UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

The Secretary, United States Department of Housing and Urban Development, Charging Party, on behalf of: DELORES WALKER, and GREGORY WALKER, by and through DELORES WALKER, his legal guardian, Complainants, v. MICHAEL COREY, Respondent.	HUDALJ 10-M-207-FH-27 May 16, 2012

Appearances

Michele Caramenico, Attorney, U.S. Department of Housing and Urban Development
Philadelphia, Pennsylvania, For the Charging Party

Fred F. Holroyd, Attorney, Holroyd & Yost
Charleston, West Virginia, For Respondent

INITIAL DECISION AND ORDER

BEFORE: J. Jeremiah MAHONEY, Chief Administrative Law Judge (Acting)

On September 29, 2010, the Secretary of the United States Department of Housing and Urban Development ("Charging Party") filed a Charge of Discrimination (the "Charge") against Michael Corey ("Respondent"). The Charge alleged that Respondent discriminated against Complainants in violation of the Fair Housing Act (the "Act"), as amended in 1988, 42 U.S.C. §§ 3601 et seq. The Charge was filed on behalf of Delores Walker and her disabled brother, Gregory Walker, of whom Delores Walker is the legal guardian ("Complainants").[1]

Charge 1 alleges that Respondent violated § 3604(f)(1) of the Act, which makes it unlawful "[t]o discriminate in the . . . rental, or to otherwise make unavailable or deny, a dwelling to any . . . renter because of a handicap of . . . that renter, . . . a person residing in or intending to reside in that dwelling after it is so . . . rented, or made available; or . . . any person associated with that . . .renter."

Charge 2 alleges that Respondent violated § 3604(f)(2) of the Act, which makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of . . . rental

[1] Under the Act, the Walkers were aggrieved persons. 42 U.S.C. § 3602(i).

of a dwelling . . . because of a handicap of . . . that person; or . . . a person residing in or intending to reside in that dwelling after it is so . . . rented, or made available; or . . . any person associated with that person."

Charge 3 alleges that Respondent violated § 3604(c) of the Act, which makes it unlawful "[t]o make . . . any . . . statement . . . with respect to the . . . rental of a dwelling that indicates any . . . limitation, or discrimination based on . . . handicap, . . or an intention to make any such . . . limitation, or discrimination."

Specifically, the Charge of Discrimination alleges that Respondent discriminated against Complainants in violation of the Act, by requiring Complainant Delores Walker to purchase a $1 million liability insurance policy to cover any damages or injuries caused by her disabled brother, Gregory; to sign a paper assuming liability for damages caused by Gregory; and to obtain a doctor's note from Gregory's doctor, thereby denying the rental or imposing conditions on Complainants' tenancy because of Gregory's disability.

On November 10, 2010, Respondent filed his Answer, denying the charges and claiming that his "absolute legitimate basis for refusing to rent to [Complainants]" was Complainants' failure to establish that they were financially able to rent his property, which Respondent alleges, is a condition he requires of all other tenants.[2] (Answer, 1.)

On November 29 and 30, 2011, a hearing in this matter was held in the Municipal Court, in Charleston, West Virginia. The hearing was conducted in accord with 24 C.F.R. Part 180.[3] The parties filed post-hearing briefs on January 17, 2012. On January 30, 2012 and January 31, 2012, reply briefs were filed by Respondent and the Charging Party, respectively.

Statutory Background

The Fair Housing Act. On April 11, 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968. Federal Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73, 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631). The Act expanded on the Civil Rights Act of 1964 to prohibit discrimination regarding the sale, rental, and financing of housing based on race, color, religion, and national origin. Id. The 1968 Act was amended twice to broaden the class of people falling under the scope of its protections: in 1974, discrimination because of sex was added, and in 1988 discrimination because of familial status or disability was included. (Pub. L. 100-430, approved September 13, 1988.)

In amending the Act, Congress recognized that people with disabilities are subject to artificial, arbitrary, and unnecessary barriers preventing them from making full use of housing.

[2] Respondent's Answer also asserted a counterclaim for damages resulting from the expense and inconvenience of defending this action. (Answer, 1.) The Court is not authorized to award general damages on a counterclaim. If the Respondent ultimately prevails, an application for attorney fees and expenses may be made under 24 C.F.R. § 180.705.

[3] The following witnesses testified at the hearing: the Complainant, Delores Walker; Shelly Dearien, who later rented the Property in issue; Respondent, Michael Corey; Ben Burford, Complainants' current landlord; Nancy Brown, a friend of Ms. Walker; Joyce Bardwil, sister of Complainants; and Pam Reveal, a personal friend of Ms. Walker.

Congress also recognized that "more than a mere prohibition against disparate treatment was necessary in order that handicapped persons receive equal housing opportunities." Secretary of U.S. Dep't of Hous. & Urban Dev v. Dedham Hous. Auth., 1991 WL 442793, *5 (HUDALJ November 15, 1991) (Dedham I) (citing H.R. Rep. No. 711, 100th Cong. 2nd Sess. 25, reprinted in 1988 U.S. Code Cong. Admin. News 2186 ("H.R. No. 711")).

Under the Act, a handicapped person includes someone who has "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h). The person making the complaint (or person, on whose behalf, the complaint is being made) has the burden to show a handicap exists. United States v. Ca. Mobile Home Park Mgmt. Co., 107 F.3d. 1374, 1380 (9th Cir. 1997).

Pursuant to the Act, housing providers are prohibited from making statements with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on handicap, or intention to make any such preference, limitation, or discrimination. 42 U.S.C. § 3604(c). The Act also prohibits housing providers from discriminating because of a handicap of the renter or anyone residing or intending to reside in the housing, or any person associated with a handicapped renter, by making unavailable or denying a dwelling to a renter. 42 U.S.C. § 3604(f)(1). Additionally, it is also unlawful to discriminate against a person on the basis of a handicap by imposing different terms, conditions, or privileges of rental of a dwelling. 42 U.S.C. §§ 3604(f)(2). Despite the prohibitions set forth in § 3604 of the Act, a landlord is permitted to deny housing to individuals whose tenancy "would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. § 3604(f)(9).

Statutes Charged as Violated.

Pursuant to § 3604(f)(1) and (2) of the Act, it is unlawful for a person:

> **(1)** 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)** that buyer or renter,
> >
> > **(B)** a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
> >
> > **(C)** any person associated with that buyer or renter.
>
> **(2)** To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—
>
> > **(A)** that person; or
> >
> > **(B)** a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
> >
> > **(C)** any person associated with that person.

42 U.S.C. § 3604(f)(1)-(2).

Pursuant to § 3604(c) of the Act, it is unlawful for a person:

> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(c).

