

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Beatrice Exelberth,

Charging Party,

Beatrice Exelberth,

Intervenor,

v.

Riverbay Corporation,

Respondent

HUDALJ 02-93-0320-1
Date: September 8, 1994

Beatrice Exelberth, *pro se*

Janet B. Dreifuss, Esq.
For the Charging Party

Steven M. Post, Esq.
For the Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

On June 16, 1993, Beatrice Exelberth ("Complainant") filed a complaint with the United States Department of Housing and Urban Development ("HUD" or the "Charging Party"). She alleges that Riverbay Corporation ("Riverbay" or "Respondent") discriminated against her on the basis of handicap in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act").

On January 27, 1994, HUD issued a Determination of Reasonable Cause and Charge of Discrimination. The Charge alleges that Ms. Exelberth suffers from recurrent depression and that her pets ease the depression's effects. The Charge further alleges that the Respondent violated sections 804(f)(1)-(3) of the Act (42 U.S.C. § 3604(f)(1)-(3)) by refusing to make a reasonable accommodation in its rules to allow the Complainant to keep a dog in her apartment.

Ms. Exelberth filed a request to intervene on February 25, 1994. After the parties requested a postponement, a hearing was held in New York City on May 17, 1994. Before the hearing convened, the Respondent made a motion to stay the proceedings and a motion to dismiss. I denied the motion to stay and reserved ruling on the motion to dismiss until I issue this decision. At the close of the hearing, I ordered the parties to file post-hearing briefs by July 6, 1994. The time for filing briefs was extended until August 2, 1994. On that date the parties filed their briefs and the record closed.

I make the following findings and draw the following conclusions based on this record, my observation of the witnesses and their demeanor, and my evaluation of the evidence.

Findings of Fact

A. Background

1. Beatrice Exelberth, 68 years old at the time of hearing, lives at 24-A Debs Place in the Bronx, New York. Transcript ("Tr.") 147; Government's Exhibit ("G-Ex.") 1; G-Ex 13, Mid-Year Summary, Jan. 30, 1994. Her apartment is in the Co-op City development, managed by Riverbay Corporation. Tr. 150.

2. Co-op City has 15,372 units housing between 50,000 and 60,000 residents. Tr. 376, 497. The complex began accepting residents in 1968. Tr. 377.

3. Ms. Exelberth has lived in Co-op City since July 1971, and at her present address, in a one-bedroom townhouse apartment, since January 1992.¹ Tr. 151, 227. At her original address, she lived with her husband, her daughters, and her father in a three-bedroom apartment; since 1990, she has lived alone.² Tr. 151, 160, 286.

4. Ms. Exelberth participates in programs at Co-op City's senior center. Tr. 238-239. Additionally, she socializes with a friend living in Co-op City. Tr. 240-241.

5. Ms. Exelberth works as a street vendor in Manhattan. Tr. 155; G-Ex. 13, Mid-Year

¹The area where Ms. Exelberth lives has heavy pedestrian traffic. Tr. 559.

²Ms. Exelberth was widowed and her father died in 1981. Tr. 161; G-Ex. 13, Mid-Year Summary, Jan. 30, 1994.

Summary, Jan. 30, 1994.

6. Ms. Exelberth obtained a Yorkshire terrier on October 13, 1991.³ Tr. 154-155, 229. Originally, she had not planned to keep the dog, but subsequently was unable to give the dog away. Thereafter, she kept the terrier, and began to grow attached to it. Tr. 155-156, 229-230.

7. The occupancy agreement for Co-op City prohibits keeping "dogs or other animals of any kind" in her apartment. Tr. 154; G-Ex. 2. Ms. Exelberth was aware of this prohibition. Tr. 230.

8. Upon the advice of a lawyer from the American Society for Prevention of Cruelty to Animals ("ASPCA"), she believed she would be able to keep her dog if she walked it openly at Co-op City for three months without any action by Riverbay to make her remove the dog. Tr. 230-231, 289, 299. At the time, Ms. Exelberth was unaware of the Fair Housing Act's protection of disabled persons. Tr. 290.

9. On March 10, 1992, Riverbay notified Ms. Exelberth that she must remove the dog from her apartment. Tr. 367; G-Ex. 3. She began exploring ways to keep the dog. For her, removing the terrier was not an option because she found it so emotionally beneficial. Tr. 171-172.

10. On March 24, 1992, Riverbay levied a fine of \$25.00 plus five dollars in administrative fees against Ms. Exelberth for violating her occupancy agreement. Tr. 174; G-Ex. 4. She paid the fine. Tr. 174.

11. Riverbay began eviction proceedings against Ms. Exelberth based on her harboring a dog. Tr. 154, 176. Thereafter, Riverbay refused to accept Ms. Exelberth's rent payments for eight months. Tr. 175, 374.

12. The eviction proceeding began on November 10, 1992, in the Civil Court, Housing Part of Bronx County, New York. The parties were Riverbay and Ms. Exelberth. Respondent's Exhibit ("R-Ex.") 1.

13. During the eviction proceeding, Ms. Exelberth presented evidence to her attorney that her mental condition necessitates her keeping the dog. Tr. 198-199, 311; G-Ex. 6. Her attorney chose not to raise the issue of Ms. Exelberth's disability at the eviction proceeding. Tr. 199, 250-251.

³Ms. Exelberth also owns a cat. Tr. 157, 163.

