

<sup>1</sup> Throughout the course of this litigation, Ms. Katzman has been identified as Claimant, Complainant, and Petitioner in various documents submitted to and issued by the HRC and OZAH.

request to record the meetings constitutes a reasonable accommodation.” *Id.* The parties filed their respective dispositive motions to address the legal issues presented by those two questions.

### **DISPOSITIVE MOTIONS PROCEDURAL HISTORY**

Respondent filed a “Motion for Partial Summary Disposition” on September 28, 2023 arguing against Ms. Katzman’s request to record stating residents are entitled to a reasonable expectation of privacy as legally supported by the Wiretap Act and the Commission for Common Ownership Communities (CCOC) instructions to County HOAs against recording meetings without full consent those attending. (Dkt. 40). Claimant filed a “Response and Motion to Deny Respondent’s Motion for Partial Summary Decision” on October 18, 2023 arguing her right to record is protected by the ADA and the public accommodations section under the Fair Housing Act (FHA). (Dkt. 42). Respondent subsequently filed “Respondent’s Response to Claimant’s Motion for Summary Decision” on October 30, 2023 arguing first that Ms. Katzman’s motion is untimely and that as Claimant she must prove Respondent engaged in discriminatory and/or retaliatory practices, which remain facts still in dispute. (Dkt. 43). Claimant then filed a “Response to Respondent’s Response to Claimant’s Motion for Summary Disposition” on November 1, 2023, again asserting the same arguments previously made on October 18, 2023. (Dkt. 44). On December 19, 2023, Sophia Jayanty, Esq., Supervising Attorney for the University of Maryland School of Law, Fair Housing Law Clinic entered her appearance on behalf of Claimant. (Dkt. 46). After a prehearing conference with attorneys for both parties, the Hearing Examiner permitted counsel for Claimant the opportunity to submit a supplement brief on the legal issues identified during the prehearing conference. (Dkt. 56)<sup>2</sup>. Oral argument proceeded on January 22, 2024. For all the following reasons Respondent’s

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<sup>2</sup> The parties disagree on the scope of the issues to be covered by the Claimant’s Supplemental Brief.

Motion for Partial Summary Disposition is denied in part regarding to the reasonable accommodation claim and Claimant's Motion for Summary Disposition is granted in part regarding reasonable accommodation and denied in part regarding any retaliation claims because facts remain dispute.

### **UNDISPUTED FACTS**

The following facts are undisputed by parties:

1. Ms. Katzman has been a resident and member of Leisure World of Maryland since 2012. (Dkt 56).
2. Leisure World of Maryland is a private gated community for residents 55 years of age or older in Montgomery County, Maryland. (Dkt. 40).
3. Leisure World of Maryland is governed by Leisure World Community Corporation (LWCC) a body of residents who serve as the Board of Directors. (Dkt. 40).
4. Ms. Katzman produced medical documentation verifying the existence of her disability. T. 15-17.
5. Ms. Katzman requested of LWCC that she be allowed to record LWCC meetings. T. 16.
6. LWCC denied Ms. Katzman's request to record LWCC meetings. T. 17.

### **PARTY POSITIONS**

The Hearing Examiner, at the conclusion of the prehearing conference, identified the position of the parties as follows:

1. Respondent asserts settlement is not possible because it cannot grant Claimant's reasonable accommodation request to record the meetings because such a recording is illegal under the Maryland Wiretap Act and contrary to guidance provided by Montgomery County's CCOC. T. 8

2. Claimant asserts that under Montgomery County as well as federal and state law that her request to record LWCC meetings represents a reasonable accommodation and to deny her this request amounts to discrimination under the law. T.8

Based on these positions, discussion during the prehearing conference and as further established by emails with the parties immediately following the prehearing conference, the Hearing Examiner asked for legal argument on the following:

1. What would be a reasonable accommodation for Ms. Katzman under the law?
2. Is a recording a protected right?
3. Is a recording the only option for a reasonable accommodation?
4. Who pays for it?
5. Was LWCC's offer to permit Ms. Katzman the ability to hire or bring a private note taker a reasonable accommodation?

