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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE ROSE,

Petitioner,

vs.

Case No. 20-2789

PHCSA,

Respondent.

RECOMMENDED ORDER

Administrative Law Judge Hetal Desai, of the Division of Administrative Hearings (DOAH), conducted the final hearing in this case by Zoom video conference on October 15, 2020.

APPEARANCES

For Petitioner: Lawrence Rose, pro se
4787 Klosterman Oaks Boulevard
Palm Harbor, Florida 34683

For Respondent: Andrew J. Salzman, Esquire
Unice Salzman, P.A.
1815 Little Road
Trinity, Florida 34655

STATEMENT OF THE ISSUE

Whether Respondent, PHCSA,¹ discriminated against Petitioner, Lawrence Rose, based on his gender in violation of section 760.08, Florida Statutes (2019),² when it restricted his access to its tennis courts.

¹ Respondent, PHCSA, is the Palm Harbor Community Services Agency.

² All references to the Florida Statutes and administrative rules are to the 2019 versions unless stated otherwise.

PRELIMINARY STATEMENT

On January 22, 2019, Petitioner filed a Technical Assistance Questionnaire for Public Accommodation Complaints (TAQ) with the Florida Commission on Human Relations (Commission or FCHR). Petitioner described the following facts in the TAQ:

I was discriminated by an employee named Ed Hooker and later kicked out for good by Erica Lynford. The harassment started in 2015 when they would lock us out of the tennis courts at Putnam Park in Palm Harbor. In June 2018 we were kicked out for 10 weeks because they said they run a summer camp from 9am to 2pm. They allowed a private person (Johnny Angel) to use the courts from 4-7 pm all summer as well. Myself and another person complained about not being able to use the tennis courts and asked for the financials and when the courts would be open for public use. ... Erica would not provide [the] all the financials or when the courts would be available for the public. She later claimed we swore at Ed Hooker and called the sheriff's office to cite us for trespassing. This happened the day after I posted a negative review on facebook and google on September 10, 2018. They have harassed us since 2014. *We never swore at anyone and have been harassed and I believe it is due to my age as I am a senior citizen.* (emphasis added).

In the TAQ section asking for the basis of the public accommodation discrimination claim, Petitioner only marked one box labeled "Other" and wrote in "age."

On March 5, 2019, the Commission issued a Notice of Right to Amend indicating it could not investigate Petitioner's complaint because the place to which Petitioner complained he was denied access was not a public accommodation. It is unclear whether Petitioner amended his complaint with

the Commission, but no amended complaint was transmitted by the Commission to DOAH.

Regardless, on May 20, 2020, the Commission issued a "Determination: No Reasonable Cause" addressing the age discrimination claim in the TAQ and a previously unmentioned claim of sex discrimination.³ In that document the Commission found:

Complainant filed a complaint of discrimination alleging that Respondent committed unlawful discrimination on the bases of age *and sex* in violation of the Florida Civil Rights Act of 1992. The [Commission] has completed its investigation of this matter. The Office of General Counsel has completed its review of the investigation and finds it is unlikely that unlawful discrimination occurred in this matter. (emphasis added).⁴

On June 16, 2020, Petitioner filed a Petition for Relief. The Petition does not mention either age or sex as a basis for discrimination, but instead alleges general harassment. The Petition also adds a claim for violation of sections 90-60 and 10-44(u) of the Pinellas County Code of Ordinances (Pinellas County Code).

On June 17, 2020, the Commission referred the Petition to DOAH to conduct a hearing, where it was assigned to the undersigned and set for hearing.

³ Respondent erroneously states it filed its response to the Commission of Ethics. *See* Resp. PRO, p.3, ¶5.

⁴ Respondent assumes that Petitioner's complaint included both age and sex discrimination. *See* Resp. PRO, p.3, ¶2.

On August 19, 2020, PHCSA filed a Motion to Dismiss the Petition for Relief on the following grounds: (1) its tennis courts were not "public accommodations" as defined in the Florida Civil Rights Act (FCRA); and (2) the allegations of violations of the Pinellas County Code were improper. Respondent's Motion to Dismiss was heard at the pre-hearing conference held on August 28, 2020. On August 31, 2020, the undersigned issued an Order denying the motion to dismiss without prejudice as to the FCRA public accommodation claim because there were disputed issues of fact. The Order struck the allegation of violations of the Pinellas County Code from the Petition for Relief.

On October 12, 2020, three days before the final hearing, Respondent filed a second Motion to Dismiss (second Motion) on the grounds there could be no public accommodation discrimination claim based on age because section 760.08 does not include "age" as a protected class. Argument on the second Motion was heard at the final hearing. The second Motion was granted as to the age claim (for reasons explained in the Conclusions of Law below), and the testimony at the hearing was limited to the claims of harassment and discrimination based on sex.

