No. 02-CV-00711

DISTRICT OF COLUMBIA COURT OF APPEALS

EVELYN DOUGLAS,

Appellant

v.

KRIEGSFELD CORPORATION,

Appellee

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA,
CIVIL DIVISION, LANDLORD AND TENANT BRANCH

BRIEF OF APPELLANT ON REHEARING EN BANC

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RULE 28(a)(2)(A) STATEMENT

The parties to the case are appellant Evelyn Douglas, the defendant below, and appellee Kriegsfeld Corporation, the plaintiff below. Ms. Douglas was represented in the superior court and on the initial appeal by Brian Gilmore of the Neighborhood Legal Services Program. She is represented in this en banc proceeding by Barbara McDowell, Julie H. Becker, and Tamara Jezic of The Legal Aid Society of the District of Columbia and by Patricia Millerioux of the Neighborhood Legal Services Program. Kriegsfeld Corporation was represented in the superior court and is represented in this Court by Timothy P. Cole of Schuman & Felts, Chartered.

No intervenors or amici appeared in the superior court. On the initial appeal, amicus briefs were filed by Rhonda Dahlman and Anthony J. De Marco for Legal Counsel for the Elderly; by Michael L. Murphy and David T. Beddow of O'Melveny & Myers LLP for D.C. Law Students in Court; and by Jonathan Smith, Eric Angel, Ms. Becker, and Ms. Jezic for The Legal Aid Society. In the en banc proceeding, an amicus brief has been filed by Richard W. Luchs and Roger D. Luchs of Greenstein Delorme & Luchs, P.C. for the Apartment and Office Building Association of Metropolitan Washington. It is anticipated that additional amicus briefs will be filed in this proceeding on or before the due date of October 4, 2004. See Rule 29(e).

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ISSUES PRESENTED

The Fair Housing Act, 42 U.S.C. 3601 et seq., requires landlords to provide reasonable accommodations required by tenants with mental or physical disabilities. In this suit to evict a tenant from her apartment for violations of her lease, the tenant sought to defend on the ground that the landlord had violated the Fair Housing Act by refusing a reasonable accommodation for her mental disability. The superior court rejected the tenant's Fair Housing Act defense as legally deficient. This appeal presents the following issues:

1. Whether the superior court erred in holding that the evidence was insufficient, "as a matter of law," to prove that the tenant had a mental impairment that affected her ability to comply with her lease because the tenant did not introduce expert medical testimony explaining her psychiatric diagnosis.

2. Whether the superior court erred in holding that the tenant had not made out a viable Fair Housing Act defense because she did not request an accommodation from the landlord until after she had been sued for eviction.

3. Whether the superior court erred in holding that a landlord has no obligation under the Fair Housing Act to provide a reasonable accommodation to a tenant who, without such accommodation, poses a threat to the health or safety of other tenants.

STATEMENT OF THE CASE

This case concerns the scope of a landlord's duty under the Fair Housing Act to "make reasonable accommodations in rules, policies, practices, or services" at the request of a tenant with a disability. 42 U.S.C. 3604(f)(3)(B). In this suit by a landlord to evict a tenant for having an unsanitary apartment, the tenant defended on the ground that the landlord violated the Fair Housing Act by refusing her request for an accommodation that would have permitted her to remain in the apartment while efforts were made to restore it to sanitary condition. The superior court refused, on three distinct grounds, to allow the jury to consider that defense: (i) that the tenant had failed to make a sufficient prima facie showing of an impairment that affected her ability to maintain her apartment, (ii) that the tenant's request for the landlord's forbearance from pending eviction proceedings while the District of Columbia government arranged for the cleaning of her apartment was not a timely request for reasonable accommodation under the Fair Housing Act, and (iii) that the landlord was not required under the Fair Housing Act to provide any reasonable accommodation because the tenant's apartment constituted a threat to health and safety. The jury, without hearing the tenant's Fair Housing Act defense, found for the landlord in the eviction case. A division of this Court, over Judge Schwelb's dissent, reversed the superior court's ruling on the Fair Housing Act defense and remanded the case to permit the tenant to raise the defense at a new trial. The full Court vacated the division's opinion and granted rehearing en banc.

STATEMENT OF FACTS

1. The Lease. On January 2, 2001, appellant Evelyn Douglas signed a lease for a basement apartment at 1430 W. Street, N.W. The landlord was appellee Kriegsfeld Corporation (Kriegsfeld). Lease (Trial Exh. 1).

The form lease stated that the tenant, by signing it, acknowledged that the apartment was "in good and satisfactory order and repair." The lease further provided that the tenant agreed "to keep [the] apartment in good order and repair." Lease 4-5 (Trial Exh. 1).

