

December 2004 Property Law Column

Homeowner's Association Required to Make Reasonable Accommodation for Disabled Person

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In a recent opinion (which has not been certified for publication or ordered published for purposes of California Rule of Court 977), the Third District Court of Appeal upheld a Fair Employment and Housing Commission ("FEHC") decision that a homeowner's association discriminated against disabled members when the disabled members were prohibited from having a small dog by the association's covenants, conditions and restrictions ("CC&R's") that only permitted cats. *Auburn Woods I Homeowners Association v. Fair Employment and Housing Commission* (2004) 2004 W.L. 1888284 (only the West cite citation is available because this decision has not been certified for publication or ordered published). Although this is not a published decision, it is helpful when analyzing how the FEHC may view similar matters. This case also demonstrates the deference the appellate courts provide to FEHC rulings.

Facts

Ed Elebiari and his wife, Jayne (referred to collectively as the "Elebiaris") sought to keep a small dog at their condominium at Auburn Woods. Ed had been involved in a serious car accident and suffered brain damage that required three surgeries. He was hydrocephalic, had a seizure disorder, and suffered from severe headaches and depression. A psychiatrist also diagnosed him as suffering from bipolar disorder, obsessive-compulsive personality disorder, and seizure disorder. He was permanently disabled and incapable of working. His wife also suffered from "major depression, recurrent". During her recurrent episodes of depression (that lasted from nine months to a year), she had problems with concentration and sleeping, engaged in self-mutilation and avoided social interaction. Her doctor believed that she would do fairly well if medicated and she could continue working.

In 1998, the Elebiaris bought a condominium at Auburn Woods. Section 6.17 of the condominium association's CC&R's provides:

No reptiles or animals shall be permitted in the condominium units or on the property except that pet birds and domestic house cats (limit of one) shall be allowed so long as they do not constitute a nuisance to the neighbors and their residents. The Board of Directors has the

discretion to adopt reasonable rules and regulations in regard to the keeping of these specifically enumerated pets so as to avoid nuisance problems or health and safety hazards. *No dogs are allowed to be kept anywhere in the development.*

Id. at *2 (italics added by appellate court).

In April 1999, the Elebiaris bought a small terrier named Pooky which Jayne believed would help her and her husband with their depression. As it turned out, Jayne's agitation lessened, she had better concentration, her interpersonal relationships improved and she slept better. Her acts of self-mutilation also became less severe. Ed took the dog for walks and played with her and the dog alleviated his depression, as well as enabling both of the Elebiaris to better enjoy each other's company. Their psychiatrist believed the dog elevated their moods and improved their affects.

However, beginning in June of 1999, the property manager for Auburn Woods began sending letters to the Elebiaris warning them that they were not allowed to have a dog. The Elebiaris therefore took the dog to a friend's home, but their depression symptoms returned. In September 1999, Jayne asked the association for permission to keep the dog to help with Ed's history of seizures. The association director requested medical verification, in response to which Jayne submitted a letter to Auburn Woods asking for a reasonable accommodation for her impairment. She told the association in her letter that her symptoms improved with the acquisition of a companion pet and had deteriorated when the dog was removed. Her letter stated: "I am a disabled person who works outside the home who needs the companionship of a dog to alleviate some of the adverse affects [sic] of my disability both at home and on the job. The alternative is a additional stronger medications which would prohibit gainful employment." *Id.*, at *3. Jayne sent the association a letter from her psychiatrist that stated:

Jayne Elebiari has been receiving psychiatric care since March of 1998. Jayne's emotional well-being improved after purchasing a companion dog. I recommend that reasonable accommodations in rules be made to allow Jayne to continue to have her companion animal.

Id. Jayne's request did not mention Ed because Ed was very sensitive about his medical history and Jayne did not want to upset him by publicizing his medical condition.