### **STANDARD OF REVIEW**

Any party may move for summary disposition when there is no genuine issue of material fact to be decided at a hearing, and that party is entitled to a ruling as a matter of law. OZAH RULES OF PROC. FOR AGENCY REFERRAL & ACCESSORY APARTMENT CASES, §1.5.6. In cases where the hearing examiner is not the deciding official, summary proceedings may result in the hearing examiner issuing a report and recommendation to the deciding body of dismissal or other finding without the needed for an evidentiary hearing. *Id.*

The Montgomery County Administrative Procedures Act ("MCAPA") §2A-7 governs prehearing procedures. Pursuant to §2A-7(d), any party may file a motion for summary decision at least 30 days before a hearing date and the hearing authority may grant summary decision upon a finding, subject to a 10-day response deadline for responses by other parties, that: (1)

there is no genuine issue of material fact to be decided at the hearing; and (2) the moving party is entitled to prevail as a matter of law. Maryland courts have interpreted this standard to permit the grant of a motion for summary decision when a case “present[s] no material facts that may reasonably be said to be disputed.” *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 534 (2003). “[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

### **PROCEDURAL ISSUE**

#### **A. Claimant’s Failure to Follow Rules of Procedure**

Respondent argues Claimant’s Opposition to Respondent’s Motion for Partial Summary Disposition is untimely filed and her failure to comply with the rules of procedure as set forth in the August 14, 2023 Procedure Order (Dkt. 37) require the Hearing Examiner to reject all of Claimant’s arguments and not consider content of any document that fails to meet the procedural requirements. While the Hearing Examiner finds Claimant’s failure to acknowledge or abide by any of the rules of procedure and her pattern of regularly ignoring deadlines incredibly frustrating, to dismiss her opposition or fail to consider her arguments on dispositive motions to be too severe a punishment. Montgomery County Council when it adopted the County’s Administrative Procedures Act intended “to provide for and ensure the realization of administrative due process with respect to specified appeals and contested matters which are subject to hearings ... and to provide where feasible, uniformity in procedures and regulations governing the processing of administrative appeals ...protect those legal rights afforded to affected parties...” MONTGOMERY COUNTY CODE, §2A-1. Given the fact that the rules of

procedure are just that rules of procedure, the Hearing Examiner will consider the Claimant's Opposition and Summary Disposition Motion.<sup>3</sup>

## ARGUMENT

### **A. Did LWCC discriminate against Ms. Katzman per Montgomery County Code, Section 27-12(a)(5) when it denied her request to record LWCC meetings?**

On August 27, 2019, claimant filed a complaint with the HRC alleging the following:

I have made several requests, beginning in June 2019, to the Respondent to recognize the 2017 reasonable accommodation to record any/all Leisure World meetings due to the inability to write copious notes because my right hand/wrist being permanently disabled. My doctor has also made this accommodation request on my behalf and provided medical documentation to support my request but the Respondent has refused to acknowledge any request. 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. (Dkt. 59)<sup>4</sup>

Claimant cites extensively to the history and evolution of the ADA and the FHA and Montgomery County's adoption of its own anti-discrimination laws shortly after the passage of the federal statutes. (Dkt. 56). In addition, Claimant states that with the "certification" of Montgomery County's discrimination laws the County is required to administer its own laws as well as the federal fair housing protections. *Id.* The Hearing Examiner agrees with Claimant's analysis that review of federal statutes and case law in the application of the County statute to the instant case is appropriate. Because the reasonable accommodation request serves as the basis of

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<sup>3</sup> During the prehearing conference on December 27, 2023, the Hearing Examiner permitted the submission of a Supplemental Brief by Claimant's newly engaged counsel to provide legal argument issues presented, essentially permitting a Claimant the opportunity to legally support her previous attempt at submitting a Dispositive Motion.

