STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIRIAM AND LENNOX HOYTE,

Petitioners,

vs. Case No. 20-0788

STONELAKE RANCH HOMEOWNERS ASSOC., INC.,

Respondent.
_____/

RECOMMENDED ORDER

On March 9, 2021, Administrative Law Judge Hetal Desai of the Florida Division of Administrative Hearings (DOAH) conducted the final hearing via Zoom web conferencing.

APPEARANCES

For Petitioners: JoAnn Nesta Burnett, Esquire
Becker & Poliakoff, P.A.
1 East Broward Boulevard, Suite 1800
Fort Lauderdale, Florida 33012

For Respondent: Scott H. Jackman, Esquire
Cole, Scott and Kissane, P.A.
4301 West Boy Scout Boulevard, Suite 400
Tampa, Florida 33607

STATEMENT OF THE ISSUES

Whether Stonelake Ranch Homeowners Association, Inc. (HOA) subjected Miriam and Lennox Hoyte to discriminatory housing practices based on their race (African American) and disability, failed to make reasonable accommodations for their son's disability, and retaliated against them in

violation of the Florida Fair Housing Act, chapter 760, part II, Florida Statutes (2020) (FFHA).[1]

PRELIMINARY STATEMENT

On, June 4, 2018, Petitioners filed a Housing Discrimination Complaint with the Florida Commission on Human Relations (FCHR), alleging Respondent discriminated against them based upon their race (African-American) and disability (related to their son), in violation of the FFHA.[2] The Housing Complaint alleged Petitioners resided in a home located in and subject to the rules and regulations of the HOA. Specifically, Petitioners alleged:

> On November 17, 2017, Complainants allegedly submitted a written request for accommodation on behalf of Aggrieved Party Noah Hoyte. The purpose of this request was to demonstrate Aggrieved Party's need for emotional support animal, Oberon. Complainants attached a copy of the Aggrieved Party's physician justifying benefits of having an emotional support animal. Complainants alleged that on December 3, 2017, Respondent failed to respond to Complainants request for accommodation. Complainants alleged Respondent is pursuing civil litigation against them because Oberon was in the property without a leash. Complainants alleged other individuals who are Caucasian and own dogs which are regularly unleashed on the property have not been denied an accommodation and have not been sued by Respondent. On May 1, 2017, Respondents sent Complainants a legal notice to inform them they are to be present in Court on October 23, 2018. As

[1] All statutory references are to the 2020 version of the Florida Statutes, unless otherwise indicated.

[2] In their Proposed Recommended Order (PRO), Petitioners refer to an Amended Housing Complaint filed August 20, 2019. *Id.* at p.4. Although a copy was offered into evidence (Exhibit P11), it is not date stamped as received by FCHR, no such document was transferred to DOAH by FCHR, and it is not referenced in the "Determination (No Cause)," issued by FCHR on January 4, 2020.

> such, Complainants believe that Respondent failed to grant their reasonable accommodation request and subjected them to discriminatory terms and conditions based on disability.

On January 14, 2020, FCHR issued a "Notice of Determination of No Cause," and "Determination (No Cause)," finding that reasonable cause "does not exist to believe that a discriminatory housing practice has occurred."

On February 13, 2020, Petitioners filed a Petition for Relief with FCHR, again alleging Respondent had committed a discriminatory housing practice against them based on their race and their son's disability, and that Respondent had retaliated against Petitioners. FCHR transmitted the Petition for Relief to DOAH. DOAH assigned the undersigned to conduct an evidentiary hearing.

Due to the COVID-19 pandemic, the final hearing was set and continued numerous times. On March 5, 2021, the undersigned conducted a pre-hearing conference with all of the parties. Thereafter, the parties submitted an Amended Joint Pre-hearing Stipulation with eight stipulated facts, which have been incorporated into this Recommended Order where appropriate.

The undersigned conducted the final hearing on March 9, 2021. Petitioners presented the testimony of Miriam Hoyte and Dr. Lennox Hoyte, and Petitioners' Exhibits P2, P3, P5 through P7, P9 through P19, P21 through P24, and P26 through P31 were admitted into evidence. Respondent presented the testimony of Mark Chapman (the HOA Manager) and Brian Funk (the HOA's corporate representative). Respondent's Exhibits R1 through R7, R9, R10, R12, and R14 through R16 were admitted into evidence.

Additionally, pursuant to Florida Administrative Code Rule 28-106.213(6), the undersigned took official recognition of the docket, complaint, transcript, and final judgment in the case of *Stonelake Ranch Homeowners Association, Inc. v. Lennox and Miriam Hoyte*, Case No. 16-CC-041454, 13th Judicial Circuit in and for Hillsborough County, Florida (Enforcement Action).[3]

The transcript of the final hearing was filed with DOAH on April 14, 2021. After receiving an extension, both parties timely filed their proposed recommended orders, which have been duly considered.[4]

FINDINGS OF FACT

Parties and Property

1. Petitioners are African Americans who are married and live with their family at 12321 Stonelake Ranch Boulevard, Thonotosassa, Florida (Home). The Home is located in Stonelake Ranch, a community of 142 homes and/or lots in Hillsborough County, Florida. The Hoytes are one of two or three families who are African American in Stonelake Ranch.

2. The HOA is a mandatory homeowners' association pursuant to chapter 720.

3. Petitioners also have numerous pets including two dogs; one is a gray Weimaraner named "Oberon." Petitioners' youngest son suffers from a mental or emotional disability. Oberon serves as an emotional support animal for Petitioners' youngest son.

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[3] The transcript (P16), complaint (part of R17), and the final judgment (R15) in the Enforcement Action were admitted into evidence at the final hearing. The docket of the Enforcement Proceeding was obtained through the Hillsborough Clerk of Courts website at CreateReport, hillsclerk.com. (last visited on April 20, 2021).

[4] By requesting and agreeing to the extension of time, the parties waived the requirements in section 120.57(3)(e), Florida Statutes, for the rendering of a recommended order within 30 days of the filing of the transcript. Fla. Admin. Code R. 28-106.216(2).

4. Property owners of Stonelake Ranch are subject to the HOA's Declaration of Covenants and Restrictions (Declaration), as are all residents, members, tenants, and guests. Petitioners are subject to the Declaration's rules and regulations. Respondent is charged with enforcing the terms of the Declaration.

5. At all times relevant to these proceedings, Mark Chapman served as the HOA's Property Manager, and was authorized to act on behalf of the HOA.