14. On March 12, 1993, Ms. Exelberth was ordered evicted. Tr. 371; R-Ex 2. This eviction was affirmed by the Appellate Term of the Supreme Court, First Department in New York on January 14, 1994.⁴ Tr. 373; R-Ex. 3. The Respondent has agreed to take no action to enforce the judgment of eviction during the pendency of this hearing.

15. The eviction proceedings have caused Ms. Exelberth anxiety and to feel "tremendous rage." Tr. 204, 297. She has not looked for other housing because of her limited income, and she fears--is "scared as hell"--that she will become homeless. Tr. 207, 241. She considers this possibility for "every moment practically." Tr. 208.

B. The Expert Testimony

The parties' expert witnesses disagreed on both the existence of Ms. Exelberth's mental disability and the effectiveness of her dog in alleviating her disability's symptoms. I have credited the Charging Party's expert testimony in both of these matters.

The Charging Party's expert, Dr. James Spikes, is a psychiatrist. Tr. 51, 56. He examined Ms. Exelberth twice, on July 5, 1993, and on May 9, 1994. Tr. 56, 98. The July 5th examination lasted 45 minutes. It was the first time Dr. Spikes had met Ms. Exelberth. Tr. 98. She described her medical history, her feelings, her personality, her difficulties relating to other people, her feelings about her dog, and the Respondent's unwillingness to allow her to keep her pet. Tr. 99-100, 102, 118-120. Before the May 9, 1994, meeting, Dr. Spikes reviewed letters, reports, and summaries of therapy written about Ms. Exelberth by her therapists at the Ferkauf School of Psychology at Yeshiva University over a six-year span. Tr. 56, 99, 136; G-Ex. 6, 7, 13. The interview consisted of reviewing Ms. Exelberth's previous examination and her current symptoms. Tr. 84. The Respondent's expert witness, Dr. Norman Weiss is also a psychiatrist. Tr. 406. He reviewed the same notes and letters that Dr. Spikes reviewed, as well as a letter Dr. Spikes wrote to Riverbay about Ms. Exelberth's mental condition. Tr. 415-416; G-Ex. 8-A. Dr. Weiss never spoke to Ms. Exelberth prior to the hearing. Tr. 433.

Despite Dr. Weiss's skepticism that a 45 minute session with a patient provides a sufficient basis for drawing medical conclusions, I find that Dr. Spikes was able to adequately evaluate Ms. Exelberth's condition.⁵ Tr. 410, 415. Dr. Spikes met twice with Ms. Exelberth and reviewed the notes of her therapists. Additionally, he has experience with patients who have special needs for pets.⁶ Tr. 106. Moreover, Dr. Weiss agrees with many of the Ferkauf Institute

⁴I note that Ms. Exelberth is appealing the Decision and Order of the Appellate Term. Tr. 35. I have not been notified of the outcome of this appeal.

⁵Ms. Exelberth's therapists at the Ferkauf Institute did not want to participate in the instant matter because such involvement would interfere with Ms. Exelberth's therapy. Tr. 120.

⁶Dr. Weiss also has patients with special dependencies on their pets. Tr. 410.

therapists' findings relating to Ms. Exelberth's mental state. *See* Tr. 452-453, 460. He also agrees that a dog could fulfill a person's emotional needs. Tr. 478.

Accordingly, I credit Dr. Spikes' diagnosis and conclusions relating to Ms. Exelberth's mental condition and need for a dog.

C. Ms. Exelberth's Mental History and Disability

1. When Ms. Exelberth was six years old until she was 14, her mother was institutionalized for a mental illness. Tr. 173, 184, 471; G-Ex. 13.

2. Ms. Exelberth has been hospitalized three times for depression. A depression followed the birth of each daughter, and the other followed the death of her husband. Tr. 158, 188. During her second hospitalization and third hospitalizations she was given shock treatments.⁷ Tr. 120, 188.

3. She received psychotherapy for a period during the 1960s, and then resumed psychotherapy in 1981. She continues to receive psychotherapy. Tr. 120, 129, 189, 229.

4. For a period of time during her hospitalizations, she was prescribed several drugs including Thorazine. Since 1983, she has taken no medication for anxiety or depression. Tr. 120, 190-191, 228, 296. Ms. Exelberth believes having the dog, in part, helps her stay off medication. Tr. 296.

5. On December 14, 1984, an administrative law judge of the Social Security administration determined that Ms. Exelberth was mentally disabled within the meaning of the Social Security Act and suffered from "severe major recurrent depression." Tr. 178; G-Ex. 5, page 3. She received disability payments retroactively to 1983 and continues to receive payments.⁸ Tr. 179.

6. Ms. Exelberth has

a schizoid personality disorder, which is a disorder characterized by difficulty in relations with people, difficulty becoming involved with other people, and she has a depressive disorder, which at times is what we call a dysthymic disorder, which she has most of the time, and at times, that's punctuated by what we refer to as major depressions, which are acute disturbances characterized by complete loss of pleasure in life, wish to die, and very low self-esteem.

⁷Ms. Exelberth received a total of 49 shock treatments. Tr. 193.

⁸Upon turning 65, Ms. Exelberth began to receive retirement payments from Social Security that were classified as disability payments. Tr. 179.

Tr. 58; *see also* Tr. 86; G-Ex. 13, Mid-Year Summary, Jan. 30, 1994 (the Complainant "has experienced lifelong patterns of disorganization in thinking, coupled by chronic depression").

7. Symptoms of the schizoid personality include difficulty in trusting and cooperating with other people. Tr. 59, 110. A schizoid personality is treated by psychotherapy; dysthymia is treated by either psychotherapy or medication. Tr. 60.

