STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. HC38HW-65639
HUD FILE NO. 02-16-0050-8

A.B. **[redacted]**,	)	
	)	Administrative Action
Complainant,	)	
	)	**FINDING OF PROBABLE CAUSE**
v.	)	
	)	
The Avery Apartments,	)	
	)	
Respondent.	)	

On October 28, 2015, A.B. **[name redacted]** (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that The Avery Apartments (Respondent) discriminated against her based on her disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by creating a $100 monthly fee for disability parking. Respondent denies the allegations of discrimination in their entirety. DCR's investigation found as follows.

Respondent is a 302-unit townhome style apartment complex located in Willingboro, New Jersey. The property is owned by Willingboro Associates LLC.

Complainant is a Burlington County resident who states that she was diagnosed in 2011 with Nyctalopia, which restricts her ability to see in dim light or at night. On September 8, 2012, she signed a one-year lease agreement with Respondent (where she continues to reside). She states that in 2013, she was diagnosed with coronary artery disease, and diagnosed in 2014 with Rheumatoid arthritis in her hip. She states that those conditions significantly restrict her mobility.

Complainant told DCR that on or about April 15, 2014, she verbally requested a designated parking space in front of her unit as a reasonable accommodation for her disabilities. She followed up with an email to Property Manager Karen Sulkin, which said:

> Per our discussion on April 15th, 2014, you informed me that an accommodation of having a handicapped parking space for disabled tenants was denied previously to other tenants. It would subsequently be denied for me as well. I informed you that I know the law and under the ADA and FHA, handicapped parking space is a reasonable accommodation if requested. You said you would get back to me. It's been over a week. I am formally requesting a handicapped spot in front of my apartment #[redacted]. I have a NJ permanent handicapped parking placard. I suggest you, the company and the "Director of Construction" make yourself familiar with the laws under the ADA and Fair Housing Act. I have included the links . . .
>
> [See Email from Complainant to K. Sulkin, Apr. 24, 2014, 9:15 a.m.]

Complainant sent another email to Sulkin with an attached letter that stated as follows:

> I am writing this letter to formally request the reasonable accommodation of a handicapped parking space outside my building. I am a tenant at #[redacted]. I have a NJ motor placard and meet the eligibility criteria/definition for a person with a disability that has been certified by my medical doctor. Please respond in writing by Friday, May 2nd, 2014. I wish to resolve this amicably. However, if this cannot be resolved, I plan to file a formal complaint with the Department of Housing and Urban Development.
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> [See Email from Complainant to Sulkin, Apr. 24, 2014, 5:01 p.m.]

On May 1, 2014, Sulkin sent a letter to Complainant that stated, "If you are requesting a reserved handicap parking spot, please supply the office with documentation from your physician." Similarly, counsel for the property owner, Willingboro Associates LLC, responded as follows:

> Please be advised that this office represents your Landlord, Willingboro Associates. Our client informs us that you have requested a Handicap spot be placed opposite your apartment as a Reasonable Accommodation. As you may be aware, Willingboro Associates currently provides ten (10) Handicap spaces at the property whereas only eight (8) are required for

compliance with applicable Codes. In order to consider your request for a Reasonable Accommodation, please provide medical documentation supporting your request that Handicap space be assigned in front of your apartment so that my client can consider said request.

[See Letter from Jules Leiberman, Esq., to Complainant, May 5, 2014.]

In response to the above requests, Complainant submitted a doctor's note that stated as follows:

> I have been treating [A.B.] [**name redacted**] as a patient since 2011. I understand that under federal and state law, an individual is disabled if he/she has a physical or mental impairment that substantially limits one or more life activities, has a record of such an impairment, or is regarded as having such an impairment. Major life activities include walking, seeing, hearing, speaking, breathing, thinking, communicating, learning, performing manual tasks and caring for oneself.
>
> Impairments also include such diseases and conditions as orthopedic, visual, speech and hearing impairments, Cerebral Palsy, autism, seizure disorder, Muscular Dystrophy, Multiple Sclerosis, cancer, heart disease, diabetes, HIV, mental and emotional illness, drug addiction, and alcoholism. This definition does not cover an individual who is a drug addict and currently using an illegal drug, or an alcoholic who poses a direct threat to property or safety because of alcohol use (224 CFR Part 8 3 and HUD Handbook 4350.3 (Exhibit 2-2).
>
> I certify that she has a physical and visual impairment which meets the definition above. I recommend Willingboro Associates make a reasonable accommodation of her disability by providing a reserved parking space in front of her housing development. I verify that this request is directly related to her disability and is necessary to afford her the opportunity to access housing, maintain housing, or fully use/enjoy housing.
>
> [See Letter from Kripa Nambiar, M.D., May 28, 2014.]

