19-P-1024 Appeals Court

FLAVIA MORETALARA vs. BOSTON HOUSING AUTHORITY.

No. 19-P-1024.

Suffolk. September 17, 2020. - December 3, 2020.

Present: Green, C.J., Milkey, & Wendlandt, JJ.

Boston Housing Authority. Administrative Law, Hearing, Findings, Regulations, Judicial review. Landlord and Tenant, Handicapped person. Anti-Discrimination Law, Handicap, Housing.

Civil action commenced in the Eastern Division of the Housing Court Department on July 8, 2016.

The case was heard by Jeffrey M. Winik, J., on a motion for judgment on the pleadings.

Michael J. Louis & Angela Marcolina for the defendant.
Deena Zakim for the plaintiff.
Susan Ann Silverstein, of the District of Columbia, & Richard M. Glassman & Thomas Murphy, for AARP & others, amici curiae, submitted a brief.
Eric Dunn, of Virginia, & Faye B. Rachlin, for National Housing Law Project, amicus curiae, submitted a brief.

MILKEY, J. The plaintiff, Flavia Moretalara, is an elderly tenant who suffers from various disabilities. Her son often

visited her at her apartment to help take care of her. Unbeknownst to the plaintiff, her son also hid heroin and a high-capacity firearm magazine there. When he was arrested and the contraband discovered, the Boston Housing Authority (BHA) terminated the plaintiff's Section 8 housing benefits. She, in turn, sought to reverse that decision in court, claiming that her disabilities prevented her from detecting and preventing her son's misconduct on the premises. She also provided evidence that, going forward, her son had agreed not to return to her apartment, and that she had secured a new personal care attendant who would help her monitor her apartment. Based on a record developed over a series of administrative hearings, a Housing Court judge ruled in the plaintiff's favor and enjoined the BHA from terminating her Section 8 benefits. On the BHA's appeal, we affirm.[1]

Background. 1. Flavia Moretalara. The plaintiff, who is a cancer survivor, has long suffered from numerous medical conditions. These include vertigo, which caused her to fall and injure herself on at least one occasion, and various sources of intermittent or chronic pain. Her pain often directly limits her mobility, and she has undergone numerous surgeries dating

[1] We acknowledge the amicus briefs submitted in support of the plaintiff by the AARP, AARP Foundation, Disability Law Center, Inc., and National Disability Rights Network; and the National Housing Law Project.

back to at least 2011 to address that pain. One of the BHA's hearing officers summarized the plaintiff's condition as follows: she experiences "fatigue, swelling of the leg, dizziness, weakness, forgetfulness, and high blood pressure"; during acute episodes, migraines, disabling vertigo, and intense pain can make her unable to tolerate light, sound, or food; and her physical symptoms cause "stress, excessive worry and panic attacks."

The plaintiff rents an apartment in the Jamaica Plain section of Boston with the help of a Section 8 Housing Choice Voucher administered by the BHA.[2] She has lived in that apartment since October 2001. Her family members, including her son, often visited her to help care for her. The family members would stay in the apartment's second bedroom when visiting. According to an uncontested averment by the plaintiff, her son "was especially helpful because he was strong enough to pick me up if I fell," and could "help[] me physically if I fell or struggled, which happened and still happens regularly."

2. Section 8 benefits terminations. The plaintiff's lease imposed various obligations on her, including, as relevant here, a duty "to refrain from engaging in and to cause . . . guest(s),

[2] For a succinct description of the Section 8 Housing Choice Voucher Program, see Wojcik v. Lynn Hous. Auth., 66 Mass. App. Ct. 103, 103 n.2 (2006).

or any person under [her] control to refrain from engaging in any criminal or illegal activity in the rented Premises." Should she commit serious or repeated lease violations, the BHA is authorized -- but not required -- to terminate her Section 8 benefits. See 24 C.F.R. §§ 982.551(e), 982.552(c)(1)(i). See also BHA Administrative Plan for Section 8 Programs § 13.5.2(d) (rev. 2020). However, Federal law grants the plaintiff, and beneficiaries like her, two important protections. First, in deciding whether to terminate Section 8 benefits pursuant to 24 C.F.R. § 982.552(c)(1)(i), the BHA may consider all relevant circumstances, which include "the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the" event leading to termination. 24 C.F.R. § 982.552(c)(2)(i). Second, "[i]f the family includes a person with disabilities," the BHA must consider granting a "reasonable accommodation" of the disability in accordance with Federal law[3] and the BHA's own policies. 24 C.F.R. § 982.552(c)(2)(iv).