2. The Notice To Cure Or Quit. In August 2001, Kriegsfeld, through its attorney, prepared a "Notice To Cure Or Quit," which stated that Ms. Douglas was violating her lease by failing to maintain the apartment "in a clean and sanitary condition." More particularly, the notice stated that "the kitchen appliances and fixtures are filthy, bathroom fixtures are filthy, trash and debris has accumulated throughout the apartment, dirty clothes are strewn throughout the unit, the floors are dirty and cluttered, and walls and doors are dirty beyond normal wear." The notice added "[t]he unsanitary conditions cause or contribute to rodent and insect infestation." The notice informed Ms. Douglas that, if she did not clean up the apartment within 30 days, she would have to move out and, if she failed to do so voluntarily, "it will be necessary to take such steps as are appropriate to secure possession of the premises." Complaint, Attachment 1 (R. 14-19).[1]

3. The Filing Of Suit. On November 30, 2001, Kriegsfeld sued Ms. Douglas for possession of the apartment. The complaint stated that Ms. Douglas had "failed to vacate property after notice to quit expired" and was "holding over after notice of breach and opportunity to cure." Complaint 1 (R. 13).

On December 21, 2001, the designated return date, counsel entered an appearance for Ms. Douglas. On January 25, 2002, after a continuance, Ms. Douglas, through counsel, filed a

[1] On the copy of the notice to quit that is attached to the complaint, there are hand-written notations representing that service of the notice on Ms. Douglas was attempted on August 24, 2001, but that there was no answer at her door, that the notice was posted on the door on August

Verified Answer And Jury Demand denying the allegations in the complaint and asserting, as a defense, that Kriegsfeld had violated the federal Fair Housing Act and the District of Columbia Human Rights Law by failing to make a reasonable accommodation for her disability. Answer 2 (R. 31-32). She also filed an application to proceed in forma pauperis and a supporting affidavit, which stated that her "total" monthly income consisted of "$531.00 from SSI Disability." Aff. In Support Of Def.'s Mot For Leave To Proceed In Forma Pauperis 1 (R. 28). The motion was granted. 1/25/02 Order (R. 30).

4. The Requests For Accommodation. On February 5, 2002, Ms. Douglas's counsel sent a letter, titled "Request For Reasonable Accommodation," to the District of Columbia's Department of Consumer and Regulatory Affairs (DCRA). The letter stated that Ms. Douglas "suffers from a disability (mental) as defined by the Fair Housing Act," explaining that she "is currently diagnosed with a mood disorder" and "also has other health problems that aggravate her mood disorder." The letter further stated that, to the extent that Ms. Douglas had committed the alleged lease violations (which she continued to deny), they were "directly due to her mental disabilities." Def.'s Summ. J. Mot., Ex. 3 (R. 186-187).

With respect to accommodation, the letter stated both that "[t]he District of Columbia government is prepared to assist [Ms. Douglas] with cleaning the apartment" and that Ms. Douglas herself, who had "already been referred for psychiatric outpatient treatment through the District of Columbia government," was "prepared to continue any treatment that will improve her mental condition." Accordingly, the letter proposed as an accommodation that Kriegsfeld "would only need to delay taking any further action to obtain possession of her unit and afford

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27, and that the notice was placed in the mail to her on August 28, 2001. See Complaint, Attachment 1 (R. 14).

her an opportunity to work with the District of Columbia government in resolving her disability issues as they relate to her current housing arrangement." Def.'s Summ. J. Mot, Ex. 3 (R. 186-187). DCRA did not respond to the letter.

On February 20, 2002, Ms. Douglas's counsel sent a letter to Kriegsfeld's counsel "re-asserting th[e] request" for a reasonable accommodation previously made to DCRA. The letter stated that "Ms. Douglas suffers from a mood disorder (mental illness)," "is on SSI disability," "has been assigned a case worker with the District of Columbia government," and "is an outpatient at a city operated mental health/substance abuse clinic." The letter explained that "[t]he District of Columbia government has advised [counsel] that they are prepared to assist [Ms. Douglas] because it is their opinion as well that Ms. Douglas would benefit from intervention and a reasonable accommodation." The letter concluded by proposing discussions between Ms. Douglas's counsel and Kriegsfeld's counsel in order to "bring closure to the suit." Def.'s Summ. J. Mot., Ex. 2 (R. 184-185). Kriegsfeld did not respond to the letter.

