Memo

Date: March 8, 2012

To: Amy Sneirson, Executive Director

From: John Gause, Commission Counsel

Re: H11-0752,

The Chief Investigator has recommended that this complaint should be administratively dismissed for failure to state or substantiate a claim. Complainant has objected to the request for dismissal. I agree that the complaint should be administratively dismissed for a failure to substantiate.

A complaint may be administratively dismissed by the Executive Director for failure to substantiate the complaint of discrimination. *See* 94-348 C.M.R. ch. 2, §2.02(H)(2). Here, Complainant, a tenant with a disability, alleges that her landlord, Respondent, was required to waive or reduce its parking fees for Complainant's personal care assistants. The personal care assistants provide necessary care for her disability. Respondent charges fees for all uses of its parking spaces. Respondent refused to waive or reduce its fees for Complainant's personal care assistants.

The Maine Human Rights Act 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.A. § 4582-A(2).

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 it 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.A. § 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").

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.

Here, Complainant has not substantiated that waiving or reducing the parking fees was necessary to afford her an equal opportunity to use and enjoy her housing. An accommodation is "necessary" when, "but for the accommodation, [Complainant] likely will be denied an equal opportunity to enjoy the housing of [her] choice." *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003) (citations and quotations omitted). In response to the Commission's request that Complainant provide any information that supports her opposition to the request for dismissal,

Complainant stated, in relevant part, as follows:

> By depriving of her personal care assistants, she would no longer be able to live in her apartment. Requiring 's personal care assistants to park away from would unduly impede their ability to care for her as well as her ability to find adequate caregivers willing to either take the bus or walk to her residence. Although her personal care assistants did not require a parking space prior to 2006, forcing the current personal care assistants to use public transportation or a private car service would present various logistical and practical difficulties. . . .
>
> Without two parking passes for her personal care assistants or if her personal care assistants are required to find another method of transportation, would have great difficulty finding assistants. Furthermore, without a fee waiver, might be unable to live at as she has a disability, which [sp] prevents her from working and causes her fixed income, low-income status.
>
> Without one no-cost parking space for her personal care assistants to share, is subjected to an undue hardship in finding caretakers who use other forms of transportation. The requirement would be unfair. . . .
>
> This is insufficient to substantiate that the parking fee waiver or reduction was necessary.

Accepting that the personal care assistants were necessary for her to use and enjoy her housing, Complainant has not shown that, but for the waiver or reduction of the fees, she would be unable to utilize the assistants. *See U.S. v. California Mobile Home Park Management Co.*, 107 F.3d 1374 (9th Cir. 1997) (Fair Housing Act). Although she cites potential difficulties under the fees, she has apparently not been told that her current assistants would be unable to continue while paying them or that she could not find replacement assistants, if necessary.

The Ninth Circuit Court of Appeals decision in *U.S. v. California Mobile Home Park Management Co.* is instructive. There, the mother of a child with a disability claimed that her landlord was required to waive its parking fees to enable her to retain a caregiver for her child. The lower court found for defendant. On appeal, the Ninth Circuit Court of Appeals held that no reasonable jury could have found that waiving the parking fees was necessary to afford her an equal opportunity to use and

enjoy her dwelling, with reasoning as follows:

> In this case, plaintiff asks for a reasonable accommodation not for herself, but for a caregiver, Plaintiff failed to show why 's convenience is necessary for her own use and enjoyment of her home. Plaintiff submitted no evidence explaining why could not have parked outside of the mobile home park and still have provided caregiver services to Cohen-Strong's daughter. The policy at issue in this case is the fee that defendants charged for parking her car at Cohen-Strong's trailer home. There is no evidence that 's car was necessary to provide services for Cohen-Strong's daughter. Further, Cohen-Strong introduced no evidence explaining why she did not require to pay the guest and parking fees. Nor did Cohen-Strong explain why 's employer, the State of California, did not pay the parking fees. It is not unusual for any working person to incur parking expenses at their place of employment. The fact that some of these people may work with handicapped individuals does not require that their parking fees must be waived.

Id. at 1381.

Here, because Complainant has not substantiated that waiving or reducing the parking fees was necessary to afford her an equal opportunity to use and enjoy her housing, the Complaint should be administratively dismissed pursuant to Procedural Rule §2.02(H)(2) and 5 M.R.S.A. §4612(2).