Comm'n on Human Rights ex rel. Carol T. v. Mutual Apartments, Inc.

OATH Index No. 2399/14 (Mar. 13, 2015)

Petitioner established that respondents discriminated against complainants by failing to provide them with the reasonable accommodation of the waiver of the no-dog policy to permit them to keep a companion or emotional support dog. Compensatory damages of $40,000 and $25,000 recommended, along with a civil penalty of $25,000 and affirmative relief in the form of training, institution of an anti-discrimination policy, and withdrawal of the holdover action filed in housing court. Damages and civil penalty recommended against corporate respondents only.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS EX REL. CAROL T. and CINAMMON T.
Petitioner
-against-
MUTUAL APARTMENTS, INC., PRESTIGE MANAGEMENT, INC., and SHIRLEY SMOOT
Respondents

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a proceeding commenced by the New York City Commission on Human Rights ("Commission"), on the complaint filed by Carol T. ("Carol") and Cinnamon T. ("Cinnamon"),[1] alleging discrimination on the basis of disability against respondents Mutual Apartments, Inc., Prestige Management, Inc., and Shirley Smoot. Petitioner asserts that respondents violated the New York City Human Rights Law, Administrative Code section 8-107, by failing to provide complainants with a reasonable accommodation, the waiver of the housing cooperative's no-dog

[1] The complainants' full names have been redacted to protect their privacy interests, in light of the extensive discussion of their medical histories and conditions. *See* 48 RCNY § 1-49(d) (Lexis 2014); *Comm'n on Human Rights v. Riverbay Corp.*, OATH Index No. 1300/11 at n. 1 (Aug. 26, 2011), *adopted*, Comm'n Dec. & Order (Jan. 9, 2012) (redacting complainant's name in light of extensive discussion of her mental health disorder); *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) (same).

rule, to permit the complainants to continue living with their shih tzu puppy, Swag, who petitioner contends is a companion or emotional support animal. Admin. Code § 8-107 (Lexis 2014). Respondents deny that complainants are disabled and further deny that they engaged in unlawful discrimination.

At a three-day trial, petitioner presented the testimony of: both complainants; therapist Helen Schwartz; psychiatrist Ubaldo Leli; Gwendolyn Leary, a member of the Board of Directors ("the Board") at Mutual Apartments, Inc; Alex Heron, a security guard at Mutual Apartments as well as the President of the Board; and respondent Smoot. Respondents called one witness, Carol's husband, Michael T. ("Michael"). The record was left open to permit the parties to file post-trial briefs.

As discussed below, I find that when notified that Swag provided emotional support and "mental therapy" to complainants, respondents failed to engage in the requisite interactive process to assess the needs of complainants and the reasonableness of waiving the no-dog rule. Respondents' sole action was to initiate an eviction holdover proceeding against complainants, which was marked off calendar on March 18, 2014, on Carol's motion for a stay pending resolution of this case (Resp. Ex. B). Respondents' failure to engage in the interactive process and to permit complainants the reasonable accommodation of a companion animal or emotional support animal constituted illegal discrimination under the New York City Human Rights Law.

I recommend that Carol be awarded compensatory damages of $40,000 for mental anguish, that Cinnamon be awarded compensatory damages of $25,000 for mental anguish, and that a civil penalty of $30,000 be imposed. I recommend that damages and the civil penalty be assessed against the corporate respondents only. Further, I recommend that all respondents and any other individuals employed or engaged in a supervisory or managerial capacity should be required to undergo anti-discrimination training, providing proof of completion, and that respondents should be required to withdraw their eviction proceeding against complainants.

ANALYSIS

The complainants are a mother and daughter who reside in an apartment in a Mitchell-Lama cooperative building at 636 Brooklyn Avenue in Brooklyn. Carol, the mother, has resided in the building since October 1992, and lives with her three children, including Cinnamon, and their dog, Swag (Carol: Tr. 318). Michael, Carol's husband and Cinnamon's father, lives

separately from the family (Carol: Tr. 342, 382; Michael: Tr. 463, 464). The name of the housing cooperative is Mutual Apartments, Inc. (Tr. 162). Prestige Management is the management company for Mutual Apartments, and Ms. Smoot has been the managing agent or property manager for Prestige since December 2011 (Smoot: Tr. 162). The building was estimated to contain 159, 160, or 180 apartment units, with about 700 or 800 tenants (Smoot: Tr. 164, 210; Heron: Tr. 231).

It is undisputed that the building has a no-dog policy. There is a sign in the front window of the building lobby which says, "NO DOGS ALLOWED" (Resp. Ex. A). Carol previously served on the Board of Directors for the cooperative (Tr. 369-70), and according to Ms. Smoot and Mr. Heron, was on the Board when it passed its no-dog policy (Smoot: Tr. 210; Heron: Tr. 262-63). The policy, dated June 9, 2010, indicates, "Please be advised that dogs are not allowed to be harbored in the apartment, unless written consent and approval is granted by the Housing Company." It further provides that shareholders who are "illegally harboring a dog" are in violation of the House Rules and Regulations, and their actions "may lead to legal intervention and DHCR proceedings" (Pet. Ex. 6). The policy does not indicate the circumstances in which consent to keep a dog might be granted, nor the procedure for making a request to keep a dog.

It is also undisputed that Michael brought Swag into Carol and Cinnamon's home in April 2013. The dog was a gift for Cinnamon because of her depression (Carol: Tr. 338-39; Cinnamon: Tr. 422; Michael: Tr. 467, 475). Michael did not testify about how he brought the dog into the building. However, Mr. Heron testified that Michael walked into the building with Swag hidden in his coat. Mr. Heron stopped Michael and told him there was a "no dog" sign, which Michael said he did not see. Michael retreated. However, as Mr. Heron observed through the zoom lens on his camera, Michael then put Swag into a bag, put the bag in a shopping cart or baby stroller, and rolled the dog into the building (Tr. 268). Mr. Heron testified that he felt it was inappropriate to look inside the bag, so he let Michael proceed and resolved to speak to Carol about it (Tr. 268-69). In the absence of any contradictory testimony, I credited Mr. Heron's testimony that Michael brought Swag into the building in a surreptitious manner.

The parties further agree that about two days later, Mr. Heron saw Carol in the lobby of the building and spoke to her about the dog. By all accounts, Mr. Heron told Carol that he had seen Michael bring a dog into the building and that Carol replied that the dog was for Cinnamon (Heron: Tr. 255; Carol: Tr. 346). The parties disagree about the remainder of the conversation.

Carol testified that she told Mr. Heron, "The dog is for Cinnamon, Cinnamon is suffering from depression" (Tr. 346). Mr. Heron testified that Carol did not indicate that the dog was intended to help Cinnamon with depression or any other mental illness (Tr. 255-56, 270). Mr. Heron testified that Carol never spoke to him after this (Tr. 276). Thus, he testified that he was not aware that either Carol or Cinnamon had emotional or psychological problems (Tr. 257).

Mr. Heron's testimony that he did not know either complainant had psychological problems flatly contradicted statements that he made in an affidavit submitted in the holdover action in housing court, in opposition to petitioner's motion to dismiss for lack of notice:

> I have had extensive conversations with . . . Carol regarding her harboring of a dog in the Apartment both before and after the Notice to Cure and Notice of Termination were served. Mrs. T . . . admitted she received the notices and . . . Petition, but claimed in these conversations that her daughter required the dog as . . . an emotional support animal. She even went so far as to state that her daughter's doctor had provided her with a letter to that effect, which was ultimately provided to Petitioner's counsel.

(Pet. Ex. 7, ¶ 7). Mr. Heron acknowledged signing the affidavit but contended that it did not "accurately reflect" what took place (Tr. 259, 260). This was unpersuasive.