5. The Hearing On Ms. Douglas's Fair Housing Act Defense. The case proceeded to discovery and trial, which was scheduled to begin on June 17, 2002. On that date, the superior court asked counsel about the status of "any efforts to negotiate a settlement of this case." 6/17/02 Tr. 7. Kriegsfeld's counsel responded: "We are willing to allow Ms. Douglas to stay in the unit through the end of August, the beginning of September, but the landlord would definitely request possession of the unit after a period of time. They don't see there's any way to get around or to accommodate Ms. Douglas in this matter to allow her to stay." Ibid. Ms. Douglas's counsel, in turn, explained to the court the accommodation that was being sought from the landlord: to hold the eviction proceedings "in abeyance" so that the District of Columbia government could hire a contractor to clean the apartment and the success of those efforts could

be assessed. Id. at 35-37, 41-42; see id. at 43 ("We didn't want her to be allowed to just stay in an apartment that was filthy forever * * *. We just asked for additional time to address the problem in the apartment.").

Then, before proceeding to jury selection, the court conducted an evidentiary hearing to "determine whether this defense [i.e., Ms. Douglas's reasonable accommodation defense] has any viability to it." 6/17/02 Tr. 54. The court heard testimony from two employees of the District of Columbia government who had interacted with Ms. Douglas. Ms. Douglas was not herself present at the hearing or the subsequent trial.

a. The Mental-Health Specialist. James B. Sutton, Jr., a mental-health specialist with the District of Columbia's Department of Mental Health, testified that his position involved the supervision of a team of specialists and counselors that makes mental health assessments as to whether individuals in the community pose a danger to themselves or others. 6/17/02 Tr. 57-58, 60. He has a master's degree in mental health. Id. at 59. He has held his current position since 1986. Id. at 58.

Mr. Sutton testified that he first encountered Ms. Douglas in July 2001, after his agency received a request that she be evaluated because of the state of her apartment. 6/17/02 Tr. 61-62. He testified that he and another mental-health worker visited the apartment, which he described as being in "very deplorable" condition, with "urine in bottles," "rodent infestation," "spoiled food," "trash and other de[b]ris throughout the apartment," and water on the floor and carpet. Id. at 63. He testified that, when he spoke with Ms. Douglas about the condition of her apartment, she responded that "she didn't see anything wrong with it," denied that she had any mental health problems or was taking any medication, and claimed that she was waiting for money coming to her from the United States Navy. Id. at 64. He added that, although he and his colleague

"encourage[d] her to go with us to the mental health center to see our psychiatrist," she refused. Ibid.

Mr. Sutton testified that he concluded from that encounter that Ms. Douglas had a mental illness involving "some paranoia and some delusion." 6/17/02 Tr. 65. In addition, because of Ms. Douglas's admissions about her daily consumption of vodka and beer, the alcohol on her breath, and the "alcohol bottles throughout the apartment," he concluded that "the alcohol was affecting her judgment and insight, along with her mental illness." Id. at 65-66. He testified that his conclusions were consistent with those of a psychiatrist at St. Elizabeth's Hospital who saw Ms. Douglas in December 2001; he noted, consulting Ms. Douglas's medical records, that the psychiatrist had diagnosed her as having a "mood disorder" and "alcohol dependence" and recommended treatment at an alcohol detoxification program. Id. at 67; see Def.'s Summ. J. Mot., Ex. 1 (R. 173-183) (medical records).

Mr. Sutton testified that he had visited Ms. Douglas on two subsequent occasions -- in October 2001, when similar concerns about the condition of her apartment were raised, and again in June 2002, within two weeks of the hearing. 6/17/ 02 Tr. 68-69, 72-73. According to Mr. Sutton, when he and his colleague mentioned during their most recent visit that she would have to appear in court in this case, "[s]he said Jesus is going to take care of it." Id. at 69. She also acknowledged that she was continuing to consume alcohol. Id. at 70.

b. The Social Worker. Damon Byrd, a licensed social worker with the District of Columbia's Adult Protective Services, testified that his position involved investigating and responding to cases of abuse and neglect of adults in the community, including "self-neglect," as in Ms. Douglas's case. 6/17/02 Tr. 75-76. He testified that he had a master's degree in social work and had held his current position for nearly three years. Id. at 75-76.

Mr. Byrd testified that he first met with Ms. Douglas on July 26, 2001, after the case had been referred to him by an intake worker. 6/17/92 Tr. 80. He stated that, when he arrived at Ms. Douglas's apartment, "she was half naked" and "completely exposed," and that he had to request that she dress herself before they spoke. Id. at 81. He testified that, at the time of that visit, "the place was totally filthy," "[t]he hallway was cluttered with trash," "[t]here were forty-ounce liquor bottles" on the kitchen counter, and Ms. Douglas was cooking pork chops on a hot plate on the floor because she believed that the stove was not operating. Id. at 81-82.

