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January 17, 2012

VIA FIRST CLASS MAIL AND EMAIL

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Office of the Administrative Law Judges
451 7th Street S.W. Room B-133
Washington, D.C. 20410

RE: *The Secretary, United States Department of Housing and Urban Development,
on behalf of Delores Walker and on behalf of Gregory Walker, by and through Delores
Walker, his legal guardian v. Michael Corey*
HUDALJ 10-M-207-FH-27

Dear Judge Mahoney:

Enclosed for filing, please find Charging Party's Post-Trial Brief and Certificate of Service.

Respectfully,

A handwritten signature in cursive script that reads "Michele Caramenico".

Michele Caramenico
Attorney-Advisor

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that service of the attached Post-Trial Brief was made via email to the following:

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on this 17th day of January, 2012.


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UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of Delores
Walker and on behalf of Gregory
Walker, by and through Delores Walker,
his legal Guardian,
Charging Party,

v.

HUDALJ No. 10-M-207-FH-27
FHEO No. 03-09-0387-8

Michael Corey,
Respondent.

SECRETARY'S POST-HEARING BRIEF

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I. INTRODUCTION

On September 29, 2010, the Secretary of the United States Department of Housing and Urban Development (“Charging Party” or ‘HUD’) issued a Determination of Reasonable Cause and Charge of Discrimination on behalf of Complainants Delores and Gregory Walker, alleging a violation of the Fair Housing Act, 42 U.S.C. § 3601, et seq., by Respondent Michael Corey. Respondent was charged with violating 42 U.S.C. §§ 3604(c), 3604(f)(1) and 3604(f)(2) of the Fair Housing Act. As set forth in the Charge, Respondent Corey made discriminatory statements indicating a preference for renting to persons without disabilities and refused to rent to Complainants Delores Walker and Gregory Walker unless they agreed to additional discriminatory requirements that were imposed solely because of Gregory Walker’s disability. The Charge also alleged that Respondent made a written statement memorializing the additional discriminatory requirements that he intended to impose on Delores and Gregory Walker before he would consider renting the subject property to them. On November 28 and 29, 2011, a hearing was held before Administrative Law Judge Jeremiah Mahoney. At the conclusion of the hearing, Judge Mahoney ordered that post-hearing briefs be filed on or before January 17, 2012.

II. STATEMENT OF FACTS

In April 2008, after the death of their mother, Delores Walker became the legal guardian and primary caregiver of her brother, Gregory Walker. (GX #20; Tr. 14, 15).¹ Gregory Walker is an adult male diagnosed with autism and mental retardation; he requires significant assistance with most activities of daily living and is consequently a person with a disability. (GX #21; Tr. 14).

In April 2009, Ms. Walker responded to an advertisement for a two-bedroom house for rent and dealt with Respondent Corey, the owner of the property at 5215 Venable Avenue in Charleston, West Virginia (“Subject Property”). (GX # 39 at pp. 21, 22). During the course of the conversations between Ms. Walker and Mr. Corey about the rental of the Subject Property, Ms. Walker mentioned to Respondent Corey that her brother would live with her at the Subject Property and that he has autism and mental retardation. (GX #39 at p. 22).

After learning about Gregory Walker’s mental disabilities, Respondent imposed additional requirements before he would rent the Subject Property to Delores and Gregory Walker. (GX #39 at pp. 23, 24, 25, 29, 31, 33, 34, 40; Tr. 19, 20, 125). These additional requirements were imposed, according to Respondent Corey, because of concerns that Gregory Walker would attack the neighbors, burn down the Subject Property or would cause a rise in liability due to the fact that Mr. Walker is diagnosed with autism. (GX # 39 at pp. 23-24, 40; Tr. 125, 228-229).

Respondent stated that Ms. Walker would need to obtain a million dollar liability policy before he would consider renting the Subject Property to her. (GX 39 at pp. 25, 28, 29, 33, 34; JNTX # 4 at pp. 41, 42, 43; Tr. 125-127). Respondent stated that he required Ms. Walker to obtain the liability policy because he had concerns that Gregory Walker would cause property damage or would harm neighbors. (GX #39 at pp. 24, 25, 28, 40; Tr. 122, 228-229).

Respondent Corey also demanded that Ms. Walker submit a note from Gregory Walker’s

¹ Through this brief, “GX” refers to a Government Exhibit, “TR” refers to the Trial Transcript and “JNTX” refers to a Joint Exhibit.

doctor. (GX #39 at pp. 24, 27, 29; Tr. 123, 128). According to Respondent, he was “looking for a letter telling me that [Gregory Walker] was of no danger to himself, no danger to the property, and no danger to the property, and no danger to the surrounding neighbors, and that he was not capable of setting the house on fire or doing any other damage due to his condition.” (GX # 39 at p. 40). Respondent Corey also insisted that Ms. Walker sign a statement accepting responsibility if her brother caused any damage to the Subject Property. (GX #39 at p. 25).

While viewing the subject property, Ms. Walker asked Respondent Corey to write down the conditions that he was imposing before he would rent the Subject Property to her and her brother. (GX #39 at p. 34). Ms. Walker provided a piece of paper to Respondent Corey on which she had written, “5215 Venable Ave. Need to possible [sic] rent house with Greg.” (Tr. 22). In response to Ms. Walker’s request, Respondent Corey wrote the following on the paper that she provided:

“1,000,000 Ins policy to protect landowner from any problems that might exist due to her brother’s condition.”

“Tenant is to sign a paper to be responsible for any damages caused by her brother”

“Note from doctor about brother’s condition” (GX #7; GX # 39 at pp. 33, 34; Tr. 130-131).

Ms. Walker did not fill out the application given to her by Respondent Corey. (Tr. 26). Ms. Walker testified that the additional requirements imposed by Respondent Corey discouraged her from applying for tenancy. (Tr. 26, 27). When asked about why she did not complete the rental application, Ms. Walker stated: “I just felt that with all the requirements that he wanted and everything like that, and the frustration I was going through with the whole situation, I just felt that, you know, he wouldn’t give me the place anyway.” (JNTX # 4 at p. 46). At trial, Ms. Walker again stated that the additional requirements discouraged her from filling out the rental application. When asked about why she did not complete the rental application, Ms. Walker stated: “Well, with the stipulations that he wanted here. . .I didn’t even think I could afford a million dollars in insurance...I think even if I filled it out he still wasn’t going to give it to me....” (Tr. 26-27).

After touring the Subject Property, Ms. Walker called Mr. Corey and asked if he would be willing to accept a half-million dollar liability policy instead of a million dollar policy. (Tr. 28). Respondent Corey refused to lower the dollar amount of the liability policy that he was requiring from Ms. Walker. (GX # 39 at p. 28). According to Respondent Corey, he told Ms. Walker that he required a million dollar liability policy because he had only a million-dollar insurance policy and if there was a lawsuit it would have been insufficient in light of the damage that Respondent Corey felt that Gregory Walker could possibly cause. (GX #39 at p. 28).

Respondent admitted that he has never met Gregory Walker and that he knew nothing about Gregory Walker other than the fact that Delores Walker said that her brother was diagnosed with autism and mental retardation. (GX # 39 at p. 23; GX # 18 para. 21, 22; Tr.129).

Based solely on Gregory Walker’s diagnoses of autism and mental retardation, Respondent Corey assumed that there would be a “rise in liability” because of Mr. Walker’s mental disabilities. (GX #39 at pp. 23, 27. Respondent Corey admitted that he believes that “persons diagnosed with autism and mental retardation pose a greater risk in terms of liability.” (GX #18 para. 27). Respondent also believed that Gregory Walker, because he was diagnosed with autism and mental

retardation, could harm the three babies in the house next to the Subject Property. (Tr. 229).

Respondent Corey does not typically require liability insurance, doctor's notes or statements accepting responsibility for damages from his tenants and did not require the non-disabled tenant who rented the Subject Property in May 2009, Shelley Dearien, to meet such requirements. (GX # 39 at pp. 28, 30, 39; Tr. 146).

Because of her brother's disability, in order for Ms. Walker to rent 5215 Venable Avenue, she would have had to agree to comply with an application process that was different, and more burdensome, than the application process required of non-disabled applicants. (GX # 39 at pp. 23, 24, 25, 29, 31, 33, 34, 40). In addition, because of her brother's disability and the requirement that she purchase liability insurance because of her brother's disability, it would cost more for Ms. Walker and Gregory Walker to reside at 5215 Venable Avenue than it would be for a non-disabled family. (GX # 39 at pp. 31, 32).

