 2018 versions.

^{2/} The funding for low-income housing projects, which include mandatory meal plans pursuant to 24 C.F.R. Part 278 (Mandatory Meals Program in Multifamily Rental or Cooperative Projects for the Elderly or Handicapped), was phased out in approximately 1989. HUD has not approved any HUD-assisted housing projects for the elderly with mandatory meal plans since April 1, 1987. See generally 14 C.F.R. § 200.1301 (Expiring Programs - Savings

Clause). POAH offered testimony that TTS is the only such program that remains in Florida.

^{3/} Respondent did not object to the authenticity or admission of Exhibits P1 (note dated November 31, 2018) and P5 (undated note). It is unclear if these notes were provided by Petitioner to the Commission.

^{4/} Generally, the Florida FHA is patterned after the federal FHA found in 42 U.S.C. § 3601, et seq. See Floyd v. City of Sanibel, Case No: 2:15-cv-795-FtM-38CM, 2017 U.S. Dist. LEXIS 158242, at *15 n.6 (M.D. Fla. Sep. 26, 2017) (noting it was proper to cite "FHA authority for [defendant's] argument that the proposed accommodation was reasonable under the FHA, ADA, Rehabilitation Act, and [Florida] FHA. In this context, that is proper because analysis of a reasonable accommodation claim is generally treated the same under the Acts."); Bhogaita v. Altamonte Heights Condo. Ass'n, 765 F.3d 1277, 1285 (11th Cir. 2014) ("The [Federal Fair Housing Act] and the Florida Fair Housing Act are substantively identical, and therefore the same legal analysis applies to each.").

COPIES FURNISHED:

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(eServed)

Brian C. Costa, Esquire
Alvarez Feltman Da Silva
Suite 1100
2121 Ponce de Leon Boulevard
Coral Gables, Florida 33134
(eServed)

Deborah Fielding
Apartment 302
615 East New Haven Avenue
Melbourne, Florida 32901
(eServed)

Cheyenne Costilla, General Counsel
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(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.