

DETERMINATION OF REASONABLE CAUSE

CASE NAME: Archibald, Joseph v. RiverBay Corporation, et al.

CASE NUMBER: 02-09-0090-8

I. JURISDICTION

On November 3, 2008, Joseph Archibald (“Complainant”) filed a complaint with the United States Department of Housing and Urban Development (“HUD”), alleging that he is a victim of housing discrimination because Respondents have refused to let him keep his service dog¹ in his apartment as a reasonable accommodation.

Complainant further alleges that Respondents have harassed him by threatening to evict him and by fining him for harboring an animal after he had requested a reasonable accommodation. The most recent alleged act of discrimination occurred on August 31, 2008, and is continuing.

HUD initially referred this complaint to the New York State Division of Human Rights (“NYSDHR”) for investigation, but on June 29, 2009, with the consent of the NYSDHR, HUD reactivated this complaint and initiated an investigation.

On September 22, 2009, Complainant amended his complaint to include a claim of retaliation. Specifically, Complainant alleges that Respondents harassed him by having security officers visit his apartment, and fine him for harboring a dog. Complainant states that despite showing proof that the dog was an emotional support animal, the officers nevertheless proceeded to issue him a summons.

If proven, the allegations would constitute a violation of Sections 804(f)(2) and(f)(3)(b) and 818 of Title VIII of the Civil Rights Act of 1968, as amended (“the Act”).

Respondent RiverBay Corporation is a New York State middle and low-income Mitchell-Lama housing cooperative (commonly known as Co-op City), located in the Northeast Bronx with 15,372 residential units in 35 high-rise buildings and seven townhouse clusters. It has approximately 50,000 residents.

Vernon Cooper, manager of RiverBay, and Henry T. Milburn, Jr., Director of Security for RiverBay, are also named as Respondents.

¹ Complainant refers to his emotional support animal as a “service animal.” This Determination will reflect that Complainant is seeking an emotional support animal.

II. COMPLAINANT'S ALLEGATIONS

Complainant states that he purchased his apartment from RiverBay for \$8,475.96 in April 2002. In 2002, Complainant was employed as a correction officer by the City of New York. He is presently retired and works part-time as a private investigator.

Complainant states that he has suffered from chronic depression for approximately 15 years.

Complainant alleges that on January 6, 2008, he sent a letter to RiverBay requesting a reasonable accommodation. Complainant states his letter (1) explained that he suffers from chronic depression; (2) noted that his doctor had prescribed an emotional support animal; and (3) requested that RiverBay make an exception to its "no pet policy" by permitting him to keep an emotional support animal in his apartment. With his letter, Complainant enclosed a statement from his psychiatrist that described his need for an emotional support animal and a copy of a license issued by the New York City Department of Health and Mental Hygiene.²

Complainant alleges that on February 5, 2008, RiverBay employees questioned him for about an hour regarding the details of his disability and treatments. At that time, Complainant provided his emotional support animal's registration, proof of required canine vaccinations, and a letter from his psychiatrist.

Complainant alleges that on March 1, 2008, a RiverBay security officer came to his apartment and questioned him about the presence of a dog in his apartment. Complainant states that the officer informed him that RiverBay must give him permission to bring a dog into his apartment.

Complainant alleges that on April 14, 2008, he received a letter from Respondent Cooper denying his requested accommodation. The letter stated, in part, "...we conclude that the facts do not show that you have a disability which requires you to have a dog in order for you to use and enjoy your apartment and thereby require a reasonable dog accommodation. Even if you were disabled, Riverbay finds insufficient documentation that you need a dog to use or enjoy your Riverbay apartment."

Complainant alleges that from July through December 2008, RiverBay refused to accept his rent payments.

Complainant alleges that on August 2, 2008, a Co-op City Officer detained his wife in the front lobby of his apartment building as she was leaving with his emotional support animal.

² Such licenses are granted irrespective of whether the dog is an emotional support animal or a service dog.

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Complainant alleges that on August 2, 2008, a Co-op City Officer issued him a summons for having a dog in his apartment even though he had shown the Officer his dog's emotional support animal registration tag.

Complainant alleges that on August 28, 2008, he sent an email to Respondent Milburn, asking that Co-op City Officers cease harassing him because he has an emotional support animal.

Complainant alleges that on August 31, 2008, two Co-op City Officers came to his residence and gave him a summons for having a dog in his apartment.

