

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Shannon R. Cooper, Rebekah A.
Cooper, and Idaho Fair Housing
Council,

Charging Party,

v.

Blue Meadows Limited Partnership,
Blue Meadows Associates, Realvest
Corporation, Cindy Skalak and
Martha Reed,

Respondents.

HUDALJ 10-99-0200-8
HUDALJ 10-99-0391-8
Decided: July 5, 2000

James Reid, Esq., and
S. Bryce Farris, Esq.,
for the Respondents.

David F. Morado, Esq., and
Jo Ann Riggs, Esq.,
for the Secretary and the Complainants.

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION

This matter arose as a result of two housing discrimination complaints filed by Shannon R. Cooper and Rebekah A. Cooper, on behalf of themselves and two of their

minor children, Kristina and Paul¹, and the Idaho Fair Housing Council² (“IFHC”; “Complainants” or “Aggrieved Parties”), alleging that they had been denied housing in an apartment building by Blue Meadows Limited Partnership, Blue Meadows Associates, Realvest Corporation, Cindy Skalak, and Martha Reed (“Respondents”), on the basis of handicap. They complain that Respondents, the owners and managers of Blue Meadows, discriminated against them by refusing to rent or otherwise make an apartment available to them because of handicap, by discriminating in the terms and conditions of rental, refusing to make a reasonable accommodation in rules, and by making discriminatory statements on the basis of handicap.

On September 30, 1999, after conducting an investigation, a Charge of Discrimination was filed by HUD’s Assistant General Counsel for Northwest/Alaska on behalf of the Complainants. The Charge alleges that Respondents violated applicable parts of the Fair Housing Act, as amended, which are found at 42 U.S.C. §§ 3604(c) and 804 (f)(1), (2) and (3)(B) (“Act”). This case is adjudicated in accordance with Section 3612(b) of the Act and the regulations of the Department of Housing and Urban Development (“HUD”) that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

A hearing was conducted in Caldwell, Idaho, on March 28 - 29, 2000. Post-hearing briefs were ordered to be filed by May 11, 2000, and the parties timely filed their briefs. Thus, the record was closed, and this case became ripe for decision on the last-named date.

The Parties

1. Complainant Shannon R. Cooper is a 33-year old man who uses a wheelchair for mobility. Complainant Rebekah Dunbar Cooper is Shannon Cooper’s ex-wife and fiancée. The Coopers have a son and Ms. Cooper has two children by a previous marriage.

¹ The children’s surnames were not provided.

² After the facts in this case were complete, and some time prior to the hearing, the Idaho Fair Housing Council changed its name to the Intermountain Fair Housing Council (“IFHC”).

2. Complainant IFHC is a “501(c)(3)” private, nonprofit corporation. IFHC’s organizational mission is to ensure full housing opportunity for Idaho residents, free of illegal housing discrimination. (T 371).³ To that end, IFHC provides fair housing education to housing consumers, housing providers, and advocacy organizations, provides counseling and referrals, conducts tests for discrimination, and engages in general enforcement activities. (T 372, 374, 379). About 35 percent of IFHC’s work involves disabled persons. (T 381). Richard Mabbutt is the Executive Director of IFHC. (T 368).

3. Blue Meadows Apartments is a 229-unit apartment complex located at 5122 W. Stoker Lane, Boise, Idaho. (Answer ¶2; S-11). Blue Meadows has 96 affordable housing units built with Section 42 Low Income Tax Credits. (T 589).

4. At the time of the facts of this case, Respondent Blue Meadows Limited Partnership was the owner of Blue Meadows. Respondents Blue Meadows Limited Partnership and Realvest Corporation are General Partners of Blue Meadows Associates. (Ans. ¶ 4).

5. Respondent Realvest Corporation, a Washington corporation, is a property management company with properties in six states. Realvest manages Blue Meadows Apartments. (Ans. ¶ 4).