6. Brian Funk was on the HOA's Board of Directors from the HOA's inception in 2007 to November 2020. At all times relevant to these proceedings, Mr. Funk was acting on behalf of the HOA and its Board of Directors.

7. There is a guard station at Stonelake Ranch's entrance that is constantly manned and a patrol guard who drives around the community. Although these guards were employed by various security companies over the years, the undersigned finds that the guards worked under the authority of the HOA, and were agents of the HOA.

8. The HOA also contracted with a management company, Condominium Associates, who issued non-compliance citations to HOA members, managed the Board minutes, and served other functions on behalf of the HOA and the HOA's Board of Directors. The undersigned finds Greg Koury, the HOA's Manager and an employee of Condominium Associates, had authority to act on behalf of the HOA.

9. Petitioners are within a protected class under the FFHA and the federal Fair Housing Act (FHA) because of their race and because their minor son suffers from a handicap or disability.

HOA Declaration

10. Article VIII 1(I), sections 1, 3, and 8, of the Declaration address the keeping of animals within the HOA property:

I. Animals. Except as to horses, as provided below, an Owner may only keep a reasonable number of domestic animals, including livestock and poultry, in or on any [of] the Property, subject to the provisions herein, and subject to rules and regulations adopted by the Association from time to time. The following shall apply with regard to any animal which is allowed to be kept in or on the Property:

1. Owners of animals which are not securely fenced in an enclosed area shall keep them on a leash at all times.

* * *

3. No animal will be permitted which creates excessive noise, emits obnoxious odors, creates unsafe or unhealthy living conditions, or creates other disturbances of any kind, whether on a continuous or intermittent basis, and regardless of the time of day or night. Any Owner of an animal allowed hereunder who is the subject of three justifiable complaints of violations shall be subject to the enforcement actions set forth in Article XI hereof … including a hearing before the Covenants Committee. The sanctions may include a requirement that the Owner permanently remove the animal from the Owner's property. Such Owner shall not be allowed to have any animals within the Property at any time thereafter, except upon the express written consent of the Board of Directors of the Association.

* * *

8. The Association may impose more strict prohibitions as to the keeping of animals within the Property. None of the foregoing shall supersede or abridge any governmental regulations regulating the keeping of animals.

11. Article XI of the Declaration addresses enforcement of the covenants, rules, and regulations contained therein. Specifically, this Article requires the HOA to provide a 14-day notice of hearing, a hearing held before a "Covenants Committee," and a written decision by the Covenants Committee imposing a fine or penalty. An affected homeowner then has the right to appeal the Covenants Committee's decision to an "appeals committee."

12. In summary, relevant to these proceedings, the above provisions of the Declaration provide:

- HOA members may keep animals, including livestock and poultry, on their property subject to the rules in the Declaration.
- Animals not contained in a securely fenced area must be on a leash.
- Animals that create excessive noise, unsafe or unhealthy living conditions, or other disturbances are not permitted.
- Three complaints of violations of the animal provisions of the Declarations can result in sanctions, including permanent removal of the offending animal.
- Such sanctions can only be imposed after proper notice and a hearing before the HOA's Covenants Committee.

13. There is no dispute the HOA received three or more complaints from Petitioners' neighbors regarding Oberon.

14. There is no dispute that the HOA failed to comply with the procedures set forth in Article XI of the Declaration before taking any actions against the Hoytes.

The Hoytes' History in Stonelake Ranch

15. The Hoytes moved to Stonelake Ranch in August 2009. Initially, they rented a home in the community located at 10604 Broadland Pass (Rental). Eventually, they purchased a vacant lot in Stonelake Ranch from Mr. Funk but remained in the Rental while the Home was being built on their lot.

16. While they were living in the Rental, Petitioners owned a dog named Sugar Ray.[5] On December 13, 2012, and January 10, 2013, the HOA issued citations to the owner of the Rental because their tenants (the Hoytes) were "allowing their dog to run loose on the property, unleashed and unattended." Nothing in the citation indicated Sugar Ray had been aggressive.

17. There is no evidence that any action was taken against the Hoytes while at the Rental, but the citations indicated: "Non-compliance may result in further action including fines and removal of the pet" and "the Board will be assessing a $25.00 fine per occurrence, if this continues."

18. In 2014, after Sugar Ray's passing, Petitioners obtained Oberon as an emotional support animal for their son. Oberon was a puppy at the time he came to live with Petitioners.

19. Petitioners moved into the Home in 2015.

20. On December 29, 2015, the HOA issued a citation to Petitioners indicating that they were "allowing their dog to run loose on the property, unleashed and unattended." There is no indication Oberon was aggressive, nor was there any indication that sanctions were imposed against the Hoytes at that time. The citation indicated, "This is a recurring issue – any future violations will be turned over to the attorney for further action."

21. The HOA offered evidence that it received numerous complaints from neighbors regarding Oberon. No one who had witnessed Oberon or had an encounter with Oberon testified at the hearing. The written and text complaints offered into the record contain uncorroborated hearsay. There was no non-hearsay evidence during the hearing establishing the nature of those complaints.

22. The undersigned finds that numerous complaints were made to the HOA about Oberon, but makes no findings regarding the nature of those complaints or whether those complaints were substantiated.

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[5] Sugar Ray is not the subject of these proceedings and therefore, evidence of how Petitioners treated Sugar Ray and how Sugar Ray died is not relevant to these proceedings.

23. In January 2016, Petitioners started the process of fencing in the area immediately outside the Home. The Hoytes installed an access gate in the driveway that opened when a light beam was tripped. The fence, made out of metal rods, had "puppy spacing" which is more narrow than standard spacing to prevent Oberon from escaping.

24. It is apparent that the Hoytes did not get along with some of their neighbors, nor did they get along with Mr. Funk. On more than one occasion either Mrs. Hoyte or a neighbor contacted Hillsborough County Sheriff's Office and/or Animal Control to complain about the other. The Hoytes have accused their neighbors of making false statements about them and Oberon. Mr. Funk snidely referred to Dr. Hoyte as "the world-famous doctor" in an email.

Pre-Suit Letter and Enforcement Action

25. On March 10, 2016, the HOA's attorney sent the Hoytes a letter demanding the removal of Oberon (Pre-Suit Letter). The Pre-Suit Letter outlined three previous complaints regarding the Hoytes' dogs (at least two of which involved the now-deceased Sugar Ray), and a fourth complaint made to the HOA on March 5, 2016, alleging one of the Hoytes' dogs chased a child and made the child scream.

