# *Comm'n on Human Rights ex rel. L. D. v. Riverbay Corp.*

OATH Index No. 1300/11 (Aug. 26, 2011), *adopted*, Comm'n Dec. & Order (Jan. 9, 2012),* **appended**

Petitioner established that respondent provider of a housing accommodation discriminated against a tenant who suffers from a psychiatric disability by denying her the reasonable accommodation of a companion animal. ALJ recommended damages of $50,000 for mental anguish plus $150 in additional compensatory damages, and a civil penalty of $40,000.

*Post-appeal settlement, $30,000 for mental anguish plus a civil penalty of $15,000.

---

**NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**
*In the Matter of*
**COMMISSION ON HUMAN RIGHTS EX REL. L. D.** [1]
*Petitioner*
*- against -*
**RIVERBAY CORPORATION**
*Respondent*

---

## REPORT AND RECOMMENDATION

**TYNIA D. RICHARD,** *Administrative Law Judge*

In a proceeding brought by the New York City Commission on Human Rights ("Commission") on the complaint of L.D. ("complainant" or "Mrs. D"), petitioner alleges discrimination on the basis of disability against respondent Riverbay Corporation ("Riverbay"), her landlord. Petitioner claims that respondent failed to provide complainant with a reasonable accommodation, in violation of the Human Rights Law. Admin. Code § 8-107 (Lexis 2011). Respondent denies the allegation.

[1] In the interest of privacy, initials have been used in place of disclosing the complainant's name due to the extensive discussion of her medical condition and history contained herein. *See* 48 RCNY § 1-49(d)(2011); *Human Resources Admin. v. Anonymous*, OATH Index No. 1242/10 at 1 (May 4, 2010), *modified on penalty*, Admin/Comm'r Dec. (June 16, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-17-A (Apr. 29, 2011) (party's name withheld where decision discussed extensive personal medical information including mental health disorder).

The hearing was held on April 5 and 7, 2011. The record was closed on May 26, after the parties' submission of closing briefs. The record was reopened for the submission of supplemental briefs, which were fully submitted on June 28, 2011. At the hearing, petitioner presented the testimony of complainant and her therapists, Dr. Michael Behar and Susan Kushner. Respondent presented an employee from its legal department, Ms. Ricks.

Based on the record of the hearing, I find that respondent discriminated against Mrs. D by refusing her a reasonable accommodation of a companion animal for which she is entitled to recover $50,000 for mental anguish plus $150 in additional compensatory damages, and the Commission is entitled to collect a civil penalty in the amount of $40,000.

## FACTUAL BACKGROUND

L. D. is the owner of a 24-pound Shih Tzu named Star. Star lives with Mrs. D and her family in a cooperative apartment community known as Co-op City. Riverbay owns and/or manages 15,372 units housing 55,000 tenants in Co-op City's 300-acre complex (ALJ Ex. 1, ¶¶ 1, 5; Tr. 175). Riverbay enforces a no-pets policy. Petitioner alleges here that the complainant was discriminated against by Riverbay for its failure to grant her the reasonable accommodation of waiving the no-pets policy to permit her to house her dog Star, a companion animal, in her apartment. Riverbay offered no evidence that providing the accommodation would create an undue hardship. Riverbay contends that the Human Rights Law does not entitle complainant to keep a companion animal if she cannot prove that she needs the dog in order to use and enjoy her apartment.

Mrs. D's treating therapists testified as experts. Dr. Behar is a licensed psychiatrist who has treated her since May 2008.[2] He prescribes her medication and sees her once a month for psychotherapy (Tr. 23, 26). Ms. Kushner, a licensed clinical social worker, has been Mrs. D's treating therapist since 2004.[3] She sees her in twice weekly psychotherapy sessions (Tr. 35, 73). Dr. Behar, who has worked with Ms. Kushner for 10 years, regularly consults with her

[2] Dr. Behar was qualified as an expert in psychiatry (Tr. 25). He received his medical degree from Albert Einstein College of Medicine and he is board certified in adult psychiatry and in child and adolescent psychiatry (Tr. 18-21). His areas of specialty include mood disorders, such as major depression and bipolar disorder, and addiction. He also has experience treating post-traumatic stress disorder.

[3] Ms. Kushner was qualified as an expert in psychotherapy (Tr. 60-62). She obtained her masters of social work from Hunter College and her advanced training at the Jewish Board of Family and Children's Services, where she has worked for 20 years and supervises four other therapists (Tr. 66-68). She currently treats adults with long-term chronic mental health issues involving trauma, depression and anxiety.

concerning complainant's progress (Tr. 32). They both work for the Jewish Board of Family and Children's Services.

Dr. Behar diagnosed complainant with major depressive disorder, recurrent (Tr. 26). He said she has had bouts of serious depression along with periods of incapacitation due to crippling depressive feelings, an inability to function, difficulty getting out of bed, trouble getting to work, feelings of hopelessness and helplessness, and suicidal ideation. These conditions are triggered by stress. Her last major depressive episode for which she was hospitalized occurred in 2007, prior to his treating her.

According to Ms. Kushner, in 2007, complainant went off her medication and ended her therapy during a time when she felt better (Tr. 74). Within a couple weeks, she was "decompensating" and "unable to function." She could not concentrate and she was crying all the time. She was so unstable that she was admitted to a mental health facility called Four Winds.

Dr. Behar and Ms. Kushner described complainant's "severe extensive trauma history" as the basis for her psychiatric condition (Tr. 69). Her mother was a schizophrenic and did not take her medication, and her father was an active alcoholic. Based on these and other factors, they concluded that she did not receive any effective parenting as a child (Tr. 36, 69). Although her sister is a couple years older, by the age of six or seven, complainant was the caretaker of the group, which included two younger brothers (Tr. 70). Around that time, her sister would take her to the park where she was given alcohol and cigarettes and would stay out until all hours. She attended school intermittently and does not know if she graduated elementary school. Her mother tried to commit suicide several times and complainant recalls finding her on the bathroom floor more than once with her wrists slit and blood everywhere. She would call the police and often begged them to take her mother to the hospital, but her mother would not be kept there for long, which made her feel "helpless and hopeless and desperate." She was raped by an older man at the age of 13; by age 14, she was pregnant by a 19-year-old boyfriend who committed suicide when she was four months pregnant. She gave birth at the hospital but no one was there with her. She was in and out of foster care, but once she had her own child, she refused to give her up to foster care (Tr. 71). When she was 16, she worked for a family, taking care of their children, and became involved with the father of the family. For years, she stayed in a physically and emotionally abusive relationship with him. She eventually attempted suicide,

around age 17 or 18, in an attempt to escape the situation. She remained in that relationship for 12 years and had two children with this man before leaving him. Her most recent trauma, in July 2009, was the death of her not yet two-year-old granddaughter, who died after choking on food at a family barbeque (Tr. 72). Complainant's history of trauma, according to Ms. Kushner, is much more extensive than that of the average patient with post-traumatic stress disorder ("PTSD").

As a result of these multiple traumas, complainant has difficulty trusting people, including her own children (Tr. 36). Her therapists both believe that her dog is the "only non-conflictual relationship" in her life (Tr. 37, 82). That is, the dog represents a being that loves her unconditionally since human relationships are "fraught with great conflict and mistrust" (Tr. 37). She trusts the dog implicitly and fears it not at all. Dr. Behar said its loss would be devastating to her (Tr. 36).

Dr. Behar testified that he did not prescribe the dog as a companion for Mrs. D and has never done so for a patient (Tr. 27). Nor did he make the dog a part of his recommended treatment plan (Tr. 41, 52). Although his progress notes do not mention the dog (Tr. 55), he testified that the pet has played a role in complainant's treatment, along with medication and psychotherapy, without which "her ability to function would be compromised" (Tr. 34; Pet. Ex. 3). He acknowledged that Mrs. D has not experienced incapacitating depression since her hospitalization in 2007, and she is currently able to maintain a job and a home, and care for her children (Tr. 47-48, 50). She has also recovered from the death of her granddaughter. Dr. Behar was not sure there was anything that she could not do in her apartment due to her condition.

Nevertheless, in support of her application for reasonable accommodation of a dog, Dr. Behar wrote:

> In addition to therapy and medication, the regular companionship of a loving and loyal pet dog has also been <u>vital</u> to patient's recovery. I am urging you to allow her to keep her dog for medical/psychiatric reasons.

(Pet. Ex. 2) (emphasis in original).

Susan Kushner diagnosed complainant with major depressive disorder and post-traumatic stress disorder (Tr. 69). Her treatment focuses on reducing complainant's symptoms of trauma (Tr. 72). In order to survive the trauma in her life, complainant became adept at numbing herself emotionally, so they work on breaking through the numbness and attempting to regulate the

underlying emotional pain which is difficult to manage (Tr. 73). With PTSD, memories can transport a patient back into the trauma, so it is "very tricky" to treat.

Ms. Kushner did not recommend that complainant get a dog. She said she does not recommend adjunct therapies such as acupuncture or meditation, although she might encourage or support their use (Tr. 74, 91, 94). But she did observe the impact of the dog on her patient's mood. After complainant received the dog, "her affect was much brighter" by comparison to her usual emotional numbness (Tr. 75). She was excited and happy with the dog, and she reported that it was strange to feel so happy. Ms. Kushner noted it in her records because it was so unusual (Resp. Ex. B at 3-4).[4]

According to Ms. Kushner, the dog helps complainant in many ways. It comforts her and helps her soothe herself; she is able to get up in the morning feeling less anxious (Tr. 81). More significantly, she believes, the dog has come to symbolize more than a pet, and its loss would likely trigger past losses and symptoms of trauma. Having the dog "has been a key part" of helping her manage her symptoms and improve functioning, because the dog gives her unconditional love -- something she never had (Tr. 82; Pet. Ex. 3). If she lost the dog, she said, "I don't think she would be able to function," and it would take her a long time to stabilize (Tr. 81). Ms. Kushner described complainant's identification with her pet:

> So, in a way, the nurturing that she provides for that pet is the nurturing she never got. She describes it that way. She has dreams about that. So, one of my main concerns is that without that pet, that whole sense of nurturing, of feeling okay, of having someone there for her, is gone.

(Tr. 83). In a letter to Riverbay dated December 8, 2008, Ms. Kushner wrote that use of complainant's dog "as a therapeutic pet has been extremely helpful and is an important part of this treatment" (Pet. Ex. 4; Tr. 80). She also stated that "removal of the dog would be destabilizing for her and increase the threat of hospitalization" (Pet. Ex. 4).

Mrs. D has discussed Star with her many times, sharing the joy she feels and her fears of losing her (Tr. 83). Those fears have triggered stress responses in the months preceding trial and

[4] Star's arrival is noted in entries dated January 14 and 18, 2008. On January 14, Ms. Kushner notes that "[L] was excited and happy today and explained that family had surprised her with a new pet puppy. The positive feelings she was able to experience in connection with this were quite intense for her. [L] was able to differentiate her emotional reactions to events in the present as generally more intense than they were in the past." Ms. Kushner explained that, even though the dog is not regularly noted in her treatment notes, she and complainant discussed Star "many times" that are not in the notes because all issues they discuss are not recorded in detail (Tr. 92-93).

escalated her symptoms, which include nightmares and crying spells (Tr. 84). She called Ms. Kushner the day before trial "panic stricken" and on the verge of leaving her job, which is unlike her (Tr. 96). She left a voicemail message stating, "I feel really horrible today. I don't know what's going on; I don't know what to do. I have to go to work; I'll call you later." She called back later "sounding very panicky and half crying" (Tr. 97). Although she loves her job at the pet store, Mrs. D thinks she would not be able to work there if she loses Star (Tr. 87).

Ms. Kushner has concluded that complainant's relationship with her dog is one of the most important things in her life and helps her to function (Tr. 85). She believes that Mrs. D's need for her dog is different from that of another pet owner. She would not only be saddened by losing the dog; she would be devastated and her symptoms would escalate (Tr. 86).