6. Respondent Cindy Skalak has been employed by Realvest for 21 years and has been the resident manager of Blue Meadows for five years. (T 477). Respondent Martha Reed was employed by Realvest as a leasing agent at Blue Meadows from July, 1988, to February, 2000. (T 550-51).

Findings of Fact

1. In 1984, Shannon Cooper fell 60 feet from a cliff while free-climbing its face. (T 16). Since then he has been unable to support his weight and unable to walk, and is therefore confined to a wheel chair. (T 17). An additional result of Cooper’s injuries is that he suffers from neurogenic bowel syndrome. (T 290).

2. Mr. Cooper has remained physically active, including participation in wheel chair sports and taking long “walks” along the river in Boise. By 1993 Cooper had developed painful chronic shoulder problems from propelling his chair by hand, a frequent and usual problem for wheel chair users. (T 19).

³ References to the transcript of the hearing are cited with a T plus a page number. The exhibits that were put into evidence by the Secretary are cited with an S plus an exhibit number and those from the Respondent are cited in like manner with an R.

3. In 1966, Cooper consulted with his treating physician, Robert H. Friedman, M.D., about getting a dog to assist him by pulling his chair to minimize the strain on his arms and shoulders, and to pick things up from the floor. (T 21, 263-64). Dr. Friedman, who is Board Certified in Physical Medicine and Rehabilitation and has treated Cooper for his spinal chord injuries since 1990, wrote a “prescription” for a helper dog based on his opinion that Cooper would benefit from a dog “appropriately trained” to assist him. (S 1, 14; T 257-59, 280, 297).

4. At that time, Cooper was living in Park River Apartments, Boise, and he asked permission from management to have a helper dog. (T 19-20). Upon a showing of the “prescription,” Park River Apartments granted Cooper a reasonable accommodation by lifting its “no pets” policy to allow him to have an assistance dog in his apartment. (T 20, 26-27).

5. When Cooper learned that helper dogs such as he needed were too expensive for him, including his having to travel out of state to take part in training sessions with the dog, he decided to adopt a dog and train it himself to do the things that he required. (T 266). Thus, he went to the Idaho Humane Society and adopted an eight-year-old black Labrador Retriever mix named “Bear.” (S 2). The two Coopers then trained Bear to perform the activities that Mr. Cooper needed. (S 34). At the time of the hearing, Bear was approximately 13 years old and was suffering from hip dysplasia. (T 112).

6. In 1997 Park River’s new manager contacted Dr. Friedman about Shannon Cooper’s need for the dog. (T 36). Friedman responded with a letter to the manager stating that Cooper “... has a canine assistant ... trained by Mr. Cooper to assist him in his daily activities. These activities include mobility, ADL [activities of daily living] activities, fetching items that have fallen on the floor, and otherwise accommodating to Mr. Cooper’s disability.” The letter did not state any opinions of Dr. Friedman as to the quality of the dog, the need for a dog, or the appropriateness of the dog’s training; just what he had been told by Cooper about the dog. (S 3, T 278, 294-96). The Park River Apartments manager allowed Cooper to keep the dog.

7. In 1998, Shannon Cooper and Rebekah Dunbar Cooper reconciled their differences and decided to re-marry. (T 39). Ms. Cooper started working at Park River Apartments and moved into a two-bedroom unit with the Coopers’ son, Paul, and her daughter, Kristina, who were at the time of the hearing, nine and 16, respectively. Ms. Cooper’s other son, who was 17 at the time of the hearing, was living with his father when the facts of this case arose, but had joined the Coopers by the time of the hearing. (S 13; T 15, 196-97; 200). Rebekah Cooper’s two-bedroom unit was provided to her free of rent as part of the compensation for her employment. When she was fired in November of

1998 she was only given three days to move out of her apartment, also because of a condition of her employment and compensation agreement. (T 197-98; 200).