26. The Pre-Suit Letter concluded:

> Therefore, within fourteen days of the date of this letter, you must PERMANENTLY REMOVE your dog from Stonelake Ranch. If you fail to do so, the Association will pursue all legal and equitable remedies against you that the law allows, including filing a lawsuit against you for the removal of the dog. If such action must be taken, the Association will be entitled to an award of attorney's fees and costs against you.

27. The issuance of the Pre-Suit Letter action was not consistent with Article XI of the Declaration. The Hoytes were never provided with a notice of hearing, or a hearing in front of the HOA's Covenant Committee.

28. The Pre-Suit Letter also was not authorized by the HOA Board of Directors. Although Mr. Funk claims he discussed the Hoytes' animal violations with other board members, these conversations are not reflected in the Board minutes. Nor did the Board make any motions or take any votes regarding the Hoytes or the removal of their dogs. Rather, Mr. Funk admitted that he "was the bad guy" and made the decision to initiate a lawsuit against the Hoytes.

29. The undersigned finds that Mr. Funk did not follow the process set forth in the Declaration and failed to get Board approval when he decided to have the HOA's attorney issue the Pre-Suit Letter demanding removal of Oberon and to pursue a civil action if necessary.

30. On March 22, 2016, in response to the Pre-Suit Letter, Dr. Hoyte sent a letter back to the HOA's attorney disputing that Oberon had been aggressive. Dr. Hoyte noted in his response that Petitioners had installed a pet containment fence around the play area and garage of the Home. This fence cost approximately $74,485.

31. After receiving the Pre-Suit Letter, in an effort to appease the HOA, the Hoytes had a wooden exterior fence built on the outer edge of their property. The cost of the exterior fence was approximately $31,094.

32. In September 2016, Mrs. Hoyte attended obedience training with Oberon and received a certificate indicating Oberon had successfully completed the class.

33. In October 2016, as described below, Oberon was involved in a biting incident with a lawncare employee.

34. On December 19, 2016, the HOA followed through with the threat made in the Pre-Suit Letter and filed a civil complaint triggering the Enforcement Action. Petitioners were served with the civil complaint on December 28, 2016.

35. In its Enforcement Action complaint, the HOA sought the following relief: (1) removal of Oberon and another dog owned by the Hoytes; (2)

prohibiting Oberon and the other dog to return to the Home or Stonelake Ranch; (3) prohibiting the Hoytes from bringing any other animals in the Home without HOA approval; and (4) attorney's fees and costs.

36. According to the Final Judgment in the Enforcement Action, the Hoytes raised a number of Affirmative Defenses in the litigation. First, it argued the HOA failed to comply with conditions precedent before filing the Enforcement Action. Second, it argued the HOA was selectively enforcing the Declaration provisions regarding animals. Third, it argued that the Declaration and the FFHA prohibited the HOA from removing Oberon as an emotional support animal. This last Affirmative Defense was struck by the trial court judge on March 28, 2018.

37. The trial court judge held a bench trial in the Enforcement Action on December 11, 2019. At that trial, two of the Hoytes' neighbors testified about incidents involving Oberon. Although the transcript was admitted into evidence, the testimony from these neighbors is hearsay evidence that cannot be used to support a finding of fact.

38. On December 11, 2019, the trial court judge entered a Final Judgment dismissing the Enforcement Action in favor of the Hoytes. Although she found that the HOA had three or more viable complaints related to Oberon and that Oberon had bit a lawncare employee, she ultimately found the HOA had not followed its own procedures as set forth in the Declaration before bringing the Enforcement Action. The trial court judge did not rule on Petitioners' defenses related to the FFHA violations of disability discrimination or racially motivated selective enforcement.

Disability Accommodation

39. There is no dispute the Hoytes' youngest son is disabled as defined by the FFHA. Nor has the HOA contested the fact that Oberon is the son's emotional support animal.

40. During the Enforcement Action, the Hoytes raised the defense that Oberon should not be removed because he served as an emotional support

animal for their son. In furtherance of this defense, on March 9, 2017, the Hoytes provided the HOA with medical documentation from Dr. Michael Murphy (Note). The Note indicated that the Hoyte's child "suffers from an anxiety disorder and that his condition is partly alleviated by the presence of his therapeutic dog, Oberon. ... It is my opinion that if Noah were deprived of this therapeutic dog, his condition would deteriorate."

41. At the hearing, Mr. Funk admitted that after receiving the Note, the HOA did not respond to the Hoytes because, he believed, the Note was provided as part of the Enforcement Action litigation. To his knowledge, the HOA had never responded to the medical documentation related to Oberon outside of these proceedings.

42. When Mrs. Hoyte was asked when she had requested a specific accommodation for her son from the HOA and what that accommodation was, she could not provide a credible answer. She did not know whether the accommodation was to be exempt from the Declaration. Now that the Enforcement Action is closed and Oberon is currently with the Hoytes, it is unclear, what accommodation if any, the Hoytes were or are seeking in this proceeding.

43. Although the relief sought by the HOA in the Enforcement Action would have removed Oberon from the Home and prevented the Hoytes from having any other dog without HOA permission, that did not happen because the HOA lost.[6] There was no evidence that after the Enforcement Action, the HOA has taken any steps to remove Oberon from the Home, or prevented Oberon from acting as an emotional support animal for the Hoytes' child.

[6] As noted above, the trial court judge specifically declined to rule on whether the HOA had violated the FFHA based on the Hoytes' defense that Oberon was an emotional support animal because the FFHA defense had been previously struck, and such a ruling was unnecessary because the Hoytes had successfully established the HOA had failed to comply with the requirements of the Declaration prior to the institution of the Enforcement Action.

Dog Bite Incident

44. After the Pre-Suit Letter, but before the initiation of the Enforcement Action, on October 28, 2016, there was an incident involving Oberon and an employee of a lawncare company doing work on the common area outside of the Home and fenced-in area. No one present at the incident testified at the hearing. Mrs. Hoyte and Mr. Chapman came onto the scene after the incident. By all accounts, everyone was upset; there were children and lawncare employees screaming. Mrs. Hoyte claimed a lawncare employee assaulted her daughter.

45. When Mr. Chapman arrived at the scene, one of the lawncare employees claimed Oberon had bit him on the leg. Mr. Chapman observed a tear in the employee's pants, and a bite on the employee's leg. Mr. Chapman took photos of the bite, which were admitted into evidence.

46. Both the Hillsborough County Animal Control and the local Sheriff's Department sent officers to the scene. Animal Control issued the Hoytes a citation for an alleged bite, but this citation was later withdrawn after a 14-day quarantine period. There is no evidence that Animal Control attempted to take any further action or remove Oberon from the Hoytes at this time.

