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Judge Cindi S. Port

Plaintiff's Motion for Summary Judgment Noting Date: May 8, 2020

Attorney General's Motion for Leave to File Amicus Brief Noting Date: May 15, 2020

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ROBERT ELON MIX,

Plaintiff,

v.

DIMENSION TOWNHOUSES LLC, and RAJSONS PROPERTIES INC. d/b/a DIMENSION PROPERTIES,

Defendants.

NO. 19-2-16106-0 KNT

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Civil Rule 7(b), the Attorney General of the State of Washington respectfully requests leave to file a brief as amicus curiae in the above-captioned case. Although no Civil Rule specifically addresses amicus participation in the Superior Court, the Court enjoys discretion to allow it. *See Parsons v. Dep't of Soc. & Health Servs.*, 129 Wn. App. 293, 302, 118 P.3d 930, 934 (2005) (upholding the trial court's decision to permit amicus participation). The undersigned counsel has notified counsel for the parties of the Attorney General's intent to seek leave to file an amicus brief.

I. IDENTITY OF AMICUS CURIAE

The Attorney General is the legal adviser to the State of Washington. RCW 43.10.030. The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195, 199 (1978).

II. THE ATTORNEY GENERAL'S INTEREST IN THIS MATTER

The Attorney General is authorized to investigate and enforce the Washington Law Against Discrimination (WLAD) and, therefore, has a strong interest in ensuring the correct interpretation of the statute. The Attorney General also has an interest in protecting the public interest, including the public's right to be free from unlawful discrimination. *See* RCW 49.60.010 (finding that discrimination "threatens not only the rights and proper privileges of [state] inhabitants but menaces the institutions and foundation of a democratic state"); *see also City of Seattle v. McKenna*, 172 Wn.2d 551, 562, 259 P.3d 1087, 1091-92 (2011) (Attorney General's "general powers and duties" include "discretionary authority to act in any court, state or federal, trial or appellate, on a matter of public concern") (internal quotation marks omitted). The Attorney General has a strong interest in protecting this public interest, and ensuring the correct interpretation of the WLAD.

Because this case involves the scope of a housing provider's duty to reasonably accommodate disabled individuals who depend on scheduled benefit payments to pay rent, this case affects individuals beyond the named plaintiff, and implicates the public interest for this additional reason. The Attorney General offers this brief to assist the Court in considering the scope of the duty to make reasonable accommodations in housing under the WLAD, and argues that a blanket policy of refusing to consider split rent payments as a reasonable accommodation is inconsistent with the requirements of the WLAD.

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III. FAMILIARITY WITH THE ISSUES

The Attorney General is familiar with the issues raised in this case and with the scope of the arguments presented in both the Plaintiff's Motion for Partial Summary Judgment and the Defendants' Response in Opposition to the same. The Attorney General has expertise in the WLAD through its enforcement of the statute in numerous cases.

IV. ISSUES TO BE ADDRESSED

The Attorney General's proposed amicus brief addresses the following issues:

1. Whether adjustments to due dates for rent payments may constitute reasonable accommodations required by RCW 49.60.222(2)(b); and

2. Whether the WLAD imposes a separate, mandatory duty that housing providers engage in an "interactive process" in response to a request for reasonable accommodation by a person with a disability.

V. REASONS FOR ADDITIONAL ARGUMENT

It is within the discretion of this Court to permit participation by amicus curiae if it may be helpful to the Court. *Parsons*, 129 Wn. App. at 302, 118 P.3d at 934. The Attorney General's Office has experience enforcing the WLAD, including in circumstances where a company's accommodation policies are alleged to be discriminatory. *See, e.g., State v. Colmar, Inc.*, No. 19-2-12542-5 (Pierce Cty. Sup. Ct. Dec. 5, 2019) (asserting claims for failure to accommodate employees in violation of the WLAD); Order, *State v. Matheson Flight Extenders, Inc.*, No. 2:17-cv-01925-JCC, ECF No. 65 (W.D. Wash. Feb. 18, 2018) (securing the denial of summary judgment on claims for failure to accommodate employees in violation of the WLAD). The Attorney General respectfully submits that this experience will assist the Court in interpreting the WLAD and assessing the policy at issue here, including Defendant's claim that adjustments to a landlord's policy concerning rental payment due dates can never constitute a reasonable accommodation under the WLAD.

