UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Allison Barton Rice, pro se
Plaintiff - Appellant,

vs.

City and County of San Francisco, et al.
Defendants - Appellees.

9th Cir. Case No. 20-15087

District Court Case No.——
——————19-cv-04250-LB

APPELLANT'S INFORMAL REPLY BRIEF

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Issue/Argument Number 1 - STANDARD OF REVIEW

As stated in *McGary*, a very similar case, the standard of review is:

McGary v. City of Portland, 386 F. 3d 1259 (9th Cir. 2004) at 1261

(emphasis supplied):

> "We review de novo a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b) (6). *Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir.2002) (per curiam), *cert. denied,* 538 U.S. 921, 123 S.Ct. 1570, 155 L.Ed.2d 311 (2003). All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff. *Id.* Dismissal of the complaint is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief. *Id.*
>
> The Supreme Court has cautioned that, in reviewing the sufficiency of the complaint, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Jackson v. Carey,* 353 F.3d 750, 755 (9th Cir.2003) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974))."

Issue/Argument Number 2 - FHA Claim

My FHA claim is about the fact that I am a disabled person and I requested a disability related policy accommodation, specifically Appellees' written consent to lease a portion of what was my home to a rent-paying[1] roommate - which had proven to ameliorate the symptoms and difficulties of my mental illness by providing me a more normal home environment with companionship and

[1] I made objection in the District Court to Appellees' use of "non-rent-paying roommate" instead of "guest", and "rent-paying roommate" instead of "roommate" (ECF No. 19, page 6, lines 6-10 and page 7, lines 1-6). The District Court made no response to my objection. Thus, I am forced to adopt Appellees' terminology.

emotional support which helped me with my isolation and, thus, my loneliness. And, in-turn, helped improve my mental stability, interpersonal communication skills and the like, and my engagement in other major life activities.

I did enjoy this accommodation for many years[2] after receiving verbal permission to do so on or about late 2008.[3] My many years of experience/s with both rent-paying and non-rent-paying roommates clearly demonstrated to me that a rent-paying roommate ameliorated the symptoms of my mental illness because rent-paying roommates were generally respectful, genuine, considerate, and engaging in a positive manner that helped lift me and increase my confidence - which helped me be more engaging and, thus, reduced my isolation and loneliness.[4] On the other hand, my experience with non-rent-paying roommates was that they tended to be resentful, would become rude and obnoxious, and create more strife and burdens for me that only worsened the symptoms and difficulties I suffer from my mental illness.[5]

I did tell Appellees that my requested accommodation did help me with my disability related needs, which my physician concurred and recommended.[6] And, I told the Appellees' that their suggested solution of a non-rent-paying roommate would not meet my disability related needs (see note above).

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[2] ECF No. 49, page 12, lines 5-7.

[3] ECF No. 49, page 12, lines 9-10.

[4] ECF No. 49, page 12, lines 15-18.

[5] ECF No. 49, page 12, lines 12-15.

[6] ECF No. 49, page 28, lines 5-9. And, ECF No. 1.1, page 25, Exhibit E.

But, Appellees refused to make my requested accommodation - despite my arguments that my requested accommodation was [may be] “necessary” and “reasonable” (i.e. it would not impose any undue financial or administrative burden on the Appellees and it would not fundamentally alter the nature of the [housing] program or their operations. Furthermore, the exact same accommodation that I was requesting was allowed by the Agreement with “written consent” and Appellees’ own policies allowed just such an accommodation for people in the Program with a work relocation requirement or a financial hardship).

Appellees evidently did not think of the “negative consequences” of hosting a non-rent-paying roommate - thus, thinking it suitable for meeting the disability related needs of a mentally disabled person while ignoring the vulnerabilities of a person that suffers a mental illness; and the burdens, expense, and liabilities of providing free housing to a non-rent-paying roommate - although I told them many times[7] that a non-rent-paying roommate was detrimental to my mental health.

Appellees’ assertion that a non-rent-paying roommate was sufficient to satisfy my disability related needs is incorrect because (as noted above) a non-rent-paying roommate did not ameliorate the symptoms and difficulties of my mental illness and, instead, would worsen them and create more problems for me.

And, I did not need consent from Appellees to have a non-rent-paying roommate - their so-called accommodation was no accommodation.

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[7] ECF No. 49, page 15, line 16-20; and page 19, lines 9-12. And, ECF No. 1, page 17, lines 19-22; and page 18, lines 21-23. And, ECF No. 52, page 5, lines 26-28.