Even if Ms. Walker was willing to meet these discriminatory and burdensome demands, Respondent Corey would not hold the property for her as she attempted to satisfy these additional demands. (GX # 39 at pp. 27, 40; Tr. 128). As Respondent Corey stated during his deposition: "I was looking for a letter telling me that he was no danger to himself, no danger to the property, and no danger to the surrounding neighbors, and that he was not capable of setting the house on fire or any other damage due to his condition. Had I gotten that, I would have rented to her easily, without a problem, had it still been available at the time I received all the information." (GX # 39 at page 40) (emphasis added). At trial, Respondent Corey stated that he would not have processed Ms. Walker's application without a doctor's note. (Tr. 128). Respondent Corey also testified that he received many calls about the vacancy at the Subject Property and that it was rented in a few days. (Tr. 127).

Although Respondent Corey owns and personally manages his extensive real estate holdings—21 or 22 rental properties—as his full-time occupation and primary source of income, he is not familiar with his obligations under the Fair Housing Act and Respondent Corey admitted that he cannot be sure that his actions and statements are in compliance with the Fair Housing Act. (GX # 39 at pp. 9, 10, 11; Tr. 149). Respondent Corey was not aware that disability is a protected class under the Fair Housing Act. (Tr. 150).

As a defense to the violations, Respondent has repeatedly asserted that he cannot be held liable because Ms. Walker was not financially qualified to rent the Subject Property. According to Respondent's deposition testimony, he required a prospective tenant to have an income of at least \$2000 per month and couldn't recall ever renting to a tenant who did not meet his required monthly income. (GX #39 at pp. 19-21). He also stated that he had never rented the Subject Property to a tenant who did not meet his monthly household income requirements. (GX # 39 at pp. 20-21). According to Respondent's Response to Requests for Admissions, he required a household income of \$2100 in net income. (GX 18 #26). Respondent verifies income by requiring prospective tenants to show him their paystubs. (GX #39 at pp. 17, 19). He also claimed to perform credit checks on all prospective tenants. (GX #39 at p. 17).

Shelley Dearien, the tenant who rented the Subject Property at the time that Ms. Walker inquired about the rental property, did not meet the purported monthly household income requirements because she did not even have a gross income of \$2000 per month. (Tr. 112). Ms. Dearien testified that she showed her March or April 2009 paystubs to Respondent Corey so that

Respondent could verify her income. (Tr. 111).² According to the paystubs for March and April 2009, Ms. Dearien did not have a gross income of \$2000 per month, even with the addition of \$231.00 per month from Social Security. (Tr. 112). Respondent Corey testified that he reviewed Ms. Dearien's paystubs. (GX #39 at p. 35-37). Ms. Dearien also testified that she was in collections for unpaid hospital bills; she owed approximately \$9000. (Tr. 114). Respondent Corey did not pull a credit report on Shelley Dearien. (Tr. 225).

III. LAW AND ARGUMENT

A. Charging Party has Direct Evidence that Respondent Corey Violated the Act

Plaintiff can prove its case of discrimination through either direct evidence or indirect evidence.³ Direct evidence is defined as evidence proving the existence of facts without inference or presumption. HUD v. Gwizdz, Fair Hous.-Fair Lending Rptr. 25,086, at 25,793 n.7 (HUD ALJ 1994) ("Direct evidence establishes a proposition directly rather than inferentially."). There are many cases decided by HUD Administrative Law Judges wherein a violation of § 3604(c) was also described as direct evidence of a violation of another provision of the Act. Robert G. Schwemm, Discriminatory Housing Statements and Section 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision, Fordham Urban Law Journal, fn. 185, October 2001 (citing HUD v. French, 1995 HUD ALJ LEXIS 38 (September 12, 1995); HUD v. Bucha, 1993 HUD ALJ LEXIS 95 (May 20, 1993); HUD v. DiBari, 1992 HUD ALJ LEXIS 64 (September 23, 1992); HUD v. Lewis, 1996 HUD ALJ LEXIS (April 19, 1996); and HUD v. Frisbie, 1992 HUD ALJ LEXIS (May 6, 1992)). "If a case includes a statement indicating illegal motivation and that statement is linked to the defendant's action, little else is required to prove a violation." Id. at *310.

Here, Charging Party has established direct evidence of discrimination. Respondent Corey made oral and written statements which show both that he was imposing different terms and conditions on the basis of disability and that he was "otherwise making housing unavailable" based on disability. Through the use of direct evidence, it will be shown that Respondent Corey's actions and statements clearly violate the Fair Housing Act.

In a case brought under § 3604, as is the case here, there is no requirement that the Charging Party show that Respondent Corey's behavior was motivated by an intent to discriminate. The Supreme Court has recognized that discrimination against the disabled is "[m]ost often the product, not of invidious animus, but rather of thoughtlessness and indifference, of benign neglect." Alexander v. Choate, 469 U.S. 287, 295 (1985).

² Ms. Dearien's paystub dated March 13, 2009 shows a gross pay of \$708.61 and a net pay of \$523.52. (GX #42, Bates no. 270). The paystub dated March 27, 2009 shows a gross pay of \$822.84 and a net pay of \$604.61. (GX #42, Bates no. 270). The paystub of April 10, 2009 shows a gross income of \$722.59 and a net income of \$533.84. (GX #42, Bates no. 270). The paystub of April 24, 2009 shows a gross pay of \$785.50 and a net pay of \$577.16. (GX #42, Bates no. 270).

³ When indirect evidence is presented, a McDonnell-Douglas type burden shifting analysis is used. Ring v. First Interstate Mortgage, Inc., 984 F.2d 924, 926-27 (8th Cir. 1993). However, "[t]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Trans World Airlines v. Thurston, 469 U.S. 111, 120 (1985); Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1452 (4th Cir. 1990); HUD v. Country Manor Apartments, et al., 2001 WL 1132715, *12 n. 3 (HUD ALJ 2001).

B. Respondent Corey made Discriminatory Statements that Violate Section 3604(c)

The gravamen of Charging Party's contention under 42 U.S.C. § 3604(c) is that Respondent made statements, written and oral, which reflect discrimination on the basis of disability. Section 3604(c) makes it unlawful "[t]o make, print, or publish . . . any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . disability. . . ." Section 3604(c) is violated if a statement suggests to an ordinary reader or listener that a particular protected group is preferred or dispreferred for the housing in question. Jancik v. HUD, 44 F.3d 553, 556 (7th Cir. 1995) (citations omitted); White v HUD, 475 F.3d 898, 905-06 (7th Cir. 2007); HUD v. Soules, 967 F.2d 817, 824 (2nd Cir. 1992). Charging Party need not prove intent to discriminate to establish a claim under 3604(c). See Jancik, 44 F.3d at 556 (citing Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991)). In addition, simply expressing to prospective renters or any other persons a preference or a limitation on any renter because of a disability is prohibited. 24 C.F.R. § 100.75(a) (2011). See also Niederhauser v. Independence Square Hous., Fair Hous.-Fair Lending Rptr. 16,305, at 16,305.5-7 (N.D. Cal. 1998) (holding that landlord's inquiries of disabled applicants concerning their ability to live independently violates 3604(c) and other provisions of the Act. Further, the economic qualifications of a prospective tenant are irrelevant in determining if a statement is discriminatory since it is not even necessary for a protected-class member to be in the market for housing in order to prove a violation of § 3604(c). HUD v. Ro, 1995 WL 326736 (HUD ALJ 1995).⁴

Respondent Corey made discriminatory statements at the outset of the "negotiations" that preceded discussions of financial qualifications. During his conversations with Ms. Walker regarding the rental of the Subject Property, Mr. Corey stated that he could not consider renting to Ms. Walker and her brother unless she obtained a million dollar liability insurance policy. In response to Ms. Walker's question about why she would need a million dollar liability policy, Respondent Corey stated that the policy was needed so he wouldn't be held liable if her brother attached someone in the neighborhood. (Tr.25). Respondent Corey also demanded that Ms. Walker submit a note from Gregory Walker's doctor. Finally, Respondent Corey insisted that Ms. Walker sign a statement accepting responsibility if her brother caused any damage to the property. According to Ms. Walker, Respondent Corey stated that this was necessary because he brother might burn the house down. (Tr. 25). In response to Ms. Walker's request, Respondent Corey wrote the following on a paper that she provided:

"1,000,000 Ins policy to protect landowner from any problems that might exist due to her brother's condition."

"Tenant is to sign a paper to be responsible for any damages caused by her brother"

"Note from doctor about brother's condition" (GX # 7; GX # 39 at pp. 32-34; Tr. 21-23, 25).

⁴ In HUD v. Ro, 1995 WL 326736 (HUD ALJ 1995), the complainant, a black Nigerian woman, who was not in the market for housing, but was assisting a white client with finding an apartment, filed a complaint because the landlord informed complainant and her client, "She's okay for the apartment, you are not." Even though complainant was not applying for tenancy and was simply accompanying her client to view an apartment when the discriminatory statements were made, the ALJ ruled in her favor and found that the respondent had violated the Act. Id. at *5. The ALJ found that the respondent landlord made a discriminatory statement and also made the housing unavailable because the statement indicated that complainant was discouraged from applying for tenancy. Id. The issue of whether the complainant was qualified to rent the apartment was irrelevant in determining whether the respondent landlord was liable for fair housing violations.