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VI. CONCLUSION

For these reasons, the Attorney General respectfully moves the Court for leave to file the amicus curiae brief that accompanies this motion.

DATED this 4th day of May 2020.

Respectfully submitted,

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Attorney General

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CERTIFICATION

I certify that this motion contains 711 words, in compliance with Local Civil Rule 7(b)(5)(B)(vi).

Dated this 4th day of May 2020.

s/ Brian J. Sutherland
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the King County Superior Court using the electronic filing system. I certify that all participants in the case are registered with the electronic filing system and that service will be accomplished by the electronic filing system.

Dated this 4th day of May 2020 in Seattle, Washington.

Caitilin Hall
Legal Assistant

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AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

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I. INTRODUCTION

Washington State has a strong public policy against disability discrimination in housing. The Washington Law Against Discrimination (WLAD) contains broad antidiscrimination protections, which ensure that individuals with a disability receive reasonable accommodations necessary to allow them an equal opportunity to use and enjoy their housing. In this case, Defendants Dimension Townhouses LLC and Rajsons Properties, Inc. argue that adjustment of a due date for rent payments usually due on the first of the month can never constitute a reasonable accommodation under the WLAD for a tenant with a disability, even if the tenant's disability prevents him from being employed and, as a result, he must rely on benefit payments received at different times of the month to pay rent.

Defendants' proposed construction conflicts with the text of the WLAD, its mandate of broad construction, the analogous provision of the federal Fair Housing Amendments Act, and caselaw interpreting both statutes. The Court should reject Defendants' proposed construction because the WLAD requires housing providers to adjust rental payment due dates when doing so constitutes a reasonable accommodation for individuals with disabilities. And a housing provider may not simply ignore such a request or reject it out-of-hand—the WLAD requires dialogue and an interactive process before housing providers may lawfully deny requested disability accommodations. The Attorney General urges the Court to apply these important civil rights principles in considering the pending motions.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Robert Elon Mix is a disabled veteran of the United States Air Force who asked his landlord, Defendants Dimension Townhouses, LLC and Rajsons Properties, Inc., to let him pay his rent in two installments—one when he received his disability benefit from the Veterans Administration on the first of each month, and the other when he received his Social Security disability benefit on the third Wednesday of each month. 1st Am. Compl., Dkt. No. 18, ¶¶ 5-7, 13, 15, 17, 25, 27.

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Instead of granting this accommodation, as the previous property owner did, Mr. Mix alleges that Defendants ignored his request, charged him fees for late payment, and terminated his tenancy. 1st Am. Compl., Dkt. No. 18, ¶¶ 16, 28, 31-33. Mr. Mix alleges that these actions constitute disability discrimination and refusal to provide reasonable accommodation in violation of the WLAD, RCW 49.60.222(1)(f), (2)(b). He now seeks partial summary judgment on these and other claims. Pl.'s. Mot. for Partial Summ. J., Dkt. No. 23 at 9-22. Defendants cross move, denying that a split payment arrangement could constitute a reasonable accommodation required by the WLAD. Defs.' Resp. Br., Dkt. No. 32 at 6-8. Defendants do not separately address whether they had any obligation to discuss the matter with the Plaintiff.

III. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General is the legal adviser to the State of Washington. RCW 43.10.030. The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195, 199 (1978).

Mr. Mix's amended complaint alleges violations of the WLAD, which implicates the public interest because unlawful discrimination "threatens not only the rights and proper privileges of [state] inhabitants but menaces the institutions and foundation of a democratic state." RCW 49.60.010. The Attorney General has a strong interest in protecting this public interest, and ensuring the correct interpretation of the WLAD.

Because this case involves the scope of a housing provider's duty to reasonably accommodate disabled individuals who depend on scheduled benefit payments to pay rent, this case affects individuals beyond the named plaintiff, and implicates the public interest for this additional reason. The Attorney General offers this brief to assist the Court in considering the scope of the duty to make reasonable accommodations in housing under the WLAD, and argues that a blanket policy of refusing to consider split rent payments as a reasonable accommodation is inconsistent with the requirements of the WLAD.

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IV. ISSUES ADDRESSED BY AMICUS

1. Whether adjustments to due dates for rent payments may constitute reasonable accommodations required by RCW 49.60.222(2)(b); and

2. Whether the WLAD imposes a separate, mandatory duty that housing providers engage in an "interactive process" in response to a request for reasonable accommodation by a person with a disability.

