SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.A-3165-08T3

DENISE BELL,	:	
	:	
PLAINTIFF-APPELLANT	:	On Appeal from a Decision of
	:	the Superior Court of New Jersey,
	:	Mercer County
vs.	:	
	:	
TOWER MANAGEMENT SERVICES, LP	:	Sat Below:
(D/B/A/ SUNNYBRAE APARTMENTS),	:	Hon. Thomas W. Sumners, Jr.,
BARBARA PERRY, JOHN DOES 1-10	:	J.S.C.
JOHN DOE CORPORATION 1-10,	:	
	:	
DEFENDANTS-RESPONDENTS.	:	
	:	

BRIEF AND APPENDIX OF AMICUS CURIAE NEW JERSEY DIVISION ON CIVIL RIGHTS IN SUPPORT OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The Attorney General of the State of New Jersey ("Attorney General") is charged with, among other things, responsibility for enforcing the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("LAD"), and all regulations promulgated thereunder, N.J.A.C. 13:13-1.1 et seq. The Director of the New Jersey Division on Civil Rights ("Director") acts on behalf of the Attorney General, and with the Attorney General's power, in enforcing the LAD. N.J.S.A. 10:5-8(d). The Division on Civil Rights ("Division" or "DCR") is charged with, among other things, responsibility for preventing any person protected by the LAD from discrimination in housing based upon source of lawful income or disability. N.J.S.A. 10:5-3, N.J.S.A. 10:5-4, N.J.S.A. 10:5-4.1, and N.J.S.A. 10:5-12(g)(4). On October 27, 2009, this Court recognized that the Director should, therefore, be viewed as an advocate for the public interest under statutory obligations different from those of the New Jersey Public Advocate. Before addressing the specific issues of this case, the following is background describing state and federal public policy surrounding the substantive issue of this case.

The LAD was amended to prohibit housing discrimination based on lawful source of income in 2002. N.J.S.A. 10:5-1 et seq. This Courts recognizes that the legislature intended to give the Attorney General and the Division on Civil Rights more authority to fight housing discrimination when it repealed N.J.S.A. 2A:42-100

and moved its provisions to the LAD. Pasquince v. Brighton Arms Apartment, 378 N.J. Super. 588 (App. Div. 2005). In Pasquince this Court stated, "[t]he effects of moving the non-discrimination provision to the LAD were to significantly increase the civil penalties available for discrimination of this type, and to give enforcement authority to the housing authorities, the Division on Civil Rights, and the Attorney General. Press Release, Office of Governor (Sept., 2002); Sponsors' Statement to S.631 (enacted as L.2002, c. 82); Statement of Senate Judiciary Committee to S. 631 (enacted as L.2002, c. 82)Sponsors' Statement to A.710 (enacted as L.2002, c. 82), Statement of Assembly Housing and Local Government Committee to A. 710 (enacted as L.2002, c. 82)." Pasquince v. Brighton Arms Apartment, supra., 378 N.J. Super. at 594.

Two years later in 2004, New Jersey's State Rental Assistance Program ("S-RAP") was created in response to a threatened one billion dollar cut in federal Section 8 funds which would have eliminated affordable housing for thousands of New Jersey households. N.J.S.A. 52:27D-287.1 et seq. The sponsors of the bill stated that "[d]ue to cutbacks in federal funding, the availability of Section 8 vouchers has been severely impacted," and further recognized that there was a "pressing need for a State rental assistance program for low income residents of our State who are on the brink of homelessness." Assembly Sponsors' Statement, A2476 (March 4, 2004). From the beginning of the program through the end

of FY 2009, a total of 3,909 households received assistance from the program totaling $67,116,016.[1]

S-RAP enables its participants to enter market-rate housing that would otherwise be unattainable. Notably, as stated in N.J.A.C. 5:42-2.7, the S-RAP program seeks to "promote integration of housing by race, ethnicity, social class, disability and income." The calculation of the amount of the S-RAP voucher and the amount of the tenant portion is done on a case-by-case basis. First, the total gross annual income of the tenant is determined. N.J.A.C. 5:42-2.8(a)(1). Second, a deduction is taken for each minor dependent and for a head of household who is 65 and older, or disabled. The amount after any deductions is the adjusted annual income and this amount is divided by 12 to obtain the monthly adjusted income. N.J.A.C. 5:42-2.8(a)(2)-(5). The tenant will pay 30 percent or 25 percent (for a disabled person) of his or her adjusted income for his or her portion of the rent. N.J.A.C. 5:42-2.8(a)(6). Finally, the S-RAP subsidy will be the difference between the tenant rent and either the applicable payment standard or contract rent - whichever is less. N.J.A.C. 5:42-2.8(a)(7). The State's rental contribution is paid directly to the landlord.

S-RAP regulations require that 75% of the voucher holders admitted to the program must earn less than 30% of an area's median income which the regulations refer to as "extremely low income

[1] New Jersey Department of Community affairs web site: http://www.state.nj.us/dca/divisions/dhcr/offices/srap.html.

families." N.J.A.C. 5:42-2.3. The remaining 25% of voucher holders must be below 40% of the area's median income. Ibid.

