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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

PEGGY TROIANO,
Petitioner/Appellant,

v.

DCA CASE NO.: 15-3071

HERNANDO COUNTY
HOUSING AUTHORITY,

Respondent/Appellee.

_____ /

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

REPLY ARGUMENT.....1

I. The evidence in the record supports a finding that Appellant made a *prima facie* showing of discrimination, HCHA presented no evidence to refute her, and the ALJ’s findings of fact do not show otherwise.....1

II. Intent is not an element of a claim for discrimination based on failure to provide a reasonable accommodation.....4

III. FCHR’s decision is based on hearsay evidence and an incorrect interpretation of the law.....6

IV. The evidence in the record showed that HCHA discriminated by failing to respond and failing to open a dialogue regarding the requested accommodations.....9

V. A deviation from a HUD regulation is precisely the type of accommodation contemplated in the Fair Housing and Rehabilitation Acts.....11

CONCLUSION.....15

CERTIFICATE OF SERVICE.....iv

CERTIFICATE OF COMPLIANCE.....v

TABLE OF AUTHORITIES

CASES

Advocacy Ctr. For Perss. With Disabilities, Inc. v. Woodlands Estates Ass'n 192, F. Supp.2d 1344 (M.D. Fla. 2002)5

Dornbach v. Holley, 854 So. 2d (FL 2d DCA 2002)5

Garcia v. Washington County Dept. of Housing Services, 2006 WL 897984 (D. Or. 2006) 8, 13

Groner v. Golden Gate Apartments, 250 F.3d 1039 (6th Cir. 2001).....12

Jacobs v. Concord Village Condominium Assoc., 2004 WL 741384 (S.D. Fla. 2004).....11

Jankowski Lee & Assoc., 91 F.3d 891 (7th Cir. 1996).....11

Liddy v. Cisneros, 823 F. Supp. 164 (S.D.N.Y. 1993).....14

Loren v. Sasser, 309 F.3d 1296 (11th Cir. 2002).....12

Mangrum v. Fears, 2007 WL 1159943 (M.D. Ala. 2007).....13

McGary v. City of Portland, 386 F.3d 1259 (9th Cir. 2004)8

STATUTES AND REGULATIONS

§ 120.68(7)(d) and (10), Fla. Stat. (2015)4, 6, 9

§ 720.23(9)(b), Fla. Stat. (2015)5, 12

24 CFR § 5.1109, 11, 14

24 CFR § 8.2812

24 CFR § 982.517(e)12

24 CFR § 982.204(c)(2)12

24 CFR § 982.303(b)(2)3, 12

24 CFR § 982.316(a)12

24 CFR § 982.3527

24 CFR § 982.601(b)(3)12

24 CFR § 982.615(3)7

29 U.S.C. § 79412

42 U.S.C. § 3604(f)(3)(b)12

42 U.S.C. § 3535(q)14

OTHER AUTHORITIES

HUD PIH Notices 2009-41 (HA)14

HUD PIH Notice 2008-13 (HA)14

HUD PIH Notice 2013-20 (HA)14

REPLY ARGUMENT

- I. **The evidence in the record supports a finding that Appellant made a *prima facie* showing of discrimination, HCHA presented no evidence to refute her, and the ALJ's findings of fact do not show otherwise.**

The record shows that Ms. Troiano presented an overwhelming amount of evidence to support that her requested accommodation was reasonable and necessary, and to show that Appellee Hernando County Housing (HCHA) did not so much as respond to her request, thereby denying the request. Therefore, Ms. Troiano made a *prima facie* showing of discrimination under the Fair Housing Act.

Appellant is not, as Appellee contends, asking this Court to reweigh the evidence presented to the ALJ. The ALJ *made no findings discrediting the evidence* presented by Ms. Troiano. The ALJ simply stopped short of making the necessary findings, after he incorrectly interpreted the law to say that a housing authority could not make an accommodation to allow assistance at a resident owned and occupied unit. However, the record contains more than enough *unrefuted* evidence to show that Ms. Troiano made out a *prima facie* case of discrimination based on a denial of a reasonable accommodation.