Mr. Byrd testified that, including that initial visit, he met with Ms. Douglas 16 times. 6/17/02 Tr. 82. He testified that, based on his experience as a social worker, "she was not in her right frame of mind." Ibid. He further testified that, in his view, Ms. Douglas's mental condition, combined with alcohol use, affected "her ability to make rational decisions" and thus her ability to keep her apartment clean and otherwise to conduct her daily life. Id. at 85, 87; see id. at 89-90 ("Half the time she's not sober. So if she spends half her time drinking, she's not able to effectively clean her apartment, notwithstanding the fact that the apartment is rodent and rat infested. * * * I believe that the alcoholism impacts her diagnosis of mood disorder.").

Both Mr. Sutton and Mr. Byrd acknowledged that they were not psychiatrists or psychologists and could not testify to the precise details of Ms. Douglas's diagnosis. 6/17/02 Tr. 67, 89.

6. The Superior Court Rejects Ms. Douglas's Fair Housing Act Defense. On the day after the hearing, the superior court ruled that Ms. Douglas could not present to the jury at trial any defense based on Kriegsfeld's alleged violation of the Fair Housing Act and the Human Rights Law by failing to provide a reasonable accommodation for her disability. 6/18/02 Tr. 3-14. The

court gave what it characterized as three "independently sufficient" reasons for its ruling. Id. at 4.

First, the superior court ruled that Ms. Douglas's request for reasonable accommodation was untimely, as a matter of law, because it was made only after she had been sued for eviction based on lease violations. 6/18/02 Tr. 4. The court reasoned that a landlord's duty of reasonable accommodation under the Fair Housing Act and the Human Rights Law does not include a duty to defer a pending eviction suit while attempts to cure a lease violation are made. Id. at 4-5. The court perceived support for its ruling in Grubb v. Wm. Calomiris Investment Corp., 588 A.2d 1144, 1147 (D.C. 1991), a case not involving those statutes, in which a trial court was held to have discretion whether to grant relief from eviction when a tenant cured a lease violation after the 30-day cure period. 6/18/02 Tr. 6.

Second, the superior court ruled that Kriegsfeld did not have to provide any reasonable accommodation to Ms. Douglas because her apartment "clearly appears to constitute a direct threat for the health and safety of others who live in the building." 6/18/02 Tr. 6-7. The court relied in that regard on 42 U.S.C. 3604(f)(9), which states that a landlord is not required to under the Fair Housing Act make a dwelling available "to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals." The court did not specifically address why, in contrast to other courts, it did not consider whether any threat posed by Ms. Douglas would be alleviated by the proposed accommodation of cleaning her apartment.

Finally, the superior court ruled that Ms. Douglas's evidence as to whether she had a disability and, if so, whether that disability affected her ability to maintain her apartment was insufficient "as a matter of law." 6/18/02 Tr. 13-14. The court acknowledged that such evidence need not come from "a psychiatrist or a clinical psychologist," but could instead come, for

example, from "a social worker or a mental health specialist." Id. at 13. The court found, however, that the testimony of Mr. Byrd, the social worker, and Mr. Sutton, the mental-health expert, was insufficient because neither witness could explain the precise details of Ms. Douglas's "mood disorder" diagnosis. Id. at 10-11.

7. The Case Goes To Trial Without The Fair Housing Act Defense. After the superior court disposed of Ms. Douglas's Fair Housing Act defense, the case proceeded immediately to jury selection and trial. The only live witness called by Kriegsfeld was Deborah Reid, the property manager for the building in which Ms. Douglas lived. See 6/18/02 Tr. 76-113. Kriegsfeld also offered the videotaped deposition of a process server. See id. at 51-52.

Ms. Reid testified that she became aware of the condition of Ms. Douglas's apartment on July 13, 2001, when she went there to assess water damage from an emergency in the apartment upstairs. 6/18/02 Tr. 87. Ms. Reid testified that, about halfway down the basement stairs to Ms. Douglas's apartment, she encountered an odor "like a porta-potty." Id. at 88. Ms. Reid testified that the odor grew stronger as she approached Ms. Douglas's door and that, when Ms. Douglas opened her door, the odor became "unbearable to the point where you had to hold your breath." Id. at 89. Once inside, Ms. Reid testified, she observed clothing, newspapers, and "trash" scattered "all over the floor." Id. at 89-90. Ms. Reid testified that "there was trash stacked high up in the kitchen, there was cans of food lying all around, there was open liquor bottles, there was bottles of [a] substance that looked and smelled like urine sitting around her unit." Id. at 90. Ms. Reid added that "the toilet was working fine, but she was not flushing the toilet." Ibid.

