Maine Human Rights Commission
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Memo

Date: May 21, 2012

To: Jill Duson, Compliance Manager

From: John P. Gause, Commission Counsel

Re: Advisory Opinion – Tenant Request to Smoke Medical Marijuana in Apartment as Reasonable Accommodation

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Pursuant to Procedural Rule §2.12(A), a Landlord has asked whether it must allow a Tenant to smoke medical marijuana in an apartment as a "reasonable accommodation" under the Maine Human Rights Act ("MHRA"). Landlord's lease forbids smoking in the apartment due to public health, fire safety, and cleanliness. It also contains statements that its tenants shall not commit, nor permit to be committed, any violation of local, state, or federal law, including illegal drug use. Tenant has not yet disclosed the nature of his disability. Landlord asks the following questions:

1) May Landlord inquire as to the nature of the disability?

2) If Tenant cannot produce a doctor's note, can Landlord enforce the provisions of the lease against Tenant if Tenant tries to smoke in the apartment?

3) If Tenant does produce a doctor's note, may Landlord enforce the provisions of the lease against Tenant if Tenant tries to smoke in the apartment?

4) Basically, is allowing Tenant to smoke marijuana in derogation of the lease and federal law considered a reasonable accommodation that a landlord must permit to avoid running afoul of the law?

The MHRA provides that it is unlawful housing discrimination for a landlord "to refuse to make reasonable accommodations in rules, policies, practices or services when those accommodations are necessary to give a person with physical or mental disability equal opportunity to use and enjoy the housing." 5 M.R.S. §4582-A. To establish a prima-facie case of failure to accommodate, a complainant must show that:

(1) He has a "physical or mental disability" as defined by the MHRA;

(2) Respondent knew or reasonably should have known of the complainant's disability;

(3) Complainant requested a particular accommodation;

(4) The requested accommodation is necessary to afford complainant an equal opportunity to use and enjoy the housing;

(5) The requested accommodation is reasonable on it face, meaning it is both efficacious and proportional to the costs to implement it; and

(6) Respondent refused to make the requested accommodation.

See 5 M.R.S.A. § 4582-A(2); *Astralis Condominium Ass'n v. Secretary, U.S. Dept. of Housing and Urban Development*, 620 F.3d 62, 67 (1st Cir. 2010) (interpreting Fair Housing Act, but seemingly placing overall burden on Complainant to show accommodation was reasonable); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002) (plaintiff's burden is only to show reasonableness "on its face"). *Compare Reed v. Lepage*

Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001) (interpreting ADA) (holding that plaintiff need only show requested accommodation was feasible "on the face of things").

Here, assuming Tenant does not have an obvious disability that justifies smoking medical marijuana, Landlord "may request reliable disability-related information that (1) is necessary to verify that the person meets the [MHRA, 5 M.R.S. §4553-A,] definition of disability . . . (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation." Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act, ¶ 18, May 17, 2004. The type of documentation that may permissibly be requested will vary depending on the circumstances. *Id.* If Tenant does not show that smoking medical marijuana in his apartment is necessary for him to "use and enjoy the housing" in light of a "physical or mental disability," Landlord would not be obligated to provide the requested accommodation.

If Tenant does make that showing, he also must show that smoking medical marijuana in his apartment is reasonable "on its face." *Oconomowoc Residential Programs*, 300 F.3d at 783-784. With respect to the no-smoking policy, while Landlord has a defense based on that policy that will be discussed below, there is nothing unreasonable "on its face" about requesting a deviation from that policy. With respect to the policy prohibiting illegal activity, if medical marijuana were illegal under both federal and state law, a much stronger case could be made that it is facially unreasonable to require a landlord to allow a tenant to deviate from such a policy. *See In re Moore*, 2010 WL 1542524, *6 (N.Y.Sup. 2010) (holding that defendant "is not required to provide petitioner with an accommodation that allows her to engage in illegal activities"). *Cf.*

Despears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995) ("It is true that the Americans with Disabilities Act and the Rehabilitation Act require the employer to make a reasonable accommodation of an employee's disability, but we do not think it is a reasonably required accommodation to overlook infractions of law."); *Taub v. Frank*, 957 F.2d 8, 11 (1st Cir. 1992) (Postal Service employee convicted of possession and distribution of heroin was not "qualified handicapped person" under the federal Rehabilitation Act).

