

LEXSEE

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

v.

AUBURN WOODS I HOMEOWNERS ASSOCIATION, A Nonprofit Mutual Corporation; and AUBURN WOODS I CONDOMINIUM DEVELOPMENT, Owner, RESPONDENT.

JAYNE P. ELEBIARI and ABDELFAH ELEBIARI, Complainants.

CASE NO. H 9900-Q-0239-00-PH; C 00-01-124; 02-11

State of California Fair
Employment and Housing Commission

2002 CAFEHC LEXIS 11

May 7, 2002, Final Decision

April 19, 2002, Proposed Decision

COMMISSIONERS: HERSCHEL ROSENTHAL, CATHERINE F. HALLINAN, JOSEPH JULIAN, ANNE RONCE

FINAL DEC BY: HERSCHEL ROSENTHAL, CATHERINE F. HALLINAN, JOSEPH JULIAN, ANNE RONCE

FINAL DECISION:

[*1]

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. Commissioner Woolverton abstained.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code sections 11523 and 12987.1, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondent, and complainants.

PROPOSED DEC BY: CAROLINE L. HUNT, HEARING OFFICER

PROPOSED DECISION:

Hearing Officer Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on August 16 and 17, and September 5 and 6, 2001, in Auburn, California. Regina Brown, Senior Staff Counsel, represented the Department of Fair Employment and Housing. Michael W. Thomas, Esq., and Jennifer M. Jacobsen, Esq., of Weintraub Genshlea Chediak Sproul, a Law Corporation, represented respondent Auburn Woods I Homeowners Association. Complainants attended several days but not all of the hearing. Respondent's representative Michael D. Hancher was present throughout the hearing.

The Commission received the [*2] transcript on September 19, 2001, and the parties timely filed their closing briefs. The Hearing Officer subsequently asked the parties for additional briefing. The parties timely submitted their

further post-hearing briefs on February 25, 2002, and the case was submitted on that date.

After consideration of the entire record, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On January 26, 2000, Jayne P. Elebiari and Abdelfatah (Ed) Elebiari (complainants) filed a written, verified complaint with the Department of Housing and Urban Development (HUD) against Auburn Woods I Homeowners' Association. This complaint was filed with the Department of Fair Employment and Housing (Department) on February 4, 2000. In their complaint, complainants alleged that Auburn Woods I Homeowners' Association failed to accommodate complainants' disabilities by denying their request to keep a companion dog.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On February 2, 2001, Dennis W. Hayashi, in his official capacity as Director of the Department, issued an [*3] accusation against Auburn Woods I Homeowners' Association, a Nonprofit Mutual Corporation, and Auburn Woods I Condominium Development, Owner. The accusation alleged that Auburn Woods I Homeowners' Association (respondent) failed to reasonably accommodate complainants' mental disabilities by denying their request to keep a companion dog. The Department alleged that respondent thereby discriminated against complainants on the basis of disability in violation of Government Code section 12955, subdivisions (a) and (c), of the Fair Employment and Housing Act (the Act or FEHA).

3. "Auburn Woods" is an 80-unit condominium development located in Auburn, California. Respondent Auburn Woods I Homeowners' Association, a California corporation, is the homeowners' association for Auburn Woods. Respondent's Bylaws and Declaration of Covenants, Conditions and Restrictions (CC&Rs), as amended, charge respondent with managing, maintaining and controlling the Auburn Woods condominium development, as well as enforcing the CC&Rs. Respondent holds annual elections for its Board of Directors. From 1993 to the date of hearing, Randall E. Bradley was President, and Michael D. Hancher was an officer of the [*4] homeowners' association--initially Secretary and later Vice President. Hancher was also a licensed real estate broker who acted as managing agent for respondent. Respondent is an "owner" within the meaning of Government Code sections 12927, subdivision (e), and 12955, subdivisions (a) and (c).

4. Complainants Jayne and Abdelfatah (Ed) Elebiari are a married couple. In June 1998, complainants bought a condominium located in Auburn Woods, at 13063 "B" Lincoln Way, Auburn, California. Complainants' condominium qualified as a "housing accommodation" within the meaning of Government Code sections 12927, subdivision (d), and 12955, subdivisions (a) and (c).

5. Complainant Ed Elebiari was involved in a serious car accident in 1992, and since that date has experienced seizures, severe headaches and depression. He understood his condition following the car accident to be "hydrocephalus--pressure on the brain," and had three brain surgeries, resulting in the surgical placement of a shunt in his head. At times, his condition has been so debilitating that he has felt "barely alive day by day." Since 1992, he has been under the care of a number of different surgeons and psychiatrists, including [*5] Joseph Schnitzler, D.O., a psychiatrist at Kaiser Permanente Hospital in Roseville, California.

6. Dr. Joseph Schnitzler obtained his medical degree in 1990 as a Doctor of Osteopathy. He completed his residency in psychiatry at the University of California, San Francisco, Fresno campus in 1994, becoming Board-certified in psychiatry in January 1999. Dr. Schnitzler treated Ed Elebiari from August 1998 until March 2000, diagnosing him as having bipolar disorder, obsessive-compulsive personality disorder, and seizure disorder. Dr. Schnitzler observed Ed Elebiari's symptoms of bipolar disorder, including mood fluctuations and episodes of depression, followed by periods of elation, which were characterized by not sleeping, impaired judgment and high risk behavior. Ed Elebiari's obsessive-compulsive personality disorder manifested in his desire that everything had to be

"just right," with cleanliness being an issue. Dr. Schnitzler considered Ed Elebiari's mental impairments to be permanent and that he was "incapable of working." Since his car accident, Ed Elebiari has been unable to maintain paid employment and receives Social Security Disability.

7. From the mid-1990's, complainant Jayne [*6] Elebiari had experienced recurrent episodes of depression, for which she began treatment in 1996. During these depression episodes, Jayne Elebiari cried uncontrollably and had sleeping problems, nightmares, and fatigue. She was restless, tried to pull off the toenail of her big toe, over ate, avoided social interactions, and did not want to pursue her normal activities. During these episodes, Jayne Elebiari had diminished concentration, low frustration tolerance, and negative thinking, including suicidal thoughts.

8. Beginning in February 1998, Jayne Elebiari was a patient of Ted Lasser, Ph.D., a Kaiser Permanente psychologist. Dr. Lasser received his undergraduate degree at University of California at Berkeley, his masters degree from California State University, Los Angeles and in 1983, and his doctorate from United States International University, San Diego. Jayne Elebiari saw Dr. Lasser for ongoing therapy and psychological counseling on an "as needed" basis for her depression. In April 1998, Ed and Jayne Elebiari twice saw Dr. Lasser together for couples' counseling on issues affecting their depression.

9. In March 1998, Jayne Elebiari became a patient of Dr. Joseph Schnitzler. [*7] Dr. Schnitzler diagnosed Jayne Elebiari as having "major depression, recurrent." He prescribed medications, including Prozac and Wellbutrin. "Major depression, recurrent" means that a patient has had major depression episodes in the past which return as recurrent episodes. "Major depression episodes" are a more serious form of depression which generally last from nine months to a year, with symptoms such as those experienced by Jayne Elebiari--not sleeping well, impaired concentration, and negative thoughts. Dr. Schnitzler considered complainant's condition "treatable" and that, "with medication she should do fairly well" and could work. Up until the summer of 2000, complainant Jayne Elebiari worked for Legal Services of Northern California, advising applicants on Social Security Disability entitlements.