V. LEGAL ARGUMENT

Defendants maintain that permitting a split monthly rent payment into two installments can never be a reasonable accommodation required by the WLAD. Defs.' Resp. Br., Dkt. No. 32 at 6-8. But precedent requires exactly this kind of modification to payment schedules when necessary to accommodate the financial limitations of a tenant with a disability. And, before a requested accommodation may lawfully be denied, the WLAD also requires housing providers to engage in an interactive process with a tenant who requests a reasonable accommodation. Defendants must comply with both duties here.

A. The WLAD Requires Housing Providers to Adjust Rental Payment Due Dates When Doing So Constitutes a Reasonable Accommodation for Individuals with Disabilities

The WLAD provides that unlawful housing discrimination based on disability includes refusal "to make reasonable accommodation in rules, policies, practices, or services when such accommodations may be necessary to afford a person with the presence of any sensory, mental, or physical disability . . . equal opportunity to use and enjoy a dwelling[.]" RCW 49.60.222(2)(b). While this plain language clearly requires housing providers to make exceptions to generally applicable rules or policies when necessary to provide reasonable accommodation, Washington courts may also look to interpretations of federal antidiscrimination laws in construing the WLAD. *See Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193, 197-98 (2014). In the housing context, this includes the federal Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3614a (FHAA). *See Tafoya*

v. State Human Rights Comm'n, 177 Wn. App. 216, 224, 311 P.3d 70, 75-76 (2013). Federal case law makes clear that adjustments or exceptions to a housing provider's financial rules or policies may be required as a reasonable accommodation, and there is nothing in the WLAD that indicates it should be interpreted more narrowly than the identical federal provision. If anything, the WLAD should be interpreted more broadly to maximize equal housing access for persons with disabilities.

1. The FHAA Requires Modification of Payment-Related Rules, Policies, and Practices, Including Adjustments to Rental Due Dates, When Necessary to Provide Reasonable Accommodation

Federal courts nationwide have recognized that the FHAA may require exceptions to neutral housing policies where they adversely impact disabled individuals because of their financial limitations. *See Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003) (holding that "burdensome policies, including financial policies, can interfere with disabled persons' right to use and enjoyment of their dwellings, thus necessitating accommodation") (citation omitted); *Schaw v. Habitat for Humanity of Citrus Cty., Inc.*, 938 F.3d 1259, 1269-70, 1274 (11th Cir. 2019) (holding that a plaintiff's financial state can be related to his disability and an accommodation with a financial aspect may be required). Accordingly, courts have held that required financial accommodations may include granting a zoning variance so that disabled individuals can live together and share costs in a group home, *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 969 (7th Cir. 2018) (citation omitted); adjusting limits on sources of qualifying income for a disabled person to enter into subsidized housing, *Schaw*, 938 F.3d at 1274; and exempting a person who is unable to work because of a disability from a policy forbidding the use of a co-signer to qualify for a lease, *Giebeler*, 343 F.3d at 1158-59.

Indeed, at least one court has squarely held that adjustment of the due date for a tenant's rent payment because of reliance on a social security disability benefit received in the middle of the month may be a required accommodation. *Fair Hous. Rights Ctr. in Se. Pa. v. Morgan Props. Mgmt. Co.*, No. CV 16-4677, 2018 WL 3208159, at *11 (E.D. Pa. June 29, 2018) (denying

summary judgment for the housing provider), *motion to certify appeal denied*, No. CV 16-4677, 2018 WL 4489653 (E.D. Pa. Sept. 19, 2018). The court in *Morgan Properties* noted that the federal government pays social security disability benefits on a staggered schedule, so that recipients receive benefits at different times throughout the month according to their birthdate. *Id.* at *4. The court then rejected the argument that adjusting a due date to account for this is not required because it accommodates financial hardship rather than disability. *Id.* at *6-7. Defendants here make the same argument rejected by thorough and well-reasoned analysis in *Morgan Properties*. *See* Defs.' Br., Dkt. No. 32 at 3. By contrast, the case they rely upon, *Geter v. Horning Bros. Mgmt.*, did not even address whether permitting a split rent payment was a reasonable accommodation. 537 F. Supp. 2d 206, 210 n.3 (D.D.C. 2008). *Geter* is also distinguishable on its facts because the plaintiff did not show a causal connection between his disability and the need for the accommodation, given that he continued to pay rent and late fees for years after he requested the accommodation. *Id.* at 209.

