

**SENT**

**PROTHONOTARY**

October 27, 2022

**COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**Alexandrea Lewis,  
Complainant**

**v.**

**N. Barry Slusser, II,  
Respondent**

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**PHRC Case No. 201901918  
HUD Case No. 03-20-3558-8**

**FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
RECOMMENDATION OF PERMANENT HEARING EXAMINER  
FINAL ORDER**

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**PHRC Case No. 201901918  
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**FINDINGS OF FACT<sup>1</sup>**

1. Complainant is Alexandria Lewis (Lewis).
2. Lewis is an individual with a disability and was diagnosed with Post Traumatic Stress Disorder and generalized anxiety disorder as early as February 7, 2019. J.S. ¶ 12
3. Respondent is N. Barry Slusser II (Slusser).
4. Slusser owns a property located at 21033 Van Buren Rd, Blairs Mills, PA 17213, that was listed for rent in approximately June 2019. J.S. ¶ 1
5. Lewis completed a rental application dated June 17, 2019, for the property. J.S. ¶ 2
6. On the application, Lewis put that she had one medium size dog. C.1, Tr. 24, 151.
7. Lewis submitted a partial deposit of \$100 on June 19, 2019. J.S. ¶ 3
8. At the time of her application, Lewis did not notify Slusser she was disabled or required an Emotional Support Animal (ESA). *Id* at ¶ 4.
9. The first time Slusser was made aware that Lewis owned a pit bull was during a

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<sup>1</sup> Abbreviations  
Tr. Hearing Transcript  
J.S. Joint Stipulation  
C. Commission Exhibit  
O.D. Official Document  
R. Respondent Exhibit

visit to the property on or about June 27, 2019. *Id* at ¶ 5.

10. In a text message exchange on June 28, 2019, Slusser notified Lewis that his homeowners' insurance would not cover her dog's breed. *Id* at ¶ 6

11. During the text message exchange, Lewis did not allege any disability or claim that the pit bull was an ESA. *Id* at ¶ 7. C. 3.

12. During the text message exchange, Lewis wrote "if it became an issue, the dog would go." C.3.

13. On July 1, 2019, after contacting his insurance carrier, Slusser again notified Lewis that his carrier would not cover the dog and he was canceling the rental contract. *Id* at ¶ 8.

14. Only after Slusser canceled the rental contract/application did Lewis notify Slusser that she had a disability and she would be registering her pit bull as an ESA. *Id* at ¶ 9

15. On July 1, 2019, after Slusser canceled the rental contract/application Lewis requested a reasonable accommodation. C.3.

16. Slusser canceled the rental contract because of his concern for the other animals on the property and because he believed his homeowner's insurance would not insure him if there was a pit bull on the property. Tr.136-38.

17. Lewis was not prescribed an ESA by any treating medical professional until August 28, 2019. J.S. ¶ 10.

18. Lewis's pit bull was not registered as an ESA until after Slusser notified her that he was canceling the rental agreement. J.S. ¶ 11.

19. On or about October 8, 2019, Lewis filed a verified Complaint with the U.S. Housing and Urban Development (HUD) at HUD case number 03-20-3558-8. C.4.

20. On or about December 8, 2021, Lewis filed an Amended verified Complaint with the Pennsylvania Human Relations Commission (PHRC) at PHRC case number 201901918. C.5.

21. On or about November 27, 2019, Slusser filed an Answer with the PHRC. R.5.

22. On February 17, 2021, the PHRC issued a Finding of Probable Cause crediting Lewis's allegations. O.D.

23. Conciliation failed on March 19, 2021. O.D.

24. A Public Hearing was held virtually on June 22, 2022. Tr.1

### **CONCLUSIONS OF LAW**

1. The Pennsylvania Human Relations Commission (PHRC) has jurisdiction over the parties and the subject matter of this case.