Complainant told DCR that after speaking with someone from the U.S. Department of Housing and Urban Development (HUD), she requested a designated/assigned parking space for herself. Complainant sent an email dated June 4, 2014, to Sulkin stating as follows:

> Please note the change to the request. I'm no longer requesting a handicapped parking spot. I'm requesting a reserved assigned parking spot for myself in front of my building. Please get back to me within 7 days regarding the final determination.

On or about June 20, 2014, Sulkin told Complainant via email that she placed an order for the signage and that it would be installed once it was received. On or about June 25, 2014, the designated/assigned parking space for Complainant was installed and ready for her use.

A year later, Complainant received an email stating that Respondent was going to begin charging $100 per month for "reserved handicap parking space in front of a resident's unit." The email stated:

> Dear Avery Residents,
>
> This letter is being sent to advise you that after consultation with our legal counsel, there has been a change to the reserved handicap policy at The Avery Townhome Apartments. There will now be a $100 monthly fee for a reserved handicap parking space in front of a resident's unit. If you wish to continue utilizing the reserved handicap sign/space that we have provided you, upon your lease renewal this monthly fee of $100.00 will be added to your rent. If you do not wish to continue utilizing the reserved handicap space under the new policy, please let us know and the sign will be removed from the space in front of your apartment home. If you have any questions or concerns regarding this matter, please feel free to contact the office at 609-877-8600.
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> [See Email from K. Sulkin to Complainant, "Policy Change – Reserved parking," Jul. 30, 2015, 9:25 a.m.]

That day, Complainant responded as follows:

> This is an illegal practice as mine is a reasonable accommodation due to a disability with accompany [*sic*] doctor's note. You cannot charge people for a reasonable accommodation. I will be seeking legal counsel and filing a complaint with HUD and DOJ regarding Reasonable Accommodations.
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> [See Email from Complainant to K. Sulkin, "Policy Change – Reserved parking," Jul. 30, 2015, 10:57 a.m.]

That same day, Complainant filed a housing discrimination complaint with HUD. The complaint was subsequently forwarded to DCR for investigation.

During the investigation, Respondent produced an addendum to the lease agreement, which Complainant renewed on October 28, 2015. The addendum states in part:

> Owner grants Tenant parking privileges described below shall [*sic*] commence on 11/1/2015 and will end on 10/31/2016. Tenants handicap Parking shall terminate and Landlord shall remove signage (a) if Tenant does not pay parking space fees when due; (b) after service of any notice allowed by law; or (c) at the earlier of the termination date of the Agreement or the date that Tenant parking privilege granted is for: Assigned space: Reserved Handicap parking with signage for [redacted], Willingboro, NJ 08046. The monthly rent due for each space is $100.00. This amount will be deemed "additional rent" and must be paid in advance, on or before the first of the month.

Complainant told DCR that she signed the addendum under duress, and has been paying the $100 monthly fee.

During the investigation, DCR learned that Complainant was one of five tenants with a reserved parking space because of a disability. All five are being charged $100 per month for their space. Respondent's counsel told DCR the following:

> Management at the Avery Apartments decided upon the $100 monthly figure as it is a fair and approximate amount to reimburse management for the time and effort spent policing the reserved spaces to ensure their availability to the designated drivers. For example, management has recently identified a number of unauthorized cars parking in the reserved spaces, and employed a tow truck service to remove said cars.
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> [See Email from Justin H. Lubas, Esq., to DCR, Jan. 26, 2016, 2:53 p.m.]

Respondent argues that Complainant is not disabled and thus "not entitled to any accommodation." See Respondent, Explanatory Answer Pursuant to N.J.A.C. 13:4-31.2, Nov. 24, 2015, p. 3. It notes, "While Plaintiff may claim that she is limited in her ability to

walk, Defendant's [*sic*] regularly observe Plaintiff walking about her property without issue. Plaintiff's ability to walk is further demonstrated by the fact that she has chosen to reside in a two-story apartment, which begins on the second floor." Ibid. It argues that Complainant does not have a "handicap parking placard," and "has only submitted a doctor's note which vaguely mentions an unidentified 'physical and visual impairment'. This is not a sufficient substitute for the state established procedure for obtaining a handicap driving placard." Id. at 3-4.

