



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

MHRC Case No. H18-0352

January 3, 2019

Robert Lavin (Portland)

v.

Avesta Housing¹/Manny Urgiles/Nicholas Kjeldgaard (Portland)

I. Summary of Case:

Complainant, who rents an apartment from Respondents at ■■■■■■■■■■, alleged that Respondents discriminated against him because of his disability when they failed to make the reasonable accommodation of providing him with an apartment on a lower floor.² Respondents, a housing provider, a property manager, and a disability law compliance coordinator, denied discrimination and asserted that they approved Complainant's request for accommodation but were unable to provide it as no apartments became available. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, requesting additional information, and holding an Issues and Resolution Conference ("IRC"). Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Respondent unlawfully discriminated against Complainant.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: October 2015 to present.³
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): September 26, 2018.

¹ Complainant named Respondent as Avesta Housing. Respondent provided that Avesta Munjoy Commons, LP owns the building and Avesta Housing Management Corporation manages it. As Complainant did not amend his complaint, the name he used has been retained.

² Respondents moved to evict Complainant in October 2016 over rent and warned him of a potential eviction in June 2018 for not being in compliance with the lease. It has not been shown that Respondents' actions on these occasions were motivated by Complainant's request for a reasonable accommodation (MHRA-protected activity) or his disability.

³ The MHRA provides that discrimination complaints must be filed with the Commission "not more than 300 days after the alleged act of unlawful discrimination." See 5 M.R.S. § 4611. In cases involving discrete acts of discrimination, the filing deadline runs from the time that a reasonable person would have become aware of facts supporting a claim of discrimination. *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 11. The test is whether Complainant has received unambiguous and authoritative notice of the discriminatory act, not whether Respondent's alleged discriminatory act has reached a state of actual or absolute finality or permanence. *Id.* at ¶ 15.

- 3) Respondents are housing providers or agents of housing providers and subject to the Maine Human Rights Act ("MHRA").
- 4) Complainant is not represented by Counsel. Respondent is represented by David Chamberlain, Esq.

III. Development of Facts:

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

Complainant requested from Respondents an apartment on a lower floor or in a building with an elevator to accommodate his breathing distress due to [REDACTED]. Respondent approved the request, but failed to actually provide an apartment meeting that criteria for three years. When Complainant would check up on it, Respondents would only tell him that they would contact him when an apartment became available. Complainant believes lower floor apartments became available after the request.

- 2) Respondent provided the following in support of its position:

Respondents approved Complainant's request for accommodation and he was placed on a waiting list for when an appropriate apartment became available. Respondents contacted Complainant about other properties that met his criteria to see if he wanted to apply. Complainant did not fill out the paperwork for the other properties. No one-bedroom apartments became available on the first floor, so Respondent was unable to provide such.

- 3) The Investigator made the following findings of fact:

- a) Complainant, who had most of his [REDACTED] [REDACTED] because of [REDACTED]⁴, has rented an apartment at [REDACTED] in Portland ("Commons") since July 2014, which was owned and managed (through two separate entities) by Respondent Avesta Housing ("Avesta"). Manny Urgiles ("Manager") was the property manager. Nicholas Kjeldgaard ("Coordinator") was the disability law compliance coordinator. Manager and Coordinator worked for Avesta. The apartment is on the third floor in a building with no elevator and requires climbing four flights of stairs.
- b) In October 2015, Complainant requested an apartment on a lower floor or an apartment in a building with an elevator⁵ because climbing the stairs to his floor caused [REDACTED]. Complainant used Respondents' standard reasonable accommodation form. (Exhibit A) In November 2015, Coordinator sent Complainant a letter stating that the request had been approved and that the property manager would contact him when a unit became available. (Exhibit B)
- c) In December 2016, a two-bedroom apartment became available on the first floor; in March 2017 a one-bedroom on the second floor and in September 2017 another two-bedroom on the first floor.⁶

⁴ [REDACTED] is a disability without regard to severity under the MHRA as is the [REDACTED]. See 5 M.R.S. § 4553-A.

⁵ Commons has two separate buildings.

⁶ Respondents believe Complainant initially requested a two-bedroom apartment (his current size), but then changed that request to a one-bedroom in February 2016 because his daughter was going to college. This belief appears to be informed by a note taken by an intake specialist for Avesta regarding a different property they thought would have suited

Respondents did not contact Complainant to see if he wished to transfer to any of these apartments when they became available.⁷ During the investigation, Complainant confirmed that he would have been willing to move to a lower floor other than the first floor.