According to the Attorney General's 2007 New Jersey Fair Housing Report[2] ("Fair Housing Report"), the Division has seen considerable growth in the number of housing cases under investigation, and this is attributable in part to the amendment of the LAD to include "source of income" as a basis for unlawful discrimination. Source of income cases now account for approximately 22% of the housing cases under investigation. The LAD prohibits refusing to rent based on "source of any lawful income" or the "source of any lawful rent payment" to be paid for the real property. N.J.S.A. 10:5-4 and N.J.S.A. 10:5-12(g)(4). The report also stated that "[g]reat attention will be paid to discrimination based on lawful source of income." Fair Housing Report, supra., 13.

The LAD was amended effective January 1, 2004, and those amendments were "intended to permit the Division on Civil Rights in the Department of Law and Public Safety to qualify as a 'certified agency' within the meaning of the Federal Fair Housing Amendments Act, Pub.L. 100-430 (42 U.S.C. 3610 (f)), and shall be construed as consistent with that purpose." N.J.S.A. 10:5-9.2. As such, the LAD is substantially equivalent to the federal Fair Housing Act, and New Jersey courts recognize and rely upon federal case law for guidance with respect to interpretation of the LAD. Griggoletti v.

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[2] *New Jersey Fair Housing Report: Housing Discrimination Enforcement and Initiatives in 2007.* Report issued April 18, 2008. See Appendix I.

Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).[3]

The Federal Fair Housing Act, Section 8 states:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.
> 42 U.S.C. 1437.

Thirteen states and the District of Columbia have enacted statutes prohibiting discrimination based on source of income in the housing market.[4] Several state cases have addressed these statutes. For example in M.T. v. Kentwood Construction Co., 278 N.J. Super. 346 (App. Div. 1994), this Court held that a landlord's refusal to accept Section 8 subsidies from an existing tenant

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[3] See also, Erickson v. Marsh & McLennan, 117 N.J. 539, 551 (1990) (applying Title VII analysis to LAD claim charging gender discrimination in failure to promote); Goodman v. London Metals Exch., 86 N.J. 19, 31 (1981) (applying Title VII analysis to LAD claim alleging sex discrimination in refusing to hire plaintiff); Peper v. Princeton Univ., 77 N.J. 55, 82-83 (1978)(applying Title VII analysis to LAD claim alleging sex discrimination in discharging plaintiff). See also Shaner v. Horizon Bancorp., 116 N.J. 433, 437 (1989) (approving of the use of "federal anti-discrimination statutes" in general, and Title VII, in particular, when interpreting the LAD in an age-discrimination case); Clowes v. Terminex Int'l, 109 N.J. 575, 595-96 (1988)(applying Title VII to LAD claim alleging discriminatory termination of plaintiff because of alcoholism, a physical handicap); Andersen v. Exxon Co., 89 N.J. 483 (1982) (applying Title VII to LAD claim alleging failure to hire a physically handicapped plaintiff).

[4] These states are California, Connecticut, Maine, Maryland Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont, and Wisconsin. In addition, several cities have enacted legislation prohibiting discrimination based on source of income. Housing Descrimination and Source of Income: A Tenant's losing Battle, 32 Ind. L. Rev. 547 (1999).

violated the federal statute[5] and the LAD. Later, in Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602 (1999), the Supreme Court held that the LAD requires landlords to accept Section 8 payments and that mandating such a requirement is not preempted by federal law.[6]

Courts and legislatures have acknowledged a landlords' right to utilize screening mechanisms such as creditworthiness, to minimize defaults on rent payments. For example, in Connecticut, while there is a statutory protection against source of income discrimination, there is also a statutory provision that permits landlords to deny housing on the basis of "insufficient income." In Commission of Human Rights and Opportunities v. Sullivan Associates, 250 Conn. 763 (1999) ("Sullivan I") and Commission of Human Rights and Opportunities v. Sullivan Associates, 285 Conn. 208 (2008) ("Sullivan II"), the courts established that "insufficient income" must *be related to a prospective tenant's own ability to meet his or her portion of the rent obligation.* Thus, in Sullivan II, the court stated that the legislature enacted the

[5] 42 U.S.C. Section 1437 (t) was the federal "take one, take all" provision" which was repealed by Congress.

[6] Despite "source of income" statutory protections, Adam Culbreath asserts in Minimum Income Requirements Can Be Another Form of Housing Discrimination, 20 Youth Law News (March 2000), minimum income requirements and income-to-rent ratios serve as a way for landlords to exclude low-income families. Culbreath cites a study which compared the average income-to-rent ratios of tenants who defaulted and tenants who paid their rent on time and found no statistically significant correlation between a lower income-to-rent ratios and default. He notes that no state statutes expressly forbid private landlord's use of minimum income requirements in every case. However, he argues that case law and state statutes recognize that there should be some rational relationship between a landlord's rental requirements, and the amount of the rent that the voucher holder is personally responsible for. Using state civil rights statutes is the most effective avenue in which to challenge abusive minimum income standards.

source of income provision to prohibit landlords from denying rental opportunities to people whose source of income included federal or state housing assistance. The court recognized that it would be inconsistent with the purpose of this provision, "to construe the exception so broadly that a landlord may set requirements that are not reasonably related to the personal periodic rental obligations of a prospective tenant who is a section 8 participant." Sullivan II, supra. 285 Conn., 551.

