



OFFICE OF HUMAN RIGHTS

Marc Elrich
County Executive

James Stowe
Director

MCGOHR Case No. REH-06711

Sheryl Katzman
3536 Chiswick Court
Silver Spring, MD 20906

COMPLAINANT

v.

Paul Eisenhaur, Chairman
Board of Directors
Leisure World Community Corp.
3791 Rossmoor Blvd.
Silver Spring, MD 20906

RESPONDENT

DETERMINATION

Under the authority vested by Chapter 27, Article I, Section 27-7 of the Montgomery County Code as amended, the Director issues the following Determination on the merits of the subject complaint.

Complainant alleges that she is a victim of prohibited discrimination in housing on the bases of disability and retaliation. Disability and retaliation are protected categories under Chapter 27, Article I, of the Montgomery County Code.

Respondent is a condominium/housing complex within the meaning of Chapter 27, Article I, Section 27-12 of the Montgomery County Code. The alleged act of discrimination occurred June 21, 2019 and is on-going. The complaint was timely filed on August 27, 2019. All jurisdictional requirements were met.

In order to comply with the pleading standard requirements such that an investigation into the Complainant's allegations of unlawful discrimination can be initiated, the Complainant must show that a) she is a member of a class of persons protected by the County Code, b) she resided in a dwelling that is located within Montgomery County and is/was managed by the Respondent, c) the alleged discriminatory treatment was motivated by discriminatory animus.

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Docket 2
OZAH Case No: HR 23-02

Upon establishment of the pleading standard requirements, the burden of production shifts to the Respondent to articulate a legitimate, non-discriminatory rationale for its actions. To prevail the Complainant must successfully rebut the Respondent's rationale by showing it to be a mere pretext for discrimination.

Elements are sufficiently alleged in the complaint, which reads as follows.

"I believe Respondent subjected me to unlawful discrimination based on my physical disability (permanently disabled hand/wrist), in violation of my civil rights under the Americans With Disabilities Act (ADA) and Chapter 27, Article I, Section 27-16, of the Montgomery Code, as amended.

I've made several requests, beginning in June 2019, to the Respondent to recognize the 2017 reasonable accommodation to record all/any Leisure World meetings due to the inability to write copious notes because my hand/wrist being permanently disabled. My doctor has also made the accommodation request on my behalf and provided medical documentation to support my request, but the Respondent has refused to acknowledge any requests.

I believe that my insistence on this reasonable accommodation has given management reason to retaliate against me by ignoring my rightful demand and treating me in a discriminatory manner."

Respondent's Response to Complaint

Respondent submitted a letter which states as follows:

"Please accept this correspondence as my response to your letter dated, September 11, 2019, regarding the complaint filed by Sheryl Katzman.

The Complaint asserts that Ms. Katzman has been discriminated against based on physical disability (disabled hand/wrist). In addition, the complainant asserts that she and her doctor requested reasonable accommodation.

I have not been contacted by the complainant or her doctor regarding this disability. Further, I have not received any requests for reasonable accommodation from either party.

The Leisure World Community Corporation follows a policy that does not allow the recording of meetings unless all members of the body agree to such recordings. This policy is placed on the agenda of the meeting for notification purposes.

I have included a letter dated December 4, 2013 addressed to Mr. Kevin Flannery, General Manager from Thomas Schild Law Group, LLC, Counsel for Leisure World Community Corporation. This letter supports the existing policy that is followed.

I also would like to add that the meetings are recorded for the purpose of rebroadcast on our community CCTV channel which is available to everyone in Leisure World. In addition, all meetings have recorded minutes that are available upon request and are also posted on the residents' website for review by all residents.

Should you require further information, please contact me at 301-502-5572."

The Respondent also included the following statements:

- 1) That this complaint was similar to one Complainant filed with Maryland Commission on Human Rights [now named MD Commission on Civil Rights] which was investigated and dismissed in 2018.

The Complainant has made her disability assertion many times in governance meetings before I became Chair. But to my knowledge she has never provided any medical documentation for an accommodation need – certainly never to me.

