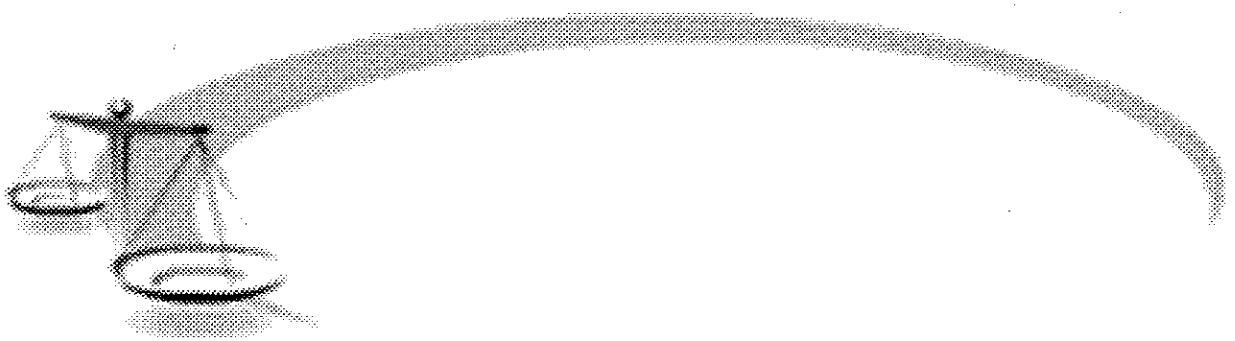

#268485 Christine Emmick
vs. Royalwood Cooperative Apartments, Inc.

Order
Linda V. Parker, Director

STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION
Cadillac Place
3054 West Grand Boulevard
Detroit, Michigan 48202

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
ex rel Christine Emmick,

Claimant,

MDCR No. 268485

v

ROYALWOOD COOPERATIVE APARTMENTS, INC.,

Respondent.
_____/

ORDER
At a meeting of the Michigan Civil Rights Commission
held in Lansing, Michigan on the 26th day of January 2004

In accordance with the Rules of the Michigan Civil Rights Commission, a Hearing Referee heard proofs and arguments and made proposed findings of fact and recommendations regarding the issues involved in this case. Commissioner Dr. Tarun Sharma, has issued an Opinion, adopted by a majority vote of the Commission. That Opinion, as well as a dissenting opinion issued by Commissioner Albert Calille shall be made part of this Order. The Commission therefore makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Claimant is a resident of Michigan.

2. Respondent is a Michigan Corporation of cooperative apartments

3. The claimant became a member of the respondent's cooperative on July 1, 1980 and has remained a member since that date.

4. The respondent has a policy of no dogs, cats or other pets not acceptable to the Cooperative will be kept on the premises. The claimant agreed to and signed the respondent's no pet agreement.

5. The claimant's terminally ill mother moved into the claimant's residence and the claimant became her primary care giver. The claimant's mother depended upon her "service-therapy" dog Max for therapeutic and emotional support during her illness.

6. In 1998 the claimant requested that the respondent waive its no pet policy and allow her and her mother to keep Max as a reasonable accommodation to the respondent's no pet policy.

7. In 1999 the respondent denied the claimant's request and instructed that the claimant had to remove the dog from the cooperative.

8. The claimant's mother moved out of the claimant's residence along with her dog. In August, 2000 the claimant's mother passed away.

9. Subsequent to the death of her mother, the claimant returned Max the dog to her residence and requested that she be allowed to keep the dog as a reasonable accommodation to her own disability.

10. The respondent denied the claimant's requests for accommodation and when the claimant continued to keep the dog at her residence the respondent began formal eviction proceedings against the claimant for violation of their no pet policy.

CONCLUSIONS OF LAW

1. The claimant has a mental disability as defined by the Michigan Persons With Disabilities Civil Rights Act.

2. The claimant provided the respondent with a reasonable request for accommodation of the respondent's no pet policy.

3. The respondent's refusal to grant the claimant a reasonable accommodation resulted in the claimant being denied an equal opportunity to use and enjoy her residence.

4. The claimant was discriminated against in violation of the law.

5. The claimant suffered severe emotional distress as a result of the respondent's actions.

WHEREFORE IT IS HEREBY ORDERED that the respondent:

1. Cease and desist from enforcing the no pets policy against the claimant and other persons with disabilities who require pets as reasonable accommodations to their disabilities.

2. Cease and desist from its action to evict the claimant based upon the no pets policy.

The respondent shall dismiss any pending current eviction action against the claimant for violation of the no pet policy with prejudice.

3. Pay the claimant $45,000 in damages for emotional distress.

4. Pay the Michigan Department of Civil Rights and the Michigan Office of Attorney General $4,654.54 as reimbursement of necessary and reasonable costs incurred in the litigation of this case.

5. Pay $58,095.09 in costs and attorney fees to Michigan Protection and Advocacy Services for legal representation of the claimant.

MICHIGAN CIVIL RIGHTS COMMISSION

Dated: 2/2/04

Linda V. Parker, Director

NOTICE OF RIGHT TO APPEAL

You are hereby notified of your right to appeal this order within thirty (30) days to the Circuit Court of the State of Michigan having jurisdiction as provided by law. MCLA 37.2606

#268485 Christine Emmick
vs. Royalwood Cooperative Apartments, Inc.

Opinion
Dr. Tarun K. Sharma, Commissioner

COPY

STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION
Cadillac Place
3054 West Grand Boulevard
Detroit, Michigan 48202

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
ex rel Christine Emmick,

Claimant,

v

MDCR No. 268485
HUD No. 050108448

ROYALWOOD COOPERATIVE APARTMENTS, INC.,

Respondent.
_____/

OPINION

Dr. Tarun K. Sharma, Commissioner

The claimant, Christine Emmick, (claimant) filed a complaint of housing discrimination with the United States Department of Housing and Urban Development (HUD) on May 23, 2001. In her complaint, the claimant alleged that the respondent, Royalwood Cooperative Apartments, Inc., (respondent), refused to reasonably accommodate her mental disability by allowing her to keep a dog in her unit, notwithstanding the respondent's no pets rule. In addition to denying her accommodation request, the respondent initiated eviction proceedings for the claimant's violation of the no pets rule. The complaint was referred by HUD, to the Michigan Department of Civil Rights (MDCR) for investigation.

The investigation concluded the evidence supported a finding of probable cause to believe the respondent unlawfully discriminated against the claimant. Conciliation was unsuccessful and a charge was issued alleging the respondent failed to provide reasonable accommodation for the claimant's mental disability in violation of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 et seq.. The respondent denies discriminating against the claimant because:

(1) they are not required to accommodate the claimant because they have no credible evidence that she is disabled,

(2) and even if she is, they have no legal duty to allow the claimant to keep her pet which is not a service animal.

A Rule 12 public hearing was held before a Hearing Referee who issued a report finding in favor of the claimant and recommending compensatory and emotional distress damages.

PRELIMINARY ISSUES

Motion in Limine

The respondent filed a Motion in Limine objecting to several of the claimant's evidentiary submissions. These objections are discussed below.

The respondent objects to the introduction of any medical, psychiatric, or treatment records regarding the claimant's disability which had not been provided or made available to the respondent prior to the filing of the complaint in this matter. Similarly, the respondent objects to the testimony of Ralph Hoke, the claimant's treating psychologist, and the expert testimony of Dr. Michael Abramsky, the clinical psychologist to whom the claimant was referred by MDCR. The respondent argues that such information is irrelevant because it was not within the respondent's knowledge when the decision to initiate eviction proceedings against the claimant was made.

The respondent also objects to, as irrelevant, the introduction of evidence relating to the accommodation request of Joyce Grad, a former resident of the respondent. Ms. Grad, like the claimant, had requested that the respondent accommodate her disability by allowing her to keep a small dog in her apartment notwithstanding its no pets rule.

Finally, the respondent objects to the introduction of expert testimony by Susan Duncan, R.N. regarding service animals on the basis that it learned for the first time on October 17, 2001, that she would be called as an expert witness. In addition, the respondent had "relied" on various alleged remarks by MDCR employees during the course of investigation that the department was not claiming that the claimant's dog was a service animal.

