

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF THE SECRETARY**

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The Secretary, United States Department of	)	
Housing and Urban Development,	)	
the Charging Party, on behalf of:	)	
	)	
	)	
JOSEPH ARCHIBALD,	)	
	)	
Complainant,	)	HUDALJ 11-F-052-FH-18
	)	
	)	
v.	)	June 6, 2012
	)	
	)	
RIVERBAY CORPORATION,	)	
VERNON COOPER, and	)	
HENRY T. MILBURN, JR.,	)	
	)	
Respondents.	)	
	)	
	)	
_____	)	

For the Complainant:      Jeanine Worden, Associate General Counsel for Fair Housing,  
   Kathleen Pennington, Assistant General Counsel for Fair Housing  
   Enforcement, John Cahill, Regional Counsel, Region 2, Henry  
   Schoenfeld, Associate Regional Counsel, Region 2, Michael  
   Posner, and Iris Springer-Elkerson, Trial Attorneys, U.S.  
   Department of Housing and Urban Development

For the Respondents:      Philip Davidoff, Todd Aidman, David Tango, Attorneys, Ford &  
   Harrison LLP, New York, NY

**ORDER ON SECRETARIAL REVIEW**

On May 22, 2012, counsel for Respondents submitted a *Petition for Review*, appealing the May 7, 2012, Initial Decision and Order (“Decision”) issued by Administrative Law Judge (“ALJ”) Alexander Fernández. The ALJ found that Respondents violated 42 U.S.C. §

3604(f)(3)(B) and 42 U.S.C. § 3617 by discriminating against Complainant on the basis of his disability<sup>1</sup>, denying him a reasonable accommodation, and retaliating against him for engaging in a protected activity. The ALJ ordered Respondents to pay compensatory damages totaling \$38,930.78 and civil penalties of \$16,000 for Respondent Riverbay and Respondent Cooper each. Respondent's *Petition for Review* asks the Secretary to: (1) overturn the ALJ's holding that Respondents violated the Fair Housing Act when they denied Complainant's reasonable accommodation request; (2) rescind or substantially reduce the \$16,000 civil penalty as to Respondent Cooper; and (3) reduce the compensatory damages awarded to Complainant by \$8,930.78. The Charging Party submitted a *Statement in Opposition to Respondent's Petition for Review* on May 29, 2012.

Upon review of the entire record in this proceeding, including the briefs filed with the ALJ and the Secretary, and based on an analysis of the applicable law, I hereby DENY the Respondents' *Petition for Review* in its entirety.

### **BACKGROUND**

On August 10, 2011, the Charging Party filed a Charge of Discrimination on behalf of Joseph Archibald ("Complainant") alleging that Riverbay Corporation, Vernon Cooper, and Henry T. Milburn, Jr. (collectively, "Respondents") violated the Fair Housing Act, as amended, 42 U.S.C. §§ 3601 *et seq.*, by discriminating against Complainant on the basis of his disability, denying him a reasonable accommodation, and retaliating against him for engaging in a protected activity in violation of 42 U.S.C. § 3604(f)(3)(B) and 42 U.S.C. § 3617. Specifically, the Charging Party alleged that Respondents denied Complainant's request for a reasonable accommodation to Riverbay's no-pets policy when they would not allow Complainant to keep his dog, Figgy, as a service animal in his co-op unit. The Charging Party also alleges Respondents unnecessarily harassed Complainant and his wife on several occasions, interfering with his right to keep a service animal. On September 15, 2011, Respondents filed their *Answer* to the Charge. The hearing took place from December 6-8, 2011. Post-hearing briefs were submitted on February 24, 2012, and reply briefs on March 16, 2012.

