

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

LUSHERYL WALDEN,

Petitioner,

vs.

Case No. 20-5191

SOMERSET PARK CONDOMINIUM
ASSOCIATION, INC.; WISE PROPERTY
MANAGEMENT, INC.; AND THOMAS
KELLEHER,

Respondents.

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), on February 3, 2021, by Zoom Conference.

APPEARANCES

For Petitioner: Lusheryl Walden, pro se
2866 Somerset Park Drive, #103
Tampa, Florida 33613

For Respondents: Joseph G. Riopelle, Esquire
Boyd, Richards, Parker and Colonnelli, P.L.
400 North Ashley Drive, Suite 1150
Tampa, Florida 33602

STATEMENT OF THE ISSUES

Whether Somerset Park Condominium Association, Inc.; Wise Property Management, Inc.; and Thomas Kelleher (collectively referred to as Respondents) discriminated against Lusheryl Walden (Ms. Walden or Petitioner), on the basis of Ms. Walden's disability; and, if so, the relief to which Ms. Walden is entitled.

PRELIMINARY STATEMENT

On April 18, 2020, Ms. Walden filed a Housing Discrimination Complaint with the Florida Commission on Human Relations (Commission), alleging that Respondents discriminated against her on the basis of her disability in violation of the Florida Fair Housing Act (the Act), sections 760.20 through 760.37, Florida Statutes. On October 14, 2020, the Commission notified Ms. Walden that it found no reasonable cause to believe that Respondents committed a discriminatory housing practice.

On November 20, 2020, Ms. Walden filed a Petition for Relief with the Commission in which she realleged a discriminatory housing practice. The Commission transmitted the Petition for Relief to DOAH to conduct an evidentiary hearing.

The final hearing was held on February 3, 2021, with both parties present. Petitioner testified on her own behalf and did not offer any exhibits. Respondents called Thomas Kelleher (Mr. Kelleher) as their sole witness. Respondents' Exhibits 1 through 5 were admitted into evidence.

At the close of the hearing, the parties requested an extended deadline of 15 days after the hearing to file post-hearing submittals. On February 18, 2021, Respondents filed a Proposed Recommended Order. Petitioner did not file a post-hearing submittal. Respondents' Proposed Recommended Order was duly considered in preparing this Recommended Order.

All references to the Florida Statutes are to the 2020 version.

FINDINGS OF FACT

1. Ms. Walden is a 49-year-old woman. She has a muscle disorder which causes her to need the assistance of a medical walker. She also uses a cane and electronic wheelchair.

2. Ms. Walden lives in a rented condominium unit at Somerset Park Condominiums (Somerset Park), which is located at 2866 Somerset Park Drive, Unit 103, Tampa, Florida. She has lived in unit 103 since March 2018.

3. Unit 103 is privately owned, but is managed, along with the other condominium units at Somerset Park, by Wise Property Management, Inc.

4. Mr. Kelleher is employed by Wise Property Management, Inc., as the property manager for Somerset Park.

5. Somerset Park was created by, and continues to be governed by, a Declaration of Condominium of Somerset Park, A Condominium (Declaration), which instrument was recorded in 2006, in the public records of Hillsborough County, Florida.

6. The Declaration describes parking spaces as follows:

(c) Parking Spaces. Parking for the Condominium is part of the Common Elements of the Condominium on the Condominium Property. The parking spaces shown on Exhibit 2 of the Declaration may be assigned to a Unit (which assignment need not be recorded in the public records of the County) by the Developer (for so long as the Developer offers a Unit for sale in the Condominium and thereafter by the Association), whereupon it shall become Limited Common Elements of the Unit to which it is assigned. Any consideration paid for the assignment of the parking spaces shall belong to the Developer.

A Unit Owner may assign the Limited Common Element parking space appurtenant to his Unit to another Unit by written instrument delivered to (and to be held by) the Association; provided however that no Unit may be left without one Limited Common Element parking space. Upon

making such assignment, the Limited Common Element so assigned shall become an appurtenance to the Unit(s) and shall pass with the title thereto regardless of whether or not specifically referenced in the deed or other instrument of conveyance of the Unit.

