UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE,	:	
Plaintiff,	:	04-CIV-6740 (SHS)(**ECF**)
-against-	:	
HUNTER COLLEGE OF THE CITY UNIVERSITY OF NEW YORK; JENNIFER RAAB; EIJA AYRAVAINEN,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

ELIOT SPITZER
Attorney General of the State of New York
Attorney for Defendants
120 Broadway, 24th Floor
New York, New York 10271
Tel. No.: 212-416-6378

KATHRYN C. SPANN
Assistant Attorney General
of Counsel

Dated: New York, New York
December 7, 2004

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Hunter College of the City University of New York ("Hunter College"), Jennifer Raab, and Eija Ayravainen ("Defendants") submit this reply memorandum of law in further support of defendants' motion to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

ARGUMENT

Point I

Congress Failed to Abrogate the State's The Eleventh Amendment Under § 5 of the Fourteenth Amendment for Claims Alleged Pursuant to Title II of the ADA, the FHA and § 504 of the Rehab Act

Plaintiff's opposition papers clarify that she seeks damages only under the Rehab Act, and not the ADA or FHA. Opp. Mem. at 1. However, with respect to claims seeking injunctive relief pursuant to the FHA and Title II of the ADA against CUNY and Hunter College, such claims also are barred by the Eleventh Amendment. See Def. Mem. at 5-13.[1] Plaintiff apparently concedes that defendants' analysis of this issue with regard to her ADA and FHA claim is correct. To the extent that plaintiff may seek prospective injunctive relief against the individual defendants sued in their official capacities, the Eleventh Amendment is not a bar.

Plaintiff also apparently concedes that defendants' application of Tennessee v. Lane analysis to the Rehab Act is correct, insofar as the Rehab Act relies upon a purported abrogation of Eleventh Amendment immunity pursuant to § 5 of the Fourteenth Amendment. However, plaintiff asserts a

---

[1] To the extent that plaintiff's claims for prospective declaratory relief, see Am. Compl. wherefore clause (a), may become moot, any remaining claim for retroactive declaratory relief must also be dismissed under the Eleventh Amendment. See Ward v. Thomas, 207 F.3d 114, 119 (2d Cir. 2000) (where there is no claimed continuing violation of federal law, declaratory relief would only serve as an "end run" around Eleventh Amendment immunity and is therefore impermissible).

waiver of Eleventh Amendment immunity under the Spending Clause. This question was not part of defendants' motion, and plaintiff has raised it for the first time in her opposition papers. This issue presents significant legal and possible factual issues which need not be addressed at this juncture, as it is not included within defendants' grounds for this motion to dismiss. Defendants respectfully submit that independent grounds exist for dismissal of plaintiff's Rehab Act claim, under Fed. R. Civ. P. 12(b)(6). However, in the event that plaintiff's Rehab Act claim is not dismissed for failure to state a claim, defendants reserve the right to move under Fed. R. Civ. P. 12(c) or 56, to present this issue of subject matter jurisdiction to the Court for resolution at a later stage of these proceedings, when this issue can be presented with the benefit of fully developed briefing.

Point II

Plaintiff Lacks Standing to Sue Under the Fair Housing Act

Plaintiff claims standing under the FHA, arguing that "in addition to barring discrimination in the sale or rental of dwellings, the statute specifically and repeatedly makes it unlawful to 'otherwise make unavailable or deny' the right to use property because of a handicap." Opp. Mem. at 11, citing 42 U.S.C. § 3604(f)(1). This construction ignores the plain language of the very statute plaintiff cites, which bars discrimination "in the sale or rental [of], or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap . . . ." 42 U.S.C. § 3604(f)(1) (emphasis added). If one is not a "buyer" or "renter" as defined in the Act, the "otherwise make unavailable" language is inapplicable. The Act defines "to rent" as "to lease, to sublease, to let or otherwise to grant for a consideration the right to occupy premises not owned by the occupant." 42

U.S.C. § 3602(e) (emphasis added).