Each of the additional requirements reference Gregory Walker and his “condition.” An ordinary listener to Respondent Corey’s words would interpret his additional three requirements as expressing a preference against tenants with disabilities so as to steer them away from the premises, and an ordinary reader would interpret the words the same way. In fact, the discriminatory additional requirements, both spoken and written, did discourage Ms. Walker from completing a rental application. Ms. Walker testified, under penalty of perjury, that the additional requirements, which were both told to her and written down, discouraged her from even applying for tenancy. When asked about why she did not complete the rental application, Ms. Walker stated: “I just felt that with all the requirements that he wanted and everything like that, and the frustration I was going through with the whole situation, I just felt that, you know, he wouldn’t give me the place anyway.” (JNTX # 4 at p. 46; Tr. 26, 27). At trial, Ms. Walker again stated that the additional requirements discouraged her from filling out the rental application. When asked about why she did not complete the rental application, Ms. Walker stated: “Well, with the stipulations that he wanted here. . .I didn’t even think I could afford a million dollars in insurance...I think even if I filled it out he still wasn’t going to give it to me....” (Tr. 26-27).

It is clear from Respondent Corey’s oral and written statements, including the statements wherein Respondent Corey expressed his belief that Gregory Walker might attack neighbors or burn down the Subject Property, that tenants with mental disabilities were disfavored when leasing out the Subject Property. Here, Respondent Corey violated the Act when he orally informed Ms. Walker of the three additional requirements that he was imposing before he would rent to her and her brother, requirements that he was imposing specifically because her brother is a person with a disability. Respondent Corey also violated the Act when he explained that he was imposing these requirements because of his concerns that Gregory Walker, because of his mental disabilities, might attack neighbors or burn down the Subject Property. He again violated the Act when he wrote those three requirements on a piece of paper. Thus, Respondent Corey should be found, by direct evidence, to have violated § 3604(c) of the Act.

C. Respondent violated Section 3604(f)(1) of the Fair Housing Act

1.) Charging Party has Direct Evidence that Respondent Corey violated 42 U.S.C. § 3604(f)(1)

Respondent Corey made the home unavailable to Ms. Walker, because of her brother’s disability, in violation of 42 U.S.C. § 3604(f)(1). Section 3604(f)(1) makes it unlawful to “to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of...a person ...intending to reside in that dwelling after it is sold, rented, or made available.” 42 U.S.C. 3604(f)(1). The implementing regulation provides that prohibited actions include the following: (1.)imposing different rental charges of a dwelling because of handicap and (2.) using different qualification criteria or rental procedures because of handicap. 24 C.F.R. § 100.60(b) (2011).

Here, because of the cost of a million dollar liability policy that Respondent Corey was requiring Ms. Walker to purchase because of her brother’s disability, the total rental cost for Ms. Walker would have been higher. This higher cost is solely due to the fact that Respondent Corey assumed that Mr. Walker was a liability risk. (GX # 39 at pp. 31, 32; TR. 122). Respondent Corey also demanded that Ms. Walker submit a note from Gregory Walker’s doctor that would address his unsupported concern that Mr. Walker presented a risk of committing violent acts and setting fires.

(GX #39 at pp. 24, 27, 29, 40; Tr. 123, 125, 128). Respondent Corey would not process Ms. Walker's rental application if she did not provide a note from Gregory Walker's doctor. (Tr. 128). Respondent Corey also insisted that Ms. Walker sign a statement accepting responsibility if her brother caused any damage to the Subject Property. (GX #39 at p. 25). Respondent Corey does not typically require liability insurance, doctor's notes or statements accepting responsibility for damages from his tenants and did not require the non-disabled tenant who rented the Subject Property in May 2009, Shelley Dearien, to meet such requirements. (GX # 39 at pp. 28, 30, 39; Tr. 146).

These requirements, which are a deviation from the typical rental procedures, are a clear violation of the Act and the regulations. Because of Gregory Walker's disability, Respondent Corey was imposing additional requirements or "qualification criteria" and deviated from his typical rental procedures. (GX # 39 at pp. 23, 24, 25, 29, 31, 33, 34, 40). Based on the regulations alone, it is clear that Respondent Corey's requirements have violated 42 U.S.C. 3604(f)(1) and 24 C.F.R. § 100.60(b) (2011) and this has been shown through the use of direct evidence—Respondent Corey's deposition and trial testimony.

A complainant who establishes direct evidence of intentional housing discrimination does not need to present her case under the McDonnell Douglas framework. Rowan v. Lockheed Martin Energy Systems, Inc., 360 F.3d 544, 548 (6th Cir. 2004); HUD v. Gruen, 2003 WL 973495 (HUDALJ 2003). Accordingly, when presented with direct evidence, courts typically do not engage in an analysis of the prima facie elements. In Gruen, respondent landlord refused to allow a prospective tenant to apply for an apartment because of prospective tenant's son and the landlord's adults-only policy. Id. at *4. Although the court acknowledged that qualifications could be part of a prima facie case, the HUD ALJ stated: "there is direct evidence of discrimination against a member of a class of persons protected by the Act, and it follows that it is not necessary to consider each element of the prima facie case." Id. See also HUD v. Schilling, et al., 1993 WL 263667 *7 (HUD ALJ 1993) (finding that discriminatory statements are direct evidence of discrimination and recognizing that respondent would need to assert one of the statutory exemptions to the Fair Housing Act to avoid liability without engaging in a prima facie analysis); HUD v. Sams, et al. 1993 WL 599076 *7 (HUD ALJ 1993) (finding that discriminatory statement is direct evidence of discrimination; court engaged in a cursory prima facie analysis); HUD v. Gwizdz, 1994 WL 681049 *6 (HUD ALJ 1994) (discriminatory statement that respondent would not rent to complainant because her children would make too much noise was direct evidence of familial status discrimination; court did not engage in analysis of prima facie case). Direct evidence of housing discrimination is evidence that demonstrates, without the need for inference or presumption on the part of the fact-finder, that the respondent impermissibly considered the complainant's status as a member of a protected class when making a housing decision.⁵ See Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir.2004).

Charging Party has established direct evidence of a §3604(f)(1) violation. Respondent must therefore articulate a legitimate justification for his policy to overcome the case against him to avoid liability. Bangertner, 46 F.3d at 1501. In making that showing, Respondent must establish that there

⁵ The Fair Housing Act does not require that a respondent be "motivated by some purposeful, malicious desire to discriminate against handicapped persons." Cnty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs, 257 F.Supp.2d 208, 225 (D.D.C.2003). Section 804(f)(1) is violated any time a person discriminates in the rental of a dwelling "because of a handicap of... a person residing in or intending to reside in" the dwelling. 42 U.S.C. 3604(f)(1)(B) (2011) (emphasis added).

is a compelling business necessity for the policy and that he has used the “least restrictive means” to achieve that end. Fair Housing Council v. Ayres, 3 Fair Housing-Fair Lending (Aspen) para. 15,931 (C.D. Cal. 1994). As an alternative basis of finding liability, the Charging party has also set forth a prima facie case for a § 3604(f)(1) violation.

2.) In addition to setting forth direct evidence of a §3604(f)(1) violation, Charging Party has also set forth a prime facie case that Respondent Corey discriminated on the basis of disability

Contrary to the assertions made by Respondent Corey throughout the course of the litigation, Charging Party does not have to show that Ms. Walker was financially qualified to rent the Subject Property. There have been many fair housing discrimination cases where, as here, an applicant was discouraged from applying for tenancy due to discrimination and the parties never reached the “negotiation” stage and liability has been found on the basis of making the housing unavailable. As mentioned above, a HUD ALJ found discrimination, on the basis of §3604(a), which contains the same language as § 3604(f)(1), where a person not even in the market for housing was denied the opportunity to apply for tenancy.⁶ In HUD v. Ro, 1995 WL 326736 (HUD ALJ 1995), the complainant, a black Nigerian woman, who was not in the market for housing, but was assisting a white client with finding an apartment, filed a complaint because the landlord informed the complainant, “She’s okay for the apartment, you are not.” Although complainant was not applying for tenancy and was simply accompanying her client to view an apartment when the discriminatory statements were made, the ALJ ruled in her favor and found that the respondent had violated the Act. Id. at *5. The ALJ found that the respondent landlord made a discriminatory statement and also made the housing unavailable because the statement indicated that complainant was discouraged from applying for tenancy. Id. The issue of whether the complainant was qualified to rent the apartment was irrelevant in determining whether the respondent landlord was liable for fair housing violations because the discrimination occurred at the outset. Because the statement, “She’s okay for the apartment, you are not,” was based wholly on the fact that the complainant was black and was made prior to the discussion of suitability for the rental unit, the HUD ALJ found that the respondent had made the apartment unavailable to the complainant, without requiring proof that the complainant would have been financially qualified to rent the apartment. Id.