Moreover, I found it plausible that Mr. Heron's frustration at the presence of Swag in the building caused him to shade his testimony to present himself and the cooperative in the best possible light. More than once, Mr. Heron noted that Carol, having previously served on the Board, should have known that she could not have a dog living in her apartment. Mr. Heron was clearly very unhappy at Swag's surreptitious entrance into the building and focused his attention on Swag and Carol. Indeed, in testifying that Carol transported the dog in a baby carriage for about a month, he acknowledged tracking their movements with his zoom lens. He further testified that when Carol started walking Swag on a leash, it caused a "big problem" because many other people in the building also wanted a dog (Tr. 272-73).

I concluded, based upon Carol's testimony and Mr. Heron's affidavit, that Carol told Mr. Heron, the President of the Board of Mutual Apartments, that Swag was needed to help Cinnamon with her depression.

The evidence further demonstrated that Mr. Heron informed Ms. Smoot of the presence of the dog within a few days after speaking to Carol (Heron: Tr. 256-57) and that Ms. Smoot and Carol engaged in an e-mail exchange about Swag on July 9, 2013. The e-mail chain (Pet. Ex. 5)

shows that Ms. Smoot sent Carol an e-mail at 11:10 a.m., reading, "Hi Carol. Please call me when you get a chance. We have another issue!!" Carol responded at 11:15 a.m., "Hi Ms. Smoot, I am calling. You can call me at [phone number redacted]." About half an hour later, at 11:42 a.m., Ms. Smoot wrote, "Hi again, Carol. I spoke to the attorney and he stated you must go to court and prove your claim. Therefore, the attorney will send you a notice to cure & then after that, a notice to terminate." At 1:19 p.m., Carol replied as follows:

> Dear Ms. Smoot:
>
> Please note: Our beautiful dog is a 6 months, 10lb [sic] Shih Tzu. A well-behaved lapdog. He provides mental therapy for me and my daughter Cinnamon. Mr. Heron has sighted our dog on a few occasions and I explained he was of service to our family. Swag has lived with us for the past 5 months and it will be devastating to remove him from the family.
>
> Please consider this situation.

At 1:39 p.m., Ms. Smoot replied, "So, I guess, these are the points you should bring up in court." At 1:50 p.m., Carol thanked Ms. Smoot for her response.

Carol and Ms. Smoot provided further clarification about the e-mail exchange in their testimony. Carol testified that she told Ms. Smoot that Cinnamon suffers from depression and the dog was there to help both her and Cinnamon with their "mental needs" (Tr. 347). According to Carol, Ms. Smoot said she would call her attorney and get back to Carol (Tr. 347). Ms. Smoot testified that she recalled speaking briefly with Carol on the telephone on July 9, during which Carol said her daughter was depressed (Tr. 179, 180). Further, Ms. Smoot testified that she contacted the attorney for the cooperative, and asked the attorney if she should ask Carol for "documentation" (Tr. 165). The attorney said, "no, let her prove it in court" (Tr. 165).

Ms. Smoot testified that after she got Carol's response, indicating that Swag "provides mental therapy" for Carol and Cinnamon, she did not talk to Carol about how the dog provides therapy (Tr. 177), she never discussed Carol or Cinnamon's disabilities with Carol (Tr. 183), and she never requested additional documentation from Carol (Tr. 184). Further, she never told anyone on the Board, or any employee of Mutual Apartments, that Carol said the dog provided mental therapy (Tr. 203, 204). The Board directed her to put Carol "in holdover" and she did so (Tr. 165-66).

A week later, on July 16, 2013, Mutual Apartments served Carol and Michael (the other party on the lease) with a ten-day Notice to Cure (Pet. Ex. 9). The Notice to Cure alleged that Carol and Michael were violating paragraph ten of the lease agreement by harboring a dog in the apartment without permission, and indicated that the landlord would move to evict them if the lease violation was not cured (Pet. Ex. 9). On August 8, 2013, Mutual Apartments served a ten-day Notice of Termination upon Carol and Michael (Resp. Ex. B). Respondents then served Carol and Michael with a holdover petition, dated August 29, 2013 (Resp. Ex. B).

Both Carol and Cinnamon began seeing a therapist, Helen Schwartz, on July 10, 2013, and expressed their fear and anxiety over losing Swag (Schwartz: Tr. 37, 48, 81; Carol: Tr. 386-87; Cinnamon: Tr. 447; Pet. Exs. 2, 3). On March 10, 2014, distraught over the thought of losing Swag, Carol began seeing Dr. Leli for psychiatric care. Dr. Leli, who had treated Carol previously, re-evaluated her and concluded that she was suffering from major depressive disorder in addition to panic attacks (Leli: Tr. 134; Carol: Tr. 404-05; Pet. Ex. 4). On July 23, 2014, Carol began seeing another therapist, Robert Sweeney, when Ms. Schwartz was on vacation (Tr. 337; Pet. Ex. 14).

Carol testified that she appeared in housing court on September 16, 2013, and obtained an adjournment. Further, she testified that she presented two letters, one from Dr. Lee (Pet. Ex. 1) and one from Ms. Schwartz (Pet. Ex. 10), to the lawyer for Mutual Apartments. Dr. Lee is Carol's internist and had treated her for many years for anxiety and depression (Pet. Ex. 8). His letter, dated August 18, 2013, indicated that Carol has been "medically diagnosed" with diabetes, sleep apnea, and depression, that Carol's dog has helped her cope with depression, and that he "strongly" advised that Carol keep the dog (Pet. Ex. 10). Ms. Schwartz's letter, dated August 1, 2013, indicated that Cinnamon had a long-standing history of depression and had been in psychotherapy since July 15, 2013, due to depression and anxiety (Pet. Ex. 1). Ms. Schwartz further indicated in the letter, "an animal, small Shih-tzu puppy, is recommended in helping [Cinnamon] maintain a sense of responsibility to the animal, adhere structure, maintain discipline and improve her sense of empathy, as well as her coping skills in general" (Pet. Ex. 1). Ms. Schwartz included her office and cell phone numbers in her letter, and indicated that she could be called at any time with questions (Pet. Ex. 1). Dr. Lee's letter also included his telephone number on the letterhead (Pet. Ex. 10). According to Carol, the lawyer for Mutual Apartments reviewed the letters, but did not make copies, and did not ask any questions regarding her or

Cinnamon's mental or medical illnesses, or Carol's request to keep the dog (Tr. 353). Respondents did not rebut Carol's testimony that she showed these letters to the attorney for the cooperative.

Carol later retained an attorney, Mark Ward, through her husband's legal services plan (Tr. 356). Mr. Ward wrote to the attorney for Mutual Apartments on October 31, 2013, enclosing Ms. Schwartz's August 1, 2013 letter and highlighting Ms. Schwartz's statement that the dog was part of Cinnamon's treatment for depression and anxiety (Pet. Ex. 12). Mr. Ward requested that the cooperative terminate the holdover proceeding, asserting that maintaining the proceeding violated the City Human Rights Law (Pet. Ex. 12).

Mutual Apartments did not terminate the holdover proceeding, and on December 19, 2013, Carol and Cinnamon filed their complaint with the Human Rights Commission.

Carol e-mailed Ms. Smoot on June 2, 2014, asking if Ms. Smoot could arrange for her to meet with Mutual Apartment's Board of Directors prior to the commencement of the OATH proceeding (Pet. Ex. 11). The e-mail chain shows that the next day, June 3, at 9:43 a.m., Ms. Smoot replied, "I need to know your purpose for requesting to meet with the Board so I can let them know." Carol replied, ten minutes later, "It's to discuss the situation with the dog." Ms. Smoot replied that the holdover proceeding had already been initiated against Carol because of the dog, and that "[a]ll conversations regarding this issue must be address [sic] with the attorneys assigned to the case." Additionally, she noted that the Board was not in session over the summer and was not scheduled to meet again until September 2014 (Pet. Ex. 11).