Mrs. D has lived at her current address for 30 years. She lives with her husband, two daughters, grandson, and her dog Star (Tr. 103-05). Star is three years old and weighs 24 pounds. Mrs. D testified that she keeps photos of Star in her cell phone and "all around my house" (Tr. 105). Star was three months old when her husband bought her in January 2008 as a gift -- just after her 2007 hospitalization. She said he gave Star to her because "he didn't want to see me sad any more" (Tr. 105). She described Star as "like my best friend, best friend that I never had. A sister or brother, all of that." (Tr. 105). Her husband leaves for work early, but Star is lying beside her on the bed when she wakes (Tr. 105-06). Star is the first thing she sees and they "cuddle" each morning, which makes her feel like going on with her day. Star stays by her side most of the day when she's home. Unlike her children, Star does not place demands on her. To the contrary, she stated, "I think [Star] worries more about me" (Tr. 106). She made this observation in recent days as she has been distressed by the upcoming trial and prospect of losing Star; she noticed that Star also seemed not to be feeling well so she took her to the veterinarian. She believes Star's mood dipped after Star noticed that Mrs. D was not "feeling good."

Mrs. D said Star makes her laugh (Tr. 107). She has worked in customer service at PetSmart since January and said that she applied for jobs at pet stores so she could get discounts to buy treats and squeaky toys for Star.

Mrs. D described her disability as depression and anxiety and explained that most of the time she feels like she does not belong here, although sometimes she is able to pull herself out of it (Tr. 103). She currently takes three medications for her condition (Tr. 107). She sometimes thinks she may need to increase her medication but thinking about Star helps her avoid doing so

(Tr. 108). When her granddaughter died a few years ago, everyone around her tried to make her feel better but only Star succeeded. She feels sad at home and, to fend off the sadness, she locks herself inside her room with Star, and they "just sit together because nobody else understands" (Tr. 109). Her family tells her not to cry or not to feel sad, but Star just "sits there and looks" at her. Unlike Star, "they don't understand." She said that, although she sometimes tells Ms. Kushner about Star, she tends to talk more about the things that make her sad, rather than the things that make her feel better, like Star.

Mrs. D notified Riverbay about Star five months after getting her. She knew she was not supposed to have a dog and she wanted to comply with the rules but she felt she "couldn't get rid of her" (Tr. 110). Finally, in June 2008, she called the district manager and notified him that she had a dog. She told him that her husband, who had not lived there as long as she, bought her the dog unaware that they were prohibited (Tr. 146). A security officer visited the same day and issued her a summons for harboring a dog and charged a $150 fine (Pet. Ex. 5).[5] She said she felt "like an idiot" because her husband and daughter warned her not to notify building management (Tr. 114). The ticket was a slap in the face; she had thought they would try to help her, not just issue her a ticket.

After she got an application to request an accommodation and gave it to her doctor to complete, she thought everything would be alright (Tr. 115; Pet. Ex. 1). She submitted it to Riverbay but was denied the accommodation (Tr. 116; Pet. Ex. 7). When she received the denial, she remembered how she felt growing up in the foster care system when she tried to do everything she could but could never do enough (Tr. 118). It was a "bad pit in my stomach. A bad feeling" (Tr. 118). She filed an appeal. She was afraid and had a friend from church who is a lawyer accompany her. ("Everybody . . . that's in church with me . . . knew about Star.") The appeal required her to appear before the community board – a panel of other tenants whom she saw everyday – to disclose her problems and "pour my heart out to them about my dog" (Tr. 119). She said, "it sucked that I had to go through that." The panel asked her for additional medical information and she returned to Ms. Kushner to supply it. Besides the accommodation application her doctors filled out (Pet. Ex. 1), she also supplied Riverbay with two additional doctor's letters (Pet. Exs. 2, 4, 8). When her appeal was denied, she felt like "nobody was listening," "like always in my life" (Tr. 124).

[5] She was issued another summons on March 6, 2010, and charged another $150 fee (Pet. Ex. 6).

Shortly thereafter, she began receiving papers summoning her to Housing Court. Riverbay began refusing her rent checks. Receiving the 10-day notice to quit her apartment made her feel like "they weren't listening" (Tr. 125; Pet. Ex. 11). Another 10-day notice came, which felt like "another rejection in my life" (Tr. 126). These briefly-worded explanations of her response to these events do not capture the emotion she conveyed on the witness stand, where she was tearful during her testimony. Mrs. D recalled that having to go to Housing Court made her feel as if she had done something wrong when in fact she had never failed to pay her rent on time. She was scared of the possible repercussions:

> I've never, never one time ever in my life, as long as I've been paying rent, ever didn't pay my rent, and they gave me a dispossess notice to be out in 10 days because I told them that I had a dog, and that just – that really freaked me out. It was very scary.

(Tr. 115, 128). She produced a check she wrote to Riverbay, dated September 9, 2008, in the amount of $1,781.74 for two months' rent (Tr. 130; Pet. Ex. 14).

Although she went to court, she had no clear understanding of what was going on during the proceedings. Nonetheless, she collected a court record documenting each time she appeared. Her documents indicate that she was summoned to appear on September 12, 2008, for a holdover proceeding seeking her eviction – days after her accommodation request was denied (Pet. Ex. 13A). She also appeared on September 24 and 29, 2008, December 18, 2008, January 28, 2009, March 27, 2009, May 21, 2009, September 16, 2009, November 16, 2009, and January 11, 2010 (Pet. Exs. 13C-K). She reports that, after waiting for some period of time, she would be handed something by the Riverbay representative notifying her of an adjournment date several weeks in the future (Tr. 128, 135-39). She recalled that on December 18, 2008, she sat in court for four hours when she should have been at work (Tr. 135; Pet. Ex. 13E). She thought she was going to Housing Court to have the situation with Star resolved (Tr. 148). She was "confused" throughout this process, "not knowing what was going on," "asking for help and nobody's helping me" (Tr. 139).

On January 28, 2009, complainant presented the court with proof that she had filed a complaint with the Commission seeking a "reasonable accommodation to harbor her dog" (Pet. Ex. 13F). The court granted an adjournment on that date and on five subsequent court dates at which she appeared, pending action by the Commission on her complaint (Pet. Exs. 13F-K). She

reported she could not sleep the night before each of these court appearances and she cried each and every time (Tr. 139).

Mrs. D worries about losing Star (Tr. 143). It makes her feel sad, depressed, and upset. When asked what would happen if she lost Star, she hesitated and remarked that if she answered, her therapist, who was sitting in the courtroom, would probably send her back to Four Winds. She said she did not think she would want to live if she did not have Star living with her. She was "embarrassed and ashamed to have to say that" because, in spite of having a husband and children around her, "they can't make me feel the way she does" (Tr. 143). She said these feelings seemed so abnormal to her that she did not share them with her therapist.

I found Mrs. D to be disarmingly candid, and not at all manipulative or rehearsed. I noted that her testimony and demeanor on the witness stand were consistent with her therapists' description of her condition. She remained outside the courtroom during her therapists' testimony about her condition to avoid overwhelming her emotions. Yet, the digital audio recording of the hearing will show that she evinced a great deal of emotion and was weepy throughout her testimony. Nevertheless, she made her best effort to control her emotions and frequently apologized to the tribunal or chastised herself for interrupting her testimony with sobs (Tr. 105, 108, 118, 141).

Jameelah Ricks, a paralegal in Riverbay's legal department, was respondent's only witness at trial (Tr. 159-60). She also was a credible witness. She testified that Riverbay has always maintained a no-pets policy and enforces it by express prohibition in the tenant lease agreement. Exceptions are made subject to Riverbay's approval of an accommodation. Riverbay did not submit a written policy. Ricks said that Riverbay received six or seven requests for accommodation in 2008, three or four requests in 2009, and ten requests in 2010 (Tr. 164-65). Riverbay has granted 35 accommodation requests for dogs, including accommodations for hearing and sight impaired residents as well as those with psychiatric disabilities (Tr. 188). She did not know how those cases compared to Mrs. D's.

Ms. Ricks described the process by which Riverbay reviews and approves accommodation requests.

The cooperator service office supplies tenants with an accommodation application, which must be submitted to the legal department. Once submitted, the application is processed and reviewed by a committee comprised of Ms. Ricks and two other employees, Ms. Net and Mr.

Boiko, and an interview is scheduled (Tr. 164-65). Ms. Ricks reviews the applications to ensure they comply with Health Insurance Portability and Accountability Act ("HIPAA") requirements, but, significantly, she does not review them for compliance with human rights laws (Tr. 186). The committee interviews the applicant and then issues a final report to general manager Vernon Cooper, who decides whether to grant an accommodation (Tr. 186-87). Mr. Cooper does not consult her before making his decision, and she did not know the basis for his decision to deny an accommodation in this case. She stated, "He doesn't give an explanation. It's really just a checkbox. He either checks for approval, or he checks for a denial, but he doesn't explain why or why not" (Tr. 187).

Ms. Ricks interviewed Mrs. D alone on August 19, 2008 (Tr. 162, 166; Resp. Ex. D). She said Mrs. D began the interview by apologizing and telling her the dog was a mistake; it was a gift from her husband when she came out of the hospital. She knew it violated the no-pets policy. Ricks said, "[she] was very nice. She was very understanding, and she was very apologetic about breaking the rules within her occupancy agreement" (Tr. 167). She said Mrs. D did not speak of a need for the dog or talk about her relationship with the dog. However, Ricks recalled that complainant told her she was attached to the dog and would be very upset if the dog were removed from her home (Tr. 168).

As she conducted the interview, Ms. Ricks filled out a "Pet Accommodation" questionnaire created by Riverbay (Tr. 169; Resp. Ex. D). It contains a list of questions, which she asked complainant, and the answers she gave (Tr. 170). The questionnaire asked whether the disabled person had problems walking, sleeping, hearing, speaking, breathing, learning, sitting, standing, or thinking, all of which Ms. Ricks indicated on the questionnaire were answered by complainant in the negative. Only one item in the list, "problems concentrating," was answered affirmatively ("a little concentration issues").

Ms. Ricks was aware of the holdover proceeding that Riverbay filed against complainant (Tr. 172). She admitted that holdover proceedings are filed in a large percentage of dog accommodation requests (Tr. 174-75). However, she said, when a tenant files a complaint with the Commission, the holdover proceeding is stayed until the Commission issues a decision on the complaint. In her experience, no tenant has been evicted over a dog accommodation during the pendency of a human rights inquiry.

She conceded that none of the Riverbay managers involved in the accommodation review process hold medical credentials and that she did not contact Mrs. D's therapists during review of her application, even though she recorded in her notes from the interview their names and frequency of visits with complainant and the medications prescribed (Tr. 181). She also admitted she never attempted to obtain medical records that Mrs. D authorized in conjunction with her accommodation application (Pet. Ex. 1 at 8). Ms. Ricks said she never calls doctors or therapists to follow up on accommodation requests, although Mr. Boiko is responsible for doing so (Tr. 188). She was unaware whether he did so in this case. Nor did she know whether Riverbay substituted its assessment of Mrs. D's medical condition for that of her doctors, reiterating that she was not involved in making the accommodation decision (Tr. 184). She also was not involved in the appeals process (Tr. 171).

## ANALYSIS

Petitioner alleges that Riverbay discriminated against complainant by denying her the reasonable accommodation of a companion animal. Riverbay is a provider of a housing accommodation as defined by the Human Rights Law. Admin. Code § 8-102(10) (Lexis 2011) (a housing accommodation is "any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings."). The Human Rights Law prohibits discrimination against any person by reason of their disability "in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith." Admin. Code § 8-107(5)(a)(2) (Lexis 2011). In its verified answer, Riverbay denies discriminating and contends that complainant failed to prove "that she required a dog to use and enjoy her apartment" (ALJ Ex. 1, ¶¶18, 19). Therefore, says Riverbay, she is not entitled to a reasonable accommodation.

The Commission bears the burden of establishing a *prima facie* case of discrimination. The parties disagree about the proper legal standard to be applied.

The Commission asserts the following standard: (i) that the complainant has a disability; (ii) that respondent knew or should have known of the disability; (iii) that an accommodation "may be necessary to afford complainant the use and enjoyment of her apartment"; (iv) the accommodation is reasonable; and (v) respondent refused to provide it (Pet's Br. at 3). This standard is applied in cases involving the federal Fair Housing Act, which defines discrimination

as "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations *may be necessary* to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B) (Lexis 2011) (emphasis added); *see Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006); *Bronk v. Ineichen*, 54 F.3d 425, 428 (7th Cir. 1995).