Findings of Fact

The Court has considered all matters presented by the parties, including the Complaint, the Answer to the Complaint, the exhibits, the testimony at hearing, and the post-hearing submissions by the parties. Based on a thorough and careful analysis of the entire record, including evidence in the form of testimony and documents adduced at the hearing, the Court finds the facts as described above, and further finds and takes cognizance of the following facts:

1. Gregory Walker is a 48-year-old man diagnosed with autism and mental retardation. He is unable to live alone because he requires constant care.

2. No evidence was adduced to establish Gregory Walker has ever been violent or aggressive. Based upon the testimony presented, he has maintained a good relationship with his neighbors.

3. Following his mother's death in 2008, Gregory Walker was taken in by his sister, Delores Walker, who has full custody of Gregory and is his legal guardian.

4. When she brought Gregory to live with her, Ms. Walker lived in a small, two-bedroom house. As of the hearing date in this case, they still lived in that house.

5. The monthly rent for Delores and Gregory's house is $425.

6. Michael Corey ("Respondent") has been in the business of managing rental properties for 15 years.

7. Respondent owns 20 to 22 rental units and works full-time managing them.

8. Respondent owns a house at 5215 Venable Avenue, Charleston, West Virginia (the "Property").

9. In April of 2009, Respondent advertised that the Property was available for rent.

10. Monthly rent for the Property was set at $600, not including utilities.

11. Ms. Walker responded to the advertisement and made an appointment with Respondent to view the Property.

12. The only persons present at the appointment were Respondent and Ms. Walker.

13. During the appointment, Ms. Walker informed Respondent that she wanted to rent the Property.

14. Ms. Walker also informed Respondent that her brother, Gregory Walker, would be living with her at the Property.

15. Respondent informed Ms. Walker of his requirement to meet all tenants, so he would need to meet Gregory and he would require a separate rental application from each of them.

16. Ms. Walker then indicated that her brother would not be able to complete a rental application because her brother suffered from "severe autism and mental retardation."[4]

17. Ms. Walker's characterization of her brother's disability as "severe" raised a "red flag" in Respondent's mind.

18. As a result of Ms. Walker's characterization of Gregory's disability, Respondent believed Gregory could possibly be a threat as a tenant, and decided that a professional opinion would be necessary to determine if Mr. Walker's presence as a tenant would pose a threat to the Property or other people.

19. Respondent asked Ms. Walker to provide a note from Mr. Walker's doctor stating whether Mr. Walker's tenancy would pose such a threat.

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[4] The record reflects conflicting testimony as to when Respondent first became aware of Gregory Walker's disability. During direct examination, elicited by a series of leading questions, Ms. Walker testified that she first told Respondent about her brother's disability during her initial phone call to Respondent:

> Q. What did you and Mr. Corey discuss in that first phone call?
> A. He just gave me a tour of the house and we were just talking and there was, you know, some people that he knew that I knew and we were just having a normal conversation.
> Q. Did you mention your brother's disability to Mr. Corey during that first phone call?
> A. Yes, I did.
> Q. Why did you bring it up?
> A. I don't know, I just always tell everyone about Greg, you know, that he's MR with autism.
> Q. You're not ashamed?
> A. There was no particular reason why.
> Q. Was it an explanation for why you were looking for a new place to live?
> A. Oh, yeah, it was – yeah, to get –
> Q. What was Mr. Corey's response when you mentioned your brother's disabilities?

(Hr. Tr. 18-19) Respondent, however, testified that he was not informed of Gregory Walker's disability until he met with Ms. Walker at the Property and indicated to her that Gregory Walker would need to complete a rental application if he is to be a tenant. (Hr. Tr.121, 217.) As the transcript suggests, the passage of time had some effect on both individual's memory of the order of events.

20. Respondent also informed Ms. Walker that she could be required to obtain a $1 million renter's insurance policy if the doctor's note indicated Gregory Walker's disability made him a threat to the Property or neighbors.

21. Ms. Walker told Respondent that Gregory Walker was not dangerous.

22. Respondent then reaffirmed his desire to meet Mr. Walker.[5]

23. At some point during her conversations with Respondent, Ms. Walker wrote the following on a sheet of paper, "5215 Venable Avenue, need to rent possible house with Greg."[6]

24. In response to Ms. Walker's request, Respondent wrote the following on the same sheet of paper:

> 1,000,000.00 Ins policy to protect land-owner 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

(Gov't. Exh. 7.)

25. The requirement that Ms. Walker accept responsibility for any damages her brother caused to the property was redundant with a standard clause in the form lease used by Respondent for all tenants.

26. Before their meeting ended, Respondent provided Ms. Walker with a rental application and asked, "You do have $2,000 a month income, don't you?"

27. Ms. Walker answered in the affirmative.

28. Respondent set a $2,000 minimum income requirement after considering the following potential expenses: $600 for rent; $300 - $400 utilities; car maintenance and gas; and other living expenses for two adults.

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[5] Ms. Walker testified that she could not specifically recall Respondent asking to meet Gregory. (R. 230.) Respondent, however, testified on several occasions that he made such a request to Ms. Walker both before and after being informed of Gregory's disability. (R. 121, 218, 220.) Considering the witnesses' testimony during the hearing and their ability to recall the events and conversations that transpired, the Court found Respondent's testimony to be more credible on this point.

[6] Ms. Walker testified that she wrote, "5215 Venable Avenue, need to rent possible house with Greg" on the paper while waiting for Respondent to arrive at the Property. (R. 22, 233-34.) Ms. Walker explained that she prepared the document in advance of the meeting after being made aware of Respondent's stated conditions on her disabled brother's tenancy during a phone call with Respondent. (R. 22, 234-35.) As previously indicated, in paragraph 16, above, and note 2, the parties differ in their recollection of the order of events when Ms. Walker informed Respondent that Gregory had "severe autism and mental retardation." However, the order in which these events transpired, and the number of discussions between Ms. Walker and Mr. Corey does not affect any material finding of fact by the Court.

29. Respondent's formula for setting minimum income for a particular property took into consideration anticipated expenses for the prospective tenant(s). In a June 2010 lease, the minimum monthly income required for a lease of $625 per month was $3,000.

30. The rental application indicated that the Respondent landlord might obtain a credit and criminal background check during the application process.

31. Ms. Walker took the rental application and completed part of it, but she never returned it to Respondent for processing.

32. Had Ms. Walker submitted the rental application and deposit, Respondent would have held the Property for her while she obtained the requested doctor's note.

33. Ms. Walker testified that she could have gotten a note from Gregory's doctor, but it would have taken time.

34. Sometime after their meeting, Ms. Walker testified she was angry and called Respondent while her sister, Joyce Bardwil, listened on the phone.