Based on our review of the record, the Commission concludes that the respondent's objections are without merit for the following reasons. With respect to the admission of the claimant's prior medical and psychiatric history and the testimony of Ralph Hoke and Dr. Abramsky relating to that history, the Hearing Referee correctly found, for reasons discussed later in this Opinion, that this material could have been made available to the respondent if the respondent had made any good faith effort to obtain the information before making the decision to evict the claimant. Moreover, we also find that this evidence was directly relevant to the issue of whether the claimant had a disability and her accommodation request.

The Hearing Referee also correctly ruled that evidence regarding Joyce Grad's prior accommodation request was admissible to show "pattern and practice" and to show requisite knowledge and intent on the part of respondent with respect to its decisions and actions regarding the claimant's requested accommodation. "Evidence of prior discriminatory acts is often crucial in proving that defendants' current practices reveal discriminatory motivation." *Wyatt v Security Inn Food & Beverage*, Inc., 819 F2d 69, 71 (CA 4, 1987)

We likewise do not find merit in the respondent's objection regarding the testimony of Susan Duncan. The expert testimony of Susan Duncan was relevant as to how service animals assist persons with disabilities, as opposed to how companion animals or other types of animals assist persons with disabilities. Moreover, the respondent has made no showing that the disclosure on October 17, 2001, that Susan Duncan would be called as an expert witness violated any scheduling or discovery order or that the respondent was prejudiced thereby.

Finally, the respondent and the Dissenting Opinion conclude there was no duty to accommodate the claimant because the evidence did not establish that her dog is a service animal. This reasoning implies that designation as a service animal is a prerequisite to requiring an accommodation in housing cases. The dissent relies on *Bronk v Ineichen,* 54 F3d 425 (7th Cir 1995) in support of this position. The majority respectfully disagrees with this implication and finds the dissent's reliance on *Bronk* misleading as it relates to the case at issue.

In *Bronk* two profoundly deaf tenants brought action against their landlord, alleging that landlord had discriminated against them under the Fair Housing Amendments Act (FHAA), a Wisconsin state statute and the Madison Equal Opportunities Ordinance, by refusing to modify their no pets policy and allow tenants to keep their "trained" hearing dog. The dog had been trained by one tenant's brother to, "alert his owners to the ringing of the doorbell, telephone or smoke alarm, and to carry notes." The landlord refused to accommodate their request. The United States District Court for the Western District of Wisconsin entered judgement in favor of the landlord, and the tenants appealed. The Court of Appeals held that: (1) deaf tenants were not entitled to a dog as a reasonable accommodation under FHAA if the dog was not necessary as a hearing dog, but (2) jury instructions were misleading and improper, requiring reversal of the verdict in favor of the landlord. The problem with the jury instructions was that the district court in this case instructed the jury as if there were just one cause of action rather than three. The district

judge combined requirements of local, state, and federal law in instructing the jury. In vacating the lower court decision, the Court of Appeals decided these instructions were confusing because they,

> implied that as a matter of law it was reasonable for landlord to demand the dogs training credentials from a school, or to make the dogs residence contingent on plaintiff's accepting responsibility for damages caused by their dog. A jury could logically infer from this that without school training, a dog cannot be a reasonable accommodation. *The federal statute, however, does not say any of these things, and there is no basis for imputing them into a text that is silent on the subject.* While it is true that reasonable accommodation must have some meaning, in the context of this case, we have already spelled out that meaning. The accommodation must facilitate a disabled individual's ability to function, and it must survive a cost-benefit balancing that takes both parties' needs into account. Professional credentials may be part of that sum; they are not its *sine qua non.* Id., p. 430

Identical to the federal statute, the Michigan Persons with Disabilities Civil Rights Act does not require formal school training or designation as a service animal as a prerequisite to an animal being a reasonable accommodation and this Commission sees no basis for imputing such a requirement into the text of a statute that is silent on the subject.

FACTS

The claimant joined and became a resident of the respondent on July 1, 1980, and has resided there ever since. It is undisputed that when claimant first became a member of the respondent she signed an Occupancy Agreement with the respondent, under Article 14 of which she agreed to abide by all By-Laws, Rules and Regulations of the Cooperative. (Exhibit C). Additionally and contemporaneously with the Occupancy Agreement, claimant signed an additional agreement with the respondent pursuant to which she agreed to abide by the respondent's no pets policy. (Exhibit B). The claimant has not been employed since 1998, at which time she was laid-off from her job as a graphic designer at General Motors, where she had been assigned through EDS as a

contract employee. (T10125/01:91) The claimant has not had a regular source of income since working at General Motors. Her only source of income has been liquidating her IRA and stocks and a few small freelance jobs. (T 10/25/02:92)

Within approximately two months of being laid-off from General Motors, the claimant's mother, who lived in South Carolina, was diagnosed with lung cancer. At that time the claimant went to South Carolina to care for her mother, where she remained for five or six months. (Id.) Shortly after returning to Michigan, the claimant was notified that her mother's condition had deteriorated to the point that she had dementia, could not stand or walk, and unless her condition stabilized, had only weeks to live.

The claimant, then returned to South Carolina and brought her mother and her mother's Shih Tzu dog (Max) back to live with her at the respondent. (T 10/25/02:93) Claimant arranged to have her mother treated first at Beaumont Hospital and then at Woodward Hills Nursing Home. Following this treatment, which lasted approximately three months, the claimant brought her mother back to her residence at the respondent, where she provided her with total care and assisted her with getting on Medicaid. (T 10/25/02:94, 97) A letter dated August I 6, 1999, from Richard Cail, property manager of the respondent, was sent to claimant stating that the respondent's Board of Directors had been advised that she was keeping a dog in her unit, which was in violation of the respondent's strictly enforced no pet policy. (Exhibit D) The letter contained the following paragraph:

> It is my understanding that this dog may belong to your mother who is currently living with you and that your mother has been ill for a period of time. However, the Board of Directors cannot make exceptions as it relates to its pet policy. If the pet in question was a service dog (i.e. leader dog, etc.), the Board of Directors, I am sure would look at this very differently and would comply with all federal and state laws dealing with "service dogs". I do not believe, however, that is the case in this particular instance and, therefore, the Board has requested that you take those steps necessary to have the pet removed from Royalwood.

The claimant responded to the respondent's notification to remove her mother's dog in a letter to Mr. Cail dated August 25, 1999, which in effect, requested an accommodation to allow the dog to remain in her apartment. The claimant's letter stated that her mother had lung cancer and her doctors believed that the dog was of benefit to her. (Exhibit E). Along with her letter, the claimant enclosed an unsigned letter from Cancer Care Associates (Exhibit 18), her mother's physicians, which stated:

> To Whom It May Concern:
> Ms. Mary Ann Straubel is a patient in our practice. Due to the therapeutic and humanistic benefits of owning, loving and caring for a pet, it is felt to be in this patient's best interests to be able to keep her dog with her. Any special consideration given on her behalf would be greatly appreciated. If you have any questions or concerns please contact our office.
> Sincerely, Cancer Care Associates.

Richard Cail testified that the claimant's letter together with the letter from Cancer Care Associates was forwarded to the respondent's Board of Directors, which looked at them along with the respondent's by-laws and rules and made a decision based on those documents. Cail testified that the Board did not consider it as a request for an accommodation, but rather, as a request to maintain a pet by a non-member of the respondent. (T 1/9/02:170 -171) Mr. Cail's statement that the Board of Directors viewed the request as one to maintain a pet, rather than for an accommodation is consistent with the testimony of two members of the Board of Directors.

Dorothy Prier, President of the Board of Directors at the time of her testimony, stated that when the Board considered the claimant's request on behalf of her mother at its September 27, 1999, meeting. The Board's discussion "dealt with the fact that she had signed an agreement not to have a pet and she was in violation of the pet policy and her signed agreement." (T 1/9/02:18-19) Ms. Prier indicated that while she had heard the term "reasonable accommodation she did not have a clear idea of what the term meant.

