



Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711

www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT MHRC No. H18-0155/HUD No. 01-18-9374-8 July 31, 2018

Leslie McClellan (Old Orchard Beach)

v.

Mark Gervais (Old Orchard Beach)

I. Summary of Case:

Complainant Leslie McClellan resides at 16B Pondview Road, Old Orchard Beach (the "Premises") which is owned and operated by Respondent Mark Gervais.¹ Complainant alleged that Respondent discriminated against her based on her disabilities by treating her differently in the terms and conditions of housing (including denying reasonable accommodation requests) and retaliating by trying to evict her. Respondent denied discriminating or retaliating against Complainant, and stated that he sought to evict her because she did not comply with lease terms and he needed to renovate the heating system. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, holding an Issues and Resolution Conference ("IRC"), and requesting additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Respondent discriminated against Complainant based on disability and retaliated against her for asserting her MHRA-protected rights.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: January 19, 2018 and ongoing.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): April 23, 2018.
- 3) Respondent is subject to the Maine Human Rights Act ("MHRA") and the federal Fair Housing Act ("FHA"), as well as state and federal housing regulations.
- 4) Complainant is represented by Patricia Ender, Esq. Respondent is represented by Neal Weinstein, Esq.

III. Development of Facts:

- 1) Complainant provided the following in support of her claims:

Complainant is disabled and requires the use of an assistance animal to allow her to enjoy her housing.

¹ The property records for the Premises reflect that it is co-owned by Mark and Lyn Gervais; Complainant did not amend her complaint to add the co-owner. Because the facts reflect that Complainant's primary contact was with Mark Gervais, even if Complainant had amended her Complaint to add Lyn Gervais, the outcome here would be unchanged.

In January, Complainant watched her relative's ("Relative") dogs a few times for about eight hours a day. Respondent told Complainant he did not want the dogs there. Complainant informed Respondent that she planned to get an assistance animal and then he served her with a Termination of Tenancy ("Notice"). As part of the eviction proceeding, Complainant requested reasonable accommodations that Respondent denied. When Respondent was unsuccessful in his first eviction attempt, he served her with a second Notice days later. Complainant felt that the attempts to evict her were retaliatory.

2) Respondent provided the following in support of his position:

Complainant did not follow her lease terms and Respondent took steps to evict her. After this eviction process was stopped, he served a second Notice because he decided he needed to change the heating system in the building. Respondent did not deny Complainant's reasonable accommodation requests. Respondent believed it was unreasonable for him to pay the increased heating costs resulting from Complainant leaving her windows and doors open.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties and the information gathered at the IRC:

- a) Complainant, who has physical/mental disabilities², requires the use of an assistance animal to mitigate the effects of her disabilities. She took steps to have an assistance animal at the Premises.³
- b) Complainant viewed the Premises with Relative in September 2017. During the viewing, Relative mentioned her dogs and Complainant sometimes caring for them. On September 15, 2017, Complainant emailed Respondent concerning Relative's dogs, apologizing for Relative's conduct at the viewing and stating that she did not wish to take care of those dogs. Complainant mentioned that her own dog, which had been right for her disabilities, recently died, and that Relative's dogs were not the right fit for her.
- c) On September 29, 2017, Complainant signed a month to month lease to rent the Premises from Respondent starting on October 1, 2017.
- d) Complainant goes outside the Premises to smoke several times a day, leaving her interior door open, but closing the storm door. Complainant leaves the door open because of her [REDACTED] and wanting to get back inside in case of an emergency.⁴
- e) At some point, Complainant took care of Relative's dogs (Relative's assistance animals) at the Premises for three or four days, up to eight hours per day; Relative was not there. At the IRC, Complainant acknowledged that Relative was not at the Premises at all times with Relative's assistance animals.
- f) During one of the times Complainant watched Relative's dogs, Respondent reminded Complainant it was a lease violation to have dogs at the Premises.

² Complainant has both physical and mental impairments which are disabilities without regard to severity under the MHRA. See 5 M.R.S. § 4553-A(1)(B).

³ In Respondent's Answer dated May 15, 2018, Respondent's counsel stated that Complainant never said she had disabilities, nor did she request an assistance animal.

⁴ Complainant provided that she keeps her heat very low and that there should not be increased costs because of the door being open. She provided a video showing that the Premises's storm door has some gaps in it based on the installation.