7. According to the Declaration, parking spaces at Somerset Park are considered “limited common elements” after they are assigned to a unit. Generally speaking, limited common elements consist of properties, equipment, or structures whose use is reserved to a particular unit to the exclusion of other units.

8. Units at Somerset Park are individually owned. When a unit is sold by Somerset Park, the unit comes with its own parking space, which is considered a limited common element “appurtenant thereto.”

9. Other types of limited common elements include patios, balconies, and terraces, as well as air conditioning compressors and water heaters that are located outside of the condominium unit.

10. When Ms. Walden moved into unit 103 in 2018, she was notified that she was assigned to parking space number 409. Parking space number 409 is the limited common element attached to unit 103.

11. In March 2020, Ms. Walden made a verbal request to Mr. Kelleher to be reassigned a parking space closer to her unit. Mr. Kelleher told Ms. Walden that he could not reassign a parking space, but that she was welcomed to reach out to her neighbors to find someone willing to switch.

12. The Declaration specifically sets forth the means by which an assigned parking space may be reassigned. It provides that a “unit owner may assign the limited common element parking space appurtenant to his unit to another unit by written instrument delivered to [Somerset Park.]” For a parking space assigned to a unit that is still owned by Somerset Park, Somerset Park may reassign such parking space to another unit.

13. Ms. Walden’s assigned parking space—parking space number 409—is four parking spaces away from her unit. Ms. Walden has an informal agreement with the resident assigned to parking space number 408 (which is three spaces away from her unit), who allows her to park in that space.

14. There are six parking spaces closer to Ms. Walden’s unit than her assigned space—three to the left and three to the right of the walkway to her unit. All six parking spaces are assigned as limited common elements to condominium units not owned by Somerset Park. All six are outside the control of Respondents who have no authority to force the owners to switch spaces with Ms. Walden.

Ultimate Findings of Fact

15. Petitioner failed to prove that there was any reasonable accommodation Respondents could have given her that would have enabled her to park closer to her unit.

16. Respondents offered a legitimate non-discriminatory reason for denying Petitioner’s request for a parking space closer to her unit.

17. Petitioner failed to prove that Respondents intentionally discriminated against Petitioner because of her disability.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.35(5)(b), Florida Statutes.

19. Ms. Walden alleges Respondents discriminated against her, based on her disability, by failing to provide her with a parking space closer to her condominium unit.

20. The Act prohibits discrimination in the sale or rental of housing. Section 760.23(2) provides that it is an unlawful housing practice 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 handicap.

21. Section 760.23 provides, in pertinent part:

(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:

(a) A refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises; or

(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.

22. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996). In this case, Petitioner has the burden of proving by a preponderance of the evidence that Respondents violated the

Act by failing to provide a reasonable accommodation for Petitioner's disability. *Sec'y, U.S. Dep't of HUD, on behalf of Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990).

23. The Act is patterned after the Federal Fair Housing Act. The Commission and Florida courts have determined that Federal court decisions interpreting the Federal Fair Housing Act provide guidance in construing provisions of the Act. *See Dornbach v. Holley*, 854 So. 2d 211, 213 (Fla. 2d DCA 2002).

24. When evaluating reasonable accommodation housing discrimination claims, courts apply the three-part, burden-shifting framework set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *See, e.g., Blackwell*, 908 F.2d at 870. ("We agree with the ALJ that the three-part burden of proof test developed in *McDonnell Douglas* governs in this case.").

25. Under the *McDonnell Douglas* framework, Petitioner bears the initial burden of establishing a prima facie case of housing discrimination based on her disability. Once this burden is met, Respondents have the burden of articulating a legitimate non-discriminatory basis for its action.