(T 1/9/02:127)

Barbara Nielsen, President of the Board of Directors at the time of the claimant's August 25, 1999, letter, together with the letter from Cancer Care Associates on behalf of her mother, stated that they were discussed and denied by the Board as "A request to keep a pet, and we have a no pet policy." (T 1/9/02:211) Ms. Nielsen then went on to state with regard to receiving a request for an accommodation, "I don't know the law - - I don't know what's required under the law," (T 1/9/02:215)

The Board of Directors decided at its September 25, 1999, meeting to deny the claimant's request that her mother be allowed to keep the dog. Mr. Cail wrote a letter to the claimant dated October 4, 1999, notifying the claimant that her letter of August 25, 1999, along with the enclosure from her mother's doctors had been discussed by the Board, but had not caused it to change its position. The letter acknowledged that the Board was aware that the claimant's mother had a very serious illness and that pets have therapeutic value to individuals with serious illnesses, but had determined that no exception would be made to its no pets policy unless the "pet was a service type pet such as a seeing eye dog." (Exhibit S)

Because the Board of Directors did not grant the claimant's request for an accommodation, on behalf of her mother to allow her mother's dog to remain in her apartment, and faced with the threat of eviction, the claimant started "scrambling" to find a place for her mother to live where she could keep her dog. The claimant testified that the threat of eviction caused tremendous stress for her and her mother. In November 1999 the claimant found a subsidized senior apartment, Danish Village, located in Rochester Hills for her mother. After placing her mother in the senior apartment, the claimant continued to care for her mother, and in order to do so, had to commute from her home to her mother's and back at least five days a week. (T 10/25/01:104-105) The mother's condition deteriorated at Danish Village, and in June 2000 she was admitted into

Beaumont Hospital where she died in August 2000. (T 10/25/01:106)

After her mother's death, the claimant experienced increased depression and anxiety. (T 10/25101:108-109) After her mother's death and until November 2000, the dog Max was taken care of by claimant's brother in the apartment at Danish Village for which the rent had been paid in advance to that time. In November 2000 after the claimant's brother ceased caring for Max, the claimant brought Max back to her home at the respondent. During that period the claimant circulated a petition among the residents of the respondent in an effort to get the by-laws changed to allow pets. She did so in order to be able to keep Max with her without having to reveal her medical history, which she had always tried to keep secret. The claimant also contacted Sherry Scott, Secretary of the Board of Directors, in order to find out the procedure to bring the proposed change in the by-laws to a vote. The claimant testified that Ms. Scott told her that she would get back to her about it, but never did. (T 10/25/01:106-108)

Subsequent to respondent's denial of the accommodation request on behalf of the claimant's mother, an accommodation request of a similar nature was made by another the respondent resident, Joyce Grad. In a letter dated November 10, 2000, Ms. Grad identified herself as a person with a disability who suffered from a chronic emotional disorder. (Exhibit 6) She indicated that consistent with the recommendations of both her psychiatrist and her psychologist, she wished to obtain a dog as a service/therapy animal. Her letter requested that the Board of Directors make an accommodation, pursuant to the Fair Housing Act, to allow her to have a therapy dog notwithstanding the respondent's no pets rule. Attached to her letter was a letter from her psychologist and a letter from her psychiatrist. The letter from the psychologist stated that Ms. Grad was suffering from a severe and debilitating depressive disorder, and that she needed a pet, preferably a dog, for her mental health and well being. The letter from Ms. Grad's psychiatrist stated that she was being treated for anxiety and depression, and that she needed a pet, particularly a dog, to help in her recovery. The psychiatrist's letter indicated that he believed the dog

would be a service/therapy animal under the Fair Housing Act. Both letters offered to provide any desired additional information upon request. (Exhibit 6)

A letter dated November 22, 2000, which Mr. Cail wrote at the direction of the Board of Directors to Ms. Grad, stated that the Board viewed her letter as a request to maintain a pet in her unit. The letter went on to state that the Board had denied her request because she was aware of the no pets rule before she had moved into the respondent and had signed an agreement to that effect. The letter only speaks in terms of denying Ms. Grad's request for a pet and does not address her letter as being a request for an accommodation. (Exhibit 6)

That the respondent viewed Ms. Grad's letter as nothing more than a request for a pet is highlighted by the testimony of Board of Directors members Barbara Nielsen and Cheryl Scott. Ms. Nielsen testified that she viewed Ms. Grad's letter as "asking about pets." (T 1/9/02:99) Ms. Scott stated that Ms. Grad "asked the doctor to write a letter for her so she could have a pet," and that Ms. Grad was "looking for a pet, not a service animal." Moreover, Ms. Grad never received any requests from the respondent for any additional information regarding her accommodation request. (T 10/26/01:102)

By letter dated November 22, 2000, attorney David Radner wrote to Richard Cail on behalf of the claimant. (Exhibit 7) In his letter Mr. Radner indicates that it is his understanding that the respondent is threatening to evict the claimant because she is allegedly in violation of its no pets rule. Mr. Radner's letter states, in part:

> I believe that if you evict Ms. Emmick, your company will be in violation of the Fair Housing Act. Specifically, the Fair Housing Act provides that 'project owners...may not apply or enforce any pet rules developed...against individuals with animals that are used to assist persons with disabilities.'

Mr. Radner's letter refers to a letter which he is enclosing from the claimant's doctor, Gurudarshan Khalsa, which states that she is suffering from an emotional disability. The

letter from Dr. Khalsa, which was enclosed with Mr. Radner's letter to Mr. Cail, states in part:

> At this time Christine is suffering from an emotional disability that is limiting some of her major activities. I believe that keeping and caring for her mother's dog would be of service and support to Christine. I also believe that this would be therapeutic and beneficial to her health.

Mr. Cail responded to Mr. Radner by letter dated January 5, 2001. (Exhibit 8) In that letter Mr. Cail acknowledges receipt of Mr. Radner's letter together with the attached letter from Dr. Khalsa, and states that the Board of Directors will review them at its January 15, 2001, meeting, after which, Mr. Radner will be notified of the Board's decision in the matter. Mr. Radner, in fact, never received any such notification. The only other communication Mr. Radner received from the respondent was a letter dated January 29, 2001, from Debra Meier, an attorney with the law firm representing the respondent, requesting a citation to the language in the Fair Housing Act to which Mr. Radner quoted in his November 22, 2000, letter. (Exhibit 9) Mr. Radner testified that he responded to Ms. Meier's letter by telephoning her and leaving a message that he did not understand what she was looking for in her letter. He further testified that he never heard anything more from Ms. Meier or any other representative of the respondent. (T 2/4/02:18)

It is undisputed that no one on behalf of the respondent ever made any inquiry of Mr. Radner about the claimant's medical condition or limitations on her major life activities. It is also undisputed that no one from the respondent ever made a written inquiry of the claimant about her medical condition or limitations on her major life activities. Subsequent to Mr. Radner's November 22, 2000, letter requesting accommodation on behalf of the claimant, the first attempt by the respondent to contact the claimant was in the form of a telephone message which Board member Dorothy Prier left on the claimant's answering machine on April 9, 2001. The first message was followed by a second message left on April 11, 2001. (T 1/9/02: 87) The message which Ms. Prier left for the claimant was to the effect "we have to meet face-to-face to get to the bottom of this once and for all." (T

10/25/01:115)

Dorothy Prier testified that she called the claimant in April 2001 as a result of a decision at the March 2001 Board of Directors meeting to contact the claimant prior to instituting eviction proceedings. Prier read from the minutes of that meeting as follows: "D. Prier and N. Stanfield will speak with Chris Emmick regarding the dog she is keeping in her apartment. Further action if required will be considered at the next Board meeting." (T 1/9/02:86)

The claimant testified that she did not directly respond to Ms. Prier's telephone message because she thought that it sounded combative, and she believed that Barbara Neilsen was still President of the Board, rather than Ms. Prier. Instead, the claimant called Barbara Neilsen and left a message on her answering machine referring her to her doctor's letter and attorney's letter. (T 10/25/01: 115) The claimant also wrote a letter to Ms. Prier, dated April 14, 2001, to the same effect. It is undisputed that the respondent's Board of Directors voted to evict the claimant at its April 2001 meeting and that on May 11, 2001, she was served with a Notice to Quit by the respondent. This Notice to Quit constituted the only notice which the claimant received of the respondent's decision with respect to her accommodation request. (Respondent's answer to interrogatory question 14.) On July 1, 2001, the respondent filed a complaint in 44th District Court to terminate the claimant's tenancy. That action has been held in abeyance pending a final decision by this Commission.