8. Ms. Exelberth angers easily and has narcissistic tendencies. Tr. 111, 275.

9. Ms. Exelberth's mental condition necessitates her having a dog. Tr. 61. Without the dog, another episode of depression, and possible hospitalization, is likely.⁹ Tr. 65, 132, 140.

10. A dog's love for its master is unambivalent, unlike the more complicated feelings human beings have for one another. Because Ms. Exelberth is uncomfortable relating to "people who express their hate, anger and hostility because it's going to tap that within [herself]," this simplicity of feeling provides Ms. Exelberth with "a tremendous sense of emotional relief that one couldn't get any place else." Tr. 64, 172; *see also* Tr. 163, 165, 280-282.

11. Ms. Exelberth's terrier

provides her with a creature that she can feel totally unmixed about in a way that she cannot about people. The dog's presence is soothing in a way that she could never be soothed by other people, even her therapists or the medications she would get.

Tr. 61; *see also* Tr. 89.

12. Ms. Exelberth began to look forward to waking up and feeding her dog; it gave her a good feeling to care for the pet that she felt was caring for her. Tr. 157.

13. Riverbay's janitorial staff has received no reports of Ms. Exelberth failing to clean up after her dog. Tr. 572.

14. Walking the dog during the winter, despite having emphysema, gave Ms. Exelberth a sense of having the ability to overcome her circumstances and to overcome guilt she felt about raising her children. Tr. 158.

15. Ms. Exelberth takes the dog on walks, driving it to the beach or to local parks. She

⁹Dr. Spikes recommended that Ms. Exelberth obtain another dog if her current pet becomes ill. Tr. 65.

was unable to enjoy such trips before obtaining her pet. Tr. 157.

16. Ms. Exelberth depends on her dog "for good feelings" and "the energy to get up." Tr. 177. She feels that the dog keeps her balanced. Tr. 193. The dog also enables her to articulate feelings of love. Tr. 164. She finds it easier to interrelate with people, to consider ways to avoid conflicts with them. Tr. 282-283.

17. Although the dog was obtained inadvertently, Ms. Exelberth is able to enjoy the therapeutic benefit from it. Tr. 89.

18. Without the dog, Ms. Exelberth would feel "[e]mpty and . . . a great sense of being denied something that's very meaningful in [her] life." Tr. 212.

19. Ms. Exelberth's moving to another apartment could initiate another episode of depression because she does not easily adjust to change.¹⁰ Tr. 82-83, 108, 133; G-Ex. 6. She has suffered significant anxiety from not knowing if she could keep her dog and stay in her current apartment. She had suffered insomnia, anxiety attacks, and an increase in her feelings of depression. Tr. 86, 87, 128.

D. The Current Fair Housing Act Action

1. Ms. Exelberth advised Riverbay of her mental disability in April 1992. Tr. 194. Riverbay's knowledge is reflected in a memorandum from an area manager at Co-op City, Evelyn Bennett, to a paralegal in the Respondent's Legal Collections department dated April 2, 1992. It states that Ms. Exelberth is harboring a dog and refuses to stop because she "claims that the dog is a wonderful companion since she has many health problems." Tr. 194; G-Ex. 11.¹¹

2. Ms. Exelberth hoped that a letter from Dr. Spikes would convince Co-op City's Board to allow her to keep her dog. Tr. 100-101, 103, 116-117, 124, 130-131, 258, 262.

3. Following his July 5, 1993, examination of her, Dr. Spikes wrote a letter to Iris Baez, the President of the Respondent's Board of Directors. In that letter, he explained that due to Ms. Exelberth's "long history of serious, recurrent depressions . . . [she] has a special need for companion animals such as the cat and dog now in her possession." Tr. 66-69, 97-98, G-Ex. 8-A. That letter was forwarded by Ms. Exelberth to Ms. Baez on

¹⁰ Keeping the dog is more important to Ms. Exelberth's mental health than remaining in the residence. Tr. 126.

¹¹ Riverbay denies it had knowledge of Ms. Exelberth's disability before she filed her complaint. Tr. 498. This denial is flatly contradicted by the existence of the earlier memorandum. Additionally, Ms. Exelberth was vocal about her mental history to "everybody," including Ms. Bennett, and I find that the "health problems" described in the memorandum were mental health problems. Tr. 193. Furthermore, I note that Ms. Bennett was not called to testify concerning the memorandum.

August 28, 1993. Tr. 196, 316; G-Ex. 8.

4. Ms. Baez did not allow Ms. Exelberth to speak to the Board. Tr. 201, 294. Because she was not allowed to speak to the Board, Ms. Exelberth felt harassed. Tr. 295.

5. This proceeding also has caused Ms. Exelberth stress. Tr. 297. Approximately a week before the hearing in this matter, Ms. Exelberth was unable to sleep because of stress. As a result, she saw a doctor at Jacobi Psychiatric Hospital. During her visit she became "hysterical." Tr. 209, 211, 275. Ms. Exelberth's incidents of insomnia have increased during the span of the instant matter. Tr. 298.

6. Scott Ryan, an employee of the Respondent's legal department, told Maria Centano, HUD's investigator in this matter, that Riverbay received a July 1993 letter from Ms. Exelberth's therapists at the Ferkauf Institute. Ms. Centano also faxed to Mr. Ryan an earlier letter from Ms. Exelberth's therapists at the Ferkauf Institute that had gone to Ms. Exelberth's attorneys in the eviction action. Tr. 317, 505; G-Ex. 6, 7. Ms. Centano then sent Mr. Ryan a copy of the letter Dr. Spikes wrote to Ms. Baez. Tr. 321, 505. Mr. Ryan sent a copy of the July 1993 letter from Ms. Exelberth's therapists at the Ferkauf Institute to other employees of Riverbay to put in Ms. Exelberth's file. Tr. 382; G-Ex. 12.