8. Ms. Cooper and the two children moved into Shannon Cooper's one-bedroom apartment until more suitable housing could be found. (T 41). However, Park River would not allow the four Coopers and Dunbars (hereinafter "the Coopers") to stay in the one-bedroom apartment because of its occupancy limitations. On Monday, November 23, 1998, Cooper phoned Janet Lovell Smith, his housing representative at Boise City Housing Authority, to ask for a new Section 8 certificate for a three-bedroom apartment which he would need to accommodate his suddenly reacquired and larger family. On November 24, as a result of learning in the Smith conversation that he could only get a new Section 8 certificate by submitting a notice to vacate, Cooper submitted his notice that he would vacate Park River Apartments by December 31, 1998. (S 4; T 48).

9. The Coopers' search for new housing started on or about November 23, 1998. Ms. Cooper contacted about nine apartment complexes without success. They either had no three-bedroom units on the ground floor, did not accept Section 8 vouchers, or were not located in areas that the Coopers found desirable. (T 199). Shannon Cooper phoned Blue Meadows Apartments and spoke to the manager, Respondent Cindy Skalak, asking whether any three-bedroom ground floor apartments were available. He explained his use of a wheel chair and further asked whether Section 8 vouchers were accepted at Blue Meadows. To all of this, Skalak responded affirmatively and she also described the amenities at Blue Meadows. (T 43, 199, 497).

10. Cooper stated to Skalak that he had a dog, although it is not clear whether he described Bear to be a helper dog or a pet at that time. Skalak responded that Blue Meadows had a no pets policy and told Cooper that he should come by to get an application. (T 43-4, 497). When Shannon got off the phone he indicated to Rebekah that he was excited about his find, but he did not indicate at that time that there was any dispute about the dog. (T 200).

11. Jonnie Peden, the Blue Meadows assistant manager, was with Skalak during that phone conversation because they share an office. Since Skalak knew she would soon be leaving for the Thanksgiving holiday, she informed Peden that Cooper would be coming in to pick up an application. There was no mention of the dog in that conversation. (T 490, 498, 529). On November 24, 1998, the Coopers went to the Blue Meadows office and Shannon picked up their application packet, consisting of an Idaho Rental Application form for each Cooper, a Statement Of No Income form, and another form for Consent To Release Social Security information. (S 6, R1-3; T 482-83, 500, 554). The Coopers were also required to bring in the Section 8 certificate and a \$200 deposit to complete the application. (T 486-87). It is Blue Meadows's normal course of business to send

completed applications, including all associated documents, to a screening agency called TES to rule on qualification to rent the apartment, and Blue Meadows honors that assessment. (T 488).

12. Later on the 24th, Cooper phoned Janet Smith at the Boise City Housing Authority and told her that Blue Meadows appeared to be invoking its no pets policy with regard to his service dog. She advised him to contact Idaho Legal Aide Services ("ILAS"). (T 46-8). He did so, and on November 25 he met with Zoe Ann Olson of ILAS. After consulting with Rorie Stopho of IFHC, Olson gave Cooper a form called Request For Reasonable Accommodation for him to fill out asking Blue Meadows to make an exception to its no pets policy to allow Cooper to have his service dog live with him in a Blue Meadows apartment. On the form, Cooper wrote that he has a service dog that is trained to pull his chair, and added, "please see [attached] letter." He listed Dr. Friedman as the person to contact to verify the need for the accommodation and gave the doctor's address and telephone number. Cooper also listed the manager of Park River Apartments as a reference. Olson retained a copy of the completed form and instructed Cooper to give the original to Blue Meadows's management as part of his application. (S 5; T 53, 305-07).

13. On November 25, 1998, the Coopers filled out their basic application forms and returned them, but no other forms or documents, to the Blue Meadows office where they handed them to Martha Rogers. Rogers, who did some office work as well as cleaning and maintenance, was the only person working that day. It was the day before Thanksgiving, the others had gone on their Thanksgiving vacations, and the office was only to be open half the day. (S 6, 13; T 557). Normal hours were resumed at the Blue Meadows office on Monday, November 30, 1998.

