INTRODUCTION AND PROCEDURAL HISTORY

Rose E. Shafer (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on September 16, 1997.

The Commission investigated the charge and found probable cause that Joseph Furlan (Respondent) engaged in unlawful discriminatory practices in violation of Revised Code Section (R.C.) 4112.02(H)(4).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on April 30, 1998. The public hearing was held in abeyance pending the Commission's conciliation efforts.

The Complaint alleged that Respondent subjected Complainant to "different terms and conditions of renting regarding an accommodation of her disability" and denied her reasonable accommodation for her disability.

Respondent filed an Answer to the Complaint. Respondent admitted that he was a housing provider, but denied all of the other allegations of the Complaint.

The Commission attempted to conciliate this matter after the complaint was issued. Its efforts were unsuccessful. The matter was then scheduled for public hearing.

A public hearing was held on February 10-11, 1999 at the Lausche State Office Building in Cleveland, Ohio.

On the second day of hearing, the Commission moved to admit Commission Exhibit 15 into evidence. This exhibit contained several newspaper and magazine articles, along with summaries of each, about the use of pet therapy to treat certain medical and physical conditions. Respondent objected to the admission of this exhibit. The Hearing Examiner reserved ruling and created a schedule to brief the issue.

The Commission filed a Motion for Judicial Notice on February 19, 1999. Respondent filed an answer memorandum on March 3, 1999. In its motion, the Commission requested that the Hearing Examiner take judicial notice of "pet therapy as a treatment commonly used for a range of mental and physical conditions."

The Hearing Examiner denied the motion on March 11, 1999. The Hearing Examiner sustained Respondent's objection to the admission of Commission Exhibit 15, and the exhibit was proffered into evidence.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 248 pages, exhibits admitted and proffered into evidence at the hearing, post-hearing briefs filed by the Commission on April 6, 1999[1] and by Respondent on April 28, 1999, and a reply brief filed by the Commission on May 4, 1999.

FINDINGS OF FACT

The following findings are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of

[1] The Commission amended its post-hearing brief on April 15, 1999.

subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or the lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on September 16, 1997.

2. The Commission determined on April 30, 1998, that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(4).

3. The Commission attempted, but failed to resolve this matter by informal methods of conciliation.

4. Respondent is a provider of housing accommodations. Respondent owns and rents a “two family” house located at 4453 West 51st Street in

Cleveland. Respondent is also part owner of two “single family” houses that he rents in Parma and Independence. (Tr. 102)

5. In 1990, Complainant and her son, Robert, moved into the upper part of the house located on West 51st Street. Their lease required them to pay $425 per month in rent and a $500 security deposit. (Comm.Ex. 3) The lease also provided that no pets were allowed without Respondent’s consent.

6. Two years later, Complainant and her son entered into a second lease. (Comm.Ex. 14) This lease raised their rent to $450 per month. The amount of their security deposit and the pet policy remained the same.

7. Complainant and her son signed a one-year lease with Respondent on July 1, 1995. (Comm.Ex. 4) This lease contained the same monthly rent and security deposit as the previous one. This lease contained the following language regarding Respondent’s pet policy:

> No pets are allowed unless prior written approval is granted by the OWNER. TENANT must put any pet requests in writing to the OWNER. Any pet that is allowed on the premises will be the responsibility of the TENANT who accepts full responsibility for damages to the premises or personal injury. Any unallowable pets constitutes default.

When this lease expired, Complainant and her son continued to reside in the house as month-to-month tenants under the same terms.

8. On June 1, 1997, Complainant enclosed a written request to "have a small dog" with her rent payment.[2] (Comm.Ex. 6) Respondent received the request two or three days later. He did not respond to the request prior to leaving for vacation on June 5, 1997.

9. Complainant picked up the dog on either June 6 or June 7. She brought it to the house after not receiving a prompt response from Respondent. The dog lived at the house for the next few weeks.

10. Respondent returned from vacation during the evening of June 14, 1997. The next morning, Respondent left the state for a work-related training. This training lasted for one week.

11. Upon Respondent's return, the downstairs tenant informed him that Complainant and her son had a dog living with them. Respondent called the house and informed Robert that he had been out-of-town for several weeks. Respondent also told him that they could not have the dog.

12. Respondent sent a follow-up note to Complainant on June 25, 1997. *Id.* The note reiterated Respondent's refusal to allow her to keep the dog and gave her until July 1, 1997 to remove it from the premises. Complainant took the dog to her husband's house on June 30, 1997.