On September 27, 1999, the property manager for Auburn Wood left a message on the Elebiaris' answering machine in which he stated that he had received the letter and then laughed. His message stated:

This letter here is not going to be substantial enough, I can tell you that right now. He'll -- we'll have to go to court on the

thing and the doctor will have to testify and bring your records up. And also uh, Ed's doctor will have to come in . . . but I'm gonna go ahead and forward it to our attorney and it's gonna be a while, so make sure that during the interim you don't have the dog there . . . I'll have our attorney forward, uh, correspondence to you that she is in review and, uh, then the subpoenas will come out and we'll have to go and have your doctor testify. But, uh, uh, it doesn't look very good to me. So, (laugh) I just don't understand why you're doing this to tell you the truth . . .

Id.

In the meantime, Michael Fletcher, who worked as an advocate for people with disabilities, wrote to the association explaining that both Jayne and Ed were prescribed a companion animal for medical reasons. The Elebiaris' psychiatrist also wrote to Auburn Woods advising that Ed was "permanently disabled since 1992. He has been receiving psychiatric care since August of 1998. His emotional well-being improved substantially with the purchase of a companion dog. I recommend that [Ed] be allowed to keep his companion dog." On the same date, attorney Beth Grimm, representing Auburn Woods, wrote to the psychiatrist and asked if there was any reason that a cat would not make as good a companion as a dog, asked that he identify the condition of "handicap" that fell within the definition of 42 U.S.C. §3604(c) and requested that he clarify whether he was prescribing the dog as necessary or therapeutic or stating that obtaining the dog was the basis for improvement stay. Because the doctor did not know how to respond, he did not reply.

The Elebiaris then hired a lawyer to handle their case. On November 9, 1999, Grimm wrote to the Elebiaris' lawyer denying the request to keep a dog, concluding that the law only contemplated reasonable special accommodation and that the Elebiaris' request for the special accommodation was not acceptable in light of the fact that Auburn Woods allowed a cat as a companion animal.

In December 1999, Jayne Elebiari spoke to the association board and explained that she was allergic to cats and therefore a companion cat was not a feasible option. When the association continued to assert its position that allowing cats was a reasonable accommodation for persons who wished to have companion pets, the Elebiaris decided to put their condominium on the market.

DFEH Proceeding

In February 2000, the Elebiaris filed a complaint with the Department of Fair Employment and Housing ("DFEH") charging that Auburn Woods had discriminated against them by failing to make a reasonable accommodation for their disabilities. In July 2000, the Elebiaris sold their condominium and moved to Oklahoma. In February 2001, the DFEH issued an accusation charging Auburn Woods with disability discrimination based on the failure to

provide a reasonable accommodation of the Elebiaris' mental disabilities.

During the FEHC hearing, Jayne testified that Auburn Woods never interviewed her or sought additional medical records from her. Nor had Auburn Woods sought a medical release for the Elebiaris. Auburn Woods argued that it did not know the exact nature of the disabilities or the reasons why the accommodation request was necessary until May 2000. In the FEHC ruling, it was noted that "it is not reasonable to expect an individual seeking reasonable accommodation to have to speculate about what further information a respondent may be seeking." It also ruled that a companion dog would have been a reasonable accommodation and that Auburn Woods' repeated denials constituted unlawful discrimination. Ed was awarded \$5,000 and Jayne was awarded \$7,500 in emotional distress damages.

Appellate Proceedings

After the FEHC decision, Auburn Woods filed a petition for administrative writ of mandate, but did not name or serve the Elebiaris. The trial court granted the requested relief, finding there was no medical evidence to support the Elebiaris' request for accommodation and there was no evidence that a companion dog was a necessary reasonable accommodation. Upon learning of the court proceedings, the Elebiaris filed an application to intervene so that they could appeal the court's decision. The appellate court overturned the trial court's decision and upheld the FEHC ruling that a companion dog would have been a reasonable accommodation.

CONCLUSION

Under California's Fair Employment and Housing Act ("FEHA"), which appears at Government Code §12899, *et seq.*, it is unlawful to refuse to "make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." Government Code §§12927, subd. (c)(1) and 12955. This case demonstrates that homeowner's associations are certainly not immune from DFEH requirements.