Complainant alleges that on September 11, 2008, Riverbay filed a Holdover Petition in New York City Housing Court, requesting that Complainant vacate his apartment because he kept a dog there.

Complainant alleges that on September 15, 2008, a Co-op City Officer gave him another summons for keeping a dog in his apartment.

Complainant alleges that on September 15, 2008, he filed a report with the New York City Police Department alleging harassment by Co-op City Officers.

Complainant alleges that on September 17, 2008, he appealed the summonses issued on August 2 and 30, 2008.

Complainant alleges that on October 20, 2008, RiverBay withdrew its Holdover Petition because it had failed to comply with New York City's Pet Waiver Law, requiring that a landlord enforce its "no pet" lease provision within three months of obtaining knowledge that a tenant was keeping a pet in his apartment.

Complainant alleges that on December 15, 2008, RiverBay sent him a letter stating that his garage privileges were suspended because of his non-payment of rent.

Complainant alleges that on December 23, 2008, he received a letter from Riverbay stating that his reasonable accommodation request had been granted, but then on January 9, 2009 RiverBay rescinded the reasonable accommodation approval letter of December 23, 2008.

III. RESPONDENTS' DEFENSES

Respondents allege that Complainant brought a dog into his apartment in violation of his lease and then sought permission to keep the pet as a reasonable accommodation for an "alleged disability."

Respondents allege that despite Complainant's statements that he "has been depressed for more than 15 years," Complainant worked twenty years for the New York City Corrections Department and is now able to work as a private investigator.

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Respondents allege Complainant failed to disclose on his HUD complaint that he knew he would be allowed to keep his dog pursuant to New York City's "pet waiver law," and that an identical action was pending before the New York City Commission of Human Rights. For this reason, Respondents argue that HUD should dismiss this action because of mootness and bad faith.

Respondents allege that Complainant received a full and fair hearing on his application to keep his dog as a reasonable accommodation for a disability.

RiverBay alleges that it has a policy and procedure for tenants to apply for permission to acquire a dog as a reasonable accommodation and that Complainant knew of this policy, but chose to ignore it and simply acquired a dog without seeking consent.

RiverBay alleges that in January 2008, Complainant submitted an application to keep a dog as a "special accommodation" for his "alleged disability," but refused to provide information that it requested concerning Complainant's disability and treatment. Instead, Complainant provided a doctor's note which simply stated that the dog would be "helpful to Complainant's condition," without ever identifying any specific therapeutic needs or benefits.

RiverBay alleges that on February 5, 2008, it met with Complainant to discuss his reasonable accommodation request. At that time, Complainant indicated that he would not be willing to keep any pet other than a dog. RiverBay alleges that Complainant said that he was considering moving from Co-op City to a "therapeutic environment" and would not bring the dog with him. As a result of the February meeting, Respondents Cooper and RiverBay concluded Complainant "did not have a disability that required a special accommodation within the meaning of the law."

Respondents RiverBay and Cooper allege that on April 14, 2008, Complainant was notified that his application for a waiver of the no-pet rule had been denied because Complainant's application and statements indicated that he did not require a dog to use and enjoy his apartment. Respondents allege that Complainant was informed of his right to appeal the decision, but Complainant never did so.

Respondents allege that Complainant ignored their decision, failed to appeal, and continued to keep his dog in violation of his Occupancy Agreement.

RiverBay alleges that in August 2008, it commenced a "Holdover Proceeding" against Complainant in New York City Housing Court because Complainant continued to keep a dog in his apartment. However, on October 20, 2008, RiverBay was compelled to discontinue the Holdover Proceeding because of New York City's Pet Waiver Law.

RiverBay alleges that on October 20, 2008, Complainant filed a fair housing complaint with the New York City Commission on Human Rights ("NYCCHR") and while that complaint was still pending filed a similar complaint on November 10, 2008, with the New York State Division of Human Rights.

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RiverBay alleges that on December 15, 2008, NYCCHR administratively closed Complainant's reasonable accommodation complaint.

IV. FINDINGS

In accordance with 24 C.F.R. § 100.201 of the Act, a person with a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. In addition, 24 CFR 100.201(a) provides that a "*physical or mental impairment* includes:...(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities." Further, in accordance with Section 100.201, "*major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."