13. In late July 1997, Complainant visited her physician, Dr. Norbert Bangayan. Complainant asked Dr. Bangayan, who had been treating her for hypertension (high blood pressure) and anxiety, to write a letter about how a pet could benefit her emotionally. (Tr. 16) Dr. Bangayan wrote the following statement on Complainant's behalf:

> Miss Rose Shafer has been under my medical care for Labile Hypertension and Anxiety. Having a pet, like a dog[,] will surely help her emotional state especially when she is alone in her apartment or at home. (Comm.Ex. 7)

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[2] Complainant identified the dog as a "Shitzer" in the note. (Comm.Ex. 6)

14. On August 1, 1997, Complainant enclosed Dr. Bangayan's statement and a note to Respondent with her rent payment. (Comm.Ex. 8) The note requested that Respondent advise Complainant whether he still refused to allow her to keep the dog in light of the physician's statement.

15. Respondent sent Complainant a written response on August 15, 1997. *Id.* The response indicated that Complainant could keep the dog under the following conditions:

(1) She paid an additional $50 per month in rent;

(2) She paid $500 for a total security deposit of $1,000;

(3) She cleaned up after the dog immediately;

(4) He conducted monthly inspections of the property without notice; and

(5) She paid for all damages caused by the dog.

The response ended with the statement, "Let me know either way." *Id.*

16. Following the August 15, 1996 response, Complainant and her son did not engage in any further communications with Respondent about the dog.

They continued to reside in the house until the end of April 1998. At that time, they moved into an apartment complex that allowed pets with written permission.[3] (Comm.Ex. 1)

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented.

[3] Complainant and her son paid more rent and a higher security deposit at their new apartment. They paid $600 per month in rent, which included a $25 monthly fee for the dog. (Tr. 59) They paid an additional security deposit of $300 for the dog for a total of $900. *Id.* As of March 1, 1998, Respondent raised the rent to $475 and required a security deposit of $600. (Comm.Ex. 5)

1. The Commission alleged in the Complaint that Respondent subjected Complainant to "different terms and conditions of renting regarding an accommodation of her disability" and denied her reasonable accommodation for her disability.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

> It shall be an unlawful discriminatory practice:
>
> (H) For any person to:
>
> (4) Discriminate against any person in the terms or conditions of . . . renting, . . . or use of any housing accommodations, . . . because of . . . handicap, . . . ;
>
> (16) Discriminate in the terms, conditions and privileges of the . . . rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a handicap . . . ; and
>
> (19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including associated and common use areas.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(H) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G); R.C. 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Ohio Civ. Rights Comm*. *v. David Richard Ingram*, *D.C.*, *Inc.* (1994), 69 Ohio St.3d 89. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under the federal Fair Housing Act of 1968 (Title VIII), as amended.[4]

5. Under federal case law, the same evidentiary framework used in employment discrimination cases applies to housing discrimination cases. *Kormoczy v. HUD*, 53 F.3d 821, 823 (7th Cir. 1995). In absence of direct evidence, this framework requires the Commission to first establish a *prima facie* case of disability discrimination. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973). The proof required to establish a *prima facie* case may vary

[4] Sections 3604(f)(2) and (f)(3)(B) of Title VIII are substantially the same as R.C. 4112.02(H)(16) and (19), respectively.

on a case-by-case basis. *Id.*, at 802, n.13.

6. In the context of a refusal to reasonably accommodate case, the Commission may establish a *prima facie* case by showing that:

(1) Complainant has a handicap as defined by R.C. 4112.01(A)(13);

(2) Respondent knew of Complainant's disability or should reasonably been expected to know about it;

(3) The accommodation of the disability "may be necessary" to afford Complainant an equal opportunity to use and enjoy the housing accommodations;

(4) The accommodation is reasonable; and

(5) Respondent refused to make such accommodation.

HUD v. Riverbay, P-H: Fair Housing—Fair Lending Rptr. ¶25,080 at 25,740 (HUD ALJ 1994) (citations omitted).

7. R.C. 4112.01(A)(13) defines “Handicap” as:

> . . . a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.[5]

This definition is substantially the same as Title VIII’s definition of handicap and the definition of disability under the Americans with Disabilities Act (ADA). Therefore, federal case law interpreting those definitions may be used to interpret R.C. 4112.01(A)(13).