Ms. Reid testified that, when she returned to Ms. Douglas's apartment on subsequent occasions, she encountered similar conditions. On October 4, 2001, Ms. Reid testified, she smelled the same odor as she approached the apartment and saw "[t]he same type of trash" inside

the unit. 6/18/02 Tr. 90-91; see id. at 111 (testifying that she was accompanied on that visit by Mr. Byrd and one of his colleagues). On April 12, 2002, Ms. Reid testified, the odor from Ms. Douglas's apartment could be detected at the top of the basement stairs; inside the apartment, Ms. Reid stated that she again observed "open liquor bottles, couple of bottles that look[ed] like, smelled like urine and * * * trash and clothes lying around the unit." Id. at 97. On May 9, 2002, Ms. Reid testified, she smelled the odor at the top of the basement stairs and she saw "large rodents running around the basement" in "an area near Ms. Douglas's unit." Id. at 106.

Ms. Douglas did not call any witnesses. 6/18/02 Tr. 114.

The superior court instructed the jury that, in order to recover possession of a rental unit, the landlord must establish three elements: first, that the tenant violated "a substantial provision of the lease" or "a substantial obligation of her tenancy"; second, that, within six months of the violation, the landlord properly served the tenant with a legally sufficient notice to correct or vacate; and, third, that the tenant failed to correct the violation within 30 days after receiving the notice. 6/18/02 Tr. 126. Adhering to its earlier ruling, the court did not instruct the jury on the elements of a tenant's reasonable accommodation defense under the Fair Housing Act and the Human Rights Law.

After deliberating for about 20 minutes, the jury reached a verdict for Kriegsfeld. 6/18/02 Tr. 140-142. The landlord subsequently obtained a Writ of Possession (R. 228-229). The superior court denied a motion to stay the eviction pending appeal (R. 240), as did this Court. Amended Order (July 2, 2002), and Ms. Douglas was evicted.

SUMMARY OF THE ARGUMENT

This case presents important questions about the application of the Fair Housing Act's requirement that landlords "make reasonable accommodations" in the provision of housing to

tenants with disabilities. 42 U.S.C. 3604(f)(3)(B). Here, the tenant invoked the Act's reasonable accommodation requirement as a defense to a suit to evict her for violating the lease provision requiring that her apartment be maintained in a sanitary condition; the tenant asserted that she had a mental disability that impaired her ability to care for her apartment and that the landlord failed to provide a requested accommodation that would have cured the lease violations. The superior court refused to allow the tenant to present that defense to the jury. Each of the court's three reasons for doing so was legally incorrect.

I. The superior court erred in holding that, because Ms. Douglas did not present expert medical testimony explaining her psychiatric diagnosis, the evidence was insufficient, as a matter of law, to establish an impairment that affected her ability to care for her apartment. Nothing in the text, history, or purposes of the Fair Housing Act requires expert medical testimony to confirm the existence of a disability. The Act requires simply that a person demonstrate any "physical or mental impairment which substantial limits one or more of such person's major life activities," 42 U.S.C. 3602(h)(1) -- a functional standard that "is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual," 29 C.F.R. Pt. 1630, App. § 1630.2(j) (construing the similar standard under the Americans With Disabilities Act). The federal agencies responsible for enforcing the Fair Housing Act have recognized that expert medical proof ordinarily is not essential to the disability analysis. Instead, an individual may establish a disability through her own testimony, the testimony of social-service professionals or laypeople who have dealt with her, or evidence that she receives government benefits provided to persons with disabilities.

Under the correct approach, Ms. Douglas made an adequate prima facie showing of a mental disability that required reasonable accommodation. The record establishes, among other

things, that Ms. Douglas received benefits under the Supplemental Security Income program as a person with a disability, that Ms. Douglas lived in squalor that was so extraordinary in its nature and degree that it was most reasonably explained as a product of a mental impairment, and that two District of Columbia employees with extensive professional experience dealing with mental illness recognized that Ms. Douglas had a mental impairment, compounded by alcohol dependence (which is itself a covered impairment), that affected her ability to care for the apartment. In light of that evidence, the superior court committed legal error in taking the disability question from the jury.

II. The superior court further erred in holding that Ms. Douglas's request for reasonable accommodation -- that the landlord defer its prosecution of the eviction suit while the District of Columbia government arranged for cleaning services to correct her lease violations -- was untimely, as a matter of law, because it was made after the suit was filed. The Fair Housing Act does not impose any such arbitrary deadline for requesting an accommodation. The Act's protections against discrimination based on disability, including refusal of reasonable accommodations, extend to "any buyer or renter," 42 U.S.C. 3604(f)(1), a category that encompasses tenants who are being sued for eviction. To deny such persons a right to reasonable accommodation would be contrary to the Act's broad remedial purposes. Often, tenants with disabilities are not aware of their right to request accommodation -- or even of their need for accommodation in order to remain lease-compliant -- until they have been sued for eviction and subsequently sought legal assistance. That may be particularly so for a person with a mental disability that, by its very nature, prevents her from recognizing that she is, in fact, disabled. Federal agencies and courts have consequently recognized that a reasonable accommodation

under the Act may appropriately include forbearance from eviction activities while the situation precipitating those activities is addressed.