With respect to the third prong, respondent argues that petitioner should have to prove the accommodation "is necessary" to the use and enjoyment of the apartment (Resp's Br. at 8), citing cases reviewed under the state Human Rights Law, section 296 of the Executive Law. *See Kennedy Street Quad, Ltd. v. Nathanson*, 62 A.D.3d 879, 880 (2d Dep't 2009) (proof failed to show that dog "was actually necessary in order for them to enjoy the apartment"); *105 Northgate Cooperative v. Donaldson*, 54 A.D.3d 414, 416 (2d Dep't 2008) (complainant failed to show through medical or psychological expert evidence that she "required a dog in order to use and enjoy her apartment"); *Landmark Properties v. Olivo*, 5 Misc. 3d 18, 20 (2d Dep't 2004) (failed to introduce sufficient evidence to establish disability "and the necessity of keeping a dog to use and enjoy the apartment"); *One Overlook Avenue Corp. v. NYS Division of Human Rights*, 8 A.D.3d 286, 287 (2d Dep't 2004) (proof failed to establish complainant "required a dog in order for him to use and enjoy the apartment"). It should be noted that the state Human Rights Law requires a showing that the accommodation "may be necessary" to afford equal use and enjoyment to a disabled person. Exec. Law § 296(2-a)(d)(2) (Lexis 2011) (housing accommodation may not "refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling"). However, the courts may be using the terms interchangeably.[6]

Nonetheless, the city Human Rights Law makes no reference to any "necessity." It requires reasonable accommodation whenever doing so "enables" a person with a disability to enjoy certain rights. It states as follows:

> any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation *to enable a person with a disability to* satisfy the essential requisites of a job or *enjoy the right or rights in question*

[6] Curiously, the "is necessary" standard is cited in Federal Housing Act cases as well, *e.g., Quad Enterprises Co. v. Town of Southold*, 2010 U.S. App. LEXIS 5073 at *8-9 (2d Cir. Mar. 2010); *Echeverria v. Krystie Manor, LP*, 2009 U.S. Dist. LEXIS 27353 at *20 (E.D.N.Y. 2009), even though the precise language in the FHA is "may be necessary." 42 U.S.C. § 3604(f)(3)(B).

> provided that the disability is known or should have been known by the covered entity.

Admin. Code § 8-107(15)(a) (emphasis added). While it may be informative to review analogous statutes and caselaw, that law is not determinative, because the city Human Rights Law is to be interpreted more broadly than its correlatives in state and federal law. *Phillips*, 66 A.D.3d at 180 (the city and state Human Rights Laws are not "'equivalent,' and require distinct analyses.").

The Local Civil Rights Restoration Act of 2005 ("Restoration Act") mandates a more liberal construction and broader application of remedies under the city Human Rights Law:

> The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.

Admin. Code § 8-130 (Lexis 2011); *see Albunio v. City of New York*, 16 N.Y.3d 472, 477-78 (2011) (adopting a broad interpretation of the word "opposed," according to this principle, to find that complainants both opposed discrimination of a co-worker); *Williams v. NYC Housing Auth.*, 61 A.D.3d 62, 70-71 (1st Dep't 2009) (adopting a broader interpretation of "retaliation"); *Phillips v. City of New York*, 66 A.D.3d 170, 180-81 (1st Dep't 2009) (adopting a broader interpretation of "reasonable accommodation").

The breadth of the city Human Rights Law is further demonstrated in its definition of "reasonable accommodation":

> such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship.

Admin. Code § 8-102(18). This definition, unlike the state Human Rights Law and the federal Americans with Disabilities Act ("ADA"), allows no category of accommodation to be "excluded from the universe of reasonable accommodation" and, unlike the ADA, there are no accommodations that may be unreasonable under the city Human Rights Law if they do not cause undue hardship. *Phillips*, 66 A.D.3d at 182. Thus, the term "accommodation," though undefined in the law, is "intended to connote any action, modification or forbearance that helps ameliorate *at least to some extent* a need created by a disability." *Phillips*, 66 A.D.3d at 182, n.

12 (original emphasis). In light of the City Council's "legislative policy choice to deem all accommodations reasonable except for those a [respondent] proves constitute an undue hardship, general principles of statutory interpretation preclude the judicial importation of other exceptions." *Phillips*, 66 A.D.3d at 182.

Accordingly, to more closely reflect the language of section 8-107(15)(a) as it pertains to housing accommodation, I find that petitioner must prove that: (i) complainant has a disability, (ii) respondent knew or should have known of the disability; (iii) an accommodation enables the complainant to use and enjoy her apartment; (iv) the accommodation is reasonable; and (v) respondent refused to provide it. Petitioner established all five prongs here by a preponderance of the evidence.

Petitioner proved that complainant is disabled under the Human Rights Law. The Human Rights Law defines disability as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Admin. Code § 8-102(16)(a). Petitioner offered compelling evidence of psychological impairment through the credible testimony of complainant's therapists who are highly qualified in the fields of psychiatry and psychotherapy and have treated her for many years.

Dr. Behar and Ms. Kushner testified that complainant suffers from major depressive disorder, recurrent, and post-traumatic stress disorder for which they have treated over many years with prescribed medications and regularly scheduled psychotherapy. They detailed her symptoms and the history of her condition. Their testimony that complainant currently suffers from serious emotional and psychological distress establishes that she suffers "mental or psychological impairment" under the statute.

Riverbay does not dispute that complainant's disability "was known or should have been known" to it. Complainant filed a request for accommodation through channels established by Riverbay in which she and her therapists described her disability and need for her companion animal (Pet. Ex. 1). This is discussed in more detail, below.

For the third prong of the *prima facie* case, the Commission urges three bases upon which to make a finding: (1) the companion animal "affirmatively enhances" complainant's quality of life by "ameliorating the effects of her disability"; (2) complainant derives a "special benefit" from the companion animal; or (3) complainant receives "significant support" from the

companion animal, the loss of which "could precipitate severe psychological stress." (Pet's Br. at 15-16).

I find that the evidence proves that Star enables the complainant to use and enjoy her apartment, in accordance with section 8-107(15)(a). As a result of very severe trauma beginning at age six or seven, complainant has great difficulty trusting others but has come to love and trust her dog Star. Star has become an emotional support like no other, offering unconditional and non-conflictual love and acceptance that complainant is unable to experience with family members. Star helps relieve her frequent symptoms of anxiety and stress and has been a "key part" of her improved functioning. Star brightens her mood, visibly transforming an affect often characterized by emotional numbness. While Star was not the idea of her therapists, she has become an integral part of complainant's emotional life and a vital part of her therapeutic recovery, such that losing the dog would likely cause her severe emotional and psychological stress. Indeed, complainant was "ashamed" to say she would not want to go on without her. Her therapists confirmed that losing Star would be a serious emotional setback that would likely escalate her symptoms of trauma and depression, by triggering the memories of past losses. Thus, the evidence not only shows that complainant has a disability but also that her dog helps to "ameliorate at least to some extent a need created by a disability." *See Phillips*, 66 A.D.3d at 182, n. 12.

Star reduces her anxiety and depression and feelings of loss due to trauma; Star offers her love and acceptance in a way that even family members sometimes cannot; and complainant, who often feels sad at home, locks herself inside her room with Star to alleviate her sadness (Tr. 109). This evidence illustrates that Star is instrumental to Mrs. D's ability to use and enjoy her home and family life, which is lived at home. *See, e.g., Dep't of Housing & Urban Development ex rel. Evan v. Dutra*, H.U.D. ALJ No. 09-93-1753-8 at *11; 1996 WL 657690 (Nov. 12, 1996) (Initial Dec. & Order) (where two doctors rendered opinions that pet cat provided a "therapeutic benefit," proof established that the pet "greatly increased [complainant's] enjoyment of his apartment and the quality of his life"). In this case, petitioner has also proved that Star ameliorates the effects of complainant's anxiety and depression to such a degree that her loss is likely to precipitate severe psychological distress. Petitioner has well established the third prong.

Respondent's arguments in opposition suggest a misunderstanding of what is needed for a person with a psychiatric disability to use and enjoy her apartment, by focusing on physical

manifestations of use and enjoyment. *See* Resp's Br. at 10 (attempting to distinguish this case from *Dutra*, where "the complainant was physically and mentally disabled"). A psychiatric disability is manifestly different from a physical one. Because Mrs. D suffers from a psychiatric disability, what assists her in use and enjoyment of her living space is fundamentally different from what may be needed by someone with a physical disability. Moreover, in its arguments, respondent relies on facts that are unimportant, such as Mrs. D's admission that purchase of the dog was "an accident" and the fact that her therapists never "prescribed" the dog as part of her therapy. The Human Rights Law does not require that a companion animal be a part of a physician's treatment plan to be a reasonable accommodation. None of the cases cited by respondent suggests this is so. The fact that the dog was an incidental purchase, while fortuitous, does not diminish the therapeutic effect of her presence. Nor is petitioner's case disadvantaged by the fact that Mrs. D works and is sometimes well-functioning at home. *See*, *e.g.*, *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Comm'n*, 121 Cal. App. 4th 1578 at 1595 (3d App. Dist. 2004) (under state Fair Employment and Housing Act, which affords greater rights and remedies to an aggrieved person than those afforded by other state laws, the fact that complainant was capable of working and was sometimes able to function well at home did not mean that her disabilities did not interfere with the use and enjoyment of her home. A substantial limitation on use and enjoyment does not require an individual to be incapable of any use and enjoyment of his or her home.).

Although this application of the Human Rights Law offers broader protection, it is not inconsistent with the showing of need for a companion animal under the state Human Rights Law and FHA. *See, e.g., Bronk*, 54 F.3d at 429 (under FHA, "the concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability"); *Crossroads Apartments Assoc. v. LeBoo*, 152 Misc. 2d 830, 834 (City Ct. Rochester 1991) (to prevail under state HRL, complainant "must demonstrate that he has an emotional and psychological dependence on the cat which requires him to keep the cat in the apartment."). In some cases, complainants have been unsuccessful due to a failure of adequate proof about the animal's therapeutic value. *See Landmark Properties*, 5 Misc. 3d at 21 (complainant's failure of proof under state HRL included "ambiguous statement of his physician that depressed people may benefit from having pets" and notes from his medical records that he was anxious about the possibility of losing his dog). In

this case, where petitioner's case was supported by the credible testimony of two highly qualified therapists who have diagnosed complainant and treated her for serious depression and trauma over many years, there was no ambiguity about complainant's need or about Star's therapeutic value.

Proof of the fourth prong, that the accommodation is reasonable, also is established by the evidence. An accommodation is reasonable so long as it does not "cause undue hardship in the conduct of the covered entity's business." Admin. Code § 8-102(18); *Phillips*, 66 A.D.3d at 182 ("there are no accommodations that may be 'unreasonable' if they do not cause undue hardship"). The covered entity shall have the burden of proving undue hardship. Not only was there no evidence of hardship, but it was not even alleged in respondent's Verified Answer (ALJ Ex. 1). Star is a tiny dog and Riverbay offered no theory of how allowing complainant to harbor the dog would create an undue hardship, particularly since Riverbay has granted dog accommodations to other tenants.

Finally, there is no dispute that Riverbay refused the accommodation of the companion dog.

***Refusal to accommodate***

It is appropriate to review the process by which Riverbay arrived at its decision to deny complainant's request for the reasonable accommodation of a companion animal.

Complainant filed a formal request for accommodation with Riverbay on July 11, 2008 (Pet. Ex. 1, Disability Application for Waiver of No-Pets Provision). The 13 pages she submitted contain personal and medical information certified by her therapists, including descriptions of her disability, its characteristics, and the therapeutic benefits to her of having her dog, and include medical authorizations she signed for herself and for her dog Star. This application was more than ample notice to Riverbay of her medical condition and need for accommodation. *See Dutra*, H.U.D. ALJ No. 09-93-1753-8 at *12 (sufficient that "specific indications of the nature of his need for the cat" were provided). If Riverbay required additional information or clarity about complainant's need, her therapists were available for consultation, but Riverbay declined to contact them.

