

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009CH2531
)	HUD NO.: 05096058
LORETTA BARBOREK,)	ALS NO.: 09-0523
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Marti Baricevic, Robert S. Enriquez, and Gregory Simoncini presiding, upon Loretta Barborek's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2009CH2531; and the Commission having reviewed *de novo* the Respondent's investigation file, including the Investigation Report and the Petitioner's Request, and the Respondent's response to the Petitioner's Request, and the Petitioner's Reply; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that:

- (1) The Respondent's dismissal of Count C of the Petitioner's charge is **SUSTAINED** for **LACK OF JURISDICTION**; and,
- (2) The Respondent's dismissal of Count A and Count B of the Petitioner's charge is **VACATED**, and Counts A and Count B are **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** as to those Counts, and for further proceedings in accordance with this Order and the Act.

In support of which determination the Commission states the following findings of fact and reasons:

1. On February 11, 2009, the Petitioner filed an unperfected three-count (Counts A- C) charge of discrimination with the Respondent, perfected on April 2, 2009, in which she alleged The Timbers in Palos Condominium Association, Inc. ("Association"), Harry Rock, and The Property Specialist, Inc., had failed to reasonably accommodate her disability, Chronic Obstructive Pulmonary Disease ("COPD") (Count A), and had altered the terms and conditions of her real estate transaction because of her disability (Count B), in violation of Sections 3-102.1(B) and 3-102.1(C)(2) of the Illinois Human Rights Act (the "Act"). Further, she alleged that her upstairs neighbor, Barbara Stauffer, made a discriminatory oral statement and harassed and intimidated her because of her disability (Count C), in violation of Sections 3-105.1 and 3-102(F) of the Act. On August 18, 2009, the Respondent dismissed Counts A and B for Lack of Substantial Evidence, and Count C for Lack of Jurisdiction. On September 21,

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Department's action shall be referred to as the "Petitioner."

2009, the Petitioner filed a timely Request. The Respondent filed its response on October 22, 2009. After having received an extension of time from the Commission, the Petitioner filed a timely Reply on November 16, 2009.

2. The undisputed evidence in the investigation file shows the Petitioner is the owner of a condominium unit in a building called The Timbers ("Subject Property"). Stauffer is also a unit owner who resides in the unit directly above the Petitioner. The Association is the authorized administrator for the Subject Property. Harry Rock was the President of the Association at the time of the alleged violations. The Property Specialists, Inc., is the managing agent for the Subject Property. Harry Rock and The Property Specialists, Inc. will be collectively referred to as "Agents" of the Association.
3. Stauffer moved into the unit above the Petitioner's in approximately July of 2007. At the time Stauffer moved in, Association by-laws permitted smoking in the individual units, but not in the common areas of the Subject Property.
4. Around that same time period, the Petitioner began regularly smelling smoke. The Petitioner believed it was secondhand smoke emanating from Stauffer's unit. The smoke severely aggravated the Petitioner's COPD, making it difficult for her to breathe.
5. The Petitioner asked Stauffer to stop smoking in her unit, but Stauffer denied that she or anyone who came into her unit smoked.
6. Thereafter, from August 9, 2007 through March 25, 2008, the Petitioner sought assistance from the Association and its Agents, to help her resolve the secondhand smoke issue. She sent letters to the Association and its Agents, complaining that Stauffer was smoking in her unit, causing the Petitioner to breathe in secondhand smoke. However, the Petitioner alleges the Association and its Agents were dismissive toward her, and characterized her situation as a dispute with her neighbor.
7. Although the file is not clear on the precise date, it was within this same time period that the Petitioner asked the Association and its Agents to provide her with a reasonable accommodation for her disability by amending the by-laws to ban smoking within the units on the Subject Property.
8. The Association and its Agents declined to make such an amendment on the grounds it would be legally unenforceable. There is no evidence that the Association and its Agent Rock engaged in any further cooperative discussion with the Petitioner concerning how else they might reasonably accommodate the Petitioner's disability.
9. The file contains various theories for why the Petitioner might be smelling smoke in her unit. The Petitioner submitted statements of witnesses to support her contention that Stauffer was the source of the smoke. However, there is evidence that Stauffer is an asthmatic and non-smoker. There is also evidence in the file that Stauffer and the Petitioner do not share a ventilation system. There is speculation that the smoke could have been lingering from prior fire damage caused by a fire in the Petitioner's unit. There is further speculation that Petitioner's adult children, allegedly smokers, could be the source, as they allegedly smoked

outside of her unit on occasions when they visited the Petitioner. Thus, there remains a factual dispute as to the source of the smoke the Petitioner smells in her unit.