Alternatively, Respondent contends that to the extent Complainant has a disability, she has been provided with a parking space that gives her an "equal opportunity to use and enjoy the dwelling." Id. at 4 (quoting 42 U.S.C. § 3604(f)(3)). It argues that its "policy which requires the same $100 payment as any other resident, and then gives preference to handicap individuals regarding the location of their parking space, is a sufficient reasonable accommodation." Id. at 4.

Analysis

The LAD is "remedial legislation" designed to root out the "cancer of discrimination," Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996). In enacting the law, the New Jersey Legislature declared that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic State." N.J.S.A. 10:5-3; see also L.W. v. Toms River, 189 N.J. 381, 399 (2007) (noting "[f]reedom from discrimination is one of the fundamental principles of our society").

Because of the LAD's remedial purpose, courts have adhered to the Legislative mandate that the statute be "liberally construed," N.J.S.A. 10:5-3, by consistently

interpreting the LAD "with that high degree of liberality which comports with the preeminent social significance of its purposes and objects." Andersen v. Exxon Co., 89 N.J. 483 (1982); Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005).

The LAD bans housing discrimination based on disability. N.J.S.A. 10:5-12(g); N.J.S.A. 10:5-4.1. Housing providers are required "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling." N.J.A.C. 13:13-3.4(f)(2).

The duty to provide a reasonable accommodation "does not entail the obligation to do everything humanly possible to accommodate a disabled person." Oras v. Housing Authority of Bayonne, 373 N.J. Super. 302, 315 (App. Div. 2004). An accommodation is not required if it would "impose undue financial and administrative burdens on the landlord or if the requested accommodation would fundamentally alter the nature of the landlord's operation." See Sycamore Ridge Apartments v. L.M.G., 2012 N.J. Super. Unpub. LEXIS 1313, *23 (App. Div. June 14, 2012). The burden to prove that a requested accommodation would impose an undue hardship lies with the housing provider. See, e.g., Lapid-Laurel, LLC v. Zoning Bd. of Adjust. of Scotch Plains, 284 F.3d 442, 457 (3d Cir. 2002) ("plaintiff bears the initial burden of showing that the requested accommodation is necessary to afford handicapped persons an equal opportunity to use and enjoy a dwelling, at which point the burden shifts to the defendant to show that the requested accommodation is unreasonable."); Lasky v. Moorestown Twp., 425 N.J. Super. 530, 545 (App. Div. 2012), certif. denied, 212 N.J. 198 (2012).

A New Jersey regulation promulgated pursuant to the LAD prevents landlords from imposing a disability surcharge on tenants for providing reasonable accommodations:

> It is unlawful for any person to discriminate against any individual because of disability in the price, terms, conditions or privileges of the sale, rental or lease of real property or in the provision of services for facilities in connection therewith. People with disabilities shall not be required to pay extra compensation or additional security deposits as a result of their maintaining or requiring special practices or accessories though such persons may be liable for any specific damage which may be done to the premises by virtue of their requirement.
>
> [N.J.A.C. 13:13-3.4(e)]

Although the regulation "does not require a landlord to . . . bear the expense of any such special . . . practices," N.J.A.C. 13:13-3.4(e)(1), it does not permit a landlord to charge a fee for providing a resident with disability accommodations.

Likewise, the United States Departments of Justice (DOJ) and Housing and Urban Development (HUD), which enforce the federal Fair Housing Act, 42 U.S.C. §§ 3601 – 3619, issued a joint guidance on the issue. They wrote, "Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation." See DOJ & HUD, Joint Statement of DOJ & HUD: Reasonable Accommodations Under the Fair Housing Act, May 17, 2004, p. 9; cf. Dare v. California, 191 F.3d 1167, 1171 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001) ("surcharges against disabled people constitute facial discrimination"); see also 28 C.F.R. 36.301 (prohibiting places of public accommodation from placing a "surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as provisions of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the [ADA].").

Initially, Respondent did not dispute that Complainant is a person with a disability. Nor did it dispute her need for the requested accommodation. However, it now challenges both points. It argues that Complainant does not have a "handicap parking placard," "has only submitted a doctor's note which vaguely mentions an unidentified 'physical and visual impairment'," and is "regularly observe[d] . . . walking about her property without issue." See Respondent's Answer, supra, at p. 3-4.

DCR found that Complainant has a placard, which was issued in or about March 2014 and expires in 2017. Moreover, if Respondent had questions about the legitimacy of her claim or the vagueness of her doctor's note, it could have conveyed those concerns to Complainant and asked for additional information from her or her doctor. There is no indication that it did so. DCR spoke with Complainant's treating physician who stated that it was his medical opinion that Complainant is disabled, and that she has a number of conditions—low vision, pre-diabetes, osteoarthritis, and gait disorder—which make it difficult for her to walk safely and require her to have a parking spot close to her unit.