III. Finally, the superior court erred in holding that the landlord had no obligation under the Fair Housing Act to accommodate Ms. Douglas because her apartment was a threat to the health and safety of other tenants. Although the Act does not require a landlord to provide housing to "an individual whose tenancy would constitute a direct threat to the health or safety of other individuals," 42 U.S.C. 3604(f)(9), that exception applies only when the tenant would continue to pose such a threat even after the requested reasonable accommodation was implemented. That understanding of Section 3604(f)(9) comports with the Supreme Court's directive that exceptions to the Act be narrowly construed, with the legislative history making clear that Section 3604(f)(9) applies only when the threat cannot be eliminated by a reasonable accommodation, and with the consistent approach of other courts. The superior court did not purport to analyze whether Ms. Douglas's apartment would have posed any threat to other tenants if the landlord had granted her request for reasonable accommodation. Nor can the court's error in not applying the correct Section 3604(f)(9) analysis be disregarded as harmless. The record provides no basis for the court to have concluded, as a matter of law, that Ms. Douglas would constitute a threat to others if, as she proposed, the District of Columbia government arranged for a cleaning service to maintain her apartment in sanitary condition.

ARGUMENT

The Fair Housing Act, 42 U.S.C. 3601 et seq., implements "the policy of the United States to provide * * * for fair housing throughout the United States." 42 U.S.C. 3601. As amended in 1988, the Act makes it unlawful "[t]o 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 *

* * that buyer or renter." 42 U.S.C. 3604(f)(1). Under the Act, discrimination includes a landlord's "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B).[2]

Congress described the 1988 amendments to the Fair Housing Act as "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2176, 2179. Congress explained that the amendments would promote "the goal of independent living" among individuals with physical or mental disabilities who had been "deni[ed] critically needed housing" because of "prejudice and aversion -- because they make non-handicapped people uncomfortable." Ibid.; see, e.g., 134 Cong. Rec. H-4603 (June 22, 1988) (statement of Rep. Fish, a House conferee) (observing that the amendments were designed to assure "fair treatment -- that is, reasonable access to decent housing" -- for the "approximately 36 million physically and mentally disabled persons in our country").

The Supreme Court has emphasized the Fair Housing Act's "'broad and expansive' compass" for protecting the housing rights of persons with disabilities. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (quoting Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972)). Other federal courts, as well, have noted the breadth of the Act's

[2] Except when quoting from the Fair Housing Act, this brief uses the term "disability," which is more generally accepted than the term "handicap." The terms have the identical meaning under the federal statutes prohibiting discrimination based on "handicap" or "disability." See Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (observing that the definition of "disability" in the Americans With Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988").

protections against discrimination "because of a handicap," 42 U.S.C. 3604(f)(1), including discrimination in the form of a landlord's "refusal to make reasonable accommodations," 42 U.S.C. 3604(f)(3)(B). See, e.g., Samaritan Inns, Inc. v. District of Columbia, 325 U.S. App. D.C. 19, 114 F.3d 1227, 1234 (1997) (noting the Act's "broad and inclusive" language); Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1106 (3d Cir. 1996) (acknowledging "the broad remedial intent of Congress embodied in the [Fair Housing] Act") (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982)); Bronk v. Ineichen, 54 F.3d 425, 428 (7th Cir. 1995) ("The statute is worded as a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals."). It has accordingly been held that the Act's protections of persons with disabilities "must be given a 'generous construction.'" Samaritan Inns, 114 F.3d at 1234 (quoting Trafficante, 409 U.S. at 209); accord, e.g., Hovsons, 89 F.3d at 1106; Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 335 (2d Cir. 1995); United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1416 (9th Cir. 1994).

A tenant with a disability may invoke the protections of the Fair Housing Act and similar statutes not only as a sword in a suit against the landlord for monetary or equitable relief, but also as a shield in an eviction suit brought by the landlord in state court. See Josephinium Assocs. v. Kahli, 45 P.3d 627, 625-626 (Wash. Ct. App. 2002) (observing that "[m]ost jurisdictions permit unlawful discrimination to be asserted as a defense in summary eviction proceedings" and citing cases in support of that position); see also, e.g., Arnold Murray Constr., L.L.C. v. Hicks, 621 N.W.2d 171 (S.D. 2001); City Wide Assocs. v. Penfield, 564 N.E.2d 1003 (Mass. 1991); Cobble Hill Apts. Co. v. McLaughlin, 1999 Mass. App. Div. 166, 168 (Mass. App. Div. 1999); Schuett Investment Co. v. Anderson, 386 N.W.2d 249 (Minn. Ct. App. 1986); Crossroads Apts. Assocs. v. LeBoo, 578 N.Y.S.2d 1004 (N.Y. City Ct. 1991). "Unlawful discrimination based on a

tenant's disability is an affirmative defense in an eviction action for which the defendant bears the initial burden of advancing a prima facie case." Cobble Hill Apts., 1999 Mass. App. Div. at 168.

