**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| FAIR HOUSING RESOURCE CENTER, INC., | ) |
| Plaintiff, | ) |
| | ) Case No. 1:08-cv-2848 |
| v. | ) Judge Donald C. Nugent |
| DJM'S 4 REASONS, LTD., et al., | ) |
| Defendants. | ) |

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

The United States of America hereby submits this brief as amicus curiae in connection with Plaintiff's Motion for a New Trial filed February 3, 2010.[1] Dkt. No. 73. On January 28, 2010, the jury returned a verdict in favor of the Defendant on Plaintiff's claim under the Fair Housing Act ("FHA"), which the United States has statutory authority to enforce. In this brief, we set out our understanding of the law applicable to the FHA claim.

Specifically, we discuss the standard for evaluating a claim under Section 804(c) of the Fair Housing Act, 42 U.S.C. § 3604(c), see Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646-48 (6th Cir. 1991); the application of the FHA's reasonable accommodations requirement to a landlord's refusal to make an exception to a "no pets" policy for a person with a disability who needs an assistance animal; and the circumstances under which a corporate officer can be held directly liable for personally engaging in discriminatory conduct that violates the FHA. Because the Court's decision will depend on its assessment of the evidence presented at trial, and the trial transcript is not yet available, we express no view as to whether Plaintiff's motion for a new trial should be granted.

## I. INTEREST OF THE UNITED STATES

The United States, through litigation by the Attorney General and administrative enforcement by HUD, has important enforcement responsibilities under the FHA. See 42 U.S.C. §§ 3610-14. In view of the limited resources available to the United States for enforcement of

[1] The United States first learned of this matter from Plaintiff's counsel on February 4, 2010. Because of weather conditions the following week, the federal government in Washington, D.C. was closed on February 8-11, 2010. The United States was therefore not able to file this brief at an earlier time.

the statute, however, private litigation under the Act is an important supplement to government enforcement. See Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972). Accordingly, the United States has a substantial interest in ensuring that such cases are decided in accordance with the statutory mandate "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

## II. BACKGROUND

On December 3, 2008, Plaintiff Fair Housing Resource Center ("FRHC") filed this lawsuit alleging that Defendants DJM'S 4 Reasons Ltd., and Dudley Murphy, DJM'S 4 Reasons Ltd.'s member-manager (collectively, the "Defendants") "made illegal statements and advertisements indicating a preference for non-disabled persons," failed to "have a reasonable accommodation policy for renting . . . to individuals with handicaps," and denied a person "the opportunity to see or view [a property] because of a prospective roommate's disability" in violation of the Fair Housing Act, 42 U.S.C. § 3604 et seq., and Ohio R.C. § 4112.02(H). Dkt. No. 1.

The parties filed cross motions for summary judgment, Dkt. Nos. 27 & 32, which this Court denied. Dkt. No. 43. From the summary judgment motions, it appears the Plaintiff was prepared to present evidence that the following events occurred.[2]

On May 3, 2008, Tester B, a FHRC tester, spoke to Defendant Dudley Murphy on the telephone about a dwelling unit located at 7281 Lake Road East in Madison, Lake County, Ohio. Dkt. No. 28-5, ¶ 4, 8-9. During the conversation, Tester B informed Murphy that he had a severe anxiety disorder that made it difficult for him to sleep at night, and that a doctor had prescribed

[2] The trial transcript was not available at the time this brief was filed.

an assistance animal for relaxation and improved sleep. Id. ¶ 9. Tester B told Murphy that the assistance animal was a dog. Id. In response, Murphy said that he thought the tester did not "have any pets." Id. The tester explained that the animal was not a pet, but an assistance animal, to which Murphy asked if it was a dog, and whether it lived with him all week. Id. ¶ 10. The tester indicated yes, and Murphy said the animal is what he "calls a pet." Id. Murphy did not make further inquiries regarding the need for the animal and he ceased negotiating for the unit's rental. Id. ¶ 11. Instead, Murphy said that the arrangement would not work and ended the call. Id.

On June 30, 2008, Tester Y spoke with Murphy on the telephone about renting the same unit. Dkt. No. 28-7, ¶ 6-7. Tester Y told Murphy that she was looking for a rental for herself, her sister, and her brother, who was blind and needed an assistance animal. Id. ¶ 7. Tester Y asked if it would be "okay to rent the place," and Murphy said absolutely not. Id. ¶ 7-8. He said that the advertisement said "no pets." Id. ¶ 8. Tester Y explained that the animal was a doctor-prescribed assistance animal, not a pet, and Murphy responded that it "most certainly was a pet," and that it would not be allowed "under any circumstances." Id. ¶ 9-10. Murphy did not make further inquiries regarding the need for the animal and he ceased negotiating for the unit's rental. Id. ¶ 11.