DISCUSSION

Was the claimant discriminated against in violation of the PWDCRA by respondent's denial of her request for an accommodation in the form of an exception to its no pets policy to allow her to keep a dog?

The PWDCRA provides that "a person shall accommodate a person with a disability for purposes of...housing unless the person demonstrates that the accommodation would impose an undue hardship." MCL 37.1102. The PWDCRA further prohibits a person to

> Refuse to make reasonable accommodations in rules, policies, practices, or services, when the accommodations may be necessary to afford the person with a disability equal opportunity to use and enjoy residential real property. MCL 37.1506a(l)(b)

The United States Housing Act, 42 U.S.C. 3601 et seq., contains language virtually identical to that of the PWDCRA, except it uses the term "handicap' instead of "disability." and like the PWDCRA requires reasonable accommodation. Specifically, 42 U.S.C. 3604(3)(S) prohibits:

> a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [handicapped) person equal opportunity to use and enjoy a dwelling;

Moreover, both the Fair Housing Act and Americans with Disabilities Act, 42 U.S.C. 1201 et seq., contain definitions of the terms "handicap" and "disability" which are virtually identical to "disability" as that term is defined in the PWDCRA. The PWDCRA defines the term "disability" as

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
> (D) For purposes of Article 5, substantially limits one or more of that individual's major life activities and is unrelated to the individual's ability to acquire, rent, or maintain property.
> (ii) A history of a determinable physical or mental characteristic described in subparagraph (1).
> (iii) Being regarded as having a determinable physical or mental characteristic as described in subparagraph (i). MCL 37.1103

In interpreting the provisions of the PWDCRA, analogous federal precedents are persuasive, although not necessarily binding. *Chmielewsk v Xermac*, Inc. 57 Mich 593,

601; 580 NW2d 817 (1998). To establish a prima facie case for failure to make a reasonable accommodation claimant must show (1) claimant suffers from a disability as defined under the PWDCRA, (2) respondent knew or should reasonably be expected to know of the disability, (3) accommodation of the disability may be necessary to afford the claimant an equal opportunity to use and enjoy the premises and does not present an undue hardship on respondent, (4) respondent refused to make such accommodation. *Bachman v Swan Harbour Association*, Mich App, slip op., p. 13 (August 9, 2002)

The claimant has established the elements of a prima facie case of failure to make a reasonable accommodation. First, the claimant suffers from a disability as that term is defined by the PWDCRA. The claimant testified that she has suffered from anxiety and depression for her entire life and began treatment with a psychiatrist when she was age 17. (T 10/25/01:118,128) She sleeps on average 4 hours per night, has frequent nightmares, and wakes up as many as five times per night. Lack of sleep makes the claimant unable to concentrate and unmotivated. The claimant stated that even though she loves to read she cannot stay focused enough to finish a book. (T 10/25/01: 120,122-123) She stated that her inability to concentrate due to depression, anxiety, and lack of sleep have made her unable to do the kind of work she previously did at GM, or even do the free lance work she used to do to the same extent. (T 10/26/01:14)

Pastor Ralph Hoke, M.A., a limited license psychologist who was treating the claimant at the time of her request for an accommodation from the respondent, diagnosed her as suffering from depressive neurosis and generalized anxiety disorder. (T 11/1/02: 114) Mr. Hoke testified that the respondent's anxiety and depression substantially impaired her ability to work and to sleep and her prognosis was guarded. (T 11/1/02: 117, 121-122)

Dr. Michael Abramsky, Ph.D., the claimant's expert witness who interviewed the claimant, took her psycho-social history and tested her psychometrically, diagnosed the claimant as suffering from anxiety and chronic major depression recurrent. (T 10/19/01)

During the hearing the respondent moved to strike Pastor Hoke's testimony on the basis that an Attorney General Opinion, OAG, 1979-1980, No: 5550 states that a limited license psychologist can only practice psychology under the supervision of a psychologist with a full license. However, that Opinion also states, "There is no such restriction imposed upon individuals, granted a limited license who are employed by a governmental entity or nonprofit organization." Pastor Hoke is employed by a nonprofit organization.

Pastor Hoke testified that he counseled the claimant as part of his ministerial duties for Beautiful Savior Lutheran Church and received no payment from the claimant for the counseling. (T 1/10/02:103,147) We, therefore, find that respondent's motion to strike is not supported by the cited Attorney General Opinion and is denied.

Dr. Abramsky testified that this depression substantially limits the claimant's ability to work and to sleep. Dr. Abramsky further testified that her prognosis for improvement was poor in view of the early onset of her depression during childhood, and that her condition has declined rather than improved. (TI 0/1/9/01:53-54, 104) With respect to the claimant's inability to work Dr. Abramsky testified that she was unable to handle the day-to-day stresses that are inherent in any job. She cannot meet expectations on a regular basis. What would be mild stresses for most people, are major stresses to the claimant, such as the ability to be criticized about her work. Her mood swings are too severe to keep to a schedule. Additionally, because of her illness, the claimant lacks the motivation, flexibility, and energy to learn new skills. (T 10/19/01:34-35) Dr. Abramsky also testified that the claimant has a significant sleep disorder, and at least two nights a week does not sleep at all. In the nights that she does sleep, it is fitful and she is plagued by nightmares. As a result of her sleep disorder, the claimant is fatigued much of the time during the day, which in turn contributes to her inability to work. (T 10/19/01:24, 36)

The testimony of Pastor Hoke and Dr. Abramsky that the claimant suffered from anxiety and depression is consistent with her medical history. (Exhibit 2, Exhibit 3)

Because of the similarity in purpose and in definitions it is appropriate to look at the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., and the Americans with Disabilities Act (ADA), 42 U.S.C. 121 01 et seq., for guidance in interpreting the terms "substantially limits" and "major life activities" under the PWDCRA. *Stevens Inland Waters, Inc.*, 220 Mich 4 p 212, 217-218; 559 NW2d 61 (1977)

> Whether an impairment substantially limits a major life activity is determined in light of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long term effect. Ibid.

The testimonies of the claimant, Dr. Abramsky, and Pastor Hoke, along with the claimant's medical records, establish that her depression resulting in her substantially impaired ability to work and sleep is severe, longstanding, and not likely to significantly improve. The *Stevens* court adopted the definition of major life activities contained in the administrative regulations for both the ADA and the Rehabilitation Act which include working as a major life activity. Id. Sleep is also a major life activity within the meaning of the ADA. *McAlindin v County of San Diego*, 192 F3d 1226, 1233 (CA9, 1999) cert. den. 530 US 1243; 12 S Ct 2689: 147 L Ed 2d 961 (2000)

We therefore reject the respondent's contention that work is not a major life activity. The respondent has not cited any case which holds that work is not a major life activity. Instead respondent cited the case of *Toyota Motor Mfg., Kentucky, Inc. v Williams*, 534 US 184; 122 S Ct 681, 151 L Ed 2d 615. The language in *Toyota* upon which the respondent relies and cites (appearing on page 15 of the slip opinion) is dicta. In that dicta the court notes that it has never decided the issue of whether working is a major life activity and need not do so in *Toyota*. The issue on which the court in *Toyota* granted certiorari was 'to consider the proper standard for assessing whether an individual is substantially limited in performing manual tasks." *Toyota*, 122 S Ct 689. The dicta which respondent relies upon appears in the context of the *Toyota* court's discussion of why the Court of Appeal's reliance on *Sutton v United Airlines, Inc.*, 524 US 471, 119 S Ct 2139; 144 L Ed

2d 450 (1999) for the idea that a "class" of manual activities must be implicated for an impairment to substantially limit the major life activity of performing manual tasks was misplaced. The *Toyota* court pointed out that *Sutton* only said, "when the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires that plaintiffs allege that they are unable to work in a broad class of jobs. (emphasis original, citation omitted). The dicta which respondent relies upon is contained within the following language which appeared in the *Toyota* opinion immediately after the above quote from *Sutton* and states,

> Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today. In *Sutton*, we noted that even assuming that work is a major life activity, a claimant would be required to show an inability to work in a broad range of jobs, rather than a specific job. (citation omitted). But *Sutton* did not suggest that a class-based analysis should be applied to any major life activity other than working. *Toyota*, 122 S Ct, 692-693.