In Appellees' ARGUMENT I, they state (emphasis mine):

> "The City's accommodation reflected the grounds for Rice's request. Rice substantiated his request with a letter from Dr. Ludwig requesting that Rice be allowed to take on a roommate. The letter acknowledged Rice's isolation and mental health instability, and described why a roommate would be beneficial for Rice's condition. SER 157. However, the letter did not say that Rice needed the roommate *to pay rent* to be beneficial for Rice's mental health. *Id.* Rice's own doctor failed to demonstrate the nexus between the payment of rent by a roommate and the benefit to Rice's mental health. The City's offer to allow Rice to have a non-rent paying roommate to alleviate the loneliness and isolation Dr. Ludwig described reasonably accommodated Rice's mental health condition." (9th Cir. ECF No. 8, at 11-12)

Appellees made clear that their position was that I failed to allege that any accommodation was necessary to afford me an equal opportunity to "use and enjoy" my home. That position is incorrect, as shown in *McGary*.

McGary, 386 F. 3d 1259 (9th Cir. 2004) at 1262 (emphasis mine):

> "The dispute in this case focuses entirely on the third requirement. The City does not dispute that McGary's complaint sufficiently alleged that he was handicapped under the FHAA, that it was informed of McGary's handicap, and that it refused to grant McGary the accommodation he requested. Rather, the City argues that McGary failed to allege that any accommodation was necessary to afford him an equal opportunity to "use and enjoy" his home. We hold that, while McGary's claim may not present a paradigmatic discrimination claim arising under the FHAA, it satisfies the liberal pleading requirements established by Supreme Court and Ninth Circuit precedent."

I had no obligation to accept Appellees' so-called accommodation if I believed it would not meet my disability related needs and my preferred accommodation was reasonable - as made clear in the 'Joint Statement of the Department of Housing and Urban Development and the Department of Justice *Reasonable Accommodations Under the Fair Housing Act*', which states:

> "…Providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable." (at fourth paragraph of question 7 - ECF No. 1.2, page 21, Exhibit U)

But, again, Appellees' so-called accommodation was no accommodation.

Appellees' ARGUMENT I concludes with:

"As the district court properly held, these allegations fail to state a cognizable FHA claim." (9th Cir. ECF No. 8, at page 12)

However, as shown in *McGary*, my allegations met the threshold to state a cognizable FHA claim.

McGary, 386 F. 3d 1259 (9th Cir. 2004) at 1262 (emphasis supplied):

> "The threshold for pleading discrimination claims under the FHAA is low. In *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), the Supreme Court held that the standard for pleading an employment discrimination claim is no higher than the relaxed notice pleading standard of Federal Rule of Civil Procedure 8(a), *viz.,* "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 512, 122 S.Ct. 992. In *Swierkiewicz,* the Supreme Court clarified that a plaintiff need not establish a prima facie case of discrimination in the complaint, since the prima facie case is "an evidentiary standard, not a pleading requirement," and often requires discovery to fully adduce. 534 U.S. at 510-11, 122 S.Ct. 992. The Ninth Circuit has explicitly extended the Court's holding in *Swierkiewicz* to Fair Housing Act (FHA) claims. *See Edwards v. Marin Park, Inc.,* 356 F.3d 1058, 1061-62 (9th Cir.2004); *see also* *Gilligan v. Jamco Dev. Corp.,* 108 F.3d 246, 248-49 (9th Cir.1997) (applying Federal Rule of Civil Procedure 8(a)'s liberal pleading standard to FHA claims and noting that this standard "contains 'a powerful presumption against rejecting pleadings for failure to state a claim'" (quoting *Auster Oil & Gas, Inc. v. Stream,* 764 F.2d 381, 386 (5th Cir.1985)))."

And, Appellees go on to state:

> "The allegations in the FAC show that the City *accommodated* the only problem that Rice identified: the loneliness and isolation stemming from living alone. That the City denied Rice's accompanying, unsubstantiated request that the roommate *pay rent* does not state a claim for discrimination under the FHA. The district court properly dismissed Rice's FHA claim with prejudice." (9th Cir. ECF No. 8, at page 12)

I identified isolation and loneliness as a symptom of my mental illness,[8] not as the only problem. Additionally, if a lamb is lonely, you can't throw it in a cage with a lion and say: There! Problem solved. Likewise, I needed relief, not the added burdens of a roommate who lives for free (like a sponge, freeloader, or parasite) and enjoys the rights to the shared living space while shouldering none of the responsibilities of the dwelling. In my mind, a rent-paying roommate was a helpful companion and an equal - while a non-rent-paying roommate was more like an invited guest that never leaves and is resentful, rude, and obnoxious.

