



Maine Human Rights Commission

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INVESTIGATOR'S REPORT MHRC H18-0466; HUD 01-19-1289-8

March 11, 2019

Patricia Kalar (Guardian) and O/B/O Son (Ward)¹ (Buxton)

v.

Maine State Housing Authority (Augusta)

I. Summary of the Case:

Complainant alleged that Maine State Housing Authority discriminated against her based on her association with a person with disability when it denied her an income deduction (which would have increased the amount of her housing voucher) for the cost and care of her son's assistance animal. Respondent denied discrimination and provided that they changed their policy for qualifying medical deductions to include only service animals as defined by the Maine Human Rights Act ("MHRA") and the Americans with Disabilities Act ("ADA"), as that term is specifically used in guidance issued by the federal Internal Revenue Service ("IRS"). The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, an Issues and Resolution Conference ("IRC"), and requests for additional information. Based upon this information, the Investigator recommends a finding that there are no reasonable grounds to believe that Respondent discriminated against Complainant and Son based on disability (including association with an individual with a disability), and that there are reasonable grounds to believe that Respondent unlawfully interfered with Complainant's exercise and enjoyment of her housing rights.²

¹ Ms. Kalar filed her complaint on behalf of herself and her dependent adult son ("Son"). Son has a disability and has an assistance animal; the complaint relates to the characterization of costs associated with the maintenance of the animal. Because Son does not pay any of those costs, he does not have any independent claims, and his claims rise and fall with Ms. Kalar's; her claims are based on her association with a person with a disability. Accordingly, the term "Complainant" shall refer to Ms. Kalar, and Son's claims will not be addressed separately.

² Complainant also alleged that she was denied a reasonable accommodation. The MHRA makes it unlawful for "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). Respondent does not fall under this provision and therefore Complainant's claim that she was denied a reasonable accommodation in housing will not be further analyzed. To the extent that Respondent is a public accommodation – which was not

II. Jurisdictional Data:

- 1) Date of alleged discrimination: January 1, 2018.
- 2) Date complaint filed with the Maine Human Rights Commission (“Commission”): December 3, 2018.³
- 3) Respondent is subject to the MHRA, the ADA, and the federal Fair Housing Act (“FHA”), as well as state and federal housing regulations.
- 4) Respondent is represented by John Bobrowiecki, Esq. Complainant is not represented by counsel.

III. Development of Facts:

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

Complainant receives a housing voucher (“voucher”) from Respondent to assist her with her rent payments. Complainant lives with Son, who has disabilities and has an assistance animal. Complainant applied to have the costs of the care of the animal, a rabbit, deducted from her income as a qualifying medical expense. The costs were approved one year, but denied the following year. When Complainant asked why Respondent did not include those costs in her deductions, Respondent replied that they had changed their policy and were no longer deducting costs for anything other than service dogs.

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

Respondent develops an Administrative Plan (“Plan”) for the operation of its Housing Voucher Program. As guidance for what expenses qualify for income deductions, Respondent uses IRS

alleged or argued by Complainant – it has an obligation “to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless, in the case of a private entity, the private entity can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations.” 5 M.R.S. § 4592(1)(B). However, Complainant’s claim that she was denied a reasonable accommodation by Respondent in its role as a public accommodation would fail because she was not treated differently on the basis of her association with an individual with a disability, but rather on the type of assistance animal Son uses.

³ While Commission complaints must be made under oath, *see* 5 M.R.S. § 4611, the Commission’s Procedural Rule provides that “[c]omplaints may be amended to cure technical defects or omissions, including failure to swear to the complaint under oath before a Notary Public”. Me. Hum. Rights Comm’n Reg. Ch. 2, § 2.02(F). Where a Complainant has, within the 300-day period following the alleged violation, provided the Commission with information (such as an intake form) sufficiently describing an alleged violation of the MHRA, and later perfects the complaint by providing a sworn complaint, the complaint will be considered timely. In this case, the intake stating a claim of housing discrimination was received on October 29, 2018.

Publication 502, entitled Medical and Dental Expenses.⁴ In 2015, the Commission clarified the definitions of "service animal" and "assistance animal." The Plan developed and approved for 2018 identified the MHRA definition of "service animal" in its section on eligible medical deductions. Because Complainant's animal is a rabbit, it does not qualify under the MHRA definition of "service animal", which only includes dogs.