7. Ms. Centano also contacted Mimi Mermelstein, an employee in Riverbay's finance department. Ms. Mermelstein told Ms. Centano that Ms. Exelberth was a "problem" and not mentally well.¹² Tr. 322-323, 361, 379.

8. Riverbay believed that Ms. Exelberth's request to allow her to keep her dog was designed to evade the eviction action. Tr. 503, 519.

9. Riverbay also believed that by accommodating Ms. Exelberth's request, Co-op City would be open to similar requests by "just people running out and getting a doctor's note and saying I need the dog." Tr. 503; *see also* Tr. 509-511, 514.

10. Riverbay enforces the no-pets clause against pets that are visible outside an apartment or if the pet is reported to be in an apartment. Tr. 378-379, 385, 388. However, this rule is applied only to dogs, not to cats. Tr. 288-289, 389, 506.

¹²Ms. Mermelstein claims that she first learned of Ms. Exelberth's mental disability when Ms. Centano contacted her, and denies telling Ms. Centano that Ms. Exelberth had a mental problem. Tr. 374-375. I, however, credit Ms. Centano's version of her contact with Ms. Mermelstein. On cross examination, Ms. Mermelstein became uncertain about her mention of Ms. Exelberth's mental condition. Tr. 379-380. Ms. Centano had a much clearer recollection of the contact. Tr. 322-323.

11. Respondent feels that if Ms. Exelberth is permitted to keep her dog, a policy will need to be developed to allow the keeping of dogs, and that such a policy would have to be approved by New York state's Division of Housing and Community Renewal. Tr. 504, 512, 554.

12. Riverbay has allowed a blind woman resident to keep her seeing eye dog. It has started eviction proceedings against non-handicapped residents who refuse to give up their dogs. Riverbay has not always successfully been able to evict these tenants, and they remain in Co-op City with their animals.¹³ Tr. 364-366, 376, 384. Those tenants were protected by a New York City law that forbids a landlord from evicting a resident for harboring a dog prohibited by the landlord's rules if the tenant openly and notoriously walks the dog on the premises for ninety days and the landlord fails to act within that time. Tr. 364-365. Ms. Exelberth is aware of another resident who has harbored a dog for at least five years. Tr. 201-202.

13. For residents in wheelchairs, Riverbay has widened doorways, added rails to bathrooms, lowered public telephones, and modified the inside of the unit to make access easier. Tr. 492-493.

Discussion and Conclusions

A. *Res Judicata* and Ms. Exelberth's Eviction

Respondent argues that the judgment against Ms. Exelberth in the Bronx County Civil Court, Housing Part, allowing her eviction, precludes the current action under the doctrine of *res judicata*. *Res judicata* is applied to prevent the relitigation of claims already decided in a prior proceeding. The doctrine is also applied to the litigation of claims that could have been raised in a prior proceeding. 18 Charles A. Wright, Arthur Miller, & Edward H. Cooper, *Federal Practice and Procedure; Jurisdiction* § 4402 (1981); *Brown v. Felson*, 442 U.S. 127, 131 (1979). Therefore, the Respondent asserts, the instant Fair Housing action must be dismissed. I disagree.

New York courts employ a "transactional approach" to *res judicata*. If a claim arises from the same "factual grouping" as an earlier claim, both claims will be deemed part of the same cause of action. In that case, the later claim will be barred unless "the initial forum did not have the power to award the full measure of relief sought in the later litigation." *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986). *Res judicata* applies not only to the parties involved in the earlier claim, but their privies as well. *Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634 (2d Cir. 1987), *cert. denied*, 484 U.S. 992 (1987).

As a threshold matter, the Respondent has not shown that HUD is in privity with Ms.

¹³In those cases where the Respondent was unable to evict tenants with dogs, it did not seek a waiver from New York state's Division of Housing and Community Renewal. Tr. 545.

Exelberth. "Privity . . . represents a legal conclusion that the relationship between [the parties] is sufficiently close to [support] preclusion." *Levy v. United States*, 776 F. Supp. 831, 835 (S.D.N.Y. 1991) (quoting *Southwest Airlines v. Texas Int'l Airlines*, 546 F.2d 84, 95 & n.38 (5th Cir.), cert. denied, 434 U.S. 832 (1977)); see also *Cepeda v. Coughlin*, 785 F. Supp. 385 (S.D.N.Y. 1992). Privity attaches if the interests of the party bringing the later action were adequately represented in the former action. *Levy* at 836. HUD's interests were not represented in the Housing Part of the Bronx Civil Court. It was neither a party nor did it participate in the proceedings. Neither was HUD represented by Ms. Exelberth in the eviction action. Additionally, HUD's interest in the instant case is distinct from Ms. Exelberth's interest in the eviction hearing.

Ms. Exelberth's interest was the solely private benefit of being able to keep her dog in her apartment. HUD's interest is in the vindication of public rights protected by the Fair Housing Act, including the right for people with disabilities to be integrated with persons lacking a disability, and the right of the disabled to have housing providers make reasonable accommodations for their disabilities.¹⁴ See H.R. Rep. No. 711, 100th Cong., 2d Sess., 17-18 (1988). Keeping Ms. Exelberth in her apartment with her terrier upholds such public rights. Therefore, I conclude that the lack of privity between HUD and Ms. Exelberth in the eviction proceeding bars the application of *res judicata*.¹⁵ See *HUD v. Mountain Side Mobile Estates*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,043 (HUDALJ Mar. 22, 1993).