- g) On January 19, 2018, Respondent approached Complainant telling her that he did not want Relative's dogs there. Relative was not present at the time. Complainant recalled that Respondent gave her permission to watch the dogs; Respondent denied he ever did so. During that conversation, Complainant mentioned that she planned to get an assistance animal when she could find a suitable one. Complainant described the form her doctor ("MD") would fill out and sent a blank copy to Respondent.
- h) In response to the email with the blank assistance animal form, Respondent asked for Complainant's mailing address. Complainant asked the reason for the inquiry; no response was received.
- i) On January 25, 2018, Complainant received the first Notice. The Notice stated that the eviction was based on Relative's dogs being at the Premises and leaving her inside door open during the winter despite Respondent's request to leave the door closed.⁵
- j) On February 12, 2018, Complainant (through her attorney) requested the following reasonable accommodations: to stop the eviction proceeding; to allow Complainant to leave her inside door open when she is outside for brief periods; and to acquire an assistance animal. Complainant also asked for repair work to the windows and explained that Relative's dogs were assistance animals, so they were allowed when Relative visited her. With the letter, Complainant provided a copy of MD's January 30, 2018 letter identifying at least one of Complainant's disabilities and discussing the necessity of an assistance animal. Complainant also provided a letter from a community support services program manager describing Complainant's [REDACTED] [REDACTED].
- k) On February 20, 2018, Respondent (through his attorney) replied to the accommodation request stating that the eviction was because Complainant "violated the lease by allowing dogs in the apartment on several occasions". In response to the request to keep the door open, Respondent stated that it was a lease violation to leave the door open and he had asked Complainant to close the inside door when she is outside smoking or doing other things. Further, the reply stated that Respondent "is not willing to allow your client to stay as she has proven that she is not able to comply with the terms of the lease". During the IRC, Respondent stated that stopping an eviction process was not a reasonable accommodation since it was not a request to change a policy or procedure.
- l) On February 23, 2018, the parties had a court hearing on Respondent's forcible entry and detainer complaint, with the judge ruling in Complainant's favor because Respondent "failed to adequately address [Complainant's] request for reasonable accommodations under the Fair Housing Act".
- m) Respondent served Complainant with a second Notice on March 1, 2018, with the given reasons that he elected not to renew Complainant's month to month lease and because he intended to renovate the building to install two new heating systems. Due to increased heat costs in 2018, Respondent decided that he wanted to change the heating system before fall of 2018.
- n) On April 20, 2018, the parties entered into an agreement on the second hearing date providing that Complainant would vacate the Premises by August 1, 2018.

⁵ Respondent provided documentation of this year's heating bills through July reflecting that he already spent almost \$750.00 in heat this year, with five months remaining in the year. Respondent provided a summary of the prior heating bills (though not the requested documentation to verify the assertion) showing that average heating bills for the building for the prior two years was close to \$800.00. The heater for the building is the only heat source for multiple units. Respondent believed that Complainant left the door open for convenience when smoking, not based on a disability.

- o) During the IRC, Respondent claimed that he granted the accommodation requests because Complainant leaves the inside door open. After she acquired dogs in the spring, he has taken no steps to remove them. Respondent believed that the reasonable accommodations were discussed and resolved as part of the mediation in the court process. Respondent also argued that it was an undue financial burden for him to pay the increased heat costs associated with Complainant leaving her door open and that Complainant's request was unreasonable.
- p) Respondent has not taken steps to change the heating system because Complainant continues to reside in the Premises. Respondent did not ask any other tenants to vacate the building because they were not impacted by the renovations.

IV. Analysis:

- 1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA provides, in part, that a person has the right to rent housing without discrimination on the basis of disability. 5 M.R.S. § 4581-A(1)(B); 94-348 Code of Maine Regulations ("C.M.R.") Ch. 8 8.04(a)(1).

Denial of Reasonable Accommodations Claim

- 3) The MHRA makes it unlawful "[f]or any owner, lessee, sublessee, managing agent or other person having the right to sell, rent, lease or manage a housing accommodation or any of their agents to refuse to make reasonable accommodations in rules, policies, practices or services when those accommodations are necessary to give a person with physical or mental disability equal opportunity to use and enjoy the housing." 5 M.R.S. § 4582-A(2). This includes the requirement to allow an individual with a disability to use an assistance animal.
- 4) To establish a prima-facie case of failure to accommodate, Complainant must show that:
 - (1) She has a "physical or mental disability" as defined by the Maine Human Rights Act;
 - (2) Respondent knew or reasonably should have known of the Complainant's disability;
 - (3) Complainant requested a particular accommodation;
 - (4) The requested accommodation is necessary to afford Complainant an equal opportunity to use and enjoy the housing;
 - (5) The requested accommodation is reasonable on its face, meaning it is both efficacious and proportional to the costs to implement it; and
 - (6) Respondent refused to make the requested accommodation.

See 5 M.R.S. § 4582-A(2); *Astralis Condominium Ass'n v. Secretary, U.S. Dept. of Housing and Urban Development*, 620 F.3d 62, 67 (1st Cir. 2010) (interpreting similar provision in Fair Housing Amendments Act, but seemingly placing burden on Complainant to show accommodation was reasonable); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002) (plaintiff's burden is only to show reasonableness "on its face"). *Compare Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (interpreting ADA) (holding that plaintiff need only show requested accommodation was feasible "on the face of things").

- 5) If Complainant shows this, Respondent can defeat the claim by showing that the proposed accommodation was unreasonable, meaning “it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program.” *Oconomowoc Residential Programs*, 300 F.3d at 784.
- 6) An assistance animal is an animal that “has been determined necessary to mitigate the effects of a physical or mental disability by a physician, psychologist, physician assistant, nurse practitioner or licensed social worker” or that has been “individually trained to do work or perform tasks for the benefit of an individual with a physical or mental disability”. 5 M.R.S. § 4553(1-H).
- 7) Under the MHRA, it is unlawful for “any owner, lessor, sublessor, managing agent or other person having the right to sell, rent, lease or manage a housing accommodation or any of their agents to refuse to permit the use of an assistance animal or otherwise discriminate against an individual with a physical or mental disability who uses an assistance animal at the housing accommodation unless it is shown by defense that the assistance animal poses a direct threat to the health or safety of others or the use of the assistance animal would result in substantial physical damage to the property of others or would substantially interfere with the reasonable enjoyment of the housing accommodation by others.” 5 M.R.S. § 4582-A(3).
- 8) Here, Complainant was able to show that Respondent discriminated against her on the basis of disability by denying some of her reasonable accommodation requests, with reasoning as follows:
 - a) Complainant has disabilities as defined under the MHRA. Respondent knew that she had disabilities based on MD’s January 30, 2018 letter provided to him. Complainant requested several reasonable accommodations: (i) to stop the eviction proceeding; (ii) to allow Complainant to leave her inside door open when she is outside for brief periods; and (iii) to acquire an assistance animal that would allow her to use and enjoy her housing.⁶ All of the requests were feasible and, if granted, would allow Complainant an equal opportunity to use and enjoy the housing.
 - b) Respondent did not believe that stopping the eviction proceeding was a reasonable accommodation because it did not amount to a modification of a housing policy or practice, and proceeded to bring an eviction action against Complainant. This is too narrow a view. The policy or practice at issue was the practice of evicting a tenant for the listed lease violations, at least one of which – the open interior door – related to one of Complainant’s disabilities. Complainant’s request was based on her disabilities and was a request to have time to show compliance with their lease terms if they were granted other reasonable accommodations and time to prove their compliance.
 - c) As to the request to leave the door/windows open, Respondent stated that he granted her accommodation request by allowing her to leave the doors open. Alternatively, Respondent argued it was an undue financial burden to heat the Premises. Respondent’s concerns about his increased financial burden have merit. Although leaving windows and doors open during winter months in Maine was feasible, it would not be a reasonable request, when Complainant was not responsible for her own heating costs. It is, however, of some concern that Respondent did not engage in any interactive process about this issue with her, since there may well have been an alternate accommodation that could have been adopted.
 - d) Regarding the assistance animal request, Respondent initially claimed he never received one. He did,

⁶ Complainant’s claim that Relative was denied the use of her assistance animals (dogs) while visiting is not analyzed here because the record reflects that the dogs were left with Complainant when Relative was not present. The dogs were not Complainant’s assistance animals and were not providing Complainant with a service while she watched them. The record is devoid of any information that Respondent would not allow Relative to visit with her assistance animals.

however, receive MD's January 30th letter recommending Complainant obtain an assistance animal, prior to the eviction proceeding. Respondent later stated that he learned Complainant had two dogs in the Premises during the spring and he took no steps to remove them. He argued that Complainant provided no paperwork about the animals, but Respondent did not request any information from her.

