STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO. HG14WB-65418
HUD NO. 02-15-0519-8

Princess King,	)	
	)	Administrative Action
Complainant,	)	
	)	**FINDING OF PROBABLE CAUSE**
v.	)	
	)	
Ashraf Elshowki,	)	
	)	
Respondent.	)	

On July 9, 2015, Essex County resident Princess King (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her landlord, Ashraf Elshowki (Respondent), refused to make necessary repairs to her apartment and sought to evict her because of her disability and service dog, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. See Verified Complaint, ¶¶3-6, Jul. 9, 2015. Respondent denied the allegations of housing discrimination in their entirety. DCR's investigation found as follows.

Respondent is a Brooklyn resident who owns multiple rental properties in New Jersey including a three-family home at 57 Pennsylvania Avenue, Newark. Complainant has a housing choice voucher administered by the Newark Housing Authority that pays a portion of her monthly rent. On October 1, 2013, Complainant and Respondent entered into a one-year lease for an apartment in the three-family home for $1,000 per month. The lease agreement prohibits pets. Complainant claims that Respondent knew that she intended to live with her dog, a pit bull, before she moved into the apartment, and that Respondent knew that the tenants in an upstairs apartment—Ada Vasquez and Oscar Martinez—lived with two pit bulls.

On or about April 5, 2014, Vasquez and Martinez's dogs attacked Complainant. Complainant sustained injuries and required hospitalization. Complainant sued Respondent alleging that he negligently installed a fence in the backyard, which caused the attack. See King v. Elshowki, Docket No. ESX-L-4504-14 (Law Div., Jun. 19, 2014). Respondent's insurance carrier, Hermitage Insurance Company (Hermitage), brought a declaratory judgment action alleging that it had no duty to defend or indemnify Elshowki in the above lawsuit. See Hermitage Ins. Co. v. Elshowki, Docket No. ESX-L-8869-14 (Law Div., Dec. 15, 2014). An Essex County Superior Court official told DCR that the declaratory judgment action was tried on October 26, 2015, and the Court ruled in favor of Elshowki. Hermitage continues to defend Respondent in the personal injury lawsuit.

Complainant alleges that on or about December 15, 2014, Respondent told her that she could no longer keep her dog in her apartment, that he would make no further repairs to her apartment, and that she would have to move out. Complainant claims that the fact that she lived with a dog became an issue only after she commenced the personal injury lawsuit.

On February 25, 2015, Complainant sent an email to Respondent stating that her dog was a "service animal" trained to retrieve dropped items, help her with "balance and mobility," "do perimeter searches to alleviate [her] severe anxiety and PTSD symptoms," and "calm, prevent, and distract [her] from having panic attacks." See Email from Complainant to Respondent, "Princess King Reasonable Accommodation," Feb. 27, 2015, 2:22 p.m. She asked that the dog be allowed to continue living with her. She attached a note from a doctor who identified himself as a "Licensed Psychologist NJ # 2138" and "Certified Psychoanalytic Psychotherapist," which stated:

> This letter is to confirm that Ms. Princess King is under treatment for Post-Traumatic Stress Disorder precipitated by a reported assault committed by her neighbor this past summer. She was attacked by two pit-bull dogs, resulting in disabling injuries to her arm and leg. She suffers extreme pain, insomnia and anxiety including frequent panic attacks. Her personal dog played a major role in defending her during this attack. She views her dog's intervention as having been life saving.
>
> Ms. King meets the definition of disability under the Americans with Disabilities Act, the Fair Housing Act, and the Rehabilitation Act of 1973. Due to this emotional disability, Ms. King has certain limitations coping with what would otherwise be considered normal, but significant day to day situations. To help alleviate these challenges and to enhance her day to day functionality, I have prescribed that Ms. King obtain a psychiatric service dog. One of the few sources of assurance and comfort she experiences during this rehabilitation period is her dog. The presence of this animal is necessary for Ms. King's emotional and mental health because his presence is essential to mitigate the symptoms of anxiety, pain, insomnia, panic, despondency and other PTSD symptoms from which she is currently suffering. If you have any questions, please call.