10. Respondent's CC&Rs do not allow residents to keep dogs anywhere within Auburn Woods. Other animals, such as cats, rabbits, guinea pigs and birds, are permitted under the CC&Rs.

11. In April 1999, complainant Jayne Elebiari brought home a dog, a small, 11 pound female wire-haired terrier mix, which she and her husband named "Pookie." Jayne Elebiari's decision to adopt the dog was [*8] impulsive and she did not notify respondent prior to bringing the dog home. Jayne Elebiari thought that a dog would help her husband and her with their depression. Ed Elebiari quickly came to love the dog and depend on her company. n1 Before the dog's arrival, Ed Elebiari had spent his days at home alone. With the dog, Ed Elebiari was constantly occupied--the dog either sat in his lap or "forced" him outside for walks or to play chase. With the dog, Ed Elebiari tried harder to do things and to spend more time outside. He found the dog a "wonderful companion," helping alleviate his depression and sense of isolation. Both complainants "bonded" with the dog, enjoying and laughing at her antics, grooming her, and spending time together playing with her.

n1 As the parties at hearing referred to the dog by the female designation "she," this decision will do the same.

12. On June 28, 1999, Mike Hancher, managing agent for respondent, informed complainants in writing that they were not permitted to keep a dog on the premises and gave them a "Formal Warning" that they had to either permanently remove their dog or be fined "\$ 50, \$ 75 and \$ 100 respectively every three (3) days." Within [*9] a day or two of receiving Hancher's letter, complainant Ed Elebiari became ill and went to the hospital complaining of severe headaches.

13. On July 1, 1999, complying with Michael Hancher's Formal Warning letter, and because they could not afford the fines, complainants removed their dog from their home, taking it to board with friends on a property in Nevada County. This was a hard thing for complainants to do, as they had become extremely attached to the dog. Complainant

Ed Elebiari cried for the first three days. He had sleeping problems, appetite loss, increased irritability, crying bouts, and anger. He neglected activities that he had previously enjoyed, such as doing projects in the yard, gardening and pruning roses. Jayne Elebiari "shut down" emotionally. She experienced a recurrence of depression, including fatigue, tearfulness, suspiciousness, depression, anger, low self esteem and hurt feelings. Jayne Elebiari became short-tempered and irritable. She stayed in bed and ate "junk food" rather than going to work, and she and Ed either argued or ignored each other.

14. During the next three months, complainant Jayne Elebiari talked to her secretary Janette Himmel about how [*10] sad she was at having to get rid of the dog. Himmel observed that in this period both Jayne and Ed Elebiari appeared sad and depressed.

15. Over the next several months, complainants often visited the dog at their friend's property, taking her treats and spending the mornings playing with her. After speaking with advocates at Placer Independent Resource Center, as well as co-workers, Jayne Elebiari decided to seek "accommodation" from respondent by asking to keep the dog at the condominium. In early September 1999, Jayne Elebiari telephoned Mike Hancher. She told Hancher that Ed Elebiari had a history of seizures, and that she sought permission to keep the dog. Hancher told complainant to obtain medical verification to support her request to keep the dog.

16. Jayne Elebiari had an appointment with Dr. Joseph Schnitzler on September 22, 1999, and he agreed to write a note to support her accommodation request. Dr. Schnitzler believed that it was beneficial for complainants to have a dog as a "companion animal." He believed that after complainants obtained the dog their moods improved, they seemed happier, were generally doing better emotionally, and Ed Elebiari in particular seemed "more [*11] social."

17. On September 23, 1999, Dr. Schnitzler wrote a "To whom it may concern" letter, stating:

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

18. On September 24, 1999, complainants forwarded Dr. Joseph Schnitzler's letter to Mike Hancher, together with a letter from Jayne Elebiari in which she requested a "reasonable accommodation to my impairment by waiving the prohibition against dogs." Jayne Elebiari wrote, in pertinent part:

My reasons for the request are: I am a disabled person who works outside the home who needs the companionship of a dog to alleviate some of the adverse affects [sic] of my disability both at home and on the job.

19. In her letter of September 24, 1999, Jayne Elebiari stated that she would "immediately dispose of all solid waste products produced by the dog, keep all barking to an absolute minimum at all times; and, the dog will wear a lead at all times if she's within the common condo areas."

20. On September 27, 1999, Mike [*12] Hancher left a message on complainants' answering machine stating that he had just received complainant's letter, then laughed. Hancher said he would forward Dr. Joseph Schnitzler's letter to respondent's attorney, then stated, "This letter is not gonna be substantial enough, I can tell you that right now" and "we'll have to go to court...and the doctor will have to testify."

21. In September 1999, respondent asked Beth Grimm, Esq., to advise respondent on the Elebiaris' claim for reasonable accommodation. Grimm had represented respondent as its attorney for many years, and had drafted the CC&Rs and Bylaws.

22. During 1999 and through the date of hearing, Michael Fletcher was Services Coordinator for Placer Independent Resource Services, an advocacy group assisting persons with disabilities. Fletcher knew complainant Jayne

Elebiari through her work at Legal Services of Northern California. Jayne Elebiari regularly attended monthly meetings at Placer Independent Resource Services, meeting with the resource workers on social services issues. Complainants' efforts to be allowed to keep the dog as a reasonable accommodation came up at several of these meetings. Jayne Elebiari asked Fletcher [*13] to write a letter on her behalf to support her request for reasonable accommodation. Fletcher wrote the letter to respondent on September 29, 1999, stating that both complainants Jayne and Ed Elebiari sought a waiver of respondent's "no dogs" policy as an accommodation of their disabilities. Fletcher stated in his letter:

Both Mr. and Mrs. Elebiari's health and well-being have been adversely affected by the association's refusal to allow them to keep their 11 lb. canine companion because they have a strong emotional bond with their canine companion causing them severe psychological harm and the small dog's presence in their home provides significant therapeutic benefits in terms of anxiety, stress, and pain relief, and decreases the need for medication.

23. On September 30, 1999, respondent notified complainants in writing that Grimm was now reviewing their request for reasonable accommodation, and that pending her advice, respondent's "position remains the same"--i.e., that the dog was not allowed on the premises.

24. On October 12, 1999, letters from Beth Grimm and Dr. Schnitzler apparently crossed in the mail. On that date, Grimm wrote to Dr. Schnitzler, asking him to answer [*14] the following questions:

1. Is there any reason to believe that a cat would not make just as good a companion animal as the dog you reference in your letter?
2. Could you please identify the condition of "handicap" which falls within the definition of 42 U.S.C. Section 3604(c)?
3. Your letter is vague and does not establish the "causal" relationship between getting the dog and the improvement in Mrs. Elebiari's condition. Are you prescribing the dog as being necessary or therapeutic or stating that obtaining the dog is the basis for the improved mental state?