14. On December 3, 1998, Cooper returned to the office to turn in the Coopers' \$200 deposit for the apartment. (T 559). Rogers gave him a receipt, which he signed. (S 21; T 559-60). Cooper also turned in a copy of the November 1997 letter from Dr. Friedman to the Park View Apartments manager, but he did not submit the Application For Reasonable Accommodation form which he had prepared. (S 3, 5; T 503, 509, 505, 560, 562-63). While Rogers prepared the receipt, Peden took the letter into the inner office to Cindy Skalak. (T 533-34, 560). Peden returned, and informed Cooper that Blue Meadows would get back to him regarding the letter. (T 534; 561).

15. Cindy Skalak discussed the letter and the request for the dog with her husband, Bob Skalak, who is the Area Manager for Blue Meadows and has his office in the Blue Meadows building, but usually does not get involved in the apartment house's daily business. (T 579-81). Cindy Skalak then sent a copy of the letter to Bill Ward at the Idaho Housing Agency and phoned him to get his advice on the matter. Bob Skalak

phoned Jeff Brown, Realvest's property manager, to also seek his advice. (T 504-06). Following these conversations, Cindy told Jonnie Peden to request additional information from Mr. Cooper, such information to include a more current and complete letter from the doctor and more information about the dog, including its type, training, temperament, and how Cooper proposed to care for it, especially with regard to its need to go out to a "relief area." (T 506-08, 535).

16. On the following day, and before Peden had contacted Cooper to tell him of Skalak's request for more information regarding the dog, Cooper visited Blue Meadows to see an apartment. Peden showed him a three-bedroom apartment on the ground floor and told him about the need for a current letter from the doctor and the other information about the dog, and also that he still must turn in the income verification, social security, and the Section 8 forms before Blue Meadows would process the Coopers' application. (T 512, 536, 539). Blue Meadows does not process applications one piece at a time. Rather, when they have a complete application in hand, including all supporting documents and the deposit, they send all of it together to the TES independent screening service. The Coopers never returned these forms, the additional information regarding Bear, or their Section 8 certificate, and so their application was never sent to TES. (T 513).

17. Meanwhile, on November 27, Cooper returned to Legal Aide, where Rorie Stolfo of IFHC gave him a brochure on Fair Housing laws. (T 72). He also contacted Legal Aide twice on December 4, meeting with Zoe Ann Olson and Rorie Stolfo in person, and again speaking with Olson by phone. (T 84, 308, 320). In spite of Cooper's stated belief that he was being excluded from Blue Meadows because of his helper dog, neither of the legal aide and housing specialists made any calls to Blue Meadows to confirm Mr. Cooper's fears that he could not live at Blue Meadows with the dog or to help him with the perceived situation. However, Ms. Olson stated at the hearing that it would have been useful for one of them to do so. (T 339-40).

18. On December 8, 1998, Cooper returned to Blue Meadows to pick up the \$200 deposit, and Cindy Skalak gave him his original money order, for which he signed the Blue Meadows copy of the receipt. (T 91, 93, 541). While there, Cooper stated to Peden that he had found another place to live. (T 515, 541). By then, the Coopers were looking for a house. (T 174-75). Finally, on December 11, 1988, three days after withdrawing his deposit for the Blue Meadows apartment, Cooper asked Dr. Friedman to write a new letter requesting a reasonable accommodation so that he could qualify for a house under Boise City Housing programs. The doctor did so and sent it to that agency. (T 98).