Inviting a non-rent-paying roommate into my home would not provide any relief to me from the symptoms of my mental illness. It would make them worse, as proven by my own experiences of having a non-rent-paying roommate.

My physician wrote to them recommending they approve a rent-paying roommate.[9] She wouldn't have written to them recommending they approve a long-term guest, she wrote because I needed something different.

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[8] ECF No. 49, page 10, lines 3-4.

[9] ECF No. 1.1, page 25, Exhibit E.

In my FHA claim[10] I pled facts sufficient to establish:

1. I am a "person with a handicap" within the meaning of 42 U.S.C. section 3602.

2. The Defendants knew I was handicapped.

3. The accommodation I requested was may be necessary to afford me an equal opportunity to use and enjoy my home because a rent-paying roommate was effective and beneficial for my mental handicap (and a non-rent-paying roommate was not, as explained above).

4. The accommodation I requested was reasonable because it would not impose any undue financial or administrative burden on the Appellees and it would not fundamentally alter the nature of the [housing] program or their operations. Furthermore, the exact same accommodation that I was requesting was allowed by the Agreement with "written consent" and Appellees' own policies allowed just such an accommodation for people in the Program with a work relocation requirement or a financial hardship. And,

5. Appellees refused to make my requested accommodation.

Yet, the District Court dismissed my FHA claim because:

"The denial of a rent-paying roommate (for failure to meet financial guidelines) is not plausibly discrimination, especially given that the defendants allowed a roommate generally." (ECF No. 58, page 6, lines 7-8)

Appellees use of the requirements of their financial hardship exemption to refuse to make my requested accommodation was specious reasoning, misleading, spurious, sophistic, and a pretext for their discriminatory conduct. And, Appellees did not "allow" me anything - their so-called accommodation was, in reality, no accommodation.

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[10] ECF No. 49, ¶¶ 71-77.

As stated in *McGary*, as in my case, unlawful discrimination includes a refusal to make a reasonable accommodation in policies when it may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling. And, Appellees had an affirmative duty to do so.

McGary, 386 F. 3d 1259 (9th Cir. 2004) at 1261:

> "Under the FHAA, unlawful discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). We have repeatedly interpreted this language as imposing an "affirmative duty" on landlords and public agencies to reasonably accommodate the needs of disabled individuals."

There is no dispute Appellees refused to make my requested accommodation (by enforcing the requirements of their financial hardship exemption). And, I did plead facts sufficient to cross the threshold for pleading a discrimination claim under the FHA.

Thus, it was not proper for the District Court to dismiss my FHA claim.

<u>Issue/Argument Number 3</u> - ADA Claim

My ADA claim[11] is with respect to Appellees excluding me from and denying me the benefits of the services, programs, or activities (that they advertise and otherwise) and subjecting me to discrimination.

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[11] ECF No. 49, page 29, ¶ 83

And, my allegation in my ADA was (emphasis mine):

"The Defendants did discriminate against Plaintiff Rice by reason of his disability because, despite his exhaustive efforts to obtain from them assistance or legal advice of the kind that they advertise they provide, or just an explanation of their reasoning, the Defendants refused any assistance and withheld from him participation in or excluded him from the legal and housing related counseling services and the protection or rights which they advertise to offer to the general public. As is clear from their communications with Plaintiff Rice, Defendants denied him these services, which they offered to persons without disabilities, <u>because to offer him the assistance he needed by way of their services, would have required them to make an accommodation or a change to their programs, which they saw as changing the way they viewed the Program and it's goals; in other words, they refused him these services because he was disabled</u>. (ECF No. 49, page 32, lines 6-16)

To be sure, I asked Appellees for explanations and information regarding my disability rights, housing accommodations, and their policy exemptions numerous times over a rather protracted period of time, mainly from October 27th 2017 to January 23rd 2018.[12] In fact, I did so until it became clear to me that Appellees were not going to provide me information that was critical for me to exercise and defend my disability rights; and that they were ignoring me and would continue to ignore me - despite being fully informed of my disabled status and despite my complaints of ignoring me[13]. As shown when I told them I was selling my home and their response:[14]

Continued on next page.

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[12] ECF No. 1, page 16, ¶ 73.