35. During that phone conversation, Ms. Walker asked Respondent if he would accept an insurance policy of $500,000.

36. Respondent answered that he would not accept an insurance policy with coverage of less than $1 million.

37. Respondent subsequently determined the approximate cost of such a liability policy for a qualified applicant would be approximately $75.00 per year.

38. Respondent testified that he had a $500,000 liability policy to cover the premises, but was concerned that it would be insufficient if he were held liable for a risk created by renting to Complainants.

39. Respondent had previously required a tenant with a pool to provide proof of a liability policy covering that risk, when pointed out by his insurance agent.

40. Ms. Walker visited two other prospective rentals properties after her meeting with Respondent.

41. Ms. Walker brought Gregory Walker with her on her visits to both prospective rental properties.

42. For one of the visits, the prospective landlords knew Ms. Walker and were familiar with Gregory Walker's disability.

43. As of the hearing date in this case, Ms. Walker had not moved to another residence.

44. Ms. Walker stated she had not rented another house because she was "frustrated" that she could not find a house "in an area [she'd] want to live in or…insufficient square footage" and because she was concerned about Gregory Walker being discriminated against.

45. Ms. Walker never brought Gregory Walker to meet Respondent, nor offered to do so.

46. Had Respondent met Gregory Walker, the Respondent might have made his own determination that Mr. Walker would not pose a threat to the rental property or to other people.

47. Although it would not have been a problem for Ms. Walker to request and obtain a doctor's note, she did not think it was fair for Respondent to request one.

48. Ms. Walker felt that Respondent's request for a doctor's note was disrespectful of her brother.

49. Respondent subsequently rented the Property to Shelly Dearien less than a week after it was originally advertised.

50. Ms. Dearien applied to rent the property by providing Respondent with a completed rental application and paycheck stubs for March 2009 and April 2009.

51. Respondent quoted Ms. Walker $2,000 as the minimum monthly income.

52. Ms. Dearien's rental application indicates she earned a net income of $759.00 bi-weekly from her employer as well as $231 monthly from child support.

53. At one point during the processing of her rental application, Ms. Dearien provided Respondent with papers verifying the $231 she received in monthly child support.

54. Respondent verified Ms. Dearien's employment income by checking her paycheck stubs and speaking with her work supervisor, Stacy Smith.

55. Ms. Smith informed Respondent that Ms. Dearien was an excellent employee and would make an excellent tenant.

56. Respondent also spoke with a reference provided by Ms. Dearien. The reference was George Hannah, who was experienced in renting properties, and was a friend of Respondent.

57. Mr. Hannah provided a favorable reference to Respondent on Ms. Dearien's behalf.

58. Respondent determined Ms. Dearien was qualified to rent the property based on her rental application, documents included with her rental application, and conversations Respondent had with Ms. Dearien's supervisor and references.[7]

[7] In various portions of his testimony, Respondent elaborated on how and when he evolved his economic standards for prospective tenants. Among the variables are his projections in living expenses for the tenant(s), and the

59. Ms. Walker works as an independent contractor through ARC of the Three Rivers (ARC) earning between $850-$875 in monthly pay.

60. In all of 2009, Ms. Walker earned $7,109.26 as an employee for ARC.

61. Ms. Walker testified she earned between $300 and $350 per month on a cash basis doing odd-jobs for various people, but she did not have records of receiving pay for the odd-jobs she performed as she has never paid taxes on that income.

62. Gregory Walker received $1,074 per month in Social Security Benefits.

63. Ms. Walker never showed Respondent any documentation to verify her income.

64. If Ms. Walker had submitted a rental application, Respondent testified he would have verified Complainants' income, and performed criminal background and credit checks.

65. In April 2009, Ms. Walker's credit report reflected derogatory credit and she had previously been denied a credit card.

Discussion

Respondent is charged with making a rental unavailable to Complainants, and imposing conditions on the Complainants' tenancy more onerous than those imposed upon prospective tenants who were not disabled, in violation of § 804(f)(1) and (2) of the Act. Additionally, Respondent is charged with making oral and written statements in response to Complainant Delores Walker concerning her brother's disability in violation of § 804(c) of the Act.

Procedure. Evidence establishing violations of the Fair Housing Act, may be "direct" or "indirect." U.S. Dep't of Hous. & Urban Dev. v. 1430 Seagirt Boulevard Corp., 1998 WL 70138 (HUDALJ Feb. 17, 1998); see also Aloqaili v. Nat'l Hous. Corp., 743 F. Supp. 1264, 1269 (N.D. Ohio 1990) (court found that the direct evidence approach may be used in fair housing claims).

Direct Evidence. If a violation is proven by a preponderance of direct evidence, then the evidence is sufficient to support a finding of discrimination. Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1452 (4th Cir. 1990). Direct evidence proves a fact in issue without the need for an inference or presumption. U.S. Dep't of Hous. & Urban Dev. v. Gunderson, 2000 WL 1146699 (HUDALJ Aug. 14, 2000); see also Dixon v. The Hallmark Companies, Inc., 627 F.3d 849, 854 (11th Cir. 2010) (citing Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004) and stating "only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination).

In the Dixon case, the appellate court found defendant's comments "You're fired, too. You're too religious." constituted direct evidence of defendant's impermissible religious

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creditworthiness and trustworthiness of the prospective tenants. Credit reports and criminal background checks are less important to Respondent if he personally knows the prospective tenant or their reference or employer.

discrimination in an employment discrimination case. In Texas v. Crest Asset Mgmt., Inc., 85 F. Supp. 2d 722, 731 (S.D. Tex., 2000), defendant's statements instructing management "to make [the tenant's] life miserable because he is an Arab" were taken to be true for the purposes of summary judgment and found to constitute direct evidence of discriminatory intent in violation of the Act. See also Signal v. Gonzales, 430 F. Supp. 2d 528, 540 n.5 (D.S.C. 2006) (stating, "an example of direct evidence [of discrimination] would be a piece of paper saying, 'discipline Thomas, she is black.'"); U.S. Dep't of Hous. & Urban Dev. v. Ro, 1995 WL 326736 *6 (finding the statement that a white prospective tenant was "okay for the apartment" but the black rental agent was not, did not constitute direct evidence of discrimination because one would be unable to conclude, without making an inference, that the statement was based on race or national origin); U.S. Dep't of Hous. & Urban Dev. v. Kelly, 1992 WL 406534, *6 (HUDALJ Aug. 26, 1992) (the ALJ found a landlord's statement that a prospective tenant had "one child too many" to be direct evidence of discrimination).