Furthermore, the Respondent has not shown that Ms. Exelberth could have raised her Fair Housing Act claim during the eviction proceeding. In New York City, proceedings involving residential property under Article 7 of the Real Property Actions and Proceedings Law "shall be commenced in the housing part." N.Y. Rules of Court § 208.42(a) (McKinney 1994). These proceedings include "summary proceedings to recover possession of residential premises to remove tenants therefrom . . ." N.Y. City Civ. Ct. Act § 110 (McKinney 1989). The jurisdiction of the housing part is extremely limited, and no authority presented by either party establishes that the court would accept jurisdiction over a Fair Housing Act claim.¹⁶ In *Crossroads Apts. v. LeBoo*,

¹⁴I also note that, as a general matter, the government is not barred from litigating to vindicate public rights by earlier private litigation on the same issues. See *City of Richmond v. United States*, 422 U.S. 358 (1975); *United States v. East Baton Rouge Parish School Bd.*, 594 F.2d 56 (5th Cir. 1979).

¹⁵The Charging Party also cites *United States v. Mariner's Cove, Inc.* (United States District Court for the Central District of California, 4/15/94) in support of its assertion of no privity. I have neither considered nor relied on this case because the Charging Party did not cite it completely or enclose a copy of the decision for my review and I was unable to locate this case. In a similar manner, the Charging Party quotes from *HUD v. Tucker*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,033 (HUDALJ Aug. 24, 1992) in support of its assertion of no privity without pinpointing the page on which the quote appears. I did not rely on the Charging Party's reading of *Tucker* because such language does not appear in that decision.

¹⁶Respondent mistakenly cites section 110(c) of the New York City Civil Court Act to support the proposition that the housing part would hear the claim: "Regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the

578 N.Y.S.2d 1004 (Rochester City Ct. 1991), a landlord sought to evict a tenant for violation of a "no pets" clause in the tenant's lease. At the eviction hearing, the tenant raised the issue of his need for a cat due to a mental disability. Based on this assertion, the court would not grant summary judgment. However, in *Ocean Gate Assoc. v. Dopico*, Fair Housing-Fair Lending (P-H) ¶ 16,608 (N.Y. Civ. Ct. Kings Co. 1981), a counterclaim that a dog was needed because of tenants' severe physical handicaps was severed from the main proceeding. In short, without clear authority showing that Ms. Exelberth could have raised her claim in the housing part, I conclude that this element of *res judicata* is also not met.¹⁷

B. Liability

The Fair Housing Act prohibits making a dwelling unavailable to a renter because of the renter's handicap. 42 U.S.C. § 3604(f)(1)(A). It also prohibits discriminating against a renter in the terms, conditions, or privileges of renting a dwelling because of the renter's handicap. 42 U.S.C. § 3604(f)(2)(A). Discrimination includes the refusal to make "reasonable accommodations" in rules and policies to afford the renter with a disability the "equal opportunity to use and enjoy the dwelling." 42 U.S.C. § 3604(f)(3)(B). "Handicap" refers, in part, to a "mental impairment which substantially limits . . . [a] person's major life activities." 42 U.S.C. § 3603(h)(1).

A *prima facie* case of a Fair Housing Act violation based on a refusal to reasonably accommodate is established by proving the following elements:

- 1) Complainant suffers from a handicap as defined in the Act;
- 2) Respondent knows of the Complainant's disability or should reasonably be expected to know of it;
- 3) Accommodation of the handicap "may be necessary" to afford the Complainant an equal opportunity to use and enjoy the dwelling;
- 4) The accommodation is reasonable; and,
- 5) Respondent refused to make such accommodation.

See *HUD v. Dedham Hous. Auth.*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,015 at 25,212 (HUDALJ Nov. 15, 1991).

enforcement of housing standards" This section only applies to buildings, to standards that "directly impact[] the health and safety of the occupants of buildings." *Various Tenants of 515 East 12th St. v. 515 East 12th St., Inc.*, 489 N.Y.S.2d 830 (N.Y. Civ. Ct. 1985). It does not apply to claims like Ms. Exelberth's.

¹⁷ Collateral estoppel does not apply in this case either because there has been no showing that HUD or Ms. Exelberth had a "full and fair opportunity to litigate in [the] prior action[]" the Fair Housing Act claim. *Sam and Mary Housing Corp. v. New York State*, 632 F. Supp. 1448, 1451 (S.D.N.Y. 1986). Additionally, as discussed above, privity does not exist between HUD and Ms. Exelberth. See *Conte v. Justice*, 802 F. Supp. 997, 1003 (S.D.N.Y. 1992).

1. Ms. Exelberth's Disability

Beatrice Exelberth suffers from a disability under the Act. She has a long history of depression. She has been hospitalized three times for depression, received shock and drug therapy, and continues in psychoanalysis. This depression partially manifests itself in the inability to relate to other people without mistrust, fear, or hatred. Her mental disorder clouds her entire life, affecting all her major life activities.

2. Respondent's Knowledge of the Disability

Respondent knew of Ms. Exelberth's disability in April of 1992 when she informed an area manager at Co-op City that she needed the dog for health reasons. In July 1993, the Board of Co-op City received a letter from Dr. Spikes informing them of Ms. Exelberth's mental disability. The Board received additional information pertaining to Ms. Exelberth's disability from her therapists at the Ferkauf Institute and HUD's investigator.