The record contains *unrefuted* evidence to support the following facts that make a *prima facie* case, and the ALJ made no findings to the contrary:

1. Ms. Troiano is a person with a disability which causes her to have very specific housing needs, which entail the location of the home, the materials used in the home, and the layout of the home.
2. It is extremely difficult and time consuming, if not impossible, for Ms. Troiano to find suitable rental housing, and the process of moving exacerbates her condition.
3. After two years of searching, the house on Pomp Parkway was specifically selected, purchased, and remodeled for Ms. Troiano, and it meets her needs.
4. Ms. Troiano's physician has stated that she must have a live-in caretaker, and that Julia Williams is the only caretaker in the area with the specific knowledge and training to meet Ms. Troiano's needs.
5. HCHA approved Julia Williams to be Ms. Troiano's landlord, and live-in aide, then terminated the housing assistance payment due to the home being owner-occupied, and instructed Ms. Troiano that she had to move.
6. HCHA gave Ms. Troiano only about 35 days' notice that they were terminating the housing assistance payment at Pomp Parkway.
7. HCHA gave Ms. Troiano only 60 days to find alternative housing.
8. On September 8, 2014, Ms. Troiano requested an accommodation of being allowed to continue to receive Section 8 assistance at the Pomp Parkway home, or to be granted additional time to work with HCHA to find another

accommodation that would meet her needs, stating that, due to her disability, a housing search takes months to years, it would be “extremely difficult if not impossible” for her find another rental that would meet her needs.

9. Ms. Troiano made subsequent requests to have the voucher reinstated at Pomp Parkway on October 30, 2014, and December 9, 2014.

10. HCHA did not respond to any of Ms. Troiano’s requests for accommodation or apply for a HUD administrative waiver, but terminated the housing assistance payment on September 30, 2014, effectively denying the requests.¹

11. HCHA did not engage Ms. Troiano in an open dialogue or interactive process, in order to determine if there might be an alternative way to accommodate her needs.

The HUD regulations state at 24 CFR § 982.303 that public housing agencies must extend a housing search term for a voucher holder who needs and requests an extension of the initial 60 days, as a reasonable accommodation, “up to the term that is reasonably required for that purpose.” It is clear from the facts of this case that Ms. Troiano made such a request for additional time to find suitable

¹ Appellee incorrectly asserts in the Answer Brief that Ms. Troiano’s participation in the program was never terminated. The evidence clearly showed no payments were made after September 2014, and that Ms. Troiano was issued one voucher packet with a 60-day term to find alternate housing, which expired in October 2014 when she was not able to enter into a lease within the 60 day term. Under the Section 8 program, clients whose vouchers expire are considered terminated from the program and must reapply for the waitlist, which can be years long.

housing, and that HCHA failed to respond to Ms. Troiano's request, and effectively denying it. It is clear that in this instance, HCHA discriminated against Ms. Troiano by failing to make a reasonable accommodation.²

Appellee's argument that Ms. Troiano failed to make out a *prima facie* showing of discrimination due to failure to make a reasonable accommodation fails. Because the ALJ's decision and FCHR's final order is based in findings of fact that are not supported by the competent substantial evidence in the record, because the ALJ omitted essential findings of fact, and because the decision is contrary to the law, the order must be must be set aside or the case must be remanded for further proceedings. § 120.68(7)(d) and (10), Fla. Stat. (2015).

II. Intent is not an element of a claim for discrimination based on failure to provide a reasonable accommodation.

As Appellee Hernando County Housing Authority (HCHA) completely failed to respond to Ms. Troiano's request for accommodation, Appellee's argument that

² Appellee asserts that Ms. Troiano's request for an extension of time to find suitable housing should not be considered by this Court because it was not previously raised as an issue in the case. However, this request has been an issue from the onset of the case. Ms. Troiano's original Housing Discrimination Complaint to FCHR (R. 22-23) and the FCHR Determination (R.12-21) state that on September 8, 2014, Ms. Troiano submitted a request to have her voucher reinstated to her current residence "until she would be able to locate a home that would meet her medical needs" because it would be difficult for her to find a home to meet her needs. The letter was included in the record at DOAH (R. 611) and was the subject of Ms. Troiano's testimony at the hearing. The ALJ restates the same language in the preliminary statement of the recommended order (R. 164).