25. On the same day, October 12, 1999, Dr. Schnitzler wrote a "To whom it may concern" note on Kaiser Permanente letterhead, stating:

Abdelfatah Elebiari has been permanently disabled since 1992. He has been receiving psychiatric care since August of 1998. His emotional well-being improved substantially with the purchase of a companion dog. I recommend that Mr. Elebiari be allowed to keep his companion dog.

26. Respondent received Dr. Schnitzler's note on or about October 13, 1999. On or about that date, Dr. Schnitzler received Grimm's letter; however, he did not have any idea [*15] how to respond, nor what was expected of him, and he did not reply to the letter. Grimm did not contact or again write to Dr. Schnitzler about either Jayne or Ed Elebiari, even after receiving the October 12 note describing Ed Elebiari as "permanently disabled" and the doctor's renewed recommendation that the Elebiaris be allowed to keep their dog.

27. On October 13, 1999, Beth Grimm wrote to Michael Fletcher, the Placer Independent Resource Services advocate, stating that while respondent was "still investigating" the request, she did not think that Jayne Elebiari had "established a prima facie case of need for the pet, such as would satisfy 42 U.S.C. Section 3604, nor has she demonstrated that the dog was specifically prescribed as therapeutic in regard to her condition."

28. Complainant Jayne Elebiari had hoped that Dr. Schnitzler's two letters, together with that of Michael Fletcher on behalf of the Elebiaris, would be sufficient to persuade respondent to grant the request for reasonable accommodation. Jayne Elebiari was distressed, anxious and depressed that respondent continued to deny their request. She missed having the dog in her home and [*16] worried about her husband. Recognizing that respondent had placed the matter in the hands of their attorney, complainants in turn sought legal assistance from S.L. Roullier, an attorney

working with Legal Aid.

29. On complainants' behalf, S. L. Roullier, Esq., wrote to Beth Grimm on October 14, 1999, giving further specific information on Ed Elebiari's mental and physical impairments--describing these impairments as "hydrocephalus, manic depression, seizure disorder," as well as Jayne's "clinical depression." Roullier described the "therapeutic value" of complainants' dog in "alleviating [their] severe medical handicaps." Roullier also asked for permission to address the Board directly to "plead [complainants'] case."

30. On November 11, 1999, Beth Grimm responded to S.L. Roullier's letter, stating in pertinent part, that "the Association stands by its original decision, which is to deny the request ... I believe that the Association's decision is reasonable. The Association will be entitled to initiate disciplinary action if necessary to prohibit the keeping of dogs."

31. On December 1, 1999, respondent held its annual Board meeting. Jayne Elebiari addressed the meeting on the subject [*17] of her and her husband's request for reasonable accommodation. She told the Board that she had relapses of clinical depression and that her husband was disabled and did not work. She said that under the "Fair Housing Act" persons with disabilities were permitted to have animals. Jayne Elebiari also stated that she was allergic to cats, that she "fell in love" with the dog, and that it helped her depression. After complainant completed her statement, Mike Hancher stated that the Board had not changed its original position on complainants' accommodation request.

32. Complainants were despondent after the Board meeting of December 1, 1999. They felt that their attempts for reasonable accommodation had been fruitless; they were frustrated, and felt they had no more recourse in dealing with respondent directly. Jayne Elebiari was so upset that she could not stay at work on the day after the Board meeting. On December 2, 1999, S.L. Roullier wrote to Beth Grimm, expressing his concern at the "continuing delays [which are] seriously undermining the health of the Elebiaris," again asking respondent to let him personally address the Board, and advising respondent that the Elebiaris were ready [*18] to sell their condominium as a "last resort." After the December Board meeting, complainants decided that it was impossible for them to continue living at Auburn Woods without the requested accommodation, and that respondent was not going to change its mind.

33. Beth Grimm responded to S.L. Roullier's letter on January 12, 2000, stating that she saw no point in further appeals on complainants' behalf, and that "all the necessary information seems to be in, and the Board has made what I believe is a reasonable decision," that is, to deny the request for reasonable accommodation. Grimm further wrote that if complainants wanted to challenge that determination by having Roullier make a presentation, they would be obligated to pay for Grimm's travel time--"4 hrs. @ \$ 92.50 per hour." Finally, Grimm stated that she and the Board were willing to review "anything *new* you may wish to add." (Emphasis in original.) On receipt of this letter, feeling that further efforts to persuade respondent were futile, Roullier and the Elebiaris agreed that he withdraw from representing them. In approximately January 2000, complainants put their condominium on the market for sale. Complainants decided [*19] to sell their condominium because they felt they could not continue living there without their dog, and respondent had denied their accommodation request.

34. Beth Grimm wrote again to S.L. Roullier on January 26, 2000, acknowledging his withdrawal from the matter and stating that she in the future would communicate directly with the Elebiaris. The record did not establish any letters from Grimm direct to complainants. Grimm also stated in her letter:

The Association does have reasonable accommodation for people who want companion pets, and the pets include cats, rabbits, hamsters, guinea pigs, bird [sic], etc. Ms. Elebiari could have a pet, but the fact that she prefers a dog is what is keeping her from having a companion pet accommodation.

35. On January 22, 2000, complainants signed their HUD complaint, and once filed with the Department on February 4, 2000, the case was assigned to consultant Charles Ahkidenor. Ahkidenor did not complete the investigation of the case, having left the Department in approximately June 2000. During the course of his investigation, Ahkidenor made contact with complainants' treating doctors, Drs. Schnitzler and Lasser.

36. Ted Lasser, Ph.D., [*20] Jayne Elebiari's psychologist, supported complainants' efforts to keep their dog as a reasonable accommodation. In her visits to Dr. Lasser in March and May 2000, Jayne Elebiari told the psychologist that she was upset at having had to get rid of her dog. In Dr. Lasser's opinion, complainants' dog helped "contain" Jayne Elebiari's depression. According to Dr. Lasser, pets can help to elevate mood. In Dr. Lasser's opinion, having the dog helped improve the Elebiaris' "depressive impairments" and they should be permitted to keep the dog as an accommodation.

37. On May 10, 2000, Dr. Lasser wrote a note on Kaiser Permanente letterhead confirming his opinion that complainants, "both impaired by depression, need to be able to have their dog, which they are quite attached to, to improve their depressive impairments." In late May 2000, after respondent's attorney Beth Grimm received a copy of Dr. Lasser's note, she spoke to him about the Elebiaris and their request for accommodation.

38. On May 18, 2000, the Department issued a 100-day letter, advising complainants and respondent that, pursuant to Government Code section 12981, subdivision (a), the Department's completion of the investigation [*21] and issuance of an accusation within 100 days from the filing of the complaint was "impractical" because the Department needed to investigate further, analyze the issues and "make additional efforts to conciliate (settle) the complaint."

39. In June 2000, as a result of the information from Dr. Ted Lasser, respondent decided to offer complainants an accommodation permitting them to keep their dog, under certain conditions. Respondent's written offer addressed to the Department dated June 26, 2000, was not communicated to complainants. The precise terms of respondent's offer and any attached conditions was not disclosed at hearing.

40. As a result of respondent's refusing to grant complainants the requested accommodation from September 1999 to June 2000, Jayne Elebiari experienced depression, fatigue, anger and lack of self esteem. She worried about her husband. She observed Ed's continuing tearfulness, sleep problems and loss of appetite as a result of missing their dog and being denied the requested accommodation.