After granting a continuance, the final hearing was held on October 15, 2020. Petitioner testified on his own behalf and presented the testimony of Edward Hooker and Curt Baker. Petitioner's Exhibits P1, P4, P9 through P17, P21 through P29, P37, P40 through P44, and P46 through P49 were admitted into evidence. Respondent presented the testimony of Erica Lynford. Respondent's Exhibits R1 through R8 were admitted into evidence.

The Transcript of the hearing was filed on December 3, 2020. The parties requested an extension to file proposed recommended orders (PROs), which

was granted. Both parties timely filed their PROs, and both were considered in the preparation of this Order.

FINDINGS OF FACT

1. Petitioner is a male senior citizen who has used PHCSA's tennis courts in the past and wishes to continue to use those tennis courts.

2. PHCSA is a taxing district created by Pinellas County to oversee recreational areas and libraries, including Putnam Park.

3. Putnam Park, which is located in Palm Harbor, Florida, has two tennis courts that can be reserved for a fee. If the courts are not reserved, they are open to the public on a first-come basis for free.

4. There are no policies or procedures that restrict the use of a PHCSA facility, including the tennis courts, based on a person's sex.

5. If the courts are wet due to weather or from adjacent irrigation sprinklers, they are closed until the surface is dry and it is safe to play. When closed for safety reasons, the courts are unavailable to everyone, male and female.

6. Additionally, PHCSA staff edges and mows the area around the tennis courts and blows any debris off the courts. This maintenance generally occurs on Mondays.

7. During the summer, PHCSA operates a tennis camp for youth. The camp runs Monday through Friday, from 9:00 a.m. to 2:00 p.m., for eight to ten weeks. Both tennis courts are unavailable for public use during the time the camp is in session, but are available for rental or public use after camp hours.

8. In June 2018, Petitioner complained to PHCSA that the courts were not available during the time of the summer camp and that the tennis courts were being used to generate revenue. PHCSA informed Petitioner he could use the courts on the days of the summer camp any time after 2:00 p.m., and that revenue from rentals was used to maintain PHCSA facilities.

9. Petitioner acknowledged that the courts were available after 2:00 p.m. but complained that by then it was too hot to play. He also conceded that no one, regardless of gender, was allowed to use the courts (other than the camp attendees) during the tennis camp's hours of operation.

10. Johnny Angel, a male tennis instructor, has a contract with PHCSA to rent one tennis court during certain time blocks for private tennis lessons. During these lessons, Mr. Angel only utilizes one tennis court, leaving the other court available for rental or public use.

11. Petitioner complained that he did not like to play on the available court during Mr. Angel's lessons because there is no barrier to stop stray balls that inevitably come onto the available court from Mr. Angel's students.

12. Petitioner also complained to PHCSA about delays in unlocking Putnam Park on certain occasions, preventing him from using the tennis court. On these occasions, no one was able to use the tennis courts, male or female.

13. Edward Hooker, a crew leader for the PHCSA, testified that he has had multiple encounters with Petitioner since 2017. Mr. Hooker described Petitioner as "very rude," "boisterous," and "aggressive" during these encounters. In one incident, Petitioner called Mr. Hooker "a liar" and claimed staff did not blow off the courts.

14. The most recent incident between Mr. Hooker and Petitioner occurred on September 10, 2018. On this date, Petitioner arrived at Putnam Park but was unable to use the courts because the gate was locked; he had to wait 40 minutes.

15. Once open and shortly after Petitioner began playing tennis, Mr. Hooker began mowing the area around the tennis courts. Petitioner admits he asked Mr. Hooker to blow off the courts, but denies yelling or using profanity.

16. Mr. Hooker testified that he informed Petitioner that the courts were closed because they were wet and that the courts would be blown off after the

mowing was finished. Mr. Hooker claims that at some point during this encounter Petitioner yelled at him and used profanity. Mr. Hooker's version of the incident is more credible than Petitioner's version.

17. Regardless, Mr. Hooker reported the incident to his supervisor, Erica Lynford, the Director of PHCSA Parks and Recreation. Ms. Lynford testified that she had previously received complaints from three different PHCSA staff members of similar incidents with Petitioner.

18. Ms. Lynford investigated Mr. Hooker's September 10 complaint by asking another staff member, Jake Pullen, for his account of the incident. She also restricted Mr. Hooker and Mr. Pullen from working at Putnam Park. Based on her investigation, Ms. Lynford determined that Petitioner used a "posturing nature and loud voice" toward Mr. Hooker and other PHCSA staff. She decided Petitioner's behavior warranted a trespass warning.