[13] ECF No. 49, pages 17-20, ¶¶ 57-63. And, ECF No. 1.2, pages 8-10, Exhibits O, P, and Q.

[14] ECF No. 1.2, page 7, Exhibit N.

"To the MOHCD,

I am selling my BMR condominium "under protest", primarily because the MOHCD has ignored my disability and denies that the ADA is applicable to this/my situation - which is, and has been, injurious and detrimental to me. If and when I can, I intend to seek recourse through an appropriate legal channel.

Mr. Allison Barton Rice"

And,

"Dear Mr. Rice,

Thank you for notifying us of your intent to sell your BMR unit. The BMR resale procedures can be found on our website http://sfmohcd.org/process-reselling-bmr-unit if you wish to begin the resale process.

I am enclosing our previous correspondence regarding our response to your rental request. As we have discussed, you may have a roommate, but cannot rent your unit without complying with the Program restrictions.

If you would like to make a claim, you or your attorney can send us a demand letter that points to the ADA requirement for renting out your unit.

Regards,

Cissy Yin
Homeownership & Below Market Rate (HBMR) Compliance Manager
Mayor's Office of Housing & Community Development City and County of San Francisco"

I was reliant upon Appellees for accurate and appropriate information of the kind they advertise that they provide; as well as guidance and protection of my rights (especially since I have a mental disability).

Appellees state:

"Rice allegedly sought these unspecified services following the denial of his request for a rent-paying roommate." (9th Cir. ECF No. 8, at 13)

When my requested accommodation was denied, I sough specific information regarding [my] disability rights from the Appellees. However, the ONLY disability rights information Appellees provided to me was "The Americans with Disabilities Act (ADA) is not applicable to this situation.",[15] without any explanation - ever.

The City Attorney's Office was in the communications loop, as well - but said nothing.

Additionally, during the entire time I was connected to the property, Appellees never provided anything of any substance concerning my disability rights, information about the FHA, the ADA, the California Fair Employment and Housing Act (FEHA), or other applicable state law.

Nor did they ever say or expressly acknowledge, specifically, that I have a disability - to me. In this regard, the most Appellees ever did was acknowledge "receipt" of my physician's letter.[16]

Furthermore, I had sought Appellees "services" from at least the time I became connected to the property in 2004.

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[15] ECF No. 1.2, page 2, Exhibit L.

[16] ECF No. 49, page 15, ¶ 51, re: ECF No. 1.1, page 33, third paragraph, Exhibit I.

And, what "services" was I seeking? Pretty much anything and everything in the way of information that affected me and my participation in the 'Limited Equity Home Ownership Program' - especially anything to do with my disability and the FHA, the ADA, the FEHA, and other applicable state law. And, I ALWAYS expected them to respect my disabled status and protect my disability rights - as they advertise that they do.[17]

I was very ignorant of disability rights at the time and I am mentally disabled. Thus, I was completely reliant on Appellees' advertised protection of my rights, as well as a professional standard of care. Not only was it Appellees' responsibility to respond to me in a timely fashion with appropriate information for a mentally disabled person, it was their responsibility to protect my rights as they advertise that they do. But, that never happened - even though Appellees were made fully aware that I was mentally disabled at the beginning of my connection to the property, or not long thereafter.[18]

And, until their denial of my requested accommodation and my subsequent endeavor to educate myself about [my] disability rights, I was too preoccupied with my mental illness to even know, or be aware of, what Appellees were not telling me and were not providing me.

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[17] ECF No. 1.2, page 13, Exhibit T.

[18] ECF No. 1, page 15, ¶ 65.

As I explained in my Opening Brief[19], the District Court ignored the fact that my ADA claim concerned Appellees' (a) legal and counseling services, etc. which they provide to participants in their programs and (b) the administration of their rules, regulations, or policies in their programs - as well as subjecting me to discrimination. I also did state:

> "c. It ignores the fact that my ADA claim was irrespective of Appellees denying (or granting) me a roommate. And, very clearly, my ADA claim has nothing to do whatsoever with the Appellees' financial-hardship exemption."

