STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. HA22MW-66909

[redacted]., Complainant,	)	
v.	)	**Administrative Action**
	)	**FINDING OF PROBABLE CAUSE**
Sunset Harbor Condominium Association, Respondent.	)	

On March 27, 2018, [redacted]. (Complainant)[1] filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Sunset Harbor Condominium Association (Respondent or SHCA) refused to grant her a reasonable accommodation for her disabilities in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied Complainant's allegations of discrimination in their entirety. DCR's ensuing investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent is a beachfront condominium association for persons 55 and over known as Sunset Harbor, located in Ventnor, New Jersey. Sunset Harbor consists of 102 units in a high-rise oceanfront building. Sunset Harbor has a "No Pets" policy.

Complainant is a person with a disability for which her doctor prescribed an emotional support animal (ESA). Her ESA is a 65 lb. boxer dog named "[redacted]" Complainant has lived with REDACTED for 11 years.

On or about July 31, 2017, Complainant purchased a unit in Sunset Harbor. Although originally purchased as a second home, Complainant told DCR that she wishes to make Sunset Harbor her primary year-round home.

A. Disability Discrimination

Complainant alleged that Respondent refused to grant her the reasonable accommodation of allowing her to reside with [redacted] in her unit unless she signed a "Reasonable Accommodation Agreement," which she claimed set forth conditions to which she could not adhere. On November

[1] [redacted]

20, 2017, Complainant signed a "complaint form" with Fair Housing Advocates, Inc. (FHAI). FHAI sent the complaint to DCR in March 2018, after its attempts to resolve the matter were unsuccessful.[2]

On or about September 4, 2017, Complainant advised Respondent's property manager, Dale Bernato, both in person and via email, that she intended to have her ESA with her when she stayed in her unit. Complainant provided Respondent with an undated prescription blank from her physician, [redacted]., which stated that he prescribed her an "emotional support dog."

In email to Complainant dated September 21, 2017, Bernato stated in part:

> There is specific medical information that must be completed annually by a third party physician. There is an accommodation agreement that must be signed by you and the Association, all prior to the admittance of the comfort dog. Additionally, the association needs copies of all ADA certifications of the comfort dog. I sent you the paperwork and you need to fill it out and schedule a meeting with the Board of Directors.[3]

Bernato scheduled Complainant to meet with the Board of Directors on October 15, 2017, but Respondent later canceled the meeting because the Board's attorney, Steven Scherzer of Cooper Levenson, was not available on that date.

Based on [redacted] prescription note, Respondent provided Complainant a form letter that it requires owners and tenants' doctors to fill out when requesting a reasonable accommodation. Prior to her scheduled meeting with the Board, Complainant gave Bernato a letter from [redacted] dated October 3, 2017, and formatted in accordance with the form letter that Respondent required. The letter stated in part:

> [Complainant] is my patient, and has been under our practice's care for forty years. I am intimately familiar with her history and with the functional limitations imposed by her disability. I am further familiar with the definition of (sic) under the Americans with Disabilities Act, the Federal Fair Housing Act and the Rehabilitation Act of 1973. In my professional opinion, [Complainant] meets the definition of disabled under the above referenced legislation.
>
> Due to her disability, [Complainant] has certain physical limitations or has certain mental issues which adversely affect her day-to-day functions. In order to help alleviate these difficulties and to enhance her ability to live independently and to fully use and enjoy the dwelling unit at Sunset Harbor Condominiums, I am prescribing an emotional support animal that I believe will assist [Complainant] with the functional limitations of her disability. It is my professional opinion that

[2] On March 27, 2018, FHAI filed a separate verified complaint against Respondent, the allegations of which the Director will address in a separate disposition. See Fair Housing Advocates, Inc. v. Sunset Harbor Condominium Association, Docket No. HA22MW-66908.

[3] While it is unclear what Bernato intended when requesting "copies of all ADA certifications of the comfort dog," there is not any governmental agency that provides "certifications" for service or assistance animals as meeting the requirements of the ADA or LAD. While some for-profit enterprises may offer such "certifications" for a fee, such certifications from these enterprises generally do not provide any assurance that the animal is in fact a service or assistance animal.

the accommodations requested and prescribed is necessary for her to have an equal opportunity to use and enjoy her dwelling.