Consistent with the prima facie case adopted by the HUD ALJ in HUD v. Ro, the Charging Party believes that, to the extent that a prima facie case is required in the instant matter, because of the similar fact pattern in that the discriminatory acts and statements preceded discussion of qualifications, that the following would be an appropriate prima facie case for the § 3604(f)(1) violation: 1.) complainant is a member of a protected class; 2.) complainant made an inquiry about

⁶ There are numerous fair housing discrimination cases wherein testers, posing as prospective tenants, bring claims of housing discrimination and these testers do not generally provide information about their financial qualifications. For example, in Village of Bellwood v. Dwivedi, the court found that plaintiffs had established a McDonnell Douglas prima facie housing discrimination case under Sections 3604(a), (b), and (c), even though most of the plaintiffs were testers who did not intend to apply for housing. 895 F.2d 1521, 1531 (7th Cir. 1990). The qualifications of the testers were not at issue. The court found that the Act was violated when the defendants showed black testers homes in an integrated neighborhood, and white testers homes in a white suburb – actions that occurred long before the prospective homebuyers would have to demonstrate their qualifications to purchase a home. Id.

renting the apartment; 3.) respondent refused to negotiate the rental with complainant, or otherwise made it unavailable to complainant; 4.) respondent expressed a willingness to rent the apartment to a person who is not in the same protected class as the complainant.⁷ Id. at 5.

In regard to the first element, the Act defines a disability as a “physical or mental impairment which substantially limits one or more of ...[a]...person’s major life activities.” 42 U.S.C. § 3602(h)(1). According to HUD’s implementing regulations, autism and mental retardation are qualifying mental impairments. 24 C.F.R. § 100.201(a) (2011). Major life activities include caring for one’s self, learning, and working. 24 C.F.R. § 100.201(b) (2011). According to the Psychological Evaluation dated March 21, 2009, Gregory Walker requires “intense training in all areas of adaptive functioning. He requires constant supervision to ensure his health and safety” and is diagnosed with “Autistic Disorder” and “Mild Mental Retardation.” (GX #21 at Section V). Ms. Walker testified that Gregory requires “constant care” and needs assistance most activities of daily living, including bathing, toileting, laundry, meal preparation, and requires supervision at all times. (Tr. 14, 51, 53). Accordingly, Gregory Walker is a person with a disability thus satisfying the first element.

The second element has also been met. Both parties agree that Complainant made an inquiry about renting the Subject Property for herself and her brother. (GX # 39 at pp. 21, 22).

The third element, respondent refused to negotiate or otherwise made the rental unavailable to complainant, has also been met. It is clear that Respondent Corey refused to negotiate on terms that were non-discriminatory. As shown above, it is clear that his requirements violated § 3604(f)(1) and the implementing regulations. Further, courts have held that “all practices that...in any way impede, delay, or discourage a prospective renter,” constitute denying a dwelling or making a dwelling unavailable. HUD v. Hacker, 1992 WL 406538, *7 n. 8 (HUDALJ 1992). Such practices include the imposition of different or more burdensome application procedures. 24 CFR § 100.60(b)(1) (2011); U.S. v. Youritan Const. Co., 370 F.Supp. 643, 648 (D.C. Cal. 1973), affirmed in pertinent part, 509 F.2d 623 (9th Cir. 1975). In this case, at the inquiry stage, before Ms. Walker even had the opportunity to fill out a rental application, Respondent imposed additional, burdensome application procedures on her tenancy because of her brother’s disability. In doing so, he discouraged her from applying. Further, even if Ms. Walker had been willing to meet these discriminatory and burdensome demands, Respondent Corey would not have held the property for her as she attempted to satisfy these additional demands. (GX # 39 at pp. 27, 40). As Respondent Corey stated during his deposition: “I was looking for a letter telling me that he was no danger to himself, no danger to the property, and no danger to the surrounding neighbors, and that he was not capable of setting the house on fire or any other damage due to his condition. Had I gotten that, I would have rented to her easily, without a problem, had it still been available at the time I received all the information.” (emphasis added). (GX # 39 at p. 40). Moreover, Ms. Walker testified, under penalty of perjury, that the requirements discouraged her from even applying for tenancy. (Tr. 26). When asked about why she did not complete the rental application, Ms. Walker stated: “Well, with the stipulations that he wanted here. . . I didn’t even think I could afford a million dollars in insurance...I think even if I

⁷ The specific facts required for a prima facie case vary depending on the circumstances of a specific case – the exact elements articulated in McDonnell Douglas will not always be applicable. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n. 13 (1973). The prima facie case suggested by Charging Party is similar to the prima facie case used in other fair housing cases where, as here, there is direct evidence of discrimination. See, e.g. HUD v. Leiner, 1992 WL 406536 (HUD ALJ 1992) (prima facie elements do not include financial qualifications, but instead use “attempted to rent the apartment.”).

filled it out he still wasn't going to give it to me...." (Tr. 26-27). Thus, he made housing unavailable at the time of her inquiry, and the third element of the prima facie case is met.

Finally, the fourth element of the prima facie case, Respondent expressed a willingness to rent to tenants not in the same protected class as Ms. Walker and her brother, has been established. Respondent Corey, when dealing with non-disabled prospective tenants, does not require liability insurance, doctor's notes or statements accepting responsibility for damages from his tenants and did not require the non-disabled tenant who rented the Subject Property in May 2009 to meet such requirements. (GX # 39 at pp. 28, 30, 39).

D. Respondent violated Section 3604(f)(2) of the Fair Housing Act

1.) Charging Party has Direct Evidence that Respondent Corey Violated 42 U.S.C. § 3604(f)(2)

Section 3604(f)(2) makes it unlawful "to discriminate against a person in the terms, conditions, or privileges of a sale or rental of a dwelling . . . on the basis of handicap." 42 U.S.C. § 3604(f)(2). According to the implementing regulations, prohibited actions include using different provisions in leases, such as those relating to rental charges, security deposits and the terms of a lease because of disability. 24 C.F.R. § 100.65 (2011). As a general matter, any difference in the terms and conditions imposed on the tenancy of disabled and non-disabled tenants is a violation of the Fair Housing Act. A complainant can make out a case of intentional discrimination under the Fair Housing Act by "merely showing that a protected group has been subjected to explicitly differential – i.e., discriminatory—treatment." Bangerter v. Orem City, Utah, 46 F.3d 1491, 1501 (10th Cir. 1995) (noting that it is not necessary to show "malice or discriminatory animus").

Courts have found discrimination in cases where landlords have required prospective tenants with disabilities to meet tenancy requirements that are not imposed on non-disabled prospective tenants. See, e.g., Kitten v. State of Wisconsin Dept. of Workforce Dev., 644 N.W. 2d 649, 576 (Wisc. Supreme Ct. 2002) (state supreme court affirmed decision of hearing examiner that landlord had violated state fair housing act provision similar to 42 U.S.C. § 3604(f)(2) by exacting more stringent terms—six months' advance rent as opposed to the normal one month's rent and security deposit--- for the rental of an apartment because of the perceived disability of the prospective tenant and affirmed over \$20,000 in damages and a \$5,000 civil penalty). See also, HUD v. Wilmette Real Estate and Mgmt. Co., et al., 2000 WL 1478457 (HUD ALJ 2000) (parties settled case for \$30,000 in case wherein it was alleged that respondents violated Section 3604(f)(2) when they made inquiries regarding complainant's ability to live independently and by also requiring a lease cosigning provision).

Below is a brief overview of the regulations and/or caselaw that specifically show that the three conditions imposed upon Ms. Walker's tenancy are violations of the Fair Housing Act.

a.) Liability Insurance

As in the instant case, HUD v. Twinbrook Apartments, et al., 2001 WL 1632533 (HUD ALJ 2001), also involved a requirement that persons with a disability, and not the non-disabled, provide liability insurance. In Twinbrook, the owners of the apartment complex would not grant permission for wheelchair users to build a ramp unless the disabled tenants agreed to purchase liability insurance. Id. at *5. While other tenants had the option of purchasing homeowners' insurance, these disabled

tenants could not have ramps built unless they agreed to purchase liability insurance—“no insurance, no ramp. . .we will fight this issue in court.” *Id.* at 13. HUD issued a Charge alleging that the respondents violated the Fair Housing Act because they were imposing “terms and conditions” on disabled tenants that were not imposed on non-disabled tenants. *Id.* at *17. Agreeing that the policy was facially discriminatory, the ALJ awarded the three complainants damages of \$75,000, \$40,000 and \$20,000 and imposed a civil penalty of \$15,000. *Id.* at 20-24. See also United States v. Covenant Retirement Community, 04-06732 (E.D. Calif. filed 2004) (violations of Act included requiring motorized wheelchair users to obtain personal liability insurance, demonstrate ability to use motorized mobility aids and provide doctor’s certification of need; parties agreed to settlement wherein the operators of the retirement community agreed to dismantle the discriminatory policies, establish a \$530,000 settlement fund, pay a civil penalty, attend training on the Act and agree to record keeping and monitoring).

