STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. HC10MV-65237
HUD NO. 02-15-0462-8

G.V.	)	
	)	Administrative Action
Complainant,	)	
	)	**FINDING OF PROBABLE CAUSE**
v.	)	
	)	
Berk & Berk at Hunters Glen, LLC,	)	
	)	
Respondent.	)	

On April 21, 2015, G.V. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Berk & Berk at Hunters Glen, LLC (Respondent)[1] refused to rent an apartment to her because of her disability, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR investigated the matter and now finds—for purposes of this dispositon only—as follows.

Respondent owns and operates a 1128-unit housing community at 3001 Route 130 South, Delran, New Jersey.

Complainant is a Burlington County resident who submitted a rental application for an apartment on or about February 9, 2015. She states that told the leasing agent (subsequently identified as Jessica Buehler) that she had an emotional support dog that was part Labrador retriever, part Staffordshire terrier (i.e., pit bull), and gave a note to Respondent from a doctor who is board certified in psychiatry and neurology, stating as follows:

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[1] The verified complaint identified Respondent as Hunter Glen Apartments. That designation is hereby changed based on the representation of Respondent's counsel that the proper designation is Berk & Berk at Hunters Glen, LLC.

> [G.V.] has been under my care since March 2011 for treatment of Depression and Anxiety. These conditions have left her disabled and in need of a companion dog, which is part of her mental health treatment plan. The service dog provides emotional support, security, and prevents loneliness, all of which enhances [G.V.]'s mental health. Further clinical information is available upon request and patient's prior approval.
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> [See Letter from Miguel E. Calimano, M.D., to To Whom It May Concern, Feb. 18, 2015][2]

Complainant said that Buehler consulted with her supervisor and then stated that Respondent would not rent an apartment to her because of her dog's breed mix. Complainant said that she spoke with Respondent's attorney, Carol Weiskoff, who told her that the apartment complex banned pit bulls for safety reasons, and that no exceptions would be made.

Respondent does not materially dispute Complainant's version of events other than to note that the attorney with whom Complainant spoke was Robert Weishoff, not Carol Weiskoff, and that Complainant described the animal as a "service dog," not an "emotional support animal." See Respondent's Answer to the Verified Complaint, Apr. 29, 2015, ¶6. Respondent acknowledged that "Complainant provided a letter from Dr. Calimano alleging [G.V.] had been under his care since March 2011 for Depression and Anxiety and required a 'service dog' for emotional support." See Respondent's Answer, surpa, at ¶4.

Respondent's Manager, Peggy Pippin, told DCR that its pet policy is set forth in a brochure that is available to all prospective tenants. It identifies nineteen breeds—"or any mix of"—which are prohibited.[3] Pippin stated that Respondent experienced two attacks on residents by pit bulls, and that "[u]nder the terms of [Respondent]'s Insurance Liability requirements, unless the aggressive breed pet is trained, certified and/or registered, we cannot allow these

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[2] Complainant told DCR that Dr. Calamino was her treating physician from 2011-2015, until she moved to Burlington County.

[3] The restricted breeds are listed as: "Akita, Alaskan Malamute, Bulldog, Chow, Coyotes & Wild Dogs, Doberman Pincher, Fila Brasileiro, German Shepard, Great Danes, Husky-all types, Hybrid and Purebred Wolves, Mastiff – All Types, Pit Bull Terrier, Press, Canario, Rottweiler, Saint Barnard, Shar-pei, Staffordshire Terrier. The prohibition includes any dog displaying the majority of physical trait of, or any mix of, the above mentioned prohibited breeds."

breeds on our property for fear of the safety of our residents and the added financial burden of increased liability costs." See Letter from Pippin to DCR, Sept. 10, 2015.

Respondent stated that it gave Complainant the opportunity to produce documentation showing that her dog was "properly trained and registered," but Complainant failed to do so. See Respondent's Answer, surpa, at ¶5. Respondent wrote:

> When asked to provide documentation as required by NJSA 4:19-15.3 that the dog in question was properly trained and registered as a "service Dog" Complainant was unable to provide such documentation finally admitting that the Pit Bull Mix was her personal Pet. The [Complainant] did not furnish the proof requested, and nothing further was received from the [Complainant] until the within complaint was filed. It should be noted that Delran Township requires similar proof for Guide dogs and Service dogs for licensing, upon such proof no license fees are charged.
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> [Ibid.]

Pippin stated that it has a tenant with a psychiatric disability who is allowed to keep a pit bull on the premises because the dog was registered as an "Emotional Support Animal" by Register My Service Animal, LLC, and is therefore deemed to be "properly trained and certified as a comfort companion dog." See Letter from Pippin to DCR, supra.

Analysis

In New Jersey, it is unlawful to (1) refuse to sell, rent, lease, or otherwise make unavailable or deny a dwelling to a person based on disability, or (2) discriminate in the "terms, conditions or privileges of the sale, rental or lease of any real property." N.J.S.A. 10:5-12(g). Discrimination 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.