The investigation showed that in October 2017, Respondent provided Complainant with a "Reasonable Accommodation Agreement" (the Agreement), which Scherzer told Complainant she needed to sign in order to keep her ESA as an accommodation for her disability. Complainant gave DCR a copy of the Agreement, which she contended contained terms that made it impossible for her reside at Sunset Harbor with [redacted]. The Agreement stated in relevant part:

> **3. <u>Terms and Conditions Governing HOMEOWNER Exercise of Her Reasonable Accommodation Rights.</u>**
>
> **a.** HOMEOWNER will endeavor to keep her dog, in her Unit 1101 as much as possible during those times that HOMEOWNER is on the premises of Sunset Harbor**.**
>
> **b.** The dog will not be permitted at the pool, party room, library room, fitness room, or main lobby area. Entering and exiting the building must be via the back entrance.
>
> **c.** When HOMEOWNER is on the elevator with said dog, she shall hold the dog in her arms at all times, or have it in a carrying case. If the elevator is crowded or an Owner objects to her coming on, HOMEOWNER agrees to wait for another elevator.
>
> **d.** While walking the dog, HOMEOWNER will use a standard type leash, not an extension type. She will walk the dog outside the perimeter Sunset Harbour of property and will otherwise abide by all local and New Jersey law regarding pick up and disposal of her dog's waste.
>
> . . .
>
> f. Any complaint of barking with regard to the dog received when HOMEOWNER is not in her unit shall be dealt with as follows:
>
> 1. HOMEOWNER will provide her cell phone telephone number to management so she can be called to return if necessary. HOMEOWNER will be or (*sic*) notified of any owner complaints regarding dog barking. The Association reserves the right to take further action in the event the barking becomes a nuisance or otherwise impairs the quiet enjoyment of other unit owner's use of their units. This includes but is not limited to growling, unruly or disruptive behavior, aggressively jumping on people or biting an owner. If more than three bona fide, confirmed complaints are substantiated, it will result in a fine and/or revocation of the privilege of allowing an emotional support dog on the premises until such steps have been taken to mitigate the behavior.
>
> 5. HOMEOWNER will provide an annual medical report along the lines of that previously supplied to the Board, substantiating any ongoing psychological need for her to have an emotional support dog.

Complainant told DCR that because [redacted] is 65 pounds, she is not able to carry him on and off the elevator. Complainant also expressed to DCR that the other terms of the Agreement listed above prevent her from enjoying her home.

On November 29, 2017, Scherzer sent Complainant another letter, which stated in part:

> I understand that you are requesting that your dog, REDACTED be allowed on the premises, with access to all areas of the premises of Sunset Harbor. I have also reviewed the medical documentation from REDACTED.
>
> . . .
>
> This documentation provides that your disability affects your "day to day functions," such that REDACTED opines that an emotional support animal will assist you with the "functional limitations" of your disability. However, this report does not in its present form, provide any information concerning the nexus required under the law between your disability and how the animal prescribed provides a disability-related benefit to you. The nexus that must be demonstrated is that between your disability as described by REDACTED and the assistance provided by the emotional assistance animal, which has not, at this point, been provided to Sunset Harbor by your medical provider.
>
> Once we receive this further information, Sunset Harbor will continue this interactive process with you.

On December 8, 2017, REDACTED sent Respondent another letter explaining why Complainant needed REDACTED to live with her at the property as a reasonable accommodation for her disability. The letter stated in pertinent part:

> Due to her disability, [Complainant] has certain limitations which adversely affect her major life activities. Specifically, [Complainant's] disability substantially limits her ability to sleep and interact with others. [Complainant] has an emotional support animal, currently a dog named REDACTED [Complainant's] emotional bond with REDACTED significantly reduces her anxiety so she can sleep. She needs her emotional support animal so she can sleep, a major life activity. In addition, her emotional bond with REDACTED successfully ameliorates the effects of her disability so she can successfully interact with other people. It is my professional opinion that the accommodations requested and prescribed are necessary for her to have an equal opportunity to use and enjoy her dwelling unit at Sunset Harbor Condominiums. Please make any reasonable accommodation in your rules, policies, procedures and regulations so that [Complainant] can live with her emotional support animal at the property and secure the benefits of Fair Housing. REDACTED is not a pet and should not be subjected to Pet Rules under the Fair Housing Act.