HCHA did not terminate Ms. Troiano's Section 8 voucher *because of* her disability and that HCHA was only trying to comply with HUD regulations is mere pretext. It is also irrelevant, as denial of a reasonable accommodation is *de facto* discrimination, regardless of intent. In cases involving a denial of a reasonable accommodation, there is no requirement to show that a provider intended to discriminate, or that the provider treated a person with a disability differently from others *because of* their disability. § 720.23(9)(b), Fla. Stat. (2015); see *Dornbach v. Holley*, 854 So. 2d (FL 2d DCA 2002); *Advocacy Ctr. For Perss. With Disabilities, Inc. v. Woodlands Estates Ass'n* 192, F Supp.2d 1344 (M.D. Fla. 2002).

In determining whether or not discrimination occurred in this case, the only proper inquiry is whether or not the denied accommodations could reasonably be provided, whether they were necessary to provide Ms. Troiano an opportunity to use the housing program as a person with a disability, and, if not, whether a reasonable alternative was offered. The fact that, as the ALJ states, "Respondent would have been willing to continue Petitioner's housing assistance as long as Petitioner met program requirements..." is irrelevant since *Ms. Troiano's disability is what makes it impossible* for her to live in a property that meets the usual program requirement, and precisely the reason why she requested accommodations so that she could continue to participate in the housing program.

Here, the law shows that HCHA could have provided the accommodations, and the uncontroverted evidence shows that they were necessary. The proper finding, based on the law and the evidence in the record, is that discrimination occurred, regardless of whether or not HCHA intended to discriminate. Because the FCHR's decision is based on an incorrect interpretation of the law, and the correct interpretation compels a particular action, § 120.68(7)(d), Florida Statutes, requires that the decision be set aside.

III. FCHR's decision is based on hearsay evidence and an incorrect interpretation of the law.

Appellee's Answer Brief makes multiple references to e-mails from a Preston Fleming, an apparent HUD employee, that were included in the record. Appellee asserts that the ALJ properly relied on the emails as evidence in support of a finding that HCHA did not have discretion to grant Ms. Troiano's request to continue to receive Section 8 assistance in the home owned by her daughter, with her daughter serving as her live-in aide. Appellee's argument is without merit because (1) the e-mails are hearsay evidence that cannot be the basis of a finding of fact, (2) the e-mails offer an incorrect conclusion of law; (3) the e-mails were sent *before* Ms. Troiano requested an accommodation, and do not address the requested accommodation.

Hearsay evidence may not form the basis of a finding of fact in an administrative hearing. Section 120.57(1)(c), Florida Statutes, provides: “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” Preston Fleming did not testify at the hearing and was not subject to cross examination, and therefore his e-mails are hearsay evidence. See § 90.801, Fla. Stat. (2015). Further, his e-mails are hearsay within hearsay, as he is stating the opinions of his colleagues. The e-mails are without context, and it is unknown what information regarding Appellant was available to Preston Fleming and his colleagues when they offered their opinion.

Additionally, the Appellee is asserting that the e-mails should be used as a source of *law*. In the e-mails, Mr. Fleming states that he does not see an exception to 24 C.F.R. § 982.352(a)(6) regarding owner-occupied units being ineligible for Section 8 assistance in the § 982.352. Mr. Fleming seems to have missed the shared housing provisions at § 982.615(3) which state, “The owner of a shared housing unit may reside in the unit. A resident owner may enter into a HAP contract with the PHA...”

Further, to accept Mr. Fleming’s opinion as the law is to completely ignore the Fair Housing Act and the law of reasonable accommodations, as well as the multitude of other HUD regulations, HUD guidance, and case law that make clear

that HUD regulations do not supersede the Fair Housing Act, and are subject to modification as a reasonable accommodation.