Here, the superior court held that Ms. Douglas did not meet her burden of establishing the elements of a prima facie defense under the Fair Housing Act, and thus could not present that defense to the jury at the trial in the eviction case against her. The court based that holding on three distinct grounds: (i) that Ms. Douglas failed to raise a triable issue of fact as to whether she had a "handicap," as defined in the Act, that affected her ability to maintain her apartment in sanitary condition; (ii) that Ms. Douglas's request for the deferral of eviction proceedings while efforts were made to clean her apartment was not a timely request for reasonable accommodation under the Act; and (iii) that no reasonable accommodation was required because the condition of Ms. Douglas's apartment was a threat to health and safety.

"The question whether the trial judge properly allowed the case to go to the jury is one of law." District of Columbia v. Wilson, 721 A.2d 591, 596 (D.C. 1998); accord, e.g., Phillips v. District of Columbia, 714 A.2d 768, 772 (D.C. 1998) (applying that standard to a trial court's refusal to allow a case to go to the jury based on evidentiary insufficiency). Accordingly, the superior court's alternative rulings as to why Ms. Douglas was precluded from presenting her Fair Housing Act defense to the jury are each subject to de novo review. As demonstrated below, because the superior court committed legal error in arriving at each of those rulings, the case should be remanded for a new trial at which the jury is afforded the opportunity to consider Ms. Douglas's Fair Housing Act defense.

I. MS. DOUGLAS MADE A SUFFICIENT PRIMA FACIE SHOWING OF A DISABILITY THAT REQUIRED REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT

Ms. Douglas was entitled to present her Fair Housing Act defense to the jury. The superior court barred her from doing so because it found, "as a matter of law," that the evidence was insufficient to establish a disability that affected her ability to maintain her apartment. See 6/18/02 Tr. 10, 13-14. The court ruled that Ms. Douglas was required to support her Fair Housing Act defense with expert evidence explaining her precise psychiatric diagnosis. The court thereby held Ms. Douglas to an unduly rigid evidentiary standard that is not required by the text of the Act, that is contrary to its broad remedial purposes, and that has been rejected by the expert federal agencies charged with its enforcement.

The superior court's ruling is not entitled to any deference on appeal. When, as here, a trial court has found that the evidence was insufficient to proceed to the jury, this Court reviews that finding de novo. Phillips, 714 A.2d at 772; see Drevenak v. Abendschein, 773 A.2d 396, 416 (D.C. 2001) (noting that the sufficiency of the evidence, in contrast to its admissibility, is a question of law subject to de novo review). This Court's inquiry thus turns on whether, viewing the evidence in the light most favorable to the proffering party, a reasonable person could find in favor of that party. See, e.g., Wilson, 721 A.2d at 596 (discussing the standard for judgment notwithstanding the verdict). Under that "exacting standard," a trial court's refusal to submit the matter to the jury may be sustained "only in the unusual case, in which only one conclusion could reasonably be drawn from the evidence." Brown v. National Academy of Sciences, 844 A.2d 1113, 1118 (D.C. 2004) (quoting Homan v. Goyal, 711 A.2d 812, 817 (D.C. 1998)).[3]

[3] The division dissent's focus on the standard of review for the qualification of expert witnesses thus misses the point. While "the qualification of an expert witness is largely within the discretion of the trial court," Dissent 55 (quoting Gertner v. Newrath, 42 A.2d 655, 656 (D.C.

This is not such an "unusual case." A reasonable juror could conclude from the evidence in this case -- including the testimony of two social-services professionals and the landlord's property manager -- that Ms. Douglas had an impairment that affected her ability to maintain her apartment. The superior court erred in preventing the jury from evaluating that evidence.

A. The Fair Housing Act Contemplates An Expansive And Individualized Definition Of Disability

The Fair Housing Act prohibits discrimination against individuals with a wide array of actual and perceived disabilities. In order to qualify for protection under the Act, a person need only (i) have "a physical or mental impairment which substantially limits one or more of such person's major life activities," (ii) have "a record of having such an impairment," or (iii) be "regarded as having such an impairment." 42 U.S.C. 3602(h) (defining "handicap" for purposes of the Act). Significantly, Congress chose not to include in the Act "a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list and because some conditions covered under the definition of handicap may not even have been discovered or prevalent in the population at the time of passage of legislation." H.R. Rep. No. 711, at 18.

