

PHILADELPHIA COMMISSION ON HUMAN RELATIONS

JAN RUBIN

V.

KENNEDY HOUSE, INC.

PCHR Charge No. H13051182

EEOC Charge No. 17G-2013-00144F

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEFORE: The Philadelphia Commission on Human Relations (“the Commission”); Commissioner Sarah E. Ricks, Esq., Commissioner Saadiq Jabaar Garner, Commissioner Rabbi Rebecca Alpert.

Appearances

For the Complainant, Jan Rubin: Alan Turner, Esq., and Willie Pollins Esq.

For the Respondent, The Kennedy House, Inc.: Sean R. Riley, Esq., Litchfield Cavo LLP.

Introduction

In this housing discrimination case of first impression, the Commission holds that the refusal to make a reasonable accommodation to afford a disabled person an equal opportunity to use and enjoy her dwelling constitutes unlawful “discrimination” under Section 9-1108(1) of the Philadelphia Fair Practices Ordinance. Further, the Commission adopts the federal Housing and Urban Development Agency’s interpretation of the Fair Housing Act, as well as reasoning from the weight of federal caselaw, to hold that, under Section 9-1108(1) of the Philadelphia Fair Practices Ordinance, a reasonable accommodation in the housing context includes not only specially-trained “service animals” (the “ADA definition”), but also “assistance animals” that provide emotional and other support to alleviate one or more identified symptoms of a person’s disability (the “HUD definition”).

Based on the foregoing, the Commission finds that Respondent The Kennedy House, Inc., a residential co-op building, violated the Section 9-1108 of the Philadelphia Fair Practices

Ordinance by refusing Complainant Jan Rubin's request to keep her medically necessary assistance dog as an accommodation. Complainant is disabled, and the requested accommodation is reasonable and necessary, as Rubin's dog forces her to have a more ordered life, is demanding of her, and reminds her to take her medications, eat meals, and get out of bed, all of which alleviate symptoms of her disability.

Findings of Fact

Procedural History

(1) On April 29, 2013, Complainant Jan Rubin filed a Complaint for housing discrimination with the City of Philadelphia Commission on Human Relations, based on Respondent The Kennedy House, Inc.'s ("Kennedy House") alleged failure to make a reasonable accommodation under Phila. Code § 9-1108, asserting that the co-op, a no-dog building, denied Complainant's request to keep her dog as an accommodation to her disabilities. See KH Ex. 6 (Compl. at Count I); Compl. Pre-Hearing Statement at 2-4.

(2) The Complaint requested compensatory and punitive damages, as well as attorney's fees and costs. KH Ex. 6 (Compl. at ¶¶ 36-39).

(3) On July 22, 2013, Respondent filed its Amended Answer to the Complaint.

(4) Following a determination of probable cause, a hearing before the Commission was held on March 21, 2014.

(5) At the hearing, Ms. Rubin testified on her own behalf, as did Stephen C. Meister, DVM, the veterinarian who cares for Ms. Rubin's dog. James Giblin, General Manager of the Kennedy House, testified on behalf of Respondent, Kennedy House. PCHR Hearing, N.T. 3/21/14 at 34-90; 95-107.

(6) Complainant's Exhibits 1-5, 7-9 and Respondent's Exhibits 3, 4, 5, 6 were introduced into evidence via stipulation of the parties. N.T. 3/21/14 at 27, 30.

(7) At the hearing, Complainant moved for, and was granted leave to, amend the relief sought to include injunctive relief. N.T. 3/21/14 at 30-32.

(8) At the hearing, Kennedy House objected to Dr. Meister's testifying as to Ms. Rubin's medical conditions, any assistance her dog provides vis-à-vis her conditions, and as to the relationship between Ms. Rubin and her dog, upon which objection the Commission reserved judgment. N.T. 3/21/14 at 10, 21-26.

(9) In accord with an order of the Commission, post-hearing proposed findings of fact and conclusions of law were submitted by the parties on May 12, 2014.

(10) Complainant's proposed Findings of Fact and Conclusions of Law ask for injunctive relief (an order to make Kennedy House offer the next available unit and to accept Rubin's dog as a reasonable accommodation), as well as attorney's fees, but only proposes compensatory damages in the alternative (should Kennedy House be unable to offer an equivalent residential unit), and do not propose punitive damages. Compl.'s Proposed FFCL at ¶¶ 35-41.

Ms. Rubin and her Condition

(11) Ms. Rubin is a sixty-one year old resident of Philadelphia, Pennsylvania. N.T. 3/21/14 at 45.

(12) Ms. Rubin owns a ten or eleven year old dog named Mira, a Plott hound that she adopted from a rescue. N.T. 3/21/14 at 50, 76-77.

(13) Ms. Rubin has a number of medical conditions, including: (1) degenerative disc disease at multiple levels of her spine; (2) spinal stenosis at multiple levels of her spine; (3) fibromyalgia; (4) chronic pain; and (5) central nervous system sleep apnea. N.T. 3/21/14 at 46, 81-82.

(14) Complainant's conditions "limit [her] motion dramatically," limit her ability to stand to about ten to fifteen minutes, and her ability to sit to a maximum of twenty to thirty minutes before the pain becomes significant, make it difficult to cook for herself because she cannot stand long enough to cook or clean up, make it difficult for her to use stairs, and to get in and out of her current three-story residence — where she resides on the second floor — because it necessitates utilizing the stairs. N.T. 3/21/14 at 47, 49, 62.