On May 7, 2012, the ALJ issued an *Initial Decision and Order*. The ALJ reviewed the applicable law for the Fair Housing Act's definition of the term disability, the requirement to provide reasonable accommodations, and the prohibition against retaliation. *See* Decision at 2-4. He then made 77 findings of fact. *See id.* at 4-13. Based on those findings, he held that Complainant is disabled due to his mental impairment, Major Depressive Disorder, and the disability substantially limits the following major life activities: ability to interact with others, ability to care for himself, ability to sleep, and ability to engage in sexual activity. *See id.* at 14-18. The ALJ held that Respondents knew or were reasonably expected to know of Complainant's disability because (1) Complainant offered considerable evidence in his request for a reasonable accommodation to have a service animal, and (2) Respondents failed to engage in the required "interactive process" in order to resolve any doubts about his disability. *See id.* at 18-23. He held that the requested reasonable accommodation was necessary and Respondents unlawfully discriminated by denying such request. *See id.* at 23-24. Finally, he held that Respondents took

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<sup>1</sup> The term "disability" is used herein in place of, and has the same meaning as, the term "handicap" in the Act and its implementing regulations.

adverse actions amounting to unlawful retaliation in response to Complainant's protected activities of requesting a reasonable accommodation and filing a housing discrimination complaint with HUD. See id. at 24-25.

The ALJ concluded with a discussion of remedies and found Respondents liable for the following amounts: \$8,930.78 in actual damages for Complainant's out-of-pocket expenses after an angioplasty procedure; \$30,000 in intangible damages for Complainant's severe anxiety, embarrassment, and emotional distress; \$16,000 in civil penalties for Respondent Riverbay due to its bad faith at bar, its financial capability, and its three previous Fair Housing Act adjudications that were finalized either before or after the statutory period that would allow an increased maximum penalty; and \$16,000 in civil penalty for Respondent Cooper for personally participating in the wrongdoing and failing to provide any mitigating factors. See id. at 26-30. Respondent Millburn was dismissed from the action because no evidence tied him to the discriminatory acts. The ALJ's Order provides for the above remedies and injunctive relief, including a mandatory training and reporting requirements for Respondent Riverbay. See id. at 30-31.

## DISCUSSION

### **I. The ALJ's holding that Respondents violated the Fair Housing Act is affirmed.**

The Respondents argue in their Petition for Review that the ALJ incorrectly held that Respondents unlawfully discriminated against Complainant because, if Respondents had been privy to the same information as HUD at the time Respondents made the decision to deny Complainant's application, Respondents would have granted his request. See Petition at 3. However, the ALJ's findings of fact include ample evidence provided by Complainant as part of his reasonable accommodation request to put Respondents on notice of his disability. See Decision at 7-8 and 19-20; See also, e.g., United States v. Hialeah Hous. Auth., 418 Fed App'x 872, 877 (11th Cir. 2011); Astralis Condo. Ass'n v. HUD, 620 F.3d 62, 68 (1st Cir. 2010); Rodriguez v. Morgan, 2012 U.S. Dist. LEXIS 9643, \*16-18 (C.D. Cal. 2012).

Respondents' argument is without merit. Instead of giving Complainant the opportunity to address any doubts as to his disability during the decision making process, Respondents rely solely upon the fact that they have a formal appeal process for denied reasonable accommodation requests and Complainant did not appeal. The ALJ's explanation that "the interactive process is not triggered upon the denial of a reasonable accommodation request, but upon the making of that same request" is well supported by law. See Decision at 19, n.11, citing Jacques v. DiMarzio, Inc., 200 F.Supp. 2d 151, 169 (E.D.N.Y. 2002) (emphasis in original); See also, Jankowski Lee & Assoc. v. Cisneros, 91 F.3d 891, 894-95 (7th Cir. 1996); Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391 (2002); HUD v. Atralis Condo. Ass'n, 2009 HUD ALJ LEXIS 29, \*33 (HUD ALJ Sept. 10, 2009), aff'd, 620 F.3d 62 (1st Cir. 2010) ("Mere suspicion that an individual may not actually be disabled is not sufficient to deny an accommodation without further inquiry.") (emphasis added). Respondents refuse to acknowledge that the lack of an interactive process at the decision making level led to a wrongful denial of Complainant's request. Respondents instead accuse HUD of bad faith for receiving documentation on Complainant's disability during the investigative process and not sharing it immediately with them. However, the ALJ correctly dismissed this argument, stating:

"Ironically, what Respondents term 'secret operation' and 'bad faith' illustrate a good example of the interactive process that Respondents Riverbay and Cooper should have followed at bar." Decision at 23. Respondents lack of an interactive process and denial of Complainant's reasonable accommodation request violated 42 U.S.C. § 3604(f)(3)(B).