Here, Respondent Corey admitted that he required a million dollar liability policy before he would consider renting the Subject Property to Delores and Gregory Walker. (GX 39 at pp. 25, 28, 29, 33, 34; JNTX # 4 at pp. 41, 42, 43; Tr. 125-127). Respondent Corey, as a result of discriminatory and improper stereotyping, stated that he required Ms. Walker to obtain the liability policy because he had concerns that Gregory Walker would cause property damage or would harm neighbors. (GX #39 at pp. 24, 25, 28, 40; Tr. 122, 228-229). Respondent Corey does not typically require liability insurance and did not require the non-disabled tenant who rented the Subject Property in May 2009 to purchase liability insurance. (GX # 39 at pp. 28, 30, 39). Because Respondent Corey required liability insurance solely because Gregory Walker is a person with a mental disability, it is clear that the additional liability insurance requirement imposed upon Delores and Gregory Walker’s tenancy is facially discriminatory and is a violation of 42 U.S.C. § 3604(f)(2) and 24 C.F.R. § 100.65 (2011).

b.) Statement Accepting Liability

As set forth above, the Act prohibits different terms and conditions and additional application requirements which make housing unavailable, on the basis of disability. 42 U.S.C. § 3604(f)(2); 24 C.F.R. § 100.65 (2011). See, e.g., HUD v. Community Homes, et al., 1991 WL 578192 (respondent refused to rent a multiple floor unit to a blind woman unless she agreed to sign a Hold Harmless Agreement; the case settled for \$15,000 plus attorney’s fees).

Here, Respondent Corey, according to his written requirements, was requiring Ms. Walker to “sign a paper to be responsible for any damages caused by her brother.” (GX # 7). While the standard lease used by Respondent Corey contains provisions making tenants responsible for damages, he was imposing this additional requirement because of Gregory Walker’s mental disabilities and the perceived damages that Respondent Corey believed that Mr. Walker would likely cause due to those disabilities. (GX # 39 at pp. 25, 30). Because Respondent Corey required Ms. Walker to sign a statement accepting responsibility for damages cause by her brother solely because Gregory Walker is a person with a mental disability, it is clear that this additional requirement imposed upon Delores and Gregory Walker’s tenancy is a violation of 42 U.S.C. § 3604(f)(2) and 24 C.F.R. § 100.65 (2011).

c.) Doctor’s Note

The Fair Housing Act’s prohibition against disability discrimination means that housing providers may not ask certain questions during the application process. As set forth in HUD’s

implementing regulations, the law forbids asking applicants whether they or their associates have a disability or about the nature or severity of the disability. 24 C.F.R. § 100.202(c) (2011).⁸ A landlord may only ask questions pertaining to a tenant's disability in two limited circumstances, neither of which apply here.⁹ Further, "in assessing an applicant for tenancy, a landlord or owner may ask an individual the questions that he or she asks of all other applicants that relate directly to the tenancy . . . but may not ask blanket questions with regard to whether the individual has a disability. Nor may the landlord or owner ask the applicant or tenant questions which would require the applicant or tenant to waive his right to confidentiality concerning his medical condition or history." House Report 100-711, 1988 WL 169871. See also Cason v. Rochester Housing Authority, 748 F. Supp 1002, 1007-1008 (W.D. New York 1990) (finding discrimination where prospective tenants with a disability were required to provide medical information and to meet other conditions not required of non-disabled tenants: "it appears that the difference in treatment of the handicapped stems from unsubstantiated prejudices and fears regarding those with mental and physical disabilities. This is precisely the sort of situation that the fair housing laws were designed to prohibit..."); HUD v. White, 1991 WL 442796 *14 (HUD ALJ 1991)(court found that section 3604(f) of the Act and 24 C.F.R. §100.202 provide that owners of housing do not have the right to ask sitting tenants, as well as prospective tenants, blanket questions about their disabilities.).

Here, Respondent Corey, in violation of the Act and the implementing regulations, demanded that Ms. Walker submit a note from Gregory Walker's doctor. (GX #39 at pp. 24, 27, 29, 30; Tr. 123, 128; GX #7). In regard to the doctor's note requirement that he was imposing, Respondent Corey provided the following testimony:

Q: Would you have rented 5215 Venable Avenue to Ms. Walker if she met your monthly income requirement, but did not agree to purchase liability insurance?

A: Not unless I had a letter from her doctor. All I required was that.

Q: What kind of letter from a doctor were you looking for?

A: I was looking for a letter telling me that he was of no danger to himself, no danger to the property, and no danger to the surrounding neighbors, and that he was not capable of setting the house on fire or doing any other damage due to his condition. That's all I needed. Had I gotten that, I would have rented to her easily, without a problem, had it still been available at the time I received all the information.

Q: And this doctor's note requirement that you're talking about,

⁸ During the regulation's comment period, housing providers had suggested that the regulations permit inquiries into a prospective tenant's "antisocial" behavior or tendencies, but HUD rejected this suggestion because such an authorization may imply, contrary to the intent of Congress, that persons with disabilities generally posed greater risks than the non-disabled. Township of West Orange v. Whitman, 8 F. Supp. 2d 408, 432 (D. New Jersey 1998).

⁹ A landlord may ask about disability only if a prospective tenant is applying for housing that is specifically limited to those with disabilities in order to establish eligibility and if a tenant is requesting a reasonable accommodation to modify a rule, policy or practice because of her disability.

this is specifically because her brother has autism and mental retardation. Correct?

A: Yes. (Govt. Exh. 3, Corey Depo. at p. 40)

Q: What did it mean to you [that Gregory Walker had autism and mental retardation]?

A: Well, it meant a rise in liability, right off the bat...that's when I asked her to get me a letter from the doctor, let me know if he is dangerous...I've never met her brother, I don't know. (Govt. Exh. 3, Corey Depo. at p. 23)

A: "...she informed me that her brother had severe autism and mental retardation and that sent up a red flag."

Q: All right. What did the red flag say to you?

A: Well, the red flag said to me that this could be a problem possibly and I need to determine if it's a problem or not...the only way I could determine that is to get a professional analysis from his doctor that he isn't a danger to the house, danger to himself, danger to the people outside.... (Tr. 218-219).

Respondent Corey also stated that he does not typically require a doctor's note and did not require the non-disabled tenant who rented the Subject Property in May 2009 to meet such a requirement. (GX # 39 at pp. 28, 30, 39). It is clear that the doctor's note requirement is a violation of 42 U.S.C. § 3604(f)(2) and 24 C.F.R. § 100.202(c) (2011).

Charging Party believes that it has made a sufficient showing that there is direct evidence of a §3604(f)(2) violation and that Respondent Corey must therefore articulate a legitimate justification for his policy to overcome the case against him to avoid liability. Bangertner, 46 F.3d at 1501; U.S. v. Badgett, 976 F.2d 1179 (9th Cir. 1992). As an alternative basis of finding liability, Charging Party has also set forth a prima facie case for a § 3604(f)(2) violation.

2.) In addition to setting forth Direct Evidence of a § 3604(f)(2) violation, Charging Party has also set forth a prima facie case that Respondent Corey discriminated on the basis of disability

The Charge alleged disparate treatment based on disability, in that Mr. Corey subjected Delores and Gregory Walker to discriminatory rental terms and conditions by requiring liability insurance, a physician's note, and a waiver accepting responsibility before he would rent the Subject Property to them. A prima facie case of disparate treatment based on disability under the Fair Housing Act consists of the following elements:

1. The Complainant is an individual with a disability as that term is defined in the Fair Housing Act, is regarded as a person with a disability or will be living with or associated with such a person;
2. The Respondent was aware of the Complainant's disability, or intent to cohabitate with, or associate with, a person with a disability;
3. The Respondent subjected the Complainant to terms and conditions in a real estate transaction that were less favorable than those offered to those who are not disabled, or who do not intend to cohabitate with, or associate with, a person with a disability; and
4. The Respondent subjected the Complainant to these less favorable conditions because of the Complainant's disability, or because of her intent to cohabitate with, or associate with, a person with a disability.