47. Mr. Chapman, a former firefighter, testified he believed the mark on the employee's leg was a bite mark. Dr. Hoyte testified that, in his medical opinion, the photograph of the bite mark looked like it was an old wound and not consistent with a fresh dog bite.

48. The undersigned finds Oberon escaped the Hoyte's property and bit the lawncare employee's leg. The undersigned makes no finding as to whether Oberon was provoked or the severity of the bite.

49. Regardless of whether Oberon actually bit the employee, it was reasonable for Mr. Chapman to believe that Oberon had escaped from the Hoytes' property, was acting aggressively, and bit the landscaping employee.

Similarly Situated Comparators

50. The Hoytes claim the HOA selectively enforced the Declaration provisions related to animals against them when it issued the citations, threatened them with the Pre-Suit Letter, and brought the Enforcement Action against them. The Hoytes believe the HOA took these actions because they are African American and have a disabled son.

51. As proof, the Hoytes assert they are one of two or three African-American property owners or residents in Stonelake Ranch. No non-African American residents were cited by the HOA for similar animal violations and the HOA has not tried to remove any animals from non-African American neighbors who also have had complaints lodged against their dogs.

52. The evidence establishes that it was not unusual to see dogs off leash in Stonelake Ranch. Petitioners' testimony is corroborated by photographic and video evidence that show at least seven different dogs in Stonelake Ranch that are not leashed and either in the road or on an empty lot.

53. Mrs. Hoyte was confident that the dogs in the photos and videos were owned by non-African American neighbors. The HOA offered no credible evidence to the contrary. There was no evidence that any of the owners of these dogs received citations, were threatened with a lawsuit, or actually sued for violating the Declaration.

54. There were also complaints by residents about dogs other than Oberon. For example, on February 9, 2014, Mr. Chapman and Mr. Funk received an email from James Sutton indicating he had issues with two dogs in the neighborhood (neither were Oberon). One of the dogs was a golden lab, owned by the Revoys. The Revoys are not African American.

55. The other dog, owned by the Kilpatricks, had jumped on Mr. Sutton's wife and tried to bite her. There is insufficient credible evidence of the Kilpatricks' race or ethnicity. Regardless of their actual race, the undersigned

finds that the HOA did not consider the Kilpatricks as being African-American.[7]

56. Neither the Revoys nor Kilpatricks were issued citations similar to the ones issued by the HOA to the Hoytes (or their landlord) on December 13, 2012, January 10, 2013, and December 29, 2015. Neither the Revoys nor the Kilpatricks were threatened with a lawsuit or actually sued for violation of the Declaration.

57. Mr. Chapman indicated that another dog had been reported as "nipping" at a resident, but he did not consider that as aggressive behavior. The undersigned disagrees. Regardless, Mr. Chapman recalled only one dog that had actually bitten someone. That dog was owned by a visitor of a non-African American resident. Therefore, he did not believe he needed to take any action. Neither of the property owners or dog owners involved in the nipping or biting incidents were issued citations, nor was any action taken to remove other dogs from the property owners, or prohibit those property owners from keeping dogs, or having visitors with dogs.

58. On another occasion, Mrs. Hoyte received a telephone call from someone at the HOA that Oberon was off leash and off property. At the time she received the call, Oberon was laying at her feet. Mrs. Hoyte explained that there had been a case of mistaken identity. There is no evidence that a citation was issued to any homeowner based on that incident.

59. There were also numerous calls by Stonelake Ranch residents to the HOA's security company regarding stray or wandering dogs. The incidents involving dogs other than Oberon include the following:

[7] Mr. Chapman testified he could not specify the Kilpatricks' race. He admitted they were dark-skinned, but noted they could be South American, Central American, or Jamaican. Mrs. Hoyte hesitatingly testified she thought the Kilpatricks were African American, but was not confident. In contrast, the HOA stipulated that the Hoytes were African American.

Date of Incident	Incident Reported	Result
April 15, 2015	Two dogs (a white Maltese and a salt and pepper Yorkie) reported off leash	Owner identified and contacted (the Bargers); no citation issued
May 12, 2015	A brown and white boxer was off leash	Owner identified and contacted (the Kilpatricks); no citation issued; guard reunited dog with owner
May 21, 2015	A white dog was off leash and harassing residents	Owner identified and contacted (the Shakes); no citation issued
May 21, 2015	Undescribed dog off leash	Officer sent to help secure dog; no citation issued
June 6, 2016	Tan and white Boxer reported on someone's property	Officer told neighbor there were no patrol units on duty and that the guard house could not be unmanned.
October 22, 2016	Stray dog reported by multiple neighbors	Officers unable to locate the dog
November 16, 2016	Undescribed dog off leash	Owner identified and contacted (the Kilpatricks); citation issued on November 17, 2016

60. The HOA did not issue any citations to the Bargers or the Shakes related to their dogs. The Bargers and Shakes are not African American. The Kilpatricks were cited, but only for the incident that occurred after the Pre-Suit Letter had been sent to the Hoytes.

61. Other than the Hoytes and the Kilpatricks, the HOA presented evidence of one other homeowner who has been cited for animal violations. This citation was issued to the Dohertys on November 20, 2017, for their dog being "off leash and alone." Again, this citation was issued after the Hoytes

were sent the Pre-Suit Letter and after they had accused the HOA of selective enforcement.

62. On December 19, 2017, the HOA issued a second citation to the Dohertys along with an email from Mr. Koury stating the following:

> Hi Chris,
>
> The Homeowner's Association has received another complaint about your dogs wandering into the cul-de-sac and frightening one of the residents who was walking there recently. … Am wondering if your invisible defense may be down and you don't know it?
>
> The person complaining is asking the Association to take further action on this in addition to the violation letter we sent you last month. In addition to this email we will be sending you another violation letter. In the mean time could you communicate with me and let me know if the fence was out of order and if you can assure the Board that this won't happen again? Due to similar issues with other dogs in the Community there have been lawyers involved and, in one case, the Association is in the process of having one of the animals removed. Please take whatever steps are necessary so the Association doesn't have to take further action up to and including legal activity to remedy the situation.

63. The email to the Dohertys, issued a year into the Enforcement Action litigation, has an apologetic tone and states that the HOA does not want to have to take further legal action. The inference is for the Dohertys to "please take whatever steps are necessary" so the HOA does not have to treat the Dohertys like it is treating the Hoytes.