[3] Applicable Federal law includes "the Fair Housing Amendments Act (FHAA), 42 U.S.C. §§ 3601 et seq. (2000), and regulations promulgated by the Department of Housing and Urban Development (HUD), 24 C.F.R. Part 9 (2008)." Boston Hous. Auth. v. Bridgewaters, 452 Mass. 833, 838 (2009).

The BHA's current reasonable accommodation policy (BHARAP) is dated February 12, 2016. Under it, a Section 8 beneficiary may seek an accommodation "related to policies and practices, such as when [a beneficiary's] disability leads to a program violation, leading to a request that the BHA not proceed with termination if [she] provides sufficient evidence of an effective plan to prevent the violation from recurring." BHARAP § 3.2. As explained by the BHA, such a request provides equal opportunity by helping put a beneficiary "in the same position as someone who does not have [their] disability." Id. In effect, "[t]he [beneficiary] requests that [they] be given another chance to comply with the program requirements and remain housed because a person without [their] disability would not have violated the requirements in the first place." Id.

When a beneficiary requests such an accommodation, the "BHA will determine whether it is reasonable to believe that the violation is unlikely to recur if it provides the requested Accommodation." BHARAP § 5.2. Importantly, the policy contains a presumption in the beneficiary's favor:

> "As an initial matter, BHA will assume that a Client is an expert on his/her own disability and any appropriate Accommodations. Unless BHA can identify specific reasons for doing otherwise, it should accept the Client's judgment that an Accommodation is needed and that the Accommodation proposed for meeting those needs is the most appropriate."

BHARAP § 3.5. Also, "[i]f a Client requests an Accommodation in the context of a . . . proposed termination, and it is determined to be ineffective or unreasonable, BHA will propose alternative Accommodations, if they exist, to resolve the matter." BHARAP § 5.3.

3. The son's arrest and the BHA's efforts to terminate the plaintiff's benefits. At approximately 6:30 A.M. one morning in 2015, Boston Police Department officers announced themselves at the plaintiff's apartment. The plaintiff, her sister, and the plaintiff's son were at the apartment at the time. The police officers were starting to breach the apartment door, but the plaintiff opened the door before they did so.

After being admitted to the apartment, the police officers executed a search warrant targeting the plaintiff's son. In the second bedroom, they found a plastic bag containing about one gram of heroin, a high-capacity firearm magazine in a safe in the closet, and certain drug paraphernalia under the mattress and in the closet. It is not clear how long these items had been in the apartment. The officers arrested the plaintiff's son. Boston Emergency Medical Services was called to address the plaintiff's apparent distress during the execution of the warrant, but she declined transportation to a hospital. Although the plaintiff had no knowledge of her son's misconduct, the BHA moved to terminate the plaintiff's Section 8 benefits.

Thus began a tortuous procedural history that we need not describe in detail. It suffices to note the following, reserving some additional facts for future discussion. After an administrative hearing, the hearing officer (initial hearing officer) concluded that the tenant had committed a serious lease violation and approved the termination of her Section 8 benefits.

The plaintiff then filed a complaint against the BHA in the Housing Court, raising both Federal and State law disability claims, as well as other claims. Separately, she formally requested from the BHA a reasonable accommodation allowing her to stay in the apartment with a commitment from her son that he would stay away from her apartment and with the support of a personal care attendant. In accordance with its policy for evaluating reasonable accommodation requests, the BHA met with the plaintiff and her lawyer and invited the plaintiff to submit additional information, which she did. See BHARAP §§ 3.5, 3.6. The BHA then denied the plaintiff's request without proposing an alternative.

A second administrative hearing to consider that denial followed. It took place before a different hearing officer (subsequent hearing officer) who took evidence, heard argument, and then upheld the BHA's decision. The Housing Court judge, concerned that the subsequent hearing officer had misapplied

cases addressing the "innocent tenant" defense, then remanded the matter to the subsequent hearing officer with instructions to reconsider the matter without relying on those cases. On remand, the subsequent hearing officer again upheld the BHA's decision, albeit on different grounds.