19. On September 11, 2018, Petitioner returned to the tennis courts with Curt Baker, a male senior citizen. Ms. Lynford contacted the Pinellas County Sheriff's Office (PCSO) to issue the trespass warning. Once the PCSO arrived, Ms. Lynford told Petitioner and Mr. Baker they were no longer allowed on the Putnam Park tennis courts. It was explained to Petitioner and Mr. Baker that if they returned to the tennis courts they would be subject to arrest.

20. Subsequently, Mr. Baker requested that the trespass warning against him be lifted. PHCSA granted his request and Mr. Baker is now allowed to play on the tennis courts.

21. Petitioner presented no evidence that the trespass warning was based on his gender, or that PHCSA treated women in a preferential manner.

CONCLUSIONS OF LAW

22. Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes, grant DOAH jurisdiction over the parties and subject matter of this cause. *See also* Fla. Admin. Code R. 60Y-4.016.

23. Petitioner brings this action under section 760.08, the public accommodation provision of the FCRA. He alleges that PHCSA discriminated against him on account of his age and gender when it barred him from the PHCSA tennis courts. As an initial matter, however, Petitioner cannot bring a claim of public accommodation discrimination based on his age. The FCRA prohibits discrimination in places of public accommodation and provides:

All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion.

§ 760.08, Fla. Stat.

24. The public accommodation provision of the FCRA does not mention "age" or explicitly protect the elderly. Without statutory authority Petitioner can only proceed on his claim of public accommodation discrimination based on sex. *See* § 120.57(1)(e)1., Fla. Stat. ("An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on [an interpretation of] an unadopted rule or a rule that is an invalid exercise of delegated legislative authority.").⁵

25. The FCRA is modeled after Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). Consequently, interpretation of federal discrimination law is instructive and persuasive in analyzing claims under the FCRA. *See, e.g., Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); *Dornbach v. Holley*, 854 So.

⁵ Part of Petitioner's confusion regarding his age discrimination claim may have been fostered by the Commission's forms and actions. For example, the TAQ form (which is specifically for "Public Accommodation Complaints") mentions age in its acknowledgment section: "I also understand that the FCHR can only accept charges of discrimination based on race, religion, sex, pregnancy, national origin, disability, age, genetic information, or retaliation for opposing discrimination." Additionally, the Notice of Determination in this case states that FCHR investigated Petitioner's age discrimination claim even though the statute clearly does not make age a "protected class" under FCRA's public accommodation provision.

2d 211, 213 (Fla. 2d DCA 2002); *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014).

26. Regarding his sex discrimination claim, Petitioner must prove the elements of public accommodation discrimination by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; *See Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831 (Fla. 1993).

27. Claims of discrimination in public accommodations under the FCRA relying on circumstantial evidence apply the same *prima facie* standards and burdens of proof as employment discrimination claims under federal law. *See LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1368, 1370 (S.D. Fla. 1999) (finding public accommodation claims under section 760.08 have "the same *prima facie* standards and burdens of proof as do employment discrimination claims under Title VII."(citations omitted)); *see also Solomon v. Waffle House, Inc.*, 365 F. Supp. 2d 1312, 1331 (N.D.Ga. 2004).

28. In this case, Petitioner must first prove a *prima facie* case of discrimination with circumstantial evidence that supports a fair inference of unlawful discrimination. If he does so, PHCSA may explain that it prevented Petitioner from using the tennis court for legitimate nondiscriminatory reasons. If PHCSA satisfies this burden, Petitioner may show that PHCSA's explanations are not credible or are only a pretext for discrimination.

29. To prove his *prima facie* case, Petitioner must establish he: (1) is a member of a protected class; (2) attempted to afford himself the full benefits and enjoyment of a public accommodation; (3) was denied the full benefit or enjoyment of a public accommodation; and (4) such services were available to similarly situated persons outside his protected class who received full benefits or who were treated better. *Laroche*, 62 F. Supp. 2d at 1382; *see also Solomon*, 365 F. Supp. at 1331.

30. Petitioner has satisfied the first element of his sex discrimination claim, but PHCSA argues he cannot satisfy the second and third elements because the tennis courts are not a "public accommodation."

31. Under the FCRA, a "public accommodation" is defined in relevant part as:

"Public accommodations" means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section:

* * *

(c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.

§ 760.02(11), Fla. Stat.