3. Necessity of Accommodation

Respondent argues strenuously that the posture of this case (*i.e.*, Ms. Exelberth obtaining the dog prior to her requesting an accommodation rather than afterwards) frees Riverbay from its responsibility under the Act. It also argues that no connection can be drawn between her possession of her dog and the use of the property. The Charging Party seeks an accommodation in Co-op City's rules to allow Ms. Exelberth to keep her terrier. It does not seek any affirmative modification of the premises by the Respondent, nor a change in the no-pets policy. Without the sought-after accommodation, the Respondent will enforce its judgement of eviction against her, thus denying her the opportunity to use and enjoy the dwelling.

Respondent is mistaken in its arguments. Ms. Exelberth's dog enables her to experience the ordinary feelings enjoyed by persons not otherwise afflicted with her disability. Although the Respondent asserts that the soothing benefit of dogs can be enjoyed by all, it fails to acknowledge the terrier's special benefit for the Complainant. She testified that she relates to the dog in a way she cannot relate to people, and that through this relationship she has become stronger and more outgoing. Dr. Spikes testified that the terrier is a medical necessity for Ms. Exelberth's well-being. In effect, the dog gives Ms. Exelberth the same freedom that a wheelchair provides a physically disabled person.

4. Reasonableness of Accommodation

In its regulations instituting the Act, HUD provides the following example of a reasonable accommodation:

A blind applicant for rental housing wants to live in a dwelling unit with

a seeing eye dog. The building has a *no pets* policy. It is a violation of [the regulation on reasonable accommodations] for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy the dwelling.

24 C.F.R. § 100.204(b) (emphasis in original).

The instant case presents an analogous situation: Ms. Exelberth requires the waiver of a rule of Co-op City solely for herself to allow her to keep her dog that her disability necessitates. The Act protects a person with a mental disability to the same degree it protects a person with a physical disability. This protection does not require "an undue hardship or burden upon the entity making the accommodation[]." *Shapiro v. Cadman Towers, Inc.*, 844 F. Supp. 116 (E.D.N.Y. 1994); *see also Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

As discussed above, the Respondent's no-pets rule will not be affected. Only the narrow group of people whose disability requires the companionship of a pet would be permitted to harbor such pets. *See Majors v. Housing Auth. of DeKalb, Ga.*, 652 F.2d 454 (5th Cir. Unit B Aug. 1981). Additionally, purely speculative assertions of the potential costs of future accommodations have no bearing on the reasonableness of the accommodation for Ms. Exelberth. I note that no complaints have been filed against Ms. Exelberth for failing to clean up after her terrier and thus creating a health or liability hazard. Finally, Riverbay has admitted that dogs are harbored in Co-op City because of the Respondent's failure to prevail in eviction proceedings. The record does not establish that these dogs have caused unreasonable burdens on the Respondent and there is no evidence that Ms. Exelberth's terrier would cause an unreasonable burden. Therefore, despite the Respondent's unsupported assertions that this accommodation will unleash a flood of requests for dog harboring from Co-op City's residents, and the subsequent headaches of sanitation and liability flowing from Co-op City's presumed canine population, I find the requested accommodation reasonable.

5. Respondent's Refusal to Accommodate

From April 1992 until the present, the Respondent has refused to allow Ms. Exelberth to keep her terrier and her apartment in Co-op City.¹⁸ Even after Iris Baez and Scott Ryan received medical evidence from Ms. Exelberth's therapists, Riverbay would not allow Ms. Exelberth to remain in the apartment. I do note that the Respondent has not moved to enforce its judgment during the pendency of this matter.

* * *

The Respondent has violated the Fair Housing Act's prohibition of discrimination based on handicap by refusing to allow the Complainant to remain in her apartment with her dog. A simple accommodation is all that the Act requires. If Respondent had fulfilled its responsibility under the Act, it could have prevented the instant litigation as well as the earlier eviction proceeding. Rather, it succumbed to suspicions regarding the extent of Ms. Exelberth's disability and its treatment. If Ms. Exelberth had a physical ailment, the evidence indicates that the Respondent would have made efforts to accommodate her, as it had others. Its failure to be equally sensitive to mental illness precipitated its violation of the Act.

C. Remedies

Having found that the Respondent engaged in a discriminatory housing practice, the Complainant is entitled to appropriate relief. This relief may include actual damages and injunctive or other equitable relief. Respondent may also be assessed a civil penalty "to vindicate the public interest." 42 U.S.C. § 3612(g)(3). The Charging Party seeks \$15,000.00 in intangible damages, \$10,000.00 in civil penalties, and certain injunctive relief.

1. Enforcing the Judgment of Eviction and Further Injunctive Relief

Injunctive relief may be ordered to insure that the Respondent does not violate the Act in the future. *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, at 25,014 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864, 872-73 (11th Cir. 1990). The relief, however, is to be molded to the specific facts of a particular situation.