2. The parties have fully complied with the procedural prerequisites to a Public Hearing.

3. Alexandria Lewis (Lewis), is an individual within the meaning of the PHRA.

4. N. Barry Slusser II (Slusser), is an individual within the meaning of the PHRA.

5. To establish a prima facie case of discrimination by making housing unavailable because of her disability, Lewis must show that Slusser refused to rent to her because of her disability.

6. Lewis did not establish a prima facie case because Lewis failed to show that Slusser made the housing unavailable to her because of her disability.

7. Since Lewis failed to establish a prima facie case for discrimination, this claim should be dismissed.

8. To establish a prima facie case of discrimination by refusing to provide a reasonable accommodation Lewis must show:

A. She is a person with a disability;

B. Slusser knew or reasonably should have known that Lewis is a person with a disability;

C. Lewis requested an accommodation in Slusser's rules, policies, practices,

or services;

D. The requested accommodation may be necessary to afford Lewis an equal opportunity to use and enjoy the dwelling; and

E. Slusser refused to make the accommodation Lewis requested.

Lewis failed to establish that the requested accommodation may be necessary to afford her an equal opportunity to use and enjoy the dwelling. Therefore, this claim should be dismissed.

## OPINION

These consolidated cases arise out of a Complaint filed by Alexandra Lewis (Lewis) against N. Barry Slusser II (Slusser). Lewis filed a verified Complaint with the U.S. Housing and Urban Development (HUD) at HUD case number 03-20-3558-8 on or about October 8, 2019. C.4. Lewis alleged in the Complaint that Slusser discriminated against her by making housing unavailable to her because of her disability and by denying/refusing a reasonable accommodation. On or about November 27, 2019, Slusser filed an Answer with the Pennsylvania Human Relations Commission (PHRC). R.5. On or about December 8, 2021, Lewis filed an Amended verified Complaint with the PHRC at PHRC case number 201901918. C.5. In a correspondence dated February 3, 2021, PHRC staff notified Lewis and Slusser via a Finding of Probable Cause that the PHRC believed that probable cause existed to credit the two counts in the Complaint. Following the determination of probable cause, the PHRC and the parties attempted to resolve the case through conference, conciliation and persuasion. The efforts were unsuccessful, and the case was approved for a public hearing.

The parties waived their right to an in person hearing and the hearing was held virtually on June 22, 2022, before Darlene Hemerka, Permanent Hearing Examiner. Payton Gutierrez, Esquire represented Lewis. Stephanie M. Chapman, Esquire represented the Commonwealth's interest in the Complaint. Tricia Springer, Esquire and Renee Myers, Esquire represented Slusser. The parties submitted post-hearing briefs in September 2022.

Under the Pennsylvania Human Relations Act (PHRA), the term handicap or disability, with respect to a person, means:

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities;

- (2) a record of having such an impairment; or
- (3) being regarded as having such an impairment... 43 P.S. 954 p.1

The Pennsylvania Human Relations Act (PHRA) provisions are supplemented by applicable regulations promulgated by the PHRC at 16 Pa. Code §44.4. The regulations state handicapped or disabled person - includes the following:

- (i) A person who has or is one of the following:
  - (A) A physical or mental impairment, which substantially limits one or more major life activities.
  - (B) A record of such impairment.
  - (C) Regarded as having such an impairment.
- (ii) As used in subparagraph (i) of this paragraph, the phrase:
  - (A) “physical or mental impairment” means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.
  - (B) “major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
  - (C) “has a record of such impairment” means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.
  - (D) “is regarded as having such an impairment” means has a

physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment. 16 Pa. Code §44.4.

Here the parties stipulated that Lewis has a disability. J.S. ¶12. The PHRA makes it an unlawful discriminatory practice to refuse to lease or otherwise deny or withhold any housing accommodation from any person because of their disability. 43 P.S. § 955(h)(1). The PHRA also makes it an unlawful discriminatory practice “for a person to refuse to make reasonable accommodations in rules, policies or practices or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a housing accommodation.” 43 P.S. § 955(h)(3.2).