41. On July 5, 2000, complainants sold their condominium for \$ 85,000, and moved to Oklahoma, incurring about \$ 2,000 in moving expenses. Jayne Elebiari took a job in Oklahoma, [*22] earning \$ 10,000 less than her former annual salary. At some point, Ed Elebiari returned to California to retrieve his truck, paying approximately \$ 320 for the one-way airfare. Complainants spent \$ 498 in airfares and transportation costs to attend the hearing.

42. On February 9, 2001, the Department notified complainants and respondent that, pursuant to Government Code section 12981, subdivision (c), the Department was unable to make a final administrative disposition of the complaint within one year.

DETERMINATION OF ISSUES

Liability

The Department asserts that respondent discriminated against complainants on the basis of their disabilities in violation of Government Code section 12955, subdivisions (a), (c) and (d), by failing to provide reasonable accommodation to permit complainants to keep their dog as a companion animal.

A. Disability Discrimination Under Government Code Section 12955, subdivision (a)

The Act prohibits an "owner" of any housing accommodation from discriminating against any person because of the person's disability. (Gov. Code § 12955, subd. (a).) Under the housing provisions of the Act, "discrimination" includes "refusal to make reasonable accommodations [*23] in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." (Gov. Code § 12927, subd. (c)(1).)

1. Respondent as Owner

The Department alleges that respondent is an "owner" within the meaning of the Act. n2 Government Code section 12927, subdivision (e), broadly defines "owner" to include lessee, assignee, managing agent, and any person having "any legal or equitable right of ownership or possession." Respondent is charged with management, maintenance and control of Auburn Woods. Respondent enforces the CC&Rs and exercises its power to regulate use of the common areas. Thus respondent has managerial authority over the condominium owners and residents of Auburn Woods and is therefore an "owner" within the meaning of the Act. (Gov. Code § 12927, subd. (e).)

n2 The Department's accusation also refers in the caption to "Auburn Woods I Condominium Development" but at hearing, the Department did not offer any evidence or theory concerning that entity. Respondent is properly named "Auburn Woods I Homeowners Association" and is a corporation organized pursuant to California's non-profit mutual benefit corporation laws.

[*24]

2. Failure to Reasonably Accommodate

To establish a violation for failure to make reasonable accommodation under Government Code section 12955, subdivision (a), the Department must establish that complainants or either of them had a disability under the Act; that respondent was aware or should have been aware of the disability; that reasonable accommodation may have been necessary to afford complainants equal opportunity to use and enjoy their dwelling; and that respondent refused to make reasonable accommodation. (Gov. Code §§ 12927, subd. (c)(1), and 12955, subd. (a).)

a. Whether Complainants Are Persons with Mental Disabilities

At the time of the acts alleged in the Department's accusation, Government Code section 12955.3, subdivision (a), provided that for the purposes of the housing provisions of the Act:

"Disability" includes, but is not limited to, the following: (a) A physical or mental impairment that substantially limits one or more of a person's major life activities. n3

n3 Effective January 1, 2001, the definition of "disability" in housing cases was amended and now "includes, but is not be limited to, any physical or mental disability as defined in Government Code section 12926." (Gov. Code § 12955.3, amended by Stats. 2000, c. 1049 [A.B. 2222].)

[*25]

Complainant Ed Elebiari's bipolar disorder, obsessive-compulsive personality disorder, seizure disorder and attendant depression are mental impairments that profoundly affect complainant's ability to take care of himself, both during his episodes of depression, when he feels isolated and "barely alive," and during his periods of elation, characterized by lack of sleep, impaired judgment, and high risk behavior. Thus, Ed Elebiari's mental condition substantially limited the major life activities of sleeping, thinking, and interacting socially with other human beings, and therefore he is a person with a mental disability under the Act.

The Department also asserts that complainant Jayne Elebiari's recurrent major depression constitutes a disability within the meaning of the Act. Respondent disagrees, relying on Dr. Schnitzler's testimony that he did not describe Jayne Elebiari as "disabled" in his note of September 22, 1999. The doctor's use and understanding of the legal term "disabled," however, is not dispositive of the legal issue of whether Jayne Elebiari is disabled within the meaning of the Act. Whether a condition or impairment qualifies as a disability under the Act is an issue [*26] of fact and law to be determined by the hearing officer. (See *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-84.)

The Department presented credible evidence of the significant debilitating effects of the recurring episodes of major depression on Jayne Elebiari--in particular, their impact on her ability to sleep, to focus her thoughts, and to interact socially. During these episodes of major depression, she lost her will to go about her daily activities, could not sleep, pulled at her toenail, had impaired concentration and negative, including suicidal, thoughts. These depressive symptoms substantially limited Jayne Elebiari in her major life activities of sleeping, concentrating and interacting socially during the depressive episodes and thus, she is a person with a mental disability within the meaning of the Act.
n4

n4 Government Code section 12955.6 provides that the Act may not be construed to afford less protection than the FHAA. Federal fair housing law provides a floor, but not a ceiling, for the Act's housing discrimination provisions. (*Dept. Fair Empl. & Hous v. River Meadow Trailer Park* (1998) No. 98-15, FEHC Precedential Decs. 1998-1999, CEB 3, p. 20.) Federal cases construing the ADA and FHAA are thus relevant to an analysis of complainants' rights under the Act. Depression has been held to constitute a mental impairment under the Americans with Disabilities Act (ADA), as well as the Fair Housing Amendments Act, 42 U.S.C. § 3601, et seq. (1988) (FHAA). (See *Krocka v. City of Chicago* (7th Cir. 2000) 203 F.3d 507, 512; *Criado v. IBM Corp.* (1st Cir. 1998) 145 F.3d 437, 442; *Holihan v. Lucky Stores, Inc.* (9th Cir. 1996) 87 F.3d 362, 365; *Doe v. Region 13 Mental Health-Mental Retardation Comm.* (5th Cir. 1983) 704 F.2d 1402, 1408; *HUD v. Riverbay Corporation* (HUDALJ 1994) 2 Fair Housing-Fair Lending (P-H) P25,080, at p. 25,740.)

[*27]

b. Notice to Respondent of Complainants' Disabilities

Respondent asserts that the information it received directly from and on behalf of complainants was not sufficient to give respondent "any reason to believe that the Elebiari's [sic] suffered from any qualifying impairment." Respondent's position is contrary to the evidence. By mid-October 1999, respondent had received Dr. Schnitzler's two notes seeking reasonable accommodation for complainants--the first relating to Jayne Elebiari's "psychiatric care," the second to Ed Elebiari's "permanent disability"--and had also received letters from Jayne Elebiari, Michael Fletcher and S.L. Roullier, the last giving further details of complainants' mental impairments ("clinical depression," "manic depression," "seizure disorder") accompanying the request for accommodation. This information was sufficient to place respondent on notice that complainants were persons with mental disabilities and trigger respondent's obligation to explore reasonable accommodation for complainants. (See *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376 [employer's duty once informed of employee's need for accommodation]; [*28] *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950 [notice of disability triggers employer's burden to take "positive steps" to accommodate individual's limitations].)