Direct Evidence of Record. During their conversation Respondent asked Ms. Walker who would be living in the rental house. In response she stated she would be living there with her brother. Respondent said he would need to meet her brother, and the brother would also have to submit a rental application.

In response, Ms. Walker volunteered to the Respondent that her brother, Gregory, suffered from "severe autism and mental retardation." [8]

Responding to Ms. Walker's description of Gregory's condition, Respondent then asked Ms. Walker for a doctor's note addressing Gregory Walker's condition, so Respondent could determine whether Gregory's disability would pose a threat to the Property or to other people. In the alternative, Respondent stated to Ms. Walker that a liability insurance policy might be required of Complainants to protect Respondent from liability resulting from any enhanced risk created by Gregory's presence as a tenant.[9] Respondent also said Ms. Walker would have to sign an acknowledgement of responsibility for any damage caused by Gregory.

Those three statements by Respondent form the basis of the Charge of Discrimination, alleging that Respondent (1) made the Property unavailable to Complainaints because of Gregory's disability; (2) imposed conditions on their tenancy because of Gregory's disability; and (3) made statements indicating a preference, limitation or discrimination because of Gregory's disability. Thus, the first question to be resolved is whether those statements,

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[8] Referring to his conversation with Ms. Walker, Respondent testified:

> She volunteered the information that she had a brother and then my answer to her was, "Well, I need to meet with him because he needs to fill out an application."
>
> Q. And what did she say in response?
>
> A. At that point she told me that he had severe autism and mental retardation.

(Hr'g Tr. 121-22.)

[9] Respondent elaborated in testimony about his existing 500K policy, and the added policy required of a tenant for the tenant's swimming pool, which was documented in exhibits. (RX-5 to RX-8.)

individually or collectively, constitute direct evidence of unlawful discrimination, thereby requiring a finding to that effect by this Court.

1. Doctor's note. In context, Respondent's request for a doctor's note was conditional. Respondent indicated to Ms. Walker that he routinely required that he meet all prospective tenants of his rental properties and, as he needed to meet Gregory anyway, his meeting with Gregory might suffice to allay his concerns that arose from Ms. Walker's statement describing Gregory's disability. To the extent that the request for a doctor's note was as a result of Respondent's learning (1) that Ms. Walker's brother, Gregory, would share the rental property, and (2) that Ms. Walker described Gregory as suffering "severe autism and mental retardation." The conditional purpose of the request for a doctor's note suggests that the request was made for the purpose of informing Respondent whether there was a lawful basis to refuse to rent to Complainants, if Respondent could not resolve that concern by personally meeting Gregory.

As alluded to above, there exists a lawful statutory basis to deny rental to a disabled prospective tenant if that person presents a threat to persons or property. The Act states that:

> Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

42 U.S.C. § 3604(f)(9).[10]

In the context of Ms. Walker's voluntary statement notifying Respondent that Gregory would be a tenant and describing Gregory's condition—none of the three statements convey a denial, unavailability, or even a dispreference of Complainants as tenants based on Gregory Walker's disability. Rather, Respondent's statements merely reflect Respondent's concern that, as a tenant, Gregory could present a threat to persons or property, based upon Ms. Walker's statement concerning Gregory's condition.

Respondent testified that Ms. Walker's statement,

> . . . sent up a red flag. The degree, the word 'severe' sent up a red flag. I have been around parents with children with autism and I've witnessed them—I've witnessed them flailing their arms and hollering and screaming in outrage, and it sent up a red flag.

(Hr'g Tr. 122.) Respondent testified that, had he been permitted to meet Gregory Walker, and to assess for himself that Gregory Walker did not pose a threat, he would have rented the house to Complainants without a liability policy. Likewise, if he had been provided a doctor's note that Gregory did not present a threat as a tenant, he would have been open to renting to Complainants if a rental application was submitted. (Hr'g Tr. 226.) Respondent's stated concern in response

[10] See also, Questions and Answers 4 and 5, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accomodations Under the Fair Housing Act (May 17, 2004). http://www.justice.gov/crt/about/hce/jointstatement_ra.php; http://www.hud.gov/offices/fheo/library/huddojstatement.pdf

to Complainant's information about her brother's condition does not alone constitute direct evidence of discrimination.

To the contrary, Respondent's statements suggest that he wanted to first determine if Gregory's tenancy would present a threat, and if so, whether such risk might be ameliorated by a liability insurance policy. If there was no risk of threat, Respondent stated that Complainants' application to rent would be evaluated for acceptance as it would have been for any other prospective tenants.

Respondent's request to personally meet with and observe Gregory, or in the alternative, to receive a doctor's note addressing this concern, did not amount to discriminatory conditions. Considering Respondent's limited layman's knowledge of the condition described by Ms. Walker, his stated alternatives for obtaining the necessary information were a permissible inquiry to allow Respondent to try to determine if Gregory's tenancy might pose a threat.[11]

2. Insurance policy. Respondent's request for an insurance policy was also conditional. If neither Respondent's personal meeting with Gregory nor the doctor's note allayed Respondent's concern about Gregory's disability, there would remain a concern that Gregory's tenancy might constitute a threat, the risk of which might be ameliorated by a liability insurance policy to supplement Respondent's own policy.

The conditional purpose of this request suggests that the request was made for the purpose of determining whether there was a lawful basis to impose an additional condition upon rental to Complainants, rather than rejecting them as tenants.

In the context of Ms. Walker's voluntary statement describing Gregory's condition, this statement does not convey a denial, unavailability, or even a dispreference of Complainants as tenants based on Gregory Walker's disability. Rather, Respondent's statements merely reflect his concern that, as a tenant, Gregory could present a threat to persons or property, based upon Ms. Walker's statement concerning Gregory's condition. Respondent testified that if he was unable to determine for himself that Gregory Walker did not pose a threat, and he had no doctor's note to that effect, he might have conditioned the rental to Complainants on them having a liability policy. (Hr'g Tr. 126.)

Respondent's stated concern in response to Complainant's information about her brother's condition does not alone constitute direct evidence of unlawful discrimination. To the contrary, in context, those statements suggest that Respondent wanted to first determine if Gregory's tenancy would present a threat, and if so, whether such risk might be ameliorated by a liability insurance policy.[12] If there was no risk of threat, Respondent stated that Complainants'

[11] See, Joint Statement, note 6, supra, Question and Answer 5.

[12] Respondent testified that he maintained a $500,000 liability policy on the Property. He noted that his insurance agent required him to have one tenant obtain a liability policy to cover the enhanced risk created by the tenant's above ground swimming pool. The Respondent testified that if he believed there was a threat created by Gregory's tenancy, it would require an additional liability policy to cover the enhanced risk. The Respondent's insurance agent quoted an estimate of $75 per year for the cost of a $1,000,000 tenant liability policy, if the applicant qualified for coverage. (JNT-2).

application to rent would be evaluated for acceptance as it would have been for any other prospective tenants.