See also Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148 (S.D.N.Y. 1989), where plaintiffs sought a preliminary injunction alleging that defendants' rental policies had a disparate impact upon racial minorities in violation of the Fair Housing Act.[7] The alleged discriminatory policies were: 1) refusing to rent to people with Section 8 vouchers; and 2) refusing to rent to applicants whose income was not at least three times the amount of the rent (the "triple income test"). The court found that statistical evidence offered by the plaintiffs made a prima facie case of disparate impact. With respect to the triple income test, evidence showed that the odds of being excluded by the triple income test are 2.5 times greater for minority persons than non-minority persons. Judge Lowe stated that the principal function of Title VIII was to promote "open, integrated residential housing

[7] The plaintiffs were later certified as a class, and the class action was eventually settled. See Glover v. Crestwood Lake 1 Holding Corps., 746 F. Supp. 301 (S.D.N.Y.1990); Glover v. Crestwood Lake Section 1 Holding Corp. 1191 U.S.Dist. LEXIS 4995 (S.D.N.Y. April 10, 1991).

patterns." Bronson v. Crestwood Lake Section 1 Holding Corp., supra., 724 F. Supp., 153, citing Otero v. New York Housing Authority, 484 F.2d 1122, 1134 (2d. Cir. 1973).

The court also found that defendants had not met their burden to prove that the policies served a legitimate business goal - no evidence had been offered to show that the policies were reasonably necessary to insure rent payment or that renting to those not meeting the triple income test (or Section 8 tenants) had resulted in losses. The judge noted that even if the defendants' triple income test reflected prior experience with defaulting tenants, the rationale underlying those policies has little force because a substantial portion of the rent would be paid directly to the landlord pursuant to Section 8. Id., at 156. The court ordered defendants to evaluate plaintiffs' applications without employing the protested policies (the minimum income test) and to offer plaintiffs a lease if indicated. Ibid.

In Pasquince v. Brighton Arms Apartments, supra, although not part a of its holding, this Court implicitly acknowledged that minimum income requirements should not apply to voucher holders. The Court noted that the landlord in that case had minimum income requirements for applicants, but that the landlord "exempts Section 8 applicants from its minimum income requirements because it may not discriminate against such applicants based on their source of

income." Id., at 592 (emphasis added).[8]

Both national and state public policy thus weighs in favor of viewing minimum income tests as a violation of the LAD.

[8] California has a statutory prohibition against applying minimum income standards to voucher holders. California law requires that landlords accepting tenants with government housing subsidies consider **only the portion of rent to be paid by the tenant** when assessing the tenant's ability to qualify financially for a dwelling. The Cal. Gov. Code § 12955 states:

> It shall be unlawful:
> (o) In instances where there is a government rent subsidy, to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant.

Thus far, California appears to be the only state with a specific provision protecting voucher holders from minimum income requirements.

ARGUMENT

This appeal presents two questions: 1) whether Defendant's minimum income policy violates the "source of income" provisions of the LAD, N.J.S.A. 10:5-4 and N.J.S.A. 5-12(g)(4); and 2) whether Plaintiff pled a prima facie case of disparate impact under the LAD. If this Court concludes that the answer is yes to either question, then it should reverse the decision of the lower court which granted defendant's motion to dismiss the complaint, and remand the case for further proceedings.

First, the DCR contends that the minimum income policy violates the source of income provision of the LAD based upon an "insufficient income" analysis. The court below concluded that the reason defendant denied plaintiff the right to rent an available apartment was that she had insufficient income to meet the minimum income requirement. 1T8-12 to 15. The court also concluded that the "LAD, does not provide protection for individuals who do not have sufficient income to rent apartments." 2T6-23 to 25. The Director acknowledges that the LAD does not expressly protect people with "insufficient income." However, the statute does protect against discrimination based on lawful source of income, and applying the requisite "liberal interpretation" of the LAD, it logically follows that sufficiency of one's income must be measured by including public assistance vouchers. People who receive such vouchers are undisputedly protected by the "source of income" provision of the

LAD. The analysis of "insufficient income" therefore should be whether a prospective tenant can demonstrate an individual ability to meet his or her personal rent obligation for that part of the rental not covered by rental assistance payments, and to cover other obligations reasonably associated with the tenancy. As a case of first impression, we rely upon both state and federal court decisions, including those from other jurisdictions, for guidance on this point.