Respondent argues that complainants were under a duty to provide further medical documentation in support of their accommodation request. n5 It is not disputed that respondent may have been entitled to further factual information, including medical documentation, supporting complainants' request for accommodation, if respondent had requested this information. However, the evidence established that respondent did not ask complainants for any further substantiating documents. n6

n5 Mike Hancher testified that he considered complainants' requests for accommodation and their doctors' supporting notes to be insufficient because they did not include the key words he was looking for: "the impairment substantially limits their life activities." However, it is not necessary for "magic words" to be spoken to trigger respondent's obligation to explore reasonable accommodation. (See *Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at p. 954; *HUD v. Jankowski Lee & Associates, et al.* (HUDALJ 1995) 2 Fair Housing-Fair Lending (P-H) P25,109; both citing *Schmidt v. Safeway, Inc.* (D. Ore. 1994) 864 F.Supp. 991.)

[*29]

n6 While Beth Grimm testified that she was "waiting" for further medical documents, she acknowledged that this was not reflected in her numerous letters concerning complainants' request for accommodation. It is not credible that an attorney of Grimm's experience and expertise would neglect to memorialize a request for further medical documents in writing. In fact, Grimm testified that she wanted to "establish a record" for respondent of what she thought was "necessary," underscoring the importance of putting such a request, if made, in writing. Complainants and their attorney were willing to supply further documents, but simply did not know what respondent wanted. It is not reasonable to expect an individual seeking reasonable accommodation to have to speculate about what further information a respondent may be seeking.

c. Companion Animal as an Accommodation

Allowing a person with a disability to have a companion animal in a housing environment where no pets or no dogs are permitted can constitute a form of reasonable accommodation. (See *HUD v. Riverbay Corporation*, *supra*, 2 Fair Housing-Fair Lending at p. 25,740; *HUD v. Dutra*, 2 Fair Housing-Fair Lending (P-H) P25,124, [*30] at p. 26,059; *Janush v. Charities Housing Development Corp.* (N.D.Cal. 2000) 169 F.Supp.2d 1133, 1136.) A companion animal is one which provides a therapeutic benefit to a person with a disability. (See *Nahrstedt v. Lakeside Village Condominium Association* (1994) 8 Cal.4th 361, 393 (disn. opn. of Arabian, J.). n7

n7 See also *In re Kenna* (2001) 557 S.E.2d 787, fn. 15, in which the Virginia court noted, "some chronic and severe psychoses, such as schizophrenia, can substantially restrict a person's ability to form and sustain human relationships of friendship, companionship, and affection. Research has shown that a companion pet can in some cases materially improve the quality of life of such persons. See Fuller Torrey, M.D., *Surviving Schizophrenia*, Harper Collins 1983, 3d ed. pp. 235-237."

For the Department to establish that the requested accommodation is "necessary" requires "at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." (*Bronk v. Ineichen* (7th Cir. 1995) 54 F.3d 425, 429.) [*31] The Department met that burden here. Complainants credibly testified to the profound and positive emotional impact of having their dog in their lives. Drs. Schnitzler and Lasser both supported complainants' need to keep their dog. Complainants were happier and more social after they got their dog. By contrast, after being compelled to get rid of their dog in the face of the fines that respondent had threatened, complainants were withdrawn, depressed, hurt and angry. Complainants testified how important having the dog was to them, and that they could not afford to pay the fines respondent demanded if they kept the dog. After the Board meeting in December 1999, complainants were so frustrated and hopeless at being denied accommodation, that they notified respondent that they intended to sell their condominium and move away, unless accommodation were granted. Complainants credibly testified that they decided to put their home on the market and move away from Auburn Woods because respondent denied their accommodation request.

Thus, the Department established that accommodation to allow complainants' dog was sufficiently "necessary" within the meaning of Government Code section 12927 for [*32] complainants' equal enjoyment and use of their condominium.

d. Reasonableness of Requested Accommodation

Whether a particular accommodation is reasonable under the circumstances is a "fact-intensive, case specific determination. (*U.S. v. California Mobile Home Park Management Co.* (9th Cir.1997) 107 F.3d 1374, 1380.) "The requirement of reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person, cost (to the defendant) and benefit (to the plaintiff) merit consideration as well." (*Bronk v. Ineichen*, *supra*, 54 F.3d at p. 429, citing *U. S. v. Village of Palatine*, (7th Cir. 1994) 37 F.3d 1230, 1234, "determining whether a requested accommodation is reasonable requires, among other things, balancing the needs of the

parties involved.")

It is not unreasonable for respondent, as a condition of granting an accommodation of a companion dog, to impose certain conditions, such as requiring complainants to minimize the sound of barking, use a leash when walking the dog, etc. Here, complainants specifically undertook to abide by such conditions [*33] as part of their request for accommodation. Complainant Jayne Elebiari voluntarily undertook to clean up after the dog, keep her on a leash and control the dog's barking "at all times."

Respondent's Board president, Randall Bradley, testified that he was concerned that if complainants were granted accommodation to keep their dog, a "precedent" would be set, leading to the potential of the "other 79 homeowners" claiming they "were disabled and needed their dogs." Bradley testified that this would lead to an economic impact of increased maintenance and management fees, and a deteriorating environment. However, these concerns were speculative, and not supported by evidence. Moreover, the law requires that respondent consider each request on an individual basis. (See *Janush v. Charities Housing Development Corp*, *supra*, 169 F.Supp.2d at p. 1137.) n8

n8 Beth Grimm asserted, in her January 26, 2000, letter to complainants' attorney S.L. Roullier, that "Ms. Elebiari could have a pet, but the fact that she prefers a dog is what is keeping her from having a companion pet accommodation." Grimm's letter implies that complainants' request was neither reasonable nor necessary because respondent's CC&Rs permit complainants to have other enumerated animals, such as a cat, rabbit, guinea pig or bird. While respondent is not required to grant the specific accommodation sought by complainants, it must establish that an offered alternative accommodation is effective. (See *Hansen v. Lucky Stores* (1999) 74 Cal.App.4th 215, 228.) Here, complainants had developed a significant emotional attachment to their dog, as testified to by complainants and their doctors. Moreover, complainant testified that she informed respondent at the December 2000 Board meeting that she was allergic to cats. Respondent offered no evidence to establish that an alternative "permitted" animal would have been "effective" as a companion to militate against complainants' disabilities.

[*34]

Respondent did not argue or establish that undue hardship would result from permitting complainants to keep their dog. Complainants' request for accommodation, given complainants' undertakings to minimize any disruption a dog might otherwise cause, was reasonable under the circumstances.