See Letter from Mark H. Seglin, Ph.D, Jan. 6, 2015. Complainant told DCR that she trained the dog herself based on on-line tutorials.

On April 6, 2015, an attorney from the Community Health Law Project sent a letter to Respondent reiterating Complainant's need for the dog. The letter argued that Complainant "sustained psychological as well as physical injury" and that it was "unreasonable to enforce the no pets provision under the circumstances due to Ms. King's physical and psychological dependence on her dog." See Letter from Patricia Murty, Esq., to Respondent, Apr. 6, 2015.

On June 18, 2015, Respondent sent a Notice to Cease to Complainant stating that if her dog was not immediately removed, she would be evicted.

On July 1, 2015, Respondent sent a document entitled, "Notice to Vacate and Demand for Possession; Notice of Termination," to Complainant stating that her tenancy would be terminated effective August 1, 2015.

On July 9, 2015, Complainant initiated the instant action by filing a verified complaint with DCR alleging disability discrimination based on differential treatment and failure to accommodate.

On August 14, 2015, DCR received a document from Respondent setting forth his position with regard to the LAD allegations:

> We have several reasons stating why she cannot keep her dog. First, our insurance company doesn't cover animals. Second, she is suing us for dog bites obtained from her neighbors dog who residing [*sic*] in the apartment above hers. When Ms. King moved in and signed the lease, we made it clear that no animals were allowed. If we were aware she had a dog, we would not have allowed her to move in. Our insurance company canceled our insurance policy because of her and because she is suing us. Until we find a new insurance company, we must pay double what we used to pay, all because of Ms. King. We cannot afford to lose our policy because of her and we have a lawyer who plans to evict her since her lease is now over . . .
>
> [See Letter from Respondent to To Whom It May Concern, Aug. 9, 2015.]

In a subsequent interview, Respondent told DCR that repair/service persons—A.C. and R.S.—have refused to enter Complainant's apartment because of her dog. DCR interviewed A.C. and R.S. Both denied having problems with the dog. R.S. stated that Complainant's dog was very docile unlike the "aggressive" dogs that lived in the upstairs apartment. DCR also interviewed an upstairs neighbor and a city official who has performed inspections at Complainant's apartment. Like A.C. and R.S., they stated that they had no problems with the dog.

The Newark Housing Authority has refused to enter into a new housing assistance payment (HAP) contract because the apartment has not passed its annual inspection.

Analysis

In New Jersey, it is unlawful to refuse to lease or otherwise make unavailable or deny a dwelling to a person based on disability, or to discriminate in the "terms, conditions or privileges of the . . . lease of any real property." N.J.S.A. 10:5-12(g). That includes a refusal "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling." Oras v. Housing Authority of Bayonne, 373 N.J. Super. 302, 312 (App. Div. 2004) (quoting N.J.A.C. 13:13-3.4(f)(2)) (quotations omitted); see also N.J.S.A. 10:5-4.1.

In this case, Respondent does not dispute that Complainant is a person with a disability, or that she requested an accommodation, or that he denied her request, or that the animal in question would have alleviated the effects of her disability. Nor does Respondent challenge Complainant's characterization of the dog as a "service dog." Instead, he appears to argue that the requested accommodation is unreasonable, and therefore not required, because it would impose an undue hardship. See Letter from Respondent, supra.

a. Service Dog v. Emotional Support Animal

For purposes of the LAD, there is a distinction between service dogs and emotional support animals.

"Service dogs" are individually trained to do work or perform tasks for people with disabilities. N.J.S.A. 10:5-5dd ("Service dog means any dog individually trained to the requirements of a person with a disability"). Examples of such work include "minimal protection work, rescue work, pulling a wheelchair, or retrieving dropped items . . . alert[ing] or otherwise assist[ing] persons subject to epilepsy or other seizure disorders." Ibid. Service dogs are working animals, not pets. The work that a dog has been trained to perform must be directly related to the person's disability.