Instead, like the tenants in *Morgan Properties*, Mr. Mix asserts that he depends on his social security benefit because of his disability, 1st Am. Compl., Dkt. No. 18, ¶¶ 15-16, Mix Decl., ¶ 7, and he had no control over which day of the month he receives it, *Morgan Properties*, 2018 WL 3208159, at *7. Mr. Mix also never asked to pay less than what he owed. *See id.* at *7 (citing *Giebeler*, 343 F.3d at 1143). He simply asked to be allowed to pay part of his rent later in the month so that he would not have to forgo other necessary bill payments. Mix Decl., ¶ 7; Stewart Decl., ¶ 7.[1] The simple fact is that the FHAA is broad enough to require exceptions to

[1] Defendants argue that the reason Mr. Mix could not afford to pay rent in one monthly payment is that he carried substantial debt on high-interest credit cards. Defs.' Br., Dkt. No. 32 at 1-3, 7. But the text of the FHAA and the case law—which is persuasive in applying the WLAD—do not contain any exception based on the indebtedness of a person with a disability. Instead, courts are permitted to evaluate accommodation requests based on all "economic circumstances" applicable to a tenant's case, not just those caused "by reason of their handicap." *Giebeler*, 343 F.3d at 1153 (explicitly declining to limit the court's consideration to "barriers that would not be barriers *but for* the individual's disability") (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 413, 122 S. Ct. 1516, 152 L.Ed. 589 (2002) (Scalia, J., dissenting)). That is because the touchstone inquiry is not whether a tenant with a disability could have managed their finances differently, but whether a modification to a payment-related rule is necessary to allow the tenant to "use and enjoy [their] dwelling." *Morgan Properties*, 2018 WL 3208159, at *5 (quoting 42 U.S.C. § 3604(f)(3)(B)).

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housing policies which are "necessary to alleviate the *effect* of a disability." *Schaw*, 938 F.3d at 1270-72 (emphasis added). And that effect may be a financial limitation arising from the inability to work, *id.*, such as delayed receipt of government benefits which a disabled tenant relies on to make ends meet between rent and other bills, *Morgan Properties*, 2018 WL 3208159, at *7.

2. The Text of the WLAD and the Liberal Construction Rule Require the Same Result

The applicable section of the WLAD is nearly identical to the federal Fair Housing Amendments Act. Both define unlawful disability discrimination as:

WLAD	Fair Housing Amendments Act
(b) To refuse to **make reasonable accommodation in rules, policies, practices, or services when such accommodations may be necessary to afford a person** with the presence of any […] disability […] **equal opportunity to use and enjoy a dwelling**[.] RCW 49.60.222(2)(b) (emphasis added)	(B) a refusal to **make reasonable accommodations in the rules, policies, practices, or services, when such accommodations may be necessary to afford** such **person equal opportunity to use and enjoy a dwelling**[.] 42 U.S.C. § 3604(f)(3)(B) (emphasis added)

This has been the case since 1993 when the WLAD was amended "*to make [it] substantially equivalent* to the [Federal Fair Housing Amendments Act of 1988] by . . . adding *all substantive rights, protections and remedies* of the federal law . . . ." House Comm. on Trade, Econ. Dev. & Hous. and Senate Comm. on Labor & Commerce, Final Bill Report, H.R. 53-2, 1st Sess., at 1-2 (Wash. 1993) (emphasis added). *See also* WAC 162-38-010(3)(b) (providing that the FHAA is a source of guidance for applying and interpreting the provisions of the WLAD regarding discrimination on the basis of disability in real estate transactions). And yet, the definition of "disability" in the WLAD is broader than federal law. *See Taylor v. BNSF*, 193 Wn.2d 611, 621, 444 P.3d 606, 611 (2019). Given this and the statutory rule that the WLAD is to be interpreted "liberally" to accomplish its purposes, RCW 49.60.020, if there is any doubt as to whether adjusting rental payment due dates may be a required accommodation under federal law, the Court should hold that it certainly may be one under the WLAD. *See Kumar*,

180 Wn.2d at 491, 325 P.3d at 198 (noting that "[w]here the [Washington Supreme Court] has departed from federal antidiscrimination statute precedent," it has "almost always" provided greater protection").