32. Sports venues, such as tennis courts, have qualified as "public accommodations" under the federal equivalents to the FCRA. *See People of State of N.Y. by Abrams v. Ocean Club, Inc.*, 602 F. Supp. 489, 496 (E.D.N.Y. 1984) (finding tennis courts controlled by private club but offered for use to the general public were subject to federal and New York equivalent of FCRA); *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 1999) (golf course is a place of public accommodation under federal and Oregon equivalent of FCRA).

33. The Florida Attorney General has opined that a local softball field in a city park similar to Putnam Park is a "public accommodation" for the purposes of FCRA:

[T]he provisions of the Florida Civil Rights Act would prohibit the Village of Palmetto Bay from making a municipal softball field exclusively available to female athletes as any such action would constitute discrimination on the basis of sex or gender in the area of public accommodation. However, this conclusion should not be read to suggest that activities like girls' softball games cannot be scheduled exclusively at a particular

athletic field so long as opportunities exist for boys' teams to also schedule use of the park.

In Re Eve A. Boutsis, Fla. Att'y Gen. Op. 2008-58 (2008).

34. Whether a municipal park or sports field constitutes a "public accommodation" under FCRA involves "factual determinations based on the uses to which this property is put, such as whether the park is used for entertainment or exhibition, whether the park includes a sports arena or stadium, whether food may be served on park grounds, etc." *Id.*

35. Based on the facts of this case, the undersigned finds the tennis courts were a public accommodation under the FCRA definition. Specifically, although there was no evidence there was food on park grounds, Putnam Park and the tennis courts were utilized for entertainment and were available for rent by members of the public.

36. Turning to the last element, there was absolutely no evidence women were given preferential treatment by PHCSA in the use of the tennis courts. All members of the public, regardless of sex, were excluded from using the courts during the summer tennis camp or when the courts were locked. Similarly, all members of the public, regardless of sex, could use the second available court during Mr. Angel's private lessons. Moreover, the evidence established that Mr. Baker (who is in the same protected class as Petitioner) was allowed to use the courts. Petitioner show not shown that similarly situated persons outside his protected class were allowed to use the tennis courts when he was not.

37. Because Petitioner did not meet his burden of proving a *prima facie* case of sex discrimination by a preponderance of the evidence, PHCSA's reasons for restricting Petitioner's use of the tennis courts during the summer tennis camp or issuing him a trespass warning, and whether those reasons were pretexts, need not be discussed. *See generally, Adams v. Holland*, 2019 WL 4451454, at *6 (M.D. Fla. Sept. 17, 2019) (noting where plaintiff did not show a comparator outside his protective class he could not

establish a *prima facie* case for discrimination and the court did not need to address whether defendants had a non-discriminatory reason for his treatment, or whether such a reason was pretextual).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is Recommended that the Florida Commission on Human Relations enter a final order dismissing Lawrence Rose's Petition for Relief.

DONE AND ENTERED this 26th day of January, 2021, in Tallahassee, Leon County, Florida.



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Administrative Law Judge
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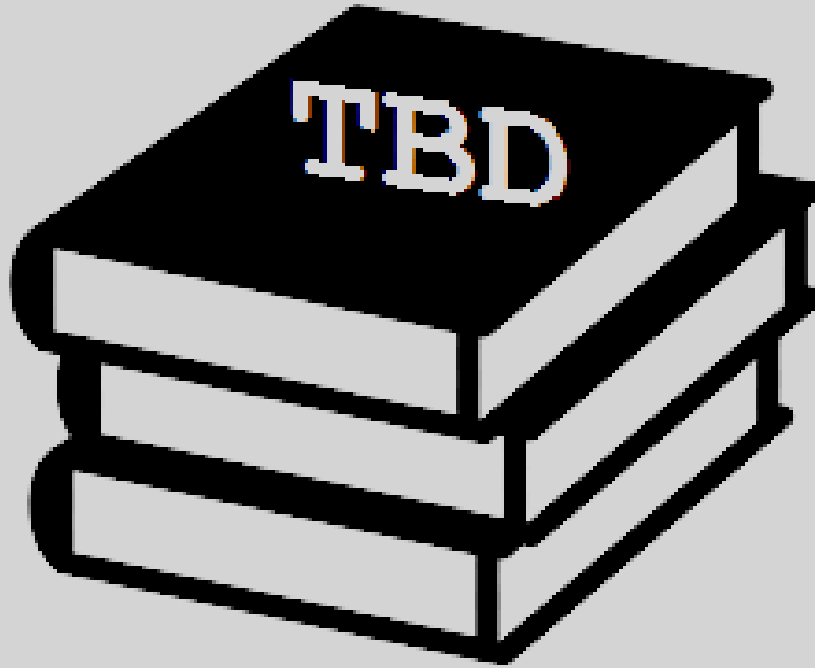
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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.

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