3) The Investigator made the following findings of fact:

- a) Complainant lives in an apartment with Son at [REDACTED]. Son has severe physical and mental disabilities which are aided by his assistance animal, a rabbit. The rabbit provides Son with a stable routine and is trained to alert him when the routine is off schedule by thumping the floor. The rabbit also provides emotional support.
- b) It would not be possible for Son to have a service dog because of his mental disabilities. The added difficulty in caring for a dog means Son could not care for one on his own. The care of the animal is what aids Son with his disability and he can care for the rabbit independently.
- c) Complainant has a note from Son's doctor which states the necessity of the assistance rabbit and she has provided that documentation to Respondent. The entire time Complainant has had the assistance rabbit, it has been permitted in her housing.
- d) Respondent manages a Housing Voucher Program which provides rental assistance. Complainant receives a monthly voucher from Respondent which offsets her rent payment.
- e) Respondent outlines the terms of implementation of the program in an Administrative Plan ("Plan"). Respondent's Plan indicates that it uses IRS Publication 502 for determining what medical expenses qualify for deductions from income. However, the Plan also explicitly states that it includes, "cost and continuing care of necessary service animals" in the summary of qualifying medical expenses.
- f) During the IRC, Respondent provided that its practice had been to allow a deduction for any animal with documentation from a medical provider that the animal assisted an applicant with their disability. Respondent did not require information on the specific disability or how the animal provided assistance. It also provided that it used the ADA and MHRA to help define "service animal."

⁴ This guidance is developed for individuals who itemize their tax deductions. It has no particular application to housing. In the IRC respondent provided that using the IRS Publication is common practice for many states with this type of program and that they use it on the advice of an outside consultant. It is worth noting that the publication does not exclude assistance animals, although it does specifically include service animals. The publication notes that the list is not exclusive, and that anything not addressed therein should be evaluated against the definition of a medical expense, which include "the costs of diagnosis, cure, mitigation, treatment, or prevention of disease, and for the purpose of affecting any part or function of the body." *IRS Publication 502*, p. 2.

- g) Respondent adopted a new Administrative Plan in 2017 which included the new MHRA definition of service animal⁵ and provided that the MHRA definition would be used to determine eligibility of expenses. The MHRA definition of a service animal includes only trained dogs.
- h) Respondent provided it made the change in its policy to ease administrative burden and become more in line with the definitions in the ADA and the MHRA of "service animal." Respondent still does not inquire specifically about applicant's individual disabilities or the training of the animal but relies on the documentation of a medical provider.
- i) Respondent has not allowed deductions for any animals other than dogs since the change in policy. Respondent has also provided that under this policy they do not accept dogs that provide emotional support, companionship, or comfort and will not accept any non-dog regardless of training or benefit.⁶
- j) Complainant received a reduction in her income from the cost and care of Son's assistance rabbit in 2017. When she applied for the year 2018, her costs associated with the assistance rabbit were not included. Complainant wrote to ask for a reasonable accommodation of a change in the policy to include her costs. Respondent responded in a letter on January 2, 2018 and wrote that it could not provide her with an accommodation because it would cause a fundamental alteration in their program.⁷
- k) Complainant's portion of her rent that she must pay out of pocket increased by \$21 per month for 2018 and by \$15 per month for 2019, when the costs for the care of the assistance rabbit were excluded from her qualifying medical deductions.

IV. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 Maine Revised Statutes ("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 Commission's regulations make clear that the obligation not to discriminate includes not discriminating against individuals because of their association with an individual with a disability. The regulations make it "unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in

⁵ The MHRA was amended in 2015 to include a definition for "assistance animal" for housing cases separate from the definition of "service animal" for cases involving public accommodations.

⁶ Respondent maintained in their submissions that they have only accepted "service" dogs as defined by the MHRA. However, they do not require any specific documentation to prove that the animal is "trained" or how the dog otherwise assists with the applicant's disability. It leaves open that "assistance" dogs are being approved as a medical expense as long as the applicant has provided documentation that the animal has been deemed necessary by a medical provider.

⁷ The letter did not provide how granting the request would amount to a fundamental alteration of its program, merely asserting that this was true. Respondent did not provide further information as part of this investigation.

connection with such dwelling, because of a physical or mental disability of...[a]ny person associated with that person.” 94-348 C.M.R. Ch. 8, §8.06(A)(2)(c).⁸

Disability Discrimination – Terms and Conditions

- 3) The MHRA makes it unlawful for “any person to whom application is made for a loan or other form of financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, whether secured or unsecured, or agent of the person, to... [d]iscriminate in the granting of financial assistance, or in the terms, conditions or privileges relating to obtaining or the use of any financial assistance, against any applicant because of...physical or mental disability.” 5 M.R.S. § 4581-A(3)(B).
- 4) Because this case does not involve direct evidence, Complainant establishes a prima-facie case of unlawful housing discrimination with respect to the price, terms, conditions, or privileges in the granting of financial assistance for the acquisition of a housing accommodation by showing (1) that Complainant is a member of a protected class, (2) that Complainant was not offered the same terms, conditions or privileges of financial assistance or not provided the same services or facilities in connection therewith made available to others, and (3) under circumstances giving rise to a reasonable inference of prohibited discrimination. *See Khalil v. Farash Corp.*, 260 F. Supp. 2d 582, 588 (W.D.N.Y. 2003).
- 5) Once Complainant has established a prima-facie case, the burden of production, but not of persuasion, shifts to Respondent to articulate a legitimate, nondiscriminatory reason its action. *See United States v. Grishman*, 818 F. Supp. at 23; *HUD v. Blackwell*, 908 F.2d at 870; *Doyle v. Dep’t of Human Servs*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse housing action. *See id.* Complainant’s burden may be met either by the strength of Complainant’s evidence of unlawful discriminatory motive or by proof that Respondent’s proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16. In order to prevail, Complainant must show that she would not have suffered the adverse action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.
- 6) Complainant did not meet her prima facie burden. While Complainant showed that she is associated with a qualified individual with a disability and she was not granted an income deduction for an assistance animal, she was unable to show that anyone else with an assistance animal was treated differently. Respondent changed its policy to disallow deductions for assistance