Therefore, complainants' mental disabilities as established by the medical testimony, their doctors' support of the accommodation request, and complainants' own credible and compelling testimony, establish that permitting complainants to keep their dog in their home constituted a reasonable accommodation of their disabilities.

e. Nine Month Delay in Grant of Accommodation

The Department established that respondent, from complainants' initial request for accommodation in September 1999, until late June 2000, repeatedly denied the requested accommodation. For a period of nine months, respondent did not comply with its obligations under the Act to take positive steps to accommodate complainants' disabilities. This decision finds that respondent did not investigate the underlying facts of complainants' request for accommodation in good faith. Respondent's efforts, in sum, comprised of repeated denials [*35] and justifications for their continuing denials of the requested accommodation, in violation of Government Code section 12955, subdivision (a).

f. Respondent's Offer of June 26, 2000

Respondent argues that its offer dated June 26, 2000, to allow complainants to keep their dog on certain conditions was a timely offer of reasonable accommodation, fully discharging respondent's obligations under the Act. However, the offer was not timely. Over nine months elapsed since complainants' original request to let them keep their dog; and over five months had elapsed since respondent's attorney asserted that she had completed her investigation and that "all

facts are in." Respondent had been on notice since December 1999 that complainants would sell their home if not granted accommodation. That respondent ultimately reversed their longstanding refusal to grant complainants accommodation does not vitiate respondent's responsibilities under the Act.

Respondent argues that its June 2000 offer constituted a "conciliation" within the meaning of Government Code section 12981, and that complainants "inexplicably rejected the offer." Respondent argues that as a result of respondent's "conciliation," [*36] the Department lacked statutory authority to file the accusation in this case. This argument is without merit. Government Code section 12981 authorizes the Department to issue an accusation where there has been a "failure to eliminate" a violation of sections 12955, et seq. or "in advance thereof if circumstances warrant." By its nature, a conciliation contemplates a mutual agreement, settlement and resolution between the parties. None occurred here, and thus no conciliation was reached to prevent the Department from filing the accusation and prosecuting this case.

The Department argues that all matters relating to the conciliation of this case are subject to the protections of Government Code section 12984, were thereby privileged and should not have been considered at hearing. However, the Department failed to establish its compliance with Government Code section 12985 (requiring the Department to notify respondent when a contact is for the purpose of conciliation) and therefore, the privilege of 12984 did not attach. Thus, testimony regarding the process and timing of respondent's offer, but not its substance, is admissible to establish that an offer was made. (*Dept. Fair Empl. [*37] & Hous. v. Jevremov.* (1997) No. 97-02, FEHC Precedential Decs., 1996-1997, CEB 1, p. 10), see *Kelly v. Dept. of Hous. & Urban Development* (1993) 3 F.3d 951, 956-957.)

Respondent next argues that the Department "dropped the ball" by not relaying respondent's offer to complainants. The Department offered no evidence of the handling of the case following consultant Ahkidenor's departure, but it was evident that complainants did not receive respondent's offer. Respondent is correct in its position that if complainants had learned of respondent's offer in late June 2000, complainants could have reversed their decision to sell their condominium. However, complainants do not claim that they incurred damages from the sale of their condominium.

Respondent also argues that the Department should have concluded its investigation within 100 days of the filing of the complaint in this case and that final disposition was mandated within one year, unless "impracticable." (Gov. Code § 12981, subs. (a) and (c).) The Department established that it noticed the parties of the impracticability of concluding the investigation and adjudication of this case within these deadlines. [*38] (Gov. Code § 12981, subs. (a) and (c); Cal. Code Regs., tit. 2, 7429, subd. (f)(8).) Moreover, respondent did not establish any prejudice resulting from the continuing investigation. To the contrary, the nine month delay before respondent offered complainants any accommodation (which respondent now offers as a defense) underscores the validity of the Department's determination of impracticability of concluding the investigation earlier.

Based on the foregoing, the Department established that respondent violated Government Code section 12955, subdivision (a), by denying complainants reasonable accommodation.

B. Civil Code section 54.1

Civil Code section 54.1 provides persons with disabilities a right of equal access to public conveyances, public accommodations and housing accommodations. Civil Code section 54.1 was originally enacted in 1969 to give protection to persons with disabilities who use guide (then referred to as "seeing eye") dogs. The Legislature added "signal dogs" for deaf or hearing impaired persons in 1979, and "service dogs" in 1980. "Service dog" is defined under Civil Code section 54.1, subdivision (6)(C)(iii): "As used in this subdivision, "service dog" means [*39] any dog individually trained to the requirements of the individual with a disability, including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items."

Civil Code section 54.1, subdivision (b)(5), provides that:

Except as provided in paragraph (6), nothing in this part shall require a person renting, leasing, or providing for compensation real property, if that person refuses to accept tenants who have dogs, to accept as a tenant an individual with a disability who has a dog. n9

n9 The parties were asked to submit supplemental briefing on the issue of the relationship of the FEHA and Civil Code section 54.1, subdivision (b)(5).

The Department does not allege that complainants' dog was a trained service dog within the meaning of Civil Code section 54.1. Rather, the Department asserts that complainants' dog was a "companion animal," a permissible accommodation under the FEHA, Government Code sections 12927 and 12955, and analogous federal law. (See 42 U.S.C. § 3601 et seq.) The Department argues that, to the extent that it conflicts with FEHA, Civil Code section 54.1, subdivision (b)(5), [*40] a prior enacted statute, must be found invalid. n10 (Gov. Code § 12956.5.)

n10 The Department also argues that respondent is not covered under section 54.1, subdivision (b)(5), as it does not rent or lease real property. Respondent counters that it provides "real property to its members in the form of common areas and structures from the dry wall out and receives compensation therefore" and is thus subject to subdivision (b)(5). For the purposes of this analysis, it is assumed *arguendo* that the subsection is applicable to respondent, although it is noted that complainants are not "tenants."

Respondent argues that if Civil Code section 54.1 and Government Code section 12955 cannot be harmonized, the "more specific" Civil Code section 54.1 controls over the "more general" Government Code section 12955. This principle, however, is properly applied only when the statutes can not be reconciled. (*Garcia v. McCutcheon* (1997) 16 Cal.4th 469, 478.) "If we can reasonably harmonize 'two statutes dealing with the same subject,' then we must give 'concurrent effect' to both, 'even though one is specific and the other general.' [Citations.]" *Ibid*.

Under the [*41] well-established rules of statutory construction, the first step is to ascertain the intent of the legislature from the statutory language context. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.) "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose, i.e., the object to be achieved and the evil to be prevented by the legislation. (See *Kizer v. Hanna* (1989) 48 Cal. 3d 1, 8 (If a statute's language is clear, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.))." (*Harris v. Capital Growth Investors XIV, supra*, 52 Cal.3d at p.1159.)

The plain language of Civil Code section 54.1, subdivision (b)(5), limits the exception's application by the words "nothing in this part." "This part" is the Disabled Persons Act, part 2.5 of the Civil Code, section 54, et seq. Thus, by giving effect to the specific statutory limiting language of subdivision (b)(5), it can be seen that Civil Code section 54.1 does not conflict with [*42] FEHA, which provides independent and broader protections, including reasonable accommodation, for persons with disabilities. Moreover, the Legislature expressly preserves and protects the "greater rights and remedies" afforded by the FEHA over other more limiting statutes. (Gov. Code § 12956.5.) n11

n11 The Legislature recently provided new protections for condominium residents with pets. Effective January 1, 2001, Civil Code section 1360.5 provides, in pertinent part:

(a) No governing documents shall prohibit the owner of a separate interest within a common interest development from keeping at least one pet within the common interest development, subject to reasonable rules and regulations of the association. This section may not be construed to affect any other rights provided by law to an owner of a separate interest to keep a pet within the development.