Complainant was interviewed by Riverbay on August 19, 2008. Riverbay denied her request for accommodation on September 4 in a letter written by general manager Vernon Cooper (Pet. Ex. 7). Around this time, Riverbay served complainant with a 10-day notice of

intent to terminate her tenancy effective September 10, 2008 (Pet. Ex. 12; Tr. 125-26), a date that preceded her deadline to appeal the denial of the accommodation. The 10-day notice was signed by Cooper and dated August 12, 2008, one week before her interview. This sequence of events could support an inference that the review process was a sham.

After the denial, complainant filed a request for appeal on October 24 (Pet. Ex. 8). Permission to appear before the Cooperator Appeals Committee was granted by letter dated November 17, and her appearance before the committee was scheduled for December 8 (Pet. Ex. 10). The appeal was denied. The appeal decision was not placed in the record.

Riverbay's refusal to accommodate Mrs. D became effective on September 4 when it notified her that her request was denied. Its refusal is further evidenced by its simultaneous commencement of holdover proceedings in housing court, seeking her eviction because she harbored her pet dog in violation of her lease agreement.

Riverbay did not offer the testimony of Vernon Cooper, the general manager, who was the only person empowered to make an accommodation decision and the person who made the decision to deny Mrs. D's accommodation request (Tr. 186-87). His denial letter states the following:

> Your application reflects that having a dog would provide you with comfort and general well-being. However, based on Riverbay's review of your application and your interview, we conclude that the facts do not show that you have a disability which requires you to have a dog in order for you to use and enjoy the apartment and thereby require a reasonable dog accommodation. I regret that Riverbay must deny your request to keep a dog.

(Pet. Ex. 7). Riverbay's conclusion that complainant has no disability that requires accommodation contradicts its own acknowledgement, also in the letter, that complainant suffers from "depression, mood disorder, attention deficit disorder, stress disorder, and generalized anxiety disorder," and that her doctor reported it was "a chronic condition which may continue indefinitely," that "maintaining a dog is critical to patient reducing symptoms of anxiety and depression," and that without treatment that includes maintaining the pet, she "would not be able to function normally" (Pet. Exs. 1, 7). It was undisputed that none of those who reviewed the application or decided its merits had any medical or psychiatric training, yet the denial appears to be a flat rejection of the experts' professional opinions of their patient's condition, without ever consulting them.

I found the review process to be superficial. Ms. Ricks interviewed Mrs. D even though Ricks was not a decision maker and had no input in the determination made by the decision maker (Tr. 186-87). Ricks rejected important information given by Mrs. D in the interview as if it was minor, concluding that Mrs. D did not indicate "a need" for the dog, even though she reported being "attached" to the dog and that she would be "upset" if Star were taken away. The degree of attachment and degree of upset are critical to understanding Mrs. D's need, yet Ms. Ricks did not consider this and had no way of understanding the importance of the animal without having a background in mental health or consulting the therapists.

The questions on Ms. Ricks's accommodation questionnaire sought information largely unrelated to a psychiatric disability (*i.e.*, problems walking, sleeping, hearing, speaking, breathing, learning, sitting, standing, or thinking) (Resp. Ex. D). Yet Ms. Ricks seemed focused on this questionnaire, rather than the description of complainant's condition provided in her application. Ricks said she discussed the questionnaire with the review committee, but there would seem to be no point in doing so since Mr. Cooper, the sole decision maker, was not on the committee (Tr. 170-71).

There is no support in the record for respondent's contention that Riverbay "considered all of the medical information" provided by complainant's therapists and "gave full weight" to their opinions (Resp's Br. at 2). The portion of Ms. Ricks's testimony cited, at page 189 of the transcript, is inapposite. There she states that she did not "ignore any of the medical information presented" nor did she conclude that complainant's doctors were wrong (Tr. 189). However, her review is largely irrelevant since she had no influence on the accommodation decision and did not even discuss it with Mr. Cooper. The record contains no information about what he considered and offers no proof that he "gave full weight" to the opinions of complainant's therapists, as respondent asserts.

The evidence points to weaknesses in Riverbay's review process that suggest a failure to fully engage in the "interactive process" to assess the particular need in complainant's accommodation request. *See Phillips*, 66 A.D.3d at 176 ("An individualized interactive process is also required by the more protective City HRL, and its absence represents a violation of . . . § 8-107(15)(a)."). Riverbay decided to interview Mrs. D alone, without the support of her therapists, and failed to consult her therapists. If Mrs. D, a person who is anxious and depressed under normal circumstances and who was likely suffering even more because of the prospect of

losing her dog, was not an effective advocate for herself during her interview, no one would be surprised. Given her diagnoses, such heavy reliance on the interview seems misplaced. It was Mrs. D's therapists who were in the best position to speak about her disabilities. Respondent has a duty to inquire. Thus, an interactive process that is intended to assess the need of a person with a psychological disability may reasonably require consultation with the disabled person's therapist, where authorization to release such information has been granted. *Cf. Dutra*, H.U.D. ALJ No. 09-93-1753-8 at *6 (although letter did not state specific medical need for companion animal, along with a prior statement that complainant needed the cat because he was disabled, it put respondents on notice that the cat might have a therapeutic purpose and gave respondent the responsibility to make further inquiry about complainant's illness and possible need for reasonable accommodation). In light of Riverbay's failure to make further inquiry, even after complainant had authorized release of her medical information, I found the interactive process engaged in by Riverbay superficial and inadequately informed.

Once petitioner has satisfied the elements of the *prima facie* case, as it has here, respondent may prevail by proving an affirmative defense that complainant cannot, "with reasonable accommodation, . . . enjoy the right or rights in question." Admin. Code § 8-107(15)(b). Respondent has not done so. Indeed, Mrs. D does use and enjoy her apartment with Star.

Petitioner has proved its *prima facie* case. Respondent has failed to prove any defense. Thus, petitioner has established discrimination under section 8-107 of the Human Rights Law.

## FINDING AND CONCLUSION

> Petitioner proved by a preponderance of the evidence that respondent provider of a housing accommodation discriminated against a tenant who suffers with a psychiatric disability by refusing her the reasonable accommodation of a companion animal, in violation of the Human Rights Law.

## RECOMMENDATION

Petitioner has requested a civil penalty of $250,000 and $50,000 in compensatory damages for mental anguish and $300 for fines Riverbay charged the complainant for "harboring" Star.

Compensatory Damages

Section 8-120(a) of the Human Rights Law empowers the Commission to award legal and equitable remedies including the payment of compensatory damages to a person aggrieved by discrimination. Admin. Code § 8-120(a)(8) (Lexis 2011). Complainant is entitled to compensatory damages incurred as a result of the discrimination in this case, which includes $150 in fines Riverbay charged her for harboring her dog after she had notified them of her disability.

Compensatory relief includes damages for mental anguish. *See Comm'n on Human Rights ex rel. Russell v. Chae Choe,* OATH Index No. 2617/09 at 6 (Sept. 25, 2009), *adopted,* Comm'n Dec. & Order (Dec. 10, 2009). An award for mental anguish damages must be based on a demonstration that "a reasonable person of average sensibilities could fairly be expected to suffer mental anguish from the incident." *Batavia Lodge v. NYS Division on Human Rights,* 35 N.Y.2d 143 (1974), *rev'g and adopting diss. opin. reported at* 43 A.D.2d 807, 810 (4th Dep't 1973). "[T]here must be some evidence of the magnitude of the injury, to assure that the Commissioner's damage award is neither punitive nor arbitrary." *NYC Transit Auth. v. NYS Division of Human Rights,* 78 N.Y.2d 207, 217 (1991).

In setting mental anguish damages, it is appropriate to consider the severity of the offense, the duration of the discriminatory practice, the number of offenses, and past awards granted for similar circumstances. *NYS Dep't of Correctional Services v. NYS Division of Human Rights,* 225 A.D.2d 856, 859 (3d Dep't 1996); *see also Comm'n on Human Rights ex rel. Romo v. ISS Action Security,* OATH Index No. 674/11 at 13 (Apr. 12, 2011); *Comm'n on Human Rights ex rel. Campbell v. Personal Employment Services,* OATH Index No. 1579/07 at 6 (Aug. 20, 2007), *adopted,* Comm'n Dec. & Order (Dec. 14, 2007); *Comm'n on Human Rights ex rel. Cherry v. Stars Model Management,* OATH Index No. 1464/05 at 15 (Mar. 7, 2006), *adopted,* Comm'n Dec. and Order (Apr. 13, 2006).

Past awards for mental anguish resulting from a housing accommodation's failure to make a reasonable accommodation have ranged from $10,000 to $50,000. *See Comm'n on Human Rights ex rel. Rose v. Co-Op City,* Comm'n Dec. & Order (Nov. 18, 2010), *rev'ing* OATH Index No. 1831/10 (June 16, 2010) (awarding $50,000 where landlord failed to install a ramp); *Chae Choe,* OATH 2617/09 at 8 (awarding $30,000 where landlord failed to permit tenant to install an accessible shower); *Comm'n on Human Rights ex rel. Martin v. Hudson Overlook, LLC,* OATH Index No. 2094/04 (Jan. 20, 2005), *adopted,* Comm'n Dec. & Order

(Mar. 25, 2005) (awarding $10,000 where landlord refused to make apartment accessible); *Comm'n on Human Rights ex rel. Raymond v. 325 Cooperative, Inc.*, Comm'n Dec. & Order at 2 (Feb. 24, 1999), *modifying on penalty*, OATH Index No. 1423/98 (Jan. 12, 1999) (awarding $15,000 where landlord failed to make apartment accessible); *Comm'n of Human Rights ex rel. Torres v. Prince Management Corp.*, OATH Index No. 301/98 at 9-10 (Aug. 14, 1997), *adopted*, Comm'n Dec. & Order (Oct. 27, 1997), *aff'd*, N.Y.L.J., July 29, 1998, at 22, col. 5 (Sup. Ct. N.Y) (awarding $40,000 where landlord failed to make reasonable accommodation.).

Discrimination that endures over the course of years will lead to a higher award. *See Co-Op City*, Comm'n Dec. & Order (Nov. 18, 2010) (landlord failed to provide reasonable accommodation for 2 ½ years); *Chae Choe*, OATH 2617/09 at 8 (the discriminatory conduct extended for approximately one year, "resulting in a protracted, continuing mental distress" to complainant); *325 Cooperative*, Comm'n Dec. & Order at 2 (Feb. 24, 1999) (awarding $15,000 for mental anguish for period "(in excess of three years) over which Complainant has had to struggle to enter and leave her residence"); *Prince Management*, OATH 301/98 at 9-10 (noting that failure occurred over course of two years).

Mental anguish may be established by the credible testimony of the complainant alone. *See Cullen v. Nassau County Civil Service Comm'n*, 53 N.Y.2d 492, 497 (1981); *compare Co-Op City*, Comm'n Dec. & Order at 4 (Nov. 18, 2010) (mental anguish damages awarded where discrimination made the complainant feel "like a second class citizen"), *with Comm'n on Human Rights ex rel. Martin v. Hudson Overlook, LLC*, OATH Index No. 137/06 at 14 (Aug. 30, 2006), *adopted*, Comm'n Dec. & Order (Dec. 5, 2006) (awarding no mental anguish damages where the complainant failed to testify that he suffered any). Testimony that the discrimination caused depression in the complainant is an important consideration. *See Chae Choe*, OATH 2617/09 at 7-8 (considering testimony that complainant, forced to reduce bathing to every other day due to respondent's refusal to provide an accessible shower, became depressed and felt unclean leaving her apartment to conduct normal daily activities, and experienced real fear that she might fall and injure herself, which caused her heart palpitations when she entered and exited her bathtub); *Hudson Overlook*, OATH 2094/04 at 6, 8 (complainant felt depressed due to inability to freely come and go, likening it to being in jail; embarrassed by having to ask strangers to help her down the stairs; and so upset about her situation that it worsened her hypertension); *Prince Management*, OATH 301/98 at 9 (complainant testified how negatively she was affected,

physically and emotionally, by having to carry her severely disabled son who, because he could not stand, "drags on the ground," causing problems with her nerves and depression).