64. The citations to the Kilpatricks and Dohertys do not establish equal enforcement of the Declaration. These citations were issued after the Hoytes had been sent the Pre-Suit Letter and after the Hoytes had accused the HOA of selective enforcement based on race.

65. Importantly, there were numerous situations that were similar to the Hoytes' situation, where neighbors had called about other dogs harassing and "nipping" them that should have warranted a citation from the HOA, but no citation was issued. All of these instances involved dogs owned by non-African Americans.

66 There is no evidence that any other non-African American owners were required to install a fence or make any type of modifications to their property, despite their dogs being off property, without a leash, or being aggressive.

67. There is no evidence that the HOA issued a Pre-Suit Letter or initiated an action to remove dogs from any other homeowner's property despite instances where dogs were "threatening" or "nipping" other neighbors. These other dogs were owned by non-African Americans.

CONCLUSIONS OF LAW

68. The undersigned and DOAH have jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569, 120.57(1), and 760.35(3)(b), Florida Statutes.

69. The Hoytes allege discrimination in violation of the FFHA section 760.23(2), (8)-(9).[8] Section 760.23 states:

> (2) 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, disability, familial status, or religion.
>
> * * *

[8]. Because the FFHA is patterned after the FHA, discriminatory acts prohibited under the federal Act are also prohibited under the state FFHA, and federal case law interpreting the FHA is applicable to proceedings brought under the FFHA. *See 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."). *Also see generally, Glass v. Captain Katanna's, Inc.*, 950 F. Supp. 2d 1235, 1244 (M.D. Fla. 2013) ("a Florida law mirrored after a federal law generally will be construed in conformity with the federal law.").

> (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 disability 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:
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> * * *
>
> (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.

70. The Hoytes also allege retaliation in violation of section 760.37, which makes it unlawful to:

> coerce, intimidate, threaten, or interfere with any person in the exercise of, or on account of her or his having exercised, or on account of her or his having aided or encouraged any other person in the exercise of any right granted under ss. 760.20-760.37.

71. In cases involving claims of housing discrimination, the complainant has the burden to prove a *prima facie* case of discrimination by a preponderance of the evidence. § 760.34(5), Fla. Stat.; *Sec'y, U.S. Dep't of Hous. & Urban Dev. ex rel. Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990). A "preponderance of the evidence" means the "greater weight" of the

evidence, or evidence that "more likely than not" tends to prove the fact at issue. *Gross v. Lyons,* 763 So. 2d 276, 289 n.1 (Fla. 2000).

72. Discrimination may be proven through direct, statistical, or circumstantial evidence. *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent behind the decision without any inference or presumption. *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001); *see also Holifield v. Reno*, 115 F.3d 1555, 1561 (11th Cir. 1997).

73. Petitioners argue that Mr. Funk's comments about Dr. Hoyte being a "world class doctor" and comments about Mrs. Hoyte are direct evidence of his racial animus. Courts, however, have held that "'only the most blatant remarks, whose intent could be nothing other than to discriminate ...' will constitute direct evidence of discrimination." *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358-59 (11th Cir. 1999). In contrast, "[e]vidence that only suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence." *Saweress v. Ivey*, 354 F. Supp. 3d 1288, 1301 (M.D. Fla. 2019). Although the comments by Mr. Funk are demeaning and may have been hurtful to Petitioners, they do not rise to the level of direct evidence of race or disability discrimination.

74. Where there is no direct evidence of discrimination, fair housing cases are analyzed under the three-part, burden-shifting framework set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under this three-part test, Petitioners have the initial burden of establishing, a *prima facie* case of unlawful discrimination. Next, if Petitioners sufficiently establish a *prima facie* case, the burden shifts to Respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, if the HOA satisfies this burden, Petitioners have the opportunity to prove that the

HOA's reason is mere "pretext." *Palm Partners, LLC v. City of Oakland Park*, 102 F. Supp. 3d 1334, 1344 (S.D. Fla. 2015).

75. Petitioners' allegations amount to three claims: (1) disparate enforcement of the HOA rules based on race and/or disability; (2) failure to accommodate Petitioners' son's disability by attempting to remove Oberon from the Home and prohibiting Oberon from acting as an emotional support animal for their son; and (3) retaliation against them for requesting an accommodation and/or filing a housing complaint.

Disparate Enforcement

76. To establish a *prima facie* case of disparate treatment, Petitioners must present evidence that they belong to a protected class and that they were treated differently by the HOA than similarly-situated owners outside that class. *See His House Recovery Residence, Inc. v. Cobb Cty., Georgia*, No. 1:17-CV-0243-SCJ, 2019 WL 11343462, at *10 (N.D. Ga. Mar. 27, 2019) (citing *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008) ("As its name suggests, a disparate treatment claim requires a plaintiff to show that he has actually been treated differently than similarly situated non-handicapped people.")). *See also Boykin v. KeyCorp,* 521 F.3d 202, 213 (2d Cir. 2008) (explaining, like Title VII employment discrimination claims, FHA disparate treatment claims are analyzed using the *McDonnell Douglas* burden-shifting framework). Establishing a *prima facie* case of disparate treatment is not "onerous." *Burdine*, 450 U.S. 248, 255, n.8 (1981). Once established, there is a presumption that the alleged discriminatory conduct "if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors" such as race or disability. *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978); *also see United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974) (finding *prima facie* case established where city made exceptions to its annexation requirements for white citizens, but not minority citizens).

77. Respondent seems to ignore the selective enforcement/disparate treatment claim and analysis. Instead, it argues that its actions were not motivated by race and that Petitioners were never deprived of the use of their home. *See* Resp. PRO, ¶38 ("It, therefore, is unclear what 'services or facilities' in connection with their 'dwelling' they claim the Association unlawfully deprived them of because of their race.").

78. While it is true that Petitioners currently have full use and enjoyment of their home (including their ability to keep animals as allowed under the Declaration), if Respondent had prevailed in the Enforcement Action Petitioners would not. Petitioners clearly were affected "in the terms, conditions, or privileges" of their dwelling, when they were issued citations, sent the Pre-Suit Letter, and forced to defend an unauthorized lawsuit to take away their pets.