Both Ms. Smoot and Mr. Heron acknowledged that Carol had asked to speak to the Board, and could not, because the Board was not in session, but both mistakenly thought that Carol's request was made in August 2013, rather than June 2014 (Smoot: Tr. 226; Heron: Tr. 287-89). Ms. Smoot testified that she spoke to Ms. Leary, another Board member, about Carol's request. According to Ms. Smoot, Ms. Leary told her it would be inappropriate for Carol to speak to the Board, since the matter was in court (Tr. 226). Ms. Leary denied speaking with Ms. Smoot about this, and indicated that Carol had brought up the subject of the dog at the last shareholder's meeting in May 2014 (Tr. 312, 313, 316). After the meeting, Ms. Leary said she spoke to Carol, who told her that she did not know the proper procedure, and that she should have gone to the Board first (Tr. 314).

I

The question before me is whether respondents discriminated against complainants under sections 8-107(5)(a)(2) and 8-107(15)(a) of the Human Rights Law. Section 8-107(5)(a)(2) broadly prohibits discrimination in housing on the basis of disability. More specifically, it prohibits the "owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation . . . or any agent or employee thereof" from discriminating against any person on the basis of disability "in the terms, conditions or privileges of the . . . rental or lease of any such housing accommodation . . . ." Admin. Code § 8-107(5)(a)(2) (Lexis 2014). Section 8-107(15)(a) requires that a housing provider, including an owner, managing agent, or agent or employee of an owner or managing agent, "shall make reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." Admin. Code § 8-107(15)(a) (Lexis 2014).

The cooperative building at 636 Brooklyn Avenue is a housing accommodation within the Human Rights Law. *See* Admin. Code § 8-102(10) (Lexis 2014) (defining "housing accommodation" as "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"). As the owner of the cooperative, the cooperative's managing agent, and the managing agent's employee, Mutual Apartments, Prestige Management, and Ms. Smoot, respectively, are prohibited from engaging in housing discrimination. *See Bartman v. Shenker*, 5 Misc. 3d 856, 863 (Sup. Ct. N.Y. Co. 2004) (denying motion to dismiss discrimination complaint against managing agent of building owner and finding ". . . the Administrative Code . . . extend[s] liability for discriminatory acts to agents of the owner").

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

Respondents, relying upon four appellate state cases which interpreted either the New York State Human Rights Law, Exec. Law § 296, or the federal Fair Housing Act, 42 U.S.C. § § 3601, *et seq.*, urge in their post-trial brief that petitioners must demonstrate that they have a disability, that they are qualified for their tenancy, that because of their disability it is "necessary" that they keep the dog in order to use and enjoy their apartment, and that reasonable

accommodations can be made to permit them to keep the dog (Resp. Br. at 9-10) (citing *Kennedy Street Quad, Ltd. v. Nathanson*, 62 A.D.3d 879 (2d Dep't 2009); *105 Northgate Coop. v. Donaldson*, 54 A.D.3d 414 (2d Dep't 2008); *One Overlook Ave. Corp. v. NYS Division of Human Rights*, 8 A.D.3d 286 (2d Dep't 2004); *Landmark Properties v. Olivo*, 5 Misc. 3d 18 (App. Term, 2d Dep't 2004)).

Petitioner, on the other hand, contends in its brief that the City Human Rights Law does not require proof that the dog is necessary in order for the complainants to use or enjoy their apartment. Rather, petitioner relies upon the standard recently enunciated by this tribunal, and specifically adopted by the Commission, in *Commission on Human Rights v. Riverbay Corporation*, OATH Index No. 1300/11 (Aug. 26, 2011), *adopted*, Comm'n Dec. & Order (Jan. 9, 2012). Under this standard, petitioner must prove five elements in order to establish a *prima facie* case of discrimination: (i) complainants have a disability; (ii) respondents knew or should have known of the disability; (iii) an accommodation would enable complainants to use and enjoy their apartment; (iv) the accommodation is reasonable; and (v) respondents refused to provide the accommodation. *Riverbay Corp.*, OATH 1300/11 at 14, *adopted*, Comm'n Dec. & Order at 13 (finding that the Human Rights Law "requires an independent, and more liberal, interpretation of its terms than comparably worded State and Federal laws" and that "the ALJ followed that requirement . . . and properly applied the New York City Human Rights Law").

Respondents incorrectly invoke the wrong standard of proof by asserting that petitioner must establish that it is necessary for them to keep the dog. Both the State Human Rights Law and the federal Fair Housing Act require a showing that a requested accommodation "may be necessary" to afford equal use and enjoyment of a dwelling. *See* Exec. Law § 296(2-a)(d)(2) (Lexis 2014); 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. 100.204. By contrast, as Judge Richard observed in *Riverbay*, the City Human Rights Law "makes no reference to any 'necessity.'" *Riverbay*, OATH 1300/11 at 12. Rather, it requires that a reasonable accommodation be made "to enable a person with a disability" to enjoy the right or rights in question. Admin. Code § 8-107(15)(a).

The more liberal standard set forth in the City Human Rights Law is consistent with the fact that the City Human Rights Law generally affords more protections than either the State Human Rights Law or federal statutes. *See Romanello v. Sanpaolo, S.p.A.*, 22 N.Y.3d 881, 884 (2013) ("The City [Human Rights Law] . . . affords protections broader than the State [Human

Rights Law.]"); *Albunio v. City of New York,* 16 N.Y.3d 472, 477-78 (2011) (provisions of the City Human Rights Law must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible").

The Local Civil Rights Restoration Act of 2005 ("Restoration Act"), which amended the City Human Rights Law, mandated that the City Human Rights Law's provisions were to "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 . . . have been so construed." Admin. Code § 8-130 (Lexis 2014). Thus, as Judge Richard noted in *Riverbay,* the Restoration Act "mandates a more liberal construction and broader application of remedies under the City Human Rights Law." *Riverbay,* OATH 1300/11 at 13. *See Williams v. NYC Housing Auth.,* 61 A.D.3d 62, 66 (lst Dep't 2009) (counterpart state or federal human rights laws are viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise") (citations omitted); *Phillips v. City of New York,* 66 A.D.3d 170, 186 (lst Dep't 2009) (in adopting a broader interpretation of "reasonable accommodation," noting that "the import" of the Restoration Act "was to reject unequivocally the practice of construing City [Human Rights Law] provisions in tandem with their state and federal counterparts"). *See also Velazco v. Columbus Citizens Foundation,* 2015 U.S. App. LEXIS 2278 at *2-3 (2d Cir. 2015) (finding that the Restoration Act created a "one-way ratchet, by which [i]nterpretations of New York state or federal statues with similar wording may be used to aid in interpret[ing] the [New York City Human Rights Law], insofar as 'similarly worded provisions of federal and state civil rights laws [would constitute] a floor below which the [New York City Human Rights Law] cannot fall.'") (citations omitted).

Considering the broad and remedial purpose of the City Human Rights Law, and the specific language of section 8-107(15), I find, in accordance with the holding in *Riverbay*, that petitioner need not prove that it is *necessary* for complainants to have Swag in order to use and enjoy their apartment. Rather, the issue is whether having Swag enables or helps complainants to use and enjoy their apartment. *See Phillips,* 66 A.D.3d at 182 n. 12 (the term "accommodation" is "intended to connote any action, modification or forbearance that helps ameliorate *at least to some extent* a need created by a disability").