(15) Complainant previously worked sixty to eighty hours a week, but can no longer work. N.T. 3/21/14 at 51, 74.

(16) Complainant's conditions have significantly worsened over the past two years. N.T. 3/21/14 at 47.

(17) Although she can walk short distances, Ms. Rubin uses a wheelchair for mobility support, and has used it much more frequently over the last two years. N.T. 3/21/14 at 55, 62, 67, 83, 89.

(18) Ms. Rubin employs two part time caregivers/assistants, who help her with various tasks. N.T. 3/21/14 at 49.

(19) Ms. Rubin applied for, and has received, full SSI disability benefits since 2012. N.T. 3/21/14 at 48.

(20) Ms. Rubin has had a handicap hang tag for her vehicle for five years, issued by the Commonwealth of Pennsylvania. N.T. 3/21/14 at 48.

(21) The nature of Ms. Rubin's physical conditions, including the chronic pain associated therewith, often make it difficult for her to order her day, to get out of bed, to remember to take her medications, and do other simple tasks such as to take a shower, comb her hair and get dressed. N.T. 3/21/14 at 51, 78-79.

(22) Ms. Rubin's dog Mira assists her in ordering her day, in remembering when to take her medications, eat meals, get up and out of bed and otherwise reminding Ms. Rubin what she is supposed to be doing at any given time. N.T. 3/21/14 at 51, 70-71, 78-79.

(23) Although Mira is usually walked by other people, "the one time of day [Ms. Rubin] is forced to and [she] get[s] out of the house [she] sometimes get[s] to see [her] neighbors and get a bit of fresh air. Otherwise, [her] other time for getting out of the house is doctors' appointments, or . . . where [she is] . . . required to." N.T. 3/21/14 at 52.

(24) Mira does not have special training and is a stay-at-home animal that does not accompany Ms. Rubin to places of public accommodation. N.T. 3/21/14 at 77, 100-101, 103.

(25) According to Dr. Stephen C. Meister, the veterinarian who testified on behalf of Ms. Rubin, it is well-documented in studies in the field of emotional support/assistance animals that such animals provide tremendous help to the disabled and elderly, reducing depression and isolation, by providing structure and purpose in their lives by encouraging those persons to get up and move around and provide for the animal. N.T. 3/21/14 at 37-38.

(26) Dr. Meister has observed that “Mira [the dog] tells [Ms. Rubin] what to do in normal situations. She lets her know when she needs to go out and when she needs to be consoled,” and that Mira requires that Ms. Rubin be “as mobile as she possibly can . . . because [Ms. Rubin] needs to provide for her.” N.T. 3/21/14 at 38.

(27) The nature and quality of Ms. Rubin’s life would be materially disadvantaged if she were forced to live without an assistance animal. N.T. 3/21/14 at 72.

Complainant’s Reasonable Accommodation Request

(28) The Kennedy House is a residential cooperative building located at 19th Street and JFK Boulevard in Center City, Philadelphia. N.T. 3/21/14 at 53, 96.

(29) The Kennedy House has approximately 559 apartments. N.T. 3/21/14 at 98.

(30) Kennedy House is a no-dog building; certain other small pets such as cats, caged birds and fish are permitted. N.T. 3/21/14 at 101.

(31) On February 17, 2011, Ms. Rubin submitted an application to join the cooperative and live in the Kennedy House, seeking a two or three bedroom unit. N.T. 3/21/14 at 54; Rubin Ex. 1 (2/17/11 App.).

(32) On her application (and accompanying cover letter), Ms. Rubin indicated that a dog was medically necessary for her condition. N.T. 3/21/14 at 54-55; Rubin Ex. 1 (2/17/11 App.) (noting Ms. Rubin “requires [a] service dog,” and would “most likely always need one”).

(33) Shortly after receiving Complainant’s application, Lynn Wagner, the Sales Representative at Kennedy House, contacted Petitioner and asked her to have a licensed medical professional write a letter attesting to Rubin’s need for an accommodation. N.T. 3/21/14 at 56.

(34) Ms. Rubin's primary care physician, internist Dr. Craig Wynne, MD, attested in a March 10, 2011 letter that Ms. Rubin has "multiple medical issues that affect her mobility," that "[s]he benefits from the support of a service dog," and that "loss of this animal [Mira] would impair her ability to function." Rubin Ex. 2 (3/10/11 Dr. Wynne Ltr.); N.T. 3/21/14 at 56, 84.

(35) Dr. Wynne has been Ms. Rubin's physician for five years; she has been a patient of his practice for thirty-five years. N.T. 3/21/14 at 84.

(36) Ms. Rubin submitted this letter to Kennedy House on or about March 16, 2011. Rubin Ex. 2; N.T. 3/21/14 at 56.

(37) On or around April 25, 2011, Kennedy House (Ms. Wagner) requested additional information regarding Rubin's request for an accommodation, asking Rubin to have her doctor fill out a set of certification forms, noting "NO specific medical information of any kind is being requested, and none should be given in connection with these certification." Rubin Ex. 3 (4/25/11 Cover Ltr.); N.T. 3/21/14 at 56.