In the meantime, the BHA had filed a dispositive motion in the Housing Court seeking judgment on the pleadings or summary judgment, which the plaintiff had opposed. After the third administrative decision issued, the judge ruled for the plaintiff on her Federal and State discrimination claims. He reversed the hearing officers' decisions and ordered the BHA to reinstate the plaintiff's Section 8 benefits. Then, because the plaintiff had an adequate alternative legal remedy, the judge ordered her certiorari claims dismissed.

Discussion. 1. Legal framework and standard of review. The winding path this case has taken has created considerable confusion as to what claims properly are before us and what standard of review applies. In seeking to challenge the BHA's decision to terminate the plaintiff's Section 8 benefits, and to deny her a reasonable accommodation, the plaintiff raised Federal and State claims. In the portion of the amended complaint raising the Federal claims, the plaintiff cited 42 U.S.C. § 1983 in asserting rights under various Federal laws such as the Fair Housing Act, 42 U.S.C. §§ 3601-3619. In the

portion of the amended complaint asserting State law claims, the plaintiff asserted that she brought her claims pursuant to G. L. c. 249, § 4, through which she was seeking to assert rights under various State antidiscrimination laws, including G. L. c. 151B, § 4. In ruling in the plaintiff's favor, the judge cited to 42 U.S.C. § 1983, and various Federal and State antidiscrimination laws, while dismissing the plaintiff's certiorari claim.

The BHA argues for the first time on appeal that only the certiorari claim was properly before the judge. However, "[t]he BHA [is] not entitled to pigeonhole [the plaintiff]'s claim as one brought under the certiorari statute." Loring Tower Assocs. v. Furtick, 85 Mass. App. Ct. 142, 146 (2014). Granted, "[i]t is a complex and difficult question of [F]ederal law whether plaintiffs have an enforceable right under [42 U.S.C.] § 1983 not to have their Section 8 benefits improperly terminated in contravention of HUD regulations" (quotations and citation omitted). Costa v. Fall River Hous. Auth., 453 Mass. 614, 620 n.8 (2009). However, we have previously allowed similarly situated plaintiffs to proceed. Id. Here, we see no sign that the BHA "challenged or questioned [the plaintiff's] right to seek relief under § 1983 in this case" until its appeal to this

court, and so "we consider any question about the issue to be waived and do not address it" further. Id.[4]

We review the judge's decision de novo. See Erickson v. Clancy Realty Trust, 88 Mass. App. Ct. 809, 810 (2016) ("we review [the trial judge's] decision as to questions of law, and questions of fact based entirely on documents, de novo"). Our determining the appropriate standard of review to apply to the hearing officers' decisions is considerably simplified by the fact that the parties agreed on one in the Housing Court. Specifically, the record reflects that the parties agreed that this case would be resolved by a review of whether the BHA's decisions were supported by substantial evidence on the record forged before the authority, and were otherwise legally tenable.[5]

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[4] Because we conclude that the plaintiff was entitled to relief on her Federal law reasonable accommodation claim, we need not address the State law discrimination claims. See Bridgewaters, 452 Mass. at 849 n.25 ("In light of our conclusion that BHA did not comply with Federal law, [Department of Housing and Urban Development] regulations, and its own lease, we need not address whether the eviction of Bridgewaters is consistent with Massachusetts antidiscrimination statutes").

[5] We pause to observe that this would be the proper standard of review were the certiorari claims before us. As Justice Kaplan observed long ago, the extent of judicial scrutiny that applies in an action in the nature of certiorari varies with the circumstances. Yerardi's Moody St. Restaurant & Lounge, Inc. v. Selectmen of Randolph, 19 Mass. App. Ct. 296, 300 (1985). Where, as here, "the action being reviewed is a decision made in an adjudicatory proceeding where evidence is presented and due process protections are afforded, a court applies the

We respect that agreement here without deciding whether it was the proper means of deciding these 42 U.S.C. § 1983 claims.