In *Garcia v. Washington County Dept. of Housing Services*, 2006 WL 897984 (D. Or. 2006), the defendant housing authority had also received letters from HUD directing it to terminate the plaintiff's voucher, and argued that it had no power or authority to make an accommodation in the HUD regulation prohibiting assistance to an owner-occupied unit. The court disagreed stating, "It is well-settled that the affirmative duty on public agencies to reasonably accommodate disabled individuals includes modifying administrative rules and policies." *Id.* at 2, citing *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004) (internal citations omitted).

Finally, it should be noted that Donald Singer's e-mail exchanges with Preston Fleming of HUD occurred *before* Ms. Troiano made her request for an accommodation in the rules, policies and procedures which would generally prevent a voucher recipient from being allowed to rent the resident owned and occupied unit. Appellee mischaracterizes the e-mails as an opinion on Ms. Troiano's request for accommodation. In fact, Ms. Troiano made her request to remain at Pomp Parkway, or alternatively for more time to move, on September 8, 2014, *in response to* the letter from HCHA dated August 22, 2014, which Appellee claims was approved in the second email from Preston Fleming. In fact, no HUD employee has offered a decision or opinion as to Ms. Troiano's requested accommodation, or as to whether

HCHA may waive the rule as a reasonable accommodation. HCHA could have sought an administrative waiver from HUD through the formal process pursuant to 24 CFR § 5.110, but did not.

As FCHR's decision is based on a finding of fact that is not supported by competent substantial evidence in the record, and is based on an erroneous conclusion of law, the decision must be set aside or the case must be remanded for further proceedings. § 120.68(7)(d) and (10), Fla. Stat. (2015).

IV. The evidence in the record showed that HCHA discriminated by failing to respond and failing to open a dialogue regarding the requested accommodations.

Appellee contends that HCHA responded to Ms. Troiano's request to continue to receive assistance at the home on Pomp Parkway, or for more time to relocate or find another resolution, but this statement is completely without support in the record, and even the ALJ made no such finding. The evidence showed that after Ms. Troiano sent her request for accommodation on September 8, 2014, there was no further communication from HCHA. Appellee points to nothing in support of this assertion that HCHA responded to the request, but attempts to argue that the August 22, 2014 letter from HCHA notifying her that HAP contract was terminated and she must move to receive continued assistance, was somehow a response to the request.

This letter was prior to her request, and was what prompted her request. To argue that it also serves as a response is absurd.

Appellee and the ALJ imply that the statement in the August 22 letter that HCHA would be sending Ms. Troiano a 3-bedroom voucher to be used at a different unit, is evidence that HCHA properly engaged in an interactive process or open dialogue with Ms. Troiano, and that she was offered alternatives to moving in 60 days. Again, this letter, and the August 27, 2014, letter which included the new voucher packet, were sent *before* Ms. Troiano made her request for accommodation, and they are precisely what prompted Ms. Troiano to request an accommodation. A reading of the August 22 letter makes clear that the new 3-bedroom voucher was not being offered as an alternative, but as the only option. The letter simply stated that she had to move, and was her first notice of this decision by HCHA.

The ALJ implies in paragraphs 30 and 54 of the Recommended Order (R. 175, 182) that Ms. Troiano was offered other options to keep her voucher assistance, but there is nothing in the record to support this finding of fact. HCHA never engaged with Ms. Troiano to discuss other options such as a different live-in aide or a different owner of the home, despite Ms. Troiano's plea to find an alternate resolution in her September 8 request. No doubt there were many possible resolutions, such as enrolling Ms. Troiano in the Section 8 homeownership program, having HCHA purchase the home as "scattered site" public housing, or submitting a proper request

to HUD for a regulatory waiver, but HCHA cut off any opportunity to explore other options when it failed to respond in any way to Ms. Troiano's request.

The law requires housing providers to open a dialogue and engage in an interactive process with a party requesting a reasonable accommodation in order to determine whether reasonable alternatives exist *before* denying a request, in order to avoid liability under the Fair Housing Act. *Jacobs v. Concord Village Condominium Assoc.*, 2004 WL 741384 at *2 (S.D. Fla. 2004), citing *Jankowski Lee & Assoc.*, 91 F.3d 891 (7th Cir. 1996). Not only did HCHA fail to open a dialogue with Ms. Troiano, but it failed to respond to her request in any way. Accordingly, HCHA discriminated under the Fair Housing Act, and FCHR's Order should be set aside.

V. A deviation from a HUD regulation is precisely the type of accommodation contemplated in the Fair Housing and Rehabilitation Acts.

Appellee's main argument that the reason HCHA denied the requested accommodation of a modification to a rule regarding the leasing of owner-occupied, relative-owned units is that HUD regulations supersede the Fair Housing Act, and that it must comply with HUD regulations. First, the argument fails because HCHA could have applied for a HUD regulatory waiver via the formal waiver process established pursuant to 24 CFR § 5.110, but did not. Second, the Federal Fair Housing Act, the Florida Fair Housing Act, and the Rehabilitation Act of 1973 all place an affirmative duty on public housing agencies to make modifications in rules,

policies or procedures, when such modifications may be necessary to prevent persons with disabilities from being excluded from the housing programs. § 720.23(9)(b), Fla. Stat. (2015); 29 U.S.C. § 794; 42 U.S.C. § 3604(f)(3)(b). HUD has, through rulemaking procedures, made efforts to implement these civil rights laws in its programs by adding language regarding reasonable accommodations into its regulations in areas where accommodations are routinely needed, such as allowances for higher rent amounts for accessible units, allowances for higher utility bills, allowances for live-in aides and special housing types, accommodations to the waiting list, and allowances for additional time to search for an accessible housing unit. *See* 24 CFR § 8.28(a)(5) and §§ 982.517(e), 982.316(a), 982.601(b)(3), 982.204(c)(2) and 982.303(b)(2). However, HUD is clearly not able to contemplate every instance in which a person with a disability might need an accommodation, or to include every possible exception in the federal regulations. Due to the unique circumstances of each individual with a disability, the inquiry into “whether a requested accommodation is required by law is highly fact-specific, requiring case-by-case determination.” *Loren v. Sasser*, 309 F.3d 1296 (11th Cir. 2002) at 1302, citing *Groner v. Golden Gate Apartments*, 250 F.3d 1039 (6th Cir. 2001) at 1044. The administrative waiver process is available to address these cases.

While the HUD regulations do not contain a specific provision stating that a reasonable accommodation should be afforded in the more unusual circumstance

where a voucher holder with a disability must rent from a relative who is also a live-in aide, this in no way suggests that the accommodation cannot be made, and there is no support for Appellee's argument that this accommodation cannot be made. Appellee ignores a large body of HUD regulations, HUD guidance and notices, and case law in making this assertion. Appellee cites only one case in support of its argument, and grossly mischaracterizes the case, which is clearly distinguishable from the instant case. In *Mangrum v. Fears*, 2007 WL 1159943 (M.D. Ala. 2007), the magistrate judge recommended dismissal of the plaintiff's complaint, stating that the *pro se* plaintiff's amended complaint failed to satisfy a court order for clarification, was ambiguous, and after the plaintiff failed to appear at a hearing set for the purpose of clarifying his claims to the Court. *Id* at 2. The court stated: "The gist of these allegations – as best as can be discerned from verbiage which lacks clarity, to be charitable – is a complaint that Defendant's wrongfully refused to let Plaintiff use his Section 8 Voucher to pay for his public housing unit." *Id*. Because HUD regulations state that a public housing unit may not be further subsidized by a public housing authority, the magistrate recommended dismissal of the case. *Id*. The case makes no mention of reasonable accommodations.

Appellant agrees with Appellee that there are few cases on point. The case of *Garcia v. Washington County Dept. of Housing Services*, 2006 WL 897984 (D. Or. 2006) is only available case with the same facts as the instant case. Yet, in another

Section 8 case, *Liddy v. Cisneros*, 823 F. Supp. 164 (S.D.N.Y. 1993), the court directly addressed the issue of whether HUD regulations conflict with the Fair Housing Act as Amended (FHAA) and the Rehabilitation Act of 1973 (RHA). The court reasoned that:

The principle that a specific statute will not be overridden by a general statute obtains only when the two statutes conflict and cannot be reasonably reconciled. However, the HUD regulations themselves require that the federal preferences be applied in a manner that is consistent with other federal requirements and the Secretary of HUD is constrained by the FHAA and the RHA to administer the policies of HUD in a manner to further the policies of FHAA, Title VIII and the RHA. *Id.* at 172 (internal citations omitted).