Regarding the first element of the prima facie case, Gregory Walker meets the definition of an individual with a disability and Dolores Walker intended to have him as a member of her household and would be associated with him. The record contains detailed analyses from a psychologist that establishes that Gregory Walker has several mental impairments that substantially limit his major life activities. (GX #21). His mental impairments prevent him from living independently and caring for himself. *Id.* Further, under the Act, autism and mental retardation are specifically protected from discrimination. 24 C.F.R. § 100.201(a)(1) (2011). In addition, the evidence establishes that Ms. Walker told Respondent Corey about her brother's diagnoses of autism and mental retardation and Respondent Corey, as demonstrated by his subsequent actions, regarded her brother as having a disability. Accordingly, the first element of the prima facie case has been met.

As to the second element of the prima facie case—awareness of Gregory Walker's disability--Mr. Corey admitted that Ms. Walker told him that her brother had mental retardation and autism, and that he would be living with her. (GX #39 at p. 22). Thus, Respondent Corey was aware of Gregory Walker's disabilities, and that he would be living in the household. The second element of the prima facie case has therefore also been established by the record evidence.

The third element of the prima facie case---whether Delores and Gregory Walker were subjected to less favorable terms and conditions than non-disabled tenants---has been met. Respondent Corey admitted that he wrote the additional requirements imposed upon the tenancy of Delores and Gregory Walker. (GX #39 at pp. 33,34; Tr. 130-131). Additionally, Respondent Corey admitted that the conditions he was imposing upon Ms. Walker and her brother were not being imposed upon prospective tenants who did not have disabilities. (GX # 39 at pp. 28, 30, 39). As set forth above, the evidence therefore establishes the third element of the prima facie case.

Finally, the fourth element of the prima facie case—the less favorable terms were imposed because of disability---has been met because the evidence establishes that the less favorable rental terms and conditions were imposed because of Gregory Walker's mental disabilities. Respondent Corey stated, during his deposition, that a tenant with a diagnosis of autism and mental retardation meant “a rise in liability, right off the bat. The same as a swimming pool in the backyard, a swing set, a trampoline; a rise in liability.” (GX #39 at p. 23). At the hearing, Respondent again stated his opinion that autism and mental retardation meant a rise in liability. (Tr. 122). The additional rental

conditions he imposed upon Ms. Walker and her brother – liability insurance, a signed note of responsibility, and a note from a doctor about his “condition” -- all show that Mr. Corey’s requirements were motivated by Gregory Walker’s disabilities since they all reference Mr. Walker’s disability or “condition.” (GX #7). At the hearing, Respondent Corey agreed that he was seeking assurances that Gregory Walker would not be dangerous and would not cause damage and that he needed these assurances because of Mr. Walker’s diagnoses of autism and mental retardation. (Tr. 125, 127). Further, Respondent admits that he had no personal knowledge of Gregory Walker’s propensity for violence before imposing the additional conditions on the tenancy of Delores and Gregory Walker. (GX #18, para. 22). Further, Respondent admitted that he never even met Gregory Walker. (GX # 18, para. 21). He also admits that he made an assumption that the presence of a person with mental disabilities, such as autism and mental retardation, would increase his potential liability. (GX #39 at pp. 23, 27).

In light of the evidence presented, all the elements of a prima facie case for unlawful housing discrimination by disparate treatment based upon disability have been met in this case.

E. Respondent’s Purported Income Requirements are not Credible

As a defense to the violations, Respondent has repeatedly asserted that he cannot be held liable because Ms. Walker was not financially qualified to rent the Subject Property. As will be shown below, Respondent Corey rented the Subject Property to a tenant who did not meet his purported household income requirements. Moreover, Respondent Corey subjected Ms. Walker to a heightened standard that was not imposed upon the prospective tenant who ultimately rented the Subject Property.

According to Respondent’s deposition testimony, he required a prospective tenant to have monthly income of at least \$2000 per month to rent the Subject Property. (GX #39 at p. 19-21). If a prospective tenant was not planning to live alone, Respondent Corey would require a higher monthly income. (GX#39 at p. 19, Tr. 10). Thus, if a tenant had a child, the prospective tenant would need a monthly income of over \$2000 per month. (GX #39 at 19). Respondent Corey stated, under penalty of perjury, that he had never rented the Subject Property to a tenant who did not meet his monthly income requirement. (GX #39 at pp. 20-21).

There are conflicting statements from Respondent Corey, however, in regard to the required monthly income for tenants who rent the Subject Property. According to Respondent’s Response to Admissions issued by Charging Party, he required a household income of \$2100 per month in net income. (GX 18 #26) (emphasis added).¹⁰ In addition, Respondent’s Motion in Opposition to Charging Party’s Motion to Strike Affirmative Defenses clearly states that the required monthly income is a “net income, after withholdings, of \$2,100.00 per month” (GX # 37).¹¹

Regardless of whether Respondent required \$2000 per month in gross income or \$2100 in monthly net income, it is clear that Shelley Dearien, the tenant who rented the Subject Property at the time that Ms. Walker inquired about the rental property, did not meet the purported monthly household income requirements because she did not even have a gross income of \$2000 per month. (Tr. 112). As set forth in the Rental Application submitted by Shelley Dearien, she had a net income

¹⁰ Respondent provided a verification stating that the Responses to Request for Admission were “to the best of my knowledge and belief, true and correct.” (GX #19, para.2).

¹¹ Although Government Exhibit 37 was not admitted into evidence, Judge Mahoney stated that the exhibit could be cited to in the post-trial brief in regard to the matters asserted therein. (Tr. 204).

of \$758 every two weeks and received \$231 “from Social Security for child support.” (JNTX #1). Ms. Dearien’s household income would therefore be \$1747 per month. At deposition, Respondent Corey claimed that Ms. Dearien did meet his monthly income requirements because she worked overtime and her overtime pay was not reflected on the rental application. (GX #39 at pp. 35-36).

Charging Party then issued a subpoena duces tecum to Ms. Dearien and in response she provided documents which reflected her gross and net pay for the time period of January 1, 2008 through May 31, 2009. (GX #42). At trial, Ms. Dearien testified that she showed her March or April 2009 paystubs to Respondent Corey so that Respondent could verify her income. (Tr. 111).¹² According to the paystubs for March and April 2009, Ms. Dearien did not have a gross income of \$2000 per month, even with the addition of \$231.00 per month from Social Security and pay for working overtime. (Tr. 112, 140).

Further, it is clear that Respondent Corey knew that Ms. Dearien did not have a monthly income of \$2000 per month in gross income. Respondent Corey testified that he reviewed Ms. Dearien’s paystubs. (GX #39 at p. 35-37). Ms. Dearien also testified that Respondent Corey reviewed her March or April 2009 paystubs. (Tr. 111).

In addition, at deposition, Respondent Corey stated that he did not require Shelly Dearien to have a monthly income over \$2000 per month because her son lived with her on a part-time basis, only on weekends and holidays. (GX #39 at p. 37-38). According to Ms. Dearien’s trial testimony, she informed Respondent Corey that her son was going to live with her at the Subject Property; her son has always lived with her on a full-time basis. (Tr. 96).

Respondent Corey also claimed that Ms. Walker did not qualify for the Subject Property because she had poor credit. (Tr. 8). Respondent Corey made this assertion based upon Ms. Walker’s deposition testimony wherein she assumed that she probably had poor credit. At his deposition, Respondent Corey stated that he performs “credit background checks” on all prospective tenants who fill out rental applications. (GX # 39 at p. 16). This was repeated at trial. (Tr. 8). Based upon the assertions that Ms. Walker would not have qualified because of her credit history, it is also clear that Respondent Corey would have considered her creditworthiness before renting to her. Respondent Corey, however, did not pull Ms. Dearien’s credit history. (Tr. 146). Moreover, if Respondent Corey had pulled Ms. Dearien’s credit history it would have revealed that she had substantial unpaid medical bills; at the time of her application to rent the Subject Property, she owed approximately \$9000. (Tr. 114). By Respondent Corey’s own admission, he would have held Ms. Walker to a higher standard than Shelley Dearien in assessing their financial qualifications. Moreover, his claims of evaluating the creditworthiness of every tenant are false.