10. The Petitioner alleged that after she began complaining about her need for a reasonable accommodation for her disability, she received delayed responses from the Association and its Agents regarding requests for maintenance and repairs. The Petitioner also submitted evidence that she had sent numerous letters to the Association and its Agents requesting assistance in trying to ascertain the source of the smoke, but had received no responses or assistance. While the Association and the Agents deny having subjected the Petitioner to differential treatment and different terms and conditions based on her disability, the Commission finds there is no conclusive evidence in the file disproving the Petitioner's claim.
11. The Petitioner further alleged that on November 17, 2007, Stauffer made a discriminatory and threatening remark in reference to her disability. Stauffer denies having made any such remark.
12. The Respondent dismissed Counts A and B for lack of substantial evidence. Regarding the failure to accommodate claim alleged in Count A, the Respondent submits that federal law interpreting the Federal Housing Act (FHA) provides some guidance for how the Commission should interpret the reasonable accommodation requirement of Section 3-102.1(c)(2) of the Act because this provision of the Act parallels language in the FHA.
13. The Respondent argues the Petitioner's failure to accommodate claim should fail because there was no substantial evidence that the requested accommodation of the total smoking ban was "reasonable" or "necessary" to afford her equal enjoyment of her housing. See Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 783 (7th Cir. 2002). The Respondent argues the ban would be unreasonable in that it would "fundamentally alter" the nature of the housing community and would impose an undue hardship on other unit owners. The Respondent also states there is no conclusive evidence the alleged smoke came from Stauffer's unit.
14. As to Count B, the Respondent also argues there is no substantial evidence the Petitioner was subjected to different terms and conditions of housing due to her disability, citing to instances where the Petitioner had received certain repairs, it argues, in a timely manner.
15. Finally, the Respondent dismissed Count C for Lack of Jurisdiction. Count C alleged a violation by Stauffer. In this case, the alleged violation occurred on November 17, 2007, when Stauffer allegedly made a discriminatory and intimidating statement to the Petitioner. The Respondent states that according to the Act, in housing matters, the Petitioner had 365 days from the alleged violation by which to file her charge of discrimination. See 775 ILCS 7B-102(A). The Petitioner filed her charge on February 11, 2009, over 365 days after this alleged violation occurred. Therefore, the Respondent argues it lacks jurisdiction to investigate the Petitioner's allegations in Count C because the charge is untimely as to that Count.
16. In her Request and Reply, the Petitioner also refers to federal law, primarily in support of her claim that she was denied a reasonable accommodation. In particular, the Petitioner argues there is no evidence in the file that a total smoking ban would in fact have been unreasonable,

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or unduly burdensome to implement and enforce, stating, for example, that no poll was taken of current unit owners to determine if they would have supported such an amendment. Further the Petitioner argues the Association and its Agents violated the Act because they failed to engage in a cooperative dialogue with her in order to determine an alternative feasible reasonable accommodation for her disability, citing to Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996). She argues this failure by the Association and its Agents constituted a violation of 42 U.S.C. § 3604(f) of the FHA, as well as Section 3-102.1(C) of the Act. Finally, the Petitioner argues the Respondent improperly resolved credibility determinations against the Petitioner, which is prohibited at the investigatory stage of these proceedings by Cooper v. Salazar, 196 F.3d 809 (7th Cir. 1999).

Conclusion

The Commission's review of the Respondent's investigation file leads it to conclude the Respondent properly dismissed Count C of the Petitioner's charge for lack of jurisdiction. However, the Commission finds that the dismissal of Counts A and B was improper, and herein determines that there is substantial evidence of a violation of the Act as to Counts A and B. As to Counts A and B of the charge, the Petitioner's Request is persuasive.

Regarding Count C, the Respondent is correct in its determination that it lacks jurisdiction to investigate those allegations. The Petitioner's charge was filed more than 365 days after the date of the alleged civil rights violation. Therefore, the charge is untimely as to Count C, and the dismissal of Count C is sustained.

However, the Commission herein vacates the Respondent's dismissal of Counts A and B because the Commission finds there is substantial evidence of a violation of the Sections 3-102.1(B) and 3-102.1(C)(2) of the Act. Under the Act, substantial evidence is evidence ... "which a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance." See 775 ILCS 5/7A-102(D)(2).

As to Count A, alleging failure to accommodate, there is substantial evidence the Association and its Agents failed to reasonably accommodate the Petitioner's disability. Specifically, the Commission agrees with the Petitioner that the Association and its Agents should have engaged in cooperative dialogue with the Petitioner in an attempt to determine how to feasibly accommodate the Petitioner's disability. There is no evidence that such dialogue ever occurred. Rather it appears the Petitioner's first suggestion was rejected out-of-hand as unreasonable and unenforceable, and thereafter, there was no further discussion. Such conduct is not in furtherance of the spirit of the Act, and serves to impede the ability of disabled individuals to attain equal enjoyment of their housing. Further, the Commission finds there was no evidentiary showing that a complete no-smoking ban would in fact have been unreasonable or unfeasible to implement. The Commission found no authority which held that no-smoking bans, even in the context of privately owned residences, were *per se* unreasonable.

As to Count B, alleging different terms and conditions, the Commission finds there remains factual disputes concerning the responsiveness of the Association and its Agents to the Petitioner's complaints regarding the smoke, as well as her requests for repairs, once she began requesting an

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accommodation for her disability. As this stage, the Commission cannot resolve factual disputes; factual disputes can only be properly resolved by a trier of fact. For that reason, the Commission finds there is substantial evidence of a violation of the Act as alleged in Count B.

Accordingly, Counts A and B will be remanded to the Respondent for entry of a finding of substantial evidence as to those Counts, and for further processing in accordance with the Act.

THEREFORE, IT IS HEREBY ORDERED THAT:

- (1) The Respondent's dismissal of Count A and Count B of the Petitioner's charge is **VACATED**, and Count A and Count B of the charge are **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** as to those Counts, and for further proceedings, consistent with this Order and the Act; and,
- (2) The Respondent's dismissal of Count C of the Petitioner's charge is **SUSTAINED** for **LACK OF JURISDICTION**.

This Order is not yet final and appealable.

STATE OF ILLINOIS)
)
HUMAN RIGHTS COMMISSION)

Entered this 24th day of March 2010.

Commissioner Marti Baricevic

Commissioner Robert S. Enriquez

Commissioner Gregory Simoncini