Complainant described the mental anguish she suffered over the past three years due to the uncertainty of not knowing whether she would be able to keep her dog, Star, after being denied the reasonable accommodation of a companion animal. She talked about her sadness and fear at the prospect of losing Star, the humiliation of having to divulge her medical condition to neighbors on the appeal panel, the despair and rejection she felt being denied the accommodation, which she compared to her experiences growing up in the foster care system, her fear of being accused of not paying her rent and being evicted, her confusion and anxiety each time she had to go to housing court for the holdover proceeding, her fear growing into panic as the time for this trial drew near, and finally, her shame at having to disclose in testimony that the loss of her dog made her feel like she would not want to go on. She was emotional and upset even as she testified about these events.

In particular, complainant suffered heightened anxiety and sleeplessness on the ten occasions she had to appear in court for the holdover proceeding (Tr. 139; Pet. Ex. 13). More significant awards are awarded where the suffering leads to physical effects such as sleeplessness or anxiety. *See Stars Model Management*, OATH 1464/05 ($10,000 for mental anguish where modeling agency rejected applicant based on her race, causing complainant to feel humiliated and violated and lose sleep over the event); *Comm'n on Human Rights ex rel. De La Rosa v. Manhattan & Bronx Surface Transportation Operating Auth.*, OATH Index No. 1141/04 (Dec. 30, 2004), *aff'd*, Comm'r Dec. & Order (Mar. 11, 2005) ($12,000 and $10,000 awarded to two disabled passengers for bus driver's refusal to assist them, causing them ongoing anxiety and feelings of helplessness that contributed to insomnia). A complainant's weakened state may also be taken into consideration. *ISS Action Security*, OATH 674/11 at 14 (discrimination "exacerbated [complainant's] already weakened mental and physical condition"); *Prince Management*, OATH 301/98 at 9-10 (failure to provide an accessible entrance "deeply exacerbated the serious difficulties" complainant experienced with her children daily).

Complainant experienced all of this mental anguish, despite the fact that, as respondent asserts, she has retained possession of Star during the pendency of these proceedings.

Here the Commission has requested an award of $50,000 for mental anguish. Considering the length of the discrimination, the extreme distress suffered by the complainant,

and awards in similar cases, that seems appropriate. Mrs. D is also entitled to reimbursement for the $150 fine she paid for harboring Star in her apartment after Riverbay had notice of her need for the reasonable accommodation of a companion animal.

Civil Penalty

Under section 8-126(a) of the Administrative Code, the Commission may impose a civil penalty of up to $125,000 to "vindicate the public interest." The purpose of this provision is to "punish the violator" and to "strengthen and expand the enforcement mechanisms of the law so the Commission could prevent discrimination from playing any role in actions related to employment, public accommodations, housing and other real estate." *119-121 East 97th St. Corp. v. Comm'n on Human Rights,* 220 A.D.2d 79, 88 (1st Dep't 1996). If the Commission finds that the unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act, the civil penalty may be increased up to $250,000. Admin Code § 8-126(a) (Lexis 2011).

In determining the amount of the civil penalty, relevant considerations include the egregiousness of the discrimination and whether it was committed over a period of time, whether there are any previous findings of discrimination against the respondent, and the potential impact of respondent's discrimination on the public. *119-121 East 97th St. Corp.,* 220 A.D.2d at 88; *Comm'n on Human Rights v. Tantillo,* OATH Index Nos. 105/11, 106/11 & 107/11 at 7 (Feb. 24, 2011), *modified on penalty,* Comm'n Dec. & Order (May 23, 2011); *Chae Choe,* OATH 2617/09 at 8-9; *Hudson Overlook, LLC,* OATH 137/06 at 15. Further, "because it is in the public interest to have individuals respond and participate in a process designed to cure discriminatory practices," the failure of a respondent to cooperate with the Commission may be considered an aggravating factor. *Chae Choe,* OATH 2617/09 at 9; *Hudson Overlook,* OATH 137/06 at 15-16.

In any analysis, a "principle of proportionality" is to be applied; the civil penalty must be narrowly tailored to the particular facts and circumstances of the case at hand, considering that the maximum that can be assessed in any instance is $250,000. *119-121 East 97th St. Corp.,* 220 A.D.2d at 88; s*ee also Silver Dragon Restaurant v. NYC Comm'n on Human Rights,* N.Y.L.J., Mar. 31, 2004 (Sup. Ct. Kings Co.) (applying proportionality analysis to reduce civil penalty from $10,000 to $5,000 where restaurant had discriminated against African-American customer by requiring that she pay for her take-out food in advance).

***Egregiousness of Discrimination***

While there is no exact definition of what constitutes egregious discrimination, prior cases are illustrative. For example, egregiousness was found in *119-121 East 97th Street Corporation,* where a landlord discriminated against a tenant on the basis of sexual orientation and disability over an 18-month period by repeated written and verbal attacks and other abusive acts. 220 A.D.2d at 88. The acts included burglarizing the tenant's apartment, disabling his door locks, turning off his electricity, refusing to accept rent checks, commencing eviction procedures, and verbally and physically accosting him, including calling him various epithets in public, telling him he had AIDS and he hoped he died, leaving threatening messages on his answering machine, and informing the tenants in his building of his HIV status.

Egregiousness was also found in *Commission on Human Rights ex rel. Russell v. Chae Choe,* OATH 2617/09 at 8. In that case, a building owner refused for approximately one year to grant a 77-year old tenant with serious medical conditions that restricted her mobility (including pulmonary disease, cardiovascular disease, and arthritis) permission to replace her bathtub with a walk-in shower, even though a not-for-profit organization would have made the replacement at no cost to him. The ALJ found that the landlord's "goal in refusing the accommodation appears to have been to make life as difficult as possible for [complainant], without regard to any potential risks to her safety that he was causing." OATH 2617/09 at 9. Due to respondent's actions, the tenant suffered severe emotional distress and physical pain.

By contrast, the court found the discrimination was not egregious in *Silver Dragon Restaurant v. City of New York Commission on Human Rights*, N.Y.L.J., Mar. 31, 2004, at 24, where a restaurant discriminated against a Commission investigator posing as a customer on the basis of race by requiring her to pay for her order before receiving the food, which it did not require of other customers. While the discrimination was "intolerable," the court stated that it was clearly different from that in *119-121 East 97th Street Corporation* and other similar cases. *Silver Dragon Restaurant,* N.Y.L.J., Mar. 31, 2004.

In this case, contrary to the testimony of Ms. Ricks that holdover proceedings initiated by Riverbay are stayed once a human rights complaint is filed with the Commission, a stay did not occur in complainant's case until January 11, 2010, one year after she presented the housing court with proof that she had filed a complaint with the Commission (Pet. Exs. 13F, 13K). Respondent subjected complainant to five unnecessary appearances, from January 2009 to

January 2010, each of which was adjourned with Riverbay's consent due to her pending complaint (Pet. Exs. 13G-J); yet, at none of these appearances did Riverbay seek a stay. Riverbay would not have been harmed by doing so; it had already protected its contractual rights under the lease by filing suit. Complainant, who was unrepresented and appeared on her own behalf at the proceedings, did not know to request a stay. It was the court's decision in January 2010, apparently *sua sponte*, to remove the case from the calendar until the complaint is resolved (Pet. Ex. 13K). These court appearances not only cost Mrs. D time away from work and the effort to get to court, but they caused her additional anxiety over the prospect of losing her dog. She testified about the crying and sleeplessness she experienced prior to each court visit.

Here, the proven discrimination is respondent's failure to grant a waiver of its "no-pets" policy as a reasonable accommodation for a disabled tenant. The refusal has continued over three years and has caused substantial distress to the complainant. Considering the medical documentation complainant provided to respondent, respondent was well aware of the negative effects its discrimination would have. Moreover, respondent subjected complainant to several court appearances in a holdover proceeding for which it should have sought a stay. Though not as severe as the intentional acts of harassment in *Chae Choe* and *119-121 East 97th Street Corporation*, repeatedly forcing the complainant to appear unnecessarily in court does constitute harassment. *See* Black's Law Dictionary at 784 (9th ed. 2009) (defining harassment as "words, conduct or action . . . that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose."). Accordingly, the discrimination in this case was sufficiently egregious to call for an aggravated penalty.

***Prior findings of discrimination***

Prior findings of discrimination aggravate civil penalties because they reveal willfulness; someone who has previously been found guilty of discrimination can no longer claim ignorance of the law. *See Comm'n on Human Rights v. Space Hunters, Inc.*, OATH Index No. 997/04 at 12 (May 31, 2005), *adopted,* Comm'n Dec. & Order (July 26, 2005) (finding prior settlement by respondent of a similar discrimination suit indicated the violation was willful in nature and aggravated the penalty).

Petitioner provided a prior court order against respondent that found it had engaged in the same sort of discrimination at issue in this case. *Dep't of Housing & Urban Development ex rel. Exelberth v. Riverbay Corp.*, H.U.D. ALJ No. 02-93-0320-1; 1995 WL 108212 (Mar. 1, 1995)

(Modified Order) (vacating prior order); *Dep't of Housing & Urban Development ex rel. Exelberth v. Riverbay Corp.*, Fair Housing-Fair Lending Pub. 25,080, H.U.D. ALJ No. 02-93-0320-1; 1994 WL 497536 (Sept. 8, 1994) (Initial Dec.). In the final court-ordered stipulation, both parties agreed that Riverbay violated the Fair Housing Act. Moreover, Riverbay also agreed not to enforce its "no-pets" rule against disabled individuals who need a pet as an accommodation and to make its employees aware of the Fair Housing Act and its non-discrimination policy. Riverbay seems to have failed to inform their current employees about this order, as Ms. Ricks said she knew nothing about it (Tr. 179-80). Respondent also agreed to pay a civil penalty and emotional distress damages. Thus, the terms of the stipulation indicate that respondent was aware of the law and which actions would violate it. This is sufficient to show that it acted willfully in the present case and to aggravate the penalty accordingly.

***Potential Impact on the Public***

The potential impact discrimination has on the public directly relates to the size of a business and the amount of business it conducts. For example, in *119-121 East 97th Street Corporation,* 220 A.D.2d at 88, the First Department reduced the original civil penalty award of $75,000 to $25,000, based on a finding that the landlords owned only 50 housing units, a number that did not reach "the upper range of units owned by large landlords in the city." The Court found that the "public interest was not affected to the much greater extent it would have been had petitioners been large landlords whose actions affected hundreds, if not thousands of individuals." 220 A.D.2d at 88-89. Likewise, in *Commission on Human Rights ex rel. Thomas v. Space Hunters*, OATH 997/04, the tribunal found that an apartment broker who refused to accept the complainant as a client because she was transsexual could have a large negative impact on the public as the broker listed apartments for hundreds of landlords. *See also Comm'n on Human Rights ex rel. Alvarez v. Gerardo's Transportation,* OATH Index No. 2045/09 (May 22, 2009), *adopted,* Comm'n Dec. & Order (Aug. 12, 2009) (civil penalty award of $15,000 imposed for refusal of car service with offices in multiple states to transport individual with a disability); *Stars Model Management*, OATH 1464/05 at 15 (penalty for employment discrimination aggravated by the fact that respondent handled bookings for hundreds of modeling opportunities on behalf of diverse and, in some instances, well known companies).

Here, respondent has over 15,000 dwellings and 55,000 tenants in a cooperative housing development that is large even by New York City standards. Accordingly, discrimination by respondent is likely to have a large impact on the public.

***Failure to Cooperate with the Commission***

Petitioner did not argue or put forth any evidence to suggest respondent failed to cooperate with the Commission.

***The Principle of Proportionality***

The principle of proportionality dictates that a civil penalty award should be commensurate with the particular facts of a given case. Less serious cases should result in a lesser damage award than more egregious cases. Notably, the highest civil penalty the Commission has ever awarded following a hearing at OATH is $50,000. *See Comm'n on Human Rights ex rel. Rose v. Co-op City of New York,* Comm'n Dec. & Order (Nov. 18, 2010) *rev'g*, OATH Index No. 1831/10 (June 16, 2010); *Chae Choe*, Comm'n Dec. & Order (Dec. 10, 2009). Both of those cases involved egregious, long-term discrimination which substantially harmed the complainants involved.

In *Chae Choe* where $50,000 was awarded, the landlord's discrimination was particularly egregious as the evidence demonstrated that it was designed to make the complainant's life as difficult as possible so that she would leave her rent-controlled apartment. OATH 2617/09 at 9. Although there were no prior findings of discrimination, the tribunal found the discrimination willful. OATH 2617/09 at 9-10. The penalty was further aggravated by respondent's failure to cooperate with the Commission. OATH 2617/09 at 9. The penalty was not aggravated, however, by the potential impact on the public as respondent owned only a small number of units. OATH 2617/09 at 8.