⁸ All further analysis in this report regarding discrimination on the basis of disability will refer also to discrimination on the basis of an association with an individual with a disability.

animals and only to allow deductions for service animals. This policy did not treat Complainant differently based on her protected class status but rather the type of animal she owns.⁹

- 7) Even if Complainant had established her prima facie case, Respondent provided a nondiscriminatory reason for the policy, which was changed to become more in line with the term "service animal" as used in IRS Publication 502, and defined in the MHRA and the ADA. At the IRC, Respondent also provided that this has always been a difficult area administratively and creating a bright line rule eased administrative burden.
- 8) Ultimately, Complainant was unable to substantiate that the real reason her request for an income reduction was denied was disability discrimination, with reasoning as follows:
 - a) Respondent's reason for its decision, while perhaps having an incidental effect¹⁰ on individuals with certain types of disabilities, was not motivated by animus towards against any disabled person or class of disabled persons.
 - b) Respondent provided that it does not make any of the decisions about a qualifying animal based on the individual's disability. They do not even collect information about the person's disability. The change in the policy was directed at the type of animal that qualified for an income deduction, and not what types of disabled people would qualify. The record supports that the change was not pretext to cover up a discriminatory motive.
- 9) Discrimination in the terms and conditions of housing financial assistance on the basis of disability is not found.

Interference with Housing Rights

- 10) The MHRA also provides that it is "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", 5 M.R.S. § 4633(2). The MHRA's definition of "person" in the MHRA "includes one or more individuals, partnerships, associations, organizations, corporations, ..." 5 M.R.S. § 4553(7).

⁹ These facts do suggest a possible disparate impact claim. Courts have recognized the applicability of the "disparate impact" approach to proving discrimination in the housing context. *See, e.g., Langlois v. Abington Housing Authority*, 207 F.3d 43, 49 (1st Cir. 2000) (Fair Housing Act). A Complainant makes a prima facie showing of disparate impact where a housing practice is facially neutral but in fact affects more harshly one group than another. *See Maine Human Rights Com. v. Department of Corrections*, 474 A.2d 860, 865-866 (Me. 1984) (employment case). The policy of approving only the costs and care of service animals could have a disparate impact on certain classes of individuals with disabilities similar to Complainant's son. Complainant established that her Son's disability is aided by an animal but would not be aided by a dog because his particular condition does not allow him to care for a dog. Both parties were asked to present information and argument on this issue as part of the investigation. However, no evidence was available to show whether other individuals with disabilities were also impacted by the policy. Accordingly, Complainant cannot establish a disparate impact claim.

¹⁰ As referenced above in footnote 10, this may be the basis for a disparate impact claim but does not support a claim of individual discrimination.

- 11) The MHRA protects an individual's right to use an assistance animal¹¹ without being charged a fee or security deposit, even when a fee or deposit is charged for keeping a pet on the premises. The individual with a physical or mental disability is still liable for any damage done by their assistance animal to the same the extent that non-disabled individuals and individuals with pets are liable for such damage. 5 M.R.S. § 4582-A(3).
- 12) Complainant, by her association with Son, has the right to have an assistance animal in the home without being charged a fee. While Respondent did not deny Complainant the use of the animal, Respondent's policy interfered with Complainant's right not to have her Son's use of an assistance animal be "conditioned" on a fee, with reasoning as follows:
- a) Respondent provided the calculation of Complainant's voucher both with and without the costs of the assistance rabbit included. Without the assistance rabbit's costs included, the amount of the voucher decreased, and Complainant therefore had to pay more in rent.
 - b) The animal has been declared necessary by a medical provider to assist with Son's disability. Complainant however, due to the change in policy, cannot keep the animal in her home without paying a higher amount in her rent (because the costs associated with a medically necessary auxiliary aid are not deducted as a qualified medical expenses). This, in effect, means Complainant has to pay more per month because her animal is an assistance animal. This creates a fee for Complainant to have the animal in her home.
- 13) Interference with exercise and enjoyment of rights protected by the MHRA is found.

VI. Recommendation:

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

1. There are **No Reasonable Grounds** to believe that Maine State Housing Authority discriminated against Patricia Kalar (Guardian) and O/B/O Son (Ward) on the basis of disability' and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2); and
2. There are **Reasonable Grounds** to believe that Maine State Housing Authority unlawfully interfered with Patricia Kalar (Guardian) and O/B/O Son (Ward) in the exercise of rights protected by the MHRA, and conciliation of this claim should be attempted in accordance with 5 M.R.S. § 4612(3).


Jane O'Reilly, Investigator

¹¹ 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). Neither party in this case disputes that the rabbit qualifies as an assistance animal.