<sup>4</sup> Several references to alleged "harassment" by LWCC of Ms. Katzman are made in various documents submitted to OZAH. Allegations of harassment were not made part of the original complaint. The Hearing Examiner will not address whether LWCC harassed Ms. Katzman but only review facts related to denial of the reasonable accommodation and any retaliation as claimed.

Claimant's discrimination claim, the Hearing Examiner must first determine whether Claimant's request is reasonable under the law.

1. Must Claimant prove discriminatory intent?

Respondent argues that crux of this matter is whether LWCC engaged in discriminatory and/or retaliatory practices under Section 27-12(a)(5). (Dkt. 43). Section 27-12(a)(5) states a person must not **because** of ... disability... discriminate ... in the ...privileges ... of occupancy of any person.” (**emphasis added**). Respondent argues that because facts are in dispute as to whether LWCC intentionally discriminated against and/or retaliated against Ms. Katzman, Claimant's Motion for Summary Disposition must be denied. (Dkt. 43). Claimant argues that the right to a reasonable accommodation to be the legal concept at issue in this case. (Dkt 56 pg. 20). Claimant further asserts because no showing of intent to discriminate is required to establish a reasonable accommodation claim, Claimant need not prove discriminatory intent. *Id.* at pg. 21.

The Hearing Examiner agrees with Claimant that a showing of discriminatory intent is not required to establish a reasonable accommodation claim per the case law cited. However, Claimant also alleges LWCC retaliated against her because of her repeated accommodation requests. Whether or not Respondent's actions in denying the reasonable accommodation request were retaliatory is a question of fact still in dispute.

2. For purposes of analyzing discrimination under Montgomery County law is Respondent required to make a reasonable accommodation to a “policy/privilege”?

Respondent argues because the complaint lodged has nothing to do with Ms. Katzman's ability to occupy her dwelling or access common areas that note taking is not a protected right under the law. (Dkt 8.) Claimant counter argues that it is unlawful for any person to refuse “to

make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling included public and common areas.” (Dkt. 56, Pg. 14). Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *Bryant Woods Inn v. Howard Cnty.*, 124 F.3d 597, 603 (4<sup>th</sup> Cir. 1997).

Claimant references the purpose of the County’s ordinance is to broadly “prohibit discrimination” so that the scope of the ordinance does not just confine protections to those instances that occur within the four corners of a dwelling. (Dkt. 56, pg. 16). In doing so, Claimant reads “dwelling” expansively such that “dwelling” includes prohibiting discrimination in services, conditions and privileges. *Id.* at 17.

The Hearing Examiner finds Claimant’s argument persuasive. The FHA makes it unlawful to refuse to make reasonable accommodations in the application of rules, policies, practices or services necessary to afford a disabled person use and enjoyment of a dwelling and its common elements. 8 POWELL ON REAL PROPERTY §54A.05(f) (2022). The case law requires no showing of discriminatory intent to determining whether an accommodation request is reasonable, and the FHA requires accommodations to expand beyond the of a dwelling unit for the Claimant to be afforded an equal opportunity to use and enjoy the privileges of Leisure World.

Claimant seeks the ability to make an audio-recording as a substitute for the notes that she would otherwise take by hand if her disability did not prevent it. While Respondent asserts note taking is not a protected right, it is difficult for the Hearing Examiner to imagine Respondent denying an individual who is blind the ability to record so that recording may be translated into braille to be reviewed by that individual later or deny a deaf member the right to have an agent



ask questions on his/her behalf during a meeting. The note taking process varies from person to person. While some members during meetings may take pages and pages of notes and others may take none. It is not up to LWCC to dictate how many notes a member may or may not take, but the ability to recall what was said and how decisions were made is essential to a member's ability to participate in the governance of his/her community. While the offer to provide Claimant with copies of the meeting minutes may help capture the decisions made during the meeting, those minutes may not go into the level of detail Claimant requires for her to participate in meetings fully.