79. To be clear, selective enforcement of a covenant, rule, or regulation is a cognizable claim under federal housing law in the Eleventh Circuit. In *Ford v. 1280 West Condominium Association, Inc.*, No. 1:14-CV-00527-RWS, 2014 WL 4311275 (N.D. Ga. Sept. 2, 2014), the court held that differential treatment in the enforcement of declarations could violate the FHA:

> Plaintiffs also provide a specific example of Defendants' disparate treatment of Plaintiffs and other owners … based on Defendants' *selective enforcement* of the Declaration. *The Eleventh Circuit has recognized selective enforcement as a basis for FHA claims.* Therefore, Plaintiffs' allegations that Defendants approved multiple leasing permits for non-minorities and permitted the transfer of leasing permits between units for non-minority owners, even though both actions violate the Declaration, while enforcing Declaration provisions against Plaintiffs, can serve as a basis for Plaintiffs' housing discrimination claim. In sum ... the Court finds that Plaintiffs state a plausible claim for housing discrimination.

*Id. at *6* (citing *Wells v. Willow Lake Estates, Inc.,* 390 F. App'x 956, 959 (11th Cir.2010) (holding that mobile-home community's selective enforcement of regulations regarding home and lawn appearance as pretext for disability and national origin discrimination could violate the FHA); and *Bonasera v. City of Norcross,* 342 F. App'x 581, 585 (11th Cir.2009) (observing that city's selective enforcement of single-family zoning ordinance against Hispanic families could violate the FHA if city was aware of violations by white homeowners and chose to ignore them)).

80. Regarding the first part of the *prima facie* case, the parties have stipulated that Petitioners are African American and have a child with a disability and, therefore, are in a protected class under the FFHA.

81. Petitioners established they were treated differently in the enforcement of the Declaration. They failed to establish, however, that the HOA was aware of their son's disability when it issued the citations, sent the Pre-Suit Letter, or filed the Enforcement Action. Petitioners also did not put forth the disability status of any of the other dog owners who violated the Declaration. As such, Petitioners' disability discrimination based on disparate treatment/selective enforcement fails.

82. Petitioners did present credible evidence of disparate treatment based on race. Petitioners showed instances where non-African American HOA members had their dogs off leash and off property, but had not been issued a citation. They established that other dogs had been aggressive, but no other owners were sent a Pre-Suit Letter, or taken to court in a civil proceeding to remove all the dogs from these non-African American neighbors.

83. Although the HOA argued it had issued citations to other HOA members, there were no evidence of citations issued prior to the Pre-Suit Letter. The citations to the Kilpatricks and Dohertys were issued after the HOA had been accused of unequal enforcement of the Declaration.

84. Moreover, some non-African American neighbors received calls from Mr. Chapman to determine the cause of the loose animal (i.e. to see if their

electric fences were working) instead of a citation letter. The Dohertys received a polite email requesting that they address the repeated violation of their dog being off their property unleashed. There was no evidence the Hoytes received this type of "kid gloves" treatment. To the contrary, the Hoytes were treated with boxing gloves.

85. There was no evidence that Petitioners were given the same leeway provided to other non-African American HOA members; they did not receive the same type of polite emails and warnings prior to a citation being issued. They did not receive calls to determine if there had been a malfunction with an electric fence. Rather, when another dog was reported "off leash," the HOA jumped to the conclusion it was Oberon. Petitioners met their initial burden of proving they were treated differently from non-African American neighbors in similar circumstances.

86. Thus, the burden shifts to the HOA to put forth a non-discriminatory reason for not citing or suing other neighbors or treating other neighbors more leniently when their dogs were off leash, off property, or nipping or biting neighbors.

87. The HOA first argues that it did issue citations uniformly and equally. (Respondent's PRO, ¶11). The undersigned rejects this argument. As found above, there were numerous incidents of dogs roaming the community, and some even "nipping" or threatening neighbors, where no citations were given. Second, the only instances where other neighbors had been cited for animal violations occurred after the Pre-Suit Letter and Enforcement Action. The timing of these violations coupled with the tone of the email to the Dohertys that accompanied that citation make these citations incomparable.

88. Next, the HOA states that its decisions were not based on race, but rather, it acted because it had a duty to enforce the Declaration and to protect the residents from Oberon. Assuming it has sufficiently established

legitimate non-discriminatory reasons for its actions, Petitioners have established that these reasons are pretextual.[9]

89. Respondent argues it was simply "doing its job" by enforcing the Declaration. Petitioners put on credible evidence that the HOA ignored or gave the benefit of the doubt to non-African Americans whose dogs were off leash or off property. Thus, if the HOA had truly wanted to enforce the animal provisions of the Declaration, it would have issued citation letters to all of the other homeowners whose dogs were off leash or off property.

90. With regards to the Pre-Suit Letter and attempt to expel Petitioners' dogs from their property, the facts that the Pre-Suit Letter was not documented in the HOA minutes or approved by the HOA Board, and that the HOA failed to provide the due process set forth in the Declaration (the same Declaration it was allegedly attempting enforce) undermine the HOA's argument that it was acting pursuant to the Declaration.

91. Finally, the HOA argued it was forced to file the Enforcement Action because of Oberon's aggressive manner and the October 28 incident involving the dog bite. There is sufficient evidence casting doubt on this reason. First, the Hoytes established that other dogs in the neighborhood had been reported as being aggressive and attempted to bite a resident without any repercussions. Mr. Chapman's characterization of a "nip" being less aggressive than a "bite" does not change the fact that no action was taken by the HOA in these instances.

92. Second, the HOA had already set the groundwork of removing Oberon in March 2016, well before Oberon's alleged dog bite incident. Thus, the HOA

[9] *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143 (2000) (noting employment discrimination plaintiff may establish he was a victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence"). Pretext is established either directly by showing by a preponderance of the evidence that a discriminatory reason more likely motivated the HOA or indirectly by showing that the HOA's proffered explanation is unworthy of credence. *See generally Chapman v. AI Transp.,* 229 F.3d 1012, 1037 (11th Cir.2000) (en banc) (employment discrimination).

was not acting because of the dog bite incident when it issued the citations or sent the threatening Pre-Suit Letter.

93. Finally, if the HOA wanted to quickly remove Oberon, it could have followed the Declaration by providing notice to the Hoytes, holding a Covenants Committee meeting, and issuing a written finding. Clearly, an HOA meeting would have taken less time and resulted in a quicker removal of Oberon than a lengthy civil trial. As with the Pre-Suit Letter, the facts that the Enforcement Action was unauthorized by the HOA Board, and that Petitioners were not afforded proper notice or a hearing in front of the Covenants Board, make the HOA's non-discriminatory reasons (enforcement of the Declaration and Oberon's aggression) ring untrue.

94. In summary, the undersigned finds Petitioners have proved racial discrimination in the enforcement of the Declaration and that the reasons proffered by the HOA for its actions were pretextual.

