

**STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION**

RICHARD A. HITE, in his official capacity as }
EXECUTIVE DIRECTOR OF THE INDIANA }
CIVIL RIGHTS COMMISSION, }
Complainant, }

ICRC NO.: HOha13041057

HUD NO.: 05-13-0657-8

vs. }

ZENDER FAMILY LIMITED }
PARTNERSHIP, }
Respondent. }

DATE FILED

NOV 17 2017

OFFICE OF THE
ADMINISTRATIVE JUDGE

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 13, 2017, the Hon. Doneisha L. Posey, Administrative Law Judge (“ALJ”) for the Indiana Civil Rights Commission (“ICRC”) issued Proposed Findings of Fact, Conclusion of Law, And Order to which Zender Family Limited Partnership, Respondent, subsequently filed Respondent’s Objection to Proposed Findings of Fact, Conclusions of Law, and Order Filed June 13, 2017 (“Objections”).

Commissioner Alpha Blackburn was named as Chair to work on behalf of the Commission. After due consideration of the record in this matter and the Proposed Decision, the Commission adopts the following:

FINDINGS OF FACT

The Commission adopts and incorporates the proposed findings of fact as stated in the Proposed Decision issued by Administrative Law Judge Doneisha L. Posey on June 13, 2017, a copy of which is attached hereto and incorporated herein by reference.

CONCLUSIONS OF LAW

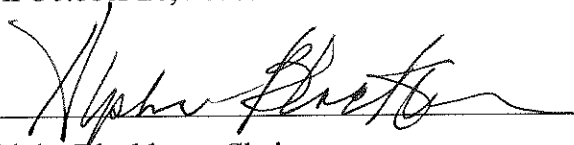
The Commission adopts and incorporates the proposed conclusions of law as stated in the Proposed Decision issued by ALJ Doneisha L. Posey on June 13, 2017, a copy of which is attached hereto and incorporated herein by reference.

ORDER:

The Commission adopts and incorporates the order as stated in the Proposed Decision issued by ALJ Doneisha L. Posey on June 13, 2017, a copy of which is attached hereto and incorporated herein by reference.

Any party aggrieved by the ICRC's decision may seek judicial review with the Indiana Court Appeals within thirty days following the date of notification of such decision. This is a final order and resolves this case.

Adopted by the Commission by the
affirmative vote of ____ Commissioners
on October 20, 2017.



Alpha Blackburn, Chair

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INDIANA CIVIL RIGHTS COMMISSION**

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Complainant,

vs.

ZENDER FAMILY LIMITED PARTNERSHIP

Respondent.

) ICRC No.: Hoha13041057
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) **DATE FILED**
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) **JUN 13 2017**
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) **OFFICE OF THE
ADMINISTRATIVE JUDGE**
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)

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

2016 On April 19, 2017 a hearing was held before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"). Complainant, Sarah Meyer ("Meyer") appeared by its counsel, Fredrick S. Bremer, a staff attorney with the ICRC, and the Respondent, Zender Family Limited Partnership ("Zender") appeared by its counsel, Danford R. Due, an attorney with DUE, DOYLE FANNING & ALDERFER, LLP.

The parties presented evidence and arguments in accordance with the rules and procedures of the Indiana Civil Rights Commission, as set forth in 910 LAC 1-11-1 *et seq.* The parties agreed to submit any final arguments and proposed findings of fact and conclusions by May 4, 2017. With this, the case was taken under advisement.

Having carefully considered all of the foregoing and being duly advised in the premises, the ALJ now proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

PROCEDURAL HISTORY

On April 4, 2013, Meyer filed a complaint with the Civil Rights Commission against Zender alleging unlawful discriminatory housing practices on the basis of disability in violation of the Indiana Fair Housing Act (Ind. Code 22-9-5.5 *et. seq.*), the Indiana Civil Rights Law (Ind. Code 22-9 *et. seq.*), and the Federal Fair Housing Act (42 U.S.C. 3601 *et. seq.*)

On December 17, 2014, an oral argument was held before ALJ, Noell F. Allen. Then, on January 21, 2016, a hearing was held before ALJ, Noell F. Allen. However, before making a ruling on the case, ALJ Noell F. Allen resigned. On October 4, 2016, the Commission appointed Doneisha L. Posey as ALJ for the ICRC.