The facts established in this case do not require the Court to determine whether a lessor may impose reasonable limitations on a prospective disabled renter in lieu of an outright refusal to rent under § 3604(f)(9). However, the fact that the possibility of imposing such a condition was stated by Respondent does require analysis to determine whether this statement about possibly imposing such a condition was itself a violation of the Act.

Had Complainants actually applied for a lease, and had Respondent's concern not been resolved, imposition of a limitation or condition (such as by imposing a requirement for liability insurance) could have been a permissible alternative to an outright refusal to rent. Bangerter v. Orem City Corp., 46 F.3d 1491, 1503 (10th Cir 1995).[13] The facts of this case failed to evolve to that point, so that precise issue is not before the Court. Nonetheless, the fact that such a condition might be a permissible alternative to an outright refusal to rent leads this Court to conclude that a statement about such a condition, properly founded in fact, would not itself constitute a violation of the Act.

3. Acknowledgment of liability. Respondent also stated that Ms. Walker would have to sign an acknowledgment of responsibility for any damage caused by Gregory. This condition was, however, no different than the requirement placed upon all prospective tenants in the standard form lease used by Respondent.[14] Simply stated, it is not evidence of unlawful discrimination based upon Complainants' disability.

In consideration of the genesis, meaning, and effect of these three charged statements, the Court concludes that Charging Party has not proved its case of discrimination by direct evidence as to any of the three violations alleged in the Charge of Discrimination. Respondent's statements on their face were not sufficient to establish violations of the Act, either individually or in the aggregate. Reference to circumstantial evidence will be required to determine whether, in context, the Respondent has violated the Act as alleged.

Indirect Evidence. If the direct evidence offered is insufficient to establish a finding of discrimination, but the indirect evidence is sufficient to establish circumstances from which a violation of the Act may be inferred, then the Court applies a burden-shifting analysis that was originally adopted in employment discrimination cases under Title VII of the Civil Rights Act ("McDonnell Douglas Test"). United States v. Branella, 972 F. Supp. 294, 298 (D.N.J., 1997)

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[13] The Court stated:

> First, the FHAA expressly allows discrimination rooted in public safety concerns when it provides that "[n]othing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. § 3604(f)(9). We read section 3604(f)(9) as permitting reasonable restrictions on the terms or conditions of housing when justified by public safety concerns, given that housing can be denied altogether for those same reasons. However, the exceptions to the FHAA's prohibitions on discrimination should be narrowly construed. Elliott v. City of Athens, Ga., 960 F.2d 975, 978-79 (11th Cir.), *cert. denied*, 506 U.S. 940 (1992).

[14] One example of several in the record is the lease to Shelly Dearien, paragraph 4, dealing with damages caused by the tenant in excess of the security deposit. (JNT-1).

(stating, "in the absence of direct evidence of discriminatory intent, the court must apply burden-shifting standards set forth in McDonnell Douglas Corp. v. Green 411 U.S. 792, 802 (1973)"); see also Lindsay v. Yates, 578 F.3d 407 (6th Cir. 2009); Mencer v. Princeton Square Apartments, 228 F.3d 631, 634 (6th Cir. 2000) (recognizing that courts have adapted the McDonnell Douglas standard to fair housing claims).

Initial Burden of Proof. Applying the McDonnell Douglas standard to housing discrimination cases, the Charging Party has the initial burden of proving, by a preponderance of the evidence, a *prima facie* case of housing discrimination.

To meet its initial burden for alleged violations of the Act under § 3604(f)(1) that Respondent (1) made the Property unavailable to Complainants because of Gregory's disability and § 3604(f) (2) that Respondent imposed conditions on their tenancy because of Gregory's disability, the Charging Party must prove the following: (1) Complainants are members of the protected class; (2) Complainants applied for and were qualified to rent the property; (3) Complainant was rejected; and (4) the property remained available thereafter. See Mencer, 228 F.3d at 634-35.

To meet its initial burden to establish a *prima facie* case for alleged violations of the Act under § 3604(c) that Respondent made statements indicating a preference, limitation or discrimination because of Gregory's disability Charging Party must prove that: (1) Respondent made a statement; (2) the statement was made with respect to the sale or rental of a dwelling; and (3) the statement indicated a preference, limitation, or discrimination on the basis of a Complainant's disability. White v. U.S. Dep't of Hous. & Urban Dev., 475 F.3d 898, 904 (7th, 2007). The test for whether the statement indicates discrimination based on a prohibited factor is if an ordinary listener would think that a particular protected class is preferred or dispreferred from housing. Jancik v. Dep't of Hous. & Urban Dev., 44 F.3d 553, 556 (7th Cir. 1995). The ordinary listener "is neither the most suspicious nor the most insensitive of our citizenry." Id. at fn. 4, (citing Ragin v. N.Y. Times, Co., 923 F.2d 995, 1002 (2d Cir. 1991).

Shift of Burden to Respondent. If the Charging Party has met its initial burden to establish a *prima facie* case, the burden shifts to Respondent who must proffer a legitimate, nondiscriminatory basis for the action. Mencer, 228 F.3d at 634.

Shift of Burden back to Charging Party. If Respondent establishes a legitimate, nondiscriminatory basis for his action, the Charging Party must then prove, by a preponderance of the evidence, that Respondent's basis for the action is pretext. Id. (citing Selden v. U.S. Dep't of Hous. & Urban Dev., 785 F.2d 152, 160 (6th Cir. 1986.)

Charged Violations under §§ 3604(f)(1) and (2). As applicable to the Charge of Discrimination in this case, the violations are (1) "[t]o discriminate in the . . . rental, or to otherwise make unavailable or deny, a dwelling to any . . . renter because of a handicap . . ." and (2) "[t]o discriminate against any person in the terms, conditions, or privileges of . . . rental of a dwelling . . . because of a handicap . . ." The Charging Party alleges that by imposing conditions on Complainants' tenancy, Respondent not only discriminated against Complainants, but also made the Property unavailable to them.

The Charging Party must prove the following in order to make a *prima facie* case of housing discrimination: (1) Complainants are members of the protected class; (2) Complainants applied for and were qualified to rent the property; (3) Complainant was rejected; and (4) the property remained available thereafter.[15] See Mencer, 228 F.3d at 634-35 (6th Cir. 2000).