II

I further find that petitioner has established its *prima facie* case under the five prongs established in *Riverbay.*

Complainants are disabled

First, petitioner established that complainants are disabled under the City Human Rights Law. The definition of disability in the law is broad and includes "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Admin. Code § 8-102(16)(a). The First Department has stressed that "the existence of a 'disability' for City [Human Rights Law] purposes is *fully and conclusively established* by nothing more than the existence of 'any physical, medical, mental or psychological impairment.'" *Phillips*, 66 A.D.3d at 184 (emphasis added). Depression and anxiety fall within the scope of a "psychological impairment." *See Riverbay,* OATH 1300/11 at 14 (finding major depressive disorder and stress disorder to be a "mental or psychological impairment"); *see also Comm'n on Human Rights ex rel. Stamm v. E & E Bagels, Inc.*, OATH Index No. 803/14 at 5 (Mar. 21, 2014) (finding complainant disabled under section 8-102(16) of the Administrative Code when she suffered from chronic depression, hearing deficits, and balance and mobility issues). Depression and similar illnesses have also been held to constitute a disability under state and federal law. *See generally Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Sealey*, OATH Index No. 1738/06 at 6-7 (Sept. 25, 2006) (finding respondent's bipolar disorder constitutes a disability under the New York State Human Rights Law); *Exelberth v. Riverbay Corp.*, H.U.D. ALJ No. 02-93-0320-1 (Mar. 1, 1995) (finding depression constitutes a disability under the federal Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*).

Here, Carol credibly testified that she has suffered from depression and anxiety her entire life, which makes her feel "hopeless" and "sad" (Tr. 319). She also suffers from panic attacks, has type 2 diabetes, is insulin dependent, and has sleep apnea. For many years she has been on medication; currently, she takes clonazepam and lexapro for her depression, anxiety, and panic attacks (Tr. 319-20). Carol's internist, Dr. Lee, treated her for anxiety and depression until Carol experienced a severe anxiety attack that led to an emergency room visit in April 2009. After that Carol saw Dr. Leli for psychiatric treatment until December 2009. After December 2009, Dr. Lee continued to treat her mental health issues, prescribing medications, including Prozac and Zoloft (Tr. 375).

Carol's testimony about her history of depression and anxiety was corroborated by medical records from various sources, including Dr. Lee's treatment records from 2005 through the present (Pet. Ex. 8), hospital records from Long Island College Hospital detailing the emergency room visit in April 2009 (Pet. Ex. 13), and the records of Dr. Leli (Pet. Ex. 4). The electronic medical record of Carol's visits to Dr. Lee indicate that beginning in 2005, he considered depression a chronic problem, and from April 2009, he cited anxiety as well. Dr. Lee prescribed a number of different anti-depressant and anti-anxiety medications from 2006 through the present (Pet. Ex. 8). The records of Dr. Leli, who saw Carol starting on May 6, 2009, indicate that he diagnosed her with panic anxiety with mild agoraphobia, and initiated a trial of klonopin (Pet. Ex. 14).

Cinnamon and Carol testified that Cinnamon has also struggled with depression for many years, and that she was treated by a social worker and psychiatrist for about six or eight months in 2005, at the Brooklyn Mental Health Group. At that time she had "severe depression," with difficulty getting out of bed as well as suicidal thoughts (Tr. 42). She was prescribed Prozac, which she took for two months prior to discontinuing it because her suicidal ideation increased (Carol: Tr. 398-400; Cinnamon: Tr. 419-420, 456). Cinnamon also saw a mental health counselor in college, because she was very depressed (Carol: Tr. 399-400; Cinnamon: Tr. 456-57). Cinnamon testified that after she graduated, she was "very depressed" about being unemployed for almost two years (Tr. 425, 450). She explained that she felt "horrible, didn't want to do my hair, just the same suicidal thoughts came back into play, and lots of anxiety. I didn't really have much [sic] goals" (Tr. 421). She rarely left the house. She had acquaintances, "Facebook people" who she rarely saw, rather than real friends (Tr. 443). Although she had a boyfriend, who she began dating in November 2011, she characterized their relationship as "toxic" and "abusive" (Tr. 442, 436-37).

Cinnamon and Carol acknowledged, however, that they did not have medical records of Cinnamon's 2005 treatment. Carol testified that the Brooklyn Mental Health Group had gone into bankruptcy and she had been unable to retrieve Cinnamon's records (Tr. 398-400). She also testified she had asked her health insurance provider for the records, but they were not available (Tr. 400).

Respondents contend that complainants have not shown that they are disabled. Respondents point to the lack of medical records relating to Cinnamon prior to her first

appointment with Ms. Schwartz on July 10, 2013, and further highlight the hiatus in Carol's treatment by Dr. Leli between December 2009 and April 2014. Respondents argue that Carol was "able to fully function" until she got the dog, and that it is the dog, and the ensuing battle over whether complainants can keep the dog, that has created "this stressful situation that requires the treatment that [Carol] is undergoing" (Resp. Br. at 6).

I disagree. As a legal matter, the fact that one copes with a disability does not negate the existence of the disability. *See Riverbay,* OATH 1300/11 at 16 ("Nor is petitioner's case disadvantaged by the fact that Mrs. D works and is sometimes well-functioning at home."); *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Comm'n,* 121 Cal. App. 4th 1578 at 1595 (3d App. Dist. 2004) (fact that complainant was capable of working and sometimes well-functioning at home did not mean that her disabilities did not interfere with the use and enjoyment of her home).

Moreover, although Carol acknowledged that she has held a full-time job as an administrative assistant at Bank of America since August 1997 (Tr. 342-43), the record established that she continued to struggle because of her disability. When questioned by respondents' counsel as to whether she was functioning without a dog before April 2013, Carol credibly responded that she "copes" (Tr. 379) and that her "depression comes on and off" (Tr. 410). Carol explained that before she and Cinnamon got the dog, she had no more sick days left at her job (Tr. 340) and that she had been warned about her attendance (Tr. 370). That Carol did not see Dr. Leli for treatment between December 2009 and April 2014 is of little consequence. Dr. Lee continued to treat her mental health issues.

Although petitioner did not produce medical records to corroborate Cinnamon's testimony, I found both her and Carol to be extremely credible regarding Cinnamon's history of depression, which included suicidal ideation in 2005. Cinnamon's decision to forego antidepressants did not undermine her credible testimony about her illness and the suffering it brings. I found that Cinnamon displayed candor in acknowledging, "I absolutely don't want to take medication. I'm afraid of the side effects . . . because of the suicidal thoughts that increased, that's why" (Tr. 440). These are credible and logical reasons for her choice. I also credited Carol's testimony that from the time Cinnamon suffered her "great depression" in 2005, Carol started to research "anything that could help a young girl with depression other than Prozac or medication" (Tr. 382).

Respondents seem to assert that any anxiety and depression that Carol or Cinnamon are now experiencing is their own fault, because they got Swag without respondents' permission and Mutual Apartments has sued them in housing court as a result. This explanation is belied by the evidence above. Carol and Cinnamon have suffered from depression and anxiety for many years. The suggestion that they simply made this up so they can keep Swag is unsupported. It is true that complainants are extremely anxious and depressed about losing the dog, and their mental health providers feel that the loss would be traumatic (Carol: Tr. 337, 361; Cinnamon: Tr. 430-31; Schwartz: Tr. 38, 42-44, 48, 52-53, 81, 82, 84, 86, 106; Leli: Tr. 137). However, this does not mean that the complainants were not depressed before getting the dog. Indeed, if anything, the complainants' anxiety over losing Swag illustrates the major role that the dog has played in helping alleviate the symptoms of their disabilities so they can better cope with everyday life.

Accordingly, prong one of the *prima facie* test is satisfied.

