CORRECTED VERSION

No. 07-7156, *consolidated with* No. 07-7166

Oral Argument Scheduled for September 16, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIDGETTE FEEMSTER, SABRINA LYMORE, MARY BROWN, BEATRICE HARRIS, MICHELLE HAWKINS, SHIRLEY HOLLAND, DYANNE JOHNSON, LILLIAN JOHNSON, AND DOROTHY PAUL,

Appellees/Cross-Appellants,

v.

BSA LIMITED PARTNERSHIP,

Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Case No. 04-CV-1901)

REPLY BRIEF OF APPELLEES/CROSS APPELLANTS BRIDGETTE FEEMSTER, ET AL.

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SUMMARY OF THE ARGUMENT

The D.C. Human Rights Act claim in this case arises from BSA's demand that the tenants pay rent from their own funds instead of in the form of Section 8 vouchers. BSA does not dispute that it refused to accept rent payments offered via the voucher program, or that it insisted that the tenants produce the funds from another source. Nor does BSA even attempt – as it did in the district court – to justify doing so based on the supposed administrative burdens of accepting rent from the voucher program.

Instead, BSA tries to change the subject, asking the Court to disregard the claim the tenants have actually made and to evaluate, and reject, a claim they have not raised. BSA's entire analysis rests on the notion that the tenants have claimed discrimination based on the landlord's desire to evict them and market its property vacant. But the tenants have never based their Human Rights Act claim on BSA's desire to terminate their tenancies. The adverse act giving rise to the tenants' discrimination claim is BSA's treatment of them while they remained in occupancy – specifically, its demand that the tenants pay rent from their own funds and not via the Section 8 voucher program. Neither BSA's wish to empty the property, nor its professedly benign motive for doing so, is relevant to its liability for source-of-income discrimination while the tenants have remained in their homes.

ARGUMENT

I. BSA'S DECISION TO REFUSE RENT PAYMENTS FROM THE SECTION 8 PROGRAM, BUT DEMAND THOSE PAYMENTS FROM THE TENANTS THEMSELVES, IS A *PER SE* VIOLATION OF THE D.C. HUMAN RIGHTS ACT.

During the time that the tenants remained in their units – while their challenge to BSA's eviction claim was pending in the local D.C. courts – they were liable for monthly rent payments. See Reply Brief of Appellant BSA Limited Partnership (hereinafter "Reply Br. of

Appellant"), at 11-12. They attempted to meet that obligation by proffering their Section 8 vouchers, which would have paid rent to BSA for their homes so long as they remained in occupancy. BSA rejected those payments and demanded that the tenants produce the money from another source.

In so doing, BSA violated the D.C. Human Rights Act. As discussed in our opening brief, the Human Rights Act prohibits a landlord from refusing "to conduct a transaction in real property" – such as accepting rent – based on the source of the tenant's income. D.C. Code § 2-1402.21(a)(1). It also prohibits a landlord from imposing "terms and conditions" on the rental relationship that discriminate based on source of income, including requirements about what funds a tenant may use to pay the rent. Id. § 2-1402.21(a)(2).

BSA does not dispute that it refused rent from one source and demanded it from another. Nor, indeed, does BSA even deny that such action falls within the coverage of the Human Rights Act. Instead, BSA addresses a separate allegation – relating to its issuance of notices to vacate – that the tenants have never made, and one that is not relevant to this case.[1] The tenants do not contend that BSA's decisions to discontinue housing use, to sell the homes, or to leave the rental market constitute discrimination based on source of income. Rather, the Human Rights Act claim arises from BSA's refusal of their vouchers to pay the rent during the time the tenants remained in their units.

That action, separate from BSA's attempt to displace them, caused tangible hardship to the tenants for which they are entitled to redress under the Human Rights Act. When BSA

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[1] See, e.g., Reply Br. of Appellant, at 5 ("Plaintiffs are left to argue that BSA must have had a discriminatory animus towards Section 8 tenants merely because it was trying to evict Section 8 tenants."); id. at 7 ("Plaintiffs never advanced any evidence that BSA wanted to discontinue the housing use and evict the Plaintiffs simply because BSA no longer wanted to accept vouchers."); id. at 8 (characterizing the tenants' claim as alleging that "since BSA wanted Section 8 tenants out, it must be because BSA is discriminating against Section 8 tenants.").

refused their Section 8 rental payments, the tenants – all low-income residents, who had relied for years on rental assistance from the project-based subsidy – were left with no sustainable way of meeting their rental obligations. A few, by stretching their own incomes and seeking help from family members, paid the full rent for their units, at a far higher rate than they would have been charged under the subsidy program. See J.A. A683-688 (Rent Ledgers for Lillian Johnson, Michelle Hawkins, and Dorothy Paul). The remainder simply accrued a running debt to the landlord, thereby risking judgment for thousands of dollars and causing damage to their credit and rental histories. See J.A. A681-682, A689-698. And, in the case of the four tenants who bought their townhomes in 2005, their rental debt to BSA – and BSA's demand that they satisfy it from their own pockets – nearly prevented them from closing on the purchase of their homes, a harm averted only when a nonprofit group stepped in to lend the missing funds. See Brief of Appellees/Cross-Appellants Bridgette Feemster et. al., at 24-25.