Finally, regulations at 24 CFR § 5.110 allow the HUD secretary to waive any portion of Title 24 of the CFR upon a showing of good cause, and HUD created a formal process by which PHA's routinely apply for regulatory waivers, outlined HUD PIH Notices 2009-41 and 2013-20. *See also* 42 USC § 3535(q). HUD so frequently grants regulatory waivers to the regulations creating the Section 8 payment standards for families with disabilities, that a special process was created, as outlined in HUD PIH Notice 2008-13 (HA). Clearly, it is HUD's intent that

exceptions be made to HUD regulations when necessary to afford persons with disabilities an opportunity to use the housing programs.

Appellee's argument and the ALJ's determination that HUD regulations supersede the Fair Housing Act is without merit. As FCHR's Order is based on an erroneous interpretation of the law, the agency action should be set aside.

CONCLUSION

For the foregoing reasons, Ms. Troiano requests that this Court set aside FCHR's Final Order and remand for an entry of an order declaring that HCHA discriminated against Ms. Troiano, and ordering that her request for accommodation be granted by reinstating the HAP contract at the Pomp Parkway home, with all rental subsidies since October 2014 paid in arrears, and any other relief that this Court deems appropriate.

Respectfully submitted,

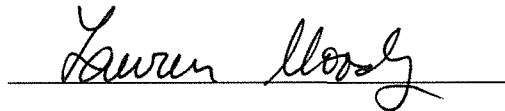
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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of this Appellant's Reply Brief has been furnished electronically to LASHAWNDA K. JACKSON of Rumberger, Kirk, and Caldwell, Counsel for Respondent, Hernando County Housing Authority, at ljackson@rumberger.com, on May 31, 2016.

A handwritten signature in cursive script, reading "Lauren Moody", is written over a horizontal line.

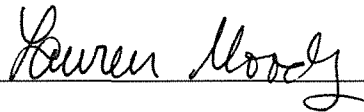
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Appellant's Reply Brief complies with the font requirements (Times New Roman 14-point font) of Rule 9.210(a)(2), Florida Rules of Appellate Procedure. Signed May 31, 2016.



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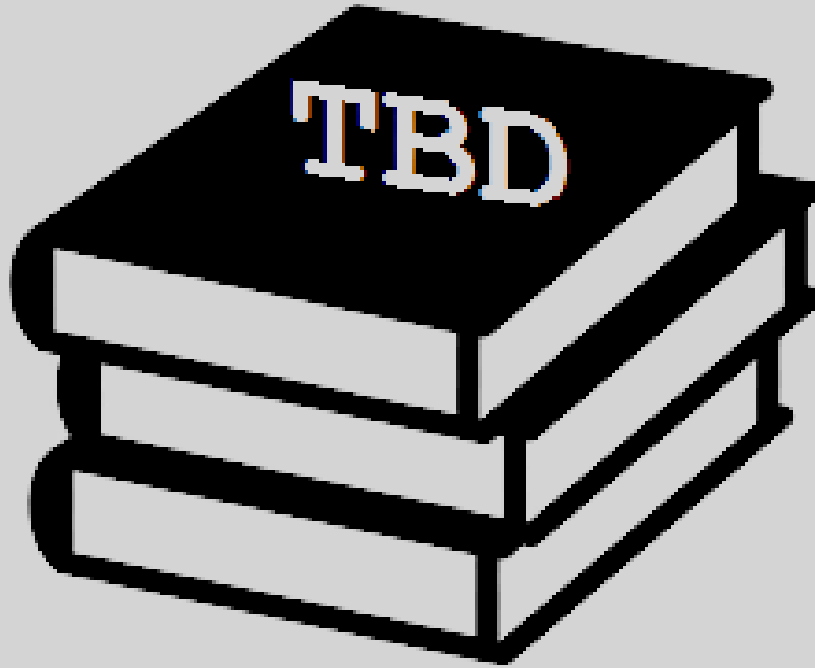
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