(38) At Rubin's request, Dr. Wynne filled out the forms, attesting that Ms. Rubin "qualifies as an individual with a disability," and that the accommodation requested by Ms. Rubin — allowance of her dog despite Kennedy House's no-dog policy — "is consistent with her needs associated with her disability." Rubin Ex. 3 (Dr. Wynne Certification).

(39) In October 2012, a 1400 square foot unit became available, and, on November 9, 2012, Ms. Rubin entered into an agreement to purchase it for \$181,000, providing \$3,100 down at that time. Rubin Ex. 4 (11/9/12 Subscription Agreement); N.T. 3/21/14 at 58-60.

(40) In January 2013, Ms. Rubin updated her membership application, reiterating that a dog was medically necessary for her condition. Rubin Ex. 3 (1/7/13 Revised App.).

(41) On January 16, 2013, Ms. Rubin was asked to attend a membership meeting, at which James Giblin, General Manager of the Kennedy House, asked Ms. Rubin about her dog Mira, how Mira accommodated Rubin's disability, and whether Mira was specially trained. N.T. 3/21/14 at 66-70.

(42) The membership meeting is a mandatory part of the application process for every applicant. N.T. 3/21/14 at 100.

(43) Ms. Rubin explained to Mr. Giblin that while Mira has no special training and is a stay-at-home animal that does not accompany Ms. Rubin to places of public accommodation, Mira assists her in ordering her day, and in remembering when to take her medications, eat meals, and get up and out of bed. N.T. 3/21/14 at 70-71, 90, 100-103.

(44) Mr. Giblin was working under the understanding that only a specially trained “service animal” — a defined term under the Americans with Disabilities Act — may qualify as a reasonable accommodation. N.T. 3/21/14 at 102-103.

Denial of Application by Kennedy House

(45) Shortly after the membership meeting, the Board of Directors of Kennedy House voted to deny Ms. Rubin’s application. N.T. 3/21/14 at 101.

(46) Via a hand-delivered letter dated January 22, 2013, authored by the President of the Board of Directors, Kennedy House notified Ms. Rubin that it denied her application for membership. N.T. 3/21/14 at 71; Rubin Ex. 5 (1/22/13 Ltr.).

(47) The letter noted that Ms. Rubin’s application “requested a reasonable accommodation exception to the [Kennedy House] ‘no dog policy’ to allow [her] to have [her] dog at the Kennedy House,” that the Board had “reviewed [her] application and request under applicable [Kennedy House] and federal law, and has determined that it does not comply with the applicable requirements,” and “[t]herefore, the Board has voted to deny [Ms. Rubin’s] application.” Rubin Ex. 5 (1/22/13 Ltr.).

(48) Prior to the membership meeting, no one from Kennedy House ever asked Ms. Rubin why she needed a dog as an accommodation for her disability. N.T. 3/21/14 at 57-58.

(49) Through a February 1, 2013 letter, Ms. Rubin asked for reconsideration of the Board’s denial of her application; Kennedy House, in a February 8, 2013 response authored by Mr. Giblin, reiterated its decision to deny the application, noting “based on the information submitted in and with the application and at the interview, Ms. Rubin’s dog does not qualify

under applicable law as a service dog or assistance animal.” KH Ex. 5 (2/1/13 Ltr. & 2/8/13 Resp. Ltr.).

(50) After Ms. Rubin’s application was denied, the Unit that Ms. Rubin sought to buy was subsequently sold to another buyer several months later. N.T. 3/21/14 at 105.

(51) Providing the requested accommodation would not have cost Kennedy House anything, and no changes or construction to the building needed to be made. N.T. 3/21/14 at 69.

(52) The Commission finds the testimony of Ms. Rubin, Dr. Meister and Mr. Giblin credible.

Conclusions of Law

Evidentiary Conclusions

(53) Veterinarian Dr. Meister’s testimony was permissible and will be considered, as his testimony is relevant, and within his area of expertise and personal knowledge. Pa. R.E. 401, 602; William Penn Sch. Dist. v. Dep’t of Educ., Div. of Food & Nutrition, 902 A.2d 583, 588 n.4 (Pa. Commw. 2006) (Pa. R.E. 602, which requires that a witness have personal knowledge of the matter to which he or she is testifying, applies to an agency proceedings).

(54) Amendment to conform a complaint to the evidence admitted at the hearing generally should be liberally allowed. See, e.g., Newcomer v. Civil Serv. Comm’n, 100 Pa. Commw. 559, 566, 515 A.2d 108, 112 (1986); Pa. R.C.P. No. 1033.

(55) Ms. Rubin’s request to amend the relief sought in her Complaint to include injunctive relief will be granted, as doing so is not prejudicial to Kennedy House.

Failure to Make a Reasonable Accommodation

(56) The Philadelphia Fair Practices Ordinance makes it is unlawful to “to deny or interfere with the housing accommodation . . . of an individual or otherwise discriminate based on his or her . . . disability, . . . including, but not limited to . . . [f]or the owner. . . to refuse to sell . . . or otherwise discriminate in the terms, conditions, or privileges of the sale . . . of any housing accommodation. . . or in the furnishing of facilities or services in connection therewith.” Phila. Code § 9-1108(1).