The issue is complicated here, however, because the State of Maine specifically allows the possession and use of medical marijuana. Pursuant to the Maine Medical Use of Marijuana Act ("MMUMA"), 22 M.R.S. §§2421, et seq., a "qualifying patient" may possess a limited amount of marijuana and "[b]e in the presence or vicinity of the medical use of marijuana." 22 M.R.S. §2423-A(1)(A), (G). A "qualifying patient" is defined as "a person who has been diagnosed by a physician as having a debilitating medical condition and who possesses a valid written certification regarding medical use of marijuana in accordance with section 2423-B." 22 M.R.S. §2422(9).

In addition, by delineating the circumstances under which a landlord is *not* required to allow a tenant to smoke medical marijuana in an apartment, the MMUMA appears to contemplate that a landlord will, under other circumstances, be required to permit a tenant to do so. The MMUMA addresses a tenant's right to use medical marijuana as follows:

> **2. School, employer or landlord may not discriminate.** A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person solely for that person's status as a qualifying patient or a primary caregiver unless failing to do so would put the school, employer or landlord in violation of federal law or cause it to lose a federal contract or funding. *This subsection does not prohibit a restriction on the administration or cultivation of marijuana on premises when that administration or cultivation would be inconsistent with the general use of the premises. A landlord or business owner may prohibit the*

> *smoking of marijuana for medical purposes on the premises of the landlord or business if the landlord or business owner prohibits all smoking on the premises and posts notice to that effect on the premises.*

22 M.R.S. §2423-E(2) (emphasis added). *Compare Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 204 (Cal. 2008) (holding that the California Fair Employment and Housing Act does not require employers to accommodate the use of illegal drugs while noting that the California medical marijuana law does not address employment discrimination).

Finally, although possession of all marijuana is illegal under federal law, 21 U.S.C. §§844(a)(1), 844a(a), the United States Department of Justice has discouraged the United States Attorneys from enforcing this law against people who use medical marijuana in compliance with state law. Memorandum of Selected United States Attorneys, David W. Ogden, Deputy Attorney General, October 19, 2009, available online at http://www.justice.gov/opa/documents/medical-marijuana.pdf.

In light of all of these factors, it is reasonable "on its face" for a landlord to allow a tenant to smoke medical marijuana in an apartment notwithstanding a policy prohibiting smoking and illegal activity in an apartment.[1]

[1] The United States Department of Housing and Urban Development has issued a memorandum ("HUD Memo") addressing whether Public Housing Agencies ("PHA") may grant current or prospective residents a reasonable accommodation under, in part, the Federal Fair Housing Act ("FHA"), 42 U.S.C. §§3601, et seq., and state nondiscrimination laws for the medical use of marijuana when such use is permitted under state law. *See* Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing, Helen R. Kanovsky, Office of General Counsel, U.S. Department of Housing and Urban Development, January 20, 2011. HUD concluded that the FHA and state law *may not be* used to permit such accommodations. With respect to the FHA, HUD concluded that such an accommodation would not be "reasonable" because it would sanction violations of federal criminal law and thus constitute a fundamental alteration in the nature of the PHA housing program. HUD Memo at 8-9. The question here, however, relates to a private landlord, not a PHA, and PHAs are subject to a statutory scheme that does not apply to private landlords. In addition, with respect to state nondiscrimination laws, HUD concluded, in part, that they would be preempted by the federal Controlled Substances Act if they were interpreted to require landlords to allow tenants to use medical marijuana. HUD Memo at 9-10. Specifically, the HUD Memo concludes that "[a] state law that would require medical marijuana use would 'positively conflict' with the CSA because it would mandate the very

That does not mean, however, that Landlord is required to permit Tenant to smoke medical marijuana in the apartment. After a complainant has established a prima-facie case, respondent may refuse to provide a requested accommodation if it can show that the requested accommodation "imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program." *Oconomowoc Residential Programs*, 300 F.3d at 784. In addition, a landlord is free to "set up and enforce specifications in the selling, renting, leasing or letting or in the furnishings of facilities or services in connection with the facilities that are consistent with business necessity and are not based on the . . . physical or mental disability [of a] tenant. . . ." 5 M.R.S. §4583.