Indirect Evidence of Record. The evidence establishes that Complainants (1) are members of a protected class, based upon Gregory's disability. However, the Charging Party did not prove Complainants (2) applied to rent the property, and did not establish that Complainants were qualified (based upon income) to rent the property. Moreover, because the Complainants did not apply to rent the Property, there is no evidence that (3) Complainants were rejected as tenants by the Respondent. Finally, although (4) the property remained available thereafter, it was soon rented to another person who applied and qualified to rent the property.

Notwithstanding the lack of proof of a *prima facie* case, as pointed out by the Charging Party, there are two exceptions to the foregoing analysis. First, there is a recognized exception to the requirement that one actually apply to rent the property. It is commonly referred to as the "futility" exception. Second, the Charging Party maintains that the person who ultimately rented the Property (who was not disabled), was not qualified by income to rent the property, thereby establishing that Respondent made the property available to the current tenant, Shelly Dearien, on more favorable terms than accorded the Complainants, who were members of a protected class (based upon Gregory's disability), thereby violating the Act. These claimed exceptions will be discussed below.

The Charging Party asserts that Complainants are not required to demonstrate that they applied and qualified to rent the Property in order to succeed on a housing violation under subsections (f)(1) and (2) of § 3604. (Post-Hr'g Br., 8.) In support of its argument, the Charging Party cites cases in which the courts found that—without considering whether a complainant was qualified—violations under the Act had occurred. See HUD v. Ro, 1995 WL 326736 (HUD ALJ 1995); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1531 (7th Cir. 1990); HUD v. Leiner, 1992 WL 406536 (HUDALJ 1992).

However, none of the cases cited by the Charging Party concern housing violations under § 3604(f)(1) and (2) of the Act.[16] Additionally, in Ro and Leiner, the *prima facie* elements used by the ALJs in each case were based upon the ALJ's own interpretation of the language of the subsections of the Act under which the allegations arose. Neither case cited case law when listing elements of a *prima facie* case under other subsections of § 3604 of the Act.[17]

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[15] These elements also apply in cases where disparate treatment under the Act is alleged. See Fair Hous. Opportunities of Northwest Ohio v. Am. Family Mut., 684 F. Supp. 2d 964, 972 (N.D. Ohio, Feb. 12, 2010).

[16] Ro concerned violations of § 3604(a) and (c), Leiner concerned violations under § 3604(a), (c), and (d), and Village of Bellwood v. Dwivedi concerned violations under § 3604(a), (b), and (d).

[17] The Court also notes that in the Leiner case, it was undisputed that the complainant at least applied for rental. HUD v. Leiner, 1992 WL 406536, *7. The case of Village of Bellwood v. Dwivedi, cited by the Charging Party, is unpersuasive. The court in that case did not analyze, or even state, the *prima facie* elements of housing discrimination under the claimed sections. Additionally, the appellate treatment of the trial decision undermines the precedential value of the case: the appellate court reversed a jury award for plaintiffs, entered judgment for one of the defendants and granted a new trial to the remaining defendants.

The Futility Exception. In some cases, courts have held that a prospective tenant need not actually apply for tenancy if the act of doing so would be "futile." Pinchback v. Armistead Homes, supra, 907 F.2d at 1451 (holding that a failure to apply does not necessarily preclude recovery on a housing discrimination claim). A *prima facie* case of housing discrimination under the "futile gesture" analysis requires a complainant to demonstrate that: (1) Complainants were members of a protected class, who were bona fide potential renters;[18] (2) Complainants were qualified to rent the Property; (3) Respondent discriminated against people of the same protected class; (4) Complainants were informed of Respondent's policy of discrimination and would have taken steps to rent the Property but for the discrimination; and (5) Respondent would have discriminated against Complainants had Complainants disclosed an interest in the property. Id. at 1452.

With regard to the third and fourth elements of a *prima facie* case under the "futile gesture" exception, the record is devoid of any evidence tending to establish that the Respondent unlawfully discriminated against people of the same protected class as Complainants—or anyone else. The record also fails to demonstrate that Complainants were informed of any discriminatory practice or policy by Respondent. See Pinchback, 907 F.2d at 1452 (plaintiffs were reliably informed of defendants' discriminatory policy when a real estate agent informed them that the community in which the home was located did not permit blacks to live there); HUD v. Mountainside Mobile Estates P'ship, 1993 WL 79428 (HUDALJ Mar. 22, 1993) (plaintiffs had actual knowledge of the discriminatory policy because the mobile home park notified its residents that it would be implementing a residency policy restricting units to three persons, and the mobile home park also personally notified plaintiff of the policy when informing plaintiff that his family could not reside there).

When asked why she failed to submit a rental application, Ms. Walker answered as follows:

> Q. Did you ever complete [the rental application]?
> A. No.
> Q. Why not?
> A. …I think even if I filled it out he still wasn't going to give it to me. He still was not going to rent the house. I just had that feeling.

(Hr. Tr. 27.)

The record does not establish that Ms. Walker's feeling was based upon actual knowledge of any past discrimination by Respondent, or that she was informed by Respondent or anyone else that Respondent's policy was to discriminate against disabled persons.[19] There is no evidence that the Respondent had a discriminatory policy, or that he would have discriminated against Complainants.

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[18] It is undisputed that Complainants were members of a protected class. Respondent stipulated to the fact that Gregory Walker had a mental disability during the hearing. (Hr'g Tr. 51.)

[19] Respondent testified that the preceding tenant at the Property was disabled, but there is no indication that Complainants were aware of that fact, and the previous tenant's disability was of a different type than Gregory's. Consequently, while relevant, the Court finds that fact immaterial.

As for the fifth element, there is no evidence that Respondent would have discriminated against Complainants had they disclosed an interest in the Property. To the contrary, after being informed of Ms. Walker's interest in the Property and Gregory's disability, Respondent provided Ms. Walker with a rental application. Respondent also testified credibly that he would have held the Property for Ms. Walker if she paid the deposit and submitted a completed rental application. Thus, no evidence was adduced establishing that Respondent would have unlawfully discriminated against the Complainants for expressing an interest in the property, or for submitting a rental application. See Darby v. Heather Ridge, 806 F. Supp. 170 (E.D. Mich., Nov. 6, 1992).[20]

For the foregoing reasons, the Court finds that the Charging Party failed to establish that Complainants' failure to apply to rent the Property should be excused as a futile gesture.