(57) Ms. Rubin alleged that Kennedy House violated The Philadelphia Fair Practices Ordinance (“the PFPO”), Section 9-1108, by failing to make a reasonable accommodation concerning Kennedy House’s no-dog policy, and thus, denying her application to purchase an apartment within the cooperative building. KH Ex. 6 (Compl. at Count I); Compl. Pre-Hearing Statement at 2-4.

(58) A “Housing Accommodation” is “[a]ny building, structure or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families, and any vacant land offered for sale or lease or held for the purpose of constructing or locating thereon any such building, structure or portion thereof.” Phila. Code § 9-1102(n).

(59) The Philadelphia Fair Practices Ordinance is applicable to the facts of this case because Kennedy House is a “Housing Accommodation” within the meaning of Section 9-1102 of the PFPO, as it is a residential cooperative building in Philadelphia, with 559 apartments. N.T. 3/21/14 at 53, 96, 98.

(60) “Discrimination” within the meaning of the PFPO is “[a]ny direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of . . . disability. . . , or other act or practice **made unlawful** under this Chapter or **under the nondiscrimination laws of the United States or the Commonwealth of Pennsylvania.**” Phila. Code § 9-1102 (emphasis added).

(61) Section 9-1108(1) of the PFPO does not specifically include a requirement for the provision of reasonable accommodations.

(62) Further, although the parties do not cite and the Commission has not found any case law in Pennsylvania specifically addressing the prohibition contained in Section 9-1108(1) of the PFPO, this provision is similar to Section 3604(f) of the Fair Housing Act (FHA), 42 U.S.C. § 3604(f).

(63) Section 3604(f) of the Fair Housing Act provides that it shall be unlawful “[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter.” “Discrimination” under the Fair Housing Act also includes “**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) (emphasis added).

(64) It is true that, in interpreting the provisions of the PFPO, the Commission is not bound by federal or state housing discrimination statutes or regulations, or by federal or state court decisions interpreting the provisions of those statutes or regulations. See City of Pittsburgh Comm’n on Human Relations v. DeFelice, 782 A.2d 586, 592 n.8 (Pa. Commw. 2001) (citing Harrisburg School District v. Pennsylvania Human Relations Commission, 466 A.2d 760 (Pa. Commw. 1983)); Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 126, 130-31 (Pa. Commw. 1977).

(65) However, in a case of first impression, as here, it is appropriate to look to analogous federal and state law for guidance. See DeFelice, 782 A.2d at 592 n.8 (“in a case of first impression, it is appropriate to look to federal decisions involving similar federal statutes for guidance”); see also Marriott Corp. v. Alexander, 799 A.2d 205, 208 (Pa. Commw. 2002) (where PFPO was silent, looking to state and federal law for guidance on exhaustion of administrative remedies).

(66) Further, the PFPO specifically includes in its definition of unlawful “discrimination” any “other act or practice made unlawful . . . under the nondiscrimination laws of the United States or the Commonwealth of Pennsylvania.” Phila. Code § 9-1102.

(67) The Commission therefore finds that the PFPO’s definition of “discrimination” includes the refusal to make reasonable accommodations, and adopts as the standard for a PFPO Section 9-1108 reasonable accommodation claim the standard for a FHA reasonable

accommodation claim set forth in federal cases, including Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains, 284 F.3d 442, 457 (3d Cir. 2002).

(68) It is well settled that the party asserting discrimination bears the burden of proving a *prima facie* case of discrimination. See DeFelice, 782 A.2d at 591.

(69) To establish a claim predicated upon denial of a reasonable accommodation, the plaintiff must establish the following: (1) the plaintiff is suffering from a disability; (2) the defendant knew or reasonably should have been expected to know of the alleged disability and requested accommodation; (3) the requested accommodation is reasonable and necessary to afford plaintiff an equal opportunity to use and enjoy his dwelling; and (4) the defendant refused to make a reasonable accommodation. See Lapid-Laurel, 284 F.3d at 457; see also Bedell v. Long Reef Condo. Homeowners Ass'n, 2013 WL 6405173, *6 (D.V.I. Dec. 6, 2013).

(70) With regard to the first element, a “disability” is defined under the PFPO as “a physical or mental impairment that substantially limits one or more of [an individual’s] major life activities, a record of such an impairment, or being regarded as having such an impairment.” Phila. Code § 9-1102(d).

(71) “Major life activities” are defined as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” 24 C.F.R. § 100.201 (regulations implementing the federal Fair Housing Act setting forth definition); 16 Pa. Code § 44.4 (regulations implementing the Pennsylvania Human Relations Act setting forth definition); see also Sch. Dist. of Philadelphia v. Friedman, 507 A.2d 882, 885 (Pa. Commw. 1986).

(72) Ms. Rubin is “disabled” within the meaning of the PFPO, as she is severely mobility-limited, sometimes requires use of a wheelchair, is unable to work, and cannot independently care for herself (requiring hired assistance), due to numerous conditions and chronic pain, including degenerative disc disease, spinal stenosis, sleep apnea, and fibromyalgia. N.T. 3/21/14 at 46-49, 51, 62, 74, 81-82.