A tenant has an absolute right to reside with his/her service dog subject to only a few restrictions, e.g., the person is liable for any damages done to the premises of a public facility by the animal. N.J.A.C. 13:13-3.4c; N.J.S.A. 10:5-29.2[1] Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the LAD. N.J.S.A. 10:5-5dd.

Here, the dog in question is Complainant's pet, which protected her during the attack and upon whom she now relies to ameliorate feelings of anxiety, pain, panic, etc., arising from the incident. The more appropriate designation might be "emotional support animal." Emotional support animals

> provide very private functions for persons with mental and emotional disabilities. Specifically, emotional support animals by their very nature, and without training, may relieve depression and anxiety, and help reduce stress-induced pain in persons with certain medical conditions affected by stress.
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> [See 24 CFR Part 5, Federal Register, Vol. 73, No. 208, U.S. Dept of Housing & Urban Devel. (HUD)'s response to comments (Oct. 27, 2008).]

A federal court found that the above language "make[s] clear that an emotional support animal need not be specifically trained because the symptoms that the animal ameliorates are

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[1] In addition, the person is responsible for the animal's care and maintenance. For example, a housing provider may establish reasonable rules in lease provisions requiring a person with a disability to pick up and dispose of his or her service animal's waste.

mental and emotional, rather than physical." See Warren v. Delvista Towers Condo. Assoc., 49 F. Supp.3d 1082, 1807 (S.D. Fla. 2014).[2]

In view of the above, including Dr. Seglin's letter opining that Complainant's pet dog was "necessary for Ms. King's emotional and mental health," DCR finds, for purposes of this disposition only, that Complainant's dog meets the definition of an emotional support animal, and functions in that capacity for Complainant.[3]

b. Undue Hardship

Respondent is correct to the extent he argues that a tenant does not have an absolute right to keep an emotional support animal on the premises. However, that is not the end of the analysis. Requests for the relaxation of a "no pets" policy must be treated as a request for a reasonable accommodation. N.J.A.C. 13.13-3.4(f)(2); Oras, supra, 373 N.J. Super. at 315-16 (citing Green v. Housing Auth. of Clackamas County, 994 F. Supp. 1253, 1257 (D. Or. 1998)).

A reasonable accommodation "means changing some rule that is generally applicable to everyone so as to make its burden less onerous on the handicapped individual." Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n. 25 (D.N.J. 1992). The duty to provide a reasonable accommodation "does not necessarily entail the obligation to do everything possible to accommodate such a person; cost (to the defendant) and benefit (to the plaintiff) merit consideration as well." Oras, supra, 373 N.J. Super. at 315.

A housing provider is not required to provide accommodations that would "impose an undue financial and administrative burden," or "fundamentally alter the nature of the housing provider's services," or if the animal "poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or . . . would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation." See HUD, Service Animals and Assistance Animals for People with Disabilities in Housing & HUD-Funded Programs, FHEO Notice: FHEO-2310-01 (Apr. 25, 2013); see also Sycamore Ridge Apts. v. LMG, No. A-5552-10T4 (App. Div., Jun. 14, 2012) (per curiam).

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[2] Although the final rule was issued in regards to HUD-assisted public housing and multifamily housing projects, the rationale is equally persuasive in non-HUD assisted housing. See Warren v. Delvista Towers Condo. Assoc., 49 F. Supp.3d 1082, 1087 (S.D. Fla. 2014) (citing Overlook Mut. Homes, Inc. v. Spencer, 666 F. Supp.2d 850, 860 (S.D. Ohio 2009) aff'd on other grounds, 415 Fed. Appx. 617 (6th Cir. 2011)).