Less Favorable Conditions. Respondent contends that Complainants were not qualified to rent the Property. Proof that Complainants met Respondent's financial qualifications to rent the Property is lacking. Respondent reasonably required prospective tenants to demonstrate their ability to afford the $600 monthly rent and utility payments by providing proof of adequate income to pay the rent and reasonable living expenses. In the case of Ms. Walker and her brother, Respondent estimated that their monthly income would have to total $2,000.[21] In 2009, Gregory Walker's regular social security benefit was $1,074.00. Ms. Walker estimated that she was earning between $850-$875 monthly from ARC of the Three Rivers, Inc., and $300-$350 monthly performing odd jobs. However, the record fails to establish that Ms. Walker would have been able to provide Respondent with documentation demonstrating that she and Gregory Walker had a combined monthly income of $2,000. Ms. Walker's Form-1099 indicated that she only earned $7,109.26 in 2009. Additionally, she had no records documenting receipt of $300-$350 monthly performing odd jobs, as she never declared it on her income tax returns. As a result, Complainants were financially unable to meet Respondent's economic qualifications to qualify as tenants.

Pretext. The Charging Party also claims that Respondent's stated income requirement for rental of the Property was a pretext for discrimination on the basis of Gregory Walker's disability. (CP Post Hr'g Br. 16.) The basis for the Charging Party's contention is Respondent's subsequent rental of the Property to Shelley Dearien. (Id. at 15.) Indeed, Ms. Dearien's income of $1,747 monthly did not meet Respondent's stated income requirement for the Complainants. However, as Respondent explained, his formula for determining economic qualifications to rent takes into consideration various factors that make up the anticipated monthly expenses of the tenant(s). In Ms. Dearien's case, she did not have the expense of maintaining and operating an automobile. Her expenses would be less than the average tenant, and her stated income would be adequate to rent the Property at $600 per month.[22] Additionally, Ms. Dearien had excellent

[20] Because plaintiffs did not become aware of defendants' discriminatory policy until after they inquired about the rental, they lacked actual knowledge of the policy and therefore could not avail themselves of the "futile gesture" doctrine.

[21] This would have included utilities and living expenses for two adults, including the expenses associated with having an automobile. (R. 221:8-23.)

[22] Respondent also considered that the second occupant of the Property would be a small child, not requiring as much monetary support as an adult. (R. 223:20-24, 224:1-7.)

references, one of whom had been a friend of Respondent for 40 years. Although Respondent made an exception to his stated income requirement for Ms. Dearien, the Respondent's decision was reasonably based upon factors that he routinely took into account as affecting a prospective tenant's ability to pay the required rent.[23]

Thus, aside from their disqualifying failure to submit an application to rent the Property, Complainants did not meet Respondent's legitimate minimum income to rent the Property. Consequentially, the Court finds that the Charging Party failed to establish the required elements of a *prima facie* case of housing discrimination under § 3604(f)(1) and (2).

Charged Violations under §§ 3604(c) Next, the Court will consider whether the Charging Party has proven a *prima facie* violation under § 3604(c). As applicable in this case, the violation is: "To make . . . any . . . statement . . . with respect to the . . . rental of a dwelling that indicates any . . . limitation, or discrimination based on . . . handicap, . . or an intention to make any such . . . limitation, or discrimination." The Charging Party alleges that, by imposing conditions on Complainants' tenancy and informing Ms. Walker of the conditions orally and in writing, Respondent indicated a preference, limitation, or discrimination against a person with a disability or an intention to make such a preference, limitation, or discrimination with respect to the rental of the Property.

Indirect Evidence of Record. The elements of a *prima facie* case of housing discrimination under § 3604(c) differ from those under § 3604(f)(1) and (2). For § 3604(c) violations, "all that is required to establish liability is that the challenged statement was made with respect to the rental of a dwelling and that it indicates discrimination based on a prohibited factor." HUD v. Gruen, 2003 WL 2110325 (HUDALJ 2007). The test for whether the statement indicates discrimination based on a prohibited factor is if an ordinary listener would think that a particular protected class is preferred or dispreferred from housing. Jancik v. Dep't of Hous. & Urban Dev., 44 F.3d 553, 556 (7th Cir. 1995). See also, White v. Dep't of Hous. & Urban Dev., 475 F.3d 898 (7th Cir. 2007) (finding a statement informing prospective tenant that landlord will not rent to her because she is unmarried with two children to be a violation of the Act); Kormoczy v. U.S. Dep't of Hous. & Urban Dev., 53 F.3d 821, 824-25 (7th Cir. 1995) (landlord's explanation that "elderly people and kids were not wanted in the building" constituted evidence of discrimination based on familial status); Soules v. U.S. Dep't of Hous. & Urban Dev., 967 F.2d 817, 824 (2d Cir. 1992) (landlord violated the Act when she informed prospective tenant that an elderly person lived in the first floor unit, and did not want an upstairs resident who would make too much noise.) The ordinary listener "is neither the most suspicious nor the most insensitive of our citizenry." Jancik v. Dep't of Hous. & Urban Dev., 44 F.3d at 556 (citing Ragin v. New York Times, Co., 923 F.2d at 1002.

With regards to inquiries about disabilities, federal regulations implementing the Act make it unlawful for a landlord to inquire as to the nature or severity of a handicap.[24] 24 C.F.R. § 100.202(c). It is also impermissible for a landlord to ask blanket questions about a prospective

[23] Exhibits provided by the Respondent concerning income required to support the rental amount in previous rentals of other properties are consistent with the income requirement he stated for Complainants.

[24] The regulation makes an exception to this rule under certain circumstances, which are not applicable in this case. See 24 C.F.R. § 100.202(c)(1)-(5).

tenant's disability. See U.S. Dep't of Hous. & Urban Dev. v. Williams, 1991 WL 442796 (HUDALJ Mar. 22, 1991) (citing H. Rep. No. 711, 100th Cong. 2d Sess. 13, (1988) ("House Report") at 30). Certain inquiries, however, may be permissible if the landlord bases them upon a "nexus between the fact of the individual's tenancy and [an] asserted direct threat" to the health or safety of other individuals."[25] Id. at 14 (citing House Report at 29.)

Specifically, the Charging Party claims that when Respondent informed Ms Walker, both orally and in writing, that he would require her to (1) purchase a $1 million insurance policy, (2) provide a note from Gregory Walker's doctor, and (3) sign a statement accepting responsibility for any damages done to the property by Gregory Walker, Respondent was "expressing a preference against tenants with disabilities so as to steer them away from the premises." (CP Post-Hr'g Br. 6.) The Charging Party also claims that Respondent's statements regarding his concerns that Gregory Walker would do harm to the Property and neighbor, also violated the Act. (Id.)