(73) Ms. Rubin’s diagnosis — and the limitations on major life activities they cause — are supported in the record by her own testimony, as well as the attestations of her primary care physician, Dr. Wynne, set forth in Compl.’s Exhibits 2 and 3.

(74) With regard to the second element, Respondent’s knowledge, there is no dispute that Kennedy House knew about her disability and her requested accommodation, as Ms. Rubin’s original February 2011 (and later updated January 2013) applications indicated that a dog was medically necessary for her condition. Further, Kennedy House requested, and Ms. Rubin submitted, both a letter from her physician, and certification forms filled out by her physician, attesting to Rubin’s disability and need for an accommodation via support of her dog. N.T. 3/21/14 at 54-56, 84; Rubin Ex. 1 (2/17/11 App.); Rubin Ex. 2 (3/10/11 Dr. Wynne Ltr.); Rubin Ex. 3 (Dr. Wynne Certification).

(75) Next, Complainant must show that the requested accommodation is reasonable and necessary.

(76) As a threshold matter, the term “service animal” (or any term regarding an animal who supports a human such as a “guide animal” or “support animal,” “companion animal,” or “assistance animal”) is not to be found in the Philadelphia Fair Practices Ordinance, or the federal Fair Housing Act. Nevertheless, Kennedy House denied Rubin’s requested accommodation because the dog Mira is not a “service animal” as defined under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, because the dog is not specially trained. KH Proposed FFCL at ¶¶ 8-22; N.T. 3/21/14 at 102-103 (Mr. Giblin understood that only a specially trained “service animal” could qualify as a reasonable accommodation); KH Ex. 5 (2/8/13 Resp. Ltr.) (“Ms. Rubin’s dog does not qualify . . . as a service dog”).

(77) There are different federal legal definitions of animals that support humans. One is the ADA definition. The Americans with Disabilities Act (ADA) definition is narrower than the definition used by the Housing and Urban Development Agency (“HUD”), as applied to the Fair Housing Act. Ms. Rubin, the Complainant, requests the Commission to apply the broader definition used by HUD. By contrast, in part because Ms. Rubin called her dog a “service dog”

in correspondence with Kennedy House, it appears — although it is not entirely clear — that Kennedy House is still taking the position that the Commission should apply the narrower ADA definition, which requires that an animal must have some evidence of individualized training to be deemed a reasonable accommodation. KH Proposed FFCL at ¶¶ 11-15, 21-23.

(78) The Department of Justice’s revised ADA regulations define “service animal” narrowly as:

any **dog that is individually trained** to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The revised regulations specify that “the **provision of emotional support, well-being, comfort, or companionship do not constitute work** or tasks for the purposes of this definition.

28 C.F.R. § 35.104; 28 C.F.R. § 36.104 (emphasis added).

(79) In contrast, Ms. Rubin requests the Commission to apply the broader HUD definition. Ms. Rubin contends that reasonable accommodations in the housing context, as here, are not limited to animals which qualify as “service animals” under the ADA. Rather, she contends that such animals include “assistance animals,” as set forth in HUD’s Fair Housing and Equal Opportunity Notice 2013-01 (April 25, 2013), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntctheo2013-01.pdf, a function which Mira is fulfilling with Ms. Rubin. Rubin Proposed FFCL at ¶¶ 33-34.

(80) HUD interprets the Fair Housing Act to apply to “assistance animals,” not just “service animals,” as defined by the ADA, and does not require such dogs to be specially trained. HUD’s Fair Housing and Equal Opportunity Notice 2013-01 provides:

An assistance animal is not a pet. It is an animal that **works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability.** Assistance animals perform many disability-related functions, including but not limited to . . . providing emotional support to persons with disabilities who have a disability-related need for such support.

HUD Notice 2013-01 (emphasis added) (April 25, 2013), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntctheo2013-01.pdf.

(81) Similarly, in its 2008 Final Rule applicable to HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities, as well as HUD administrative decisions dating to the 1990s, HUD interpreted the Fair Housing Act more broadly than the ADA to include “assistance animals” that are not specially trained. *See Pet Ownership for the Elderly and Persons with Disabilities*, 73 Fed. Reg. 63834-01, 2008 WL 4690497 (Oct. 27, 2008) (Final Rule governing requirements for animals assisting persons with disabilities in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities); 24 C.F.R. § 5.303 (same); *see also HUD v. Riverbay Corp.*, HUD ALJ 11-F-052-FH-18, 2012 WL 1655364, *20-21 (HUD ALJ May 7, 2012) (holding co-op association denied reasonable accommodation for emotional support dog to owner of unit with major depressive disorder); *HUD v. Dutra*, 09-93-173-8, 1996 WL 657690, *8-9 (HUD ALJ Nov. 12, 1996) (landlord violated the Fair Housing Act by refusing to provide a reasonable accommodation for a disabled person with fibromyalgia, anxiety resulting from this condition, and significant pain, where cat “greatly increased his enjoyment of his apartment” and complainant “derived a therapeutic benefit from keeping his cat”); *HUD v. Riverbay Corp.*, 02-93-0320-1, 1994 WL 497536, *10 (HUD ALJ Sept. 8, 1994) (landlord violated FHA by refusing to provide a reasonable accommodation for a companion dog for a disabled person with schizoid personality disorder and depressive disorder; noting “[a]lthough . . . the soothing benefit of dogs can be enjoyed by all, [respondent] fails to acknowledge the terrier’s special benefit for the Complainant”).