Pennsylvania courts generally interpret the PHRA “as identical to federal anti-discrimination laws except where there is something specifically different in its language requiring that it be treated differently.” *Fair Hous. Rights Ctr. v. Morgan Props. Mgmt. Co., LLC*, No. 16-4677, 2017 U.S. Dist. LEXIS 55249, at \*8 n.2 (E.D. Pa. Apr. 11, 2017). In this case the language of 43 P.S. § 955(h)(3.2) of the PHRA is identical to that in 804(f)(3)(B) of the Fair Housing Act (FHA). 42 U.S.C. § 3601. The PHRA and Americans with Disabilities Act (ADA) are interpreted in a coextensive manner. This practice occurs because the PHRA and ADA deal with similar subject matter and are grounded on similar legislative goals. *Kelly v. Drexel University*, 907 F.Supp. 864. 874 (E.D.Pa.1995).



When analyzing discrimination claims such as Lewis's claim that Slusser refused to rent to her because of her disability, courts often rely on the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792. However, the Supreme Court has cautioned that this framework was never meant to be rigid. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575. The method suggested in *McDonnell Douglas* is a way to evaluate the evidence on the critical question of discrimination. *Id.* at 577. Under *McDonnell Douglas*, a plaintiff has the initial burden of showing actions taken by the defendant from which one can infer, if the actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion. *Id.*

Applying this principal to Lewis's refusal to rent claim, Lewis must establish that Slusser's refusal was based upon her disability.<sup>2</sup> Lewis failed to establish this fact for several reasons. First, the parties stipulated that Lewis did not disclose her disability until after Slusser canceled the contract. J.S. ¶9. In addition, Lewis did not request a reasonable accommodation until after Slusser canceled the contract. Since Slusser was unaware of the disability when making the decision, it was impossible for him to use that as the basis. Additionally, Slusser testified credibly that he canceled the contract for non-discriminatory reasons. Specifically, he was concerned for other animals on the property and that based on conversations with his insurance company, he believed he would lose his insurance if there was a pit bull on the property Tr. 136-38. Finally, Slusser testified that he did not believe Lewis's request for an accommodation was legitimate and that she was taking the steps to get around the insurance hurdles. Tr. 145-46. Based on this evidence, Lewis failed to establish the refusal to rent claim and that claim should be dismissed.

To establish a prima facie case for the reasonable accommodation claim, Lewis must show:

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<sup>2</sup> The Hearing Examiner decided not to list elements for the refusal to rent claim because she could find no case law with binding authority on the issue and cases that could be used for persuasive authority articulated different elements. See *Castillo Condo. Ass'n v. United States HUD*, 821 F.3d 92, (1st Cir. May 2, 2016) *Wartluft v. Milton Hershey Sch. & Sch. Trust*, 400 F. Supp. 3d 91 and *Fair Hous. Justice Ctr., Inc. v. Cuomo*, 2019 U.S. Dist. LEXIS 170119.

1. She is a person with a disability;
2. Slusser knew or reasonably should have known that Lewis is a person with a disability;
3. Lewis requested an accommodation in Slusser's rules, policies, practices, or services;
4. The requested accommodation may be necessary to afford Lewis an equal opportunity to use and enjoy the dwelling; and
5. Slusser refused to make the accommodation Lewis requested.

Regarding whether Lewis is a person with a disability, the parties stipulated that she has a disability. J.S. ¶ 12. It is also undisputed that Slusser did not grant the reasonable accommodation. Thus, elements 1 and 5 are satisfied. The parties dispute whether Lewis has established the remaining elements. Element 2 is whether Slusser knew or reasonably should have known that Lewis is a person with a disability and Element 3 is whether Lewis requested a change to Slusser's policies. The parties disagree whether the notice about a disability is required before Slusser made his decision to cancel the contract for liability to attach or if the notice can be given after Slusser made the decision. In its post-hearing brief, the Respondent cited several Third Circuit employment cases for the proposition that a Respondent who does not know about the disability when making a decision cannot be held liable for failing to accommodate the disability.

The Third Circuit has held:

What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation. What information the employee's initial notice must include depends on what the employer knows. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313.