Respondents knew or should have known of complainants' disability

Petitioner further established that respondents knew or should have known that complainants are disabled. Carol credibly testified that she told Mr. Heron, the Board President, that Swag was for Cinnamon, who suffers from depression. Additionally, Carol sent Ms. Smoot an e-mail stating that Swag "provides mental therapy" for herself and Cinnamon. It was undisputed that Carol told Ms. Smoot that her daughter was depressed, and I credited Carol's testimony that she also told Ms. Smoot that the dog was there to help her and Cinnamon with their "mental needs." Ms. Smoot asked the attorney for the Board if she should ask Carol for documentation, but the attorney told her not to ask for documentation. Thus, respondents knew of Carol and Cinnamon's professed claims of disability, but willfully chose to ignore them.[2]

Moreover, Carol credibly testified that, once the housing court action was commenced, she showed the attorney for Mutual Apartments two letters, one from Dr. Lee, attesting to her disability, and the other from Ms. Schwartz, attesting to Cinnamon's disability. Mr. Ward, who became Carol's attorney in the holdover matter, affirmed that he wrote to counsel for Mutual Apartments, enclosing Ms. Schwartz's letter.

[2] It appears that Ms. Smoot, although liable under the Human Rights Law for her role in the discriminatory conduct, acted solely upon the advice of counsel for Prestige Management and Mutual Apartments. As discussed below, given these facts it seems inappropriate to assess a civil penalty against Ms. Smoot or hold her liable for compensatory damages.

Thus, petitioner established that, through statements made by Carol and letters provided by Carol and Cinnamon's treating mental health providers, respondents were on notice that Carol and Cinnamon suffered from a disability within the meaning of the City Human Rights Law. Hence, prong two of petitioner's *prima face* test is satisfied.

An accommodation would enable complainants to use and enjoy their apartment

Petitioner proved that an accommodation would enable complainants to use and enjoy their apartment, in accordance with section 8-107(15)(a) of the Human Rights Law. The evidence was overwhelming that Swag has been an immensely positive force in helping Cinnamon and Carol cope with the effects of otherwise debilitating and pre-existing depression, anxiety, and in the case of Carol, panic attacks and agoraphobia.

Both Carol and Cinnamon testified that Swag provides emotional support and that having to care for his needs provides much-needed structure to their daily lives. Carol testified that Swag has "done wonders as far as healing, mental healing," and is "like medication without side effects" (Tr. 339). Before she got Swag, she felt that she was "living in a cycle of . . . depression [and] anxiety," but Swag "has helped [her] to cope" (Tr. 345). Swag "gets [her] up and out of a dark place" (Tr. 340). Before she got Swag, she would sometimes sleep all day long; now, having Swag with her motivates her to get out of bed and go to work (Tr. 340). Swag also helps Carol to sleep at night. She testified that she hates to go to sleep because sleeping can take her into a "dark spin" of "horrible, horrible nightmares" and "bouts of anxiety" (Tr. 340). Swag's presence helps calm her so she can sleep and also soothes her when she tries to "fight" the anxiety attacks and nightmares and return to sleep (Tr. 340). Moreover, Swag helps her with her sleep apnea and her agoraphobia. Although her medication sometimes makes her drowsy, Swag forces her to be alert and focused during the day, which helps her stay awake (Tr. 341). Swag also makes it easier for her to cope with her agoraphobia when she is driving (Tr. 341).

Similarly, Cinnamon testified that Swag is "a relief and comfort" (Tr. 423) who "keeps [her] motivated and positive and makes [her] a more responsible person" (Tr. 426). She walks Swag daily and trains him (Tr. 423). Before she got Swag she barely left the house; after she got Swag, because of her need to exercise him, she runs with him about four days a week, which motivates her "to stay in shape" (Tr. 425). She is more social, has a part-time job, and is thinking about pursuing a graduate degree (Tr. 444, 446). She testified that Swag is so appreciative of her presence when she walks through the door that sometimes she "can't wait to

get home" (Tr. 425). Because of Swag, Cinnamon feels "good . . . comfortable [and] safe" at home (Tr. 425).

Dr. Leli and Ms. Schwartz confirmed Swag's role as an emotional support to Carol and Cinnamon. Dr. Leli testified that he has talked with Carol about the dog. Having the dog has structured Carol's time and decreased her level of anxiety. It has helped with her agoraphobia because Carol will leave the house to take care of and walk Swag (Tr. 137). Ms. Schwartz, similarly, testified that Swag "assists" with Carol's "day to day functioning" and "soothes the emotional traumas" (Tr. 41). When Carol is at work, Cinnamon is the caregiver for Swag, and this forces Cinnamon to leave her bed or the apartment to walk Swag and take care of him (Tr. 52). Ms. Schwartz believes that Swag helps ameliorate both Carol and Cinnamon's psychological disabilities (Tr. 107).

It is undisputed that neither Ms. Schwartz nor Dr. Leli prescribed, prior to the complainants' getting Swag, that they get a dog as a companion animal. That, however, is not dispositive of whether waiver of the no-dog rule to allow complainants to keep Swag as an emotional support or companion animal would be a reasonable accommodation. As noted in *Riverbay*, the City Human Rights Law does not require that a companion animal be a part of a physician's treatment plan to be a reasonable accommodation. *Riverbay*, OATH 1300/11 at 16 (finding that it would be a reasonable accommodation to permit complainant to keep a dog in her apartment, notwithstanding that her mental health providers had not prescribed obtaining a dog as a companion animal, and noting, "[t]he fact that the dog was an incidental purchase, while fortuitous, does not diminish the therapeutic effect of her presence."). Here, similarly, complainants' mental health providers testified persuasively that Swag helped ameliorate their disabilities. Their testimony corroborated complainants' credible testimony that Swag's presence reduced their depression and anxiety so that they could better cope with the daily demands of life, including getting out of bed in the morning and leaving the house to go to work, exercising, socializing, driving, staying awake during the day, falling asleep at night, and fighting off night-time anxiety attacks and nightmares. *See also Dep't of Housing & Urban Development ex rel. Evan v. Dutra*, H.U.D. ALJ No. 09-93-1753-8 at 9, 11; 1996 HUD ALJ LEXIS 55 at *17, 22 (Nov. 12, 1996) (Initial Dec. & Order) (where two doctors testified that a tenant "derived significant therapeutic benefit from his pet cat," proof established a "prima facie showing of need for exemption from the no-pet rule and being allowed to keep his cat in his

apartment"); *Exelberth*, H.U.D. ALJ 02-93-0320-1 at 15 (holding that housing cooperative discriminated against tenant who suffered from depression by refusing to grant her a waiver of the no-pet rule, and finding that the tenant's dog "enables her to experience the ordinary feelings enjoyed by persons not otherwise afflicted with her disability").

In sum, petitioner established that the presence of Swag in the complainants' home "ameliorate[s] at least to some extent" a need created by their disabilities, *see Phillips*, 66 A.D.3d at 182 n. 12, and thus is an accommodation which enables both complainants to use and enjoy their apartment. The third prong of the Commission's *prima facie* case has been satisfied.

The accommodation was reasonable

The Commission also proved the fourth prong of its case: that the accommodation of waiving the no-dog rule was reasonable. Pursuant to the New York City Human Rights Law, a reasonable accommodation is "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business." Admin. Code § 8-102(18). The covered entity bears the burden of proving undue hardship. *Phillips*, 66 A.D.3d at 182; *Riverbay*, OATH 1300/11 at 17. Respondents did not allege undue hardship in their verified answer (ALJ Ex. 2). Nor did they claim that permitting the complainants to maintain a comfort animal in their apartment would create an undue hardship. Indeed, Mr. Heron and Ms. Smoot admitted that Mutual Apartments had allowed at least a few residents to keep dogs, because they had dogs before the no-dog policy was instituted on June 9, 2010 (Smoot: Tr. 210; Heron: Tr. 264). Further, although the e-mail announcing the no-dog policy cited a "[h]ealth hazard and possible disturbance of other tenants which arise from the uncontrolled presence of a pet," there was no evidence that Swag was disruptive, disturbing, uncontrolled, or posed a health hazard. *See Exelberth*, H.U.D. ALJ 02-93-0320-1 at 16 (noting that no complaints were filed against tenant who sought an accommodation of the no-pet rule, and further noting lack of evidence that the presence of other pets in the cooperative posed any unreasonable burden).