As shown above, Respondent’s claims that Ms. Walker was not financially qualified to rent the Subject Property are pretext because the tenant to whom Respondent Corey rented the Subject Property at the relevant time did not meet Respondent’s purported income and credit requirements. Moreover, it has been shown that Respondent Corey made additional demands on Ms. Walker, because of her brother’s disability, which he did not make of other non-disabled prospective tenants

¹² Ms. Dearien’s paystub dated March 13, 2009 shows a gross pay of \$708.61 and a net pay of \$523.52. (GX #42, Bates no. 270). The paystub dated March 27, 2009 shows a gross pay of \$822.84 and a net pay of \$604.61. (GX #42, Bates no. 270). The paystub of April 10, 2009 shows a gross income of \$722.59 and a net income of \$533.84. (GX #42, Bates no. 270). The paystub of April 24, 2009 shows a gross pay of \$785.50 and a net pay of \$577.16. (GX #42, Bates no. 270).

and this is sufficient to show pretext. See, e.g., HUD v. Joseph, et al., 1994 WL 323997 * 6, (finding denial of rental based on poor credit history to be pretext because of the different treatment accorded black and white applicants and the discriminatory statements).¹³

Additionally, even if Ms. Walker's qualifications to rent were relevant to this case, Respondent did not know what Ms. Walker's qualifications were until after he had imposed burdensome application procedures on her and discouraged her from applying. As the Supreme Court explained in McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995), it would contravene the statutory scheme of federal anti-discrimination statutes if after-acquired evidence of a lawful justification for a discriminatory action "operated to bar all relief for an earlier violation" of an anti-discrimination statute.¹⁴ Likewise, in the present case, Respondent cannot claim to have been motivated by Ms. Walker's financial qualifications when he was not aware of those qualifications when he discriminated against her.

Finally, Respondent cannot now claim that he imposed additional application procedures on Ms. Walker and discouraged her from applying to rent his house for some reason other than Gregory Walker's disability, because he has already stated --in writing and during his deposition--- that he imposed the additional conditions because of Gregory Walker's disability. Further, Respondent articulated each of the conditions placed on Ms. Walker's tenancy only after he was made aware of her brother's disability, and expressed that the additional application terms were required if she planned to live with her brother. He did not impose any such conditions on prospective tenants who did not plan to live with a disabled person. It is clear that Gregory Walker's disability, and not Ms. Walker's qualifications, were the motivation for Respondent's actions. Clearly, Respondent's justification for his actions – that Ms. Walker was not qualified to rent his house - is a pretext for discrimination on the basis of Gregory Walker's disability.

IV. DAMAGES

A. Emotional Distress Damages

Complainant Delores Walker is entitled under the Fair Housing Act to recover damages for embarrassment, humiliation and emotional distress as a consequence of the Respondents' discriminatory acts. Secretary of HUD v. Blackwell, 2 Fair Housing-Fair Lending (Aspen) ¶

¹³ Further, the allegations raised in the Charge concern the discriminatory requirements, which preceded the discussion of financial qualifications, thus making the financial qualifications irrelevant. For example, in Alexander v. Riga, 208 F.3d 419, 424 (3d Cir. 2000), black applicants for a rental apartment were falsely informed that the apartment was not available thus being denied the opportunity to apply for tenancy. The district court did not require the complainants to show that they were financially qualified. Id. at 435. The appeals court found that district court did not abuse its discretion by excluding evidence of complainants' lack of creditworthiness. Id. According to the appeals court, a prospective tenant, under those circumstances "only need[s] to show that [she was] qualified to be [an] applicant[], to view the apartment, and be treated no differently from other applicants." Id. Accordingly, where an applicant, such as Ms. Walker is not permitted to apply for a rental unit on a non-discriminatory basis, Alexander v. Riga, suggests that Ms. Walker's financial qualifications are not relevant.

¹⁴ In McKennon, the plaintiff sued her employer under the ADEA, alleging that she was fired because of her age. Id. at 354. During depositions conducted in preparation of the subsequent litigation, the defendants discovered that prior to her termination, the plaintiff had copied confidential information regarding her employer's financial condition. Id. They argued that they could not be held liable for a discriminatory termination because if they had known of the plaintiff's actions prior to her dismissal, they would have fired her for that reason. Id. The Court stated, "[The plaintiff's] misconduct was not discovered until after she had been fired. The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." Id. at 359-60 (emphasis added).

25,001, 25,011 (HUDALJ Dec. 21, 1989), aff'd, 908 F.2d 864 (11th Cir. 1990). Administrative Law Judges are afforded broad discretion in determining emotional distress damages based on the following critical factors: (1) the egregiousness of the Respondents' behavior and (2) the effect of the Respondent's conduct on the Complainants. HUD v. Sams, 2A Fair Housing-Fair Lending (Aspen) P 25,069, HUDALJ No. 03-92-0245-1 (March 11, 1994). Because of the difficulty of evaluating emotional injuries which result from deprivation of civil rights, courts do not demand precise proof to support a reasonable award of damages. HUD v. Pheasant Ridge Asso. et. al., 1996 WL 638029 (October 25, 1996) (citing Marble v. Walker, 704 F.2d 1219, 1220 (11th Cir. 1983) (plaintiff need not prove a specific loss to recover compensatory damages even though claim was based solely on mental injuries and there was no evidence of pecuniary loss, psychiatric disturbance, effect on social activity, or physical symptoms).

Charging Party seeks emotional distress damages in the amount of \$25,000.00 to compensate Ms. Walker for her emotional distress related to the sleeplessness, anxiety, emotional strain and anger that she has experienced as a result of Respondent's discriminatory words and actions.

Ms. Walker testified that Respondent Corey's words and discriminatory requirements affected her greatly. She testified that she would lay awake in bed unable to sleep thinking about how unfairly Gregory had been treated. (Tr. 55.) She also testified about the anger she felt towards Respondent Corey: "...my stomach was so sore because I was so mad at Mr. Corey for what he said about my brother." (Tr. 56) She had difficulty eating and drinking because of stomach pain. (Tr. 56). She testified that she suffered from insomnia: "...I'd wake up at 2:00 and 3:00 in the morning and just—I know it's terrible because I'm a Christian, but I'd wake up and try to figure out ways to hurt him like he hurt me and my brother." (Tr. 56). Because she had difficulty sleeping at her own house, she would sometimes sleep at a friend's house. (Tr. 57-58). She felt comfortable at her friend's house and being there allowed her to get some sleep because the friend was available to watch Gregory and Ms. Walker could therefore take a sleep aid. (Tr. 57-58). Ms. Walker testified that she would speak about Respondent Corey's words and actions and this friend and that she felt better hearing that Respondent Corey should not have treated Gregory as he did. (Tr. 57).

Ms. Walker's friends and sister also testified about how she was affected by Respondent Corey's Discriminatory statements and actions. Nancy Brown, Ms. Walker's friend for over twenty years, testified that Ms. Walker was angry, upset and confused as a result of respondent Corey's words and actions. (Tr. 172-173). According to Ms. Brown, Ms. Walker was upset about the bond/liability insurance requirement, the doctor's note requirement and Respondent's statements. (Tr. 173). Ms. Walker was also upset about Respondent's statements suggesting that Gregory would start a fire or could possibly "do something" to a child in the neighborhood or someone else in the neighborhood." (Tr. 173-174). Ms. Brown testified that Ms. Walker's health was adversely affected: "She wasn't sleeping very well and she was upset all the time...every time I talked to her for a very, very long time, I couldn't even say how long, she would cry." (Tr. 174). Ms. Brown confirmed that Ms. Walker would sleep at her house so that she could take a sleep aid, knowing that Ms. Brown or Ms. Brown's daughter would be available if Gregory woke up. (Tr. 175). According to Ms. Brown, Ms. Walker talked about Respondent's words and actions with other friends also. (Tr. 175). It was Ms. Brown's opinion that Ms. Walker became "obsessed" and had difficulty focusing on other things. (Tr. 176). She also testified that Ms.

Walker often talks about Respondent's words and actions: "...it seemed like forever we talked about it every day...I can't remember how many years it's been now, but I can tell you that probably since it's happened there's maybe been a handful of times that it hasn't been mentioned in a conversation that we're having." (Tr. 177).

Joyce Bardwil, the sister of Delores and Gregory Walker, also testified. Ms. Bardwil testified that, as a result of her interaction with respondent, Ms. Walker was nervous, upset and couldn't sleep: "It was very disturbing to her." (Tr. 189). Ms. Bardwil also stated that she encouraged her sister to seek treatment from a doctor but that she refused because she wanted to be alert so that she could care for Gregory. (Tr. 191).

Pam Reveal, a friend of Ms. Walker's since junior high school, also testified. When asked about how Ms. Walker was affected by the interactions with Respondent, Ms. Reveal stated, "She didn't eat, she wouldn't sleep, she was moody and cried, and it was like she was afraid to go do anything, afraid someone else would say something about Gregory." (Tr. 197). Also, "One minute she'd be crying and one minute she wouldn't be, and it was like she was always afraid that someone was going to say something about Greg and hurt his feelings or something like that." (Tr. 198).

Ms. Reveal testified that Gregory Walker was also affected. According to Ms. Reveal, Mr. Walker was affected by his sister's depressed mood: "He always knows when Dee's upset and it affects him, yeah, because he'll pace the floors and he'll holler for her, it looks like he might want to cry, but like he don't know how to." (Tr. 198).