Respondent argues that the Anti-Injunction Act, 28 U.S.C. § 2283, prevents me from prohibiting Riverbay from enforcing the eviction judgment against Ms. Exelberth. The Anti-Injunction Act prohibits courts of the United States from granting injunctions to stay state court proceedings except in certain situations. When a private party seeks a stay of a state court proceeding in a federal court, the principles of the Anti-Injunction Act operate most forcefully:

¹⁸The Act places a one year limitation of the filing of a complaint from the time "an alleged discriminatory housing practice has occurred or terminated." 42 U.S.C. § 3610(a)(1)(A)(i). Because no accommodation was made, the housing practice has not terminated.

such litigation would draw the federal and state courts into conflict. This principle dissipates when the federal government seeks the stay to assert a superior federal interest, such as the enforcement of the Fair Housing Act. *See Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 225-226 (1957). I also note that some courts have found that the Fair Housing Act falls under the exception to the Anti-Injunction Act that allows federal courts to proceed "as expressly authorized by an Act of Congress." 28 U.S.C. § 2283; *Martin v. Constance*, 843 F. Supp. 1321 (E.D. Mo. 1994); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168 (N.D.N.Y. 1993); *but see Casa Marie, Inc. v. Superior Ct. of Puerto Rico*, 988 F.2d 252 (1st Cir. 1993).

Respondent also urges me to consider the principles of comity and the desire to avoid friction between state and federal courts embodied in *Younger v. Harris*, 401 U.S. 37 (1971), and abstain from ordering Riverbay to abandon its judgment. As discussed above, HUD is asserting a superior federal interest in this case, so the abstention doctrine does not apply. *See First Federal Sav. & Loan Assn. v. Greenwald*, 591 F.2d 417, 424 (1st Cir. 1979).

Consequently, the Respondent must forgo its judgment of eviction against Ms. Exelberth and allow her to remain in her Co-op City apartment with her dog. *See HUD v. Mountain Side Mobile Estates*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,065 (HUDALJ Dec. 17, 1993). The provisions of the Order set forth below contain additional injunctive relief to ensure against any future violations of the Act.

2. Intangible Damages

The court in *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1459 (10th Cir. 1993), stated that "more than mere assertions of emotional distress" are required to support an award for damages caused by emotional distress. Rather, the record as a whole must demonstrate the need for the amount awarded. Factors that may be considered in determining the damage include the effect of the Respondent's behavior on the Complainant.

The importance of the dog in Ms. Exelberth's life has been established. During the eviction proceedings based on her harboring the terrier, she felt "tremendous rage" because of the proceedings. She also considered the possibility of losing her apartment and becoming homeless "every moment practically." The current proceeding had caused Ms. Exelberth much anxiety as well: she has suffered increased bouts of insomnia, and, just prior to the hearing, drove herself to a psychiatric hospital where she became "hysterical."

The Charging Party seeks \$15,000.00 for Ms. Exelberth's distress, but has failed to demonstrate that the distress specifically caused by the violation merits such a high dollar amount. Ms. Exelberth's mental disability causes much of her suffering. Respondent's actions have caused an incrementally greater amount of emotional distress. It is this incremental amount upon which damages may be assessed.

In *HUD v. Dedham Hous. Auth.*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,015 at 25,212

(HUDALJ Nov. 15, 1991), \$10,000.00 was awarded to a complainant with cardiac problems who was denied a parking space near his apartment. The instant case differs. Ms. Exelberth was never denied her dog. Throughout the proceedings she has enjoyed its considerable benefits. She was forced to endure an eviction proceeding and the current proceeding. However, as the Respondent correctly points out, enforcement of the eviction order was suspended pending the outcome of the instant case. Considering all the evidence presented, I find that Ms. Exelberth was caused emotional distress from the violation, but in the more reasonable amount of \$2,500.00.¹⁹

3. Civil Penalty

The Charging Party also seeks a civil penalty of \$10,000.00 from the Respondent. Under the Act, an administrative law judge may assess a maximum civil penalty of \$10,000.00 against a respondent, where, as here, there has been a finding of liability, but no history of any prior discriminatory acts. 42 U.S.C. § 3612(g)(3)(A).

Assessment of a civil penalty is not automatic. *See* H.Rep. No. 711, 100th Cong., 2d Sess. at 37, *reprinted in* 1988 U.S.C.C.A.N. 2173 at 2198. In determining the amount of a penalty, an administrative law judge must consider the nature and circumstances of the violation, the degree of culpability, the financial circumstances of the respondent, the goal of deterrence, and other matters as justice may require. *Id.*

As the owner and operator of a large housing development, Riverbay is bound to know and adhere to the Fair Housing Act. Respondent's treatment of Ms. Exelberth was unlawfully based on a refusal to modify its rules to accommodate her mental disability. Given that Riverbay allows a blind woman to keep her seeing eye dog and makes physical modifications to its units to those residents in wheelchairs, its callous treatment of mental illness as a protected handicap indicates it does not understand the sweep of the Act. Furthermore, the Respondent allowed its impression of Ms. Exelberth as a "problem" and as the defendant in an eviction action to cause it to ignore medical documentation of Ms. Exelberth's illness. However, in its favor, the Respondent did suspend enforcement of the eviction. A civil penalty will send a clear message to Riverbay to follow the Act and make reasonable accommodations where necessary to its handicapped residents. Riverbay presented no evidence to show that its financial condition would preclude it from paying a civil penalty. Upon consideration of the relevant factors, I conclude that Riverbay should be assessed a civil penalty of \$5,000.00. *See HUD v. Sams*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,069 (HUDALJ Mar. 11, 1994).

ORDER

¹⁹The Charging Party also seeks an award for the inconvenience Ms. Exelberth suffered and a lost housing opportunity. It failed, however, to distinguish these damages as being separate from general emotional distress damages.