The second issue addressed below was the "disparate impact" of the minimum income requirement. The Director contends that the court erred in its analysis of the well-settled legal principle of disparate impact. The court cited to Esposito v. Township of Edison, 306 N.J. Super. 280, 290-291 (App. Div. 1997), in support of the position that "a claim of disparate impact cannot be directly related to a legitimate permissible qualification." 2T6-13 to 18. It is unclear what the court means by "legitimate permissible qualification;" however, the case and pages cited refer to what the EEOA enumerates as the proof requirements for a finding of disparate impact in employment discrimination cases. It is equally unclear how this citation relates to the issue raised in the case at bar. The court misapplied the "disparate impact" tenet, and summarily dismissed complainant's argument on this point.

A prima facie case of a discriminatory disparate impact can be made by a showing of "1) the occurrence of certain outwardly

neutral practices, and 2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." Lapid-Laurel v. Zoning Bd. Of Adjustment, 284 F.3d 442,467 (3rd Cir. 2002). The Director contends that minimum income requirements in housing rental cases have a negative disparate impact upon rental assistance voucher holders in violation of the source of income provision of the LAD. Defendant's argument that by making this assertion plaintiff is attempting to assert a class action suit is erroneous and detracts from the issues at hand. By definition, disparate impact affects more than one person. It is disingenuous and a misapplication of the law for defendant to assert that defending the rights of those against whom discriminatory conduct has a greater collective impact is contrary to New Jersey law. The Director is charged with responsibility for defending the rights of people who are disproportionately affected by a discriminatory practice.

As an amicus curiae, the Division on Civil Rights seeks to provide this Court with an additional legal opinion which advances the protections guaranteed by the LAD. As a matter of common logic, the argument that a minimum income requirement would disproportionately affect those who have been determined to have sufficiently low income to qualify for rental assistance, seems self-evident. As the agency designated to enforce the Law Against

Discrimination, the Division aims to provide an interpretation most consistent with the overall intentions of the law.

POINT I

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT BECAUSE SHE PROPERLY PLED A VIOLATION OF THE SOURCE OF INCOME PROVISION OF THE LAW AGAINST DISCRIMINATION

In November 2005, plaintiff applied for an apartment at Sunnybrae Apartments with a rent of $874/month. (Pa21, ¶13[9]) Defendants rejected plaintiff's application because her income was less than their minimum-income requirement of $28,000 (Pa21-22, ¶15) Defendants computed her income by adding together her monthly SSI cash benefit of $610.25 and what they estimated was the value of her S-RAP voucher. (Pa21-22, ¶¶14, 15) In December 2005, Plaintiff requested that Defendants waive the minimum income policy as a reasonable accommodation to her disability, but they refused. (Pa22-23, ¶19)

The law is well-settled as to what constitutes a prima facie case in discrimination suits. See, McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973); Anderson v. Exxon, 89 N.J. 483 (1982); Clowes v. Terminix, 109 N.J. 575 (1982). The proofs in a housing discrimination case are: (1) complainant is a member of a protected class; (2) respondent was aware that complainant was a member of the protected class; (3) complainant was ready willing and able to rent the apartment; and (4) Respondent refused to rent the apartment to complainant. T.K. v. Landmark West, 353 N.J. Super.

[9] "Pa" herein shall refer to the Appendix to Plaintiff's Brief.

353, 360 (Law Div. 2001), aff'd T.K. v. Landmark West, 353 N.J. Super., 223 (App. Div. 2002).

The court below acknowledged that plaintiff pled that she is a member of a protected class as a S-RAP voucher holder. 2T5- 11 to 18. There is no dispute that that defendant was aware of her status as a S-RAP voucher recipient. The S-RAP voucher together with other public assistance made plaintiff ready, willing and able to rent an available apartment and defendant denied her that opportunity. The court below concluded that defendant's reason for denying plaintiff was based upon defendant's minimum income policy. "The SRAP subsidy and her SSI income are insufficient to meet the $28,000 minimum income policy standards." 1T8-12 to 15. On appeal, plaintiff contends that her status as a voucher holder is the reason that she was denied, and this policy violates the LAD.

In T.K. v. Landmark West, 353 N.J. Super., 223 (App. Div. 2002), a case of first impression, a prospective tenant, eligible for Section 8 Rental assistance[10] sought to compel respondent to rent an apartment to her. Respondent denied complainant's application because of her credit report, and insufficient income (she did not

[10] Section 8, established by the Housing and Community Development Act of 1974, codified at *42 U.S.C. § 1437f*, authorizes the Secretary of the Department of Housing and Urban Development (HUD) to enter into annual contribution contracts with local public housing authorities so that they may make assistance payments to owners of existing dwelling units. Under this federal rent assistance program, the tenant generally pays no more than thirty percent of his or her household income toward the monthly rent. The balance of the fair market rent, as established by HUD, is paid by the housing authority to the owner. Franklin Tower v. N.M., supra.

earn the minimum income required by respondent). T.K. v. Landmark West, supra 353 N.J. Super., 357-358.

The statute under review in T.K. was N.J.S.A. 2A:42-100, which stated in pertinent part:

> No person, firm or corporation or any agent, officer or employee thereof shall refuse to rent or lease any house or apartment to another person because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the house or apartment... Nothing contained in this section shall limit the ability of a person, firm or corporation or any agent, officer or employee thereof to refuse to rent or lease any house or apartment because of the credit worthiness of the person or persons seeking to rent a house or apartment.

In referring to this statute Judge Graves concluded that the stated purpose of the statute was "to 'make it unlawful to refuse to rent a house or apartment to a person because of objections to the person's source of income...'Sponsor Statement to ASSEMBLY NO. 944, Feb. 21, 1980. Upon signing the bill, Governor Brendan Byrne stated, 'The bill is intended to protect from housing discrimination welfare recipients, spouses dependent on alimony and child support payments and tenants receiving governmental rental assistance.' Office of the Governor, *News Release* at 1(Dec. 9, 1981)." T.K. v. Landmark, supra, 353 N.J. Super., 359.

Further, the judge concluded that "there is no doubt that the plaintiff's economic status, including her unemployment, lack of sufficient income and her participation in the Section 8 program,

motivated the defendant to reject the plaintiff." Id., at 363. There is no indication that the court viewed "sufficiency of income" as separate and distinct from plaintiff's participation in the Section 8 program. As such, plaintiff's participation in the Section 8 program, and concomitant insufficient income, conferred "protected class" status upon plaintiff under the source of income provision of the statute.

As previously noted, N.J.S.A. 2A:42-100 was repealed in 2002, and the Legislature moved its provisions to the LAD, replacing it with N.J.S.A. 10:5-4. The current statute states in pertinent part:

> All persons shall have the opportunity to obtain…publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, sex or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognize as and declared to be a civil right. L. 2002, c. 82.

As such, the governing statute in the present case is, in all relevant respects, the same as the statute in force in T.K. (see Appendix II, Sponsor Statement to ASSEMBLY No. 710, February 21, 2002 and Senate Judiciary Committee Statement to SENATE No. 631, May 30, 2002).

In T.K., the stipulated facts were that plaintiff applied to rent a one-bedroom apartment at defendant's housing complex. At the

time, plaintiff was not employed but was eligible to receive Section 8 rental housing assistance. Plaintiff was denied the opportunity to rent the apartment and sought assistance from Somerset Sussex Legal Services. Plaintiff's attorney was advised by defendant's manager "that plaintiff's application had been denied because of her credit report and because she was unemployed." T.K. v. Landmark West, supra., 353 N.J. Super. 357. The undisputed facts of the present case are similar and, the decision is contrary to the conclusions of the court below. The fact that plaintiff had insufficient income was an obvious circumstance of qualifying for a public assistance voucher. Defendant's rejection of plaintiff on this basis is therefore, a violation of the source of income provision of the LAD.

There is no dispute that voucher programs contemplate that voucher holders will not meet private market income standards. The stated purpose of Section 8 is "aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing..." 42 U.S.C. §1437f(a) (1994)§§. It is designed to provide housing to those whose income is below standard private market income levels. By definition, its recipients will not meet a minimum income standard above the median income for a particular area.

In Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602 (1999), the Supreme Court addressed the issue of "whether N.J.S.A. 2A:42-

100 prohibits a landlord that has never participated in the federal Section 8 rental assistance program, 42 U.S.C. §1437(f), from refusing to accept a Section 8 voucher from one of the landlord's existing tenants who became eligible for Section 8 assistance during the course of her tenancy." Franklin Tower One, L.L.C. v. N.M., supra., 606 (1999). The case also addressed whether a landlord may reject an application because of a prospective tenant's credit history. The present case does not involve plaintiff's creditworthiness. The issue here is whether defendant's "neutral" minimum income standard violates the source of income provision of the LAD for any tenant who participates in a public assistance voucher program.

Although Franklin affirms a landlord's right to screen prospective tenant's credit history, it also affirms the well-settled legal standard that landlords may not refuse a prospective tenant because they hold a rental assistance voucher for payment of rent. Franklin supports plaintiff's contention that to deny a prospective tenant who holds a rental assistance voucher because they do not meet the minimum income standard is a denial based upon the tenant's source of income in violation of the LAD.

In Samuel Summers v. Tamarack Apartments, Docket No. A-2426-06T2 (App. Div. January 7, 2008)[11], appellant, Summers, appealed from a finding of no probable cause decision of the Director of the

[11] Pursuant to R.1:36 this unpublished opinion is attached as Appendix III.

Division on Civil Rights. Summers rented an apartment at Tamarack Apartments for over twenty years until 2005. After he was unable to find employment and fell two months behind in his rent, Tamarack sought to evict him. Summers sought help from a Homeless Prevention Program (HPP) which agreed to pay the two months of past due rent plus court costs, attorneys' fees and a late fee. The court granted a stay of eviction, but when Summers submitted the voucher for payment, the amount due had increased by one month's rent which Summers did not pay. Tamarack refused to accept the voucher without the additional amount due and Summers was evicted.