Scherzer sent Complainant yet another letter dated January 16, 2018, in which he stated that REDACTED had still "failed to provide [Respondent] with the requisite information and documentation pertaining to [Complainant's] disability and [her] ongoing need for an emotional support animal." Scherzer wrote that it is his opinion, federal and

state law allowed Respondent to request the following information from Complainant regarding her ESA:

1. The disability of handicap suffered;

2. Whether the disability or handicap meets the standards as set forth within the Federal Fair Housing Act;

3. The major life activities substantially limited by the disability or handicap;

4. Whether treatment is available for the disability or handicap;

5. The description of the accommodation requested;

6. Whether the accommodation requested alleviates or mitigates thedisability or handicap;

7. Whether any alternative accommodation exists.

He noted that REDACTED did not provide sufficient information on questions 4 and 7. He wrote that only after REDACTED answered those questions to Respondent's satisfaction would Respondent engage in any interactive process with Complainant.

Complainant did not reply to Scherzer's January 16, 2018 letter. Instead, she contacted FHAI, who emailed Respondent to discuss the contents of the letter and the ongoing process of presenting her reasonable accommodation request to Respondent. The investigation showed that FHAI was not able to resolve the matter, and during the course of FHAI's discussions with Respondent, Complainant filed a verified complaint with DCR at FHAI's suggestion.

B. Reprisal

On April 27, 2018, Complainant amended her complaint to include an allegation that Respondent subjected her to an act of reprisal when it sent a notice to all unit owners advising them that Complainant had filed the instant complaint with DCR.

In its answer to the amended verified complaint and related position statement, Respondent did not address Complainant's allegations of retaliation.

Complainant gave DCR a copy of the April 12, 2018 letter Respondent sent to unit owners. It stated in part:

> The Board of Directors wanted to notify everyone that the building has been "Officially Served Notice" that [REDACTED] in unit 1101 has begun an action with the State of New Jersey, Division on Civil Rights, Housing Investigation against the Association related to the non-admittance of a comfort animal. It is important to note that she purchased her unit knowing that the building has a no pet, no animal policy.
>
> **The Board of Directors believes it is important for everyone to be informed of this situation because as bills are incurred and legal costs escalate, it is more**

> **likely than not that there will be a homeowner assessment to pay for the legal bills incurred. Especially if the situation goes to court.**
>
> Additionally, if the Association ends up going to an Administrative Hearing, which we are willing to do, and if the verdict favors the Association … we will assess all legal costs incurred against REDACTED and unit 1101, to attempt to restore the Association to its original financial position.

Respondent also announced Complainant's complaint with DCR in its May 2018 newsletter. Complainant provided further evidence that Respondent has continued to bring up Complainant's disability and her request to have an ESA at Sunset Harbor at Board meetings in front of other community members. She asserted that Respondent's intention in making continued statements about her complaint is to embarrass, intimidate, harass, and shame her, with the hope that she will withdraw her complaint with DCR.

Complainant told DCR that as a result of Respondent's decision to announce her request for an ESA to the community at a June 17, 2018 meeting of the Board, other community members yelled at her and attempted to shame her. Complainant also stated that Respondent's decision to publicize her disability and request for an ESA resulted in other community members attacking her at Board meetings and generally shunning her. Complainant told DCR that she no longer attends Board meetings to avoid being harassed by other community members and the Board. She also asserted that she does not feel comfortable living at Sunset Harbor and is considering selling the unit because of Respondent's retaliatory actions.

ANALYSIS

At the conclusion of an investigation, the DCR 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(a). For purposes of that determination, "probable cause" is defined as a "reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe" that the LAD was violated. N.J.A.C. 13:4-10.2(b).

A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which DCR 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., 498 U.S. 1073. 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.

A. Statute of Limitations

In its answer to the verified complaint, Respondent contends that Complainant's allegations of disability discrimination are time barred because she filed more than 180 days after the date on which the alleged harm occurred. N.J.S.A. 10:5-18. Where a complaint alleges a continual pattern of ongoing discrimination or failure to accommodate, the statute of limitations runs from the date of the last harm. See Toto v. Princeton Twp., 404 N.J. Super. 604, 613 (App. Div. 2009) (citing Wilson v. Wal-Mart Stores, 158 N.J. 263, 272-74 (1999)).