In response to these allegations, Respondent asserts that after Ms. Walker's "voluntary and unsolicited statement that her brother suffers from severe autism and mental retardation," Respondent reasonably became concerned that Gregory Walker's tenancy could pose a threat and an increased risk of liability. (Resp't Post-Hr'g Br. 12.) Respondent testified that his only requirement was the doctor's note. Respondent claims he would require Ms. Walker to obtain a $1 million insurance policy only if the doctor's note indicated that Gregory Walker's disability would make him a threat to the Property or others. Respondent also testified that he explained this to Ms. Walker.[26]

In this case, Respondent did not ask Ms. Walker if her brother had a disability, nor did he inquire as to the nature or severity of the disability. Instead, Ms. Walker volunteered this information by informing Respondent that Gregory Walker had "severe autism and mental retardation." This information was relayed in response to Respondent's request to meet Gregory Walker and obtain a rental application from him, which were requirements Respondent made of all his prospective tenants.

Not anticipating such information, Respondent had to assess the meaning of Ms. Walker's words and the implications of Gregory Walker's tenancy. Respondent considered the close proximity of the Property to the house next door, which was the home of a woman with three small children. Respondent considered ordinary household hazards that might pose a threat in view of Gregory Walker's stated disability.

At the time Ms. Walker indicated her interest in renting the Property, Respondent only required a doctor's note concerning Gregory Walker. The other statements, concerning liability insurance, was only in the event that any threat posed by Gregory's tenancy was not eliminated

[25] The ALJ in Williams, found that a landlord's inquiry as to whether a tenant had AIDS was permissible because the landlord was concerned his children could contract the disease as they were tasked with cleaning the tenant's bathroom on a regular basis. Id. at 15-16.

[26] As discussed above, it was permissible, in view of Ms. Walker's statement concerning Gregory's condition, to request further information to determine if Gregory's tenancy would constitute a threat to people or property, thereby permitting Respondent to deny (or place reasonable conditions on) a lease of the Property. 42 U.S.C. § 3604(f)(9).

by Respondent's required meeting with Gregory (as a prospective tenant) or a satisfactory note from a doctor. The question remains whether Respondent's request for a doctor's note constituted a violation under § 3604(c) of the Act. The Court finds that, in the unique circumstances of this case, it did not.

Respondent's knowledge of mental disabilities was limited. The information conveyed by Ms. Walker reasonably caused Respondent concern that Gregory Walker's tenancy could pose a direct threat to the Property and the neighbors. Not having personally met or observed Gregory Walker, Respondent requested Ms. Walker provide a doctor's note stating whether Gregory Walker's disability made him a threat to persons or property.[27]

Respondent's inquiry was not for a release of Gregory Walker's medical records, nor was it for a detailed account of Gregory Walker's disability. Ms. Walker testified that providing Respondent with such a note would not have been a problem (Hr. Tr. 27), but she did not believe it fair for Respondent to ask for a doctor's note. (Hr. Tr. 83).

After considering all the facts of this case and the context in which Respondent made his request for a doctor's note, Respondent's request was not intrusive and the request was based upon Ms. Walker's statement concerning Gregory's condition. Respondent reasonably believed further information was necessary for him to ascertain whether there was a nexus between Gregory Walker's tenancy and a threat of harm. Accordingly, the Court finds Respondent's request for a doctor's note, and his statements made in relation to that request, were a nondiscriminatory and reasonable request for information to determine whether Gregory Walker might be a threat to persons or property. The request for information about Gregory's condition—as it was stated by Ms. Walker—did not indicate a preference, limitation, or discrimination in violation of the Act.[28]

CONCLUSIONS and ORDER

Having observed the testimony of both Ms. Walker and Mr. Corey, several matters became clear that cannot be garnered from the paper record, or the transcript. Doubtless, Ms. Walker was unaware of the impact upon the Respondent (as a prospective landlord) of her statement characterizing her brother's disability as "severe." Respondent had little knowledge about autism and mental retardation, and he focused on the word "severe." As she testified, Ms. Walker was very upset by Respondent's request for a doctor's note and angry about his alternative request for a liability insurance policy, and she was visibly shaken in her testimony about that conversation. Ms. Walker interpreted those requests as impugning her disabled brother whom she believed to be a threat to no one. The unfortunate result of this conversation was a failure to communicate.

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[27] Respondent testified that he had been around parents with autistic children, and seen them flailing their arms and hollering and screaming in outrage. (Hr. Tr. 122.) But he also testified that he did not know if Gregory might injure others, which was why he asked for a doctor's note. Hr. Tr. 123, and why he reiterated his requirement to meet all prospective tenants. (Hr. Tr. 121; 220)

[28] Respondent was not afforded the opportunity to meet Gregory, and the requested doctor's note was not provided. No application to rent was submitted, and a lease was neither denied nor conditioned upon Complainant obtaining a liability insurance policy.

Considering the arms-length dealing that ordinarily precedes the offer and acceptance of the continuing obligations of a lease agreement, Respondent's verbalized concerns in response to Ms. Walker's statement characterizing her brother's mental disability as "severe" were reasonable and not discrimination based upon Gregory's disability. Respondent had no expertise relevant to Gregory's disability, but had observed the behavior of an autistic child. Respondent had not met Gregory Walker, and had no personal basis to assess whether he might present a threat as a tenant.[29]

In the context of the facts of this case, Respondent's statements to Complainant Delores Walker did not constitute violations of § 3604(c) of the Act. Additionally, the Charging Party has failed to establish that Respondent discriminated in the rental, or otherwise made unavailable, or placed impermissible conditions upon rental of the Property because of Gregory Walker's disability in violation of §§ 3604(f)(1) or (2) of the Act. The preponderance of the evidence establishes that Respondent Michael Corey did not violate the Act.

So **ORDERED**.

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J. Jeremiah Mahoney
Chief Administrative Law Judge (Acting)

Notice of appeal rights. The appeal procedure is set forth in detail in 24 C.F.R. § 180.675 (2009). This Initial Decision and Order may be appealed by any party to the Secretary of HUD by petition for review. Any petition for review must be received by the Secretary within 15 days after the date of this Initial Decision and Order. Any statement in opposition to a petition for review must be received by the Secretary within 22 days after issuance of this Initial Decision and Order.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:
U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street S.W., Room 2130
Washington, DC 20410
Facsimile: (202) 708-0019
Scanned electronic document: secretarialreview@hud.gov

Copies of appeal documents. Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Hearings and Appeals.

Finality of decision. The initial decision will become the final agency decision 30 days after the date of issuance of the initial decision. 24 C.F.R. § 180.680.

Judicial review of final decision. Any party adversely affected by a final decision may file a petition in the appropriate United States Court of Appeals for review of the decision under 42 U.S.C. 3612(i). The petition must be filed within 30 days after the date of the decision's finality.

[29] The Court had no basis to observe Gregory Walker either, as he was not present at the hearing.