[3] Although DCR's investigation did not find sufficient evidence to conclude that Complainant's dog received the type of training required to qualify as a "service dog," Complainant will have the opportunity to present such evidence at a hearing. Based on such additional evidence, if an administrative law judge were to conclude that Complainant's dog is a "service dog" as that term is defined in the LAD, the reasonable accommodation analysis would be moot, and Complainant would have a right to keep her service dog in Respondent's apartment under the conditions established by the LAD. N.J.S.A. 10:5-29.2.

The burden to prove that a requested accommodation would impose an undue hardship lies with the housing provider. See, e.g., Lapid-Laurel, LLC v. Zoning Bd. of Adjust. of Scotch Plains, 284 F.3d 442, 457 (3d Cir. 2002) ("plaintiff bears the initial burden of showing that the requested accommodation is necessary to afford handicapped persons an equal opportunity to use and enjoy a dwelling, at which point the burden shifts to the defendant to show that the requested accommodation is unreasonable."); see Lasky v. Moorestown Twp., 425 N.J. Super. 530, 545 (App. Div. 2012), certif. denied, 212 N.J. 198 (2012) ("If a defendant's response to a reasonable accommodation claim is that that accommodation would be unduly burdensome or an undue hardship, this defense is considered an affirmative defense and the defendant assumes the burden of proof on this issue."); Hall v. St. Joseph's Hosp., 343 N.J. Super. 88, 108-09 (App. Div. 2001), certif. denied, 171 N.J. 336 (2002); cf. Jansen v. Food Circus Supermarkets, 110 N.J. 363 (1988) (noting that a defendant in LAD case that asserts an affirmative defense bears the burden of proof).

Here, Respondent claims that allowing the dog to reside in the apartment creates an undue hardship because (a) he cannot get technicians to perform site repairs because they are afraid of the animal; (b) it fundamentally alters the nature of his operations because he has a strict no-pets policy; and (c) his insurance carrier has cancelled his policy because of Complainant's personal injury lawsuit. See Letter from Respondent, supra, Aug. 9, 2015 ("Our insurance company canceled our insurance policy because of her and because she is suing us.")

Respondent has provided no evidence—and none has been uncovered by DCR—to support any of those arguments. DCR spoke with the repairmen identified by Respondent. They denied having any fear of the dog and stated that the dog did not interfere with their work. Others corroborated that the dog was not problematic. The notion that Respondent would be required to make a rare exception to a strictly-enforced no-pets policy is belied by the undisputed fact that Vasquez and Martinez had two pit bulls living in the upstairs apartment during the relevant time period. Elshowki produced no evidence to support his assertion that his insurance carrier is cancelling his insurance policy because of Complainant's lawsuit (arising from Vasquez and Martinez's dogs, not her emotional support animal). But even assuming that his assertion is true, it would not justify denying a request for a reasonable disability accommodation.

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid.

A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (199certif. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

Based on the above, the Director is satisfied that the circumstances of this case support a "reasonable ground of suspicion . . . to warrant a cautious person in the belief" that probable cause exists to support the allegations of disability discrimination based on a failure to accommodate. N.J.A.C. 13:4-10.2. The Director recognizes that an administrative law judge may ultimately conclude that allowing Complainant's dog to reside with her in the apartment would pose an undue hardship by, for instance, "impos[ing] an undue financial and administrative burden." However, because the burden of proof on that issue clearly rests with Respondent, and given the legal presumption in favor of disability accommodations, the Director finds at this preliminary stage in the process that Respondent has failed to establish that his affirmative defense is meritorious.

Similarly, the Director finds that where, as here, a landlord refuses to perform necessary repairs to an apartment and institutes an eviction procedure against a tenant because she relies on a service dog or emotional support animal for a disability, such conduct amounts to disparate treatment in the "terms, conditions or privileges of the . . . lease of any real property" based on disability. N.J.S.A. 10:5-12(g).

DATE: JAN. 6, 2016

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS