

**BEFORE THE DELAWARE  
HUMAN AND CIVIL RIGHTS COMMISSION**

STATE DIVISION OF HUMAN AND	)	
CIVIL RIGHTS, <i>ex rel.</i> Almalik KNIGHT	)	
Complainant,	)	
	)	
v.	)	Case No. NC-H-2381-21
	)	
HOPE RECOVERY CENTER LLC,	)	
d/b/a CHANCE OF DELAWARE	)	
HOPE HOUSE <i>et al.</i>	)	
Respondents.	)	

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**MEMORANDUM DECISION AND ORDER**

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HEARING PANEL:

Gail Tarlecki, *Commission Chair and Panel Chair*,  
Walter Smith, Jr., *Commissioner and Panel Member*, and  
Marty Rendon, *Commissioner and Panel Member*.

Daniel C. Mulveny, Deputy Attorney General,  
*Counsel for the Commission and the Panel*.

APPEARANCES:

Nicole M. Mozee, Esq., DELAWARE DEPARTMENT OF JUSTICE,  
*Counsel for Complainant*.

Ernest Osei-Owusu, *pro se*,  
*for Respondents*.

## INTRODUCTION

Pursuant to due notice of time and place of meeting served on all parties in interest, the above-identified Panel of the Delaware Human and Civil Rights Commission (the “DHCRC” or “Commission”) convened a hearing by videoconference beginning on January 11, 2023 to determine whether a violation of Delaware’s Fair Housing Act (the “DFHA”, Title 6, Chapter 46 of the *Delaware Code*) occurred. Immediately after the hearing concluded, the Panel conducted its deliberations.

## BACKGROUND

This case originated when Ms. Almalik (“Angel”) Knight<sup>1</sup> filed a complaint with the State Division of Human and Civil Rights (the “Division”) pursuant to DFHA § 4610. As will be discussed below in more detail, Ms. Knight alleged that Respondent Hope Recovery Center LLC, d/b/a Chance of Delaware Hope House and Mr. Ernest Osei-Owusu (collectively “Respondents”) discriminated against her based on her sex, gender identity, and mental disability.

After receiving Ms. Knight’s complaint, the Division conducted an investigation into the alleged discriminatory housing practices. As required by

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<sup>1</sup> The Panel was informed that Ms. Knight died after she filed her complaint due to circumstances unknown. Neither party claimed or suggested that her death was connected in any way to the events of this case and, while tragic, the Panel did not take into consideration Ms. Knight’s death in making this Decision.

DFHA § 4610(b)(5), the Division prepared a final investigatory report. The Division determined that reasonable cause existed to believe that a discriminatory housing practice occurred and issued a Charge on behalf of Ms. Knight for further proceedings under DFHA § 4612. In turn, the Commission held a hearing where the Division prosecuted its Charge against Respondents.

### **SUMMARY OF THE ALLEGATIONS**

In brief summary, Ms. Knight’s underlying complaint and the resulting Division’s Charge both allege that Respondents discriminated against Ms. Knight due to her sex, gender identity, and mental disability. Ms. Knight was intersex<sup>2</sup> and identified as female. The complaint alleges that Mr. Osei-Owusu operated Chance of Delaware that provided group housing where men live with other men and women live with other women.

In August 2020, Ms. Knight moved into a Chance of Delaware home at 820 Maryland Avenue, Wilmington, Delaware with other female tenants (the “female residence”). At the time, Ms. Knight alleges that she informed Mr. Osei-Owusu of her concerns about her safety in connection with her sex (female), gender identity, and mental disability and that she wanted to be sure that there would be no

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<sup>2</sup> The Panel takes notice that people who are intersex have reproductive or sexual anatomy that doesn’t fit into an exclusively male or female (binary) sex classification. *See* <https://my.clevelandclinic.org/health/articles/16324-intersex> (visited Feb. 21, 2023).

problems with her and the other tenants.

Ms. Knight's underlying complaint further alleges that almost immediately the other female tenants began harassing her, spying on her, and spreading misleading information about her gender identity. Ms. Knight alleges that she complained to Mr. Osei-Owusu that she felt unsafe and bullied. Mr. Osei-Owusu said the only other option was to move to Chance of Delaware's other property located at 400 7th Avenue, Wilmington, Delaware which was all-male housing (the "male residence"). Mr. Osei-Owusu said this would be temporary. Ms. Knight alleges that the proposed move to the male residence made her uncomfortable and was puzzling because of her sex and gender identity—she felt discriminated against based on her gender identity.

Ms. Knight further alleges that she was falsely assured that she would have private living quarters by Mr. Osei-Owusu. While she had separate living quarters, she was unable to lock her bedroom door and also had to share a bathroom with male tenants. The male tenants would open the bathroom door with her inside. She also alleges that she observed a male tenant fondling himself while watching her in the bathroom. After this incident, she felt unsafe. She called her caseworker and she was moved to a hotel. When she came to retrieve her personal belongings, Ms. Knight alleges that some items were missing, such as her wheelchair. The Division's Charge alleges that Ms. Knight requested an accommodation to be

moved to a separate floor so that she would not have had to share a bathroom with a male tenant but this request was denied by Respondents because Ms. Knight's housing was temporary.

In sum, Ms. Knight alleges in her complaint that after her multiple complaints were unaddressed she felt discriminated and harassed due to her sex (female), gender identity, and her disability (mental) by Respondents. The Division's Charge further asserts Respondents failed to accommodate Ms. Knight's reasonable request to move to a different floor and that Respondents failed to engage in an interactive process to provide a reasonable accommodation in violation of the DFHA.

## **SUMMARY OF THE EVIDENCE**

Both parties made brief opening statements in support of their respective cases.<sup>3</sup> Each party then presented their case.

### **Complainant's Case**

#### **1. Fawn Walker.**

Ms. Walker, duly sworn, testified in response to questions from the Division's counsel. Ms. Walker is an investigator with the Division. She has been an investigator for about one year. She explained that she investigates complaints

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<sup>3</sup> The Panel notes that opening statements are not evidence and are not summarized here. They are, however, part of the official record.

received by the Division.

Ms. Walker explained that she was assigned to investigate Ms. Knight's complaint. Ms. Walker was shown the Determination<sup>4</sup> and said that she wrote it. She explained that she wrote in the Determination that she found reasonable cause to believe Ms. Knight was discriminated against based on her sex, female gender identity, and her mental disability in violation of the DFHA. Following the Determination, a Charge was issued by the Division alleging that there was reasonable cause to believe that Respondents discriminated against Ms. Knight. Ms. Walker explained that the Charge caused the Panel hearing under the DFHA.

For the investigation, Ms. Walker contacted Ms. Knight to verify the allegations in the complaint that she was discriminated against by Respondents. Ms. Walker explained that Ms. Knight was intersex—was born with both female and male parts. Ms. Walker then prepared a narrative of events for Ms. Knight's review.

Ms. Walker also contacted Mr. Osei-Owusu to get his version of the events. Mr. Osei-Owusu told Ms. Walker that Respondents did not discriminate against Ms. Knight. Mr. Osei-Owusu offered to send in evidence regarding Ms. Knight's room. He also said that he moved Ms. Knight because she wanted to be moved into

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<sup>4</sup> Marked as Complainant's Exhibit 1.

the male residence.

Ms. Walker testified that Respondents operate two houses: the female residence at 820 Maryland Avenue and the male residence at 400 7th Avenue. Mr. Osei-Owusu initially said that there were six tenants in the male residence, but his interrogatory responses only identified Ms. Knight and Mr. Johnson as residents of the male housing. Ms. Walker explained that residents are referred to Mr. Osei-Owusu by social workers. There's an application for housing.<sup>5</sup> Ms. Walker testified that the application does not state on it that Chance of Delaware is an equal opportunity housing provider. Nor does the application state that Chance of Delaware follows state or federal fair housing laws.

As part of the Division's investigation, Mr. Osei-Owusu sent Ms. Walker a copy of the "House Rules" that all residents needed to follow.<sup>6</sup> Ms. Walker testified that the House Rules did not state that Chance of Delaware was an equal opportunity housing provider. Nor did the House Rules identify state or federal fair housing laws.

Ms. Walker further explained the events of Ms. Knight's housing with Respondents. Ms. Knight had a social worker at Connections. She was referred to Respondents by the social worker for temporary housing until permanent housing

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<sup>5</sup> A copy of an application was marked as Complainant's Exhibit 2.

<sup>6</sup> A copy was marked as Complainant's Exhibit 3.

could be obtained. Ms. Knight was accepted by Chance of Delaware as a resident at the female residence on Maryland Avenue on May 25, 2020.<sup>7</sup> Ms. Knight moved into the female residence in August 2020.

Almost immediately, Ms. Knight began having problems with the other female residents getting into her business. They were spreading rumors about her sex and sexual identity. Ms. Knight was getting into arguments with the other residents. Mr. Osei-Owusu explained that he went to the female residence several times and had house meetings to see if things could be worked out. After the attempts to resolve the problems failed, it was suggested to move Ms. Knight to the male residence on 7th Avenue. Ms. Walker said that Mr. Osei-Owusu made the suggestion to move Ms. Knight to the male residence. Moving a female to the male residence never happened before. The move was in early May 2021. Mr. Osei-Owusu helped Ms. Knight move.

Ms. Walker testified that Ms. Knight was scared and nervous about the move to the male residence. Ms. Knight explained to Mr. Osei-Owusu that she was a victim of domestic violence and sexual assault. Mr. Osei-Owusu assured her that she would have her own private quarters and that she would not have to share those quarters with a male resident. At the male residence, Ms. Knight did have her own

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<sup>7</sup> A copy of her acceptance letter was marked as Complainant's Exhibit 4.



private bedroom but she shared a common area and a bathroom with a male resident—Mr. Johnson. After being moved into the male residence, Ms. Knight complained that she was being watched constantly. Mr. Johnson was watching her and she felt unsafe and uncomfortable. Ms. Walker explained that on two separate occasions Ms. Knight observed Mr. Johnson with his pants down and masturbating. There was supposed to be a lock on the bathroom door, but Ms. Knight could not always get it to lock.

After the second incident with Mr. Johnson, Ms. Knight called and complained to Mr. Osei-Owusu that she could not stay there anymore. She called her social worker and was moved to a hotel. Ms. Walker explained that there were a series of text messages from Ms. Knight's cell phone about her stay with Respondents.<sup>8</sup> In one text exchange, Ms. Knight was explaining that she was uncomfortable being moved into the male residence. She also complained about Mr. Johnson watching her and not getting any resolution from Respondents. In response, Mr. Osei-Owusu said that Mr. Johnson was harmless. In other text messages, Ms. Knight was complaining to her caseworker who said that she should contact Mr. Osei-Owusu. In another text exchange, Ms. Knight complained about her money being stolen. Mr. Osei-Owusu responded that Chance of Delaware was

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<sup>8</sup> The text messages were marked as Complainant's Exhibit 5.

not the best place for her and he was going to talk to her social worker. Mr. Osei-Owusu did not, however, respond to Ms. Knight's complaints about harassment and such.

Overall, Ms. Knight lived in the male residence about a month. Ms. Walker explained that Ms. Knight called the police and complained about a male tenant watching her and that the police gave the male tenant a warning. Ms. Knight then contacted her social worker and they immediately got her into a hotel.

As part of her investigation, Ms. Walker interviewed Mr. Osei-Owusu. He said that Ms. Knight's allegations were untrue. Ms. Walker explained that Mr. Osei-Owusu responded to interrogatories that gave the places where Ms. Knight was living with Respondents and also identified the co-tenants.<sup>9</sup> Ms. Walker explained that Mr. Osei-Owusu stated that when Ms. Knight was placed in the female residence, she had two female co-tenants. At that time, Mr. Osei-Owusu told the co-tenants that Ms. Knight would be moving in and that "she says she's female."

In the interrogatory discussing Ms. Knight's complaints about Mr. Johnson at the male residence, Mr. Osei-Owusu said that he talked to Mr. Johnson who denied the incident.

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<sup>9</sup> The response to interrogatories was marked as Complainant's Exhibit 6.

In summary, Ms. Walker explained that Ms. Knight was discriminated against when she was denied a necessary accommodation because she could not live with male tenants. Ms. Knight was placed with male tenants after her placement in the female residence erupted. Mr. Osei-Owusu did not move out the other female tenants; he said they had been there longer. Mr. Osei-Owusu misused the information that Ms. Knight was intersex by telling the female co-tenants that Ms. Knight was a female; this put Ms. Knight in a dangerous situation.

On cross-examination by Mr. Osei-Owusu, Ms. Walker admitted that she had not seen the locks on the doors at the male residence unit that Ms. Knight was in. Regarding Ms. Knight's allegations that Mr. Johnson was masturbating, Ms. Walker said that her knowledge came from Ms. Knight and what was learned at the fact finding conference.

Ms. Walker said that she did not have any evidence that Mr. Osei-Owusu forced Ms. Knight out of the female residence on Maryland Avenue and into the male residence. Ms. Walker explained that at the fact finding conference Mr. Osei-Owusu said this was the only choice available and that he used his own truck to move Ms. Knight.

In response to Panel questioning, Ms. Walker explained that the discrimination alleged in the case was based on Ms. Knight's request for a reasonable accommodation to not live in a group house or to not be placed in the

male residence. Ms. Walker further explained that Respondents failed to address the hostile environment that Ms. Knight was living in. Ms. Walker said that in the circumstances of the case, Ms. Knight was living in the male residence and Ms. Knight was made to feel that was the only option available to her. When asked about the social worker's role in the events, Ms. Walker said that she was never able to connect with the social worker during the investigation.

On re-direct by the Division's counsel, Ms. Walker said that Mr. Osei-Owusu was a housing provider; Connections (now Connexio) is not a housing provider. When asked what Mr. Osei-Owusu should have done, Ms. Walker said that he should have contacted Connections and explained the situation with Ms. Knight and told them that they need to find her other housing because the only other housing was the male residence as opposed to moving Ms. Knight into the male residence. Ms. Walker said that would have complied with federal and state fair housing laws.

In response to further Panel questioning, Ms. Walker said that she did not go on site to observe in person Ms. Knight's quarters in the male residence, and she did not check the bathroom door to see if the door lock worked. Ms. Walker also did not go to the female residence.

The Division then concluded its presentation of evidence.

## **Respondents' Case**

### **1. Mr. Osei-Owusu.**

Mr. Osei-Owusu, duly sworn, testified in support of Respondents' case. He explained that Ms. Knight moved into the Maryland Avenue (female residence) in May 2020. Mr. Osei-Owusu just provides housing. Connections does everything else. Ms. Knight was a female.

After Ms. Knight moved in, she initially developed friendships with her roommates, but then arguments broke out regarding Ms. Knight's sex. Mr. Osei-Owusu said that Ms. Knight would initially say to others that she was female but then tell everyone that she is intersex.

Mr. Osei-Owusu called Connections and told them that there were continuing arguments in the female residence about Ms. Knight. Ms. Terry at Connections decided that Ms. Knight needed to move. Ms. Knight agreed with the move. Mr. Osei-Owusu only had space for Ms. Knight in the male residence. Ms. Knight and Ms. Terry agreed with moving to the male residence as a temporary solution. Mr. Osei-Owusu used his truck and moved Ms. Knight to the male residence.

Mr. Osei-Owusu explained that the plan was that Ms. Knight would need to share a bathroom, but there was a deadbolt lock on the bathroom door. Mr. Osei-Owusu said that Ms. Walker was incorrect in believing that the deadbolt did not

work.

About one month after the move, arguments started between Ms. Knight and the other tenants. Ms. Knight claimed that everyone was spying on her. Mr. Osei-Owusu investigated and everyone denied it.

Mr. Osei-Owusu went to the male residence several times. He found Ms. Knight disoriented. Mr. Osei-Owusu stated that Ms. Knight had a history of using drugs. Mr. Osei-Owusu thought something was wrong with Ms. Knight. At this point, Mr. Osei-Owusu told Connections that Ms. Knight needed to be moved to a hotel.

Mr. Osei-Owusu said that he did not make the decision to move Ms. Knight. It was Connections. He only provides housing.

Regarding the text messages from Ms. Knight, Mr. Osei-Owusu said that he didn't immediately respond because he was waiting to hear from Connections. He didn't want to respond to something he didn't know about.

Mr. Osei-Owusu said that Ms. Knight would tell others "who she was" and he denied telling people about her sex and sexual identity.

In response to Panel questioning, Mr. Osei-Owusu denied making Ms. Knight move into the male residence and he said Connections made that decision. He explained that Connections asked him if there was another place and he told them that he had a place in the male residence that was a private unit. Connections

said that was ok.

Mr. Osei-Owusu explained that he created Chance of Delaware after being a discharge nurse and seeing a need for transitional housing to give people with mental health or other problems a second chance. He owns the properties and has not had any previous problems. Ms. Knight was the only one who complained.

Mr. Osei-Owusu said that Connections paid rent for Ms. Knight but then it switched for Ms. Knight to pay rent. She never did. She made excuses. It was a problem. Ms. Knight would fabricate discrimination charges if anyone pressed her to pay rent. Mr. Osei-Owusu let Ms. Knight stay while Connections was finding another place.

In response to further Panel questioning, Mr. Osei-Owusu explained that the female residence at 820 Maryland Avenue was four apartments; he put Ms. Knight in a second floor unit. There was a separate exit by the fire escape. Ms. Knight went around and told the other female tenants about her sex and sexual identity.

The male residence on 7th Avenue was three floors. He put Ms. Knight in a unit on the first floor. Mr. Johnson was also on the first floor because he was disabled and needed a first floor unit. Mr. Johnson can't lift his arms up. Ms. Knight was in a private unit on the first floor which was available. There were locks on the doors for Ms. Knight's privacy. There was a separate door to go outside. Mr. Osei-Owusu said that Ms. Knight agreed to being moved into the male

residence. Mr. Osei-Owusu explained that in the male residence, Ms. Knight would leave her private unit and go into common areas with the other men; she chose to go into the common areas. Mr. Osei-Owusu further explained that Mr. Johnson and Ms. Knight lived in separate quarters but shared a bathroom; there was a deadbolt lock on the bathroom door.

On cross-examination by the Division's counsel, Mr. Osei-Owusu explained that he was the founder of Chance of Delaware. There were two residences. He was the landlord/manager. He provided temporary housing that was usually a few months. The female residence at 820 Maryland Avenue had four units. Ms. Knight had a second-floor unit. There were two other occupants on the second floor. They had their own bedrooms but shared the bathroom and kitchen. The other female tenants had been in the residence longer. One still lives there. Tenants can stay longer than a few months; there's no rule to leave.

The male residence on 7th Avenue comprised three units, nine bedrooms total. There were three full bathrooms. Each unit had a bathroom. Ms. Knight was on the first floor.

Ms. Knight came to Chance of Delaware through Connections. She didn't complete the application, Connections did. Connections is now Connexio. They didn't provide housing, instead they connected Ms. Knight with him.

Mr. Osei-Owusu said that he did not review the DFHA. He did not attend



fair housing trainings.

Mr. Osei-Owusu said that Ms. Knight was intersex and identified as a woman. The only thing Mr. Osei-Owusu shared with the other female tenants was that Ms. Knight was a woman. Mr. Osei-Owusu always does that when a new tenant comes into the house—he would tell the other females that another female is coming into the house. Mr. Osei-Owusu did not share anything else about Ms. Knight with the other tenants.

After Ms. Knight moved into the female residence there were problems with the other tenants. Mr. Osei-Owusu said Connections decided to move Ms. Knight out. Mr. Osei-Owusu said that he only provides housing, Connections made the decision to move.

When Ms. Knight was moved into the male residence, she was placed in a separate unit with a shared bathroom. She had her own living area and her own kitchen—she was separate from everyone else except for the bathroom. Mr. Osei-Owusu said that Connections made the decision to move Ms. Knight into the male residence knowing that she would have a shared bathroom with a male resident. Mr. Osei-Owusu said that he did receive complaints from Ms. Knight—she called him. He had never previously placed a male tenant in the female residence or a female tenant in the male residence and has not done since Ms. Knight.

In response to Panel questioning, Mr. Osei-Owusu said that he could have

refused Connections' request to move Ms. Knight into the male residence. He had the option to say no, but in this case, Ms. Knight agreed to the move and Mr. Osei-Owusu wanted to honor that request. Ms. Knight was arguing with everyone in the female residence so they wanted to find her another place to live.

Mr. Osei-Owusu said that he offered to place Ms. Knight in the separate unit in the male residence. Connections and Ms. Knight agreed to the move. Mr. Osei-Owusu thought it would bring peace. It was only for one month. After one month, Connections moved Ms. Knight out.

Mr. Osei-Owusu explained that he did not have a formal contract with Connections. It was an arrangement. Chance of Delaware was open to anyone being a tenant. When a tenant is accepted, there's an acceptance letter. Mr. Osei-Owusu said that he wanted to make it simple and flexible for tenants. The "House Rules"<sup>10</sup> did not operate as a lease; these were the rules of the house. Mr. Osei-Owusu doesn't use long-term leases, his goal is to give people a chance.

### **Summary of Closing Arguments**

In closing, the Division argued that Respondents failed to have any fair housing information on their housing materials. They didn't have any fair housing training.

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<sup>10</sup> Complainant's Exhibit 3.

Respondents didn't treat Ms. Knight like others. Respondents failed to provide Ms. Knight with any other option than moving into the male residence. Respondents are subject to the DFHA and should have ensured that they complied with the DFHA's requirements. This case presents an opportunity for Respondents to improve their practices.

The Division has shown that Respondents discriminated against Ms. Knight because of her protected classes. She was intersex, identified as a female, and had a mental disability.

Respondents violated the DFHA when Mr. Osei-Owusu told the other female tenants that Ms. Knight was a female—this was discrimination. Respondents also violated the DFHA when they did not give Ms. Knight any other options besides moving into the male residence. There was no legitimate non-discriminatory reason for moving Ms. Knight into the male residence.

The Division requested that monetary relief be awarded. This would be \$15,000 in compensatory damages to Ms. Knight's estate. Also, the Panel should order Respondents and their staff undergo fair housing training. Respondents should revise their rules and procedures. And Respondents should include Equal Opportunity Housing notices on documents. The Division also asked for a \$5,000 civil penalty and also for Respondent to contribute \$5,000 to the Division's outreach fund.

In response, Mr. Osei-Owusu denied that Respondents violated the DFHA. They didn't force anyone out. Connections made the decision to move Ms. Knight.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In this case, the Division's Charge alleges three violations of the DFHA.

First, the Division alleges that Respondents denied Ms. Knight's request for a reasonable accommodation to be moved to a separate floor such that she wouldn't have to share a bathroom with a male tenant in violation of DFHA § 4603A(a)(2).<sup>11</sup>

Second, the Division alleges that Respondents failed "to engage in an interactive process with [Ms. Knight] concerning her request for an accommodation as to Respondents' rules, policies, and practices and to the terms and conditions of her lease when such accommodation was necessary to afford her, a disabled person, equal opportunity to use and enjoy her dwelling...."<sup>12</sup>

Third, the Division alleges that Respondents "discriminated against [Ms. Knight] in the terms, conditions and privileges of the rental of a dwelling, and in the provision of services or facilities in connection therewith, based on her sex, gender identity and mental disability in violation of DFHA § 4603(b)(2)...."<sup>13</sup>

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<sup>11</sup> Division's Charge at ¶¶ 8 and 10.

<sup>12</sup> *Id.* at ¶ 10.

<sup>13</sup> *Id.* at ¶ 9.

## Discussion

The stated purpose of the DFHA is “to eliminate, as to housing offered to the public for sale, rent or exchange, discrimination based upon race, color, national origin, religion, creed, sex, marital status, familial status, source of income, age, sexual orientation or disability, and to provide an administrative procedure through which disputes concerning the same may effectively and expeditiously be resolved with fairness and due process for all parties concerned.”<sup>14</sup> The provisions of the DFHA are to be “liberally construed” to safeguard the rights set forth therein.<sup>15</sup>

With this understanding, the Panel addresses the three claims of illegal discrimination in the Division’s Charge in turn.

**1. Respondents did not violate the “reasonable accommodation” requirement in the DFHA by not moving Ms. Knight to a fully private unit.**

The Division’s first claim is that Respondents violated DFHA § 4603A(a)(2) by denying Ms. Knight’s request to be moved to a separate floor such that she wouldn’t have to share a bathroom with a male tenant.<sup>16,17</sup> The Panel finds that the

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<sup>14</sup> DFHA § 4601(a).

<sup>15</sup> DFHA § 4601(b).

<sup>16</sup> DFHA § 4603A(a)(2) defines discrimination on the basis of an individual’s disability to include “[a] refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”

<sup>17</sup> The Panel notes that the precise wording of Ms. Knight’s accommodation request is unclear from the evidence presented; however, the concept of the request

Delaware courts have not yet addressed a failure to accommodate claim under the DFHA, so the Panel turns to the federal courts for guidance.<sup>18</sup>

Section 3604(f)(3)(B) of the federal Fair Housing Amendments Act of 1988 (FHAA) is identical (or nearly identical) to DFHA § 4603A(a)(2).<sup>19</sup> The Panel, therefore, looks to federal caselaw applying FHAA § 3604(f)(3)(B).

The federal courts, however, have at times struggled with defining the appropriate legal standard for reasonable accommodations claims under the FHAA. For example, the Third Circuit acknowledged “that precisely what the ‘reasonable accommodations’ standard requires is not a model of clarity.”<sup>20</sup> Indeed, the Third Circuit found that while “the FHAA imposes an affirmative duty to reasonably accommodate handicapped persons...the precise obligations

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is obvious—Ms. Knight wanted to be moved to a fully private unit such that she would not have to share a bathroom with a male resident.

<sup>18</sup> *Saville v. Quaker Hill Place*, 531 A.2d 201, 204 (Del. 1987) (Recognizing that in the absence of Delaware decisions, federal caselaw may be of assistance but cautioning that “the applicability of the existing federal antidiscrimination decisions must be determined on a case-by-case basis.”).

<sup>19</sup> 42 U.S.C. § 3604(f)(3)(B) defines discrimination to include “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”

<sup>20</sup> *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996) (collecting cases).

encompassed by this duty are ambiguous.”<sup>21</sup> The Panel finds that DFHA, being essentially identical to the FHAA, suffers from the same ambiguities as to how it should be implemented. Nevertheless, we begin.

One commonly-cited federal case addressing a failure to accommodate under the FHAA is *Giebeler v. M & B Associates*.<sup>22</sup> This case sets out a four-element test designed to determine whether there was an illegal failure to accommodate. Translating the *Giebeler* test to the DFHA, for the Division to succeed in its failure to accommodate claim, the Division needs to show that: (1) Ms. Knight suffers from a disability as defined by the DFHA; (2) Respondents knew or reasonably should have known of Ms. Knight’s disability; (3) accommodation of the disability may be necessary to afford Ms. Knight an equal opportunity to use and enjoy the dwelling; and (4) Respondents refused to make such accommodation.<sup>23</sup> The burden is on the Division to prove each element.

But other federal courts have set out a different, but also somewhat similar, test. The Sixth Circuit explained that a reasonable accommodation plaintiff “must

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<sup>21</sup> *Hovsons*, 89 F.3d at 1104 (citing *United States v. City of Taylor, Michigan*, 872 F. Supp. 423, 436 (E.D. Mich. 1995)) (internal modifications omitted).

<sup>22</sup> 343 F.3d 1143 (9th Cir. 2003). See also *Rodriguez v. Morgan*, 2012 WL 253867, at \*5 (C.D. Cal. Jan. 26, 2012) and *Chahil v. Episcopal Church Home Friendship*, 2012 WL 3886950, at \*2 (D. D.C. Sep. 7, 2012) (both citing *Giebeler*).

<sup>23</sup> *Giebeler*, 343 F.3d at 1147.

prove both the reasonableness and necessity of the requested modification.”<sup>24</sup> The Sixth Circuit further recognized that a reasonable-accommodation plaintiff also must prove other “equally important elements”. These are: (1) that she suffers from a disability, (2) that she requested an accommodation or modification, (3) that the defendant housing provider refused to make the accommodation or to permit the modification, and (4) that the defendant knew or should have known of the disability at the time of the refusal.<sup>25</sup> Notably missing from the Sixth Circuit’s test, however, is any requirement for the plaintiff to show a discriminatory intent in the failure to accommodate.<sup>26</sup>

Distilling all of this federal guidance and using it here, the Panel concludes that to sustain its DFHA reasonable accommodation charge, the Division bears the burden to show the request was both *reasonable* and *necessary*.<sup>27,28</sup> The Division

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<sup>24</sup> *Hollis v. Chestnut Bend Homeowners Association*, 760 F.3d 531, 541 (6th Cir. 2014).

<sup>25</sup> *Hollis*, 760 F.3d at 541 (citations omitted).

<sup>26</sup> *Hollis*, 760 F.3d at 540-41 (explaining in detail that reasonable accommodation claims do not require proof of discriminatory intent) (citing *Peebles c. Potter*, 354 F.3d 761, 766 (8th Cir. 2004)).

<sup>27</sup> *See Hollis*, 760 F.3d at 544 (“The ultimate burden to prove both the reasonableness and the necessity of the requested accommodation or modification rests always with the plaintiff.”).

<sup>28</sup> The Panel notes that there is a split in the federal courts whether or not the plaintiff, here the Division, carries the burden to show the requested accommodation was *both necessary and reasonable*. On one hand, the Third Circuit holds that once the plaintiff shows the requested accommodation was



must also show that (1) Ms. Knight suffers from a disability, (2) that she requested an accommodation or modification, (3) that Respondents refused to make the accommodation or to permit the modification, and (4) that Respondents knew or should have known of the disability at the time of the refusal.

Starting with the elements everyone agrees upon, the Panel finds that there is no dispute that Ms. Knight had a disability as defined by the DFHA. Nor is there any dispute that Respondents knew of Ms. Knight's disabilities. And there is no dispute that Ms. Knight was never moved by Respondents into a fully separate unit during her stay.<sup>29</sup> What remains to be determined is whether the requested

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necessary, the burden shifts to the defendant, here Respondents, to show the request was *unreasonable*. *Lapid-Laurel, LLC v. Zoning Board of Adjustment*, 284 F.3d 442, 457–58 (3d Cir. 2002) (citing *Hovsons*, 89 F.3d at 1103). On the other hand, the Sixth Circuit holds that the “ultimate burden to prove both the reasonableness and the necessity of the requested accommodation or modification rests always with the plaintiff.” *Hollis*, 760 F.3d at 544. Both courts make compelling arguments as to why the burden should be shifted (or should not be shifted). In this particular case, the Panel finds that neither the Division, nor Respondents argued as to who had the burden of proof to show reasonableness (or unreasonableness). Because neither party addressed the burden of proof question, out of an abundance of caution and in fairness to the parties, the Panel has viewed the evidence from both directions and, as explained below, the Panel majority does not see a violation of the DFHA's reasonable accommodation requirement. In other words, the burden of proof question was not material to the majority's decision. The Panel does not find it necessary here to decide who bears the burden of proof in a reasonable accommodations case under the DFHA.

<sup>29</sup> While Mr. Osei-Owusu claimed that the decision to move Ms. Knight into the male residence was made by Connections and Ms. Knight, the issue is whether Mr. Osei-Owusu denied Ms. Knight's request to move to a fully separate residence. Both sides agree that Ms. Knight wasn't moved to a fully separate residence. The

accommodation of moving Ms. Knight to a separate floor such that she would not have to share a bathroom with a male tenant was both reasonable and necessary to afford Ms. Knight an “equal opportunity to use and enjoy” the dwelling.

In addressing the “necessary” question, the federal courts have explained that the inquiry “is a causal one that examines whether the requested accommodation would redress injuries that would prevent a disabled resident from receiving the same enjoyment from the property as a non-disabled person would receive.”<sup>30</sup> That is, the Division needs to show Ms. Knight’s disabilities “must cause [her] to lose an equal opportunity to use and enjoy a dwelling.”<sup>31</sup>

The Panel finds that the Division has shown that the requested accommodation was causally connected to Ms. Knight’s disability. It is not a difficult leap to conclude that a person identifying as female and being intersex would want private quarters while living in an otherwise all-male residence. The request was, therefore, necessary under the guidance of applicable federal law.

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text messages in evidence (Complainant’s Ex. 5) show that Ms. Knight complained about living in the male residence and that the other female tenants missed her and asked why Ms. Knight couldn’t move back to the female residence. From the evidence presented, the Panel infers that Ms. Knight likely made an accommodation request to move into private quarters (or at least not have to share a bathroom with Mr. Johnson). Finding that the request was made, the fact that Ms. Knight wasn’t moved causes the Panel to conclude the request was denied.

<sup>30</sup> *Howard v. HMK Holdings, LLC*, 988 F.3d 1185, 1190 (9th Cir. 2021) (citations, internal quotations, and modifications omitted).

<sup>31</sup> *Howard*, 988 F.3d at 1191.

Which brings us to the question of whether the accommodation was “reasonable”. In the federal courts, it has been said that “the crux of a reasonable-accommodation or reasonable-modification claim typically will be the question of reasonableness.”<sup>32</sup> Using the guidance of the federal courts, the Panel concludes that to determine the “reasonableness” of Ms. Knight’s requested modification, the Panel must weigh the burden of requested modification that would be imposed on Respondents (and possibly others) against the benefits that would accrue to Ms. Knight.<sup>33,34</sup> This is a “highly fact-specific inquiry.”<sup>35</sup> The federal courts instruct that a modification should be deemed reasonable “if it imposes no fundamental alteration in the nature of a program or undue financial and administrative burdens.”<sup>36</sup>

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<sup>32</sup> *Hollis*, 760 F.3d at 541.

<sup>33</sup> *See Hollis*, 760 F.3d at 541-42 (citation omitted).

<sup>34</sup> The Panel notes that it believes that the burden on other non-parties, for example, Mr. Johnson or other tenants, is a factor to consider in determining whether or not the accommodation is reasonable. The Panel believes that if the accommodation request would require or otherwise result in the ejection of an existing tenant from their residence—that is a factor to consider.

<sup>35</sup> *Hollis*, 760 F.3d at 542 (quoting *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002)) (internal quotations omitted).

<sup>36</sup> *Hollis*, 760 F.3d at 542 (citations omitted); *see also Tsombanidis v. W. Haven Fire Department*, 352 F.3d 565, 578 (2d Cir. 2003) (“A defendant must incur reasonable costs and take modest, affirmative steps to accommodate the handicapped as long as the accommodations sought do not pose an undue hardship or a substantial burden.”).

The parties disagree as to the reasonableness of Ms. Knight's accommodation request. The Division says the request was reasonable because the evidence shows that Ms. Knight was subjected to Mr. Johnson's grossly inappropriate behavior of masturbating in her presence and invading her privacy by watching her. Also the deadbolt lock on the bathroom door didn't work. According to the Division, moving Ms. Knight to private quarters would allow her to use and enjoy her dwelling.

Respondents counter and say none of that happened.<sup>37</sup> Mr. Osei-Owusu testified that he spoke to Mr. Johnson who denied masturbating or otherwise harassing Ms. Knight. According to Mr. Osei-Owusu, Mr. Johnson was disabled and needed to be on the first floor. Mr. Johnson also couldn't lift his arms up. Mr. Osei-Owusu also testified that Ms. Knight was in a private unit on the first floor with a shared bathroom that had a functioning deadbolt lock on the door. And Mr. Osei-Owusu testified that the arrangement for Ms. Knight to stay in the male residence was intended to be temporary until Connections found Ms. Knight a

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<sup>37</sup> The Panel notes that while Ms. Knight's death prevented her from testifying, it is clear to the Panel that the Division's version of the events was directly learned from Ms. Knight. Respondents did not challenge the Division's evidence as inaccurate or inconsistent with what Ms. Knight observed while she was alive. Rather, Respondents claim that what Ms. Knight said happened didn't happen. In resolving this conflict, the Panel weighs each side's version of the events based on plausibility rather than credibility.

more suitable residence—an arrangement that Ms. Knight agreed to. Ms. Knight was in the male residence for about one month.

In weighing the competing versions of the events, the Panel lands somewhere in the middle. The Panel finds that it was likely that Ms. Knight having to share a bathroom with Mr. Johnson adversely impacted her use and enjoyment of the dwelling. The question is whether the burden from the requested accommodation—moving Ms. Knight to private quarters—outweighs the benefit.

After carefully considering the evidence of record, a majority of the Panel concludes that the requested accommodation was not reasonable given the totality of the circumstances. To explain, the majority finds that the evidence shows that Mr. Osei-Owusu and Respondents were trying to do the right thing and accommodate Ms. Knight's disabilities. She was first placed in the female residence. When that arrangement failed, Mr. Osei-Owusu explained that Connections and Ms. Knight came to an agreement to temporarily place Ms. Knight in mostly private quarters in the male residence. When that arrangement broke down for whatever reason in the month that Ms. Knight was in the male residence, Respondents worked with Connections to get her relocated into a hotel because there was no fully private quarters available at Respondents.

In the unique and specific circumstances here, a majority of the Panel is unconvinced that Ms. Knight's request to be moved into private quarters was

reasonable. The problem is that the evidence does not show that there was a vacant fully private unit for Ms. Knight to be moved into. Indeed, it is unclear whether or not there were fully private units. Assuming that Respondents did have at least one fully private unit,<sup>38</sup> the Panel majority infers from the evidence presented that the private unit (or units) was already occupied since it would seem an obvious solution to move Ms. Knight into a vacant fully private unit and that didn't happen. A majority of the Panel found Mr. Osei-Owusu to have acted reasonably in addressing Ms. Knight's complaints. It is a fair inference that a reasonable person such as Mr. Osei-Owusu would have granted Ms. Knight's request to be moved into a fully private unit if such a unit was open and available. Since that didn't happen, the Panel majority concludes that moving Ms. Knight into a fully private unit would have required moving out the existing tenant.

In these specific and unique circumstances, determining the reasonableness of Ms. Knight's request comes down to whether or not it would be reasonable to

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<sup>38</sup> While the Panel is giving the Division the benefit of the doubt here that there was a private unit available, the Panel notes that if the evidence clearly showed that Respondents did *not* have any fully private units, the "necessary" requirement of DFHA does not impose a duty on Respondents to create a fully private unit for Ms. Knight. See *Howard*, 988 F.3d at 1191, n.6 (quoting *Cinnamon Hills Youth Crisis Center, Inc. v. Saint George City*, 685 F.3d 917, 923 (10th Cir. 2012) ("[W]hen there is no comparable housing opportunity for non-disabled people, the failure to create an opportunity for disabled people cannot be called necessary to achieve equality of opportunity in any sense.")).

move out an existing tenant to allow Ms. Knight to stay there.<sup>39</sup> When the undisputed fact that Ms. Knight’s stay in the male residence was intended to be short term—for a few weeks until she could be moved into a hotel by Connections—the Panel majority cannot conclude that it would be reasonable to eject an existing tenant from their private dwelling to temporarily place Ms. Knight in that dwelling.<sup>40</sup> Reasonableness requires consideration of all the adverse impacts, including adverse impacts on other residents. Here, the evidence presented was insufficient to convince a majority of the Panel that it was

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<sup>39</sup> Since this is the first DFHA “reasonable accommodation” case in Delaware that the Panel is aware of, it seems more appropriate to give the Division the (very generous) benefit of the doubt from this murky record and assume that there was a fully private, yet occupied, unit in Respondents’ group home properties. In doing so, the Panel uses this case as an opportunity to provide some guidance on how to implement the “reasonable accommodation” requirement of the DFHA going forward. The alternative pathway would be to find the Division’s evidence on this issue insufficient and conclude as a matter of fact that Respondents did *not* have any fully private units either occupied or vacant. If that were the case, the Panel would look to federal caselaw and conclude as matter of law that the DFHA does *not* require a landlord to create a fully private unit and that there was no DFHA violation. *See* n.38 *supra*.

<sup>40</sup> An alternative view of this situation is that Ms. Knight’s request was to have Mr. Johnson moved out of his unit so that she would have a fully private unit. Under this view, the question remains the same: does the DFHA require moving one tenant out so that the other may have a fully private room? The answer requires the same balancing of interests and, in the unique circumstances here, the Panel majority finds that the balance does not tip in favor of ejecting Mr. Johnson from his quarters, particularly when Mr. Osei-Owusu testified that Mr. Johnson was disabled and needed a first floor unit. Indeed, the Division did not challenge that Mr. Johnson needed to be on the first floor.

reasonable to move an existing tenant out so that Ms. Knight could be moved in for the short amount of time she was expected to stay in the male residence.<sup>41</sup>

For the above reasons, the Panel majority concludes that the first claim in the Division's Charge cannot be sustained.

**2. Respondents did not fail to engage in an interactive process to resolve Ms. Knight's housing situation**

The Panel turns to the question of whether or not Respondents violated the DFHA by allegedly not engaging in an interactive process regarding her accommodation request. The Panel finds no Delaware precedent on how to address this question and, therefore, turns to federal FHAA caselaw for guidance.

Federal guidance, unfortunately, isn't clear. It was recognized by one federal court that "there is a split among the courts as to whether the FHAA requires

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<sup>41</sup> In view of the federal circuit split regarding who bears the burden to show reasonableness (or unreasonableness), the Panel majority also finds that the evidence presented was such that it would have been unreasonable to displace an existing tenant so that Ms. Knight could be housed for the short amount of time that she was expected to stay in the male residence while Connections sought a better solution. To explain, the Panel majority finds that Mr. Osei-Owusu credibly testified that Ms. Knight's living quarters were private and that there was a functioning deadbolt on the bathroom door. Mr. Osei-Owusu also testified that Mr. Johnson denied the alleged inappropriate behavior. And Mr. Osei-Owusu's version of what happened did not include any emergency situation that would have suggested that Respondents would need to eject an existing tenant so that Ms. Knight could be immediately moved into a fully private unit. The Division did not impeach this testimony. Indeed, the Division's witness admitted that she did not contact Mr. Johnson to get his version of the events or visit the premises to inspect the allegedly defective deadbolt. When weighing the evidence, the Panel majority finds that it tips in favor of Mr. Osei-Owusu's version of the events.



landlords to engage in such a process with their disabled tenants.”<sup>42</sup> One side of the split holds that the FHAA imposes a duty on landlords and tenants to engage in an interactive process in response to a reasonable accommodation request.<sup>43</sup> The other side holds that the statutory language FHAA nowhere mentions an interactive process and no such obligation exists.<sup>44</sup> And recently, the Ninth Circuit explained that the FHAA does not impose “standalone” liability for a landlord’s failure to engage in an “interactive process” with a tenant when the underlying accommodation request “has no basis in law or fact.”<sup>45</sup>

Here, the Panel finds that it need not address the divergent views of the federal courts because the undisputed facts show that Respondents did engage with

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<sup>42</sup> See *Rodriguez v. Morgan*, 2012 WL 253867, at \* 8 (C.D. Cal. Jan. 26, 2012) (collecting cases and comparing interpretations).

<sup>43</sup> See *Jenkowski Lee & Associates v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996) (holding that “it is incumbent upon the landlord to request documentation or open a dialogue.”); also see *Bartee v. Michelin North America, Inc.*, 374 F.3d 906, 916 (10th Cir. 2004) (holding that once a landlord is made aware of a needed accommodation, both parties must participate in an interactive process of good faith communications to identify the limitation resulting from the disability and a reasonable accommodation).

<sup>44</sup> See *Lapid-Laurel*, 284 F.3d at 446 (“declining to extend the ‘interactive process’ requirement that exists in the employer-employee context of the Rehabilitation Act to the housing and land use context of the FHAA.”); also see *Groner v. Golden Gate Apartments*, 250 F.3d 1039, 1047 (6th Cir. 2001) (finding that there is no such interactive process language in the Fair Housing Act or the Department of Housing and Urban Development’s implementing regulation that would impose such a duty on landlords and tenants).

<sup>45</sup> *Howard*, 988 F.3d at 1192.

Ms. Knight in attempting to resolve her complaints about living in the male residence and sharing a bathroom with Mr. Johnson.<sup>46</sup> So, even if the DFHA was read to require Respondents to engage in an interactive process—a question we save for another day—Respondents have met that obligation.

To explain, in the federal courts that have imposed the “interactive process” obligation, the obligation requires “good faith communications to identify the limitation resulting from the disability and a reasonable accommodation.”<sup>47</sup> It is not enough to simply show that the landlord failed to engage in such discussions.<sup>48</sup> Nor is it sufficient to show that the landlord caused the discussions to break down.<sup>49</sup> Rather, “the tenant must show that the result of the inadequate process was the failure of the landlord to fulfill its role in determining a reasonable accommodation.”<sup>50</sup> Further, once the discussions have begun, the landlord needs to act in good faith and avoid unreasonable delays.<sup>51</sup>

Setting aside the fact that the exact date and nature of Ms. Knight’s

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<sup>46</sup> The Panel notes that under the federal court system, Delaware resides in the Third Circuit and while the decisions of that court are not controlling on the State, the Third Circuit’s decisions may be owed some deference.

<sup>47</sup> *Chahil*, 2012 WL 3886950, at \*2 (citations omitted).

<sup>48</sup> *Id.* (citation omitted).

<sup>49</sup> *Id.* (citation omitted).

<sup>50</sup> *Id.* (citation omitted).

<sup>51</sup> *Id.* (citations omitted).

accommodation request is unclear, a majority of the Panel finds that the evidence of record shows that Ms. Knight moved into the male residence in early May 2021. Sometime thereafter—again, the record is unclear—there is no dispute that problems arose with Ms. Knight living in semi-private quarters in the male residence and sharing a bathroom with Mr. Johnson. By June 2, 2021, the evidence shows that Mr. Osei-Owusu determined that Respondents could not accommodate Ms. Knight and recommended that she find another place to live.<sup>52</sup> Sometime thereafter, Ms. Knight was moved out by Connections and placed in a hotel.

From this undisputed evidence, it is clear to a majority of the Panel that Respondents were engaged in trying to address Ms. Knight’s concerns. While Mr. Osei-Owusu admitted that he received some complaints from Ms. Knight sometime after she was placed in the male residence,<sup>53</sup> Mr. Osei-Owusu explained that he did not immediately respond because he was waiting to hear from Connections. And the evidence also shows that Mr. Osei-Owusu took action and investigated things in response to Ms. Knight’s complaints about Mr. Johnson’s behavior. In the specific circumstances here, a majority of the Panel finds that Respondents acted in good faith in response to Ms. Knight’s complaints. To the extent that the DFHA has an “interactive process” requirement, the Panel majority

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<sup>52</sup> See text message dated June 2, 2021 at 05:14 UTC in Complainant’s Ex. 5.

<sup>53</sup> See generally, Complainant’s Ex. 5.

finds that Respondents have satisfied that requirement. Accordingly, the Division's second claim in the Charge cannot be sustained.

**3. The Division has not shown that Respondents intended to discriminate against Ms. Knight in violation of the DFHA.**

The Division's last claim in the charge is that Respondents discriminated against Ms. Knight in the terms, conditions and privileges of the rental of a dwelling, and in the provision of services or facilities in connection therewith, based on her sex, gender identity and mental disability in violation of DFHA § 4603(b)(2).<sup>54</sup> This is a claim of facial discrimination.

To begin the analysis, the Panel finds that the Delaware courts have recognized that two "families of discrimination claims may be brought by an aggrieved person under the DFHA."<sup>55</sup> These are (1) "disparate treatment" claims where there is an intent to illegally discriminate members of a protected class and (2) "disparate impact" claims where the alleged conduct causes an illegal

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<sup>54</sup> DFHA § 4603(b)(2) makes it unlawful "[t]o discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, national origin, religion, creed, sex, marital status, familial status, source of income, age, sexual orientation, gender identity or disability."

<sup>55</sup> *Newark Landlord Association v. City of Newark*, 2003 WL 21448560, at \*10 (Del. Ch. June 13, 2003).

discriminatory effect alone, without evidence of discriminatory intent.<sup>56,57</sup>

Disparate treatment occurs when a decision maker treats some people less favorably than others because of their protected class.<sup>58</sup> Conversely, “when a decision maker’s practices are facially neutral in their treatment of different groups but in fact unjustifiably disadvantage one or more groups,” a claim for disparate impact exists.<sup>59</sup>

Here, the Panel reads the Division’s third claim in the Charge as alleging the disparate treatment of Ms. Knight by Respondents.

The Delaware Supreme Court instructs that “[p]roof of discriminatory treatment requires proof of an intent to discriminate.”<sup>60</sup> The Court further explained that proving “a discriminatory motive is critical, although it can in some

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<sup>56</sup> *Id.* (citations omitted).

<sup>57</sup> The Panel notes that the *Newark Landlord Association* court found that some courts have found a third type of fair housing discrimination where the alleged conduct facially discriminates against members of a protected class. 2003 WL 21448560, at \*10, n.66 (citing *Larkin v. Michigan Department of Social Services*, 89 F.3d 285, 289 (6th Cir. 1996)) (further citations omitted). The *Newark Landlord Association* court concluded that such facial discrimination claims were a type of intentional discrimination or disparate treatment claims and decided to treat claims of facial discrimination as a claim of disparate treatment. *Id.* (citations omitted). The Panel agrees with this approach.

<sup>58</sup> See *Newark Landlord Association*, 2003 WL 21448560, at \*10.

<sup>59</sup> *Id.* (citation omitted).

<sup>60</sup> *Saville*, 531 A.2d at 206 (citation omitted).

situations be inferred from the mere fact of differences in treatment.”<sup>61</sup>

To resolve facial discrimination claims based on disparate treatment the Delaware courts follow the U.S. Supreme Court’s three-part analysis in *McDonnell Douglas Corp. v. Green*.<sup>62,63</sup> This analysis requires the following steps:

- (1) The complainant must establish a prima facie case of discrimination.
- (2) Once a prima facie case is established, the burden shifts to the respondent to present evidence of a legitimate, non-discriminatory reason for what happened.
- (3) After this production of evidence, the complainant retains the burden of persuading by a preponderance of the evidence that the respondent’s proffered reason was a pretext for discrimination.<sup>64</sup>

Further, because DFHA hearings before the Commission are subject to the provisions of Delaware’s Administrative Procedures Act (APA),<sup>65</sup> “the burden of proof shall always be upon the applicant or proponent.”<sup>66</sup>

The Panel begins with the first step of the *McDonnell Douglas* analysis—whether or not the Division has established a prima facie case of discrimination in

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<sup>61</sup> *Saville*, 531 A.2d 204 (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

<sup>62</sup> 411 U.S. 792 (1973).

<sup>63</sup> See *Quaker Hill Place v. State Human Relations Commission*, 498 A.2d 175, 182-83 (Del. Super. 1985) (applying the *McDonnell Douglas* analysis to a case brought under the DFHA).

<sup>64</sup> *Quaker Hill*, 498 A.2d at 183. (Del. Super. Aug. 3, 2000) (citations omitted).

<sup>65</sup> 29 Del. C. Ch. 101.

<sup>66</sup> 29 Del. C. § 10125(c).

violation of the DFHA. The Delaware courts, however, have not addressed the elements of a prima facie case of facial discrimination by the disparate treatment of a member of a protected class.<sup>67</sup> Again borrowing from the federal courts, the Panel finds that a prima facie claim of disparate treatment involves showing by a preponderance of the evidence: (a) that Ms. Knight’s rights are protected by the DFHA and (b) as a result of Respondents’ discriminatory conduct, Ms. Knight suffered a “distinct and palpable injury”.<sup>68</sup>

The Panel finds that the Division has met its burden to show by a preponderance of the evidence a facial violation of DFHA § 4603(b)(2). There’s no dispute that Ms. Knight’s rights were protected by the DFHA. Nor is there any significant dispute that Ms. Knight was moved into the male residence, was placed in semi-private quarters where she shared a bathroom with Mr. Johnson, and that, at least according to the evidence presented by the Division, Ms. Knight suffered harm from this arrangement because Mr. Johnson was invading her privacy and

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<sup>67</sup> The Panel notes that the *Quaker Hill* court set out a four-part standard for the denial of a rental unit. Here, the Division’s Charge alleges that Ms. Knight was discriminated by moving Ms. Knight—who identified as female—into the male residence when other females were not subjected to such treatment. See Division’s Charge at ¶¶ 6 and 9.

<sup>68</sup> See *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) (citing *Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1985)).

acting extremely inappropriately.<sup>69,70</sup>

Next, the Panel takes the second step of the *McDonnell Douglas* analysis. Here, the Division argues that there was no legitimate non-discriminatory reason for moving Ms. Knight into the male residence. The Panel majority disagrees. Respondents' explanation for what happened is that Connections and Ms. Knight made the decision to place her in the male residence temporarily while Connections sought other housing. And Mr. Osei-Owusu also said that he did not make that decision, he merely implemented the decision. The Panel majority infers from this evidence that Respondents' explanation is that they were offering a solution to a difficult problem and that Connections and Ms. Knight agreed to try that solution. Accordingly, Respondents have met their burden of production by providing a legitimate non-discriminatory reason.<sup>71</sup>

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<sup>69</sup> At the prima facie stage, the Panel accepts the Division's proof and does not consider Respondents' rebuttal evidence. *See Harris*, 183 F.3d at 1051. ("This test does not permit the court to consider rebuttal evidence at the prima facie case stage.") (citation omitted).