- e) The record reflects that Respondent failed to engage in the interactive process with Complainant to address her accommodation requests. The requests were made on February 12, 2018 and on February 20, 2018, Respondent denied all of the requests. In fact, the District Court entered a judgment in Complainant's favor at the first eviction proceeding stating explicitly that Respondent failed to adequately address Complainant's reasonable accommodation requests. After that judgment issued, Respondent took no steps to engage in the interactive process with Complainant, except perhaps as part of a confidential mediation session in connection with the second eviction action.
 - f) Here, Complainant has established that Respondent denied at least some of her reasonable accommodation requests without establishing a defense for his actions.
- 9) It is found that Complainant was unlawfully denied a reasonable accommodation for her disability.

MHRA Retaliation Claim

- 10) The MHRA makes it unlawful "for a person to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted or protected by this Act" and to "discriminate against any individual because that individual has opposed any act or practice that is unlawful under this Act or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Act." 5 M.R.S. § 4633(1)&(2).
- 11) In order to establish a prima-facie case of retaliation, Complainant must show that she engaged in statutorily protected activity, she was the subject of a materially adverse action, and there was a causal link between the protected activity and the adverse action. *See Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 20, 824 A.2d 48, 56 (employment case); *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006) (same). The term "materially adverse action" covers actions that are harmful to the point that they would dissuade a reasonable person from making or supporting a charge of discrimination. *See Burlington Northern*, 126 S. Ct. 2405. One method of proving the causal link is if the adverse action happens in "close proximity" to the protected conduct. *See id.*
- 12) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in statutorily protected activity. *See Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1st Cir. 1995). Respondent must then produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action. *See Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, Complainant must carry her overall burden of proving that there was, in fact, a causal connection between the protected activity and the adverse action. *See id.*
- 13) Complainant has established a prima-facie case by showing that she made several reasonable accommodation requests and Respondent attempted to evict her after denying her requests. Respondent stated a legitimate nondiscriminatory reason for his actions, namely that Complainant violated her lease and he elected not to renew her lease so he could renovate the heating system.
- 14) At the final stage of the analysis, Complainant has shown that she has at least an even chance of establishing

a causal connection between her protected activity and the materially adverse action she experienced:

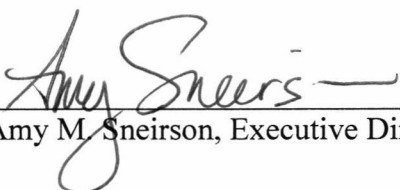
- a) Complainant argued the evictions were based on her disabilities because she mentioned in late January that she planned to get an assistance animal. After she sent the blank form to Respondent that she intended to use to acquire her assistance animal, Respondent served her with a Notice within a week. Respondent argued that the eviction was based on Complainant's lease violations, not her disabilities; as discussed above, though, the request to stop the eviction was, itself, a request for a reasonable accommodation to have time show compliance with their lease terms if they were granted other reasonable accommodations. The facts tend to show that after Complainant made a reasonable accommodation request, Respondent's immediate response was to serve her with the first Notice.
- b) The second Notice was served on Complainant within a week of the court entering judgment in Complainant's favor for Respondent failing to adequately address her accommodation requests. During the intervening week, Respondent acknowledged he did nothing to address Complainant's accommodation requests. Instead, Respondent claimed he needed to renovate the heating system. Respondent claimed the renovations were not based on Complainant's disabilities because there was no medical evidence to support Complainant's need for the windows and doors to be open. Even though leaving the doors and windows open is not considered reasonable under the circumstances of this case, the record tends to show that Respondent retaliated against Complainant for making the accommodation request. The rationale for the renovations was directly related to the increased heat costs that Complainant caused because of her disabilities. Moreover, Respondent's answers to questions about the planned renovation are suspect. Respondent provided that he had not asked the other tenants to vacate their apartment even though he intended to install separate heating systems for each unit. Respondent took the position instead that he did not yet know what kind of system he would install, and he would make that decision after Complainant was out of her apartment. This tends to support a finding that the second Notice was also retaliatory.
- c) Complainant has established that there is at least an even chance that Respondent's actions would have been different had she not made reasonable accommodations requests.

15) Retaliation in violation of the MHRA is found.

V. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

1. There are **Reasonable Grounds** to believe that Mark Gervais discriminated against Leslie McClellan on the basis of disability in the terms and conditions of her housing by denying her reasonable accommodations;
2. There are **Reasonable Grounds** to believe that Mark Gervais retaliated against Leslie McClellan for asserting her rights under the Maine Human Rights Act; and
3. The complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneirson, Executive Director



Alice A. Neal, Chief Investigator