Mr. Heron testified that an "uproar" erupted when other tenants saw Carol walking Swag and asked if they could have a dog (Tr. 272-73). However, his characterization of an "uproar" seemed overstated. It appeared that Mr. Heron was simply annoyed that other people were asking to have a dog. Moreover, as in *Exelberth*, any suggestion that providing an accommodation to complainants to permit them to have a dog would "unleash a flood of requests

for dog harboring" was "unsupported" by the record, and had "no bearing on the reasonableness of the accommodation" for them. *Id.*

Respondents refused to provide the accommodation

It is without dispute that respondents refused to allow complainants the accommodation of a companion or emotional support animal. Instead, respondents initiated a holdover proceeding in housing court. Respondents continued to maintain that action, even when Carol's attorney, Mr. Ward, requested that the case be terminated and asserted that maintaining it violated the Human Rights Law.

Respondents contend that complainants never made a request for an accommodation. This is mistaken. A request for an accommodation need not take a "specific form." *Phillips*, 66 A.D.3d at 189; *Dutra*, H.U.D. ALJ 09-93-1753-8 at 6, 12 (construing as request for reasonable accommodation a statement by a tenant that he was disabled and needed his cat, even though the statement did not include a specific request to keep his cat as a service animal); *see also Romanello*, 22 N.Y.3d at 882, 885 (holding that lower court erred in dismissing claim under City Human Rights Law where employer fired employee after receiving a letter from his attorney stating that employee did not want to abandon his position even though he was sick and currently unable to work).

Here, on several occasions Carol told Ms. Smoot and other agents or employees of respondents that Swag was needed to assist with Cinnamon or her own mental health.

First, Carol told Mr. Heron that the dog was for Cinnamon because Cinnamon was suffering from depression. Indeed, in his housing court affidavit, Mr. Heron stressed that Carol said Cinnamon needed the dog as "an emotional support animal."

Further, on July 9, 2013, Carol e-mailed Ms. Smoot that the dog "provides mental therapy" for her and Cinnamon, and that it would "be devastating to remove him from the family" (Pet. Ex. 5). Carol asked that Ms. Smoot "[p]lease consider this situation."

Under the City Human Rights Law, Carol's statements constituted a request for a reasonable accommodation.

Well beyond notice-giving, on September 16, 2013, Carol provided medical documentation that the dog was needed by giving the attorney for the cooperative letters from two mental health professionals which documented the need for the dog.

On October 31, 2013, Mr. Ward, mailed a copy of one of the letters to respondents' attorney and asked that the holdover action be terminated.

Finally, on June 2, 2014, Carol requested a meeting with the Board to discuss "the situation with the Board," but was rebuffed and told the Board was not in session. Thus, despite the President of the Board knowing that Carol claimed that Cinnamon needed the dog as an "emotional support" animal, the Board declined to meet with her.

Given these facts, respondents were well aware that complainants wanted to keep the dog as a companion or emotional support animal is incredible. The fact that complainants did not make this request prior to getting Swag does not impugn the integrity of their request. Once the request for this accommodation was made, respondents were required to engage in a good faith interactive process. As enunciated by the First Department in *Phillips*:

> the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached.

Phillips, 66 A.D.3d at 176. The absence of an individualized interactive process represents a violation of the City Human Rights Law. *Id*. (finding that employer failed to engage in requisite interactive process by summarily denying a leave request). *See also Jacobsen v. NYC Health & Hosp. Corp.*, 22 N.Y.3d 824, 837-38 (2014) (finding that the City Human Rights Law "unquestionably forecloses summary judgment where the employer has not engaged in a good faith interactive process") (citations omitted).

Engaging in the interactive process in bad faith and as a pretext to deny a request for an accommodation also represents a violation of the City Human Rights Law. For example, in *Riverbay*, OATH 1300/11, the complainant had submitted a formal request for an accommodation, according to procedures established by the landlord, which included medical information certified by her therapists. She had also undergone an interview with her landlord regarding her need for her dog. Terming the review process as "superficial," Judge Richard found that Riverbay, the landlord, failed in its "duty to inquire" by interviewing the complainant by herself and not consulting her therapists. *Riverbay,* OATH 1300/11 at 19, 20. In its Decision and Order, the Commission on Human Rights termed the interactive process "a sham," stressing

that Riverbay began arranging for the eviction before the complainant had even been interviewed. Comm'n Dec. & Order at 11 (Jan. 9, 2012). *See also Dutra,* H.U.D. ALJ 09-93-1753-8 at 13 (housing provider engaged in un unlawful discrimination under the Federal Fair Housing Act by "rejecting out-of-hand" the opinion of the tenant's treating physician and mental health counselor that he should be allowed to keep his pet cat as an emotional support animal).

Here, respondents failed to engage in this individualized interactive process, despite having ample opportunity to do so. Mr. Heron's only action, upon discovering the presence of Swag, was to alert Ms. Smoot. After learning from Carol that complainants thought the dog provided mental health therapy for both of them, Ms. Smoot not unreasonably asked the attorney for the cooperative for legal advice, including whether she should ask for documentation from Carol. Regrettably, the attorney instructed her not to ask for documentation of the asserted disability. Based on that conversation, Ms. Smoot told Carol that she would have to "go to court and prove [her] claim" (Pet. Ex. 5). Ms. Smoot acknowledged never speaking with Carol about her disabilities or why she needs Swag. She testified that at the Board's direction, she commenced a holdover proceeding against Carol (Tr. 166). Thus, despite knowing that Carol claimed that both she and Cinnamon had disabilities which required the presence of Swag as an emotional support animal, respondents utterly failed in their "duty to inquire."

Ms. Smoot and Mr. Heron testified that the protocol is to commence a holdover proceeding whenever there is an issue with a dog (Smoot: Tr. 166; Heron: Tr. 264). Mr. Heron specified that a holdover proceeding must be filed within a 90-day window or the owner's right to enforce the no-dog clause is waived (Tr. 264). Mr. Heron's testimony appears to accurately reflect the language of section 27-2009.1 of the Administrative Code, which provides that an owner has a three-month period to commence a summary proceeding or action to enforce a lease agreement prohibiting the keeping of a household pet, after which the lease provision shall be deemed waived. Admin. Code § 27-2009.1(b)(Lexis 2014).

Yet the existence of this 90-day window does not divest respondents of their obligation under the City Human Rights Law to consider a request for a reasonable accommodation. By filing the holdover proceeding, without asking Carol for documentation of the purported disabilities or asking to speak to Carol or Cinnamon's mental health providers, respondents failed to engage in an interactive process, in violation of the City Human Rights Law.

Moreover, after the holdover proceeding was filed, respondents were presented with documentation from Carol and Cinnamon's medical providers on two occasions, once from Carol herself and once from Carol's attorney. This was additional evidence of the need for the dog and presented another opportunity for respondents to engage in the interactive process by asking to speak to the mental health providers and considering their statements in good faith. Respondents could also have moved to stay the holdover proceeding, having "protected its contractual rights under the lease by filing suit." *See Riverbay*, OATH 1300/11 at 27 (noting that Riverbay failed to seek a stay of its holdover proceedings).