Disability Discrimination

95. The Hoytes also allege that the HOA discriminated against them by failing to accommodate their son when it failed to allow him to keep Oberon as an emotional support animal. § 760.23(9)(b), Fla. Stat.[10]

96. To establish a *prima facie* case for a failure to provide a reasonable accommodation claim, Petitioners must establish three things: refusal, reasonableness, and necessity. *Schwarz*, 544 F.3d at 1218–19. To establish these elements, they must show:

(1) their child is disabled;

(2) they requested a reasonable accommodation from the HOA;

(3) the requested accommodation was necessary to afford their son an equal opportunity to use and enjoy a dwelling; and

(4) the HOA refused to make the requested accommodation.

[10] Like the FFHA, the FHA also prohibits "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." 42 U.S.C. § 3604(f)(3)(B).

Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, No. 19-60007-CIV, 2020 WL 4736211 (S.D. Fla. Aug. 14, 2020) (*quoting Schaw v. Habitat for Humanity of Citrus Cty., Inc.*, 938 F.3d 1259, 1264 (11th Cir. 2019)).

97. Here, the parties have stipulated to the first and part of the third element that the Hoytes' child is disabled and an emotional support animal is a necessary accommodation. What remains in dispute is whether the Hoytes actually requested a reasonable accommodation, whether keeping Oberon is a reasonable accommodation, and if the HOA has actually refused to accommodate the Hoytes' child.

98. The only evidence of an accommodation request is the Note that was produced as part of the litigation in the Enforcement Action. The Note only indicates that if Oberon were to be taken away, then Petitioners' son would deteriorate. It says nothing about what Petitioners' son would require if Oberon was not taken away.

99. A petitioner "need not use magic words" to express a request for accommodation. *Hunt v. Aimco Properties, L.P.*, 814 F.3d 1213, 1226 (11th Cir. 2016) (citations omitted). However stated, a petitioner can be said to have made a request for accommodation when the housing provider has "enough information to know of both the disability and desire for an accommodation." *Id.* This occurs when the circumstances would cause a reasonable housing provider to make appropriate inquiries about the possible need for an accommodation. *Id.*

100. Although there is no magic language, here Petitioners have failed to meet their burden of establishing they clearly desired an accommodation for their son, and that the accommodation was to allow Oberon to remain on the Property despite any violations of the Declaration. In the context of the facts of this case, it was reasonable for the HOA to believe that the Note was just evidence in the Enforcement Action and nothing more. Moreover, it was reasonable for the HOA to believe no action was needed as long as Oberon was able to serve as an emotional support animal for Petitioners' son.

101. Even if the Note could be considered a request for a reasonable accommodation, there is no evidence the HOA has refused to grant the accommodation because Oberon is currently still living with the Hoytes. As explained in the FHA context:

> The FHA does not demand that housing providers immediately grant all requests for accommodation. However, the failure to make a timely determination after meaningful review amounts to constructive denial of a requested accommodation, as an indeterminate delay has the same effect as an outright denial. Conversely, a housing provider is not permitted to "short-circuit" the interactive process.

Bone v. Vill. Club, Inc., 223 F. Supp. 3d 1203, 1214 (M.D. Fla. 2016).

102. Because Oberon is still serving as the Hoytes' son's emotional support animal and it was not until the course of these proceedings that the Hoytes clarified that they were seeking to keep Oberon regardless of any violations of the Declaration, the HOA has not had an adequate opportunity to make a decision to approve or deny the requested accommodation. Therefore, the HOA cannot have violated the FFHA for failure to grant the accommodation request.

103. In summary, Petitioners have failed to establish that the HOA violated the FFHA by denying them a reasonable accommodation because there was insufficient evidence establishing they had made a request for an accommodation and that the HOA had refused that accommodation.

Direct Threat[11]

104. Even if Petitioners could establish they requested an accommodation that was rejected by the HOA, they would need to establish that the accommodation sought was reasonable. It is clear from Mrs. Hoyte's testimony at the hearing in this proceeding that Petitioners seek an

[11] The "direct threat" analysis is included in the event the HOA attempts to remove Oberon in the future, or if FCHR finds the undersigned has erred in concluding there was not a request for a reasonable accommodation and that the HOA has not denied such a request.

accommodation to keep Oberon as an emotional support animal for their son regardless of whether there are violations of the Declaration. Based on the past Enforcement Action, it is safe to believe that the HOA would argue keeping Oberon in Stonelake Ranch is not a reasonable accommodation. Although unartfully argued, the HOA's position is that Oberon is a direct threat to the neighborhood.

105. The Legislature has clarified the law regarding disability accommodations and the use of emotional support animals by enacting section 760.27, which became effective July 1, 2020:

> **760.27 Prohibited discrimination in housing provided to persons with a disability or disability-related need for an emotional support animal**.—
>
> (1) DEFINITIONS.—As used in this section, the term:
>
> (a) "Emotional support animal" means an animal that does not require training to do work, perform tasks, provide assistance, or provide therapeutic emotional support by virtue of its presence which alleviates one or more identified symptoms or effects of a person's disability.
>
> (b) "Housing provider" means any person or entity engaging in conduct covered by the federal Fair Housing Act or s. 504 of the Rehabilitation Act of 1973, including the owner or lessor of a dwelling.
>
> (2) REASONABLE ACCOMMODATION REQUESTS. — To the extent required by federal law, rule, or regulation, it is unlawful to discriminate in the provision of housing to a person with a disability or disability-related need for, and who has or at any time obtains, an emotional support animal. *A person with a disability or a disability-related need must, upon the person's request* and approval by a housing provider, *be allowed to keep such animal in his or her dwelling as a reasonable accommodation in housing,* and

> such person may not be required to pay extra compensation for such animal. Unless otherwise prohibited by federal law, rule, or regulation, *a housing provider may:*
>
> *(a) Deny a reasonable accommodation request for an emotional support animal if such animal poses a direct threat to the safety or health of others or poses a direct threat of physical damage to the property of others, which threat cannot be reduced or eliminated by another reasonable accommodation.*
>
> * * *
>
> (4) LIABILITY.—A person with a disability or a disability-related need is liable for any damage done to the premises or to another person on the premises by his or her emotional support animal. (emphasis added).