A pre-hearing conference was conducted on January 26, 2017 with counsel for the Complainant, Fredrick S. Bremer, and counsel for Respondent, Danford R. Due. During the conference, the parties agreed to file a joint motion for the ALJ's decision to be based on the record of proceedings to be filed by April 28, 2017. Additionally, parties reserved the right to revise previously filed Proposed Findings of Fact, Conclusions of Law, and Order to be submitted by May 4, 2017. Oral argument was held April 19, 2017. Danford Due timely submitted a revised Proposed Order while Fredrick Bremer chose to not submit a revised Proposed Order; however, his previously filed Proposed Order has been taken into consideration.

FINDINGS OF FACT

1. The issues to be resolved in this case are: (1) whether respondent upon being informed of Meyer's disability, engaged in an interactive dialogue with Meyer to identify whether her needs could be reasonably accommodated; (2) whether Respondent violated the Indiana Fair Housing Act by denying reasonable accommodation to Meyer through denying an interactive dialogue; and (3) what

damages, if any, did Meyer sustain as a consequence of the Indiana Fair Housing Act violation.

2. Meyer has been blind since birth. She has a medical condition called Leber's Congenital Amaurosis. Meyer has some light perception; however, only enough to see shapes and shadows. T11; Meyer Dep. 35.
3. Additionally, Meyer has been diagnosed with anxiety, depression, posttraumatic stress disorder, and anorexia. She has been treated by Dr. Sunil Patel for these conditions for several years. Meyer Dep. 21.
4. On or about December 17, 2011, Meyer entered into a lease agreement with Zender to rent apartment number 308 located in Harrison Apartments at 1320 North Delaware Street, Indianapolis, IN. The monthly rent was \$460. The term of the lease was to run from December 17, 2011 to December 16, 2012. T12.
5. Meyer specifically chose this location because the apartment is in close proximity to the bus stop. This enabled her to maintain her independence so she can travel to doctor appointments and perform errands without depending on her friends or family to drive her. Meyer Dep. 10-11.
6. After moving into her apartment at the Harrison, Meyer started experiencing situations, including groping and verbal assaults from individuals on the public streets, that made her feel unsafe while traveling to and from the bus stop. Meyer Dep. 17.
7. These experiences triggered memories from Meyer's past trauma which led her to have panic attacks, nightmares, flashbacks, and she reverted to her self-harming behaviors and eating disorder practices she used to cope. Meyer Dep. 21-22.

8. Although Meyer had no complaints against the apartment itself, the location of the apartment proved to be an issue because the harassment occurred in the environs of the apartment building and the path to the bus stop. T 12; Meyer Depo 17, 23, 41.
9. Meyer talked to a Zender representative to inquire as to the policy for terminating a lease. The leasing agent told her the early-termination fee is \$250 plus \$920 for two months' rent. Meyer Dep. 25-28.
10. The second time Meyer spoke to a Zender representative, she spoke with Nancy Hartman ("Hartman"). Meyer informed Hartman that she had a medically necessary reason to terminate her lease. Hartman told her she needed bring a letter from her physician for the owners to review. 73:1-74:18.
11. Meyer returned with a letter from her psychiatrist, Dr. Patel. The letter provided a recommendation that Meyer move out of Harrison apartments "for her health and well-being" because the environment has "exacerbated her condition" as well as a request that Zender allows her to relocate without having to pay the termination fee. 76:8-23.
12. Meyer gave Dr. Patel's letter to Hartman. She briefly explained the reasons she was requesting to terminate her lease such as her feeling unsafe in the apartment and the impact on her mental health. 77-79.
13. Additionally, Meyer requested to speak directly with the owners in order to provide more information; however, Hartman informed Meyer that the owners do not speak directly to the tenants. 77-79
14. The owners require tenants to speak directly to the leasing agents about the issue before the owners step in. 155:11-16.