Which was an error on my part due to my ignorance and my inability to artfully plead. What I meant was my ADA claim had to do with Appellees "excluding me from and denying me the benefits of the services, programs, and activities of the Appellees (that they advertise)" as a means to discriminate against me (i.e. subject me to discrimination). That is, by keeping me in the 'dark' about my disability rights, the Appellees effectively eliminated my ability to exercise and defend my disability rights - which was a threat to them - as I stated in my FAC:

> "… because to offer him the assistance he needed by way of their services, would have required them to make an accommodation or a change to their programs, which they saw as changing the way they viewed the Program and it's goals; in other words, they refused him these services because he was disabled." (ECF No. 49, page 32, lines 13-16)

The District Court ignored the record of communications, Appellees' conduct, and other evidence that demonstrated I was excluded from participation in and denied the benefits of their services, programs, or activities, and subjected to

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[19] 9th Cir. ECF No. 2, at 15.

discrimination - solely by reason of my disability. *McGary* provides the four elements to state a claim of disability discrimination under Title II of the ADA:

McGary, 386 F. 3d 1259 (9th Cir. 2004) at 1265:

> "McGary also alleges that the City discriminated against him in violation of Title II of the ADA by failing to reasonably accommodate his disability when it refused to grant him additional time to comply with the nuisance abatement ordinance. Title II provides that: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Therefore, in order to state a claim of disability discrimination under Title II, McGary must allege four elements: (1) he "is an individual with a disability;" (2) he "is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities;" (3) he "was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity;" and (4) "such exclusion, denial of benefits, or discrimination was by reason of [his] disability." *Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir.2002) (per curiam), *cert. denied,* 538 U.S. 921, 123 S.Ct. 1570, 155 L.Ed.2d 311 (2003)."

In my FAC[20], I clearly set forth that:

(1) I am an individual with a disability;

(2) I was qualified to participate in or receive the benefit of Appellees' services, programs, or activities;

(3) I was excluded from participation in or denied the benefits of Appellees' services, programs, or activities, or was otherwise discriminated against by Appellees; and

(4) The exclusion, denial of benefits, or discrimination was by reason of my disability - as described on previous page.

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[20] ECF No. 49, pages 29-32, ¶¶ 84-89.

Appellees' silence, near complete lack of response, the fact that they did not protect my rights, and their failure to take "affirmative action" demonstrates they excluded me to and from the participation and benefits of their services, programs, or activities. And, the record of communications and of Appellees' conduct speaks volumes that says they did behave as such - solely by reason of my disability.

Furthermore, Appellees did not provide me an "interactive process", which is a mandatory obligation under the ADA - as shown in *Humphrey*:

Humphrey v. Memorial Hospitals Ass'n, 239 F. 3d 1128 (9th Cir. 2001) at 1137 (emphasis supplied):

> "Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. *Barnett v. U.S. Air*, 228 F.3d 1105, 1114 (9th Cir.2000). "An appropriate reasonable accommodation must be effective, in enabling the employee to perform the duties of the position." *Id.* at 1115. The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. *Id.* at 1114-15; *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir.1996) ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."). Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. *Barnett*, 228 F.3d at 1116."

Yet, the District Court dismissed my ADA claim because (emphasis mine):

"For the reasons set forth above and in the court's earlier order, the plaintiff does not plausibly plead a claim that the CCSF denied him a roommate for discriminatory reasons given the undisputed fact that it denied him a rent-paying roommate because he did not meet income thresholds." (ECF No. 58, page 6, lines 17-20)

Indeed, it is an undisputed fact that Appellees denied me a rent-paying roommate because I did not meet the income threshold requirements of their financial hardship exemption.

But, I did plausibly plead a claim that the Appellees excluded me to and from the participation and benefits of their services, programs, or activities and subjected me to discrimination solely because of my disability - that was sufficient to overcome a Rule 12(b)(6) motion to dismiss. This is made clear in *McGary*:

McGary, 386 F. 3d 1259 (9th Cir. 2004) at 1265 (emphasis supplied):