Our inquiry is "whether the Housing Court judge correctly ruled that the hearing officer committed legal errors that adversely affected [the plaintiff's] material rights. As part of this inquiry, we examine the record to determine whether the hearing officer's factual findings were supported by substantial evidence." Figgs v. Boston Hous. Auth., 469 Mass. 354, 362 (2014). "Substantial evidence is defined as 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Seales v. Boston Hous. Auth., 88 Mass. App. Ct. 643, 649 n.7 (2015), quoting Durbin v. Selectmen of Kingston, 62 Mass. App. Ct. 1, 6 (2004). We "may not make de novo determinations or draw different inferences from the facts, make different judgments as to witness credibility, or disturb a choice made between conflicting inferences or views of the facts." Seales, supra at 649. To the extent that the judge himself purported to find subsidiary facts based on the evidence contained in the administrative record, we agree with the BHA that this was error. Still, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts

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'substantial evidence' standard." Figgs v. Boston Hous. Auth., 469 Mass. 354, 361-362 (2014).

from its weight." Rodgers v. Conservation Comm'n of Barnstable, 67 Mass. App. Ct. 200, 206 (2006), quoting Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966).

Before turning back to the facts of this case, we note that a hearing officer's consideration of the evidence is framed by the presumption that the BHA has adopted to "accept the [program participant's] judgment that an Accommodation is needed and that the Accommodation proposed for meeting those needs is the most appropriate." BHARAP § 3.5. A hearing officer may find that the evidence presented rebuts that presumption, but a decision to that effect must be legally valid and supported by substantial record evidence. Cf. Glendale Assocs., LP v. Harris, 97 Mass. App. Ct. 454, 464 (2020) (judge's rejection of proposed accommodation plan without explanation was legal error "[w]here the burden was on the landlord . . . to demonstrate that no reasonable accommodation was feasible").

2. Merits. For the plaintiff to be entitled to the reasonable accommodation she seeks, she must show the following: first, that she is disabled; second, that there was a causal link, or nexus, between her disability and her lease violation, see Boston Hous. Auth. v. Bridgewaters, 452 Mass. 833, 848 (2009); third, that the accommodation is indeed reasonable, see BHARAP § 3.3; and fourth, that her proposed plan to prevent

future lease violations is reasonably likely to be effective, see BHARAP § 5.2.

The parties agree that the plaintiff is disabled within the meaning of the applicable laws. The remaining factors are disputed. We take them in turn.

a. Whether there was a causal link between the plaintiff's disability and her lease violation. "[A] reasonable accommodation is required where there is a causal link between the disability for which the accommodation is requested and the misconduct that is the subject of the eviction or other challenged action." Bridgewaters, 452 Mass. at 848.

The plaintiff argued that there was a causal link between her disability and her son's misconduct at her apartment because the plaintiff's disability prevented her from detecting and addressing her son's misconduct.[6] The subsequent hearing officer rejected these arguments and found as a matter of both law and fact that there was no causal link. We address these grounds in turn.

i. Import of Department of Hous. & Urban Dev. v. Rucker and Boston Hous. Auth. v. Garcia. To understand the BHA's claim that the plaintiff was precluded, as a matter of law, from

[6] She also advanced a theory that her son's very presence in the apartment was due to her disability and sufficient to demonstrate a causal link without more. We do not reach this theory.

demonstrating a causal link between her disabilities and the lease violation, some additional context is necessary. In the past, Massachusetts public housing tenants and Section 8 beneficiaries could avail themselves of the "innocent tenant" or "special circumstances" defense, which "provide[d] relief from termination when special circumstances indicate that the tenant could not have foreseen the misconduct or was unable to prevent it by any available means, including outside help." Boston Hous. Auth. v. Garcia, 449 Mass. 727, 728 (2007), quoting Spence v. Gormley, 387 Mass. 258, 279 (1982). However, beginning in 1988, Congress mandated that public housing tenants' leases permit termination as a sanction for specified criminal activity. Anti Drug-Abuse Act (ADAA), Pub. L. No. 100-690, § 5101, 102 Stat. 4300 (1988). Specifically, the law as amended requires such leases to "provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant . . . or any guest or other person under the tenant's control, shall be cause for termination of tenancy" ("one strike" lease provisions). 42 U.S.C. § 1437d(l)(6). Comparable requirements apply to Section 8

beneficiaries.[7] See 42 U.S.C. § 1437f(d)(1)(B)(iii); 24 C.F.R. §§ 982.551(l), 982.553(iii)(b)-(c). The United States Supreme Court later confirmed in Department of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 127-128 (2002), that the ADAA lease provisions are "strict liability" provisions: in other words, covered criminal activity is an eviction-worthy breach of the lease "regardless of whether the tenant knew, or had reason to know, of that activity."[8] After Rucker, the Supreme Judicial Court confirmed in Garcia that the ADAA lease provisions' strict liability nature preempted Massachusetts's innocent tenant defense. Garcia, 449 Mass. at 734-735.

The subsequent hearing officer concluded that the abolition of the innocent tenant defense precluded the plaintiff, as a matter of law, from claiming that her disabilities caused her lease violations. In other words, the hearing officer concluded that the plaintiff's disability-based arguments are nothing more than a repackaged innocent tenant defense.

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[7] The plaintiff has not contended that there is any significant difference between the provisions governing public housing tenants and those governing Section 8 beneficiaries, and we discern none that affect this case.

[8] Rucker addressed leases for public housing tenants, which are governed by 42 U.S.C. § 1437d(l)(6). Rucker, 535 U.S. at 127. The provision governing Section 8 beneficiaries' leases is 42 U.S.C. § 1437f(d)(1)(B)(iii). The plaintiff has not contended that there is any significant difference between the two provisions, and we discern none that affect this case.

This misapplies Rucker and Garcia, neither of which involved disability-related claims. Indeed, the Rucker Court made clear that it was not addressing such claims. Rucker, 535 U.S. at 129 n.3. Nor does anything in Garcia suggest a view that the ADAA lease provisions preclude defenses to eviction rooted in Federal or State disability law. Garcia, 449 Mass. at 732. See New Bedford Hous. Auth. v. K.R., 97 Mass. App. Ct. 509, 518 n.21 (2020) (observing that Garcia only "held that in some circumstances, the 'innocent tenant defense' was preempted by Federal law").

In fact, the Supreme Judicial Court already has made it clear that the BHA's Federal fair housing obligations, including the obligation to reasonably accommodate disabled tenants, override the strict liability nature of ADAA lease provisions. See Bridgewaters, 452 Mass. at 847 n.22, citing 24 C.F.R. § 966.4(l)(5)(vii)(F) (2008). See also 24 C.F.R. § 982.552(c)(2)(iv) ("If the family includes a person with disabilities, the [public housing authority] decision [to terminate benefits] is subject to consideration of reasonable accommodation in accordance with Section 8 of this title"). This is also reflected in § 3.7.2 of the BHARAP, which states that "[d]isability law does not protect a Client from eviction, program termination, or findings of ineligibility if his/her tenancy or participation poses a 'direct threat' as a result of

a disability, unless the threat can be eliminated by [a reasonable accommodation]." We have also recognized that the ADAA lease provisions "must be read in light of" other strong Federal policies, such as those of the Violence Against Women Act, 34 U.S.C. § 12491 (2017). K.R., 97 Mass. App. Ct. at 518 n.21.

ii. Whether a causal link existed in fact. Having determined that Rucker and Garcia do not bar the plaintiff from asserting her causal theory as a matter of law, we now turn to whether a causal link existed in fact.

The plaintiff presented a facially plausible case that her mobility-limiting disabilities prevented her from finding items that her son secreted in a bedroom that she did not use. As the plaintiff, the BHA, and the subsequent hearing officer all have acknowledged, if the BHA wants to reject a tenant's proffered theory as to how her disability caused a lease violation, it is required by its own policies to identify specific reasons to do so. BHARAP § 3.5. See Bridgewaters, 452 Mass. at 849. Of course, it is up to the BHA, not a reviewing court, to decide whether such reasons exist to overcome the presumption. Nonetheless, to withstand judicial review, any such reasons offered must be legally valid and supported by substantial evidence.

The subsequent hearing officer articulated two factual reasons for rejecting the causal links offered by the plaintiff, which we address in order. She first concluded that the plaintiff's disability was not the "proximate cause for the presence of the drugs . . . because it was her son who brought the drugs into the unit." This reasoning relies on a crabbed view of causation that fails to appreciate the precise nature of the lease violation and the role the plaintiff's disabilities may have played in causing it. The plaintiff's Section 8 benefits were terminated not because her son wanted to keep illegal material at the plaintiff's apartment, but instead because she failed to prevent him from doing so. The hearing officer should not have dispensed with the plaintiff's arguments that her disabilities prevented her from policing her son's activities simply by noting that the son was more culpable than she was and initially may have brought the contraband to the apartment for reasons unrelated to her disabilities.

The second reason that the subsequent hearing officer offered for the lack of a nexus between the plaintiff's disabilities and the lease violation was the finding that the plaintiff was not suffering from a severe episode of any medical condition on the date of her son's arrest. This is a non sequitur. There is no evidence on when the contraband arrived in the apartment. Given that, the question was not whether the

plaintiff's disabilities prevented her from monitoring her apartment and deterring her son's misconduct on the specific morning that the police arrested him, but whether it interfered with her monitoring him more generally.[9]

In sum, in the face of the presumption lying in the plaintiff's favor, the BHA failed to establish legally tenable "specific reasons" why there was no causal link between her disabilities and the lease violation for which it terminated her Section 8 benefits.

b. Whether the plaintiff's proposed accommodation was reasonable. To be reasonable, a proposed accommodation must not pose an undue financial or administrative burden, and it must not require a "fundamental alteration" to BHA's Section 8 program. An accommodation "requires a fundamental alteration of BHA's program if it would cause the agency to act outside of its primary purpose as a provider of subsidized housing." BHARAP § 3.3.2. An accommodation also requires a fundamental alteration of BHA's policy if it would "require BHA to operate contrary to the requirements placed upon it by law or regulation." Id.

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[9] For completeness, we note that the subsequent hearing officer's analysis appears to rely on a questionable premise. While the fact that the plaintiff was able to open her door in time to stop the police from battering it down provides some evidence of her general capabilities, this fact hardly contradicts the evidence of her limited mobility.

The subsequent hearing officer concluded that the requested accommodation would fundamentally alter the BHA's Section 8 program for two reasons, neither of which passes legal muster. First, she concluded that the accommodation would improperly import a knowledge requirement into the strict liability termination provision that the ADAA requires. This was another way of saying that the plaintiff's defense was barred because it was simply a repackaged innocent tenant defense. As discussed, such a conclusion is erroneous as a matter of law.

Second, the subsequent hearing officer concluded that the proposed accommodation would improperly put the personal care attendant's knowledge at the heart of future termination proceedings. Specifically, she expressed her concern that "[i]n order to terminate [the plaintiff] in the future, [the BHA] would be required to show that the specific personal care attendant observed suspicious activity, informed [the plaintiff], and thereafter [the plaintiff] did not address the matter properly."

This concern is understandable, but misplaced. Accommodating the plaintiff does not rewrite her legal obligations. If more criminal activity occurs on the premises, the BHA may make a second effort to terminate her benefits. If the plaintiff raises her, or her personal care attendant's, lack of knowledge of the activity as a defense, it will be as part of

a request that the BHA exercise its discretion on the plaintiff's behalf in light of mitigating circumstances, or in another request for reasonable accommodation. In the event she makes such a request, the current plan's failure to prevent the subsequent criminal activity may factor into the analysis of whether granting such a request is appropriate.

The proposed accommodation would not require a fundamental alteration to BHA's Section 8 program, and the subsequent hearing officer erred in concluding otherwise.

c. Whether the plaintiff's proposed accommodation was likely to be effective. As noted, the plaintiff enjoys a presumption that "the Accommodation proposed for meeting those needs is the most appropriate . . . [u]nless BHA can identify specific reasons for doing otherwise." BHARAP § 3.5. We conclude that the BHA has again failed to identify adequate reasons that the plaintiff's plan for preventing future violations likely would not be effective.