15. Hartman brought the letter to Lisa Zender, partner of Zender Family Limited. 146:7-8.
16. Ms. Zender then met with two Zender partners to discuss Dr. Patel's letter and Meyer's request for accommodation. 151-152.
17. Zender did not involve Meyer in the discussion nor did they ask for further information. 163.
18. They collectively decided to deny Meyer's request to waive the early-termination fee. 152:5-8.
19. Meyer was then informed of this decision. 80:16-81:6.
20. Within a couple of weeks of the decision made by Zender, Meyer accepted a friend's offer to pay the early termination fee of \$1,170.00. 82.

CONCLUSION OF LAW

1. ICRC has jurisdiction over the subject matter and the parties.
2. The Indiana Fair Housing Act (IFHA) codified at IC 22-9.5-5-1 et seq. is violated by discriminating in the "terms, conditions, or privileges of sale or rental" to a disabled renter, and such discrimination encompasses "[a] refusal to make reasonable accommodations in rules, policies, practices or services when the accommodations may be necessary to afford the person equal opportunity to use and enjoy a dwelling." IC 22-9.5-5-5.
3. Meyer was and is disabled within the meaning of the IFHA and as such, subject to the protection afforded therein to the disabled including reasonable accommodations required by the IFHA.

4. In construing Indiana civil rights law, the courts look to federal case law for guidance. *State, Civil Rights Com'n v. County Line Park, Inc.*, 738 N.E.2d 1044, 1048 (Ind. 2000).
5. The IFHA “borrows heavily from the federal Fair Housing Act, with many parallel provisions and similar language. In fact, the first section of the Act declares that its purpose is ‘to provide rights and remedies substantially equivalent to those granted under federal law.’” *County Line*, supra. At 1048 citing IC 22-9.5-1-1.
6. The Fair Housing Act requirements for showing failure to reasonably accommodate are the same as those of the Americans with Disability Act (ADA). *Good Shepherd Manor Found., Inc. v. City of Muncie*, 323 F.3d 557, 561 (7th Cir. 2003).
7. Under federal law, it may be discriminatory in the “terms, conditions, or privileges” of rental to a disabled renter in instances of not allowing rental agreement termination on the basis of disability. *Samuelson v. Mid-Atlantic Realty Co.*, 947 F.Supp. 756, 761 (D.Del. 1996).
8. With regards to termination of a lease, one fails to provide a reasonable accommodation, which may be necessary to afford the renter equal opportunity to use and enjoy a dwelling, when one refuses to waive generally applicable fees for early termination of a lease due to disability. *See Samuelson*, 947 F.Supp. n. 6.
9. To establish a claim under the ADA for failure to accommodate an individual’s disability, a plaintiff must show 1) she is qualified individual with a disability; (2) the employer was aware of her disability; and (3) the employer failed to reasonably accommodate the disability. *E.E.O.C. v. Sears Roebuck & Co.*, 417 F.3d 789, 797 (7th Cir. 2005).

10. Case law applying the ADA provides that once the employer receives notice of the employee's disability and need for accommodation, it is incumbent upon the employer to determine, by engaging in an interactive process with the employee, whether a reasonable accommodation could be made. *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1062 (7th Cir. 2014); *Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1038 (7th Cir. 2013); *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005).
11. Both the employer and the employee are responsible for determining what accommodations are needed. *Bultmeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996).
12. The first prong, whether Meyer is a qualified individual with a disability, is not in dispute. Zender acknowledges that it knew of Meyer's disability of being blind. However, Zender contends that Meyer fails the second and third prong because they were not properly made aware of her mental health disabilities and they contend waiving the lease payout is not a reasonable accommodation.

Knowledge of Meyer's Disability

13. "If an employee tells his employer that he has a disability, the employer then knows of the disability, and the ADA's further requirements bind the employer." *Hedberg v. Indiana Bell Telephone Company, Inc.*, 47 F.3d 928, 934 (7th Cir. 1993).
14. "If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue." *Jankowski Lee Associates v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996).