> "The district court dismissed McGary's ADA claim solely on the ground that McGary failed to allege facts indicating that the City acted "by reason of" his disability, since non-disabled residents were also subject to the nuisance abatement ordinance. The court erred in doing so. We have repeatedly recognized that facially neutral policies may violate the ADA when such policies unduly burden disabled persons, even when such policies are consistently enforced. *See, e.g.,* Martin v. PGA Tour, Inc., 204 F.3d 994, 999- 1000 (9th Cir.2000) (holding that a golf association rule banning use of golf carts in certain tournaments violated the ADA when it failed to modify this rule for a disabled golfer with a mobility impairment), *aff'd,* 532 U.S. 661, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001).
>
> In Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir.1996), we considered whether the State of Hawaii discriminated against a class of visually impaired plaintiffs by refusing to make modifications to a facially neutral policy requiring all animals entering the state, including guide dogs, to be quarantined for 120 days. We held that the State discriminated against plaintiffs because this facially neutral and universally enforced policy "burden[ed] visually-impaired persons in a manner different and greater than it burden[ed] others." *Id.* at 1484; *see also* Rodde v. Bonta, 357 F.3d 988, 998 (9th Cir.2004) ("[I]n *Crowder,* we confirmed that ... state action that disproportionately burdens the disabled because of their unique needs remains actionable under the ADA."). Like the plaintiffs in *Crowder,* McGary alleges that the City's nuisance abatement policy burdened him in a manner different from and greater than it burdened non-disabled residents, solely as a result of his disabling condition. McGary was physically impaired from meningitis and hospitalized. He claims that the

> City's denial of a reasonable time accommodation prevented him from complying with the ordinance due to this disability.
>
> Therefore, he has sufficiently claimed that he was discriminated against "by reason of" his disability for the purposes of overcoming a Rule 12(b)(6) motion to dismiss."

Appellees' financial hardship requirements burdened me [a mentally disabled person] in a manner different and greater than it burdened non-disabled participants in Appellees' programs, solely as a result of my disabling condition.

And, I did claim that Appellees' denial to provide me written consent to lease a portion of what was my home to a rent-paying roommate by use of the financial hardship exemption requirements was by reason of my disability.[21]

Therefore, I sufficiently claimed that I was discriminated against "by reason of" my disability for the purposes of overcoming a Rule 12(b)(6) motion to dismiss.

Furthermore, Appellees state (emphasis mine):

"Rice's request for a *rent-paying* roommate—a request that neither Rice nor anyone else connected to his disability—was denied because he did not qualify for a financial hardship. As the district court held, allegations like this do not state a plausible ADA claim. *Id*. Therefore, Rice's ADA claim was properly denied with prejudice and should be affirmed." (9th Cir. ECF No. 8, at 13)

Appellees are incorrect, as made clear in *McGary*:

McGary, 386 F. 3d 1259 (9th Cir. 2004) at 1267-1268:

Continues on next page.

[21] ECF No. 49, page 17, ¶ 56, and page 27, ¶ 76. And, ECF No. 52, page 8, ¶ 8.

> "… the City argues on appeal that McGary was not discriminated against "by reason of" his "disability," but rather because of his "financial inability" to pay someone to clean his yard for him. … McGary does not allege that he was unable to afford to hire someone else to clean his yard. Rather, McGary sought more time to comply with the nuisance abatement program as a result of his disabling condition, which necessitated his hospitalization for at least a part of the City's allotted compliance period. We hold that McGary adequately alleged that the City discriminated against him "by reason of" his disability."

And, Id., 386 F. 3d 1259 (9th Cir. 2004) at 1268-1269 (emphasis supplied):

> "The City argues, in the alternative, that we should affirm the district court's decision because McGary failed to allege that he was "excluded from participation in" or "denied the benefits of" the nuisance abatement program under Title II. The City insists that McGary was actually "included" in—rather than "excluded from"— its nuisance abatement program, and it contends that the ADA does not require reasonable modification of nuisance abatement activities, since the enforcement of a municipal ordinance is not a cognizable "benefit" under the ADA.
>
> In making these arguments, the City mistakenly assumes that since McGary's compliance with the nuisance abatement ordinance was compelled, rather than voluntary, the City was under no obligation to accommodate his disability. In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998), the Supreme Court rejected the petitioners' contention that the phrase "benefits of the services, programs, or activities of a public entity" under Title II of the ADA does not include state prisons because "state prisons do not provide prisoners with 'benefits' of 'programs, services, or activities' as those terms are ordinarily understood." *Id.* at 210, 118 S.Ct. 1952. The Court held that prison-based programs, services, and activities fall within the purview of the ADA's reasonable modifications requirement, even though "participation" in such programs, services, and activities may be "mandatory." *Id.* at 211, 118 S.Ct. 1952; *see also* *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir.2001) (recognizing that "incarceration itself is hardly a 'program' or 'activity'" under the ADA, but that "mental health services and other activities or services undertaken by law enforcement and ... correctional facilities" come within the meaning of the ADA); *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir.1998) (holding that transportation of an arrestee to the police station is a "service" under the ADA). We have extended the Supreme Court's holding in *Yeskey* to other

mandatory activities, such as parole hearings, *see* Thompson, 295 F.3d at 897-99, and pre-trial detentions, *see Lee,* 290 F.3d at 691.