In upholding the decision of the Director, this Court noted that:

> The record reasonably admits that Tamarack did not evict Summers because he sought to pay with HPP funds, but because those funds were ***insufficient*** to settle his account. Indeed, Summers admits knowing that he had to be current with his rent by January 17, 2006, and he does not dispute that the HPP funds would not have fully compensated Tamarack for the overdue payments Summers owed. In this regard, where the assistance will not cover all of the prospective tenant's rent, the landlord has the right to look at the tenant's ability to pay the balance.
> Id., at 2 (emphasis added).

Summers is distinguished from the case at bar because in Summers, complainant literally did not have sufficient funds to pay his rent. It is not disputed that, in the present case, plaintiff received public assistance in addition to the S-RAP voucher, sufficient to pay the rent required. A liberal interpretation of

the LAD dictates that, so long as a prospective tenant can demonstrate that she has sufficient income to pay the individual portion of the rent not covered by the rental assistance voucher, the tenant should not be held to an income standard that bares no rational or reasonable relationship to the tenant's ability to pay the rent.

In John Giebeler v. M&B Associates, 343 F.3d 1143 (9th Cir. 2003), the Court was asked to decide whether denying a disabled applicant the use of a cosigner to remedy insufficient income was a failure to accommodate within the meaning of the Fair Housing Amendment Act (FHAA), 42 U.S.C. § 3601, et seq. Appellant John Giebeler, a former psychiatric technician, suffered from AIDS, was unable to work, and was unable to meet the minimum financial qualifications for an apartment from respondent M&B Associates. Appellant's mother, who did meet the financial standards, offered to rent the apartment for appellant. M&B rejected the offer, citing a management company policy against cosigners. Appellant argued that appellee violated the FHAA by refusing to waive the no-cosigner policy.

The Court of Appeals reversed and remanded the case, concluding that the district court erred in holding that an accommodation that remedied the economic status of a disabled person was not an "accommodation" as contemplated by the FHAA. It determined that the FHAA required appellee to reasonably

accommodate appellant's disability by assessing individually the risk of non-payment created by his specific proposed financial arrangement, rather than inflexibly applying a rental policy that prohibited cosigners. The Court found that appellant's request qualified as an accommodation. The Court also found that the accommodation was necessary to afford appellant equal opportunity to use and enjoy a dwelling. Thus the accommodation was "reasonable" within the meaning of the FHAA.

The Giebeler case is pertinent because it addresses whether the denial of an accommodation that provides a financial benefit violates federal laws prohibiting the denial of a reasonable accommodation to a person with a disability. However, while the plaintiff's inability to meet the income standard was in fact a result of his disability, the decision does not address whether denying a voucher holder the right to rent an apartment because he cannot meet a minimum income test is a violation of the LAD. The Director contends that, under current law, the answer is yes and the lower court decision should be reversed. See Commission on Human Rights and Opportunities. v. Sullivan Associates, 250 Conn. 763 (1999) ("Sullivan I").

In Sullivan I, plaintiffs Patricia Hanson and Patricia Roper ("prospective tenants" or "relators"), sought to rent an advertised apartment from Sullivan Associates, but were denied due to their participation in the Section 8 program. First, they did not meet

the minimum income requirement set by the landlord. Second, the landlord asserted that it did not qualify for the Section 8 program because it required two months security deposit, contrary to federal regulations, and because it used a rental lease not authorized by Section 8.[12] The prospective tenants filed complaints with the Commission on Human Rights, and the Commission filed suit in Superior Court. The trial court ruled in favor of defendant, finding that the statute, Conn. Gen. Stat. § 46a-64c, permitted the defendant to decline to rent to prospective tenants as long as the defendant consistently conducted its rental business by use of its standard rental agreement and income requirements ("the statutory exception"). The trial court held that since the prospective tenants' incomes did not meet defendant's minimum income standard, their income was *insufficient* under the statutory exception.

The Supreme Court reversed the judgment of the trial court and held that "the statutory exception must be construed more narrowly to require a showing of 'insufficient income' with respect to the potential ***tenant's own ability to meet his or her personal rent obligation for that part of the rental not covered by section 8 rental assistance payments*** and to cover other obligations reasonably associated with the tenancy." Id., at 789-790 (emphasis

[12] The court disposed of the second issue by concluding that "the statute (Conn. Gen. Stat. §46a-64c) did not require landlords to agree to the terms of section 8 leases." Commission of Human Rights and Opportunities v. Sullivan Associates, 250 Conn. 763, 775 (1999) Further, the court concluded that "federal law does not preempt the mandate of §46a-64c…" Id., at 773.

added). The Court elaborated further,

> The question remains, however, whether the defendant's standard requirement that each potential tenant have a gross weekly income that approximates one month's rent bore ***a reasonable relationship to the defendant's ability to enforce the potential tenant's personal rental obligation***. If the defendant's formula is applied to the raw numbers of the relators' incomes, its requirements are amply met. Hanson had an income of $581 a month (or $135 a week) to cover a personal rental obligation of $11; Roper had a monthly income of $776 (or $181 a week) to cover a monthly rental obligation of $64.
> In short, on the stipulated factual record of the reasons given for turning down the relators, the defendant has failed to demonstrate that the relators in the present case have "insufficient income" to qualify them as tenants for the defendant's rental property.
> Id., at 790-791 (emphasis added).