19. On January 19, 1999, Tracy Lewis, a disabled man who uses a wheelchair, was sent by IFHC to conduct a test at Blue Meadows. The test was designed by Rorie Stolfo, the testing coordinator for the Fair Housing Counsel. (T 398). Lewis confirmed his

instructions with Richard Mabbutt, director of the IFHC, prior to conducting the test. (T 347). The purpose of the test was to inquire about Blue Meadows policies regarding service dogs. Mr. Lewis was instructed to wait until the end of the test to raise that issue. (T 348). Lewis states in his report and testimony that he went to Blue Meadows and talked with one "Monty," asking about one- and two-bedroom units, was given an application and told about the amenities. (S 16; T 349). In his report dated January 9, 1999, he states that he "then asked about pets [and] she told me no pets allowed, including an Aide Dog." (S 16). The Blue Meadows employee on duty in the office that Saturday was Martha Rogers who was unable to identify the tester at the hearing nor recall any conversations about a helper dog. (T 568; 575-78). Ms. Rogers left Blue Meadows employment a few months prior to the hearing. (T 551).

Discussion

It is unlawful to discriminate in the rental of, or to otherwise make unavailable or deny, a dwelling to a prospective renter because of the person's handicap. 42 U.S.C. § 3604(f)(1)(A). It is also unlawful to discriminate against any person in the terms, conditions or privileges of rental of a dwelling because of the handicap of such person. 42 U.S.C. § 3604(f)(3)(B). Unlawful discrimination on the basis of handicap under these sections includes "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).

To establish a *prima facie* case in this matter, both the Secretary and the Respondent suggest in their post-hearing briefs that the elements which must be shown by the Charging Party are as follow:

- (1) The Complainant suffers from a handicap as defined in 42 U.S.C. § 3602(h);
- (2) The Respondents knew of the Complainant's handicap or should reasonably be expected to know of it;
- (3) Accommodation of the handicap may [*sic*] be necessary to afford the Complainant an equal opportunity to use and enjoy the dwelling; and
- (4) The Respondents refused to make such accommodation.

In support of this position, the Secretary cites *United States v. California Mobile Home Park Mgmt. Co.*, 107 F. 3d 1374, 1380 (9th Cir. 1997) and *HUD v. Dutra*, 2A Fair Hous. - Fair Lend. (Aspen) ¶¶ 25, 124, 26, 058 (HUDALJ 1997). The Respondents cite *Shanz v. Village Apartments*, 998 F. Supp. 784 (E.D. Mich. 1998) in support of their view that the above-listed elements are controlling.

To complete the parties' view of the controlling law in this case, it has been

established that a landlord's refusal to allow a disabled tenant to maintain an assistance animal in his apartment can constitute a violation of the reasonable accommodation requirement of 42 U.S.C. ¶ 3604(f)(3)(B). In fact, example 1 to HUD's regulation found at 24 CFR 100.204(b), which implements the applicable section of the Fair Housing Act, provides:

A blind applicant for rental housing wants [to] live in a dwelling unit with a seeing eye dog. The building has a *no pets* policy. It is a violation of ¶ 100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy [the] dwelling.

Bronk v. Ineichen, 54 F. 3d 425, 429 (7th Cir. 1995) bolsters the example in the regulations. In that case the court stated that “[b]alanced against a landlord's economic or aesthetic concerns as expressed in a no-pets policy, a deaf individual's need for the accommodation afforded by a hearing dog is, we think, *per se* reasonable within the meaning of the statute” The Court further stated that it would be susceptible to such determination as a matter of law if it were demonstrated that the hearing dog provided needed assistance. See also *Green v. Housing Authority of Clackamus County*, 994 F. Supp. 1253 (D. Or. 1998), in which it was held that a landlord was required to modify a no-pets policy to allow a hearing impaired individual to keep an assistance animal.

However, this theory of the instant case, and especially its dependence upon the above elements for making the *prima facie* case, as suggested by both sides to the litigation, puts the cart before the horse. The litigants' cited cases involved sitting tenants who requested from their landlords reasonable accommodation of their special needs. In contrast, this case involves a prospective tenant who alleges he was effectively denied initial residence by way of a landlord's refusal to allow him to keep an assistance dog in the apartment, and where this prospective tenant's position was that he would not move into the subject apartment without the dog; that is to say, Cooper was seeking a reasonable accommodation for the purpose of obtaining an apartment.