15. Meyer provided Zender a letter from her psychiatrist, which provided her medically necessary reason for an accommodation.
16. Zender contends that the letter was vague and therefore it was unable to understand what disabilities Dr. Patel was recommending Meyer be accommodation for other than financial reasons.
17. However, Hartman testified that she understood that Dr. Patel was not treating Meyer for her disability relating to her blindness, rather, her treatment was for her mental health. 149:1-15.
18. Additionally, Ms. Zender testified she understood that Dr. Patel's letter was referring to Meyer needing accommodation because of her health. 167:15-19.
19. Therefore, Zender was put on notice that Meyer had a mental disability that required accommodation once it read Dr. Patel's letter.
20. Zender failed in its duty to request additional information to clarify the issue and satisfy its inquiries.

Failure to Participate in the Interactive Process

21. The application of the ADA reasonable accommodation analysis is the same as FHA; therefore, a landlord who fails to engage its disabled tenant in an interactive process and/or who cause the breakdown in the interactive process has withheld the required reasonable accommodation. *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 561 (7th Cir. 2003).
22. "Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The reasonable accommodation is best determined

through a flexible interactive process that involves both the employer and the individual with a disability" *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1062 (7th Cir. 2014).

23. The failure to participate in an interactive process is actionable if it prevents identification of a reasonable accommodation for the qualified individual. *Basden v. Professional Transp., Inc.*, 714 F.3d 1034, 1039 (7th Cir. 2013).
24. "Courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith." *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005) (Quoting *Beck v. University of Wisconsin Bd. Of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996)).
25. Meyer initiated the interactive process by requesting to speak with Zender about her disability and a reasonable accommodation; however, Meyer was told that Zender does not speak directly with tenants.
26. Zender discussed and decided Meyer's request for accommodation behind closed doors without including Meyer.
27. Zender contends that it did not have an alternative accommodation for Meyer because the alternative apartments were also considered downtown.
28. Zender did not bring this option to Meyer, rather Zender assumed it knew what Meyer would prefer based on testimony from a Zender employee, not directly from Meyer. 15:12-157:20.

29. Zender contends that it did participate in the interactive process through a Zender representative. However, this interaction was in the course of normal business transactions. The interactive process requires a two-way discussion about reasonable accommodations, not a discussion involving normal business transactions.

30. Therefore, Zender obstructed the interactive process by its failure to communicate and discuss with Meyer.

Failure to Find a Reasonable Accommodation

31. Zender contends that Meyer's request was not a reasonable accommodation because it was purely a financial accommodation, not a medical necessity.

32. Additionally, Zender contends its decision to not waive the lease buyout fee did not harm Meyer by reason of her handicap, rather, by virtue of what she has in common with other people, which is financial reasons.

33. Meyer contends that her request for a reasonable accommodation was not merely financial. The request was to allow Meyer follow her physician's recommendation for her to relocate in order to find a place that she would feel safe for her mental well-being.

34. Additionally, Meyer contends that the request to waive the termination fee was merely a suggestion for a reasonable accommodation and not the only accommodation she would be willing to consider.

35. Zender never participated in the interactive process with Meyer to find a reasonable accommodation.

36. Rather than engage in the interactive process, Zender denied Meyer's request for an open dialogue and decided to deny her request for a reasonable accommodation behind closed doors without Meyer.
37. Any alternatives Zender considered was never discussed with Meyer.
38. Zender failed to uphold its duty to engage in the interactive process by responding to Meyer's request for communication and explore possible accommodations with Meyer.

Damages

39. If the ICRC finds that a person has committed an unlawful discriminatory practice, it shall issue an order requiring the person to cease and desist from that practice and requiring that person to take further affirmative action as will effectuate the purposes of the ICRL, which affirmative action may include restoring complainant's losses and requiring respondent to file proof of compliance. IC 22-9-1-6(k).
40. ICRC may also order appropriate relief, including actual damages, reasonable attorney's fees, court costs, and other injunctive or equitable relief. IC 22-9.5-6-15 (a).
41. Further, to vindicate the public interest, the ICRC may assess a civil penalty against the respondent in an amount that does not exceed ten thousand dollars (\$10,000) if the respondent has not been adjudged by order of the commission or a court to have committed a prior discriminatory housing practice. IC 22-9.5-6-15(b).