Complainant was first diagnosed with chronic depression in 2005 and is currently under the care of a Board Certified psychiatrist, Dr. B. Bernie Herron. Dr. Herron states that Complainant's depression affects every facet of his life. Complainant has difficulty with interpersonal relationships, is lethargic, has an inability to focus, and is forgetful. He is subject to unexpected bouts of crying and episodes of panic. Complainant's depressed state leads to inattention to household chores and is the main factor in his chronic insomnia. Complainant's depression also interferes with his ability to engage in the activities of daily living.

Dr. Herron states that various treatments, including medications, have failed to alleviate Complainant's anxiety or depression. Consequently, Dr. Herron recommended an emotional support dog to enhance Complainant's ability to care for himself. The investigation reveals that Complainant acquired his emotional support animal in November 2007.

Based upon the above, the investigation established that Complainant is an individual with a disability as defined in 24 C.F.R. § 100.201 and, as such, is a member of a protected class.

Reasonable Accommodation Request

RiverBay maintains a no pet policy. The investigation reveals that Complainant purchased his unit in April 2002. The Occupancy Agreement signed by Complainant and RiverBay contains the Rules and Regulations of the Co-op. Rule #17 states, "No dogs or other animals of any kind shall be kept or harbored in the leased premises."

On January 4, 2008, Complainant sent RiverBay a letter, requesting a reasonable accommodation. Complainant submitted a second request, dated January 6, 2008³, stating that he is disabled and that "a doctor has prescribed an [emotional support animal] to assist with my daily living. I am requesting that you make a reasonable accommodation in the building's 'no pets' policy to allow me to have [an emotional support animal]. I qualify as a

³ This document is actually dated January 6, 2007, although it is clear from all evidence adduced during the investigation that this date is a typographical error and that the correct date is January 6, 2008.

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person with a disability as defined by the Fair Housing Amendments Act of 1988.”

Complainant further indicated that he had been under the care of his physician since 2005, and that his treatment had involved both medication, and, most recently, an emotional support animal. He noted that while he has had a cat, bird and hamsters, as pets, “none have imparted the therapeutic effect and or focal adjustment my emotional support animal is trained to provide.” Complainant stated that he would complete RiverBay’s reasonable accommodation application and respond to all relevant questions, but not those that requested information which RiverBay was not legally entitled to obtain.

RiverBay’s application for a reasonable accommodation contains six parts: Part I (Form I) required that the resident answer basic questions such as name, address, and telephone number; Part II (Form II) asked specific questions regarding the resident’s disability and had a section to be completed by the resident’s physician; Part III contained the Co-op City Rules/Regulation to Permit the "Reasonable Accommodation" of a dog. These rules required the submission of an application, annual recertification and approval before acquisition of a dog; Part IV required copies of the dog’s license and rabies tag; Part V (Form III) required a veterinarian’s report of the dog’s complete medical history; and Part VI requested a photo of the dog.

The application had questions about the nature of the requestor’s disability and the reason for needing a dog as opposed to a different animal or form of therapy.

Complainant’s completed application contained the required information, as well as verification that his dog was a licensed service animal. Complainant’s request letter stated that he is disabled and that his doctor had prescribed an emotional support animal. The letter requested that RiverBay make an exception to its “no pet policy” by allowing him to maintain his emotional support animal. Complainant stated that his emotional support animal was trained to be "calm, submissive and when working, focuses only on me. He (the dog) is acutely aware of how to respond when I lose concentration." Complainant also attached a letter from his psychiatrist, Dr. B. Bernie Herron.

Dr. Herron stated that he is a physician and a Board Certified psychiatrist. Dr. Herron stated that he had been treating Complainant for a depression disorder since August 2005.

Dr. Herron opined that "Inasmuch as animals have always been important to him and an important source of comfort, a pet would be a great help in dealing with his present problems. I understand that under usual circumstances dogs are not allowed in your housing complex. However, in my opinion, a pet would be extremely helpful in facilitating Mr. Archibald's recovery."

Complainant received a letter, dated January 18, 2008, from RiverBay acknowledging receipt of his application for a reasonable accommodation.

On February 5, 2008, Complainant met with Riverbay’s employees to discuss his request for a reasonable accommodation. On February 8, 2008, the Riverbay employees who had interviewed Complainant prepared an interoffice memorandum, noting that Complainant had

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resided at Co-op City since 2002 and is a retired NYC correction officer who works part-time as a private investigator.

