COURT OF APPEALS
DECISION
DATED AND RELEASED

July 6, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-2967

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DIANA LINDSEY,

Plaintiff-Appellant,

v.

NOB HILL PARTNERSHIP,
APARTMENTRY, INC., OF WISCONSIN,
ROBERT BORCHERDING,
and BARBARA BOUSLOUGH,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Diana Lindsey appeals from a judgment dismissing her complaint, which alleged seven causes of action for housing discrimination. We affirm in part, reverse in part and remand.

According to the complaint, Lindsey is a woman with disabilities who receives Section 8 rental assistance pursuant to 42 U.S.C. § 1437f, and lives at the Nob Hill Apartments in Madison, Nob Hill Partnership owns it, Apartmentry, Inc., manages it, Robert Borcherding is the general partner of Nob Hill, and Barbara Bouslough is an employee of Apartmentry.

Lindsey's disability is paraplegia, necessitating use of a wheelchair. The complaint alleges the history of her tenancy in the apartment and her attempts to have the defendants accept her Section 8 certificate. Attached to the complaint is an initial determination by the Equal Rights Division (ERD) of the Department of Industry, Labor and Human Relations finding probable cause that the defendants violated various equal rights laws. The complaint alleges seven claims. The circuit court dismissed all for failure to state a claim upon which relief can be granted.

In reviewing a motion to dismiss, the facts pleaded must be taken as admitted. ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979). Because the pleadings are to be liberally construed, a claim should be dismissed only if it is quite clear that under no circumstances can the plaintiff recover. ***Id.***

Lindsey's first claim is that the defendants violated § 101.22, STATS., by exacting different terms of rental from her due to her disability.[1] The circuit court concluded that Lindsey had not alleged facts which showed that the defendants exacted different terms from her.

On appeal, Lindsey points solely to paragraph 42 of her complaint as support for this claim. Paragraph 42 alleges that the ERD issued a charge and initial determination that there was probable cause to believe the defendants discriminated against her due to her disability. Lindsey argues that "due deference" should be given to the administrative agency's determination, citing ***Plumbers Local No. 75 v. Coughlin***, 166 Wis.2d 971, 978, 481 N.W.2d 297, 300 (Ct. App. 1992). That case states that we defer to an agency's interpretation

[1] Section 101.22(2)(b), STATS., makes it unlawful for any person to discriminate on the basis of disability by exacting different or more stringent terms for the lease of housing.

of administrative rules. However, deference to an agency conclusion usually occurs in the context of judicial review of a final agency decision. There is no authority for the notion that conclusions in the ERD's initial determination are binding on a circuit court reviewing the sufficiency of a complaint. We reject the argument.

We conclude Lindsey fails to state a claim. Although the complaint alleges that the defendants did not initially agree to the rental terms she proposed, it does not allege facts showing that the defendants sought to extract from her rental terms that were different from those offered other tenants.

Lindsey's second claim is that the defendants violated § 101.22, STATS., by refusing to discuss the terms of rental with her, or by exacting different terms of rental from her, because of her lawful source of income. The "exacting different terms" part of this claim is insufficient for the same reason as the first claim.

As for the allegation that the defendants refused to discuss the terms of rental, such conduct would be unlawful under § 101.22(2)(a), STATS. Lindsey's complaint alleges in paragraphs 24 through 32 the history of her efforts to have the defendants complete her Section 8 paperwork. She alleges that the defendants did not accept her papers when she brought them to the office, and did not pick them up from her apartment in spite of her requests. Her attendant later brought them to the office. We conclude these allegations do not state a claim for refusal to discuss terms of rental.

Lindsey's third claim is that the defendants violated the Fair Housing Act, 42 U.S.C. § 3604(f)(2), by discriminating against her in their "rental practices" because of her disability. However, that subsection does not address "rental practices." It provides that it is unlawful to discriminate against a person with a handicap "in the terms, conditions, or privileges of ... rental of a dwelling, or in the provision of services or facilities in connection with such dwelling." A later subsection, § 3604(f)(3)(B), provides that "discrimination" includes "refusal to make reasonable accommodations in rules, policies, *practices*, or services, when such accommodations may be necessary to afford ... equal opportunity to use and enjoy a dwelling." (Emphasis added.) We construe the third claim as

alleging that the defendants failed to make reasonable accommodations in their practices.

Lindsey's fourth claim is that the defendants violated 42 U.S.C. § 3604(f) by "refusing and/or unreasonably delaying making reasonable accommodations" to enable her to use and enjoy her apartment. This claim appears to be indistinguishable from the third claim, as we have construed it, and therefore we address the third and fourth claims together as one.

The difference between an "accommodation" and a "modification" is significant here. We quoted above from 42 U.S.C. § 3604(f)(3)(B), which requires the owner to make "reasonable accommodations." Subsection (f)(3)(A) requires the owner "to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied ... by such person if such modifications may be necessary to afford such person full enjoyment of the premises." Thus, "modifications" are made to the physical "premises," while "accommodations" are made in "rules, policies, practices, or services." Modifications must be paid for by the tenant, while accommodations need not be.

Lindsey argues that her "reasonable accommodation" claim is supported by paragraphs 37 through 41 of her complaint.[2] Paragraph 37 alleges that "[a]t all times relevant to this complaint" the defendants have maintained the management office at Nob Hill in an inaccessible manner due to a hill and a flight of stairs. The circuit court rejected this claim on the ground that making the office more accessible would require modifications to the premises, and that Lindsey did not allege that she requested and offered to pay for such modifications.