In Commission on Human Rights and Opportunities v. Sullivan Associates, 285 Conn. 208 (2008) ("Sullivan II"), relator Denise Colon sought to rent an advertised apartment from Sullivan Associates, but her application was rejected because her income did not meet the landlord's minimum income requirement. She filed a complaint with the Commission on Human Rights, and the Superior Court rendered judgment for plaintiff. The landlord appealed, but the Supreme Court affirmed.

The Supreme Court declined the landlords' request that it overrule its prior decision in Sullivan I, supra, in which it defined "insufficient income" to mean a prospective tenant's own ability to meet his or her portion of a rental obligation. The Court further concluded that the trial court did not misapply its prior decision to conclude that the landlords' unlawfully refused

to rent to the prospective tenant because of her receipt of Section 8. The landlords' contention that they also considered the prospective tenant's bad attitude and bad credit was rejected as the prospective tenant's bad attitude did not manifest itself until after she was rejected, and the bad credit referred to a three-year old student loan. The Court concluded

> ...the reasonable purpose that the legislature would have considered in allowing the exception would have been "the sufficiency of the tenant's income to meeting his or her own financial obligations to the landlord, ordinarily the tenant's own periodic rental obligation." (citing Sullivan I, supra. 250 Conn. 788) We explained the scope of the exception in the following manner: "[T]he exception affords a landlord an opportunity to determine whether, presumably for reasons extrinsic to the section 8 housing assistance calculations, a potential tenant lacks sufficient income to give the landlord reasonable assurance that the tenant's portion of the stipulated rental will be paid promptly and that the tenant will undertake to meet the other obligations implied in the tenancy." Id., at 789. Accordingly, in evaluating whether a section 8 recipient has insufficient income, entitling a landlord to invoke the exception in § 46a64c (b) (5), only the section 8 recipient's personal rent obligation, along with "other obligations reasonably associated with the tenancy" may be considered. Id., at 790. Put another way, a landlord, in deciding not to rent to a prospective tenant, may rely on the statutory exception only with respect to income requirements that bear a reasonable relationship to a prospective tenant's ability to meet his or her personal rental obligations, as well as other obligations that arise from the tenancy.

Commission on Human Rights and Opportunities v. Sullivan Associates, supra., 285 Conn., 221.

This Court should adopt the Sullivan analyses, and conclude that a landlord should only consider a prospective tenant's ability to pay his or her personal rental obligation. For example, voucher

payments are paid directly to the landlord and are therefore guaranteed so long as the tenant and landlord qualify for the program. As such, if a rental voucher will cover 80% of a tenant's rent, then the tenant need only show sufficient income to pay 20% of the rent. There was no reason to deny plaintiff the right to rent an available apartment since she had sufficient income to meet her personal rent obligation for that part of the rent not covered by the voucher payments were made.

Both Sullivan I and Sullivan II, establish and affirm respectively, a well-reasoned criteria for determining the "sufficient income" requirement. In these cases, the Court held that "sufficient income" means a prospective tenant's individual ability to meet his or her personal rent obligation for that part of the rental not covered by rental assistance payments, and to cover other obligations reasonably associated with the tenancy. Thus a landlord's inquiry and determination of an applicant's minimum income must consider whether the applicant's resources adequately meet their individual share of the rental obligation. Any other interpretation of the source of income provision of the LAD runs afoul of the intent of the New Jersey legislature when it enacted and modified the LAD. It is also contrary to the intent of the United States Congress regarding implementation of Section 8. For the foregoing reasons, the decision of the court below should be reversed.

POINT II

THE COURT BELOW ERRED BY CONCLUDING THAT DEFENDANTS' MINIMUM INCOME STANDARD DOES NOT VIOLATE THE LAD'S DISPARATE IMPACT

Count II of the complaint alleged that defendant's minimum income standard has a disparate impact upon rental assistance voucher holders in violation of the source of income provision of the LAD (N.J.S.A. 10:5-4 and 10:5-12(g)(4)). The court below dismissed Count II for two reasons. First, the court acknowledges that plaintiff is a member of a protected class by virtue of her disability. 1T13:13 to 14. The court then went on to opine that the "difficulty with the allegation is...she has now pled, ... that the reason she cannot meet the minimum income policy is because of her disability." 1T13:15 to 17. However, complainant did not allege that the minimum income standard violates the LAD because of her disability. See plaintiff's Complaint, Appendix IV. The LAD violation was based upon her source of income.

The second reason that the court dismissed Count II of the complaint is that "the LAD does not prevent landlords from not renting to tenants because they failed to meet minimum income standards despite showing an ability to pay through a subsidy such as SRAP." 1T13:22 to 25. While it accurately reflects the statute, the court below acknowledged that plaintiff's rental assistance voucher was sufficient to pay the rent. Thus the court failed to

recognize that the rental assistance voucher was her source of income and that contrary to N.J.S.A. 10:5-4 and N.J.S.A. 10:5-12(g)(4), she was rejected because of her source of income.