Here, Respondent does not dispute that Complainant is a person with a disability, or that she requested an accommodation, or that it denied her request, or that the animal in question

would have alleviated the effects of her disability. Instead, it argues that Complainant's Labrador retriever/Staffordshire terrier is merely a pet, not a "service dog," because it lacks certification or training. Alternatively, it appears to argue that the requested accommodation would impose an undue hardship based on Respondent's "fear [for] the safety of [its] residents and the added financial burden of increased liability costs." See Letter from Pippin to DCR, supra. Both arguments are addressed below.

a. Not a Service Dog

Respondent is correct that for purposes of the LAD, there is a distinction between *guide or service dogs* on the one hand, and *emotional support animals* on the other.

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 guiding people who are blind, alerting people who are deaf, pulling a wheelchair, alerting and protecting a person who is having a seizure, reminding a person with mental illness to take prescribed medications, calming a person with Post Traumatic Stress Disorder during an anxiety attack, or performing other duties. 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 or prospective tenant has an absolute right to reside with his/her guide dog or service animal subject to only a few restrictions, e.g., the person is liable for any damages done to the premises of a public facility by his/her guide dog or service animal. N.J.A.C. 13:13-3.4c; N.J.S.A. 10:5-29.[4] 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.

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[4] 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.

In view of the above, the investigation supports Respondent's assertion that Complainant's dog does not meet the LAD definition of a guide dog or service animal. There is no evidence that the dog was individually trained to perform work directly related to Complainant's disability.

Although Complainant mistakenly interchanged the terms "service dog" and "emotional support animal," Respondent appears to have understood that she was claiming that the dog was essential for her emotional support. See Respondent's Answer, surpa, at ¶4 (admitting that Complainant's medical evidence stated that she "required a 'service dog' for emotional support."). Respondent is mistaken to the extent that it argues that an emotional support animal is required to be certified or trained to establish its bona fides.

The U.S. Department of Housing and Urban Development (HUD), which is charged with enforcing the federal Fair Housing Act (which is the substantial equivalent to the LAD in terms of prohibiting housing discrimination), declared that "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." See 24 CFR Part 5, Federal Register, Vol. 73, No. 208, response to comments, (Oct. 27, 2008).

"In light of the HUD rule, it is of no moment whether [Complainant's dog] was specially trained." Warren v. Delvista Towers Condo. Assoc., 49 F. Supp.3d 1082, 1807 (S.D. Fla. 2014). The above-cited language from HUD "make[s] clear that an emotional support animal need not be specifically trained because the symptoms that the animal ameliorates are mental and

emotional, rather than physical." Ibid.[5] Thus, we find for purposes of this disposition only that Complainant's Labrador retriever/Staffordshire terrier is an emotional support animal.

b. Undue Hardship

Respondent is correct to the extent that it argues that a prospective 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 (in this case, a "no pit bulls" 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 fundamentally alter the nature of its operations or impose an undue financial and administrative burden. Sycamore Ridge Apts. v. LMG, No. A-5552-10T4 (App. Div., Jun. 14, 2012) (per curiam)

When the accommodation involves an emotional support animal, a landlord may deny the request if: "(1) the specific assistance animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation."

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[5] Although the final rule was issued in regards to HUD-assisted public housing and multifamily housing projects, the rationale is equally persuasive in this instance. 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)).

See HUD, Service Animals and Assistance Animals for People with Disabilities in Housing & HUD-Funded Programs, FHEO Notice: FHEO-2310-01 (Apr. 25, 2013) (emphasis in original).

In other words, the landlord must undertake an individual assessment of the specific animal's actual conduct, rather than make a determination based on a generalized fear or suspicion of the breed. 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." See 24 CFR Part 5, Federal Register, Vol. 73, No. 208, response to comments, (Oct. 27, 2008). In evaluating the animal's conduct or "a recent history of overt acts, a [housing] provider must take into account whether the animal's owner has taken any action that has reduced or eliminated the risk." Ibid. "Examples would include obtaining specific training, medication, or equipment for the animal." Ibid.; see generally Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996) (noting that the reasonable accommodation inquiry is "highly fact-specific, requiring a case-by-case determination.").

This is not plowing new ground. Courts across the country have rejected the notion that a landlord can summarily deny a disability accommodation request for a pit bull based on the breed's notoriety for having a propensity for violence. For example, in Warren v. Delvista Towers Condo. Assoc., 49 F. Supp.3d 1082 (S.D. Fla. 2014), a condominium association refused to modify its "no pets" policy to allow a tenant to keep his pit bull on the premises. The tenant had presented a note from his psychiatrist supporting the requested accommodation on the basis that the dog served a therapeutic function. The Condominium Association argued that the request was unreasonable *per se* because pit bulls were banned in the surrounding Miami-Dade County. In ruling in favor of the tenant, the Court noted that a dog may be banned if it poses a direct threat, but that any such conclusion must be based on an individualized assessment of the specific dog. The Court noted, "[T]he presumption in favor of a reasonable

accommodation is such that [housing disability discrimination law] requires the existence of a significant risk—not a remote or speculative risk." Id. at 1087.