As of the date of this finding, Respondent still refuses to: (1) grant Complainant's request for a reasonable accommodation; (2) explain why it is an undue burden for it to grant Complainant's request for a reasonable accommodation; or (3) engage in an interactive process with Complainant to determine if there are other means of accommodating her disability. Complainant continues to suffer harm in that as of the date of this finding, Respondent still prohibits her from bringing her ESA to her home in Sunset Harbor. Therefore, Complainant's cause of action for failure to accommodate is not time barred.

And even if the harm to Complainant was not ongoing, and instead occurred on the date that Respondent indicated it would not engage in any interactive process with Complainant until [redacted] answered additional questions to Respondent's satisfaction (the closest Respondent ever came to a formal rejection of Complainant's reasonable accommodation request), that occurred on January 16, 2018, less than 180 days before Complainant filed a complaint with DCR. The Director declines to dismiss the complaint on this basis.

B. Failure to Accommodate

The LAD prohibits housing discrimination based on disability. N.J.S.A. 10:5-12(g) and (h). It also requires all persons – including condominium associations – 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). Since a "No Pet" policy is precisely the type of rule that N.J.A.C. 13:13-3.4(f)(2) addresses, a tenant's request to keep an emotional support animal (ESA) must be evaluated using the general principles that are applicable to all reasonable accommodation analyses. See Oras v. Housing Authority of Bayonne, 373 N.J. Super. 302, 314-16 (App. Div. 2004) (discussing the application of reasonable accommodation analysis to service and emotional support animals by courts in other jurisdictions).

While a respondent's duty to provide a reasonable accommodation "does not entail the obligation to do everything humanly possible to accommodate a disabled person," where a complainant demonstrates that she is disabled under the LAD, that the accommodation alleviates at least one of the impacts of her disability, and that the accommodation is necessary to allow her an equal opportunity to use and enjoy a dwelling, respondents must grant the accommodation requested unless doing so amounts to an undue burden on its operations. Id. at 315.

Where a disability or the need for a requested accommodation is not apparent, a respondent can request information from the complainant and her physician to evaluate whether the accommodation is necessary for the complainant to have an equal opportunity to use and enjoy the property. A respondent, however, may only request such information as is necessary to assess whether the individual with a disability needs the required accommodation.

Here, Complainant alleges that Respondent failed to accommodate her disability when it continually refused to allow her to keep her ESA on the property despite the substantial documentation that her doctor provided in support of her request. Respondent replied that Complainant did not provide evidence sufficient to demonstrate that she had a disability within the meaning of the FHA. It also argued that by refusing to provide the medical evidence that it required, Complainant rendered Respondent not responsible for her inability to keep REDACTED on the property.

The investigation found sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complaint based on disability by failing to grant her a reasonable accommodation for her disability. Complainant and Respondent both proffered evidence showing that [redacted], Complainant's long-time treating physician, opined that being able to keep [redacted] at Respondent's complex was "necessary for her to have an equal opportunity to use and enjoy her dwelling unit." Complainant made her initial request on September 4, 2017 to keep [redacted] as an emotional support animal, which was accompanied by a prescript[redacted] from [redacted] for the emotional support dog. Complainant's request triggered a back-and-forth between the parties that lasted several months. In response to Respondent's request that Complainant's medical provider complete a request form, [redacted] wrote a letter tracking Respondent's request for information where he opined that Complainant had a disability covered under the Americans With Disabilities Act, Federal Fair Housing Act and the Rehabilitation Act of 1973, and that he prescribed an emotional support animal to assist with the functional limitations of her disability. Respondent did not accept this explanation, and requested additional "information concerning the nexus required under the law between your disability and how the animal prescribed provides a disability-related benefit to you." [redacted] responded to this request by stating that Complainant's disability limits her ability to sleep and interact with others, and that REDACTED reduces her anxiety to allow her to sleep and successfully interact with others. Respondent still refused to accept the information provided as satisfactory, and specifically requested information concerning what treatment was available for the Complainant's disability and whether alternative accommodations exist.[4] At this point, the interactive process stopped between the parties.

This entire exchange took over three months, and Respondent barred Complainant from living with REDACTED on the property during the duration of this interaction. The investigation showed that since she first requested to have her ESA as reasonable accommodation in September 2017, Respondent has continually prevented Complai[redacted]rom bringing to her home at Sunset Harbor for more than two years.