The Third Circuit has also said, "The defendants must have had an idea of what

accommodation [the plaintiff] sought prior to their incurring liability for refusing it.” *Revoock v. Cowpet Bay West Condominium Assn.*, 853 F.3d 96, 111 (internal citations omitted).

However, the inquiry does not end there because HUD issued guidance in 2020 about animals as a reasonable accommodation under the FHA. The guidance is attached to this recommendation. The guidance explains that there are two types of assistance animals: service animals and other trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities. This recommendation uses the term emotional support animal (ESA) to describe the second type of assistance animals. Regarding ESAs, the guidance states:

A resident may request a reasonable accommodation either before or after acquiring the assistance animal. An accommodation also may be requested after a housing provider seeks to terminate the resident’s lease or tenancy because of the animal’s presence, although such timing may create an inference against good faith on the part of the person seeking a reasonable accommodation. However, under the FHA, a person with a disability may make a reasonable accommodation request at any time, and the housing provider must consider the reasonable accommodation request even if the resident made the request after bringing the animal into the housing.

Here Lewis sent a text message on July 1, 2019, saying “I will be registering Mirko as a service dog. That should settle any legal issues with him being there.... I did not want to discuss it, but I receive disability.” C.3. The Hearing Examiner finds that this text message constituted a reasonable accommodation request.

While the guidance makes clear that a housing provider must consider the request for a reasonable accommodation no matter when it is made, HUD’s guidance contemplates that the person requesting the accommodation must act in good faith. The Hearing Examiner finds that Lewis did not act in good faith in requesting her accommodation and that Slusser was reasonable in not considering it because in a text message exchange on June 28, 2019, three days before Lewis requested an accommodation, Slusser notified Lewis that his homeowners’ insurance would not

cover her dog's breed. J.S. ¶6. Yet, Lewis did not allege any disability or claim that the pit bull was an ESA. J.S. ¶7, Tr.139-40. During that text message exchange on June 28, 2019, Lewis wrote "if it became an issue, the dog would go." C. 3. Slusser testified that this message made him believe "that she did not really need the dog." Tr.139.

The Hearing Examiner could not find any case law on whether lack of good faith by the person requesting the accommodation is dispositive of the claim in housing cases. Therefore, the Hearing Examiner analyzed the last element the parties dispute: whether the accommodation may be necessary for Lewis to use and enjoy the dwelling.

The Third Circuit held that under § 3604(f)(3)(B) the term necessary means that the accommodation must be essential, not just preferable. *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100,107 (3d Cir. Pa. September 5, 2018). It is a high standard. *Id* at 105. The Hearing Examiner finds that Lewis failed to meet this standard for two reasons. First, Lewis's message "if it became an issue, the dog would go," indicates that the dog was not essential. In addition, the parties stipulated that Lewis was not prescribed an ESA by a treating medical professional until August 28, 2019. J.S. ¶10. This date was over a month after the alleged discrimination. Because Lewis failed to establish an element of the prima facie case, this claim should be dismissed.

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**PHRC Case No. 201901918  
HUD Case No. 03-20-3558-8**

**RECOMMENDATION OF THE PERMANENT HEARING EXAMINER**

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Lewis has failed to prove she was denied housing in violation of Section 5(h) of the PHRA or was discriminatorily denied an accommodation. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so, approved and adopted, the Permanent Hearing Examiner further recommends issuance of the attached Final Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

*Darlene Hemerka*

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**Darlene Hemerka, Hearing Examiner**

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Date: October 4, 2022

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**PHRC Case No. 201901918  
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**FINAL ORDER**

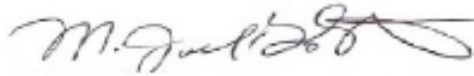
**AND NOW THIS** 24th day of October 2022, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the Complaints and hereby

**ORDERS**

1. That the Complaints in these cases be, and the same hereby are dismissed.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

By: \_\_\_\_\_



**M. Joel Bolstein**

**Attest:**



o/b/o Commissioner Mayur Patel