(b) For purposes of this section, "pet" means any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the association and the homeowner.

Therefore, Civil Code section 54.1, subdivision (b)(5), does not preclude a finding that complainants were entitled to their [*43] companion dog as a reasonable accommodation of their disabilities under Government Code sections 12927 and 12955.

C. Government Code Section 12955, subdivision (c)

The Department also asserts in its accusation that respondent violated Government Code section 12955, subdivision (c), which makes it unlawful for any person to make a statement of "preference, limitation, or discrimination," based on a protected class "with respect to the sale or rental of a housing accommodation." The Department did not establish that respondent made any allegedly discriminatory statement other than to deny complainants' request for reasonable accommodation. The Department did not establish that this denial related to the sale or rental of complainants' condominium. Thus, the Department has not established that respondent violated Government Code section 12955, subdivision (c).

D. Government Code section 12955, subdivision (d)

The Department asserts for the first time in its Post-hearing Brief that respondent is also liable for a violation of Government Code section 12955, subdivision (d), which makes it unlawful for any person subject to the provisions of Civil Code section 51 to discriminate [*44] against a person on a protected basis.

The Department did not plead a violation of section 12955, subdivision (d), in its accusation, but seeks by a footnote in its Post-hearing Brief, to amend the accusation "according to proof." Yet, the Department did not provide respondent any notice of a need to defend against this theory of liability. Further, the Department did not present any showing in support of the amendment. (See Cal. Code Regs., tit. 2, § 7409, subd. (b).) Thus, the Hearing Officer denies the Department's amendment and does not reach the issue of whether respondent violated Government Code section 12955, subdivision (d).

Remedy

The Department in its accusation seeks recovery of complainants' out of pocket expenses, compensatory damages for emotional distress for each complainant and the imposition of a civil penalty. In addition, the Department asks for affirmative relief in the form of training and the development and dissemination of a fair housing policy.

A. Out of Pocket Expenses

The Department seeks recovery of complainants' moving expenses to Oklahoma, Jayne Elebiari's reduction in salary at her new job, complainants' claimed costs of boarding their [*45] dog, one-way airfare of \$ 327 for Ed Elebiari to fly to California to retrieve his truck, and complainants' costs incurred in attending the hearing in the amount of \$ 498.50.

The Department did not establish that complainants could not have found comparable housing and employment in California. Thus, neither the costs of the move to Oklahoma nor the differential between complainant Jayne Elebiari's former and current income is awarded. The costs of boarding the dog described by complainant Jayne Elebiari as veterinarian fees, medications and pet food would have been incurred had the dog remained in their home, and are thus not awarded. Any claimed increase in costs for the dog was not established with sufficient certainty to warrant an award. The cost of Ed Elebiari's one-way airfare was also not sufficiently developed to award these damages. Complainants are, however, entitled to reimbursement of their transportation and travel costs reasonably necessary to

the conduct of this litigation, in the amount of \$ 498.50.

B. Compensatory Damages for Emotional Distress

The Department requests that the Commission order respondent to pay actual damages to compensate complainants for the [*46] emotional distress they suffered as a result of respondent's discrimination by failing to provide reasonable accommodation.

Respondent asserts that complainants are not entitled to any award for compensatory damages for emotional distress for two reasons. First, respondent argues that the Commission lacks authority to make such awards in housing cases, citing *Konig v. Fair Employment & Housing Com.* (2000) 79 Cal.App.4th 10, review granted June 28, 2000, (No. S087843). Government Code section 12987, subdivision (a)(4), authorizes the Commission to award actual damages to a complainant. This authority is currently under review by the California Supreme Court. Pending the court's determination, the California Constitution requires that the Commission enforce the provisions of the Act. (Cal. Const., art. 3, § 3.5; *Dept. Fair Empl. & Hous. v. River Meadow Trailer Park*, *supra*, 1998-1999, CEB 3, pp. 31-32.)

Second, respondent asserts that complainants should not recover damages for emotional distress because "a reasonably normally constituted person" would not have experienced emotional distress as a result of being denied accommodation and not being permitted [*47] to keep his or her dog. This ignores the very nature of complainants' disabilities and need for accommodation.

However, in this case, the majority of the emotional distress to which complainants testified occurred in June 1999, when complainants received Mike Hancher's letter telling them to get rid of the dog, and in the following three months after they complied. It was not until September 1999 that complainants notified respondent of their request for accommodation. Respondent cannot be held responsible for the emotional distress complainants experienced before they informed respondent of their mental disabilities and before they requested any accommodation.

Turning then to the evidence of emotional distress damages arising after complainants' accommodation request, i.e., after September 1999, Jayne Elebiari was distressed and depressed that respondent continued to deny their request. She missed having the dog in her home and worried about her husband. Jayne Elebiari experienced fatigue, anger, and lack of self esteem as a result of respondent's refusing the requested accommodation. She saw that Ed was continually tearful, experienced sleep problems and loss of appetite. Complainants [*48] ultimately became so frustrated, angry and hopeless at being denied accommodation that they decided to sell their condominium.

Considering the facts of this case, respondent will be ordered to pay complainant Abdelfatah Elebiari \$ 5,000 and complainant Jayne Elebiari \$ 7,500 in damages for their respective emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (*Dept. Fair Empl. & Hous. v. Merribrook Apartments* (1988) No. 88-19, FEHC Precedential Decs., 1988-1989, CEB 7, p. 22.)

C. Civil Penalty

The Department alleges in its accusation that respondent should be ordered to pay to complainants a civil penalty, asserting that respondent's conduct was particularly deliberate and egregious, revealing oppression and malice.

To vindicate the public interest, Government Code section 12987, subdivision (a)(3), authorizes the Commission to order a respondent to pay a civil penalty of up to \$ 10,000 for a first violation of the Act.

Respondent's repeated refusals to permit complainants reasonable accommodation over a nine month period indicate an overwhelming [*49] disregard of complainants' rights as persons with mental disabilities. When complainant Jayne Elebiari initially requested accommodation, respondent's managing agent Mike Hancher left a telephone message in which he laughed and told complainants they would have to go to court. Respondent, by October

2000, was on notice of Jayne Elebiari's ongoing "psychiatric care" and Ed Elebiari's "permanent disability," as set out by Dr. Schnitzler. Nevertheless, respondent exhibited an uncompromising and unequivocal rejection of complainants' requests for accommodation. At the December 2000 Board meeting, despite Jayne Elebiari's pleas, respondent again rejected complainants' accommodation request and conditioned any further appeals on complainants' paying for respondent's attorney's travel time. Respondent was aware of how important the issue was to complainants, because complainants informed respondent that they would sell their home if not granted accommodation. Nevertheless, respondent continued to deny the accommodation request for an additional six months. Respondent's conduct in its delays of over nine months and repeated denials of the requested accommodation establish, clearly and convincingly, [*50] that respondent acted in willful and conscious disregard of complainants' rights.