- d) Complainant recalls checking up on the matter with Manager approximately one year after the request and then again in the Summer of 2018. Complainant emailed Coordinator about the matter in August 2018. Complainant recalls them only telling him that they would contact him when an apartment became available.

IV. Analysis:

- 1) The MHRA requires the Commission to “determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The Maine Human Rights Act makes it 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 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).
- 3) To establish a prima-facie case of failure to accommodate, Complainant must show that:
 - (1) He has a disability as defined by the MHRA;
 - (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

Complainant's needs. The note stated Complainant's “preference” was a one-bedroom. Avesta's computer printout of that note states that Complainant “[i]deally” wants a one-bedroom. In a submission to the Commission, Complainant wrote “I have never said that I wanted a two bedroom on a lower floor. From day one of this process I have stated that I wanted a studio or one bedroom apartment.” The record is unclear as to whether Complainant *required* a one-bedroom or simply *preferred* one. Complainant recalls Manager telling him at some point that the only apartments that became available on the first-floor were three-bedrooms.

⁷ Avesta contacted Complainant to see if he wished to apply for other properties it managed that may have apartments that suited his needs; one of which was a new property that needed to be filled. That process ultimately fell through. According to Respondents, because the properties were not owned by the same company, Complainant would have had to apply anew and could not have simply been transferred to that property; the reasonable accommodation approval would not have given him priority. Respondents referred to Commons as a “very desirable property.”


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").

- 4) If Complainant makes this showing, 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.
- 5) The process for identifying an alternative accommodation is parallel to that for identifying an alternative accommodation in the employment context. Accordingly, failure by the housing providers to engage with the individual requesting an accommodation to identify an alternative may be informative when considering whether they failed to provide a reasonable accommodation. *See Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 515 (1st Cir. 1996). In determining responsibility for a breakdown in the interactive process, courts consider good faith and reasonable efforts in light of all the circumstances. *Goonan v. Federal Reserve Bank of N.Y.*, 12-CV-3859, Opinion and Order (SDNY 2014); citing *Beck v. University of Wisc. Bd. Of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996). Liability requires a "finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation". *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 91 (1st Cir. 2012); *see also Kvorjak v. State of Maine*, 259 F.3d 48, 52 (1st Cir. 2001).
- 6) Complainant has shown that Respondents failed to make a reasonable accommodation. Complainant's request for accommodation states that he wished to be transferred to an apartment on a "lower floor" not only the first floor. Complainant confirmed that he would have been willing to move to a lower floor other than the first floor, if offered. Furthermore, the accommodation paperwork outlines the reason for the transfer being [REDACTED]. Common experience suggests that climbing two flights of stairs to the second floor instead of four to the third floor would be a significant improvement in limiting [REDACTED]. [REDACTED] A one-bedroom apartment on the second floor became available and Respondents failed to offer it to Complainant. Likewise, Respondents failed to contact Complainant about multiple two-bedroom apartments that became available on the first floor.

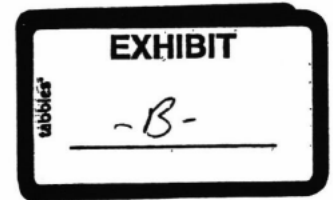
V. Recommendation:

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

- 1) There are **Reasonable Grounds** to believe that Avesta Housing/Manny Urgiles/Nicholas Kjeldgaard discriminated against Robert Lavin because of his disability by failing to make a reasonable accommodation and the complaint should be conciliated in accordance with 5 M.R.S. § 4612(3).



Joseph H. Hensley, Investigator



November 8, 2015

Mr. Robert Lavin

Dear Robert Lavin,

This letter is to inform you that your Reasonable Accommodation request, to transfer to a unit on a lower floor or a building with an elevator, has been approved. You have been added to the property transfer list for Munjoy Commons, and your Property Manager will contact you should a unit become available. Please call the office with any questions.

Sincerely,

Nicholas Kjeldgaard
Resident Service Coordinator, 504 Coordinator
Avesta Housing
207-553-2214

CC: _____, Regional Property Manager
Manny Urgiles, Property Manager
_____, Resident Service Coordinator