Before we can explore whether a reasonable accommodation was appropriate we must first determine whether we have a tenant, or as in this case, a qualified applicant for tenancy. To that end, the more appropriate decision to look to for guidance is *HUD v. Pheasant Ridge Associates, Ltd.*, Fair Hous. - Fair Lend. (P-H), ¶ 25, 123 (HUDALJ 05-94-0845-8 and 05-95-0155-8, Oct. 25, 1996). In this case, consolidating two complaints, it was held that the Respondents violated the Fair Housing Act by refusing to rent apartments to two mentally handicapped siblings because of their handicaps. In that decision, the elements of the *prima facie* case were held to be as follows:

- (1) the complaining party is a member of a protected class;
- (2) the complaining party applied for and was qualified to rent the subject property;
- (3) the complaining party was rejected as a tenant; and
- (4) after the rejection, the property remained available.

Id., at p. 26,043.

Applying those elements to the instant case, if the first two are met by the Charging Party, then the third element, rejection of the prospective tenant, should be explored in terms of whether a refusal to grant a reasonable accommodation in the application process constitutes a refusal to rent the apartment on the basis of handicap. At that point, an analysis based upon the elements for the *prima facie* case, and the attendant reasoning, from *California Mobile Home Park, Dutra*, and *Village Apartments* would be appropriate. See *Hughes v. Housing Management Services*, No. 99-3503, 2000 U.S. App. LEXIS 8499 (7th Cir. April 26, 2000).

The first element of the *prima facie* case is easily met and is not disputed. Both Shannon Cooper and his doctor testified to the fact that Cooper has a physical impairment which substantially limits one or more life activities, *i.e.*, he is unable to walk due to a spinal cord injury. Therefore, Shannon Cooper is a member of a protected class: people with handicaps as defined by the Act at 42 U.S.C. § 3602(h)(1) and by HUD's regulation found at 24 CFR § 100.201, which defines "major life activities" to include walking.

The second element of the *prima facie* case, that the complaining parties applied for and were qualified to rent the subject property, is not met. Before reaching any question about a reasonable accommodation, it must be clear that a complaining party is a sitting tenant or a qualified applicant. The Coopers never completed their application. As to the usual documents people need to apply for Section 8 housing, they did not submit the forms regarding their income verification, social security, and claim of no income, and they never submitted their Section 8 certificate. As to their request for a reasonable accommodation as part of their application process, they never submitted the requested updated letter from Cooper's doctor spelling out a need for a helper animal and they never submitted the other information that Peden asked of them regarding the dog. In fact, they withdrew their application by these failures combined with their retrieval of their deposit money. Without a complete application, TES was never given an opportunity to evaluate the Coopers' qualifications to rent at Blue Meadows. Thus, the Coopers were not qualified applicants.

Blue Meadows and its agents were justified in requesting more information about the dog and a more recent letter from the doctor about the need for a helper dog. In *Bronk v. Ineichen*, 54 F. 3d 425, 429 (7th Cir. 1995), the Court stated that “[b]alanced against a landlord's economic or aesthetic concerns as expressed in a no pets policy, a deaf individual's need for the accommodation afforded by a hearing dog is ... *per se* reasonable within the meaning of the statute” The court further made clear that such a request would be susceptible to such a determination as a matter of law if it were demonstrated that the hearing dog provided needed assistance. *See also Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Or. 1998), in which it was held that a landlord was required to modify its no pets policy to allow a hearing impaired person to keep an assistance animal.