Having concluded that Respondent Riverbay Corporation violated 42 U.S.C. §§ 3604(f)(1)-(3), it is hereby

ORDERED that:

A. Riverbay Corporation and its agents, with respect to the site commonly referred to as Co-Op City, are hereby enjoined from discriminating because of handicaps against Beatrice Exelberth or any other person in any aspect of the provisions of housing, including but not limited to the following:

1. Discriminating in the rental and occupancy of housing;
2. Discriminating in the terms, conditions, privileges, services and facilities in connection with the rental and occupancy; and,
3. Refusing to make reasonable accommodations in rules, practices and services and/or reasonable modifications when such accommodation may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling, including public and common use areas.

B. Riverbay Corporation and its agents, with respect to Co-Op City, are hereby enjoined and prohibited from the following:

1. Implementing and enforcing the no-pets rule against Beatrice Exelberth and other individuals with handicaps who require pets as a reasonable accommodation to their handicap;
2. Evicting Beatrice Exelberth or other individuals with handicaps who require pets as a reasonable accommodation to their handicap, based on the no-pets rule; and,
3. Enforcing or taking any other action against Beatrice Exelberth which would require her to comply with the Order of the Civil Court of the City of New York dated March 12, 1993 (Judge Howard F. Trussel).

C. Within forty-five (45) days of the date on which this ORDER becomes final, the Respondent shall pay actual damages to Beatrice Exelberth as follows: \$2,500.00 for emotional distress.

D. Within forty-five (45) days of the date on which this ORDER becomes final, the Respondent shall pay a civil penalty in the amount of \$5,000.00 to the Secretary of the United States Department of Housing and Urban Development.

E. Within forty-five (45) days of the date on which this ORDER becomes final, the

Respondent shall make known to all tenants with handicaps their right to request a reasonable accommodation to rules, policies, practices, or services, when such accommodations may be necessary to afford them an equal opportunity to use and enjoy their dwelling units, including the public and common use areas. To this end, the Respondent shall do the following:

1. Respondent shall provide to each tenant known by the Respondent to be an individual with handicaps, a notice of the rights of individuals with handicaps to request reasonable accommodations to their handicaps;
2. Respondent shall establish written uniform and objective policies and procedures to be used in reviewing and acting upon all requests for handicap accommodation in housing, to be used at Co-op City. Respondent shall submit a copy of these policies and procedures to counsel for the Secretary for review and approval. Such policies and procedures shall include the following:
 - a. Procedures to ensure the confidentiality of information regarding individual's handicaps and/or physical, mental, psychological, and/or psychiatric condition(s);
 - b. A requirement that the Respondent makes determinations whether to grant or deny requests for accommodation within thirty (30) days of receipt of the request unless it is impracticable to do so;
 - c. A requirement that the Respondent provide written notice to the applicant for accommodation, within thirty (30) days of receipt of the request unless it is impracticable to do so, indicating that the request is granted or indicating that the request is denied and explaining the reasons for such denial;
 - d. A requirement that the Respondent complete action to provide the accommodation within (60) days of receipt of the request in cases where the accommodation request is approved, unless it is impracticable to do so.

Nothing in this provision shall be construed to prohibit the Respondent from imposing reasonable screening process for making determinations as to requests for handicap accommodation. Any such screening process, however, shall give deference to the assessment by the individual and/or where voluntarily provided by the individual, the assessment of public health officials and/or reasonable medical evidence, as to the abilities of the individual and whether it may be necessary for the individual to have an accommodation to rules, policies, practices, or services, in order to be afforded equal opportunity to use and enjoy the dwelling unit, including public or common use areas. Any such screening process shall also be designed to guarantee the confidentiality of records and the privacy of the individual requesting an accommodation.

- F. Within forty-five (45) days of the date on which this ORDER becomes final, the

Respondent shall instruct all employees and agents of Co-op City of the terms of this ORDER and the Fair Housing Act and the nondiscrimination obligations under each.

To these ends, the Respondent shall do the following:

1. Respondent shall provide each employee and agent with a copy of this ORDER²⁰ and the Fair Housing Act and the Fair Housing Act regulations.
2. Respondent shall obtain from each such employee and agent a signed statement by which the employee or agent affirms that he or she had read the provided materials, understands his or her legal responsibilities under the ORDER and the Fair Housing Act and will comply with each.
3. Respondent shall submit these statements in accordance with the reporting provisions set forth in Part G. of this ORDER.
4. Respondent shall maintain for inspection and borrowing by tenant at its rental offices, copies of the Fair Housing Act and the Fair Housing regulations.

G. For the three month period beginning January 1, 1995, and ending March 31, 1995, and for each consecutive three-month period thereafter until December 31, 1996, the Respondent shall submit to the office listed below, reports containing the following information:

1. A copy of all written information submitted by individuals requesting an accommodation to their handicap.
2. A summary of all oral requests for accommodation by individuals with handicaps, including all information submitted in support of their request.
3. A copy of any and all information indicating action taken by the Respondent in response to requests for accommodations by individuals with handicaps, including written notices provided to accommodation applicants indicating whether such requests were granted or denied and the reason for the action taken, information indicating whether accommodations were completed, and information indicating the timeliness of the Respondent's response to requests and completion of accommodations.

The report required under this section shall be sent to the Director, Compliance Division, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 26 Federal Plaza, Room 3532, New York, N.Y. 10278.

²⁰ Before the Respondent delivers a copy of this ORDER to any person, the dollar amount of the specific monetary relief paid to Beatrice Exelberth shall be deleted.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

SAMUEL A. CHAITOVITZ
Administrative Law Judge