3. How does the *McDonnell Douglas* burden shifting test apply to the instant case?

Where the evidence presented is indirect, survival of a pre-trial motion for summary judgment is determined by a “burden-shifting” analysis first established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), holding modified by *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). The Maryland Court of Appeals previously found that the *McDonnell Douglas* burden-shifting standard applies to employment discrimination claims under the Montgomery County Code §27-19(c). *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 199–200 (2013). Maryland's highest court determined that “once the complaining party proves a *prima facie* case of reasonableness, the defending party ultimately bears the burden of showing the accommodation is unreasonable... [and] plaintiff will rarely, if ever, be in a position to prove that cost to the defendant.” *Bd. of Dirs. of Cameron Grove Condo., II v. State Comm'n on Human Rels.*, 431 Md. 61, 79 (2013) (see *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (requiring a court to balance, when determining the reasonableness of a requested accommodation, the “cost (to the defendant) and benefit (to the plaintiff”).

LWCC argues Ms. Katzman must show some evidence of intent to discriminate for her claim to stand. T. 44-45. Conversely, Claimant argues that the discriminatory act occurred because LWCC denied a reasonable accommodation request and analysis of discriminatory intent is not required when determining whether an accommodation is reasonable. (Dkt. 56, pg. 21). What is clear from the law is that the *McDonnell Douglas* burden shift applies to the instant case and Claimant must make a *prima-facie* case prior to the burden shifting to Respondent to prove the denial of the accommodation request to be reasonable.

**B. Under the law was Claimant’s request to record LWCC meetings reasonable considering her disability?**

**1. Prima-facia burden**

Claimant argues she must show that 1) she is disabled, 2) responding party knew of the disability and 3) her request for accommodation was reasonable per 42 U.S.C. §3602(h) to support a finding of a prima-facia case. *Id.* *Cameron Grove* establishes that complainant must make a prima-facie showing that the requested accommodation is generally reasonable, but that the defending party must ultimately prove that the accommodation is unreasonable. *Cameron Grove* at p. 80.

As stated above, all parties agreed that Ms. Katzman has a disability and LWCC acknowledged the existence of her disability. With items 1 and 2 of the prima-facia test established, what is left to determine is whether her request to record was reasonable under the law. On its face, a request to record using an electronic device owned by Claimant would appear to be reasonable given the fact that Respondent would incur no cost and require no changes to process, structure or responsibility to accommodate the Claimant’s request. These

facts as presented are enough to satisfy Claimant's burden of establishing a prima-facia case and shift the burden to Respondent to show the requested accommodation is unreasonable.

## 2. Respondent's Burden

Respondent argues electronic recording of communications in Maryland requires consent and if a recording is made without consent that recording is a violation of the Maryland Wiretap Act. (Dkt. 40). Specifically, the Maryland Wiretap Act makes it unlawful for any person to willfully intercept any oral or electronic communications and violations are punishable by imprisonment and fine. MD. CODE ANN., CTS. & JUD. PROC. §10-401 *et seq.* *Id.* Respondent cites *Adams v. State*, 43 Md. App. 528 (1978) and *Perry v. State*, 357 Md. 37 (1999) for the Court holdings that without consent of all parties recording of a conversation is illegal. *Id.* Respondent further cites *Fearnow v. Chesapeake & Potomac Tel. Co.* 342 Md. 363 (1999) and *Benford v. American Broadcasting Cos.* 554 F. Supp. 145 (D. Md. 1982) regarding a person's reasonable expectation of privacy in determining a violation of the Wiretap Act and further relies on *Planned Parenthood Fedn. of Am., Inc. v. Ctr. For Med. Progress*, 462 F. Supp. 3d. 514 (N.D.Ca. 2019) in applying both the subjective and objective reasonable expectation of privacy tests to the instant case. *Id.*

As stated in *Benford* a reasonable expectation of privacy is considered on the facts presented, and on a case-by-case basis. Upon review of the cases cited, including *Katz v. U.S.*, the crucial analysis is the reasonable expectation of privacy both subjectively and objectively of LWCC's Board and individual members. While the Hearing Examiner agrees that LWCC's meetings are not open to the general public and the safeguards taken to ensure only members are permitted in the meetings align with those safeguards taken in the *Planned Parenthood* case, Leisure World meetings held pursuant declarations and covenants established in order to govern a community

of approximately 8,000 units differs vastly from those meetings/discussions that occurred during the Planned Parenthood conference.<sup>5</sup>