Paul Eisenhaur
Chairman of the Board, Leisure World Community Corp.
14620 Deerhurst Terrace
Silver Spring, Md 20906
(301) 460-5588, [email omitted]

- 2) Complainant requested that she be able to record a private meeting (Leisure World is a private gated community) governance meeting due to some unspecified handicap. However, no documentation or medical request was ever made to me for an accommodation. Without that I reverted to the Maryland Statute which applies to the issue:

"Under Maryland's Wiretapping and Electronic Surveillance Act, it is unlawful to tape record any private conversation without the permission of all the parties."

... also, Maryland is one of eleven two-party states. Two party consent now more commonly referred to as all-party consent means that everyone participating in the phone call or conversation must give consent to its recording.

I know of no retaliation against this complainant. And no subsequent demand of accommodation has ever been made by this person to me. Nobody would be ignored if their demand was deemed credible.

- 3) As a matter of policy, I would not ask the details of a physical impairment (although an accommodation request should provide a general understanding). And I would expect an accommodation request supported by a qualified medical opinion. But such a request along with a qualified medical opinion have never been given here. Personal experience has given me the understanding that to be

protected under the ADA, you must have a record of, or be regarded as having a substantial, as opposed to a minor, impairment.

Complainant's Rebuttal

Complainant states the Respondent is lying about not being informed/contacted by Complainant or her physician about her disability and/or her request for an accommodation (to allow her use of a recording device because she cannot take copious notes due to hand/wrist injury). She provided emails indicating Respondent was informed of her disability on June 22, 2019.

In addition, Respondent's statements in this record indicate that Respondent knew of her disability before the June 22, 2019 request for accommodation. Her 6/22/2019 email to Paul Eisenhaur, Chair, LWCC BOD, states, "As previously informed – I am unable to write copious notes as a result of my right hand/wrist being permanently disabled in an accident. This is to reiterate the request that you acknowledged the reasonable accommodation previously approved for recording meetings."

Complainant also emailed Paul Eisenhaur, Chair, LWCC BOD, on June 16 and June 19, 2019 to remind him of the reasonable accommodation being requested (use of an electronic device to record meetings due to disabling condition of hand/wrist).

In June 2019, Complainant also reminded Chair, Paul Eisenhaur that two years before, May 28, 2017, the then Board Chair, David Frager, held a meeting during which he reminded participants that if someone desired to use an electronic device to "take notes" during an open meeting, they should be allowed to do so. In part he stated: "This has been the subject of a discrimination Complaint and I believe our current organizations are complying with this policy and will continue to do so."

According to Complainant despite former Board Chair Frager's advice to Board members and participants and despite several requests by her and her physician for a reasonable accommodation, to be allowed the use of recording device, current Board Chair, Paul Eisenhaur refuses to allow her the use of a recording device and denies any knowledge of her disability and her request for an accommodation.

Analysis and Conclusion

The Complainant states claims of discrimination based on disability and retaliation. After stating prima facie claims, the burden shifts to Respondent to articulate legitimate, nondiscriminatory rationale for its actions. Complainant refuted Respondent's position by showing that she made a reasonable request for disability accommodation and substantiated her disability with medical documentation (record evidence).

The investigative record contains medical documentation provided by Complainant's primary physician, Dr. Kamal Kaur Deol and Orthopedist Alex M. Johnson, MD indicating that Complainant has a history of a compound fracture to hand/wrist which impairs her physical ability to write/take copious notes.

The medical professionals confirm that Complainant's disability substantially limits one or more major life activities. The accommodation was necessary to afford Complainant an equal opportunity to use and enjoy the premises, in accordance with the Americans with Disabilities Act (ADA).

Thus, Respondent denies awareness of Complainant's disability and her requests for reasonable accommodation. However, the record shows Complainant and her physician informed Respondent of her disability when requesting an accommodation from Board Chair, Paul Eisenhower, in summer of 2019.

Furthermore, record evidence indicates that, before filing subject complaint, Complainant had requested accommodation and was allowed the use of a recording device for a period. At that time the Board Chair was not Mr. Eisenhower. There is evidence indicating that not all Board Chairs agree that the organization's policy prevents the use of recording devices by participants at public meetings.