Here, respondent's discrimination is similar to that in *Chae Choe* in that it discriminated against a tenant over a significant period of time causing substantial distress to her. However, respondent's actions were not intentionally designed to make her life difficult, as it was in *Chae Choe*. Riverbay went through the motions of considering complainant's application for accommodation while ignoring the evidence of her need. It filed a holdover proceeding because it routinely did so to protect its contractual rights, but it unnecessarily allowed court appearances to be scheduled, knowing that no ruling would be issued during the pendency of her discrimination complaint, while ignoring the distress and inconvenience it caused complainant.

These actions were more neglectful than malicious. Nevertheless, the civil penalty should reflect the additional worry and anguish caused by the five court appearances, between January 2009 and January 2010, that were completely unnecessary and could have been averted had Riverbay asked the court for a stay.

Respondent is a large housing development. Accordingly, a larger penalty is required to address the greater impact that Riverbay has on the public. Moreover, Riverbay's failure to appropriately remedy meritorious requests for reasonable accommodation after its sanction in the *Exelberth* case indicates that a larger penalty is necessary to prevent it from discriminating in the future. Having said this, I acknowledge that the order in *Exelberth* was rendered under the Federal Housing Act, and this case marks the first time a standard has been established under the Human Rights Law for the right to a companion animal. Both are factors that I have taken into account in making a civil penalty recommendation. Considering the factors set forth herein, I find $40,000 to be an appropriate civil penalty in this case.

I therefore recommend compensatory damages in the amount of $50,150 and a civil penalty in the amount of $40,000.

Tynia D. Richard
Administrative Law Judge

August 26, 2011

SUBMITTED TO:

**PATRICIA L. GATLING**
*Commissioner*

APPEARANCES:

**R. KEITH CHAPMAN, ESQ.**
*Attorney for Petitioner*

**SMITH, BUSS & JACOBS, LLP**
*Attorneys for Respondent*
**BY: JAMES ANDERSON, ESQ.**

**Comm'n Dec. & Order Complaint No. 09-1021397**

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS
----------x

| | |
|---|---|
| In the Matter of | Complaint # |
| L.D., | 09-1021397 |
| Petitioner, | |
| -against- | |
| RIVERBAY CORPORATION, | |
| Respondent. | |

----------x

## DECISION AND ORDER

On January 14, 2009, L.D.[7] ("Petitioner" or "Mrs. D") filed a Verified Complaint ("complaint") with the Law Enforcement Bureau ("LEB" or "the Bureau") of the New York City Commission on Human Rights ("the Commission"), alleging violations of Title 8 of the Administrative Code of the City of New York ("the Code" or "the Human Rights Law"). Petitioner has resided in a co-operative apartment complex in Bronx County since 1982; the complex, commonly known as Co-op City, is owned and managed by Riverbay Corporation ("Riverbay" or "Respondent"), which has a no-pets policy that it enforces against residents of the co-operative. In her complaint, Petitioner alleged that she has psychiatric disorders, and was hospitalized for severe anxiety and depression in June 2007. Petitioner claimed that she acquired a small dog for therapeutic reasons after her discharge from the hospital. Petitioner alleged that on June 23, 2008, she informed a Riverbay employee that she had the dog, and the medical circumstances under which the dog was purchased. On the same day, Riverbay fined Petitioner $150

[7] As in the Report and Recommendation, initials are used in this Decision and Order to protect Petitioner's privacy, due to the discussion of her medical history herein. Her true name is given in the complaint, and in the trial transcript and exhibits.

for harboring a dog. Petitioner protested the fine, and Respondent advised her to request a waiver of the no-pets policy. Petitioner claimed that she completed and submitted a waiver request, including all required supporting medical documentation. Riverbay denied the waiver request. Petitioner appealed; Riverbay denied the appeal, and informed Petitioner of this denial by letter on January 9, 2009.

The Bureau timely served Riverbay with the complaint, to which Respondent filed a timely Verified Answer ("answer"). Following an investigation in which the Bureau found probable cause to believe that Respondent had engaged in unlawful discrimination, the Bureau referred the matter to the New York City Office of Administrative Trials and Hearings ("OATH").

After unsuccessful efforts to settle the case, a trial was held before Administrative Law Judge Tynia B. Richard on April 5 and April 7, 2011. The Bureau submitted documentary evidence and testimony from Mrs. D; her psychotherapist, Susan Kushner, a Licensed Clinical Social Worker; and Dr. Michael Behar, Petitioner's psychiatrist. Respondent presented documentary evidence and the testimony of Jameela Ricks, a paralegal employed in Riverbay's legal department.

Petitioner's relevant testimony was consistent with the allegations in the complaint, in that she testified that she has depression and anxiety, and that she has been treated for these illnesses since 2003, including hospitalization in 2007. Mrs. D testified that in January 2008, shortly after she was discharged from her 2007 hospitalization, her husband gave her a puppy. In June 2008, Mrs. D notified Riverbay of the dog's presence. Petitioner testified that later on the same day, Respondent fined her $150.00 dollars for harboring a dog. Petitioner testified that Respondent fined her again, for the same

amount, in March 2010. Petitioner testified that she filed a written request for a waiver of the no-pets policy, to which she attached· information documenting her psychiatric condition, including letters from Ms. Kushner and Dr. Behar. Petitioner also signed an authorization for Riverbay to obtain medical records from Ms. Kushner and Dr. Behar (Tr. 115; Pet. Exs. 1, 2, 4, 8).

Mrs. D testified that. Riverbay denied her request and that she appealed that decision (Tr. 116; Pet Ex. 8). Doing so required her to provide additional medical information and to appear before a panel of co-operative tenants whom she saw everyday. Mrs. D said that at this meeting, explaining her need for an accommodation, she described her disabilities and "pour[ ed] my heart out to them about my dog ... It sucked that I had to go through that" (Tr. 119). Petitioner stated that her appeal was denied, and that, after denying the appeal, Respondent served her with an eviction notice and refused to accept her rent checks (Tr. 125; Pet. Ex. 11). Mrs. D testified that Riverbay continued the eviction proceedings against her for a year after she filed her complaint with LEB, until the housing court judge issued a stay in the case, pending the outcome of the Bureau's investigation (Tr. 115; Tr. 125 - 126; Tr. 139; Pet. Ex. 11; Pet. Exs. 13A - K).

According to Ms. D, the companionship of her dog, Star, has helped her cope with her illness and ameliorate her symptoms more than any other treatment, or any other relationship, including her relationship with her family. Petitioner stated that Star's presence was the only thing that helped her recover from the death of her infant granddaughter, who choked to death in 2009 (Tr. 108). Mrs. D said that she would not want to live if Star is taken from her. She said that she was afraid to admit feeling this

way, because she believed that Ms. Kushner would re-hospitalize her for doing so (Tr. 143).

Dr. Behar, who has treated Mrs. D since May 2008, testified as an expert witness in psychiatry; Ms. Kushner has treated Mrs. D since 2004, and testified as an expert witness in psychotherapy. Both testified that they are familiar with Mrs. D's psychiatric illnesses, and that her condition has improved since she acquired Star. Although neither Ms. Kushner nor Dr. Behar originally prescribed or recommended a dog for Petitioner's treatment, both testified to the importance of Star's continued presence to Mrs. D's psychiatric health.

Dr. Behar testified that Petitioner has Major Depressive Disorder, the symptoms of which include incapacitating depressive feelings, inability to function, and feelings of hopelessness, helplessness and suicidal ideation. These symptoms, according to Dr. Behar, are triggered by stress (Tr. 26). Ms. Kushner testified that in addition to Major Depressive Disorder, Mrs. D has been diagnosed with Post Traumatic Stress Disorder ("PTSD") (Tr. 69). Dr. Behar and Ms. Kushner testified that Petitioner has an extensive history of psychiatric trauma (Tr. 36,69). In addition to the death of her granddaughter, these events included multiple suicide attempts by her mother, a schizophrenic who refused to take medication, when Petitioner was a child; being raped at age 13; becoming pregnant at age 14 (Tr. 36; 69 -72), with the father of her child committing suicide when Petitioner was four months pregnant; and being in abusive relationship with an older man for 12 years, beginning at age 16 (Tr. 69 -72). At age 18, Petitioner attempted to commit suicide in order to escape this relationship (Tr. 69 - 72).

Ms. Kushner stated that treating trauma patients "is about decreasing symptoms" and helping a patient to "normalize ... feelings and be able to function" (Tr. 72). According to Ms. Kushner, typical PTSD symptoms are flashbacks, nightmares, frequent crying spells, "dissociation" and problems of "affect regulation." She explained that problems with affect regulation render a person unable to respond to events in an emotionally appropriate manner (Tr. 72). Ms. Kushner further testified that while dissociation is common even among people without psychiatric illnesses, " ... [for] people who have experienced trauma, it's much more involved so that they could be sitting there and then be somewhere else. And so if you're at work and you're dissociating, you can't work" (Tr. 84).

Ms. Kushner testified that she has discussed Star with Mrs. D several times, including Mrs. D's fears over what would happen if she could not keep Star. Ms. Kushner stated that, "Since there has been any kind of ... feeling of threat that the dog could be taken away, it's been a risk" (Tr. 83). Asked what she meant by "risk", Ms. Kushner explained that for several months prior to the trial, she and Dr. Behar had both observed that Mrs. D's fear of losing Star had caused Petitioner's symptoms to escalate, including more nightmares, more crying spells, and more dissociative symptoms, making it harder for Mrs. D to function (Tr. 84, 86). Ms. Kushner stated that the thought of losing Star had been destabilizing to Mrs. D, and that the stress over that possibility had been "almost incapacitating" (Tr. 87). Ms. Kushner stated that this was so even the day before trial, and that Mrs. D had called her then, "panic stricken," and ready to quit her job, which was unlike her (Tr. 87, 96). According to Ms. Kushner, Star helps Petitioner to function, and that losing Star would devastate Mrs. D, greatly increasing the likelihood that she would become so unstable that she would require hospitalization (Pet. Ex. 4; Tr. 80). Dr. Behar

also testified that losing Star would be devastating to Mrs. D (Tr. 36·37) and that Mrs. D's risk of hospitalization would increase, and that "her ability to function would be compromised" without Star (Pet. Ex. 3; Tr. 34).

Dr. Behar and Ms. Kushner both stated that Star's continued presence was "vital" to Mrs. D's psychiatric health, and both testified that they wrote letters to this effect to Riverbay, urging Respondent to allow Petitioner to keep her dog. Copies of these letters were entered into evidence (Pet. Exs. 2, 3 and 4). Mrs. D's medical records were also entered into evidence, as were other documents including Petitioner's waiver application and its attachments. These attachments included medical information from Dr. Behar, describing Petitioner's disabilities, the therapeutic benefits of her dog, and the risks to Petitioner - including hospitalization - if Respondent did not allow her to keep her dog (Pet. Ex. 1).

Riverbay's denial of Petitioner's request for accommodation was also entered into evidence. In the denial notice, Vernon Cooper, Riverbay's General Manger, acknowledged that Dr. Behar had diagnosed Mrs. D as having "depression, mood disorder, attention deficit disorder, stress disorder, and generalized anxiety disorder," and had stated that these were chronic conditions that might continue indefinitely (pet. Ex. 7). Mr. Cooper also quoted Dr. Behar's assessment that Mrs. D's dog was "critical to reducing symptoms of anxiety and depression;" and that without the pet, "[Petitioner] would not be able to function normally. Symptoms of depression and anxiety would intensify, culminating in possible hospitalization." (Pet. Ex. 7). However, Mr. Cooper stated in the notice that Mrs. D's request was being denied because she did not have a disability requiring a reasonable accommodation (Pet. Ex. 7).