Respondent's managing agent Mike Hancher testified to respondent's somewhat precarious financial condition in the light of the need for ongoing maintenance and upkeep expenditures. Accordingly, a civil penalty appropriately tailored to respondent's financial circumstances will be ordered. Respondent will thus be ordered to pay a total civil penalty of \$ 5,000, jointly to complainants. In addition, respondent will be ordered to pay interest on that amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until payment. (*Dept. Fair Empl. & Hous v. River Meadow Trailer Park, supra*, 1998-1999, CEB 3. pp. 31-32; *Dept. Fair Empl. & Hous. v. Merribrook Apartments, supra*, 1988-1989, CEB 7, p. 22.)

D. Affirmative Relief

The Department asks that respondent be ordered to develop, implement and post a policy against discrimination based on disability, circulate this policy to all condominium owners, tenants and residents, and incorporate this policy into respondent's Bylaws. The Department further asks that respondent's managing agents and/or Board [*51] of Directors undergo training regarding disability discrimination.

The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code § 12970, subd. (a)(5).)

Respondent shall be ordered to develop an anti-discrimination policy, distribute copies of that policy to its members, post notices in the forms attached to this decision as Attachments A and B, and designate a representative to attend anti-discrimination training. Respondent shall also be ordered to conform its Bylaws to California law.

ORDER

1. Respondent Auburn Woods I Homeowners' Association, Inc. shall immediately cease and desist from discriminating against mental disability and from denying reasonable accommodation for mental disability under the Fair Employment and Housing Act.
2. Within 60 days of the effective date of this decision, respondent Auburn Woods I Homeowners Association, Inc. shall pay to Abdelfatah Elebiari and Jayne Elebiari the amount of \$ 498.50 in actual damages and costs. Interest shall accrue on the amounts [*52] at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.
3. Within 60 days of the effective date of this decision, respondent Auburn Woods I Homeowners Association, Inc. shall pay to Abdelfatah Elebiari the amount of \$ 5,000 in emotional distress damages and to Jayne Elebiari the amount of \$ 7,500 in emotional distress damages. Interest shall accrue on the amounts at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.
4. Within 60 days of the effective date of this decision, respondent Auburn Woods I Homeowners Association, Inc. shall pay to complainants Abdelfatah Elebiari and Jayne Elebiari a total civil penalty of \$ 5,000. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, running from the effective date of this decision to

the date of payment.

5. Within 60 days of the effective date of this decision, respondent Auburn Woods I Homeowners Association, Inc. shall create and submit for approval to the Department of Fair Employment and Housing (Department) a formal, written policy against unlawful [*53] housing discrimination based on disability and the duty of reasonable accommodation. After securing Department approval of this policy, respondent Auburn Woods I Homeowners Association, Inc. shall immediately implement the policy and disseminate copies to all Auburn Woods owners and tenants.

6. Within 90 days of the effective date of this decision, respondent Auburn Woods I Homeowners Association, Inc. shall designate a Board member, its managing agent or a representative who shall attend a training program about disability discrimination and the duty of reasonable accommodation, and the procedures and remedies available under California law. Respondent Auburn Woods I Homeowners' Association, Inc. shall obtain advance approval by the Department of the form and content of the training.

7. Within 60 days of the effective date of this decision, a representative for respondent Auburn Woods I Homeowners Association, Inc. shall sign notices which conform to Attachment A and B of this decision and shall post clear and legible copies of these notices in a conspicuous place at the condominiums located in Auburn Woods, 13063 Lincoln Way, Auburn, California.. Posted copies of this notice shall [*54] not be reduced in size, defaced, altered, or covered by other material and shall be posted permanently. The notice conforming to Attachment A shall be posted for a period of 90 working days. All copies conforming to Attachment B shall be posted permanently.

8. Within 90 days of the effective date of this decision, respondent Auburn Woods I Homeowners Association, Inc. shall amend its Bylaws to reflect California law regarding reasonable accommodation of persons with disabilities and provisions permitting and regulating pets in condominiums.

9. Within 100 days after the effective date of this decision, respondent Auburn Woods I Homeowners Association, Inc. shall notify the Department and the Commission in writing of the nature of its compliance with sections two through eight of this order.

10. Complainants shall in writing waive any rights or claims they may have under Civil Code section 52 prior to payment of the sums ordered in this decision. The Department shall serve copies of the waiver on respondent Auburn Woods I Homeowners Association and the Commission.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code sections 11523 [*55] and 12897.1, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent and complainants.

ATTACHMENT A

NOTICE TO APPLICANTS, TENANTS AND UNIT OWNERS AT AUBURN WOODS I

After a full hearing, the California Fair Employment and Housing Commission has determined that Auburn Woods I Homeowners Association, Inc. violated the California Fair Employment and Housing Act by discriminating against persons with mental disabilities by denying them reasonable accommodation. (*Dept. Fair Empl. & Hous. v. Auburn Woods I Homeowners Association, Inc.* (2001) FEHC Dec. No. ____.) As a result of this finding, the Commission has ordered Auburn Woods I Homeowners Association, Inc. to distribute this Notice and to:

- 1) Cease and desist from discriminating against persons with mental disabilities;
- 2) Pay to the complainants damages for emotional injury and a civil penalty;

3) Train its Board members, managing agent and representative about pertinent housing discrimination laws and implement a written policy against housing discrimination;

[*56]

Dated: ____

By: ____

Representative of

Auburn Woods I Homeowners Association, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL BE POSTED FOR 90 DAYS FROM THE DATE LISTED ABOVE AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

NOTICE TO PURCHASERS, RESIDENTS, APPLICANTS OR TENANTS OF AUBURN WOODS I CONDOMINIUMS

YOUR RIGHTS AND REMEDIES UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

YOU HAVE THE RIGHT TO BE FREE FROM UNLAWFUL HOUSING DISCRIMINATION.

The California Fair Employment and Housing Act prohibits discrimination in housing. It is unlawful for an owner or the owner's manager or agent to:

- . Deny you housing or tell you housing is unavailable because of your race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, physical or mental disability, source of income or because you have children.
- . Ask you (either orally or in writing) to identify your race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, or whether you [*57] have a physical or mental disability. Inquiries about your level or source of income are not unlawful.
- . Make any statement, whether oral or written, that indicates a preference or limitation based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, disability status, source of income, or families with children.
- . Establish any policy which provides inferior terms and conditions of housing to any particular race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, disability status, or families with children.

YOU HAVE THE RIGHT TO COMPLAIN ABOUT UNLAWFUL, HOUSING DISCRIMINATION AND GET RELIEF.

The California Department of Fair Employment and Housing investigates and prosecutes complaints of housing discrimination. If you feel that any of these unlawful practices have happened to you, or that you have been retaliated against because you opposed these practices, you have one year to file a complaint with the state Department of Fair Employment and Housing at:

Department of Fair Employment and Housing

Housing Unit

1515 Clay Street, Suite 701

Oakland, CA 94612-2512

1-800-233-3212

The Department [*58] will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department may prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and require the property owner to pay money damages, a civil penalty, and give other appropriate relief. You may also elect to have the Department represent you in court, or you may retain your own attorney to take your case to court.

Dated: ____

By: ____

Representative of

Auburn Woods I Homeowners Association, Inc.

THE FAIR EMPLOYMENT AND HOUSING COMMISSION REQUIRES THAT THIS NOTICE BE POSTED UNDER PENALTY OF LAW. IT SHALL BE POSTED PERMANENTLY AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.