Here, Landlord is likely to establish at least the latter defense through its strict policy of prohibiting smoking in its apartments. Again, Landlord's lease forbids smoking in the apartment due to public health, fire safety, and cleanliness. Assuming Landlord enforces this lease provision against all of its tenants, not just tenants with "physical or mental disabilities" who smoke medical marijuana, such a lease provision would be "consistent with business necessity" and not "based on the physical or mental disability" of the tenant. *See* 5 M.RS. §4583. A specification is "consistent with business necessity" if it is shown by objective evidence to be closely tailored to serve a legitimate and substantial reason. *See Langlois v. Abington Housing Authority*, 207 F.3d 43, 51 (1st Cir. 2000) (interpreting FHA); Title VIII Complaint Intake,

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conduct the CSA proscribes." HUD Memo at 10. The HUD Memo is not persuasive in this regard, however. The Memo cites one provision of the CSA, 21 U.S.C. §841(a)(1), which makes it unlawful "for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," and another, 21 U.S.C. §844(a), which criminalizes the simple possession and purchase of controlled substances,[1] but it does not cite any statutory provision that prohibits a person, such as a landlord, from allowing the possession or use of marijuana on premises owned or managed by that person. Thus, while the MMUMA permits conduct by a tenant that is prohibited by the CSA, requiring a landlord to allow a tenant to use medical marijuana is not proscribed by the CSA, and there is no conflict through which the CSA would preempt the MHRA.

Investigation, and Conciliation Handbook, Chapter 2: Theories of Discrimination, at 2-4(D) (1998) (available at http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80241/80241c2FHEH.pdf). Public health, fire safety, and cleanliness are legitimate and substantial concerns of any landlord, and prohibiting smoking in an apartment building is closely tailored to those reasons. Indeed, the MMUMA specifically contemplates that a landlord "may prohibit the smoking of marijuana for medical purposes on the premises of the landlord or business if the landlord or business owner prohibits all smoking on the premises and posts notice to that effect on the premises." 22 M.R.S. §2423-E(2). Accordingly, Landlord's no-smoking policy is a sufficient defense under the MHRA, 5 M.R.S. §4583, to tenant's request for reasonable accommodation.

Landlord's questions should be answered as follows:

1) May Landlord inquire as to the nature of the disability?

ANSWER: Yes, if Tenant does not have an obvious disability that justifies his smoking medical marijuana.

2) If Tenant cannot produce a doctor's note, may Landlord enforce the provisions of the lease against Tenant if Tenant tries to smoke in the apartment?

ANSWER: If Tenant does not provide sufficient information verifying that he meets the MHRA definition of "physical or mental disability" and that smoking medical marijuana in his apartment is necessary to "use and enjoy" his apartment (this may or may not be a "doctor's note," depending on the nature of the disability), Landlord may enforce the provisions the lease against Tenant if Tenant tries to

smoke in the apartment.

3) If Tenant does produce a doctor's note, may Landlord enforce the provisions of the lease against Tenant if Tenant tries to smoke in the apartment?

ANSWER: Yes, provided Landlord prohibits all smoking on the premises and posts notice to that effect on the premises.

4) Basically, is allowing the tenant to smoke marijuana in derogation of the lease and federal law considered a reasonable accommodation that a landlord must permit to avoid running afoul of the law?

ANSWER: No, if the landlord prohibits all smoking on the premises and posts notice to that effect on the premises.

Cc: Amy M. Sneirson, Executive Director