Thus, the respondent only relies upon dicta in non-binding federal precedent, see *Chmielewski*, supra, to support its argument that working is not a major life activity. Moreover, even that dicta which respondent cites, do not hold that working is not a major life activity. Instead, the dicta merely say that the question has not been decided. The Michigan Court of Appeals has specifically adopted the definitions contained in the administrative regulations for both the ADA and Rehabilitation Act which include working as a major life activity. *Stevens*, p. 217-218. We reject the respondent's argument that working is not a major life activity.

Second, the respondent knew or should have known of the claimant's disability by virtue of the November 22, 2000, letter from David Radner, the claimant's attorney, which included as an enclosure the letter dated October 27, 2000, from Dr. Khalsa, the claimant's doctor. The letter from Dr. Khalsa stated that the claimant was suffering from an emotional disability which was limiting some of her major activities. Clearly, these letters were

sufficient to put the respondent on notice that the claimant was requesting an accommodation to its no pets rule under the Fair Housing Act because she had a disability. The respondent contends that because these letters did not identify what her emotional disability was or the major life activities which were impaired it had no legal obligation to accommodate her. We reject the respondent's contention. In *Jankowsid Lee & Associates v Cisneros*, 91 F3d 891 (CA 7, 1996) the court held that the manager of an apartment building in failing to adequately determine whether a tenant who requested a change in respondent's parking lot policy as an accommodation for his multiple sclerosis, was actually disabled, before denying his request, had thereby violated the Fair Housing Act. The court stated

> If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent on the landlord to request documentation or open a dialogue." Ibid., p. 895.

As previously discussed, no one on behalf of the respondent made any request from either Mr. Radner or the claimant for any additional information regarding her disability. The only attempt on the part of respondent to contact the claimant following the November 22, 2000, accommodation request, was when Board of Directors member Dorothy Prier attempted to contact the claimant by telephone in April 2001. However, there has been no showing that Dorothy Prier was attempting to get any additional information from claimant regarding her disability when Ms. Prier attempted to contact claimant by telephone in April 2001. Indeed, the minutes of the Board of Directors meeting from March 19, 2001, where it was determined that Ms. Prier would contact the claimant, do not reflect that any additional information regarding the claimant's disability was being sought. The only reference to the claimant which the minutes of that meeting contain is as follows:

> D. Prier and N. Stanfield will speak with C. Emmick regarding the dog she is keeping in her apartment. Further action, if required, will be considered at the next Board meeting. (Exhibit 7)

There is simply no credible evidence that respondent was interested in obtaining, or made any good faith attempt to obtain, any additional information about the claimant's disability

prior to beginning eviction proceedings against her, in spite of being put on notice that she was requesting an accommodation for an "emotional disability." Moreover, in Mr. Radner's letter of November 22, 2000, on behalf of the claimant, he invites respondent to contact him if the respondent has any questions. The claimant was free to refer respondent to her attorney for any additional information it might desire, and it is understandable that she did so, particularly since she perceived Ms. Prier's message as being combative in tone.

Third, the concept of necessity requires at a minimum a showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability. *Bronk* v *Ineichen*, 54 F 3d 425, 429 (CA7, 1995). The necessity of the dog to the claimant was supported by the testimony of both Dr. Abramsky and Mr. Hoke. Dr. Abramsky testified that the claimant's relationship with the dog has "kept her afloat and stabilized her functionally and emotionally and without the dog she would probably spend most of her life in bed." (T 10/19/01:25-26)

He further testified that the dog is part of the claimant's treatment for her depression. First, because it gets her out of her vegetative state since she feels she has to care for the dog. Caring for the dog provides needed structure for the claimant's life. Secondly, the dog is an emotional link to the claimant's mother and without the dog she would undoubtedly go into a "depressive tail spin and get worse." (T 10/19/1:29-30)

> The dog ameliorates and improves claimant's clinical condition and the loss of the dog could substantially aggravate her condition...The dog seems to be an essential part of her improvement although she is still below any agreed upon standard of normality. (T 10/19/01:65-66)

The testimony of Mr. Hoke regarding the necessity of keeping the dog is in accord with that of Dr. Abramsky. Mr. Hoke also testified that the dog is part of the claimant's treatment and provides structure in her life. (T 1/11/02:125-126). We find that the claimant has established the necessity of having the dog in order to help her ameliorate

the effects of her disability and thereby enjoy the use of her dwelling.

The accommodation did not present an undue hardship on respondent. In *Bronk*, supra, p. 429, the court stated,

> reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost [to the defendant] and benefit [to the plaintiff] merit consideration as well.

An accommodation is reasonable unless it requires a fundamental alteration in the nature of a program or imposes undue financial and administrative burdens. *Smith & Lee Associates v City of Taylor, Michigan*, 102 F3d 781, 795 (CA 6, 1996). Here, the above testimony of Dr. Abramsky and Mr. Hoke have established the great benefit which the dog provides to the claimant, and the respondent has made no showing that allowing the claimant to keep her dog would be of any burden to it, financial or otherwise. We, therefore, find that the requested accommodation did not present an undue hardship on the respondent.

Fourth, the respondent clearly refused to accommodate the claimant. Instead of accommodating the claimant by making an exception to its no pets policy, the respondent commenced an eviction proceeding against her for being in violation of the policy. The respondent argues that because the dog at issue is a companion animal rather than a service animal it was under no legal obligation to accommodate the claimant. The respondent, however, has provided no legal authority to support the proposition that whether it is required to accommodate the claimant pursuant to the PWDCRA, turns upon whether the dog is a companion animal or a service animal. The PWDCRA makes absolutely no reference or distinction with respect to the terms service animal, companion animal or pet. Rather, the PWDCRA generally requires that a person with a disability be accommodated unless the accommodation would impose an undue hardship.

Case law decided under the Fair Housing Act shows that the distinction which the

respondent relies upon with respect to service animal as opposed to companion animal is not the criteria used to determine if an accommodation is required. In *HUD v Riverbay Corp*, 02-9390320-1, 1 994 WL 497536 (September 8, 1994), the facts are remarkably similar to those of the instant case. In *Riverbay*, the complainant, a woman who suffered from depression, requested that respondent cooperative apartment make a reasonable accommodation to its rule which prohibited tenants to have "dogs or animals of any kind," to allow her to keep a Yorkshire terrier in her apartment. The decision of the administrative law judge did not focus on whether the complainant's dog was a service animal or a companion animal or had any specific training but rather on whether having the dog was necessary to the complainant to ameliorate the effects of her disability and afford her the opportunity to use and enjoy her dwelling. The opinion in *Riverbay* states: "Ms. Exelberth's [Complainant's] dog enables her to experience the ordinary feelings enjoyed by a person not otherwise afflicted with her disability." Although the Respondent asserts that the soothing benefit of dogs can be enjoyed by all, it fails to acknowledge the terrier's special benefit for the Complainant. She became stronger and more outgoing. Dr. Spikes testified that the terrier is a medical necessity for Ms. Exelberth's well-being.

In its regulations instituting the Act, HUD provides the following example of a reasonable accommodation. A blind applicant for rental housing wants to live in a dwelling unit with a seeing eye dog. The building has a no pets policy. It is a violation of [the regulation on reasonable accommodations] for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with the seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy the dwelling.

The *Riverbay* case presents an analogous situation. Ms. Exelberth requires the waiver of a rule of *Riverbay*, solely for herself, to allow her to keep her dog that her disability necessitates. The Act protects a person with a mental disability to the same degree that it protects a person with a physical disability. This protection does not require

an undue hardship or burden upon the person making the accommodation. Just as the administrative law judge in *Riverbay* found with regard to the dog at issue in that case, that complainant depended upon her dog "for good feelings" and "the energy to get up," and that the dog keeps her balanced, so too does the claimant's dog Max provide similar benefits to the claimant.