One further point deserves mention. Respondents seem to assert that they did not have to consider complainants' request to keep Swag as an emotional support animal because complainants did not seek such permission in advance. That, however, is not the law. Providers of housing accommodations are required to give good faith consideration to a tenant's request to keep a pet as a companion or emotional support animal, even if the tenant gets the pet first and asks permission later. A belated request for a reasonable accommodation is not a defense to the failure to consider or provide the accommodation. *See Riverbay*, OATH 1300/11 at 7 (complainant brought small shih tzu dog into her apartment five months before she notified the landlord of the dog's presence); *Exelberth*, H.U.D. ALJ 02-93-0320-1 at 3, 9 (complainant obtained a dog in October 1991, but did not ask for permission to keep the dog as an accommodation for her mental disability until April 1992); *see also United States v. East River Housing Corp.*, 13 Civ. 8650 at 2 (S.D.N.Y. Mar. 2, 2015) (denying motion to dismiss claim that housing cooperative engaged in a pattern or practice of discrimination under federal Fair Housing Act where tenants, threatened with eviction because they had brought dogs into their apartments without prior written consent, requested permission to keep the dogs as a reasonable accommodation to their disability, "which East River in all cases ignored or denied").

For all these reasons, prong five is established.

Thus, petitioner has satisfied the elements of its *prima facie* case. Respondents may prevail by proving an affirmative defense that complainants "could not, with reasonable accommodation . . . enjoy the right or rights in question." Admin. Code § 8-107(15)(b). Respondents have not done so. Indeed, all the evidence is to the contrary, and demonstrates that

the reasonable accommodation of a comfort animal, Swag, will enable complainants to use and enjoy their apartment.

Accordingly, petitioner has established that respondents have discriminated against complainants based upon their disabilities by failing to provide them with a reasonable accommodation, in violation of sections 8-107(5)(a)(2) and 8-107(15)(a) of the Human Rights Law.

FINDING AND CONCLUSION

Petitioner proved by a preponderance of the evidence that respondents, the owner and managing agent of a housing accommodation, and the managing agent's employee, discriminated against tenants by failing to provide them with a waiver of the no-dog rule as a reasonable accommodation for their disabilities.

RECOMMENDATION

Petitioner requests the following relief: $40,000 in compensatory damages for Carol's mental anguish; $25,000 in compensatory damages for Cinnamon's mental anguish; a $30,000 civil penalty, and as affirmative relief, that respondents and any other individuals employed or engaged in a supervisory capacity be required to undergo anti-discrimination training and provide proof of completion, and that respondents withdraw their eviction proceeding against complainants for harboring a dog.

Compensatory damages

The Commission may award damages to complainants who suffer mental anguish because of discrimination upon a sufficient showing of the existence and extent of such injury. Admin. Code § 8-120(a)(8) (Lexis 2014); *Comm'n on Human Rights ex rel. Perez v. Lee's Kapri Cleaners & Glen Lee*, OATH Index No. 101/14 at 5 (Dec. 12, 2013) ("A complainant is entitled to compensatory damages where there is credible evidence of emotional distress."). The standard is whether "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*, 43 A.D.2d 807, 810 (4th Dep't 1973), *rev'd on other grounds*, 35 N.Y.2d 143 (1974); *Riverbay*, OATH 1300/11 at 21.

However, "there 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). Factors that are relevant in assessing compensatory damages are the severity and duration of the discrimination, the level of anguish caused by the misconduct, and comparable awards. *Lee's Kapri Cleaners*, OATH 101/14 at 5 (citing *Comm'n on Human Rights ex rel. Cherry v. Stars Model Management*, OATH Index No. 1464/05 at 17 (Mar. 7, 2006), *adopted*, Comm'n Dec. & Order (Apr. 13, 2006), *aff'd*, 831 N.Y.S.2d 350 (Sup. Ct. N.Y. Co. 2006)).

Damages paid by housing providers for mental anguish vary greatly. *See, e.g., 119-121 E. 97th St. Corp. v. NYC Comm'n on Human Rights*, 220 A.D.2d 79, 85-87 (sustaining $100,000 in compensatory damages for mental anguish); *Riverbay*, OATH 1300/11 ($50,000 for mental anguish); *Comm'n on Human Rights ex rel. Rose v. Co-op City of New York*, OATH Index No. 1831/10 (June 16, 2010*), rev'd*, Comm'n Dec. (Nov. 18, 2010), *modified on penalty*, Index No. 260832/10 (Sup. Ct. Bronx Co. Sept. 21, 2011) ($15,000 for mental anguish). Generally, discrimination that endures over many years will lead to a higher award, as will discrimination that exacerbates a pre-existing disability. *See Riverbay*, OATH 1300/11 at 22-23 ($50,000 award where complainant's anxiety and depression were exacerbated by her fear of losing her dog); *see also Comm'n on Human Rights ex rel. Romo v. ISS Action Security,* OATH Index No. 674/11 at 14-15 (Apr. 12, 2011), *adopted*, Comm'n Dec. (June 26, 2011), *aff'd,* 2011 N.Y. Misc. LEXIS 6489 (Sup. Ct. Queens Co. Dec. 21, 2011), *modified*, 114 A.D.3d 943 (2d Dep't 2013) ($20,000 award where complainant's already existing emotional distress was exacerbated by security guard company's refusal to permit him and his service dog access to a building).

Here, the evidence demonstrated that respondents' actions severely hurt both Carol and Cinnamon. After a hiatus of several years, Carol renewed psychiatric treatment with Dr. Leli. She began to see Ms. Schwartz for therapy, and while Ms. Schwartz was on vacation, suffered "a terrible bout of depression/anxiety," which led her to another therapist, Mr. Sweeney (Tr. 337; Pet. Ex. 14). Carol testified that if she lost Swag, she would "be devastated" because Swag has brought "so much healing" to her home (Tr. 361). Asked how the battle over Swag affects her, she replied, "my mind is always on it . . . it's become the core of [my] existence now, and it . . . really, really heightens my depression and anxiety" (Tr. 361). Carol's therapists corroborated the destructive impact of respondents' actions upon Carol's mental health. Ms. Schwartz testified

that Carol has lost her appetite and become more agitated since the commencement of the holdover proceeding (Tr. 44). Dr. Leli also testified that Carol's symptoms have worsened since the legal conflict over the dog (Tr. 158).

Moreover, it was clear that having to deal with the holdover action was itself a major stressor which exacerbated Carol's anxiety, to the point of precipitating debilitating panic attacks. Carol testified that the Notice to Cure sent her into a "panic," that it made her "anxious, depressed, and nervous" (Tr. 349). On the first housing court date, when she appeared without counsel, she felt "defeated" when respondents' attorney returned the medical documentation she had provided and told her to bring the papers back on the next court date (Tr. 355). Carol testified that she found the whole experience "emotionally draining" (Tr. 356, 361). Perhaps most troubling, she testified that she had an anxiety attack every time she went to housing court, which was a total of four or five times. She described the anxiety attacks as feeling that her "heart was going to give away on me" (Tr. 356). This testimony was credible given Carol's documented history of anxiety attacks.

Petitioner has urged that I consider the damage award in *Riverbay* in assessing the appropriate award for Carol. I agree. *Riverbay* is relevant because its facts are so similar to this case. In *Riverbay,* Judge Richard recommended, and the Commission affirmed, a damage award of $50,000 for mental anguish.[3] As in this case, the complainant was denied the reasonable accommodation of a comfort animal, a small shih tzu. Like complainants here, the complainant in *Riverbay* faced eviction in housing court, which increased her anxiety and depression. However, in *Riverbay*, the complainant endured three years of litigation, which included ten appearances in housing court. This is in contrast to the shorter period of litigation that Carol has had to endure.

Here, considering the length of the discrimination, its devastating impact upon Carol, and awards in similar cases, including *Riverbay,* the Commission's request that Carol be awarded $40,000 in compensatory damages for mental anguish is appropriate, and I so recommend.