B. The WLAD Requires Housing Providers to Engage in an Interactive Process with Individuals who Request Reasonable Accommodations in Housing

The WLAD also requires housing providers to engage in a good faith interactive process, or dialogue, when a tenant requests a disability accommodation. This is a separate, mandatory duty under the WLAD, which Washington courts have clearly explained in the employment context. *See, e.g., Goodman v. Boeing Co.*, 127 Wn.2d 401, 408-09, 899 P.2d 1265, 1269 (1995); *Martini v. Boeing Co.*, 88 Wn. App. 442, 455-56, 945 P.2d 248, 256 (1997); *Stevens v. City of Centralia*, 86 Wn. App. 145, 156, 936 P.2d 1141, 1147 (1997) (as amended June 6 and July 3, 1997). Once an individual gives notice of a disability, the duty to take "positive steps" to accommodate is triggered. *Goodman*, 127 Wn.2d at 408, 899 P.2d at 1265 (citation omitted). This interactive process "envisions an exchange" where each party "seeks and shares information," *id.* at 408-09, 899 P.2d at 1265, and applies not only to determining whether a disability exists, but also to the reasonableness of proposed accommodations, *Gamble v. City of Seattle*, 6 Wn. App. 2d 883, 892, 431 P.3d 1091, 1096 (2018).

Which "positive steps" are required may depend on the particular facts, but at a minimum, a request for accommodation must be met with either accommodation or an evaluation and discussion of potential alternative accommodations. *See, e.g., Davis v. Microsoft Corp.*, 149 Wn.2d 521, 536-37, 70 P.3d 126, 134 (2003) (explaining that accommodation by an employer requires the affirmative steps of assisting an employee in an internal job search for a new position, inviting the employee to receive help in doing so, and sharing all available job openings); *Curtis v. Sec. Bank of Wash.*, 69 Wn. App. 12, 19, 847 P.2d 507, 511–12 (1993) (holding that an employer was required to inform an employee of open positions, test the employee on her capabilities for them, encourage her to apply, and affirmatively assist her in

doing so). Federal courts also require the interactive process. *See, e.g., Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794, 799 (9th Cir. 2017); *Lawler v. Peoria Sch. Dist. No. 150*, 837 F.3d 779, 786-88 (7th Cir. 2016); *E.E.O.C. v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009).

The interactive process looks much the same in the housing context, where it is "incumbent" upon a housing provider "to request documentation or open a dialogue" if it is skeptical of the tenant's disability or its ability to provide an accommodation. *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1287 (11th Cir. 2014) (quoting *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996)). A housing provider may not unjustifiably delay in responding to a request for reasonable accommodation, *Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000), and evidence that it simply "stonewalled" requests support the finding that reasonable accommodation was denied, *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 25 (1st Cir. 2004). *See also* Joint Statement of U.S. DOJ and U.S. Dep't. of Hous. & Urban Dev., May 17, 2004, at p. 7 (explaining that the interactive process is "helpful to all concerned" and that a housing provider should discuss alternative accommodations if it believes a requested accommodation is not reasonable). The interactive process requirement places a duty on the housing provider to truly engage with and respond to a tenant who requests reasonable accommodation.

In this case, Mr. Mix alleges that Defendants failed to communicate with him at all about his requested reasonable accommodation. Defendants suggest that Mr. Mix did not make a proper "request" when he notified them of the split payment accommodation the previous property owner provided, Defs.' Resp. Br., Dkt. No. 32 at 3, but they do not appear to dispute that Mr. Mix also sent them a letter explaining the accommodation, enclosing his two monthly rent checks with a request that they wait to deposit the second check, and asking them to contact him if there were any questions, *see* 1st Am. Compl., Dkt. No. 18, ¶ 27. Under well-established caselaw, Mr. Mix's notice triggered Defendants' interactive process duty under the WLAD. *See*

Goodman, 127 Wn.2d at 408-09, 899 P.2d at 1269-70 (holding in an employment case that an employee "need not explain the full nature and extent of her limitations" to trigger the employer's duty to investigate).

VI. CONCLUSION

The State of Washington respectfully requests that the Court construe and apply the WLAD in this case consistent with the principles and authorities above.

DATED this 4th day of May 2020.

Respectfully Submitted,

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CERTIFICATION

I certify that this *Amicus Curiae* Brief contains 3000 words, in compliance with Local Civil Rule 7(b)(5)(B)(vi).

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