Thus, under the *Bronk* case, any accommodation must be both “reasonable and necessary” under the circumstances. While the Court in *Bronk* stated that a hearing dog may be reasonable *per se* for a deaf individual if the dog provides needed assistance, the Court also stated that it is reasonable for a trier of fact to determine that a request for a reasonable accommodation is not reasonable because the dog was not properly trained or did not have the necessary skill level. Therefore even a request for a hearing dog may not be a reasonable or necessary accommodation under all the circumstances. Finally, the Court held that given the level of uncertain and conflicting evidence about the dog's training level, “it was well within the province of a rational jury to conclude that [the dog's] utility to the plaintiff was as a simple house pet and weapon against a cranky landlord, not necessarily in that order.” *Id.*

Since it is within the province of a fact finder in litigation to determine whether a request from a tenant for accommodation is reasonable or not, it follows that it must be

within the province of a landlord to make the same determination at the application stage for a prospective tenant making a similar request. Cooper's need to have a dog pull his wheel chair is not as ordinary or obvious a need as the needs of the blind or deaf for helper dogs, so Blue Meadows and its agents were justified in making requests for more information with regard to the Coopers' dog. They had a right, and a duty to their other tenants, to know more before allowing the dog to reside at Blue Meadows. Cooper never communicated such additional information to Blue Meadows. He never gave Blue Meadows any documents beyond the doctor's old letter, which simply stated what the doctor had heard from Cooper himself about the dog. He never submitted a "prescription" for the dog, or any other sort of third person's request or verification of need, nor a dog "personality" profile, nor a plan for caring for the dog including provisions for its waste needs, nor even the Request For Accommodation form that he had filled out at the Legal Aide Office. He never informed the apartment's management whether the dog barks a lot, is aggressive, or how it relates to children. It was reasonable for the apartment management to know all of this as part of the application process. But the application was never completed.

The Secretary's counsel suggests as a reason for the Coopers to not complete their application, that they reasonably concluded that Respondents would not grant their request for a reasonable accommodation and determined that it was futile to continue to seek an accommodation. *See Pinchback v. Armistead Homes*, 907 F. 2d 1447, 1451 - 52 (4th Cir. 1990), *cert. denied*, 498 U.S. 983, in which the court held that the plaintiff need not have engaged in the "futile gesture" of submitting an offer on a house after being told that no blacks were allowed. This theory is misapplied to the instant case of the Complainants' failure to complete their application, as explained below.

Not only was it reasonable for Blue Meadows to request more and current information about the dog, but Cooper had reason to know that it was reasonable for them to do so. His prior landlord had not only initially asked for information when Cooper requested that he be permitted a helper dog, but also later asked for an updated letter from the doctor. In both cases, Mr. Cooper had complied with the requests without questioning their reasonableness.

As another reason for their failure to complete their application, the Coopers stated that they were fearful that if they submitted their Section 8 certificate, they would not get it back in time, perhaps not for as long as a year, for the purpose of making another application somewhere else. It is not known where they got this strange notion. With all of Cooper's visits to Legal Aide, the IFHC, and the Idaho Housing Agency, it is not known why Cooper did not simply clarify this worry. He never asked these agencies what it would take to replace a certificate lost in an unfruitful application process. (T 219). Moreover, this unfounded fear does not explain the failures to submit other necessary parts

of the application.

Cooper described arguments between himself and Cindy Skalak in which he insisted that his dog was a helper animal and she kept repeating that the apartment did not allow pets. He claims that Skalak was rude and demeaning in manner (T 66, 68), that she yelled at him (T 73) and “cussed,” saying “damn” more than once. (T 52). The Coopers’ first contact with Respondents was a phone conversation between Shannon Cooper and Cindy Skalak. In that conversation he was told of the no pets policy, but urged to come in to apply for an apartment. Rebekah Cooper listened to Shannon Cooper’s end of that conversation and testified that Cooper got off the phone excited by the prospect of renting at Blue Meadows and did not mention such an argument. (T 200).