HUD v Dutra, 1996 WL 657690 (H.U.D. A.L.J.) is another case in which being permitted to have an animal, in this case a cat, was found to be a reasonable accommodation. In *Dutra*, the complainant suffered from fibromyalgia, a painful musculoskeletal condition, which made it difficult for him to walk, as well as mental anxiety and sleep problems. The administrative law judge found that the emotional support, which living with the cat provided, greatly increased the complainant's enjoyment of his apartment and the quality of his life. The administrative law judge noted that the cat had not been characterized as being a service animal and focused upon the therapeutic benefit which the complainant derived from keeping his cat and held that the complainant should be permitted to keep the cat as an accommodation that would allow him the equal opportunity to use and enjoy his apartment.

In *Janush v Charities Housing Development Corp*, 169 F Supp 2d 1133 (ND Cal, 2000), the court held that the refusal of a landlord to make an accommodation to its no pets policy for the alleged need of a tenant, who suffered from a severe mental health disability, for two birds and two cats to provide her with companionship in order to lessen the effects of her disability, stated a claim for violation of the Fair Housing Act. The court rejected defendant's assertion that California's definition of a 'service dog' should be read into the federal Fair Housing Act to create a bright-line rule that accommodation of animals other than service dogs is per se unreasonable. The court stated,

> Although the federal regulations specifically refer to accommodation of seeing eye dogs, there is no indication that accommodation of other animals is per se unreasonable under the statute. *Janush*, p. 1136.

The court went on to state,

> Even if plaintiff's animals do not qualify as service animals, defendants have not established that there is no duty to reasonably accommodate non-service animals. Ibid.

Respondent cited the West Virginia Supreme Court opinion of *In re Kenna Homes Cooperative Corporation*, 557 SE2d 787 (2001), as being in support of its position. In *Kenna Homes*, which was an action for a declaratory judgment, the court held that Kenna's modified no pets rule which made an exception for service animals, and required that a service animal be properly trained and certified, did not violate the Federal Fair Housing Act. However, the court discussed the training and certification of service animals with respect to assisting persons with physical as opposed to mental disabilities. The court referred to 28 CFR 38.104 (2001), which defines service animal for purposes of the public accommodation section of the Americans with Disabilities Act, not the Fair Housing Act. Section 36-104 defines a service animal as,

> any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including but not limited to guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

Thus, the court's discussion of service animals related to the training and certification of animals which performed specific physical tasks for persons who had physical disabilities. However, even the Kenna court recognized that people with mental disabilities may need accommodation in the form of a companion animal rather than a service animal. The court stated:

> We recognize that some chronic and severe psychosis, such as schizophrenia can substantially restrict a person's ability to form and sustain human relationships or friendship, companionship, and affection. Research has shown that a companion pet can in some cases materially improve the quality of life of such persons. Nothing in this opinion would bar the balanced consideration of a well-documented request for approval of a companion pet in such a case. *Kenna*, 557 SE2d 800, n 15.

Clearly, as recognized in the above cases, a distinction must be made between whether it is training or other qualities which are necessary in an animal to ameliorate the effects of a person's particular mental or physical disability. This is a distinction which respondent wrongfully and consistently failed to make with respect to the claimant's accommodation request as well as the accommodation requests on behalf of the claimant's mother and Joyce Grad.

In passing the FHAA, Congress recognized that the right to be free from housing discrimination is essential to the goal of independent living. *City of Edmonds v Oxford House, Inc.* 514 US 725, n. 11. Based upon the above analysis, we find that respondent violated the PWDCRA by denying the claimant's request for an accommodation in the form of an exception to its no pets rule. However, we do not find the respondent liable for its refusal to accommodate the claimant's mother. The denial of the claimant's request for accommodation on behalf of her mother is not the basis of the claimant's complaint or the charge in the instant case, rather the basis of both the complaint and charge is the denial of the claimant's accommodation request on her own behalf.

Additionally, the parties executed a Final Pre-Hearing Order in which they agreed to the issues of fact and law to be litigated in the hearing. Pursuant to the terms of the Final Pre-Hearing Order the issues of fact and law to be litigated are:

ISSUES OF FACT TO BE LITIGATED

I. Whether the claimant is a person with a disability as defined by the Persons with Disabilities Civil Rights Act.

2. Whether the respondent was informed on or about November 22, 2000, that the claimant was a person with a disability.

3. Whether the claimant's requested accommodation is necessary to afford her equal opportunity to use and enjoy the property.

4. Whether the accommodation sought by the claimant is reasonable.

ISSUES OF LAW TO BE LITIGATED

1. Whether the respondent's attempt to evict the claimant constitutes a violation of the Persons with Disabilities Civil Rights Act.

2. Whether this proceeding violates the due process requirements imposed by the United States and Michigan constitutions.

3. Whether this proceeding violates the Administrative Procedure Act because it constitutes rule making contrary to the procedures established in that Act.

The issue of whether the claimant was unlawfully discriminated against as a result of respondent's refusal to accommodate the claimant's mother was not one of the issues to be litigated pursuant to stipulation of the parties in the Final Pre-Hearing Order.

Finally, even if the claimant had included the refusal to accommodate the claimant's mother as an allegation in her complaint, it would not have been timely, and therefore, cannot be a basis to subject the respondent to liability for violating the PWDCRA. The claimant filed her complaint on May 23, 2001. The respondent notified the claimant of its refusal to accommodate her mother in a letter from Mr. Cail dated October 4, 1999.

Pursuant to Rule 37.4(6) of the Michigan Civil Rights Commission and Michigan Department of Civil Rights Rules, a complaint must be filed "within 180 days from the date of the occurrence of the alleged act of discrimination, or within 180 days of the date when the occurrence of the alleged discrimination was or should have been discovered. In this case the claimant filed her complaint some 17 months after she was notified of the respondent's refusal to accommodate her mother, well beyond the 180 day jurisdictional period. However, even though the denial of the requested accommodation on behalf of the claimant's mother was not the subject of a timely complaint. It may still be used as background evidence in support of the claimant's timely complaint for denial of her own accommodation request. *Wyatt*, supra.

REMEDY

Recovery for both economic and non-economic damages resulting from unlawful discrimination in violation of the PWDCRA is authorized pursuant to MCL 37.2605. Victims of unlawful discrimination may recover damages for emotional distress, mental anguish, humiliation, embarrassment, outrage, and disappointment which have resulted from such discrimination. *Department of Civil Rights ex rel Johnson v Silver Dollar Cafe*, 198 Mich App 547; 499 NW2d 409 (1992); *Howard v Canteen Corp*, 192 Mich App 427; 481 NW2d 718 (1991); *Jenkins v Southwestern Michigan Chapter, American Red Cross*, 141 Mich App 785; 369 NW2d 223 (1985).

The record shows that claimant is entitled to damages for the emotional distress, mental anguish, and humiliation she suffered as a result of the respondent's unlawful discrimination. The claimant testified that the respondent's threats to evict her as well as the eviction action itself, which necessitated her to file a complaint and pursue the instant case, have worsened her depression and increased her anxiety. Additionally, as a result of this case, the claimant has had to reveal painful childhood memories involving

molestation, physical abuse of herself and her mother, a family history of alcoholism, and details of her lifelong struggle with depression, all of which she had tried to conceal throughout her life. (T10/25/01:118-121). The claimant's treating therapist, Ralph Hoke, testified that the respondent's attempt to evict the claimant had the effect of increasing her depression and anxiety as well as her feelings of helplessness and hopelessness, impaired her treatment, and caused her condition to deteriorate. (T 1/10/02: 123-124, 131-132). The testimony of Dr. Michael Abramsky was in accord with that of Mr. Hoke that the threat of eviction exacerbated the claimant's condition. (T 10/19/01:103)

The Hearing Referee awarded the claimant a total of $55,000.00 in emotional distress damages "for the pain and suffering she incurred related to her mothers unlawful forced move from the cooperative, her own denial of her right to have a reasonable accommodation for the dog, and her additional pain and suffering related to the unlawful eviction action which was pursued against her." In view of our finding that the respondent's denial of the claimant's request for accommodation on behalf of her mother cannot be used as a basis to subject respondent to liability in this case, and that we are unable to determine what portion of the award was based upon denial of the claimant's request for accommodation on her own behalf, we remand this matter to the Hearing Referee for clarification on that point. If an additional hearing is necessary, it shall be completed and a report submitted to the Commission within 60 days.