The court below apparently misunderstood the allegation of Count II. Plaintiff alleged, and the Director agrees, that defendant's minimum income policy violates the source of income provision of the LAD, and has a disparate impact upon holders of rental assistance holders.

The courts have identified the elements of a disparate impact as "1) the occurrence of certain outwardly neutral practices, and 2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir. 1997); Lapid-Laurel v. Zoning Bd. Of Adjustment, 284 F.3d 442, 467 (3rd Cir. 2002). See also Mt. Holly Citizens in Action v. Township of Mount Holly, 2009 U.S. Dist. Lexis 11061; and Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 154 (S.D.N.Y. 1989), where the court found a prima facie disparate impact case is established by showing that the defendant's practice "'actually or predictably results in racial discrimination, in other words that it has a discriminatory effect.'" citing Hunting Branch NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988)). Upon plaintiff making out a prima facie case, the burden shifts to defendant to show a legitimate business reason for the

policy. Ibid. If defendant satisfies its burden then the burden of proof shifts back to plaintiff to show that there is an alternative practice that defendant could employ which would satisfy defendant's business interests without having a disparate impact on the protected class. Esposito v. Edison, 306 N.J. Super. 280, 290 (App. Div. 1997).

In Bronson v. Crestwood Lake, supra, defendant had a policy of requiring that prospective tenants demonstrate, among other things, that they have earned income of three times the amount of the rent. Plaintiff provided statistics which demonstrated that defendant's policy had a disparate impact upon otherwise qualified minority households.

> Of the roughly 14,063 non-minority households within the applicant pool, 3,945 or 28% qualify for tenancies at Crestwood under the triple income test. By contrast, only 14% of the minority households otherwise capable of affording defendants' apartments qualify under the test. Consequently non-minorities qualify at a rate of more than twice that for minorities. Using these same statistical figures, an odds analysis demonstrates that the odds of being excluded by the triple income test are 2.5 times greater for minority persons than non-minority persons.

Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F.Supp., supra, 154.

The court determined that "[u]sing alternative statistical approaches, plaintiffs have demonstrated that the challenged policies utilized by the defendants do indeed have a substantial disparate impact on minority persons." Ibid. Proofs submitted in

the present case are similar to those in the Bronson case.

In the present case, plaintiff offered statistical evidence that defendant's policy has a disproportionately adverse impact upon voucher holders, a protected class under the LAD. Further, at least for purposes of the motion, the court below accepted this fact. 2T7-24 to 2T8-3. As such, the court acknowledged the disparate impact that defendant's policy has on voucher holders - "eliminating 95% of SRAP voucher holders..." Ibid.

The Bronson court further rejected defendants' arguments that "1) there is no guarantee from any government agency that either Bronson or Carter will set aside the necessary amount of their public assistance grants to meet the balance of their monthly rental payments after the Section 8 assistance is advanced; and 2) the form of lease which the Section 8 Housing Voucher Contract would require Crestwood to enter into contains provisions not within its standard lease and which it finds objectionable." Id., at 155. The court rejected defendant's arguments because they did not show "that the challenged policies are reasonably necessary to insure payment of rent or that Crestwood has, in past experience, encountered losses or defaults as a result of accepting Section 8 tenants or tenants who fail to meet the triple income test." Id., at 156.

Further, the court concluded that

> even if, as a general matter, defendants' Section 8 or triple-income policies reflect prior experience with

> defaulting tenants, the rationale underlying those policies has little force...[because] those portions of plaintiffs' monthly rent covered by the Section 8 vouchers will be paid directly to Crestwood by the Yonkers Housing Authority.

Bronson v. Crestwood Lake Section 1 Holding Corp., supra., 1990 U.S. Dist. LEXIS 2648, 2.

In the case at bar, there is no dispute that defendant "universally applied" its minimum income requirements to all applicants for apartments in its facilities. However, following the Bronson test of "reasonably necessary to insure payment of rent," it is clear that defendant's minimum income standard violates the law. The court below acknowledged that, with the rental assistance voucher, plaintiff could pay the rent. Therefore, it is not reasonably necessary for defendant to impose a minimum income standard upon rental assistance voucher holders. The court conceded that if the entire rent were paid by the voucher, a minimum income requirement could not legally be applied. 3T36-12 to 17.[13] Presumably, the court makes this concession because of the guarantee inherent in the rental assistance voucher. It would follow therefore, that if the applicant is only going to be responsible for a small fraction of the rent, a minimum income requirement as applied here is not reasonably necessary, and would therefore be discriminatory.

Under current legal standards for determining whether a prima

[13] "3T" herein refers to the Transcript of the proceedings dated December 5, 2008.

facie case has been established, plaintiff has satisfied her burden and should survive a motion to dismiss.

CONCLUSION

For the foregoing reasons, Amicus Curiae DCR respectfully requests that this Court reverse the trial court's dismissal of the Complaint and remand for further proceedings consistent with its opinion.

Respectfully submitted

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