8. It is undisputed in this case that Complainant has received medical treatment for hypertension and anxiety in recent years. The Commission must not only show that Complainant’s conditions are physical or mental impairments, but it must also prove that her conditions, whether individually or

[5] The Revised Code uses the term “Handicap.” Since the Commission amended its regulations to change “handicap” to “disability”, the Hearing Examiner used those terms interchangeably in this report.

jointly, substantially limited her ability to perform one or more major life activities.[6] Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . . The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.

> *Interpretive Guidance of Title I of the Americans with Disabilities Act*, (*EEOC Interpretive Guidelines*), 29 C.F.R. Pt. 1630 App., § 1630.2(j); *See also Hood v. Diamond Products*, *Inc.* (1996), 74 Ohio St.3d 298, (whether a person's physical or mental impairment meets the definition of handicap under R.C. 4112.01(A)(13) must be determined on a case-by-case basis).

[6] Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty." *EEOC Interpretive Guidelines,* at § 1630.2(i). Such activities include, but are not limited to, "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working, . . . sitting, standing, lifting, and reaching." *Id*. (legislative citations omitted).

9. Three factors “should be considered” when determining whether an impairment substantially limited an individual's ability to perform a major life activity:

> (1) The nature and severity of the impairment;
>
> (2) The duration or expected duration of the impairment; and
>
> (3) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.
>
> 29 C.F.R. § 1630.2(j).

This determination must be made “with reference to the mitigating measures” such as medication. *See Murphy v. United Parcel Service*, *Inc.*, 119 S.Ct. 2133 (1999) (court affirmed ruling that plaintiff’s severe hypertension, when medicated, did not substantially limit him in any major life activity).

> An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the . . . [three factors], does not amount to a significant restriction when compared with the abilities of the average person.
>
> *EEOC Interpretive Guidelines,* at § 1630.2(j).

10. Respondent argues in his brief that the Commission failed to prove that Complainant was disabled under the statute. This argument is well taken. The record lacks sufficient evidence to conclude that either Complainant's hypertension, even when unmedicated, or her anxiety substantially limited her in any major life activity.[7]

11. If anything, the evidence shows that Complainant's conditions did not rise to the level of a disability. Complainant testified that she was able to engage in her "normal functions" despite her blood pressure. (Tr. 85, 98) Dr. Bangayan's statement, which Complainant provided to Respondent, indicated that he was treating her for "Labile Hypertension and Anxiety." (Comm.Ex. 7) As the Commission points out, Labile Hypertension is defined as "borderline" hypertension. (Comm.Br. 25) This apparently means that sometimes Complainant's blood pressure was above the normal level, but other times it was within the normal range. J.E. Schmidt, M.D., *Attorneys' Dictionary of Medicine and Word Finder*, Matthew Bender, 1999. Such

[7] There is also no evidence that Complainant has a record or history of a substantially limiting impairment or she has been misclassified in a record as having such an impairment. *See* 29 C.F.R. 1630.2(k). Further, the record in this case is void of any evidence that Respondent perceived or treated Complainant as having an impairment that substantially limited one or more major life activities.

evidence suggests that Complainant's hypertension was not severe, and her blood pressure was, at times, comparable to the average person of the same age.[8]

12. Further, Complainant continued to perform her daily life activities without taking the blood pressure medication that Dr. Bangayan had prescribed for her. This evidence also suggests that Complainant's hypertension lacked severity, and belies any argument that it was substantially limiting.

13. The Commission argues in its brief that Respondent's act of only allowing Complainant to keep the dog upon payment of higher rent, an additional security deposit, and other conditions is direct evidence of discrimination. The Commission further argues that whether Complainant's conditions meets "the statutory definition of handicap should be irrelevant for the purpose of this direct evidence analysis in the same manner as an underlying act need not be unlawful to make its report protected activity." (Comm.Br. 21) These arguments are flawed for obvious reasons.

[8] Complainant was 58 years of age at the time of the hearing.

14. It is axiomatic that the Commission's jurisdiction in disability cases hinges on whether the complainant meets the statutory definition of "handicap." Respondent's actions in this case do not relieve the Commission of its burden of proving the most fundamental *prima facie* element in a disability case—Complainant had a handicap as defined by R.C. 4112.01(A)(13). It is also beyond argument that housing providers only have a duty to accommodate disabled tenants, and therefore, may require those who are not disabled to meet certain conditions to have a pet on the premises.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8277.

TODD W. EVANS
HEARING EXAMINER

August 20, 1999