The claimant is also seeking attorney fees and costs. In her Post-Hearing Brief claimant requested attorney fees in the amount of $55,626.00 and costs in the amount of $1,499.72, for a total of $57,124.72 "as well as monies due to the Department of Attorney General (sic) pursuant to a reimbursement agreement." The Hearing Referee found that the requested attorney fees and costs were reasonable and recommended that the claimant be awarded the full $57,124.72 amount requested, but provided no basis for the determination. In the Exceptions filed by both counsel for MDCR and the claimant's counsel it is requested that additional awards be made in the amount of $4,408.00 for

expert witness fees and $291.24 in lay witness fees. Attachment 2 to the MDCR's Exceptions, an itemized statement from MDCR's Accounting Division Director, indicates that these additional costs were incurred by MDCR. Attachment I to MDCR's Exceptions is a document titled "REIMBURSEMENT AGREEMENT" in which the claimant agrees that "...if there is a monetary award or settlement resulting in the payment of money damages to me, I may be required to reimburse the Department of Civil Rights for the services of expert witnesses who will be deposed or testify in my case."

Section 605 of the Elliott-Larsen Civil Rights Act (ELCRA) authorizes "Payment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney fees and expert witness fees, if the commission determines that award to be appropriate." Additionally, ELCRA Section 605(i) of the authorizes "Payment to the complainant of damages for, an injury or loss caused by a violation of this act, including a reasonable attorney's fee." By its terms the Reimbursement Agreement imposes no obligation on the claimant, the complainant, for repayment of lay witness fees but only with respect to the repayment of expert witness fees. Therefore, lay witness fees are not awarded as part of costs.

The claimant's request for attorney fees is not supported in the record by a petition for attorney fees or other statement which shows with specificity the basis for the 445 hours of attorney time for which the claimant's counsel requested to be compensated in her Post-Hearing Brief. Moreover, the claimant's request for costs in the amount of $1,499.72 as set forth in her Post-Hearing Brief was not supported by an affidavit or other documentation. In *Grow v W.A. Thomas. Co*, 236 Mich App 696. 714-715; 601 NW2d 426 (1999), the Court set forth some of the factors to be used in determining reasonable attorney fees including:

(1) the skill, time, and labor involved,

(2) the likelihood, if apparent to the client, that the acceptance of employment will preclude other employment by the lawyer,

(3) the fee customarily charged in that locality for similar services,
(4) the amount in question and the results achieved,
(5) the expense incurred,
(6) the time limitations imposed by the client or the circumstances,
(7) the nature and length of the professional relationship with the client,
(8) the professional standing and experience of the attorney, and
(9) whether the fee is fixed or contingent.

DAMAGES AND AWARD

Therefore this case was remanded to the Hearing Referee in order to receive evidence which shows with specificity the basis for an award of attorney fees and costs including expert witness fees, afford respondent the opportunity, to challenge such evidence, and make specific findings and recommendations with respect to such an award.

The Hearing Referee filed an amended report and recommendations on April 10, 2003 which complies with the Commission's directives upon remand. The Hearing Referee awards the claimant a total of $55,000 in emotional distress damages which breaks down to $10, 000 for damages suffered by the claimant for emotional distress because of her association with a disabled person (see facts above regarding the status of the claimant's mother) and the remaining $45,000 for the emotional distress suffered by the claimant by the respondent's failure to accommodate her reasonable request to allow her companion animal to live with her.

The Hearing Referee awards costs of $4,654.54 to reimburse the Department of Civil Rights and the Office of the Attorney General for necessary and reasonable costs incurred in the litigation of this case.

Finally the Hearing Referee awards $58,095.09 in costs and attorney fees to Michigan

Protection and Advocacy Services. The total amount of the Hearing Referee's recommendations are $117,749.63.

We are not awarding the $10,000 in damages to the claimant for emotional distress suffered from her association with a disabled person (her mother) for reasons previously stated above.

Therefore, it is the opinion of the Commission that the claimant having been found to be discriminated against because of her disability, in violation of the Michigan Persons With Disabilities Civil Rights Act shall be awarded damages for emotional distress, reimbursement for costs, and attorney fees in the amounts stated above for an award of $107,749.09.

Tarun K Sharma

Dr. Tarun K. Sharma, Commissioner

Dated: 1/26/04

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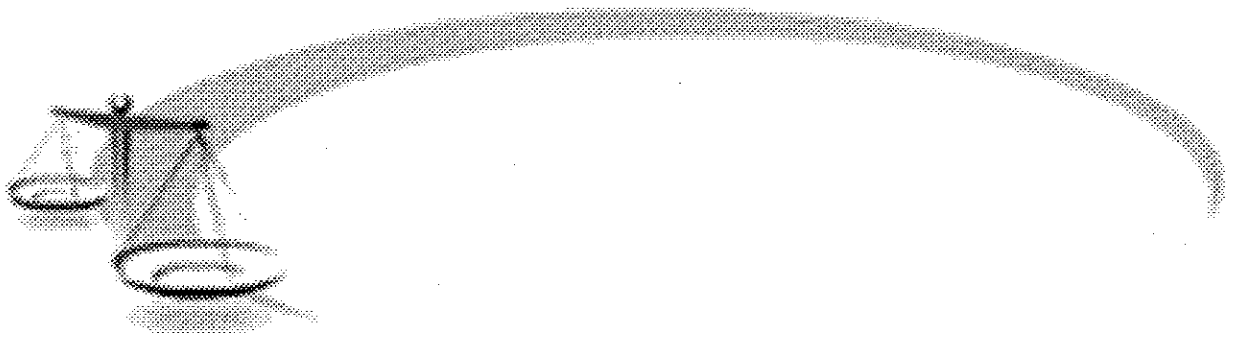

#268485 Christine Emmick
vs. Royalwood Cooperative Apartments, Inc.

Dissenting Opinion
Albert Calille, Commissioner

STATE OF MICHIGAN

DEPARTMENT OF CIVIL RIGHTS

SEP 0 3 2003

MICHIGAN DEPARTMENT OF CIVIL RIGHTS ex rel. CHRISTINE EMMICK,

Claimant, **MDCR No. 268485**

vs. **HUD No. 050108448**

ROYALWOOD COOPERATIVE APARTMENTS, INC.,

Respondent.

COMMISSIONER ALBERT CALILLE

DISSENTING OPINION

I

This case comes to the Commission from a Complaint filed by Claimant, Christine Emmick, on May 23, 2001 against Respondent, Royalwood Cooperative Apartments, Inc., with the United States Department of Housing and Urban Development under 42 U.S.C. §3601 *et seq*. That complaint, which alleged housing discrimination based upon disability, was subsequently referred to the Michigan Department of Civil Rights. There, a similar complaint was filed alleging a violation of the Persons with Disability Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*.

In essence, Ms. Emmick claims that she suffers from an emotional disability, that because of this disability she requested Respondent to make an exception to its no-pet policy to allow her to keep her dog, that Respondent denied the requested accommodation and, in turn, sent her a Notice to Quit on May 11,

2001.[1] For its part, Respondent asserts that at the time the Notice to Quit was sent to Claimant, it did not know, nor could have known, that Claimant was disabled as that term is defined under the Federal and State statutes or that Ms. Emmick was claiming her dog as a "service animal" which Respondent was required to accommodate. Respondent further avers that Claimant does not have a disability within the meaning of either act and her dog does not qualify as a "service animal."

II

The record, fairly considered, demonstrates the following. Since the age of 17, Claimant has suffered from depression and anxiety and has received psychiatric treatment, off and on, since that time. Claimant's mother and father divorced when she was 16 years old. Her mother and stepfather were alcoholics. While her grandparents were good to her, her stepfather physically abused her and her mother and molested her.