The record shows that the Respondent's statements and actions are egregious, creating emotional distress for Delores Walker. Respondent expressed no remorse for his words or actions and has no understanding of how Ms. Walker was affected by his discriminatory words and actions.

Charging Party requests that emotional distress damages in the amount of \$25,000.00 be awarded to Ms. Walker. See HUD v. High Country Apts., 2000 WL 1754153 (initial decision and consent order awarding \$40,000.00 to disabled complainant who could not comply with respondents' snow removal policy); HUD v. Pheasant Ridge Asso. et. al, 1996 WL 638029 (\$29,500.00 and \$49,000.00 awarded in emotional distress damages to complainants who were refused a rental because of their mental disabilities); HUD v. Burns Trust 1995 WL 29708 (\$30,000.00 and \$50,000.00 awarded in emotional distress damages to complainants who had been evicted because of disability (acquired immune deficiency syndrome)); HUD v. Dedham Housing Authority, 1991 WL 442793 (\$10,000.00 awarded in emotional distress damages to complainant who had been denied a handicapped parking space).

B. Delores and Gregory Walker Lost Critical Housing Opportunities.

Respondent deprived Delores and Gregory Walker of housing opportunities in two ways: one, the Walkers were denied the opportunity to rent the Subject Property; second, the discrimination permanently discouraged Ms. Walker from applying for other rentals. Because of being deprived the opportunity to rent the Subject Property, Delores and Gregory Walker remained in their cramped house. According to Ms. Walker, she needed a larger house. (Tr. 18). When Gregory moved in with her, she had to take her desk and computer out of the room that became his bedroom; her desk was moved into the living room. (Tr. 18). Other things were

moved into the garage that leaks when it rains. (Tr. 18). She testified that she needed larger bedrooms where she had more space. (Tr. 18).

Ms. Brown also testified about the need for Ms. Walker to find a larger home: “The rooms are just small...It doesn’t give you the space to really have your own area, it’s so compact...Greg rocks and makes his sounds, but she doesn’t –there’s not a place for her or him to get away from each other.” (Tr. 179). Ms. Brown also said, “She, you know, has taken care of him since her mom passed away and none of her other family either have the capacity or the want to do it...so she took him in. But, you know, she kind of needs to have her own little area too.” (Tr. 179). Also, “...she was really upset over just not being able to find a bigger place for her and Greg to live and then ...she kept saying, ‘How in the world am I going to get a million dollar policy? You know that’s got to cost a lot of money.’” (Tr. 175).

Ms. Revel also testified about the need for Delores and Gregory Walker to have a larger home: “...the home they’re living in now is small and they could have used bigger rooms, really could have used bigger rooms, because the bathroom’s so small, really one person can get in there, but sometimes you have to go in there with Greg, you know, to help him put his toothbrush back up or make him stand still when he’s walking backwards and forwards.” (Tr. 199).

In addition, because of Respondent’s discriminatory words and actions, Ms. Walker was discouraged from applying for other housing opportunities. When asked if she was fearful of facing the same discrimination, Ms. Walker stated, “...if I was to call about one more house and somebody tells me something like that about Greg, I would have probably went off the deep end.” (Tr. 55). Ms. Walker’s strong fear of facing discrimination was confirmed by Nancy Brown, Ms. Walker’s friend. According to Ms. Brown, Ms. Walker said “Mom never had a problem in all the time she had Greg living in her house and, you know, now this has come. And is this going to be this way every time?” (Tr. 174). Ms. Brown stated that Ms. Walker has a tendency of “taking things that happen one time and thinking that it’s going to happen every single time she tries to do something. So it affected her like that.” (Tr. 174).

Accordingly, Charging Party respectfully requests that the Honorable Administrative Law Judge issue an order compensating Complainants Delores and Gregory Walker \$5,000 (FIVE THOUSAND DOLLARS) for lost housing opportunities.

V. CIVIL PENALTY

In order to vindicate the public interest and deter future transgressions of the Fair Housing Act, the law authorizes the administrative law judge (ALJ) to impose a civil penalty upon a respondent found to have discriminated in violation of the Act. 42 U.S.C. § 3612(g)(3). See also 24 C.F.R. § 180.671. Where, as here, a respondent has not been adjudged to have committed any prior discriminatory housing practice, a maximum penalty of \$16,000 may be assessed for a violation. 42 U.S.C. § 3612(g)(3)(A). See also 24 C.F.R. § 180.671(a)(1) (2011). Assessment of a civil penalty is not automatic; the ALJ must consider various factors such as the “nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of the Respondent and the goal of deterrence, and other matters as justice may require.” HUD v. Schmid, 3 Fair Housing-Fair Lending (Aspen) ¶ 25,139, 26,153 (HUDALJ July 15, 1999) (quoting H.R. Rep. N. 711, 100th Congr. 2d Sess. At

37) (1988). Other factors may be considered as justice requires. 24 C.F.R. § 180.671(c)(vi) (2011).

A. Nature and Circumstances of the Violation

The nature and circumstances of Respondent's violation is of a serious nature warranting imposition of the maximum penalty allowable. Respondent's callous words and actions have adversely affected Ms. Walker; Respondent is also responsible for lost housing opportunities. As noted above, the trial transcript indicates numerous times in which Ms. Walker experienced anger, anxiety, insomnia, and difficulty eating. Further, Respondent's disregard for Ms. Walker's feelings is clear. Respondent Corey fails to appreciate that it would be painful for Ms. Walker to hear Respondent's offensive statements alleging that her brother poses a risk and that he might attack neighbors or start fires that could kill babies, simply because of his diagnosis.

B. History of Prior Violations

There is no evidence that Respondent has been adjudged to have committed a prior discriminatory housing practice; therefore, any civil penalty imposed upon Respondent may not exceed \$16,000.00 for a violation. 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 180.671(a)(1).

C. Goal of Deterrence

With the aim of deterring future violations of the Act, especially other housing providers who are interested in pursuing similar policies that could negatively impact upon both the availability of housing for the disabled and the privileges and conditions of housing of persons with disabilities, an award of a maximum civil penalty is appropriate.

D. Financial Circumstances of Respondents

It is the Respondent's burden to demonstrate financial hardship, which the Respondent has not demonstrated. To the contrary, the Respondent owns a significant amount of rental property that likely generates a significant amount of income. Therefore, the Respondent's financial circumstances should not be considered in determining the civil money penalty to be assessed in this case. HUD v. Schmid, 3 Fair Housing-Fair Lending (Aspen) ¶ 25,139, 26,154 (HUDALJ July 15, 1999).

E. Amount to be Awarded

For the above stated reasons, and because Respondent has caused the Charging Party to expend significant government resources that would not have been expended had Respondent not violated the Fair Housing Act, the Charging Party respectfully requests that the Honorable Administrative Law Judge assess civil penalties of SIXTEEN THOUSAND DOLLARS (\$16,000) against Respondent.

VI. INJUNCTIVE AND AFFIRMATIVE RELIEF

After the Administrative Law Judge finds that a respondent has engaged in a discriminatory housing practice, she may order injunctive or other equitable relief. 42 U.S.C. § 3612(g)(3).

1. Monitoring In order to enforce this deterrence, the Secretary requests that, for a period of three years after the entry of final judgment in this case, that the following information be provided by Respondent Corey to the Charging Party for monitoring purposes:

a. a duplicate of every written application and written description of any oral application for any of the properties owned and leased, by Respondent, including information identifying the applicant's disability status, whether the person was accepted or rejected, the date of such action and, if rejected, the reason for such action;

b. copies of notices or advertisements of vacancies at any of the properties owned by either Respondent and a written description of the manner in which such notices were provided.

2. Training The Secretary also requests that Respondent Corey be ordered to participate in fair housing training to be conducted by an approved fair housing organization. The training should address federal, state and local fair housing laws, regulations and ordinances.

VII. CONCLUSION

Respondent Corey has harmed Delores and Gregory Walker through his blatant and offensive statements and actions. How this honorable forum rules in this matter will send a strong message to Respondent, and other landlords, that discriminatory rental practices will not be tolerated. Finally, the ruling will affect the behavior of future parties. Assessing damages and penalties that are less than the cost of defense will simply encourage future respondents to ignore the Office of Administrative Law Judges. Accordingly, the Administrative Judge should also send a strong message to Respondent by showing the severe consequence of violating the Fair Housing Act.

WHEREFORE, the Charging Party on behalf of Delores and Gregory Walker respectfully requests that this tribunal enter an order for damages in the amount of THIRTY THOUSAND DOLLARS (\$30,000). Additionally, the Charging Party requests that a civil penalty in the amount of SIXTEEN THOUSAND DOLLARS (\$16,000) to be assessed against Respondent Corey, that specific injunctive relief be ordered as requested herein, and for such other relief as this tribunal deems appropriate and necessary.

Respectfully submitted,



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