Plaintiff argues that the "otherwise make available" language provides a right of action for one who is not a "buyer" or "renter" to invoke the FHA. She cites an array of cases which she contends support this proposition. The cases, however, do not serve her argument. Woods v. Foster, 884 F. Supp. 1169 (D. Ill. 1995), is from another jurisdiction and its reasoning does not appear to have been adopted elsewhere in the ten years since its issuance. In any event, Woods is distinguishable as the defendant program in essence received the "rental" sum from a third party pursuant to a contract for the housing of these residents. The remaining cases cited by plaintiff also entail payment of consideration, and are thus inapposite because plaintiff has not tendered any consideration. See City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995) (Oxford House "had leased and was operating a home"); Villegas v. Sandy Farms, Inc., 929 F. Supp. 1324, 1329 (D. Or. 1996) ("the payment of $1.50 per day by the occupants of the cabins to defendant under the terms of the rental agreement falls within the broad definition of rent under Oregon law"); Baxter v. Belleville, 720 F. Supp. 720, 735 (D. Ill. 1989) ("[FHA plaintiff] testified that he has suffered economic injury from the loss of income from tenants due to his inability to go forward with his plans" to remodel a former office building he had purchased into a residence for occupancy by persons with AIDS); United v. Hughes Mem. Home, 396 F. Supp. 544, 547 (D. Va. 1975) ("parents and guardians are requested to pay to the Home a monthly sum of money to defray some of the cost of the child's care, and most in fact make such payments.").[2] N.A.A.C.P. v. American Family Mut.

[2] See also Turning Point v. City of Caldwell, 74 F.3d 941, 944 (9th Cir. 1996) (not specifically addressing issue of consideration, but noting damages awarded by trial court to the plaintiff operators of homeless shelter, calculated by lost program reimbursement for meals because of restrictions on number of residents).

Ins. Co., 978 F.2d 287, 297-301 (7th Cir. 1992), which found a right of action against a provider of property insurance, still hinged on the provision of such insurance to one who sought to buy a home.

In an effort to bring herself within the protection of the statute, plaintiff contends that she provided consideration by not opting for the stipend offered by the College as an alternative to dormitory housing, or alternatively by signing the Housing Contract, or by "having foregone educational opportunities elsewhere." Plaintiff, however, offers no support for her theory on this aspect of her prima facie case. Under New York law, a contract unsupported by consideration is generally invalid. If the promisor loses nothing, and the promisee acquires nothing by an arrangement, then there is no valid consideration. See Manufacturer's Hanover Overseas Capital Corp. v. Southwire Co., 589 F. Supp. 214, 219 (S.D.N.Y. 1984). Here, plaintiff has lost nothing; rather, she (1) chose to accept the scholarship offered by the College, and (2) made a choice among possible grant options within that scholarship. One grant entailed $1,000 and no Housing Contract, while the other option entailed dormitory housing with its attendant regulations as embodied in the Housing Contract. Plaintiff's FHA claim requires dismissal.

Point III

Plaintiff Fails to State a Claim

A. Plaintiff Is Not "Otherwise Qualified" for Residence in the Dormitory

Plaintiff argues that there are unspecified issues of fact[3] as to whether she is "otherwise qualified" for residence in the Hunter College dormitory. Opp. Mem. at 16. However, as set forth

[3] If by this she makes reference to the self-evident fact that "dormitory residence poses inherent stressors, which a student must be emotionally able to withstand," Def. Mem. at 20, see Opp. Mem. at 20, the Second Circuit evidently does not consider such truisms to require extraneous proof, as exemplified by its decision in Doe.