The memorandum acknowledged that Complainant has suffered from chronic depression for about 15 years and takes several medications for his depression. It also stated that Complainant suffers from sleep apnea. The memorandum acknowledged that Complainant has been treated by his psychiatrist since 2005 and that his doctor indicated that "a pet would be a great help in dealing with his present problems." The memorandum indicated that the doctor's letter did not state how the dog lessens the effects of Complainant's depression. The internal memorandum also noted that that Complainant stated that he goes to see his doctor once or twice a month and that Complainant does not attend group sessions for depression.

The memorandum also noted that (1) the dog is left alone in Complainant's apartment for about eight to nine hours a day; (2) Complainant and his friend trained the dog to assist Complainant with his emotional needs; and (3) Complainant filled-out a reasonable accommodation application and provided a note from his psychiatrist, as well as a letter from the NYC Department of Health and Mental Hygiene that his dog is a licensed service animal.

The memorandum went on to state that Complainant does not have any problems performing manual tasks, and can perform the daily functions of walking, learning, hearing, sitting or standing.

The investigation revealed that Complainant received a letter, dated April 14, 2008, from Respondent Cooper, denying his request for a reasonable accommodation. In the letter, Mr. Cooper acknowledged that Complainant suffered from chronic depression, sleep apnea, inability to focus and forgetfulness. Mr. Cooper also stated however that based upon a review of his application and personal interview, the facts did not show that Complainant had a disability that required him to have a dog in order to use and enjoy his apartment. The letter stated, in part, "Even if you were disabled, Riverbay finds insufficient documentation that you need a dog in order for you to use or enjoy your apartment and thereby require a reasonable dog accommodation... Riverbay must deny your request to keep a dog." Complainant had 30 days to appeal this decision to the Cooperator Appeals Committee.

On April 17, 2008, Complainant submitted a written objection to RiverBay's denial of his request for a reasonable accommodation. In that correspondence, Complainant stated, "I am writing to inform you that I am deeply disturbed by your decision. I attended that meeting on February 5, 2008 out of good faith. I was not required to by law. I divulged personal and private information about myself that was not required by law..." No formal decision or response was made by RiverBay to this letter.

Subsequently, on December 23, 2008, RiverBay sent Complainant a letter approving his reasonable accommodation request. This approval letter states, "Riverbay records show that you were approved a reasonable accommodation to have a dog Chihuahua and Whip-It "Figgy" in your apartment..."

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However, on January 9, 2009, RiverBay sent Complainant a letter reversing its decision granting Complainant a reasonable accommodation. This letter states in its entirety: "I am writing to correct my letter of December 23, 2008. For the record Riverbay did not grant you a reasonable accommodation. The eviction case was discontinued and Riverbay no longer contest [sic] you having "Figgy" due to the 90 day pet waiver law. If you have any questions or concerns please contact me at 718-320-3329."

Following Complainant's April 17, 2008 objection to the denial of his request for a reasonable accommodation, RiverBay initiated a series of actions to enforce its denial of Complainant's request for an accommodation. These are discussed below.

Refusal to Collect Rent

The investigation reveals that Respondent RiverBay refused to accept Complainant's rent from July – December 2008.

The investigation reveals that RiverBay filed a Holdover Petition against Complainant, dated October 6, 2008, in New York City's Housing Court. Subsequently Riverbay discontinued the Holdover proceeding in order to comply with the New York City Pet Waiver Law.

The investigation reveals that RiverBay sent Complainant a letter, dated December 12, 2008, stating that Complainant had been in rent arrears for over two months and therefore his garage privileges would be terminated effective December 29, 2008, unless he became current and paid all amounts due. The letter stated that if Complainant continued to be in rent arrears, he would no longer be allowed to park his vehicle in any Co-op City garage or parking lot after the termination date and his vehicle would be subject to towing at his expense. In addition, Complainant would be unable to apply for a new parking lease for at least 6 months. The letter also stated that the garage sticker and access card must be returned to Riverbay. The letter stated that a failure to return these items would result in a \$30 administrative fee.

Summons for Harboring Dog

Complainant has identified several instances where he alleges that Co-op City security officers have visited his apartment because of his dog. He asked that RiverBay cease making these visits because they were embarrassing and stressful.

The investigation reveals that on August 2, 2008, a Co-op City officer issued a summons to Complainant for harboring a dog.

The investigation reveals that on August 25, 2008, Complainant emailed Respondent Milburn, complaining about the way officers were treating him. The email explained that Complainant is a disabled person who resides in Co-op City with an emotional support animal to assist him with his disability. Complainant stated that a RiverBay officer had stopped and questioned him regarding his emotional support animal and gave him a summons though he tried to show the officer his dog's registration as an emotional support animal. Complainant's stated that there have been instances when officers have come to his apartment to give him a summons.