Claimant has lived in the Royal Cooperative Apartments for 21 years. At the beginning of her residency, she agreed to abide by respondent's no pet policy.

In 1998, claimant's mother was diagnosed with cancer. Some time in 1999, claimant brought her mother and her mother's dog, Max, to Michigan to live with her. In August 1999, respondent

[1]Following issuance of the Notice to Quit, Respondent instituted an eviction proceeding in the 44th District Court on July 2, 2001. Pursuant to the stipulation by the parties, this matter was stayed, pending a final decision by the Michigan Civil Rights Commission.

became aware of the dog's presence. In a letter dated August 16, 1999, respondent informed claimant that her mother's dog violated the cooperative's no pet policy. Exhibit D. The letter went on to state that if the dog were a "service dog," like a leader dog for the blind, respondent might look at the situation differently.

On August 25, 1999, claimant sent a letter to respondent's property manager requesting an accommodation for her mother's dog. In a letter dated October 4, 1999, respondent reiterated its earlier position, which affirmed its no pet policy and indicated that an exception would be made only for a service animal. Exhibit 5. Thereafter, claimant's mother and her dog moved to a facility.

Following her mother's death in June 2000, claimant continued to have recurring symptoms of depression, experienced uncontrollable crying, and suffered from severe anxiety. Claimant brought her mother's dog, Max, back to live with her.

On November 22, 2000, David Radner, an attorney acting on claimant's behalf, sent a request for accommodation to respondent to allow claimant to keep Max. Exhibit 7. Attached to this request was a letter from Dr. Khalsa, dated October 27, 2000. In his letter, the doctor stated that claimant "is suffering from emotional disability that is limiting some of her major activities. ... The doctor went on to state that "keeping and caring for her mother's dog would be of service and support to Christine." The doctor also believed that "this would be

therapeutic and beneficial to her health." *Id.*

Claimant also testified that when she wakes up in the middle of the night in a panic attack, she takes medication and calls Max to her. The dog helps her cope with her fear of being alone and calms her down so she can breathe easier. When she is feeling alone and abandoned, the dog's presence comforts her. Max also helps her get up in the morning because she knows the dog needs his medicine, needs to be fed, and taken for a walk. Walking Max also helps to reduce her anxiety. T 10/25/01: 121, 124-125.

III

The PWDCRA defines the term "disability" in the following manner:

> (I) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> ***
>
> (D) ..., substantially limits 1 or more of that individual's major life activities and is unrelated to the individual's ability to acquire, rent, or maintain property.

Particularly relevant to this case is MCL 37.1506a(b) which makes it unlawful for a person in connection with a real estate transaction to:

> (b) Refuse to make reasonable accommodations in rules, policies, practices, or services, when the accommodations may be necessary to afford the person with a disability equal

opportunity to use and enjoy residential real property.

To establish a *prima facie* case where a request for reasonable accommodation is made to use and enjoy a dwelling, Claimant must show that: (1) she suffers from a handicap as defined in 42 U.S.C. §3602(h); (2) Respondent knew or should reasonably have been expected to know of the handicap; (3) accommodation of the handicap may be necessary to afford Claimant an equal opportunity to use and enjoy the dwelling; and (4) Respondent refused to make such an accommodation. *U.S. v California Mobile Home Park Company*, 107 F3d 1374, 1380 (9th Cir. 1997).

To be an actionable claim, the accommodation must be "reasonable" and "necessary." *Bronk v Ineichen*, 54 F3d 425 (7th Cir. 1995). The test for "reasonableness," does not require that everything humanly possible be done to accommodate a person with a disability. Rather, reasonableness connotes consideration of the cost to the defendant on the one hand and the benefit to the plaintiff on the other hand. *Id.* at 429. Moreover, 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." *Id.*[2] Whether an accommodation is "reasonable" is to be determined

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2In this case claimant does not claim that she could not "use" the residential property without the presence of her dog. At most, claimant's position is that her dog provides her an incentive to perform certain daily activities (both inside and outside the residential property) that she might not otherwise perform. The record does not support the position that claimant

case by case. *Jankowski Lee & Associates v Cisneros*, 91 F.3d 891, 896 (7th Cir. 1996). The evidence, taken as a whole, does not establish a prima facie case of disability discrimination under the PWDCRA.

IV

A.

Claimant is disabled within the meaning of the PWDCRA. Both Dr. Abramsky and Dr. Erard found that claimant suffered from major depression and has had a long history of psychological problems.[3] Dr. Abramsky and Ralph Hoke, Claimant's treating therapist, further testified that claimant's major life activities in the areas of work and sleep were substantially impaired. 1/10/02: 114-116, 121, 125, 131, 134-135, 137. Sleeping and working have been found to be

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would not perform these activities without her dog. Rather, the record is undisputed that claimant "used" the residential property for many years before requesting the accommodation, and the record is undisputed that with or without the dog claimant can perform all the usual activities performed in residential property. In essence, the record supports the position that the presence of the dog reduces claimant's anxiety, which in turn allows her to perform more readily certain daily activities. Since I find that the dog at issue is not a service animal, it is not necessary to decide in this case whether this is a sufficient showing to establish that the presence of the dog is a reasonable accommodation for an emotional disability.

3There is testimony in the record from Dr. Abramsky that claimant's psychological problems have been treated with medication in the past and to some extent the present. (Testimony of Dr. Abramsky, pp 28-29) The record is not complete regarding the affect that such medication had on claimant. If such medication, if taken by claimant, has the effect of counteracting claimant's psychological condition, then the Michigan Supreme Court has held that the condition is not a disability under the PWDCRA.

major life activities. *Stevens v. Inland Waters, Inc*, 220 Mich App 212, 217-218; 559 NW2d 61 (1996); *McAlindin v. County of San Diego*, 201 F3d 1211 (9th Cir. 1999). Determining whether an impairment substantially limits major life activity is made in light of "(1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanency or expected permanency or long term effect. *Lown v. J J Eaton Place*, 235 Mich App 721, 728, (1999). Both Dr. Abramsky and Paster Hoke testified that claimant's depression is chronic and that she has been treated for her depression off and on since 1971. They believe claimant will continue to be disabled by her illness, and Paster Hoke believed that at best her prognosis is guarded.

B.

Respondent had knowledge of Claimant's disability. Claimant's attorney requested an accommodation to respondent's no pet rule in a letter dated November 22, 2000. This request was accompanied by a letter from Dr. Khalsa, stating that claimant was suffering from an emotional disability that is limiting some of her major activities. The doctor went on to state that keeping and caring for her mother's dog would be of service and support to claimant, as well as therapeutic and beneficial to her health.

C.

It is on the issue of accommodation where I part company with

the Majority Opinion. In the instant case, I find that Respondent had no duty to accommodate the Claimant because claimant did not establish that her dog was a service animal. In *Bronk*, the Seventh Circuit held that the deaf tenant could be entitled to keep his dog if he could show that the animal was necessary as a service animal. *Id.* at 429. There, the dog was found to be a pet and not a hearing dog. No evidence was offered that this dog had any "discernible skills." *Id.* Since this pet was not necessary as a hearing dog, the court determined that "his presence in the townhouse was not necessarily a reasonable accommodation. *Id.*

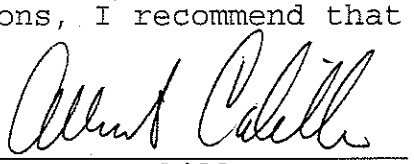
Claimant testified to the training which she gave to Max:

> ...I've trained him. ... and consulted with a ... dog groomer. And she instructed me like to get him a choke collar, and to do an award system of him and now he's very good. He knows the commands of stay and wait, and he knows to come for treats. (10/25/01: 125-126).

The training identified by Claimant is behavior training that would apply to any pet dog. It is not training that is designed or intended to assist Claimant with her disability or the use of the residential property. To maintain the distinction established by law between a pet and service animal, it is necessary that an animal be provided training that goes beyond that commonly given to a pet by its owner.

Respondent informed Claimant that she could not keep the dog because it was not a service animal. Claimant never provided Respondent with proof to the contrary.

For the above stated reasons, I recommend that this case be dismissed.



Albert Calille