in defendants' moving brief, the Second Circuit has affirmed a 12(b)(6) dismissal on a similar factual record. Doe v. New York University, 666 F.2d 761, 774 (2d Cir. 1981). Plaintiff attempts to distinguish Doe v. NYU, arguing that the NYU plaintiff's deceit and assaultive behavior were the determinative factors in the Second Circuit's decision. Review of that decision, however, belies this assertion. The issue is not whether the instant plaintiff is equally or less ill than the medical student Doe. The issue is whether the particular manifestations by the instant plaintiff render her "otherwise unqualified" for the program at issue – here, dormitory residence. In Doe v. NYU, the question was whether the particular manifestations of that plaintiff's illness rendered her "otherwise unqualified" for participation in medical school. See Doe v. NYU, 666 F.2d at 777. The enquiry is plainly context-dependent. Particularly as plaintiff's papers fail to identify any allegations fulfilling her burden to demonstrate that she is otherwise qualified, her claim requires dismissal.

Plaintiff also argues that the Hunter College Housing Contract "bar[s] people whose depression may result in a suicide attempt." Opp. Mem. at 15. This statement is flatly incorrect; the Housing Contract bars only individuals who have attempted suicide, regardless of whether they suffer from depression or another disability or no disability. A suicide attempt may be in response to a situation, such as an unsuccessful relationship or death of a loved one, or may occur in connection with alcohol or substance use.

Plaintiff argues that the College's conclusion that she is not "otherwise qualified" to live in the dormitory because she is unable to live independently in a dormitory setting "itself discriminates on the basis of disability." Opp. Mem. at 17. This assertion improperly conflates two distinct aspects of the governing standard. A plaintiff may plead that she is disabled because she is unable to live independently, and thus establish that she is "substantially limited in a major life activity,"

thus bringing her within the ambit of the disability discrimination statutes. But if that disability itself renders her not "otherwise qualified" for the program or service at issue, she may not prevail. See generally Doe v. NYU; Shannon v. New York City Transit Auth., 332 F.3d 95, 100 (2d Cir. 2003) (affirming summary judgment in favor of Transit Authority where, assuming plaintiff's color-blindness was a disability because he was allegedly regarded as being substantially limited in the major life activity of working, the plaintiff was not "otherwise qualified" to be a bus driver, as bus drivers are required to be able to distinguish the colors of traffic signals); Siederbaum v. City of New York, 309 F. Supp. 2d 618, 630 (S.D.N.Y. 2004) (plaintiff who suffered from bipolar disorder was not otherwise qualified to drive buses because when untreated, or if a person fails to follow the prescribed regimen of medication, the disorder can result in poor judgment, distractibility, and reckless behavior; noting "substantial and reasonable interest [of the Transit Authority] in avoiding the liability that would follow should any of the risks associated with bipolar disorder actually materialize and cause an accident"). Indeed, this is not a case where plaintiff has sought a reasonable accommodation that would enable her to transcend those aspects of her disability which render her "otherwise unqualified" for dormitory residence.

Plaintiff asserts that this Court should disregard the Second Circuit's holding in Doe v. NYU, 666 F.2d 761 (2d Cir. 1981), and should look instead to Cason v. Rochester Housing Auth, 748 F. Supp. 1002 (W.D.N.Y. 1990), Niederhauser v. Independence Sq. Housing, (N.D. Cal. 1998), and Jainniney v. Maximum Indep. Living, (N.D. Ohio Feb. 9, 2001). These cases, however, highlight the flaw in plaintiff's argument. In Cason, the court cited legislative history indicating that "in the case of a person with a mental illness . . . there must be objective evidence from the person's prior behavior that the person has committed overt acts which caused harm or which directly threatened

harm. . . . The landlord's determination must not rest on 'unsubstantiated inferences.'" 748 F. Supp. at 1007-08. Here, the determination rests on overt suicidal acts, see Am. Compl. ¶ 10, which surely fall squarely within the exception identified in the legislative history. Further, in Neiderhauser and Jainniney, the plaintiffs sought to live in the subject apartments with outside assistive services, such as assistants or caregivers. That is not the subject of Ms. Doe's suit.