<sup>70</sup> The Panel notes that the elements of the Ninth Circuit's prima facie standard do not include a showing of disparate treatment, that is, that non-members of a protected class were treated differently. In an abundance of caution and in case judicial review finds that disparate treatment is a necessary element of a prima facie case, the Panel finds that there was no dispute that non-members of Ms. Knight's protected class were treated differently. Mr. Osei-Owusu testified that no other female had ever been placed in the male residence or vice-versa.

<sup>71</sup> The Panel notes that at this stage of the analysis, the burden is merely one of *production*, not persuasion. The U.S. Supreme Court has explained: "By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons,



The Panel next moves to the final step in the *McDonnell Douglas* analysis. At this point, the burden of proof is on the Division to show by a preponderance of the evidence that Respondents proffered reason for what happened was a pretext for discrimination. In the context of Delaware’s Equal Accommodation Law<sup>72</sup>—the DFHA’s companion anti-discrimination law intended to prevent discrimination in places of public accommodation—the Delaware Supreme Court has explained that at this step, the complainant (here, the Division) needs to present evidence sufficient to convince a reasonable jury that Respondent’s explanation for what happened “lacks all credibility.”<sup>73</sup> In explaining what this means in practicality, the Delaware Supreme Court has said that while identifications of inconsistencies in Respondent’s testimony can be evidence of pretext, mere denial of credibility has no evidentiary value.<sup>74</sup> The Panel finds the Delaware Supreme Court’s guidance for the DEAL equally applicable to the DFHA and incorporates it here.<sup>75</sup> And the

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petitioners sustained their burden of production, and thus placed themselves in a better position than if they had remained silent.” *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 509 (1993) (internal quotations omitted).

<sup>72</sup> 6 *Del. C.* ch. 45 (the “DEAL”).

<sup>73</sup> *Boggerty v. Stewart*, 14 A.3d 542, 553 (Del. 2011) (citing *Jaramillo v. Colorado Judicial Department*, 427 F.3d 1303, 1310 (10th Cir. 2005)) (other citations omitted).

<sup>74</sup> *Id.* (citing *Ekokotu v. Boyle et al.*, 294 Fed. Appx. 523, 526 (11th Cir. 2008)).

<sup>75</sup> The Panel also notes that Respondents do not have the burden to prove a lack of discrimination. Rather, it is the Division that bears the burden to show by a preponderance of the evidence that discrimination in violation of the DFHA took

Panel is further guided by the U.S. Supreme Court’s instruction that the “*McDonnell Douglas* methodology was never intended to be rigid, mechanized, or ritualistic.”<sup>76</sup>

Upon weighing the evidence presented, the Panel majority finds that the Division has not met its burden to show that Respondents’ explanation was a pretext to discriminate against Ms. Knight. Indeed, the Panel majority is convinced that Respondents were attempting to help Ms. Knight get out of a bad situation and that there was no intent to discriminate against Ms. Knight.

To explain, while the Panel is unconvinced with Mr. Osei-Owusu’s explanation that he played no part in the decision to move Ms. Knight into the male residence, a Panel majority finds that the Division has failed to prove that Respondents *intended* to discriminate against Ms. Knight.

Claims of facial discrimination under the DFHA are measured by the *McDonnell Douglas* burden shifting analysis and the goal of that analysis is to determine from the evidence whether there was an intent to discriminate.<sup>77</sup> And it

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place, and this burden includes proving that Respondents’ explanation lacks all credibility and was a pretext for the discriminatory conduct.

<sup>76</sup> *St. Mary’s Honor Center*, 509 U.S. at 519 (citations and internal quotations omitted).

<sup>77</sup> The Delaware Supreme Court has explained that “proof of discriminatory treatment requires proof of an intent to discriminate.” *Saville*, 531 A.2d at 406. And it is well-settled that the *McDonnell Douglas* test is used to determine an intent to discriminate. *See, e.g., Hollis*, 760 F.3d at 539-40 (finding that the

is the Division’s burden to persuade the Panel that Respondents acted with discriminatory intent.<sup>78</sup> The Division did not meet its burden here.

At bottom, the Panel majority finds that Respondents’ conduct in this case involved bad decisions and poor judgment. But the majority is unconvinced that these bad decisions and poor judgment rose to the level of illegal intentional discrimination in violation of the DFHA. The Panel majority finds that Mr. Osei-Owusu credibly testified that he was trying to help people with his business and that he was trying to help Ms. Knight. And the Division did not present any evidence from which the majority could infer discriminatory intent, for example, evidence suggesting that Respondents were hostile or otherwise disrespectful to Ms. Knight. Indeed, throughout the hearing, Mr. Osei-Owusu referred to Ms. Knight as “Miss Angel” and the Panel majority found Mr. Osei-Owusu was respectful of Ms. Knight’s disabilities. And the Panel majority finds that when things came to the breaking point, Respondents were respectful in saying that “[t]his is not the right place for you” and offering to find “better housing

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*McDonnell Douglas* test is “designed to discern intent” and explaining that the test, “which shifts the burden of production from the plaintiff to the defendant and then back to the plaintiff *in an effort to zero in on the specific intent underlying the defendant’s conduct.*”) (emphasis added).

<sup>78</sup> *St. Mary’s Honor Center*, 509 U.S. at 518 (“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”) (citations and internal quotations omitted).

options.”<sup>79</sup> After carefully considering all of the evidence presented, the Panel majority finds that this case presents a close call. But the Panel majority nevertheless concludes that the evidence does not show that Respondents acted with discriminatory intent.

That said, the Panel wants to make clear that its decision was not unanimous. The dissenting Panel member found Respondents’ conduct inexcusable. As the dissent saw things, Respondents were in business to make money and the dissent infers from Respondents’ willingness (or their failure to refuse Connections’ request) to move Ms. Knight into the male residence was more than sufficient to infer discriminatory intent. And Respondents’ excuses were unconvincing and that Respondents appeared to be merely shifting the blame.

For these reasons, by majority vote, the Panel concludes that the Division has not met its burden to show that Respondents intended to discriminate against Ms. Knight. Accordingly, the Division’s claim of facial discrimination in violation of DFHA § 4603(b)(2) fails.

The Panel is unanimous, however, in finding that Respondents admitted to not having any fair housing training and that this case involved a series of poor decisions and bad judgment. The Panel believes that Respondents need to improve

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<sup>79</sup> Text dated June 2, 2021 at 07:39 UTC in Complainant’s Ex. 5.

their “game” and strongly encourages Respondents to undergo fair housing training and incorporate better business practices to prevent situations like this one from happening again.


### **CONCLUSION**

After careful consideration of the evidence and arguments presented, the Panel, by majority vote, concludes that the Division has failed to prove that Respondents engaged in discriminatory housing practices in violation of the DFHA as alleged in the Charge. Respondents, however, are strongly encouraged by the Panel to undergo fair housing training.


## ORDER

Pursuant to 6 *Del. C.* § 4612(g)(7), by majority vote, the Panel hereby orders that the Division's Charge is **DISMISSED**. Each party shall bear their own fees, costs, and expenses.


**IT IS SO ORDERED** this 31st day of March, 2023.

  
Gail E. Tarlecki (Mar 31, 2023 13:38 EDT)

Gail Tarlecki, *Commission Chair and Panel Chair*

  
Walter Smith Jr. (Mar 31, 2023 13:49 EDT)

Walter Smith, Jr., *Commissioner and Panel Member*

  
Marty Rendon (Mar 31, 2023 14:47 EDT)

Marty Rendon, *Commissioner and Panel Member*