Respondent's only witness, Ms. Ricks, testified that Riverbay specifically includes the prohibition against pets in each lease. Ms. Ricks stated that Riverbay permits tenants seeking an accommodation for a disability to request a waiver of the no-pets rule. Ms. Ricks described the procedures by which tenants make such requests or appeal their denial. Ms. Ricks stated that tenants must complete an application explaining why the accommodation is needed. Ms. Ricks testified that after the application has been submitted, a member of the Riverbay legal staff interviews the tenant, using a "Pet Accommodation" questionnaire created by Riverbay. Ms. Ricks testified that she followed this procedure and interviewed Mrs. D (Tr. 162, 166; Resp. Ex. D). Ms. Ricks further stated that Mrs. D provided written authorization for Riverbay to obtain her medical records (pet. Ex. 1). Ms. Ricks did not contact Ms. Kushner or Dr. Behar, or request Petitioner's medical records from them (Tr. 181), and did not know whether or not anyone from Riverbay did so when evaluating Mrs. D's request (Tr. 188). Ms. Ricks stated Mr. Boiko, one of her colleagues in the legal department, once worked as an emergency medical technician, but that no one else involved in reviewing requests for accommodation holds any medical credentials, including Mr. Cooper.

Ms. Ricks forwarded the accommodation questionnaire, her interview notes and the application and its attachments to Mr. Cooper, but had no further involvement in the case. Ms. Ricks did not know why Mrs. D's request was denied, and had no role in determining whether or not the accommodation would be granted (Tr. 186-87). She stated that Vernon Cooper, alone, determines whether or not a waiver request will be granted or denied. Mr. Cooper does not consult with her before deciding whether or not to grant a

waiver request, or disclose the reasons for his decisions, and did not do so here (Tr. 170-71).

According to Ms. Ricks, tenants may appeal the denial of an accommodation by meeting with Riverbay's Cooperator Appeals Committee, which consists of co-op shareholders. Mr. Cooper ultimately decides whether or not to grant a waiver request in the event of an appeal. Ms. Ricks was not involved in Mrs. D's appeal, and did not know why her appeal was denied (Tr. 171). Respondent provided no evidence that Mr. Cooper consulted with anyone before he denied Petitioner's appeal.

Ms. Ricks testified that Riverbay has granted 35 waivers of the "no pets" policy, including waivers to tenants with psychiatric disabilities. She knew nothing else about these cases, including when the accommodations had been granted (Tr. 188). And she knew nothing about the approximately 20 requests for pet accommodations that she testified Riverbay received between 2008 and 2010 (Tr. 164-65). Ms. Ricks acknowledged that Riverbay had commenced eviction proceedings against Petitioner, as Respondent usually does against tenants who have dogs. She testified that Riverbay's policy and practice is to stay those proceedings upon receiving notice that a complaint of unlawful discrimination has been filed. Ms. Ricks did not provide a written copy of this policy, but stated that she knew of no case in which a tenant had been evicted for harboring a dog while an LEB investigation was pending (Tr. 172, 174-75).

ALJ Richard issued a Report and Recommendation on August 26, 2011, wherein she determined that Respondent violated the Human Rights Law by denying Petitioner the reasonable accommodation of a comfort animal. The ALJ recommended that the Commission award damages to Mrs. D in the amount of $50,000 dollars for mental

anguish, and an additional $150 dollars in compensatory damages for the fine Riverbay assessed against her for harboring a dog. The ALJ also recommended that the Commission impose a civil penalty of $40,000 dollars on Respondent.

After reviewing the ALJ's report and recommendation; the trial transcript and exhibits; and the comments; the Commission adopts the report and recommendation, including the recommended $50,150 dollars in compensatory damages and the $40,000 civil penalty.

Under the Human Rights Law, housing providers may enforce a no-pets policy. A tenant's request for a waiver of no-pets rules, as a reasonable accommodation for a disability, need not be granted if doing so would cause the housing provider an undue hardship. Riverbay did not reject Petitioner's requested accommodation on the ground of undue hardship. Instead, conceding that Petitioner has a psychiatric disability, and that they were aware of it, Riverbay argues that its only duty is to provide Mrs. D an apartment; that no other accommodation is required under the law; and that because she is able to perform physical tasks in her apartment, and is able to maintain gainful employment, Petitioner requires no accommodation to use and enjoy her apartment. In short, Riverbay insists that Petitioner is not disabled enough to trigger any duty to accommodate that disability under the Human Rights Law.

This argument is without merit. The Code, defines "disability" to mean "any physical, medical, mental or psychological impairment, or a history or record of the same." See Code Sect. 8-102(l6)(a) and 8-102(16)(b)(2) (emphasis added). The plain text of the Code does not include a threshold level of severity for disabilities, below which the law does not apply. Complete debilitation is not a precondition to application of the

Human Rights Law, and tenants requesting reasonable accommodations for their disabilities, whether physical or mental, need not show that they are wholly incapable of performing a task of daily living before they may request or receive an accommodation.

The Code defines "reasonable accommodation" to mean, "such an accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship." See Code Sect. 8-102(18). The Code also mandates that covered entities "shall make reasonable accommodation to enable a person with a disability to ... enjoy the right or rights in question provided the disability is known or should have been known." Moreover, when the need for a reasonable accommodation is at issue, "it shall be an affirmative defense that the person aggrieved ... could not, with reasonable accommodation .. . enjoy the right or rights in question." See Code Sect. 8-107(15)(a) and (b) (emphasis added).

The Commission finds that the ALI properly applied the law. Mrs. D has a both a "mental or psychological impairment" and "a history or record of such impairment" – as Vernon Cooper acknowledged in his letter denying Petitioner's accommodation request. Clearly, she is a person with a disability as defined by the Code. Respondent did not plead, or offer evidence showing, that Mrs. D would be unable to use and enjoy her apartment with the accommodation of a comfort animal, thereby failing to meet its burden under the affirmative defense, as required by the Code. Moreover, Riverbay did not plead undue hardship in its answer to the complaint, and offered nothing at trial addressing the question. The record is devoid of anything demonstrating that Riverbay suffered an undue hardship, or would do so, by allowing Mrs. D to keep her dog. Indeed,

Riverbay asserted at trial that it has previously granted such accommodations to other residents with psychiatric disabilities, which suggests that doing so for Mrs. D would not cause an undue hardship. Instead of undue hardship, ALJ Richard found that Riverbay merely "went through the motions" when considering Mrs. D's request for an accommodation, and that Respondent's review of that request was "superficial and inadequately informed."

The record amply supports these findings. ALJ Richard found Ms. Ricks to be credible; although there is no basis in the record for disturbing that finding, it is also plain from the record that Ms. Ricks' role in the application process was minimal, and, ultimately, entirely irrelevant to the determination of Mrs. D's accommodation request. Mrs. D provided written authorization to contact her clinicians and to obtain her medical records. She attached 13 pages of supporting documents to her application, including statements from Dr. Behar and Ms. Kushner. But Ms. Ricks did not contact Ms. Kushner and Dr. Behar; she did not review their statements and the other attachments Mrs. D provided; and did not seek to obtain Petitioner's medical records. Instead, as ALJ Richard found, she focused on the pet accommodation questionnaire. The Commission finds this limited focus unsurprising: By her own admission, Ms. Ricks lacked medical credentials of any kind. She simply was not competent to evaluate the information that Mrs. D provided with her application.

Neither was the ultimate decision maker, Vernon Cooper, who also lacked any medical credentials. Moreover, Mr. Cooper did not personally interview Mrs. D when considering her accommodation request, or speak to Ms. Ricks concerning it. Thus, when Mr. Cooper initially denied Mrs. D's accommodation, he did so without speaking to the

only member of Respondent's staff who spoke with Petitioner about the accommodation request; he did not possess any medical credentials to guide him in assessing that request; he did not contact Mrs. D's clinicians to help him do so; and there is nothing in the record demonstrating that Riverbay retained its own medical experts to review Petitioner's accommodation request. The Commission, therefore, finds that Riverbay's review of Petitioner's request was, at best, superficial.

But the record also supports the more troubling inference that Respondent's entire review process was merely a sham, as the ALJ observed. Ms. Ricks interviewed Petitioner on August 19, 2008. However, the notice to vacate the apartment, signed by Mr. Cooper, was dated August 12, 2008 - one week before Petitioner's interview with Ms. Ricks. Mr. Cooper's letter denying the requested accommodation was dated September 4, 2008, and in that letter, he advised Petitioner, "you may appeal my decision to the Cooperator Appeals Committee, within thirty (30) days of the date of this letter." (Emphasis added). Immediately after the denial, however, Riverbay began the eviction proceedings against Mrs. D, serving her with a notice of intent to terminate her tenancy, effective September 10, 2008. The eviction, therefore, was to become effective three weeks before expiration of the 30-day deadline for Petitioner to file an appeal.

By letter dated November 17, 2008, the Cooperator Appeals Committee directed Petitioner to appear before them on December 8, 2008; Petitioner did so, and, as she described, had to "pour [her] heart out to them about [her] dog." But the committee did not determine whether or not to grant the accommodation; Vemon Cooper did. There is no evidence in the record that the committee as a whole, or through any member or members thereof, consulted with him concerning Petitioner's appeal. Thus, despite the

fact that Mr. Cooper had informed Mrs. D, in writing, of her right to appeal his decision (Pet. Ex. 7), Mr. Cooper himself again denied the accommodation, doing so entirely without input from the appeal committee.

Vernon Cooper, therefore, had unfettered discretion in deciding whether or not to grant Mrs. D an accommodation. He began arranging for Petitioner's eviction even before Ms. Ricks had the opportunity to interview her, and Riverbay commenced those proceedings even before Mrs. D had an opportunity to appeal the denial of her requested accommodation. In short, the record inescapably and overwhelmingly supports the conclusion that Respondent never seriously considered Petitioner's request, and never intended to do so. The Commission, therefore, has no hesitation in finding that Respondent's review of Petitioner's request, including her appeal, was in fact a sham. Given this, and Respondent's complete failure to plead and prove the affirmative defense required by the Code or to demonstrate that granting the requested accommodation would constitute undue hardship, the Commission finds that Riverbay violated the Human Rights Law when it refused to grant that accommodation.

For the reasons discussed below, the Commission finds that Riverbay's remaining arguments challenging the report and recommendation are without merit. As also discussed below, Riverbay's conduct in this case fully warrants the compensatory damages and civil penalty recommended by the ALJ.

Riverbay argues that ALJ Richard improperly used Federal standards under the Fair Housing Act, 42 U.S.C. 3604(f)(3)(B) ("FHA"), as guidance in assessing whether or not unlawful discrimination occurred in this case. The Commission rejects this argument.

The FHA standards were not given improper weight by the ALJ. As she correctly stated, the New York City Human Rights Law, not Federal or New York State law,

controls this case. The Code requires an independent, and more liberal, interpretation of its terms than comparably worded State and Federal laws, and irrespective of how those laws have been construed. See Code Sect. 8-130. The Commission finds that the ALJ followed that requirement here, and properly applied the New York City Human Rights Law.

Riverbay also argues that awarding Petitioner the recommended compensatory damages will improperly "enrich" Mrs. D, and further argues that the ALJ did not consider Riverbay's "unique status, ownership and [the] public good it provides," when assessing the compensatory damages and the civil penalty. The Commission finds both of these contentions to be without merit. Compensatory damages, including damages for mental anguish, are authorized by the Code, and the credible testimony of a complainant, alone, will support the award of damages for mental anguish.

Here, Mrs. D, corroborated by two expert witnesses familiar with her disabilities and directly involved in her treatment, testified about how severely Riverbay's actions affected her. Ms. Kushner testified that prior to Respondent's denial of Mrs. D's accommodation request and subsequent efforts to evict her, Mrs. D was doing very well. Thereafter, Ms. Kushner further testified, the very thought of losing Star destabilized Mrs. D. Continuing even to the day before trial (when she called Ms. Kushner, "panic stricken," and ready to quit her job) all of Petitioner's PTSD symptoms - flashbacks, nightmares, crying spells, dissociation - increased, impairing her ability to function to the point that she was almost incapacitated (Tr. 83 - 84; 96 - 97). Dr. Behar and Ms. Kushner both stated that Star's continued presence was "vital" to Mrs. D's health, and that losing Star would devastate Petitioner, further escalating her symptoms and rendering her so

unstable that she would likely need to be hospitalized. And, Mrs. D, who attempted suicide when she was 18, testified that the very thought of losing Star made her feel that she would not want to live any longer - feelings that she hesitated to reveal, because she feared that this would cause Ms. Kushner to re-hospitalize her (Tr. 143).