B. The Suicide Provision of the Hunter College Housing Contract Does Not Discriminate on the Basis of Disability

Plaintiff argues that the College's policy of requiring a one-semester period out of the dormitory for a student who attempts suicide is intentionally discriminatory on the basis of disability "because it requires that a person who attempts suicide be evaluated by a school psychologist or his or her designated counselor prior to returning to the residence hall." Opp. Mem. at 22. Were that the case, requirements that applicants for any program or job undergo any kind of physical or psychological examination would inevitably be stricken as intentionally discriminatory. Yet the courts have not done so, because such evaluations are a legitimate means for an employer or program sponsor or, here, dormitory administrator, to determine that an applicant is, in fact, "otherwise qualified" for the program or job at issue. See Teahan v. Metro-North Commuter R. Co., 951 F.2d 511, 518 and 520 (2d Cir. 1991) ("nothing in the language, history or precedents interpreting § 504 suggest that this provision is designed to insulate handicapped individuals from the actual impact of their disabilities;" noting that evaluation of whether plaintiff was "otherwise qualified" would include factors such as plaintiff's likelihood of substance abuse relapse and future absenteeism, even if he was not currently abusing), cert. denied, 506 U.S. 815 (1992).

Plaintiff also relies on an array of cases from other jurisdictions that do not support her

position but rather reinforce the conclusion that the College's suicide policy is not administered in a discriminatory manner. Humphrey v. Mem. Hosps. Assn., 239 F.3d 1128 (9th Cir. 2001), also recognizes that a plaintiff's mental illness may sufficiently impair her job performance to render her not "otherwise qualified" for the position at issue. LaPorta v. Wal-Mart Stores, Inc., 163 F. Supp. 2d 758 (W.D. Mich. 2001), highlights the difference between an individual who is otherwise qualified but requests a reasonable accommodation, and one like plaintiff who is not otherwise qualified and whose request is for waiver of the policy rather than a modification to facilitate her efforts at adequate performance. A plaintiff always bears the burden of demonstrating that she is able to perform the essential functions of the position, though a reasonable accommodation may be necessary. Here, plaintiff has not requested additional psychological support from the school, or monitoring services from the school to ensure that she is taking her medications, which may or may not enable her to live independently; that would more closely resemble a "reasonable accommodation" within the meaning of the law. Rather, plaintiff simply asks the school to disregard its policy as applied to her. She offers no support for her assertion that this is a "reasonable accommodation" within the meaning of the law.

Plaintiff also argues that the College's suicide policy has a disparate impact on people with mental illnesses. Plaintiff fails to state a claim under a disparate impact theory, because she has not alleged that this policy disproportionately affects dormitory residents who have a mental illness. See Hack v. President & Fellows of Yale College, 237 F.3d 81, 90-91 (2d Cir. 2000) (finding plaintiffs failed to state a disparate impact claim under the FHA because they did not allege that the policy at issue actually or predictably results in an under-representation of orthodox Jews in campus housing; plaintiff must allege "'a causal connection between [a] facially neutral policy . . . and the resultant

proportion of minority' group members in the population" governed by the policy); see also Tsombanidis v. West Haven Fire Dept., 352 F.3d 565, 576-77 (2d Cir. 2003) ("there must be some [statistical or other] analytical method to determine disproportionate impact"). Ultimately, she cannot avoid the Second Circuit's holdings that there is no cause of action for discrimination based on the severity of an individual's disability, i.e., between mentally individuals who are not so ill as to attempt suicide and those who do. See Def. Mem. at 21.

CONCLUSION

For the foregoing reasons, plaintiff's amended complaint requires dismissal.

Date: New York, New York
December 7, 2004

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York
Attorney for Defendants
By:

/s/
KATHRYN C. SPANN (KS 8143)
(212) 416-6378
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271

KATHRYN C. SPANN
Assistant Attorney General
of Counsel