(82) One Hawaii district court, looking to regulations promulgated under the ADA, held that only a trained service animal may qualify as a reasonable accommodation under the Fair Housing Act. *See Prindable v. Ass’n of Apartment Owners of 2987 Kalakaua*, 304 F.Supp.2d 1245, 1256-57 (D.Haw.2003), *aff’d on other grounds sub nom.*, *Dubois v. Ass’n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006).

(83) But the trend, in “more recent decisions, recognizing that the [Fair Housing Act] and its implementing regulations [do not] include [a] training requirement, [is to] conclude[] that

an emotional-support animal may be a reasonable accommodation under the FHA when the animal is necessary for a disabled person to enjoy equal housing rights.” Falin v. Condo. Ass’n of La Mer Estates, Inc., 2012 WL 1910021, *3-4 (S.D. Fla. May 28, 2012) (denying summary judgment for condominium and manager, because, viewing evidence in the light most favorable to elderly woman with dementia, anxiety, and difficulty in sleeping, dog was necessary to alleviate her disabilities); see Smith v. Powdrill, 2013 WL 5786586, *6 (C.D. Cal. Oct. 28, 2013) (granting summary judgment for plaintiff on FHA and state law claims where defendants denied plaintiff a companion dog as an accommodation to her mental disabilities, as “exceptions to no-pet rules may be required as accommodation in the case of untrained companion animals that provide emotional support to individuals with mental disabilities”); Ass’n of Apartment Owners of Liliuokalani Gardens at Waikiki v. Taylor, 892 F. Supp. 2d 1268, 1288 (D. Haw. 2012) (a “court cannot categorically deny a reasonable accommodation request [under the FHA] for an emotional support animal merely because the animal has not received specialized training”); Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc., 778 F. Supp. 2d 1028, 1036 (D.N.D. 2011) (the Fair Housing Act applies to a management company’s imposition of pet fees on disabled tenants with non-specially trained assistance animals); Overlook Mut. Homes, Inc. v. Spencer, 666 F. Supp. 2d 850, 858-59, 861 (S.D. Ohio 2009) (the requirements for emotional support animals “must be evaluated in the appropriate context of housing as opposed to that of public accommodations covered by the ADA” and an animal without specialized training could be a reasonable accommodation to ameliorate plaintiff’s anxiety, contrary to the landlord’s no-pet policy).

(84) Notably, the ADA does not apply to residential housing. H.R. Rep. No. 101–485(II), 101st Cong., 2d Sess. 383 (1990), U.S. Code Cong. & Admin. News 1990 (legislative history of ADA making clear that “[o]nly nonresidential facilities are covered by this title”). Rather, the ADA applies to places of public accommodation. See Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998).

(85) The Fair Housing Act, in contrast with the ADA, makes it illegal to discriminate against handicapped individuals in providing housing. 42 U.S.C. § 3604(f)(1).

(86) As the Court in Overlook Mut. Homes, Inc. v. Spencer stated:

Simply stated, there is a difference between not requiring the owner of a movie theater to allow a customer to bring her emotional support dog, which is not a service animal, into the theater to watch a two-hour movie, an ADA-type issue, on one hand, and permitting the provider of housing to refuse to allow a renter to keep such an animal in her apartment in order to provide emotional support to her and to assist her to cope with her depression, an FHA-type issue, on the other.

Overlook, 666 F. Supp. 2d at 858-59; see also Goldmark, 778 F. Supp. 2d at 1035. Thus, [w]hile both the ADA and FHA prohibit discrimination on the basis of disability, it is not unexpected that different rules might govern in public places versus private dwellings.” Goldmark, 778 F. Supp. 2d at 1035.

(87) The Commission is persuaded by the court decisions summarized in paragraphs 83-84, and 86, and by HUD’s interpretation of the Fair Housing Act in its regulatory guidance and its administrative decisions, summarized in paragraphs 80-81. The Commission adopts their reasoning here, to hold that, under Section 9-1108(1) of the Philadelphia Fair Practices Ordinance, a reasonable accommodation in the housing context includes not only specially-trained “service animals” but also “assistance animals.”

(88) Furthermore, Kennedy House’s legal obligation to make reasonable accommodations for assistance animals under Section 9-1108(1) of the PFPO applies even though Ms. Rubin, a layperson, may have used the term “service” dog when referring to Mira. N.T. 3/21/14 at 81 (Rubin stating that when she used the term “service dog,” she “did not imply anything other than the dog served a purpose beyond a pet”).

(89) Of course, an accommodation is only “necessary” if there is a nexus between the requested accommodation and the individual’s disability, as the person with a disability who is requesting the assistance animal must demonstrate a disability-related need for the animal. That is, the “animal [must] work, provide assistance, perform tasks or services for the benefit of a

person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability." HUD Notice 2013-01 at 3; see 73 Fed. Reg. 63834-01, at *63836, 2008 WL 4690497; Matarese v. Archstone Pentagon City, 761 F. Supp. 2d 346, 364 (E.D. Va. 2011) ("there must be a demonstration of a direct linkage . . . If the proposed accommodation does not provide direct amelioration of a disability's effect, it does not qualify as necessary"); Essling's Homes Plus, Inc., a Minn. Corp. v. City of St. Paul, a Minn. Corp., 356 F. Supp. 2d 971, 980 (D. Minn. 2004) ("demonstration that an accommodation is 'necessary' requires a 'showing that the desired accommodation will affirmatively enhance a disabled [person's] quality of life by ameliorating the effects of the disability'").