On January 25, 2010, Plaintiff FHRC withdrew all of its claims except the claim under 42 U.S.C. § 3604(c) and the comparable claim under Ohio law. Dkt. No. 65. A trial commenced on January 26, 2010. Dkt. No. 68. On January 27, 2010, at the close of the Plaintiff's case, Defendants moved for a judgment as a matter of law under Fed. R. Civ. P. 50. Dkt. No. 69. The Court denied the motion as to DJM'S 4 Reasons Ltd, and granted the motion as to Dudley

Murphy. Dkt. No. 69. On January 28, 2010, the jury returned a verdict in favor of Defendant DJM'S 4 Reasons Ltd, and against Plaintiff FHRC, Dkt. No. 71, and the Court entered judgment on January 29, 2010. Dkt. No. 72. On February 3, 2010, Plaintiff FHRC moved for a new trial pursuant to Fed. R. Civ. P. 59. Dkt. No. 73.

## III. ARGUMENT

### A. The Standard for Liability Under Section 3604(c) Is an Objective One

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]" or "cause [such statements] to be made." 42 U.S.C. § 3604(c).[3] To establish a § 3604(c) claim, a plaintiff needs to demonstrate that: (1) a speaker made a statement (2) that indicated any preference, limitation, or discrimination based on a protected class (3) that was made with respect to the sale or rental of a dwelling. See Hous. Opportunities Made Equal, Inc., 943 F.2d at 646-48; accord Campbell v. Robb, 162 Fed. App'x 460, 466 (6th Cir. 2006); see also United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972), cert. denied, 409 U.S. 934 (1972); accord Jancik v. HUD, 44 F.3d 553, 556 (7th Cir. 1995).

A statement indicates a preference, a limitation, or discrimination in violation of § 3604(c) when it suggests to "the ordinary [listener] that the natural interpretation of" the statement is that there is any preference, limitation, or discrimination on a prohibited basis. See

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[3] Although the Fair Housing Act uses the term "handicap," the term "disability" is synonymous and generally preferred. See Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (definition of "disability" under Americans with Disabilities Act taken almost verbatim from definition of "handicap" under Fair Housing Act); Helen L. v. DiDario, 46 F.3d 325, 330 n.8 (3d Cir. 1995) ("The change in nomenclature from 'handicap' to 'disability' reflects Congress' awareness that individuals with disabilities find the term 'handicapped' objectionable."), cert. denied sub nom, Pennsylvania Sec'y of Pub. Welfare v. Idell S., 516 U.S. 813 (1995).

Hous. Opportunities Made Equal, Inc., 943 F.2d at 646; White v. HUD, 475 F.3d 898 (7th Cir. 2007); Soules v. HUD, 967 F.2d 817, 824 (2d Cir. 1992); Ragin v. New York Times Co., 923 F.2d 995, 999 (2d Cir. 1991) (section 804(c) is violated when "an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question"); Hunter, 459 F.2d at 215. The ordinary reader "is neither the most suspicious nor the most insensitive." Ragin, 923 F.2d at 1002.

The standard is an objective one, and proof of a defendant's subjective motivation for making the statement is not required. Campbell, 162 Fed. App'x at 466 (citing Hous. Opportunities Made Equal, Inc., 943 F.2d 644 (applying "*objective* 'ordinary reader' standard") (emphasis added)); Hous. Rights Ctr. v. Donald Sterling Corp., 274 F. Supp. 2d 1129, 1137-38 (C.D. Cal. 2003), aff'd Hous. Rights Ctr. v. Sterling, 84 Fed. Appx. 801 (9th Cir. 2003) ("Plaintiffs need not prove Defendant acted with a *subjective intent to discriminate* in order to make out a claim for violation of § 3604(c)." (emphasis added)); accord Llanos v. Estate of Anthony Coehlo, 24 F. Supp. 2d 1052, 1057 (C.D. Cal. 1998) ("Section 3604(c) may be violated without a showing of subjective intent to discriminate."). Under § 3604(c), the only question is whether an ordinary listener would have heard the statement as expressing any preference, limitation, or discrimination based on disability, not whether the speaker made the statement for that purpose.[4]

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[4] It is irrelevant that the alleged discriminatory statements were made over the telephone. Section 3604(c) applies "to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling." 24 C.F.R. § 100.75(b); see, e.g., Stewart v. Furton, 774 F.2d 706, 709 (6th Cir. 1985) (holding that oral statements by landlord violated the Act). Nor is it relevant that the Defendant's statements were made to testers rather than to bona fide home seekers. 24 C.F.R. § 100.75(c)(2) (discriminatory statements may include statements to "*any other persons*"
(continued...)

**B. Discrimination on the Basis of Disability Under § 3604(c) May Include a Failure to Make Reasonable Accommodations**

The FHA defines "discrimination" to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). This definition codifies longstanding federal law defining prohibited discrimination on the basis of disability. See PGA Tour, Inc. v. Martin, 532 U.S. 661, 674-75, 683 (2001) (ADA); Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979) (Section 504 of the Rehabilitation Act); Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1044 (6th Cir. 2001). The reasonable accommodations requirement does not simply require that persons with disabilities be treated the same way as persons without disabilities; it "imposes an *affirmative duty* to reasonably accommodate handicapped people." Smith & Lee Assoc., Inc. v. City of Taylor, Mich., 102 F.3d 781, 795 (6th Cir. 1996) (citing City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994), aff'd, 514 U.S. 725 (1995).