The ALJ, who had the opportunity to see and hear the witnesses and evaluate their demeanor, credited this testimony. Indeed, the ALJ noted that the bare transcript could not convey the emotion Mrs. D evinced while testifying, and that Mrs. D was "weepy" throughout her testimony. The Commission finds no basis in the record for disturbing the ALJ's credibility determination. It is clear from this record that Petitioner, a woman with an extensive history of trauma and depression who once attempted suicide, did not suffer mere annoyance because of Respondent's actions. Mrs. D's mental anguish in reaction to Riverbay's denial of her accommodation request, and its efforts to evict her, was not minimal, such that it cannot be distinguished from her pre-existing condition. To the contrary, the record shows that Petitioner's condition worsened considerably. Respondent's acts caused a distinct and nearly incapacitating increase in Petitioner's symptoms, an increase that both of Mrs. D's clinicians observed occurring *after* Respondent's actions began in this case. And Mrs. D testified that *after* Respondent's actions began in this case, she felt that she would prefer death to life without her dog. The Commission also finds that Riverbay caused Mrs. D mental anguish via the utterly meaningless and illusory appeal process, by forcing Petitioner to reveal details about her illnesses, and her need for Star, to fellow Co-op City residents whom she saw everyday.

Accordingly, the Commission finds that Petitioner is entitled to compensatory damages for mental anguish. The Commission further finds that the ALJ properly applied

the correct legal standards when calculating the recommended compensatory damages and, on this record, finds that the amount recommended by the ALJ is appropriate.[8]

In making her civil penalty recommendation, ALJ Richard considered a previous finding of unlawful discrimination against Respondent, *United States Department of Housing and Urban Development ex reI. Beatrice Exleberth v. Riverbay Corporation*, ALJ 02-93-0320-1, a Federal proceeding under the FHA. Riverbay contends that the order in that case was vacated, and that the ALJ should have, therefore, disregarded it in her analysis. The Commission has reviewed the decision and order in *Exleberth*. For the reasons described below, the Commission concludes that Respondent, at best, mischaracterizes *Exleberth*, and the Commission finds respondent's argument to be completely without merit.

The legal conclusions and relevant facts in *Exleberth* are nearly identical to those in the present case: Ms. Exleberth resided in Co-op City, had been hospitalized three times for depression, and acquired a dog after her last hospitalization. No doctor recommended that Ms. Exleberth obtain a dog, or prescribed one as part of her treatment, but the animal's presence ameliorated her symptoms. Six months later, after Ms. Exelberth informed Riverbay that she had the dog, Riverbay fined her for violating the no-pets policy; commenced eviction proceedings against her; and denied her request to keep the dog as a comfort animal to accommodate her psychiatric disability.

The United States Department of Housing and Urban Development ("HUD") filed a charge of discrimination against Riverbay. At a subsequent hearing before a HUD

---

[8] Aside from compensation for mental anguish, there is no dispute that Riverbay twice fmed Petitioner $150.00 dollars for having her dog. The first fme was assessed before Respondent was aware that Petitioner was seeking to keep the dog as an accommodation for her disability. The ALJ correctly held that Mrs. D is entitled to compensation for the second fme, which was assessed after she made her accommodation request.

Administrative Law Judge ("the HUD ALJ"), complainant, corroborated by an expert witness, established that the continued presence of the dog was medically necessary. Riverbay argued that it had no duty to accommodate Ms. Exleberth, and that the requested accommodation was unnecessary for her to use and enjoy her apartment. Observing that the plain language of the FHA protects persons with mental handicaps to the same extent that it protects persons with physical ones, the HUD ALJ found that Riverbay's refusal to accommodate Mrs. Exleberth violated the FHA, and recommended the imposition of a civil penalty, injunctive relief and damages for mental anguish.

Contrary to Riverbay's mischaracterization, HUD's ensuing order adopting these recommendations was not vacated, but was modified on some aspects of the injunctive relief, solely to end appellate proceedings by Riverbay. In the modified final order, filed in the United States Court of Appeals for the Second Circuit in 1995, Riverbay *conceded* that it had violated the FHA, and its appeal was dismissed with prejudice; the recommended damages and civil penalty were unchanged; Ms. Exleberth was permitted to keep her dog; and Riverbay was enjoined from enforcing its no-pets policy against Ms. Exleberth and similarly situated tenants.

All of this is apparent from even a cursory glance at the final order in *Exleberth*, and the Commission is disturbed that Riverbay contends, in effect, that the case was dismissed: Clearly, Riverbay was guilty of violating the FHA, for refusing to grant a disabled tenant the reasonable accommodation of a comfort animal. Prior findings of unlawful discrimination are always relevant in determining appropriate civil penalties under the Human Rights Law, especially where, as here, the prior unlawful conduct is the

same as that charged in a later proceeding. The Commission, therefore, finds that ALJ Richard properly considered *Exleberth* in calculating the recommended civil penalty.

Respondent argues that the application of the FHA in *Exleberth* could not have put it on notice that the Human Rights Law would apply to its actions[9] in the present case, and that Riverbay "should not be penalized for following a good-faith interpretation of the law." The Commission rejects this assertion: The Commission simply cannot credit that Riverbay did not know that the Human Rights Law would apply to a large apartment complex within the City of New York. Nor can the Commission credit that Riverbay believed that the Code provided less protection to tenants with psychiatric disabilities than the FHA. On its face, the Human Rights Law unambiguously applies to housing accommodations, and plainly includes persons with psychiatric disabilities within the scope of its protection. The Code explicitly requires liberal interpretation of its provisions, regardless of how comparable New York State, or Federal, statutes have been construed - and has done so since 2005, well before the events at issue here.

Riverbay is a housing provider conducting business in the City of New York, operating subject to local law, and chargeable with knowledge of the law. Respondent is not a small landlord for whom unfamiliarity with anti-discrimination laws might explain, though not excuse, a violation of the Human Rights Law: Riverbay controls more than 15,000 apartments, housing approximately 55,000 tenants, in a 300-acre complex. The Commission thus concludes, as ALJ Richard did, that Respondent's repetition of the same unlawful discrimination that it committed in *Exleberth* was not a product of ignorance,

[9] Given the nature of the violation in *Exleberth*, and the terms of the final order therein, this argument, taken to its logical conclusion, means that Respondent knowingly violated the FHA when it denied Mrs. D's accommodation request. At minimum, Respondent appears to have knowingly risked committing such a violation.

but a willful violation of the Human Rights Law. ALJ Richard also found that Riverbay harassed Mrs. D when it continued to seek her eviction after being served with the complaint, but characterized this conduct as "more neglectful than malicious," and declined to consider it in making her penalty recommendation. The Commission agrees that Respondent harassed Mrs. D, but disagrees with the ALJ's characterization. Harassment, by definition, serves no legitimate purpose; it is inherently malicious. The Commission is satisfied, however, that the civil penalty recommended by the ALJ is appropriate, and declines to increase that amount.

Riverbay knew of Mrs. D's disabilities; engaged in a superficial review of both her accommodation request and her appeal of its denial of that request; and made no effort to show that granting it would cause an undue hardship. And, instead of proving the affirmative defense required by the Code, that Mrs. D could not use or enjoy her apartment with a reasonable accommodation, Riverbay simply asserts that no accommodation of any kind is necessary for Petitioner to use and enjoy her apartment, rendering the Human Rights Law inapplicable. Riverbay took this position recently in New York City Commission on Human Rights ex reI. Rose v. Riverbay Corporation, Complaint No. 1020824. The Commission's rejection of Riverbay's position was upheld, upon review in New York State Supreme Court, Bronx County, on September 9, 2011 (*sub nom, Riverbay Corporation and Vernon Cooper v. New York City Commission on Human Rights*, Index No. 260832). Riverbay thus repeats the same unsuccessful argument that it made in *Rose* only this year, and made concerning the FHA, in *Exleberth*, nearly 20 years ago. That argument is equally unavailing now.

IT IS HEREBY ORDERED, that Riverbay Corporation pay Petitioner $50,150 dollars in compensatory damages, and pay the City of New York a fine in the amount of $40,000 dollars.

Pursuant to Section 8-1 23 (h) of Title 8 of the Administrative Code of the City of New York, anyone aggrieved by this Order has thirty (30) days after service to seek review in the New York State Supreme Court.

Dated: New York, New York
January 9, 2012

**SO ORDERED:**
**New York City Commission on Human Rights**

William J. Hibsher
Commissioner

Dr. Derek B. Park
Commissioner

Patricia L. Gatling
Commissioner

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of

Index No. 260093/2012

RIVERBAY CORPORATION

Petitioner,

for judicial review of an administrative determination pursuant to section 8-123 of the Administrative Code of the City of New York and Article 78 of the New York Civil Practice Law and Rules,

**STIPULATION OF SETTLEMENT**

-against-

NEW YORK CITY COMMISSION ON HUMAN RIGHTS and L.D.,

Respondents.

WHEREAS, following the filing of a Complaint with the Respondent New York City Commission on Human Rights (the "Commission"), an administrative hearing was held, and the Commission directed that Complainant/Respondent L.D. (the "Complainant") be permitted to retain her dog, Star, as a reasonable accommodation for her disabilities, and awarded $50,150 in compensatory damages and a $40,000 civil penalty, and

WHEREAS, Petitioner Riverbay Corporation (the "Petitioner") filed a petition to strike or reduce the damages and penalties imposed by the Commission; and the Commission filed a cross-motion to dismiss the Petitioner's action and to enforce the Commission's order; and

WHEREAS, the parties have determined that it is in the best interests of all parties to resolve this matter promptly without further litigation and on the following terms;

**IT IS HEREBY STIPULATED AND AGREED** by and among the parties, that:

1. The pending petition and motion are withdrawn, and the above-captioned matter is hereby discontinued, on consent of the parties.

2. The Petitioner shall implement the Commission's direction to grant Complainant's accommodation request to keep a dog as a reasonable accommodation to her disability.

3. The Petitioner shall pay the sum of $30,000 to L.D. and $15,000 to the City of New York, in full settlement of the above-captioned action, the Complaint filed by the Complainant, and the Order of the Commission in this action. Petitioner shall provide corporate checks for such amounts to Leonard Braman, Assistant Corporation Counsel at the New York City Law Department, on or before July 20, 2012.

4. All parties agree that they are entering into this stipulation willingly, without any coercion or duress, that this stipulation contains all of the agreed-upon terms and no other promises have been made outside of this stipulation, and that this stipulation completely resolves the above-captioned action, the Complaint filed by the Complainant, and the Order of the Commission in this action.

5. The Complainant hereby releases and discharges the Petitioner, and Petitioner's affiliated companies, subsidiaries, parent companies, and directors, shareholders, officers, employees, attorneys, agents, representatives, and successors and assigns, and all persons acting with or on behalf of them, from all charges, complaints, claims, liabilities, obligations, promises, agreements, actions, or causes of action, debts, attorneys fees or other costs or expenses, of any nature relating to discrimination, including but not limited to housing discrimination claims arising under local, state or federal statute, regulation, or ordinance relating to housing discrimination, or prohibiting retaliation for reporting a violation of the law, or any other discrimination claim related to or arising out of the Complainant's Complaint before the Commission.

6. The Petitioner hereby releases and discharges the Complainant, and Complainant's attorneys, agents, representatives, and successors and assigns, and all persons acting with or on behalf of them, from all charges, complaints, claims, liabilities, obligations, promises, agreements, actions, or causes of action, debts, attorneys fees or other costs or expenses, of any nature relating to discrimination, including but not limited to housing discrimination claims arising under local, state or federal statute, regulation, or ordinance relating to housing discrimination, or prohibiting retaliation for reporting a violation of the law, or any other discrimination claim related to or arising out of the Complainant's Complaint before the Commission.

7. None of the parties is to be considered a prevailing party for purposes of an award of attorneys' fees.

8. This stipulation may be executed in counterparts and any signature appearing hereon that has been transmitted by facsimile shall have the same legal effect as a hand-written original signature.

NEW YORK CITY LAW DEPARTMENT
*Attorneys for Respondent New York City Commission on Human Rights*

By: Leonard Braman

L.D.
By: L.D.

SMITH, BUSS AND JACOBS, LLP
*Attorneys for Petitioner*

By: Jennifer L. Stewart, Esq.