We see no reason to distinguish between municipal code enforcement and the other mandatory activities we have found to fall within the purview of the ADA. It is axiomatic that "the ADA must be construed broadly in order to effectively implement the ADA's fundamental purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *See* *Barden v. City of Sacramento,* 292 F.3d 1073, 1077 (9th Cir.2002) (quotation marks and alteration omitted), *cert. denied,* 539 U.S. 958, 123 S.Ct. 2639, 156 L.Ed.2d 656 (2003). Our case law interpreting the ADA strongly counsels against carving out "'spheres in which public entities may discriminate on the basis of an individual's disability.'" *Thompson,* 295 F.3d at 899 (quoting *BAART,* 179 F.3d at 731). In fact, we have already recognized that local land use laws, such as zoning, fall squarely within the type of public activities covered by Title II of the ADA. *See BAART,* 179 F.3d at 730- 732; *see also* *Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 44 (2d Cir.1997) (holding that the ADA encompasses zoning decisions because zoning is "a normal function of a governmental entity"), *overruled on other grounds by* *Zervos v. Verizon New York, Inc.,* 252 F.3d 163, 171 n. 7 (2d Cir.2001).

The regulations interpreting the ADA support our conclusion that compliance with municipal code enforcement can constitute a benefit of the services, programs, or activities of a public entity under Title II. The regulations specify that the statutory term "benefit" under the ADA includes the "provision of services, financial aid or disposition (i.e., treatment, handling, decision, sentencing, confinement, or prescription of conduct)." 28 C.F.R. § 42.540(j). The Department of Justice's Technical Assistance Manual, which interprets its regulations, uses municipal zoning as an example of a public entity's obligation to modify its policies, practices, and procedures to avoid discrimination. The Americans with Disabilities Act: Title II Technical Assistance Manual § II-3.6100, illus. 1 (1993) (TA Manual). Moreover, the Department of Justice's commentary on the ADA establishes that "[t]he general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities." 28 C.F.R. Pt. 35, App. A, Subpart B.

> We hold that McGary adequately stated a claim under Title II of the ADA when he alleged that the City failed to reasonably accommodate his disability by denying him additional time to participate in the nuisance abatement program without incurring charges. The "benefit" McGary sought in this case was to be allowed sufficient time to comply with the City's code enforcement activities in a manner consistent with his disability. *Cf. Gorman,* 152 F.3d at 913 ("The 'benefit' Gorman sought in this case was to be handled and transported in a safe and appropriate manner consistent with his disability.")."

I adequately stated a claim under Title II of the ADA when I alleged that Appellees failed to reasonably accommodate my disability by denying me a rent-paying roommate in the 'Limited Equity Home Ownership Program', a "benefit" that would have been consistent with my disability.

Thus, it was not proper for the District Court to dismiss my ADA claim.

<u>Issue/Argument Number 4</u> - Sections 1983 and 1985(3) Causes of Action

My Sections 1983 claim and 1985(3) claim are about the nature, methods, practices, communications, and actions Appellees employed in their process of refusing to make my requested "may be necessary" and "reasonable" disability related policy accommodation and their exclusion of me from participation in or denying me the benefits of their services, programs, or activities, and subjecting me to discrimination solely by reason of my disability.

Regarding my Civil Rights Act Section 1983 Cause of Action, I draw from my FAC:

"1. the Defendants acting under color of state law did interfere with his exercise of and then did refuse Plaintiff Rice a reasonable and necessary

disability related policy accommodation which deprived him of his rights under the FHA, and 2. the Defendants, acting under color of state law and by reasons of the Plaintiff's disability, did prevent him from participating in or did exclude him from the services, programs, or activities of the Agency which deprived him of his rights under the ADA. In both the FHA and the ADA cases, the deprivation of the Plaintiff's rights was the deprivation of rights secured by laws of the United States." (ECF No. 49, page 34, lines 6-14)

And,

Regarding my Civil Rights Act Section 1985 Cause of Action, I draw from my

OPPOSITION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

AND PROPOSED ORDER:

"Plaintiff Rice notes here, to the Court, that in his First Amended Complaint he err'd in identifying § 1985 part (2) as the applicable part of § 1985 when, in fact, he intended to indicate part (3). He now identifies § 1985 part (3) as the applicable part of his § 1985 claim, and he shall later request from the Court a 'Leave to Amend' to correct this error." (ECF No. 52, page 38, lines 12-15), and