For purposes of this disposition, the Director finds that the multiple letters from [redacted] in response to Respondent's requests for information are sufficient to explain why Complainant's ESA is medically necessary, in light of the limitations of her disability, to allow her "equal opportunity to use and enjoy the property"—specifically, to allow her to sleep and interact with other people. N.J.A.C. 13:13-3.4(f)(2). While Respondent may request certain medical information to demonstrate the need for the emotional support animal, it is not entitled to more of Complainant's medical history than is necessary to make a determination as to whether the accommodation is necessary to address the limits of a disability. Respondent appeared to have sufficient information from Complainant's medical provider of the connection between the limitations of Complainant's disability and need for the ESA, and has not produced any evidence challenging the veracity of the information provided by Complainant and [redacted]. By refusing to accept [redacted] letters as sufficient proof that Complainant had a disability under the LAD and that her ESA relieved the symptoms of her disability and either grant Complainant her requested accommodation or show why doing so would be an undue burden on its operations,

[4] Respondent also sought assurances that Complainant's condition met the definition of disability under federal law, and that her condition substantially limited a major life activity. Whether or not a medical condition substantially limits one or more major life activities is not part of the inquiry under the LAD, because the definition of "disability" under the LAD is broader than the FHA's definition of that term and does not include a "substantially limiting" component. See N.J.S.A. 10:5-5(q) and 42 U.S.C. 3602(h).

Respondent failed to fulfill its obligations under the LAD. Moreover, Respondent has never offered any evidence that allowing [redacted] to live at Sunset Harbor would be an undue burden on its operation.

Additionally, the Director notes that while condominium associations and housing providers may compel homeowners and tenants to sign agreements designating rules by which the homeowners or tenants must abide to retain their ESAs, such agreements cannot render the accommodation illusory. Here, most obviously, Complainant presented evidence that she cannot carry [redacted] at all times while she is in the elevator, as he weighs 65 pounds, and thus even if Respondent did grant her a reasonable accommodation of allowing [redacted] to live on the property, its "Reasonable Accommodation Agreement" would render that accommodation a nullity. Respondent thus may not require Complainant to abide by that provision in the agreement as a precondition to granting her request to have an ESA on the property.

C. Reprisal

The LAD also prohibits any person from retaliating against an individual for engaging in any LAD-protected activity or from doing anything "to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of … any right granted or protected by this act." N.J.S.A. 10:5-12(d). To set forth a prima facie case of retaliation in violation of the LAD, a complainant must show that: (1) she engaged in a protected activity known to the respondent; (2) respondent thereafter subjected her to an adverse action or otherwise retaliated against her; and (3) there is a causal nexus between the protected activity and Respondent's action. See Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995).

By asking for a reasonable accommodation and then by filing a complaint with DCR, Complainant engaged in a LAD-protected activity. Respondent then attempted to coerce, intimidate or interfere with Complainant's ability to maintain her action at DCR by notifying the entire Sunset Harbor community that: (1) Complainant had brought an action against Respondent for not granting her a reasonable accommodation under the LAD, and (2) the community members would likely be required to pay more in dues as a result of Complainant's action.

Complainant told DCR that after Respondent released the April 2018 letter and May 2018 News Letter to the community stating that she brought the present claim with DCR and how that claim was negatively impacting the community, other community members have subjected her to consistent abusive and aggressive treatment both in Board meetings and otherwise. The investigation showed that Respondent's actions instigated ill will towards Complainant, and that it then failed to take action to prevent other community members from harassing Complainant about her request to have [redacted] live in her unit. With regard to the causal connection, it is indisputable that Respondent's statements in letters to the community about Complainant and this complaint and the actions of the other community members relate directly to her engaging in an activity protected by the LAD: filing a complaint with DCR. By all accounts, Respondent's publicizing Complainant's complaint and accommodation request had the desired effect – residents turned on Complainant and harassed Complainant for making the complaint. Such

actions amount to an attempt to "coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of … any right granted or protected by this act." N.J.S.A. 10:5-12(d).[5]

D. Conclusion

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of disability discrimination and reprisal.

Date: January 10, 2020

Rachel Wainer Apter, Director
NJ Division on Civil Rights

[5] Further, the LAD provides that a respondent may recover attorney fees and costs from a Complainant only upon showing that the complaint was brought in bad faith. N.J.S.A. 10:5-27.1. In the absence of such a showing, Respondent's claim to homeowners that it can assess its legal costs against Complainant if it simply prevails at an administrative hearing is inconsistent with the LAD.