Similarly, in Chavez v. Aber, 2015 U.S. Dist. LEXIS 104317 (W.D Tx. Aug. 8, 2015), the court denied a landlord's motion to dismiss a housing disability discrimination claim where the tenant claimed that her mixed-breed pit bull was an emotional support animal. The landlord argued the requested accommodation was unreasonable because having a pit bull on the premises "caused an undue burden on Defendant due to the danger to others, including tenants and third parties, for which [the landlord] would be held legally responsible" and because the requested accommodation would fundamentally alter the nature of defendant's operations by "reconfiguring and altering the common area used by all tenants." Id. at *27. The defendant concluded, "As a matter of law it is not reasonable accommodation to keep [such] a dangerous dog on the premises." Id. at *28-29.

In finding that the defendant could not reject an emotional support animal based solely on the dog's breed, the Chavez court noted that "whether an accommodation is reasonable is a question of fact determined by a close examination of the particular circumstances." Id. at *27-28 (citing Stevens v. Hollywood Towers & Condo Assoc., 836 F. Supp.2d 800, 810 (N.D. Ill. 2011)). The Court wrote that determining whether Ms. Chavez's specific pit bull "poses a direct threat that cannot be mitigated by another reasonable accommodation . . . is distinctly a question of fact," and that such a factual assessment might determine that the dog has "no aggression" or "socialization issues." Id. at *29. Thus, the Court acknowledged that "allowing [a pit bull] to remain on the premises was a potentially reasonable accommodation." Id. at *29-30 (citing Petty v. Portofino Council of Coowners, 72 F. Supp.2d 721 (S.D. Tex. 2010)).[6]

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[6] DCR notes—without adopting the notion—that some courts have found that even dogs that have exhibited aggressive behavior may be reasonable accommodations in housing cases under certain circumstances. See e.g., Kovalevich v. Rhea, 2013 N.Y. Misc. LEXIS 4634 (Supreme Ct, NY Cty, Sept. 27, 2013) (allowing a tenant of the New York City Housing Authority to keep a pit bull as an emotional support animal to accommodate her psychiatric disability even after the dog bit another resident and

In sum, a landlord is not required to determine with mathematical certainty whether granting a tenant's request would cause it to suffer an undue hardship. However, the decision cannot be based on sheer conjecture without a substantial evidential basis. If a landlord has concerns that an animal might pose a direct threat to persons or property, the landlord must consider the specific dog, and cannot simply impose a blanket prohibition against a particular breed of dogs. In this case, it is undisputed that no such individualized analysis was undertaken. Respondent freely acknowledges that its decision was not based on objective evidence about the specific animal in question, but rather on the breed generally and/or damage caused by other dogs of its breed. See Respondent's Answer, supra, at ¶5 ("Respondent does not rent units to tenants who have a pet, Pit Bull or a Pit Bull Mixed breed, based upon past negative experience with Pit Pulls at the complex attacking other residents.").

DCR notes that Respondent has already relaxed its "no pit bulls" rule in another case. Respondent told DCR that it allows a tenant with a psychiatric disability to keep a pit bull that is an "emotional support animal," as opposed to a service dog, on the premises. See Letter from Pippin to DCR, supra.

At the conclusion of an investigation, DCR 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 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.

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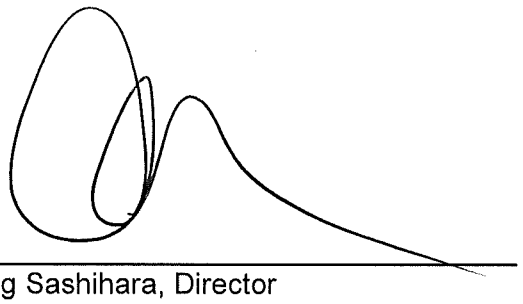
despite the Housing Authority's prohibition of non-service dog pit bulls); Oregon Bureau of Labor v. Housing Authority of Douglas County, 2014 U.S. Dist. LEXIS 146671 (D. Ore. 2010) (finding that an untrained pit bull that exceeded landlord's weight and size requirements and was reported by neighbors to have acted aggressively may still constitute a reasonable accommodation).

1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. 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, DCR is satisfied at this preliminary stage of the process, 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 theory of failure to provide a reasonable accommodation. N.J.A.C. 13:4-10.2. DCR recognizes that an individual assessment may ultimately conclude that allowing Complainant's Labrador retriever/Staffordshire terrier to reside with her in the apartment would pose an undue hardship. But on the other hand, State and federal law make clear that Complainant's housing options cannot be prematurely foreclosed by a prospective landlord's speculation and guesswork arising from a request for a disability accommodation.

DATE: 10-30-15



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