Waiver of a "no pets" policy for a person who needs an assistance animal is a classic example of a reasonable accommodation. See 24 C.F.R. § 100.204(b), Example 1; Joint Statement of the Dep't of Hous. and Urban Dev. and the Dep't of Justice on Reasonable Accommodations Under the Fair Housing Act, Question 6, Example 3; Question 11, Example 2 (May 17, 2004) (Attached as Exhibit 1); Bronck v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995); Janush v. Charities Hous. Dev. Corp., 169 F. Supp. 2d 1133 (N.D. Cal. 2000). In fact, the United States has brought several lawsuits against landlords where testing evidence showed that

[4](...continued)
(emphasis added)); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-75 (1982).

the landlord refused to make an exception to its "no pets" policies for assistance animals, and obtained consent decrees.[5] See, e.g., United States v. Stealth Invs., LLC, No. 4:07-cv-500 (D. Idaho) (Consent decree entered May 29, 2008) (Attached as Exhibit 2); United States v. Bolt, No. 2:07-cv-118 (S.D. Ga.) (Consent decree entered Oct. 31, 2007) (attached as Exhibit 3); United States v. National Props., Inc., No. 07-cv-434 (E.D. Pa.) (Complaint filed Feb. 1, 2007) (attached as Exhibit 4); United States v. Douglass, No. 06-cv-152 (D.D.C.) (Complaint filed Jan. 30, 2006) (attached as Exhibit 5).

The fact that the Plaintiff narrowed its claim to only § 3604(c) before trial does not change this analysis. Section § 3604(c) prohibits statements that indicate "discrimination" on the basis of disability. See supra, p. 4. As § 3604(f)(3)(B) makes clear, refusing to make a reasonable accommodation where appropriate is "discrimination" on the basis of disability. If a landlord tells a homeseeker that he or she will not make an exception to a "no pets" policy for a person who needs an assistance animal to accommodate a disability, such conduct indicates "discrimination" on the basis of disability in violation of § 3604(c).[6]

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[5] A person with a disability need not use the words "reasonable accommodation." The person need only communicate that he or she needs an exception to the policy because of a disability. See, e.g., Taylor v. Phoenixville School Dist., 184 F.3d 296, 313 (3d Cir. 1999) (noting, under the ADA, that an employee requesting a reasonable accommodation need not "formally invoke the magic words 'reasonable accommodation,'" but only "make clear that the employee wants assistance for his or her disability"); see also Joint Statement, at 11 (Attached as Exhibit 1).

[6] In cases challenging defendants' statements to testers that defendants would not make exceptions for guide dog users, the United States has alleged that such conduct violates § 3604(c) as well as § 3604(f)(1) and § 3604(f)(2). See, e.g., United States v. Stealth Invs., LLC, No. 4:07-cv-500 (D. Idaho) (Consent decree entered May 29, 2008) (Attached as Exhibit 2); United States v. Bolt, No. 2:07-cv-118 (S.D. Ga.) (Consent decree entered Oct. 31, 2007) (attached as Exhibit 3); United States v. National Props., Inc., No. 07-cv-434 (E.D. Pa.)

(continued...)

### C. A Corporate Officer May Be Held Directly Liable For Discriminatory Statements that Violate § 3604(c)

Section § 3604(c) prohibits any person from making statements that indicate any preference or limitation based on disability. The FHA defines the term "person" to include, among other things, "one or more individuals . . . ." 42 U.S.C. § 3602(d).

It is true, of course, that a corporate officer is not personally liable for the discriminatory acts of an employee simply because of the officer's position in the corporation. See Meyer v. Holley, 537 U.S. 280, 290 (2003) (under the FHA, liability for actions of a third party must be evaluated consistent with traditional principles of vicarious liability). A defendant's status as a corporate officer, however, does not shield him from liability for his own actions. Carter-Jones Lumber Co. v. Dixie Distributing Co., 166 F.3d 840, 846 -847 (6th Cir. 1999) (holding president, CEO, and sole shareholder "may not hide behind his officer or employee status" but is personally liable on account of his personally participation in the tortious activity); 3A William Meade Fletcher, Cyclopedia of the Law of Private Corporations § 1135 (rev. ed. 2002 & Cumm. Supp. 2007) ("[I]f a corporate officer participates in the wrongful conduct, or knowingly approves the conduct, the officer, as well as the corporation, is liable . . . . The plaintiff must show some form of participation by the officer in the tort, or at least show that the officer directed, controlled, approved, or ratified the decision which led to the plaintiff's injury."). Thus, a defendant can be held directly liable for discriminatory statements he made in violation of § 3604(c), regardless of the defendant's position a corporate officer.

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[6](...continued)
(Complaint filed Feb. 1, 2007) (attached as Exhibit 4).

## IV. CONCLUSION

The United States submits this brief to assist the Court in assessing Plaintiff's motion for a new trial. In evaluating any legal issues arising under the Fair Housing Act, we request the Court to apply the framework set forth in this brief.

Dated February 26, 2010.

Respectfully submitted,

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