The Hearing Examiner finds persuasive the June 20, 2023 Attorney General opinion specifically answering the question of would the Maryland Wiretap Act prevent the taping of an HOA meeting. (Dkt. 56a, Ex. H). In the Attorney General’s opinion, Ms. Rowe stated that HOA meetings do not fall under the State Open Meetings Act, but because Real Property Article §11B-111(1) requires meetings be open to all members of the HOA and their agents an “HOA meeting cannot be described as a private conversation and recording of the meeting would not violate the Wiretap Act.” *Id.* Respondent also relies on CCOC guidance from 2018 that states HOA Boards of Directors have a right to limit the audio and video taping of meetings and further goes on to say that “in fact it is illegal to make a recording without the knowledge and consent of the participants in a meeting.” (Dkt. 45). While the Hearing Examiner is sympathetic with situation in which the LWCC finds itself, i.e., rejecting CCOC’s recommendations in this instance, the guidance provided by the CCOC in advocating the prohibition of recording meetings conflicts with county, state and federal law as it relates to granting Claimant a reasonable accommodation.

In 2022, the Maryland Supreme Court undertook a thorough discussion of assessment collection efforts undertaken by HOA’s. Specifically, helpful to the analysis before the Hearing Examiner is the following provision:

Although the governing body of an HOA or a condominium regime has the statutory right to collect delinquent assessments, interest, and fees, **the exercise of such rights must be undertaken in conformance with** the organization's respective bylaws and organizational documents, **as well as applicable state**

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<sup>5</sup> “Planned Parenthood delivers programs, resources, and tools in classrooms, communities, and online that help people make informed choices about their sexuality and relationships, so they can lead full and healthy lives.” <https://www.plannedparenthood.org/about-us/who-we-are#:~:text=As%20a%20respected%20leader%20in,lead%20full%20and%20healthy%20lives.>

**laws. *Nagle & Zaller, P.C. v. Delegall*, 480 Md. 274, 289. (2022) (emphasis added.)**

While the Hearing Examiner is not presented with a debt collection action, the Court’s analysis in this case, specifically citing *Goshen Run Homeowners Association, Inc. v. Cisneros*, reinforces Claimant’s legal argument that an HOA may not act in such a way that violates state and federal law.<sup>6</sup> With the Attorney General opining that an HOA meeting is not a private conversation and the Wiretap Act does not prohibit meeting recordings and the requirement that HOAs must not only act as set forth in their respective bylaws and organization, but also in conformance with state and federal law, Respondent has failed to show granting Claimant’s request to record, given her disability, constitutes an undue burden. Because Respondent failed to meet its burden in the second step of the burden shifting analysis, Hearing Examiner does not address whether the Claimant can demonstrate the justification is pretext for the discrimination.

### **RECOMMENDATION**

Considering the foregoing analysis, I recommend the following:

1. Claimant be granted the reasonable accommodation of making audio recordings of all LWCC meetings in which she is an attendee, thereby resolving by summary disposition the reasonable accommodation legal issue presented.
2. Facts remain in dispute surrounding claims made by Claimant that LWCC engaged in retaliatory actions due to her disability/request for reasonable accommodations.
3. A hearing on the merits will proceed on Thursday, February 22 and Friday February 23, 2024, on the retaliation claim only and a report and recommendation on that issue will follow.

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<sup>6</sup> In this case cited the confessed judgment tool used to collect the debt to violated the Maryland Consumer Protection Act (MCPA). *Id.* at 290.

On this 16<sup>th</sup> day of February 2024, I respectfully submit this Report and Recommendation disposing of the reasonable accommodation issue by summary disposition.



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Kathleen Byrne  
Hearing Examiner

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