Respondent has produced no persuasive evidence to support its assertion that Complainant does not have a disability. In view of the above, the Director is satisfied for purpose of this disposition that Complainant has a disability and that the parking spot would alleviate the effects of her disability to afford her an equal opportunity to use and enjoy the dwelling.

Respondent argues that it has the discretion to charge its tenants for reserved parking spaces that serve as reasonable accommodations. Although a tenant with a disability may be responsible for the actual costs of a requested structural modification to the premises (e.g., installation of an automatic door) or a service, there is no support for

imposing a general, administrative fee for the grant of an accommodation. In fact, a property owner may be required to incur reasonable costs to accommodate a disabled tenant. See Sporn v. Ocean Colony Condo. Assoc., 173 F. Supp.2d 244, 249 (D.N.J. 2001) (citing Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334-335 (2d Cir. 1995)). And as noted above, State and federal regulations expressly ban the creation of a surcharge that discriminates against people with disabilities. N.J.A.C. 13:13-3.4(e).

Respondent argues that imposing a $100 monthly fee to Complainant and other tenants with disabilities is justified by the cost of parking enforcement. However, it offers no documentation of the actual costs incurred or damages caused by Complainant's use of a reserved space. Without such information, there is no basis to evaluate whether a $100 monthly charge is necessary and reasonable under the circumstances. Perhaps Respondent could consider imposing the cost of parking enforcement on those who violate the reserved designation, rather than those who have properly secured the reservation. But in any event, it is settled that a claim of undue hardship "requires proof of actual imposition or disruption" because the "magnitude and the fact of hardship require an examination of the facts of the specific case." See EEOC v. Abercrombie & Fitch Stores, 966 F. Supp. 2d 949, 963 (N.D. Cal. 2013). An unsupported statement about speculative or unspecified costs is not sufficient to discharge a burden of proving undue hardship. Ibid.

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable

cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799 (1991). Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

Based on the above, the Director is satisfied that the circumstances of this case support a "reasonable ground of suspicion" that Respondent failed to provide a reasonable accommodation that would allow Complainant an equal opportunity to use and enjoy the subject dwelling. N.J.A.C. 13:4-10.2. The Director recognizes that Respondent may ultimately present sufficient evidence to demonstrate that its $100 monthly charge is necessary to absorb the cost of what would otherwise be an undue burden of providing this parking spot. However, because the burden of proof on that issue clearly rests with Respondent, and given the legal presumption in favor of disability accommodations, the Director finds at this preliminary stage in the process that Respondent has failed to establish that his affirmative defense is meritorious.[1]

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[1] The Court recently addressed the issue of whether a municipality could charge a $50 annual permit fee to residents with disabilities for "a personally-assigned, exclusive handicapped parking space on the street in front of their residences." See Dial v. City of Passaic, 2016 N.J. Super. LEXIS *6 (App. Div., Jan. 14, 2016). The Court ruled that the ordinance survived a facial challenge. However, the Court stressed that it would "not foreclose a future 'as-applied' challenge based on competent evidence demonstrating that a municipality's provision of free generic handicapped parking spaces does not, in actual practice, reasonably accommodate the parking access needs of its disabled residents." Id. at *31.

Moreover, the circumstances of that case are clearly distinguishable from those at issue here. For example, Dial involved a municipality and parking on a public street. This case involves a

WHEREFORE, it is determined that probable cause exists to believe that Respondent violated the LAD.

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private entity and parking in a private lot. There, the plaintiff faced the "substantial burden" of proving that the law was invalid. Id. at *13 (quoting N.J. Shore Builders Ass'n v. Twp of Jackson, 199 N.J. 38, 55 (2009) (noting that "support for the legislative judgment will be presumed and, absent a sufficient showing to the contrary, it will be assumed that the statute rested 'upon some rational basis within the knowledge and experience of the Legislature"). In this case, the landlord's rule is afforded absolutely no level of deference—it is not assumed to be rationally based. In Dial, the Court noted, "[W]e do not foreclose a future challenge to a permit fee imposed for a personalized handicapped parking space that, unlike the modest $50 annual fee charged here by Passaic, is manifestly exorbitant." Id. at *31. In this case, Respondent's $1,200 annual fee could potentially be viewed as "manifestly exorbitant" particularly when compared to the City of Passaic's $50 fee.