## **II. The ALJ's assessment of a \$16,000 civil penalty against Respondent Cooper is affirmed.**

Second, Respondents' argue the ALJ erroneously imposed the maximum civil penalty of \$16,000 on Mr. Cooper in his individual capacity. See Petition at 5. Respondents suggest that the ALJ assessed Mr. Cooper a maximum penalty only as a ruse for issuing Riverbay a "double penalty." See id. at 10. The Respondents argue that, because the Decision issued a maximum civil penalty on Mr. Cooper by referencing the reasons explained in issuing the same penalty on Riverbay, then the Decision must be erroneous and rescinded. However, this is a flawed reading of the Decision. The ALJ found Complainant Cooper liable for participating personally in the violation. See Decision at 30 n. 23. The ALJ also analyzed the factors required by 24 C.F.R. § 180.671(c) to find the need for a maximum penalty. See Decision 28-30.

The Respondents also argue that HUD's behavior and Mr. Cooper's "good faith" should be used as mitigating factors. This argument is a mischaracterization of the record and the ALJ's findings regarding the interactive process. See Petition at 8. Mr. Cooper claims that he would have granted Complainant's request had he known the information HUD learned during the investigation. However, this after the fact assertion is not a mitigating factor. Instead, it provides further support for the ALJ's finding that Mr. Cooper failed to conduct an interactive process before making the decision to deny Complainant's reasonable accommodation request. In fact, the ALJ explained, "[p]ermeating the entire record is a blatant disregard for the interactive process and an elevation of Riverbay's No Dog Policy above the needs of the disabled." Decision at 29. Respondents' final contention that Riverbay's newly revised policy for reasonable accommodations should be considered a mitigating factor is contrary to legal precedent. Post-hoc efforts to cure a violation do not negate the violation or preclude assessing penalties. See, e.g., United States v. West Peachtree Tenth Corp., 437 F.2d 221, 228 (5th Cir. 1971). Respondents fail to offer a valid reason to overturn or modify the ALJ's determination. The \$16,000 civil penalty assessed against Respondent Cooper is affirmed.

## **III. The ALJ's award of \$8,930.78 for Complainant's Angioplasty is affirmed.**

Finally, Respondents argue the ALJ erroneously awarded damages to Complainant for an "alleged angioplasty." See Petition at 11. The Secretary finds this argument wholly without merit. The fact that Complainant underwent an invasive diagnostic angioplasty and was billed \$8,930.78 for the portion his insurance did not cover is well established by the record. See Decision at 12 and 26 (including the angioplasty as a finding of fact # 68); See also, CP's Statement in Opposition at 13-14 (citing Complainant's testimony at Tr. 57, 76-77, and 142; also citing the medical bill submitted as an exhibit at Tr. Ex. 14). Here, the "procedure revealed that Complainant's heart had no blockages and the likely cause of Complainant's chest pains was anxiety. It was Dr. Herron's [Complainant's treating psychiatrist] impression that Complainant's severe anxiety was primarily caused by his dispute with Riverbay." Decision at 26. The fact that the blockage was not found and thus stents were not inserted does not negate the fact that an

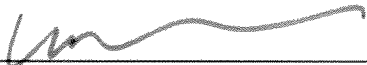
angioplasty procedure occurred. Complainant is entitled to compensation for actual damages that result from unlawful discrimination, including both out-of-pocket expenses and damages for intangible injuries such as emotional distress. See HUD v. Blackwell, 908 F.2d 864, 872 (11<sup>th</sup> Cir. 1990); HUD v. Godlewski, 2007 HUD ALJ LEXIS 67, \*5 (HUD ALJ Dec. 21, 2007). The ALJ was correct to award \$8,930.78 to Complainant as actual damages for costs associated with this procedure.

**CONCLUSION**

**Upon review of the record in this proceeding, and based on analysis of the applicable law, the Respondents' *Petition for Review* is hereby DENIED.**

**IT IS SO ORDERED.**

**Dated this 6th day of June, 2012**

  
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**Laurel Blatchford**  
**Secretarial Designee**