42. Administrative review of this proposed decision may be obtained by the filing of a writing identifying with reasonable particularity each basis of each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
43. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ordered that:

1. Zender cease and desist from all discriminatory practices in housing made unlawful by the Indiana Civil Rights Law, Indiana Fair Housing Act, and the Americans with Disabilities Act.
2. Zender shall deliver to Meyer with thirty (30) days after the effective date of this Order, a check made payable to her in the amount of fifteen thousand dollars (\$15,000). Of this the sum of \$1,170.00 corresponds to the buyout fees that Meyer had to pay and the balance corresponds to what will adequately compensate Meyer for the emotional distress she suffered.
3. Zender shall deliver to the ICRC within thirty (30) days after the effective date of this Order, a check made payable to the ICRC in the amount of five thousand dollars (\$5,000).
4. Should Zender within five years of the effective date of a final order issued by the Commission in this case re-commence the offering of residential property/units for rent, Zender is ordered to meet the following conditions:

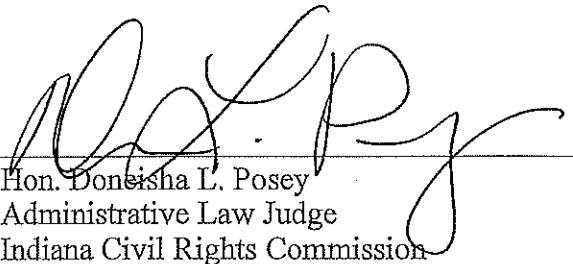
- a. Respondent will not refuse to rent or discriminate against any person in the advertising, terms, conditions or privileges of renting a dwelling unit, or in the provision of services or facilities in connection therewith, because of race, color, religion, national origin, sex, familial status, or disability.
- b. Respondent will not coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on the account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected based on race, color, religion, national origin, sex, familial status or disability.
- c. In any rental, leasing, and/or management office or mailbox of any properties Respondent owns or manages in Indiana Respondent will display the Fair Housing Poster to inform all potential renters or residents that the properties are available to be occupied by any applicants regardless of race, color, religion, national origin, sex, familial status or disability.
- d. Provide a copy of its nondiscrimination policy to all officers, agents, and employees. This policy will address discrimination, harassment, reasonable accommodation and modifications and be provided to all current and prospective applicants/residents. If no policy exists, the Respondents agree to create such policy and distribute accordingly.
- e. Provide all Respondent officers, agents, and employees with a copy of its request for reasonable accommodations and/or modifications form and to review with said personnel the policies and procedures governing the processing of such requests. If no such form or policy, Respondent shall create

and distribute accordingly to accurately and completely reflect federal and state fair housing laws and the guidance with regard to reasonable accommodations and modifications found in the Joint Statements of the Department of Housing and Urban Development and the Department of Justice on *Reasonable Accommodations Under the Fair Housing Act* and the additional statement *Reasonable Modifications Under the Fair Housing Act*.

- f. Provide the following written statement to applicants at any properties it owns or manages as part of any standard applications, leases, rules, or policies: “We are an equal housing opportunity provider. We do not discriminate on the basis of race, color, religion, national origin, sex, familial status or disability.”
- g. Within one year of Respondent’s resumption of leasing residential rental units and continuing for two years after on a yearly basis, the Respondent will see to it that Respondent’s property managers, leasing agents, and anyone in positions of decision making, attend a fair housing seminar of at least two hours in length about the provisions and requirements of fair housing laws with any costs of these trainings being the responsibility of the Respondent. The Respondent shall submit evidence of attendance by providing a copy of a certificate of completion to the ICRC for each person and each training.
- h. Within one year of Respondent’s resumption of leasing residential rental units and continuing for two years after on a yearly basis, the Respondent shall see to it that at Respondent’s expense its property managers, leasing agents, and anyone in positions of decision making will attend a Disability Awareness Training of at least one hour in length regarding person-first language,

disability sensitivity, and cultural competence related to disability issues among other factors. Respondent shall submit evidence of attendance by providing a copy of a certificate of completion to the ICRC for each person and training.

5. This order shall be effective once it is approved and signed by a majority of the members of ICRC unless it is modified by ICRC pursuant to IC 4-21.5-3-31(a), stayed by ICRC pursuant to IC 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.



Hon. Doneisha L. Posey
Administrative Law Judge
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehitia Eromosele, Admin Asst.
317/234-6358