"… the individually named Defendants did conspire for the purpose of depriving, either directly or indirectly, Plaintiff of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of the City and County of San Francisco and the State of California from giving or securing to him the equal protection of the laws under the FHA and the ADA; which did injure him and his property and did deprive him of his rights or privileges as a citizen of the United States and, thus, constituted a cause of action pursuant to § 1985.(3) of the Civil Rights Act." (ECF No. 52, page 38, lines 18-24)

In Argument III of Appellees' Answering Brief, they state:

"Because Rice fails to plausibly allege a constitutional or statutory violation, his Sections 1983 and 1985 claims fail as well. … In the absence of an alleged violation, he is not entitled to any remedy under Section 1983 or Section 1985. As such, his claims under these statutes fail as a matter of law and were properly dismissed with prejudice by the district court." (9th Cir. ECF No. 8, at 13 and 14)

Appellees claim is incorrect as I have shown in clear, appropriate, reasonable, logical, and factual arguments that my FHA and my ADA claims did plausibly allege a statutory violation and, thus, my Sections 1983 and 1985 claims did not and do not fail. And, because it is a fact that there is an existence of an alleged violation, I am entitled to remedy under Section 1983 and Section 1985.

Thus, it was not proper for the District Court to dismiss my Civil Rights Act Sections 1983 and 1985(3) Causes of Action.

Regarding my other claims from my Original Complaint not in my FAC but which I appeal, they should be re-instated as shown in *McGary.*

McGary, 386 F. 3d 1259 (9th Cir. 2004) at 1271:

"*McGary also alleges that the City violated Oregon* Revised Statutes § 659A.145, prohibiting discrimination on the basis of disability in the provision of housing, and Portland City Code 3.1000.005, prohibiting discrimination on the basis of disability in the provision of services. The district court assumed that these state and local laws should be interpreted in the same manner as their federal counterparts, and dismissed these claims based on its reasoning under the FHAA and ADA claims. Because the district court's reasoning with regard to both the FHAA and ADA claims was flawed for the reasons discussed above, we also reverse its dismissal of McGary's state and local claims."

Issue/Argument Number 5 - Under Protest and Great Duress

In Appellees' Answering Brief, they claim:

"Rice ultimately voluntarily sold his unit in early 2018." (9th Cir. ECF No. 8, page 8, second paragraph)

Clearly, I did not "voluntarily" sell my home. I made it very clear to them that I was selling my home "under protest" and great duress, as shown in my Issue/ Argument 3 - ADA Claim above at page 11.

Issue/Argument Number 6 - Rule 12(b)(6) Motion

In my Reply, I have demonstrated that my FAC:

1. Contains a cognizable legal theory and sufficient facts alleged under a cognizable legal theory.

2. Contains provable facts that support my claim that entitles me to relief.

3. Contains allegations that are not conclusory or vague. And,

4. Contains factual allegations that allege a plausible legal claim.

For the foregoing reasons, Appellees' Rule 12(b)(6) motion fails and it was not proper for the District Court to dismiss my claims with prejudice and without leave to amend, nor should its judgment be affirmed in its entirety or partially.

Closing Comment

I do not have a law school education. By necessity, I can only strive and do my utmost to provide an accurate and absolutely truthful telling of the facts, what the issues are in my view and what I believe, and the most clear / appropriate / reasonable / logical / factual arguments and application of the law that I can.

Conclusion

In my Opening Brief and in my Reply Brief, I have provided clear and convincing arguments that show the District Court was in error to dismiss my FAC with prejudice and without leave to amend.

Prayer

For the foregoing reasons, I humbly and respectfully request that the U.S. Court of Appeals for the Ninth Circuit reverse, remand, overturn, or overrule the District Court's Order Granting Motion to Dismiss my FAC with prejudice and without leave to amend and Judgement - on the grounds of judicial errors and/or other reasons as this Court may determine; and make a ruling on my other claims from my Original Complaint not in my FAC; and on the Proper Service and Failure to Appear Issue [Fed. R. Civ. P. 55(b)(2)]; and/or provide me a leave to amend - in the interests of justice and to provide me fair and equal protection under the laws.

Sincerely and Respectfully,

Allison Barton Rice
Name

/s/ Allison Barton Rice
Signature

13809 Research Blvd, Suite 500 PMB 90978
Austin, TX 78750
Address

August 9, 2020
Date