A lesser award, although still substantial, should be ordered in compensatory damages to Cinnamon. Cinnamon testified that when she learned that respondents wanted her to get rid of Swag, she felt "horrible" and "disgusted" (Tr. 427). She could not sleep and she felt angry. Her

[3] The parties entered into a post-trial settlement providing for payment of a reduced damage award and civil penalty. *See* Stipulation of Settlement, *Riverbay Corp. v. NYC Comm'n on Human Rights,* Index No. 2600093/2012 (Sup. Ct. Bronx Co.).

depression and her suicidal thoughts returned (Tr. 427). Like Carol, she is consumed with thoughts of losing Swag. Cinnamon testified that she worries "every hour of every day" about losing Swag and that she "would be completely devastated" if that happened (Tr. 430-31). When she learned that the cooperative had commenced legal action, she felt "nervous" and had "horrible panic attacks" (Tr. 428). Although Cinnamon, unlike Carol, was not present for every housing court appearance, she testified that when she went to housing court with her mother, she was afraid that they "were going to be kicked out into the streets" (Tr. 429).

Evidence of mental anguish may be proven by the credible testimony of the complainant alone. *Riverbay*, OATH 1300/11 at 22; *see also NYC Transit Auth.*, 78 N.Y.2d at 216 ("Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct.").

Here, however, Ms. Schwartz corroborated Cinnamon's testimony that her depression and anxiety have increased over the thought of losing Swag. Ms. Schwartz testified that Cinnamon said she was isolating herself at home and staying in bed because she felt depressed and was afraid of losing the dog. Cinnamon felt that Swag suffered as a result because she was not taking care of him at these times (Tr. 68). Cinnamon also told Ms. Schwartz that she could not sleep at night (Tr. 56; Pet. Ex. 3). She referred to Swag as her "baby" and said she would not be able to live without him (Tr. 86).

Considering Cinnamon's testimony, as well as awards in similar cases, I agree that an award of $25,000 in compensatory damages for mental anguish is reasonable, and I so recommend.

The Commission has also requested that I recommend a civil penalty of $30,000.

A civil penalty may be awarded to "vindicate the public interest." Admin. Code § 8-126(a) (Lexis 2014). The purpose of this provision is to "punish the violator" and to "strengthen and expand the enforcement mechanisms of the law so the Commission [may] prevent discrimination from playing any role in actions related to employment, public accommodations, housing and other real estate." *119-121 E. 97th St., Corp*, 220 A.D.2d at 88.

Among the factors to be considered in determining an appropriate civil penalty are 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. *Riverbay*, OATH 1300/11 at 25; *Comm'n on*

Human Rights v. Tantillo, OATH Index Nos. 105/11, 106/11, 107/11 at 7-8 (Feb. 24, 2011), *modified on penalty amount*, Comm'n Dec. & Order (May 23, 2011); *see also 119-121 East 97th St. Corp*., 220 A.D.2d at 88-89. In addition, a "principle of proportionality" should be applied so as to narrowly tailor the penalty to the facts and circumstances of the case. *119-121 East 97th St. Corp*., 220 A.D.2d at 88.

As noted, the facts in *Riverbay* were strikingly similar. There, Judge Richard imposed a $50,000 civil penalty, noting that: Riverbay's refusal to grant a reasonable accommodation lasted three years and caused substantial distress to the complainant; Riverbay subjected complainant to several court appearances in a holdover proceeding when it could have sought a stay; Riverbay previously admitted to violating the Fair Housing Act by refusing to permit the reasonable accommodation of a comfort or emotional support animal; and, Riverbay's apartment complex had over 15,000 dwellings and 55,000 tenants. *Id.* at 25-30. Judge Richard stressed that because of the size of the housing development, as well as Riverbay's prior sanction for similar conduct, a larger penalty was appropriate. *Id.* at 30.

Here, the holdover action was initiated in the summer of 2013 and marked off calendar in March 2014. Carol was subjected to four or five housing court appearances, which is about half of what the complainant in *Riverbay* endured. Moreover, there are no prior judgments of discrimination against respondents and there are about 700 or 800 tenants who reside in Mutual Apartments, which is a mere fraction of the number of tenants in *Riverbay*.

Hence, a substantially smaller civil penalty is warranted. *See, e.g., 119-121 East 97th Street Corp.,* 220 A.D.2d at 88-89 (reducing the civil penalty award of $75,000 to $25,000 in consideration of the fact that the landlords owned only 50 housing units). Nonetheless, a significant penalty is appropriate. Respondents failed to engage in any interactive process with Carol or Cinnamon. Even when told that Swag provided "mental therapy" for complainants, respondents' sole reaction to discovering Swag's presence in the building was to initiate a holdover proceeding in housing court. Moreover, although there are no prior findings of discrimination, the record established that Mutual Apartments and Prestige Management had no procedures in place by which a tenant could seek a reasonable accommodation of the waiver of the no-dog policy. The policy itself (Pet. Ex. 6) states only that dogs are prohibited, "unless written consent and approval is granted by the Housing Company." Nowhere is there any indication that a tenant could make a request for wavier of the policy, much less any statement as

to how that request should be made and what it should include. Despite Mr. Heron's testimony that the policy "implied" a reasonable accommodation process (Tr. 243-44), the policy provided no such notice. Indeed, Mr. Heron admitted that Mutual Apartments had no written policies about what to do if a tenant requests a dog because of illness or disability (Tr. 247).

Similarly, Ms. Smoot testified that she was not aware of any policies or procedures established by Mutual Apartments about what to do if a tenant requests an accommodation for his or her disability (Tr. 164). Nor was she given instructions as building manager about how to respond to such a request (Tr. 164). Rather, she testified that she was instructed to inform the Board if she learned that a tenant was acting contrary to the lease or the house rules, so that the Board can let her know whether she should "put them in holdover" (Tr. 207).

Considering the above, I find that a civil penalty of $25,000, half of that imposed in *Riverbay*, is reasonable, and I so recommend.

I further recommend that both the civil penalty and the compensatory damage awards be assessed against the corporate respondents only, and not against Ms. Smoot. Ms. Smoot is liable under sections 8-107(5)(a)(2) and 8-107(15)(a) of the Human Rights Law for her acts as building manager or managing agent. However, it is clear that she acted upon the instruction of the attorney for Prestige Management and Mutual Apartments, not of her own accord. Indeed, Ms. Smoot appears to have considered entertaining Carol's request to keep the dog, as she telephoned the attorney to ask whether she should get documentation from Carol. Unfortunately, the attorney told her that documentation was not required and that Carol would have to prove her claim in court. It was undisputed that the Board directed Ms. Smoot to put complainants "in holdover." Under these circumstances, it seems unfair to require Ms. Smoot to pay a civil penalty or compensatory damages. *See* Admin. Code § 8-126(b) (Lexis 2014) (mitigating factors may be considered in determination of civil penalty awards).

Petitioner's final request is for affirmative relief, which is authorized by section 8-120(a)(4) of the Human Rights Law. Petitioner seeks a recommendation that respondents and any other individuals employed or engaged in a supervisory capacity be required to undergo anti-discrimination training and provide proof of completion, and that respondents withdraw the eviction proceeding against complainants for harboring a dog. The request for training is entirely appropriate, "considering that the purpose of the law is to eliminate and prevent discrimination." *Comm'n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*,

OATH Index No. 1240/13 at 31 (Mar. 14, 2014) (recommending that employer institute a written anti-discrimination policy and train all staff on the Human Rights Law). I further recommend that all members of the Board of Directors of Mutual Apartments be required to attend such training, and that respondents Mutual Apartments and Prestige Management develop a written policy regarding requests for accommodations relating to comfort or emotional support animals. Finally, I recommend that respondents be ordered to withdraw their eviction proceeding forthwith and grant complainants the reasonable accommodation of a waiver of the no-dog policy to permit them to keep Swag as a companion or emotional support animal.

Faye Lewis
Administrative Law Judge

March 13, 2015

SUBMITTED TO:

CARMELYN P. MALALIS
Commissioner

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