26. If Respondents satisfy their burden, Petitioner must then prove that the legitimate reason asserted by Respondents is a mere pretext for housing discrimination. *Blackwell*, 908 F.2d at 870; *Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1231 (S.D. Fla. 2005).

27. To establish a prima facie case of housing discrimination by failure to provide a reasonable accommodation, Petitioner must demonstrate that: (1) she is disabled or handicapped; (2) she requested a reasonable accommodation; (3) such accommodation was necessary to afford her an opportunity to use and enjoy her dwelling; and (4) Respondents refused to make the requested accommodation. *Solodar v. Old Port Cove Lake Point Tower Condo. Ass'n*, 2012 WL 1570063 at *5 (S.D. Fla. 2012).

28. Petitioner demonstrated, by a preponderance of the evidence, three of the four elements of her prima facie case. The uncontradicted, credible testimony of Petitioner established that she has a disability that causes her to have difficulty walking; a parking space closer to her unit is necessary for the use and enjoyment of her condominium unit; and Respondents refused to provide a closer parking space.

29. Petitioner did make a request to Respondents for an accommodation; however, she did not prove that the accommodation she requested was reasonable.

30. The Federal Fair Housing Act regulations provide a specific example that illustrates when it would be a reasonable accommodation to provide a closer parking space for a mobility impaired resident of an apartment complex. 24 C.F.R. § 100.204 provides, in pertinent part:

§ 100.204 Reasonable accommodations.

(a) It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

(b) The application of this section may be illustrated by the following examples:

* * *

Example (2): Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a *first come first served* basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of § 100.204 for the owner or manager of Progress Gardens to refuse to

make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

31. In accordance with this example, courts have held that condominium associations must provide handicapped residents with reasonable accommodations in the form of designated parking spaces closer to their unit so as to allow them equal use and enjoyment of their dwelling and facilities.

32. Depending on the facts and circumstances, a disabled tenant may request a reasonable accommodation related to parking that would deviate from the normal parking rules and regulations of a condominium association. In *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2nd Cir. 1995), the court found that modification of the defendant's "first come/first served" parking policy for awarding parking spaces on the ground floor was likely a required reasonable accommodation because of the tenant's handicap.

33. However, whether an accommodation is reasonable is a highly fact-specific analysis, requiring a case-by-case determination. *Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002); *Solodar*, 2012 WL 1570063 at *5. In this case, Petitioner's request for the assignment of a parking space closer to her condominium unit sounds, on its face, like a reasonable request. But for Respondents, acquiescing to this request is not possible.

34. Residents at Somerset Park are legally entitled to the parking spaces appurtenant to the units they occupy. All of the parking spaces closer to Petitioner's unit are limited common elements that have been conveyed to specific condominium unit owners. Respondents do not own or have rights to the parking spaces closer to Petitioner's unit, and, therefore, do not have the legal power to unilaterally assign away those parking spaces. *See U.S. v.*

Fairways Villas Condo. Ass'n., 879 F. Supp. 798 (N.D. Ohio 1995), *vacated*, 920 F. Supp. 115 (N.D. Ohio 1996).¹ Respondents could designate an unassigned parking space² to Petitioner, but there are no unassigned parking spaces closer to Petitioner's unit than where she currently parks.

35. Respondents encouraged Petitioner to ask her neighbors to switch parking spaces. Petitioner saw some success in doing so—she is now parking in a space that is one spot closer to her unit. There are very few parking spaces that are closer to Petitioner's unit, and those spaces are not under Respondents' control.

36. Because Petitioner did not meet her burden of proving a prima facie case of housing discrimination, the undersigned concludes that a discriminatory housing practice did not occur.

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 dismissing Petitioner's Petition for Relief.

¹ *Fairway Villas* was vacated through settlement agreement during the pendency of an appeal.

² Somerset Park has unassigned parking spaces that are not reserved as limited common elements.

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



JODI-ANN V. LIVINGSTONE
Administrative Law Judge
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Filed with the Clerk of the
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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.