(90) Kennedy House maintains that there is no nexus between Ms. Rubin's physical mobility disabilities and the emotional support the dog provides. Kennedy House argues that while Ms. Rubin's dog may contribute to her emotional well-being, she has no psychological or mental health impairments, and the dog purportedly does not assist her with the physical disabilities she does have. KH Proposed FFCL at ¶¶ 62-63; KH Pre-Hearing Statement at 5.

(91) The Commission disagrees with Kennedy House's position regarding the lack of a nexus between Ms. Rubin's disability and the dog's assistance. Ms. Rubin has a physical disability that causes her significant chronic pain, affects her ability to lead a normal and orderly life and take care of herself, and causes social isolation. Her dog substantially aids her, by forcing her to have a more ordered life, by being demanding of her, by reminding her to take her medications, eat meals, get up and out of bed and otherwise reminding Ms. Rubin what she is supposed to be doing at any given time. N.T. 3/21/14 at 51, 70-71, 78-79 (Rubin), 38 (Dr. Meister); HUD Notice 2013-01. Although the dog Mira is usually walked by other people, Ms. Rubin also occasionally walks her, allowing Rubin to "sometimes get[] to see [her] neighbors and get a bit of fresh air." N.T. 3/21/14 at 52 (Rubin).

(92) The nexus between Ms. Rubin's disability and the dog's assistance is also supported by her doctor's statement. Ms. Rubin's primary care physician, Dr. Wynn attested that the accommodation requested by Ms. Rubin — allowance of her dog despite Kennedy House's

no-dog policy — “is consistent with her needs associated with her disability.” Rubin Ex. 3 (Dr. Wynne Certification); see also Rubin Ex. 2 (3/10/11 Dr. Wynne Ltr.) (Rubin “benefits from the support of a service dog,” and “loss of this animal [Mira] would impair her ability to function”).

(93) Thus, the record clearly establishes a nexus between the requested accommodation and Ms. Rubin’s disability, as the dog Mira “alleviates one or more identified symptoms or effects of [Ms. Rubin’s] disability.” HUD Notice 2013-01. The nexus between the requested accommodation and Ms. Rubin’s disability closely resembles the successful claim in Smith v. Powdrill, 2013 WL 5786586, *6 (C.D. Cal. Oct. 28, 2013). There, plaintiff prevailed on Fair Housing Act and state anti-discrimination claims, where “Plaintiff suffer[ed] from depression, anxiety, and insomnia that impair[ed] her ability to engage in daily functions, including taking care of herself, getting out of bed, and interacting with others [and] [a]ccording to Plaintiff, the companion dog, Layla, alleviate[d] these symptoms by motivating her to maintain a regular routine, get out of bed, clean, maintain relationships with others, and exercise.” Id. at 6.

(94) The Third Circuit held in Lapid-Laurel that “the initial burden is on the plaintiff to demonstrate that the accommodations that it requested are ‘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 accommodations are unreasonable.” Lapid-Laurel, 284 F.3d at 459. Here, Ms. Rubin carried her burden and the burden shifted to Kennedy House to show that waiving its “no dog” rule for Ms. Rubin would be unreasonable. Kennedy House focused its proof on the nexus between Ms. Rubin’s disability and the functions of the dog, not on attempting to prove that waiving the “no dog” rule would be unreasonable. Regardless, the Commission finds that Kennedy House did not satisfy its burden. Specifically, the requested accommodation is also reasonable in that it will cost Kennedy House nothing to provide, and no changes or construction to the building would need to be made. N.T. 3/21/14 at 69.

(95) Accordingly, the Commission finds that Ms. Rubin’s assistance dog is a necessary, reasonable accommodation.

(96) Finally, a successful claim of discrimination for failure to provide a reasonable accommodation requires that the request for such accommodation be denied. In this case, it is undisputed that Respondent Kennedy House denied Ms. Rubin's request for waiver of its no-dog policy, and accordingly, denied her membership application. Rubin Ex. 5 (1/22/13 Ltr.); N.T. 3/21/14 at 71.

Conclusion

(97) Based on the foregoing discussion and analysis, the Commission holds that Respondent The Kennedy House, Inc. violated Section 9-1108(1) of the Philadelphia Fair Practices Ordinance.

Remedy

(98) After a finding that Respondent engaged in an unlawful housing practice, the Commission is authorized to issue an order directing Respondent to pay a fine and take affirmative action to redress the harms suffered by the Complainant, including, but not limited to injunctive, compensatory, and punitive damages, as well as reasonable attorney's fees and costs. Phila. Code §§ 9-1110, 9-1121.

(99) Ms. Rubin's request to amend the relief sought in her Complaint to include injunctive relief will be granted, as amendment to conform a complaint to the evidence admitted at the hearing generally should be liberally allowed, and doing so is not prejudicial to Kennedy House.