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Complainant requested that RiverBay cease these actions because they caused him stress and emotional trauma.

The investigation reveals that on August 31, 2008 a Co-op City officer issued Complainant a summons; it stated that the officer observed Complainant harboring a dog in his apartment.

The investigation reveals that Complainant filed a complaint on September 15, 2008, with the New York City Police Department against Co-op City security for harassment. Following Complainant's complaint to the New York City Police Department, Complainant did not receive any additional summonses.

V. CONCLUSION

Reasonable Accommodation

The regulation at 24 CFR § 100.204(a) states, "It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices or services, when such accommodation may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas."

The investigation revealed that Complainant had applied for an exception to RiverBay's "no pet policy" as a reasonable accommodation for his disability and supported that application with a letter from his treating psychiatrist. On April 14, 2008, Respondent Cooper denied Complainant's request for an accommodation. On April 17, 2008, Complainant appealed RiverBay's denial of reasonable accommodation.

The investigation revealed that Complainant complied with RiverBay's comprehensive reasonable accommodation process and, as part of that process, provided medical documentation verifying his depression and need for an emotional support animal. RiverBay nevertheless asserted that Complainant failed to present adequate evidence that he required an emotional support animal because of chronic depression.

While a respondent is to consider all of the evidence, it may not substitute its medical judgment for that of licensed medical expert. In this case, Complainant provided a letter from a Board-certified psychiatrist explaining why an emotional support animal was necessary, only to have RiverBay reject Complainant's request without ample justification.

Mootness

RiverBay asserts that this matter is moot because it has agreed that Complainant could retain his emotional support animal pursuant to New York City's Pet Waiver Law.

However, the investigation revealed that the instant complaint is not moot for several reasons. First, Complainant may be entitled to damages because of RiverBay's response to his request for a reasonable accommodation and that issue has not been resolved. Second, Complainant's entitlement to a reasonable accommodation has also not been resolved because RiverBay rescinded its letter granting Complainant permission to keep his emotional support animal as a

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reasonable accommodation. Thus, if Complainant's support animal dies, he will once again face eviction should he bring a new support animal into his apartment.

Indeed, HUD records reflect that RiverBay has a pattern of denying its residents reasonable accommodations, unless faced with an investigation of its denials. Previously it permitted five tenants to keep their dogs as an accommodation, but only after they had filed a complaint with HUD and/or the New York State Division of Human Rights ("NYSDHR").

For the foregoing reasons, there is reasonable cause to believe that Respondents RiverBay and Cooper's refusal to provide Complainant with an exception to RiverBay's "no pet policy" as a reasonable accommodation violates Sections 804(f)(2) and (f)(3)(b) of the Act and the issue is not moot.

Retaliation

The Act also provides, in part, that it "shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed...any right granted or protected by section 803 or 804." 42 U.S.C. § 3617. Conduct made unlawful under this section includes, retaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act. 24 C.F.R. § 100.400 (c)(5).

A retaliation claim under the Act requires proof of three elements: (1) that the plaintiff was engaged in an activity protected by the Fair Housing Act; (2) that the defendant took some adverse action against the plaintiff; and (3) that a causal connection existed between the protected activity and the adverse action. *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002).

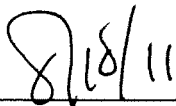
In this instance, after Complainant made a request for a reasonable accommodation, Respondent engaged in threatening and coercive conduct that interfered with Complainant's right to an emotional support animal. Thus, there is reasonable cause to believe that Respondents also violated Section 818 of the Act.

VI. ADDITIONAL INFORMATION


Notwithstanding this determination by HUD, the Fair Housing Act provides that Complainant may file a civil action in an appropriate federal district court or state court within two years after the occurrence or termination of the alleged discriminatory housing practice. The computation of this two-year period does not include the time during which this administrative proceeding was pending. In addition, upon the application of either party to such civil action, the court may appoint an attorney, or may authorize the commencement of or continuation of the civil action without the payment of fees, costs, or security, if the court determines that such party is financially unable to bear the costs of the lawsuit.

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A copy of the final investigative report can be obtained from: Jay Golden, Region II Director, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, 26 Federal Plaza, Room 3532, New York, New York 10278-0068.



Date



Jay Golden
Region II Director
Office of Fair Housing and Equal Opportunity