We agree that Lindsey has not stated a claim that the defendants unlawfully failed to modify the office. Nor has she stated a claim that the defendants failed to make a reasonable accommodation, since, according to the complaint, her attendant has been able to deliver necessary papers to the office.

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[2] Lindsey also cites paragraphs 42 and 43. However, these merely cite to the ERD determination which we concluded above is not relevant.

Paragraph 38 alleges that shortly after renting her apartment, Lindsey requested a parking stall with a "handicapped" sign, and defendant Bouslough informed her that she would have to buy the sign. After Lindsey continued to insist that the defendants were responsible for posting the sign, they did so. The circuit court viewed this claim as requiring a modification, and rejected it because Lindsey again failed to allege that she offered to pay for the modification. Lindsey argues that this is actually an accommodation because it relates to the use of parking, which she describes as a service. We disagree.

Installation of a handicapped parking space is a modification of the premises. If we were to accept Lindsey's argument, then virtually every request for a modification could be recast as an accommodation simply by phrasing it in terms of the service provided by that part of the premises to be modified.[3] If it requires a physical alteration of the premises, it is a modification. Because Lindsey's request for handicapped parking was for a modification, and because her complaint alleges that she insisted the defendants pay for it, paragraph 38 does not state a claim.

Paragraph 39 alleges that during the winter of 1992-93 Lindsey "was forced to complain to the management ... on numerous occasions that the sidewalk and the handicapped parking spot were not shovelled which made it virtually impossible for her to get out of the building due to her dependence on a wheelchair." The circuit court concluded:

> [I]t is well established that in Wisconsin the practicality of not allowing any accumulation of snow must be considered in determining whether an obstacle created by snow should have been removed. See Stippich v. Milwaukee, 34 Wis.2d 260, 271, 149 N.W.2d 618 (1967). The Court agrees with the defendants that it would have been unreasonable for the plaintiff to request that the sidewalk in front of her apartment be completely cleared of snow at all

[3] For example, a request to install a special bathroom tub could be described as a request for an accommodation in the provision of plumbing and water services.

> times during an entire winter. Such maintenance would be impractical if not impossible.

We do not read Lindsey's complaint so broadly. It does not allege that the only reasonable accommodation was for the defendants to keep the walk cleared of snow at all times during an entire winter. Snow shovelling is a service. It may be reasonable for the property owner to make some accommodation in the form of more frequent, prompt or thorough shovelling. Just how much accommodation would be reasonable and whether the defendants met that standard need not be determined from the complaint. Liberally construed, paragraph 39 alleges sufficient facts to state a claim.

Paragraphs 40 and 41 allege that Lindsey's mailbox and apartment door chain lock are located in positions that she cannot reach. These are modifications. Lindsey does not allege that she requested the modifications or that she offered to pay for them. These paragraphs do not state claims.

Therefore, we conclude that Lindsey states a claim that the defendants failed to make reasonable accommodations in the shovelling of snow, but that her third and fourth claims were otherwise properly dismissed.

Lindsey's fifth claim is that the defendants violated the state law which is analogous to the federal law at issue in the preceding claim, § 101.22(2r)(b)3, STATS. The circuit court's analysis of this claim was essentially the same as for the preceding one, as are the parties' arguments on appeal. We reach the same conclusion. Lindsey states a claim only with respect to the defendants' failure to make reasonable accommodations in shovelling snow.

Lindsey's sixth claim is that the defendants violated the Fair Housing Act, 42 U.S.C. § 3617, by "unlawfully interfering, on the basis of her disability, with [her] rights to the exercise of or enjoyment of the right to rent an apartment due to her disability and have her disabilities reasonably accommodated." That statute makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of [her] having exercised or enjoyed, ... any right granted or protected by [42 U.S.C. §§ 3603, 3604, 3605 or 3606]." The circuit court reasoned that this statute

"supplements the substantive rights granted by federal housing discrimination law by protecting persons who have exercised these rights," and that Lindsey had not alleged facts showing a violation of this provision.

On appeal, Lindsey argues that paragraphs 37 through 41 and 43 support this claim. We described each of those paragraphs above. They do not allege facts showing interference by the defendants. Rather, they allege or attempt to allege substantive violations of the housing laws. Lindsey argues, in effect, that every substantive violation of the housing law is also an attempt to "interfere with" her exercise of the rights provided by the substantive provisions. Lindsey provides no support for such a broad reading of § 3617, and we reject it.

Lindsey's seventh claim is that the defendants violated 42 U.S.C. § 1437f(t) by discriminating against her "through refusing to accept her Section 8 certificate." The statute makes it unlawful for a property owner who has entered a contract for housing assistance payments under that section to "refuse to lease any available dwelling unit" to a holder of a certificate or voucher. We conclude that Lindsey fails to state a claim. Her complaint does not allege that she has been refused a lease. There is no allegation that the defendants refused to allow her to become a tenant at any time.

In summary, we conclude that the trial court properly dismissed Lindsey's complaint except for the parts of her third/fourth claim and fifth claim which allege the defendants failed to make reasonable accommodations in shovelling snow.

Regarding costs in this appeal, we note that Lindsey's complaint alleged a total of six claims,[4] all of which were dismissed. On appeal, she has prevailed with respect to approximately one-quarter of two claims, or approximately one-twelfth of her complaint. Therefore, we conclude that she is entitled to one-twelfth of her costs.

[4] We concluded the third and fourth claims were indistinguishable.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.