(100) Kennedy House's January 2013 action denying Ms. Rubin's application is deemed null and void.

(101) Kennedy House shall immediately place Ms. Rubin at the top of the waiting list, in the same position in the application process she was in November 2012, before the Unit she sought to purchase became available, and shall grant a waiver to its no-dog policy, permitting

Ms. Rubin to keep an assistance animal, as a reasonable accommodation to Ms. Rubin's disability.¹

(102) The Commission assesses no compensatory or punitive damages. This is a case of first impression in this jurisdiction and an emerging area of the law nationally. The record clearly demonstrates that Kennedy House acted in good faith, believing its actions were lawful at the time, a point Complainant's counsel even conceded on the record. N.T. 3/21/14 at 111 ("Kennedy House made a decision that I am sure it thought was lawful at the time. Well, [the dog] wasn't specially trained, case over.").²

(103) Respondent shall reimburse Complainant \$15,842.50 for reasonable attorneys' fees, as set forth in the invoices attached to Complainant's proposed Findings of Fact and Conclusions of Law.³

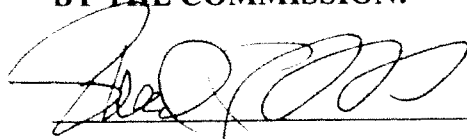
(104) The parties shall reimburse the Commission for the cost of the hearing transcript incurred by the Commission, splitting the \$553.89 equally.

¹ Per Mr. Giblin's testimony, the Board of Directors makes the final decision whether to accept or deny an application for membership in Kennedy House. N.T. 3/21/14 at 100. Ms. Rubin must still satisfy the Board's other application criteria and receive its approval.


² Furthermore, Complainant's proposed Findings of Fact and Conclusions of Law only propose compensatory damages in the alternative and do not propose punitive damages. Moreover, the evidence Ms. Rubin offered on valuation was highly speculative, and anyway, Ms. Rubin's request for compensatory damages — reimbursement for the additional cost she will incur to buy an equivalent unit in a similar condominium — has been rendered moot by the Commission's order granting injunctive relief.

³ Complainant's request for \$602.72 in costs is denied.

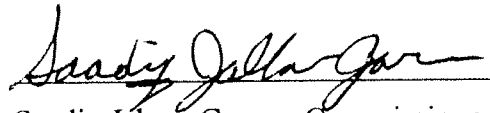
BY THE COMMISSION:



Sarah E. Ricks, Esq., Commissioner, Panel
Chairperson



Rabbi Rebecca Alpert, Commissioner



Saadiq Jabaar Garner, Commissioner

August 8, 2014

PHILADELPHIA COMMISSION ON HUMAN RELATIONS

JAN RUBIN

V.

KENNEDY HOUSE, INC.

PCHR Charge No. H13051182

EEOC Charge No. 17G-2013-00144F

ORDER

AND NOW, this **8th** day of **August**, 2014, the Commission hereby finds that Respondent The Kennedy House, Inc. violated Section § 9-1108(1) of the Philadelphia Fair Practices Ordinance. Accordingly, it is hereby **ORDERED** that:

(1) Complainant's request to amend the relief sought in her Complaint to include injunctive relief is GRANTED;

(2) Respondent's January 2013 action denying Complainant's application is deemed NULL and VOID;

(3) Respondent shall immediately place Complainant at the top of the waiting list, in the same position in the application process she was in November 2012, before the Unit she sought to purchase became available, and shall grant a waiver to its no-dog policy, permitting Complainant to keep an assistance animal, as a reasonable accommodation to Complainant's disability.¹

(4) The Commission assesses no compensatory or punitive damages. This is a case of first impression in this jurisdiction and an emerging area of the law nationally. The record clearly demonstrates that Kennedy House acted in good faith, believing its actions were lawful at the time, a point Complainant's counsel even conceded on the record. N.T. 3/21/14 at 111 ("Kennedy House made a decision that I am sure it thought was lawful at the time. Well, [the dog] wasn't specially trained, case over.").

(5) Respondent shall reimburse Complainant \$15,842.50 for reasonable attorneys' fees, as set forth in the invoices attached to Complainant's proposed Findings of Fact and Conclusions of Law.²

(6) The parties shall reimburse the Commission for the cost of the hearing transcript incurred by the Commission, splitting the \$553.89 cost equally.

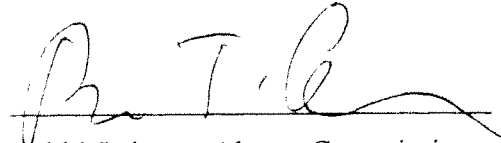
¹ Complainant must still satisfy the Board's other application criteria and receive its approval.

² Complainant's request for \$602.72 in costs is denied.

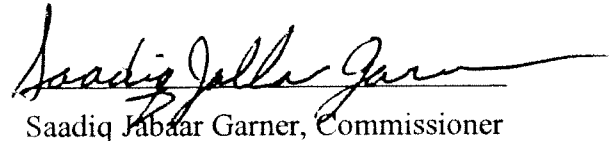
BY THE COMMISSION:



Sarah E. Ricks, Esq., Commissioner, Panel
Chairperson



Rabbi Rebecca Alpert, Commissioner



Saadiq Jabaar Garner, Commissioner

August 8, 2014