The plaintiff's plan had two parts. First, she banned her son from visiting her apartment. He agreed to stay away and even provided an affidavit under the pains and penalties of perjury in support of the plaintiff's reasonable accommodation request. Second, the plaintiff recruited a new personal care attendant who could care for her without her son's assistance. The plaintiff had acquired funding to pay the personal care

attendant for about twice as many hours of work as her prior attendant. The attendant, a friend of the plaintiff's, had also committed to stay for many more hours on a volunteer basis, including overnight if the plaintiff needed her to do so. There were also some indications that the plaintiff was receiving care that would improve her mobility.

The subsequent hearing officer concluded that the accommodation was unlikely to be effective, mostly because the plaintiff was paying her new personal care attendant for only a limited number of hours per day, and there was no guarantee that this friend would be able to continue working as the plaintiff's personal care attendant. The subsequent hearing officer expressed concern that a future personal care attendant would be unable to volunteer additional unpaid hours to help the plaintiff. Although we recognize these uncertainties, we think that the subsequent hearing officer applied too strict a standard; she at least verged on asking the plaintiff to prove a negative. As the judge wrote, the plaintiff "cannot be expected to" do so. There was no indication in the record that the son's promise was made in bad faith, or that the plaintiff would allow him in if he did come to the apartment for some reason. Again, as the judge wrote, the plaintiff "has agreed to take all reasonable steps to keep [her son] from returning to her apartment. Her inability to provide absolute assurance that

[her son] may not try to return does not render this part of her proposed accommodation unreasonable." Nor was there any suggestion that any other third party might engage in criminal activity at the apartment. In fact, at the time of the incident, the plaintiff had lived in the apartment for well over a decade without apparent incident. It is also undisputed that the incident involving the son placed the plaintiff and her personal caregivers on alert about the possibility of misconduct at her apartment.[10]

Of course, our conclusion does not make the issues identified by the subsequent hearing officer irrelevant. We reiterate that if the plaintiff is forced to request another accommodation due to future criminal activity on the premises, the current plan's failure may factor into an analysis of whether to grant her request.

We conclude that the subsequent hearing officer failed to articulate specific reasons, supported by substantial evidence, that the plaintiff's plan to prevent future lease violations is unlikely to prevent future violations.[11]

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[10] At oral argument, the plaintiff's counsel represented that the plaintiff has continued to live at her apartment for the last several years without further incident.

[11] The plaintiff must also establish that she is "otherwise qualified," that is, able to comply with the terms of her lease aside from those addressed by her reasonable accommodation. See Andover Hous. Auth. v. Shkolnik, 443 Mass. 300, 310 (2005);

3. Remedy. Through its own informal process and three administrative hearings, the BHA has had ample opportunity to try to justify its decision to terminate the plaintiff's Section 8 benefits. For the reasons set forth above, we conclude that the BHA has not done so. Moreover, as noted, the BHA's own policies establish a presumption in the plaintiff's favor with regard to the import of the plaintiff's disabilities. Nearly five years now have elapsed since the BHA first sought to terminate the plaintiff's subsidies. Under these circumstances, we conclude that it is appropriate to affirm the judgment of the Housing Court, without ordering another remand for the agency to take another bite at the apple. See Boston Gas Co. v. Department of Telecomm. & Energy, 436 Mass. 233, 242 (2002) (remanding administrative decision "would be futile" where agency "has been repeatedly presented with the argument that its decision . . . is unsupported by substantial evidence and, in response, has issued three decisions . . . each lacking sufficient record support . . . [and] has offered no indication that its decision can ever be supported by substantial

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BHARAP § 3.1.2. Because of this requirement's considerable overlap with the other showings, we need not address it at any length here. See Shkolnik, supra at 310. It suffices to note that the subsequent hearing officer's conclusion that the plaintiff was not "otherwise qualified" because she cannot prevent criminal activity on the property was, at best, another way of saying that the accommodation is unlikely to be effective.

evidence"). See also Gloucester v. Civil Serv. Comm'n, 408 Mass. 292, 301 (1990) (reversing agency action on substantial evidence review pursuant to certiorari statute, where sole administrative decision permitting action was incorrectly decided). Contrast Bridgewaters, 452 Mass. at 850-851 (remanding for reasonable-accommodation analysis where BHA failed to undertake such analysis prior to terminating benefits). We therefore affirm the judgment of the Housing Court.

So ordered.