Cooper testified that a similar argument took place at the Blue Meadows Office on November 25th. (T 172). However, other Blue Meadows employees, including one no longer working there, recall no such incident. HUD counsel, his own attorney in this case, describes the “arguments” in considerably more mellow terms than does Mr. Cooper. Moreover, while it is reasonable to expect that Cooper would have described the arguments to Zoe Ann Olson of Legal Aide and Rorie Stalfo of IFHC, to whom he was complaining that he was being excluded from Blue Meadows, he did not. (T 308, 333). His explanation for not describing the very conversations about which he was complaining was that he didn’t want to say anything like that in front of a lady. (T 85) instead, he told Olson that he was planning on looking for a house instead of an apartment. (T 322, 327). This part of this Complainant’s case lacks credibility. It is apparent that Cooper recalls his conversations with Skalak in darker terms than was the case.

In Rebekah’s last conversation with Skalak, on December 3, 1998, she stated that they had found a home for the dog. (T 244-45). Additionally, since Shannon Cooper testified that he did not have any conversations with Cindy Skalak after December 3, 1998, the only information Skalak had from the Coopers was that they had found another place for the dog, and thus no longer needed a special accommodation. (T 247). The following day, December 4, 1998, Cooper still thought he would be allowed to move in with the dog if he pursued the issue. (T 77). He testified that he continued to believe so when he picked up the deposit on December 8th. (T 183). Thus, the Complainants’ own versions of the events, if assumed true, and discounting the many inconsistencies and contradictions that they contain, do not show that the Respondents denied Mr. Cooper his request, and certainly do not show that it would have been a futile gesture for the Coopers to complete their application.

Furthermore, Richard Mabbutt, the executive director of IFHC, views Blue Meadows as a “remarkable” apartment complex and in “distinct contrast” to other Boise apartment complexes for its accessibility and treatment of handicapped individuals. He in

fact refers handicapped people to that apartment complex in preference to any other in the Boise area. (T 380-83). This opinion of Blue Meadows's accommodation of handicap people was readily available to Cooper right where he was complaining.⁴ It follows from the evidence discussed in these last four paragraphs that there is no basis for the Secretary's claim based on the futile gesture theory.

In *Hughes, supra*, the Complaining Party claimed to be disabled, but failed to document or otherwise prove that claim. He also failed to complete his application by not providing references from previous landlords. The court held that because the Complaining Party had failed to establish a *prima facie* case of discrimination, summary judgment for the defendants had been correctly entered by the trial court.

Because the Charging and Complaining Parties in the instant case have failed to establish a *prima facie* case, this matter ought to be, and will be dismissed in the Order that follows. For that reason, it is not necessary to delve into the Charging Party's additional theories of the case or Respondent's claim that IFHC lacks standing to position itself as a Complaining Party because of the minimal role that it played in the accumulation of facts herein considered.⁵ *Hughes, supra, citing Coco v. Elmwood Care, Inc.*, 128 F. 3d 1177, 1179 (7th Cir. 1997).

Order

The Charging Party has failed to prove by a preponderance of the evidence that any of the Respondents engaged in discriminatory housing practices in violation of the Fair Housing Act. Accordingly, this matter is dismissed.

⁴ Both Skalaks testified convincingly that had Cooper provided the information about the dog and his need for the dog that they had heard in the course of the hearing, and especially from Dr. Friedman's testimony, they would have allowed Cooper to move in with the helper dog. (T 518). Both further stated that if Cooper still wanted to live at Blue Meadows, they would allow him and his family to take the next suitable and available apartment, with a helper dog, so long as he completed all of the application documents and was approved by TES. (T 592-93). One would hope, but it cannot be ordered at this time, that this statement will remain valid.

⁵ It would have been difficult in the hearing of this case to fail to notice that IFHC did nothing to confirm or allay Complainant Cooper's fear that he was being excluded from Blue Meadows or to actually help the Complaining Party resolve apparent early differences with the Respondents. It only took an active role later, when it was time to prepare for the hearing.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 CFR 104.910, and it will become final upon expiration of 30 days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

_____/s/_____
ROBERT A. ANDRETTA
Administrative Law Judge