Regarding Respondent's statement that, "the Leisure World Community Corporation follows a policy that does not allow the recording of meetings unless everyone agrees to such recordings," no support for this claim was submitted in this investigation. Respondent did not provide a copy of the referenced policy. Further, the statement is contradicted by a statement from previous Board Chair David Frager, who informed participants at a meeting held May 28, 2017 that anyone requiring an electronic device to take notes should be allowed the use of the device. He added that he believed all company organizations were complying with the policy (record evidence).

Although Maryland's Wiretap Act makes it unlawful to record a person conversation or any telephone or electronic communication without the permission of all other parties, such consent is apparently already in place. Otherwise, Respondent would not be able to record the meetings for the purpose of rebroadcast. As had become evident during the COVID pandemic, consent of electronic conversations can be easily accomplished by an up-front statement that the meeting is being recorded and any party participating in the meeting is deemed to have given consent to recording.

Additionally, Respondent stated concerns that recording devices can be used for reasons other than taking notes. For example, if there are personal issues between the user and members of the Board, the user can use it to "bad-mouth management." The Respondent did not provide any evidence of bad-mouthing incidents involving the Complainant. However, Respondent is protected against bad-mouthing as recording with criminal or tortious purpose is illegal, regardless of consent.

As regards Respondent's claim that Complainant filed a similar complaint with the Maryland Commission on Civil Rights (MCCR) a couple of years prior to subject complaint, record evidence indicates that in the Complaint filed with the MCCR in 2018 Complainant did not provide documentation that she was disabled. However, in the instant case medical documentation submitted by Complainant shows that she has a disability which limits one or more major life activities.

During the investigation, Respondent Paul Eisenhauer was given the opportunity to resolve this complaint by participating in mediation. He declined to participate in mediation. Mr. Eisenhauer was also informed by the investigator that Complainant meets the definition of disabled under the ADA and if he agreed to allow Complainant to use a recording device when attending meetings, the complaint could be resolved without further investigation. Mr. Eisenhauer appeared to indicate he would consider an informal resolution but apparently had a change of mind and instead submitted a written response to the complaint.

This agency finds that Complainant satisfies the definition of disabled under the pertinent statutes. She provided documentation from medical professionals substantiating that her injury substantially limits one or more major life function. As a member of a protected class (disabled person), Complainant was engaged in protected activity (a request for reasonable accommodation).

Once a request for reasonable accommodation is presented, it is incumbent upon Respondent to engage in good faith negotiations about the request for disability accommodation. There is no indication in the record that any such negotiation occurred. Respondent's outright denial of Complainant's request for reasonable accommodation constitutes an action with discriminatory animus based on her disability.

Former Board Chair David Frager's statement (record evidence) indicates that the current Board Chair is either disingenuous about the company/organization policy to allow the use of a recording device in a community meeting, or he is acting contrary to the policy. The Board's failure to accommodate Complainant's request amounts to discrimination. As Complainant was engaged in a protected activity, Respondent's refusal to allow her to record notes constitutes retaliation based on activity protected under the anti-discrimination laws.

Based on the foregoing, the agency finds reasonable grounds exist to believe Respondent engaged in unlawful discriminatory actions in violation of the American with Disabilities Act (ADA) and Montgomery County Code, Chapter 27, Article I, Section 27-12 when Respondent denied Complainant's request for reasonable accommodation based on her disability and when Respondent further retaliated against her by prohibiting her from taking notes in its public meetings.

In view of the findings, the Director invites the Respondent to join in a collective effort toward a just conciliation of this matter. The Respondent should indicate its willingness to conciliate the matter within 30 days from the date this Determination is mailed to parties. Acceptance of conciliation may be by written response to: Director, Montgomery County Government's Office of Human Rights, 21 Maryland Avenue, Suite 330, Rockville, MD 20850.

Aug 24, 2021
Date

James L. Stowe
James L. Stowe, Director

* This document was sent by USPS First Class Mail – rather than certified mail – due to widespread facilities closures during the health pandemic.

 **MAILED**
08/27/21
JL