106. The U.S. Department of Housing and Urban Development (HUD) has also issued special guidance regarding having an animal as a reasonable accommodation under the FHA. Regarding a dangerous dog, it states:

> The FHA does not require a dwelling to be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. *A housing provider may, therefore, refuse a reasonable accommodation for an assistance animal if the specific animal poses a direct threat that cannot be eliminated or reduced to an acceptable level through actions the individual takes to maintain or control the animal (e.g., keeping the animal in a secure enclosure).*
>
> * * *
>
> *Pet rules do not apply to service animals and support animals.* Thus, housing providers may not limit the breed or size of a dog used as a service animal or support animal just because of the size or

> breed *but can, as noted, limit based on specific issues with the animal's conduct because it poses a direct threat or a fundamental alteration.*

U.S. Dep't of Hous. And Urban Dev., FHEO Notice 2020-01, p.13-14 (Jan. 28, 2020) (emphasis added).

107. In *Friedel v. Park Place Cmty. LLC,* No. 2:17-CV-14056, 2017 WL 3666440, at *3 (S.D. Fla. Aug. 24, 2017), *aff'd,* 747 F. App'x 775 (11th Cir. 2018), a disabled resident brought a housing discrimination claim under the FHA when his mobile home park banished his emotional support dog for bad behavior. The *Friedel* court explained:

> The Fair Housing Act does not require that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.
>
> The determination of whether an assistance animal poses a direct threat must rely on an individualized assessment that is based on objective evidence about the specific animal in question, such as the animal's current conduct or a recent history of overt acts. *The assessment must consider the nature, duration, and severity of the risk of injury; the probability that the potential injury will actually occur; and whether reasonable modifications of rules, policies, practices, procedures, or services will reduce the risk.* In evaluating a recent history of overt acts, *a provider must take into account whether the assistance animal's owner has taken any action that has reduced or eliminated the risk.* Examples would include obtaining specific training, medication, or equipment for the animal. Thus, determining whether an animal poses a direct threat that cannot be mitigated by a reasonable accommodation is not a question of law, it is distinctly a question of fact. (emphasis added, quotations and citations omitted).

108. In this case, there was evidence that Oberon had escaped from the fenced area around the Home and bit a lawncare employee that may have been on the Hoytes' property in October 2016, but there was no credible non-hearsay evidence that Oberon is still aggressive. Moreover, there was credible evidence that the Hoytes had taken steps to address any undesirable behavior: Oberon had obedience training and the Hoytes had made changes to their fence and gate to ensure he does not escape.

109. Based on the evidence in the record, the undersigned cannot find that Oberon is currently a direct threat. Absent additional information, allowing Oberon to remain at the Home as the Hoytes' son's emotional support animal is a reasonable accommodation.[12]

Retaliation

110. To prevail on a claim for retaliatory housing discrimination, Petitioners must establish that the HOA "coerced, intimidated, threatened, or interfered with" their exercise of rights granted under the FFHA. § 760.37, Fla. Stat.; *Dixon v. Hallmark Cos.*, 627 F.3d 849, 858 (11th Cir. 2010). The three elements to prove retaliation are: (1) Petitioners engaged in a protected activity under the FFHA; (2) the HOA subjected them to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. *Id.*

111. Assuming the adverse action was the Enforcement Action, Petitioners cannot prove that any protected activity is causally linked to this action. Petitioners' Housing Discrimination Complaint occurred after the initiation of the Enforcement Action. Therefore, Petitioners cannot claim the adverse actions taken by the HOA were caused by or in reaction to their Housing Complaint.

[12] This conclusion does not prevent the HOA from assessing in the future whether Oberon is a "direct threat" as long as it takes into account the factors outlined in *Friedel* and it follows the procedures provided in the Declaration. This also does not prevent private owners from holding the Hoytes liable for any actual damage caused by Oberon. *See* § 760.27(4), Fla. Stat.

112. Petitioners have failed to establish that the HOA retaliated against them in violation of the FFHA.

Damages & Relief

113. Because Petitioners have proven their disparate treatment claim based on race, they are entitled to relief and certain damages.

Section 760.35(5)(b) provides:

> If the administrative law judge finds that a discriminatory housing practice has occurred or is about to occur, he or she shall issue a recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including quantifiable damages and reasonable attorney fees and costs.

114. When a petitioner proves selective enforcement of a homeowners' association's rule or regulation, the association is estopped from applying that rule or regulation. *Shields v. Andros Isle Prop. Owners Ass'n, Inc.*, 872 So. 2d 1003, 1007 (Fla. 4th DCA 2004) (applying real property law and citing *Chattel Shipping & Inv., Inc. v. Brickell Place Condo. Ass'n*, 481 So. 2d 29, 30 (Fla. 3d DCA 1985). In this case, the HOA cannot continue to issue citations for stray, off leash, or off property animals unless it does so equally to all violators.

115. As relief in these proceedings, Petitioners have requested the following: the cost of installing the wooden fence, reimbursement for missed work due to the Enforcement Action, emotional distress, fines, and punitive damages.

116. The Hoytes are entitled to the costs associated with the changes they made as a result of the Pre-Suit Letter. The Hoytes spent approximately $31,094 on the exterior fence as a result of the HOA's threats to legally remove Oberon.

117. Petitioners would be entitled to damages such as loss of income incurred by Dr. Hoyte during the time he spent defending the Pre-Suit Letter

and Enforcement Action, and the actual attorney's fees and costs incurred in defending the Enforcement Action. The undersigned, however, cannot award this relief because Petitioners failed to provide sufficient evidence to quantify such damages.

118. Finally, the FFHA does not provide for civil penalties, emotional distress damages, or punitive damages. As such, the undersigned has no authority to award this relief.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Florida Commission on Human Relations issue a final order granting the Hoytes' Petition for Relief, in part, as follows:

(a) Finding that the HOA engaged in a discriminatory housing practice based on the Hoytes' race by selectively enforcing the Declaration against them, but failing to enforce the same provisions against similarly situated non-African American homeowners when it: (1) issued citations to the Hoytes for violating the animal provisions of the Declaration; (2) issued a Pre-Suit Letter demanding the Hoytes remove their dogs from their Home; and (3) initiated and pursued the Enforcement Action to permanently remove all dogs from their Home and prevent them from acquiring additional dogs in the future without the HOA's consent;

(b) Prohibiting the HOA from selective enforcement of the Declaration based on race;

(c) Prohibiting the HOA from removing Oberon from Petitioners' home in the future unless it follows the procedures in the Declaration and establishes Oberon is a direct threat under the FFHA;

(d) Awarding Petitioners $31,094 in quantifiable damages;

(e) Awarding Petitioners reasonable attorney's fees and costs for these proceedings.

DONE AND ENTERED this 8th day of June, 2021, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
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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.