The Human Rights Act prohibits a landlord from doing what BSA did here: picking and choosing among sources of income to satisfy its demand for rent. It is not correct (and the tenants have not claimed) that the Human Rights Act applies "*every* time a landlord refuses to execute a lease with a Section 8 tenant and accept a voucher," Reply Br. of Appellant, at 5. See Bourbeau v. Jonathan Woodner Co., 2008 U.S. Dist. LEXIS 31574 (D.D.C. Apr. 17, 2008), at *21 (noting that the DCHRA does not "mandate" acceptance of a Section 8 voucher where a tenant is otherwise not qualified to rent the unit). But the plain language of the Act does cover cases, like this one, in which the landlord refuses rent payments through the voucher program while demanding and accepting them from another source. See D.C. Code § 2-1402.21(e) (explicitly including Section 8 payments within the definition of "source of income"). BSA may take issue with the D.C. Council's decision to require a landlord to accept Section 8 payments as

rent for a tenant's unit if the landlord would accept payments from the tenant's own resources – but it has not offered any basis for reading the Human Rights Act differently.

II. BSA'S SUBJECTIVE MOTIVE FOR REJECTING THE TENANTS' VOUCHER PAYMENTS IS NOT RELEVANT TO ITS LIABILITY UNDER THE HUMAN RIGHTS ACT.

Where a landlord explicitly differentiates based on a prohibited factor, such as source of income, its motive for discriminating is irrelevant. See Brief of Appellees/Cross-Appellants Bridgette Feemster et. al., at 38-40 (citing cases). Here, BSA treated the plaintiffs differently than it would have had they paid rent with another source of income – a factor explicitly prohibited by the Human Rights Act.

BSA takes issue with this well-established rule regarding motive by referencing the "myriad of published decisions" holding that to prove discrimination, the plaintiff's membership in a protected class must be at least a "motivating factor" in the defendant's actions. Reply Br. of Appellant, at 3-6. BSA's analysis, however, confuses the concepts of "motive" and "motivating factor." "Motivating factor" is a question of but-for causation: it asks whether the defendant would have taken the same adverse action but for the plaintiff's race, gender, or other status. See Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41, 258 (1989).[2] "Motive," by contrast, asks why the defendant has taken the prohibited factor into account – in this case, why BSA accepted rent from one source and refused it from another. As BSA observes, "motive" is essentially an inquiry into animus – i.e., whether the defendant acted with a particular hostility toward members of the protected class. See Reply Br. of Appellant, at 5 (arguing that to prevail,

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[2] As BSA correctly notes, the "motivating factor" analysis is merely one form of a but-for inquiry into causation: ultimately, the critical question is whether the defendant would have made the same decision if the plaintiff had not been a member of the protected class. See Reply Br. of Appellant, at 4 n.6 (quoting Price Waterhouse, 490 U.S. at 249). As a technical matter, the "motivating factor" test serves as an expanded form of but-for analysis, allowing a plaintiff to prevail even where both legitimate and illegitimate reasons caused the adverse decision. See Price Waterhouse, 490 U.S. at 241; Hollins v. Fannie Mae, 760 A.2d 563, 575 (D.C. 2000).

the tenants must show "that BSA must have had a discriminatory animus toward Section 8 tenants").

The issue of causation is relevant here; the issue of motive, or animus, is not. See, e.g., Johnson v. New York, 49 F.3d 75, 78 (2d Cir. 1995) (holding, in an age discrimination case, that "[w]here an employment practice is facially discriminatory, the plaintiff need not prove the employer's animus or ill will toward older people"); Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995) ("[A] plaintiff need not prove . . . malice or discriminatory animus" where the defendant explicitly takes action based on a factor prohibited by law); United States v. Pelzer Realty Co., 484 F.2d 438, 443 (5th Cir. 1973) (finding that applying different closing costs based on race violated the Fair Housing Act, even though the defendant's motive was making money rather than racial animus); Cato v. Jilek, 779 F. Supp. 937, 942 n.16 (N.D. Ill. 1991) (noting that fear of "trouble in the neighborhood" does not justify a refusal to rent based on race). And, on causation, the "ultimate question" is "whether [the prohibited factor] made a difference to the defendant's decision-making, regardless of [the defendant's] exact motives" for considering that factor. Parker v. Sony Pictures Entm't, Inc., 260 F.3d 100, 109 (2d Cir. 2001) (distinguishing the term "motivating factor," a question of causation, from the issue of motive); see Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193, 212 (3d Cir. 2000) ("[A] policy explicitly based on a prohibited factor . . . is illegal regardless of the underlying motive.").

Here, the adverse action at issue is BSA's refusal of rent payments from the voucher program and demand that the tenants pay rent from other funds instead. The "ultimate question" for purposes of their Human Rights Act claim, therefore, is whether the source of the tenants' rental income "made a difference" in BSA's decision to reject those funds. And, in fact, it is undisputed that the source of those payments was not only a reason BSA rejected them, but was

the only reason – i.e., the source of the income was the but-for cause of BSA's actions. Indeed, throughout this case, BSA has expressly demanded and accepted rent from any source other than the tenants' Section 8 vouchers, while refusing payments offered via the voucher program. See Brief of Appellees, at 35-36.

Whatever BSA's motives for its actions, its treatment of the tenants' rental payments explicitly discriminated based on their source of income. That fact is entirely sufficient to prove source-of-income discrimination under the Human Rights Act.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the District Court's grant of summary judgment to BSA on Count III of the complaint should be reversed. The case should be remanded for entry of judgment in the Plaintiffs-Appellees' favor as to BSA's liability under the Human Rights Act, and for a trial as to the tenants' damages on that claim.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on the 30th day of June, 2008, I caused the foregoing Corrected Version of the Reply Brief for Appellees/Cross-Appellants Bridgette Feemster, et al. to be served via first-class mail on:

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