1946)), the issue for review in this case is not the refusal to qualify an expert witness. Rather, the issue is whether the superior court erred in ruling that Ms. Douglas's proffered evidence was legally insufficient to support her Fair Housing Act defense -- in part, because her witnesses did not include what the court perceived to be the right sort of expert to attest to a mental disability. The court's ultimate decision did not turn on the admissibility, as either expert or lay opinion, of the testimony of Mr. Sutton and Mr. Byrd. In the court's own words, it found, "as a matter of law," that their testimony was insufficient to establish that Ms. Douglas had a mental disability that affected her ability to maintain her apartment. That legal ruling, which prevented Ms. Douglas from presenting her defense to the jury, is subject to de novo review.

The implementing regulations promulgated by the Department of Housing and Urban Development confirm the breadth of the Act's definition of "handicap." The regulations define an "impairment" for purposes of the Act as:

> Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

24 C.F.R. 100.201(a)(2). The regulations define "major life activity," in turn, to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 C.F.R. 100.201(b).[4]

The statute and regulations make clear that whether an individual has a "handicap," within the meaning of the Fair Housing Act, primarily entails a functional inquiry, not a medical inquiry. As the Equal Employment Opportunity Commission's interpretive guidance for the comparable provision of the Americans With Disabilities Act explains, "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the

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[4] As the regulations provide, alcoholism, whether or not accompanied by other mental illness, qualifies as a "handicap" under the Fair Housing Act if it affects an individual's ability to perform a major life activity. Indeed, Congress rejected a proposed amendment that would have exempted from the Act's "handicap" definition "any current impairment that consists of alcoholism." H.R. Rep. No. 711, at 28 (noting the rejection of such an amendment by the House Judiciary Committee); see 134 Cong. Rec. H-4919-H4925 (June 29, 1988) (rejecting a floor amendment that would, inter alia, have declared "any current impairment that consists of alcohol abuse" not to be a disability under the Act). In contrast, Congress did exclude "current, illegal use of or addiction to" controlled substances from the Act's definition of "handicap." 42 U.S.C. 3602(h).

individual." 29 C.F.R. Pt. 1630, App. § 1630.2(j). Moreover, "[s]ome impairments may be disabling for some particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling, or any number of other factors." Ibid. That existence of a disability thus requires an "individualized," "case-by-case" assessment, Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 198 (2000); Sutton v. United Air Lines, 527 U.S. 471, 483 (1998) -- an approach that comports with the Fair Housing Act's overarching "mandate[] that persons with handicaps be considered as individuals." H.R. Rep. No. 711, at 18.

B. The Fair Housing Act Does Not Require Expert Medical Evidence To Establish The Existence Of A "Handicap" That Requires Accommodation

Nothing in the text, history, or purposes of the Fair Housing Act suggests that its protections are available only to individuals whose disabilities are substantiated by expert testimony explaining the details of a medical diagnosis. Indeed, because, as Congress understood, individuals with disabilities often have limited financial resources, as well as limited physical or mental resources, it would contravene Congress's remedial purposes to read into the Fair Housing Act any rigorous requirement of expert medical proof. See, e.g., Epicenter of Steubenville, Inc. v. City of Steubenville, 924 F. Supp. 845, 849 (S.D. Ohio 1996) (noting that Congress recognized in enacting the 1988 amendments to the Fair Housing Act that "members of the handicapped community rarely have the resources necessary to protect their interests"); 6/17/02 Tr. 47 (Ms. Douglas's counsel explains that "we don't have money to retain" medical experts to testify to her condition).[5]

[5] A per se rule requiring expert medical testimony would be particularly problematic in landlord-tenant cases in which the vast majority of tenants are not represented by counsel. See Final Report of the D.C. Bar Landlord-Tenant Task Force 5 (1998) (noting that 86% of landlords, but

Accordingly, the federal agencies charged with enforcing the Fair Housing Act have recognized that, "[i]n most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary to th[e] inquiry" into whether a person has a "handicap" under the Act. Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act 14 (May 17, 2004) [hereinafter HUD-DOJ Joint Statement], available at www.usdoj.gov/crt/housing/joint_statement_ra_5-17-04.pdf (last visited Sept. 10, 2004).[6] Those agencies have explained that a person's disability may be established in a variety of ways, including through testimony from the individual herself or other professional or lay witnesses who are in a position to observe her condition:

> Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual himself or herself (e.g., proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits or a credible statement by the individual). A doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability.

Id. at 13-14 (footnote omitted); accord, e.g., Advocacy Center for Persons with Disabilities, Inc. v. Woodlands Estates Ass'n, 192 F. Supp. 2d 1344, 1347 (M.D. Fla. 2002) (holding that

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fewer than 1% of tenants, are represented by counsel in landlord-tenant court). An unrepresented tenant would face formidable obstacles in attempting to persuade a physician to spend a day or more in landlord-tenant court awaiting trial, to obtain and serve a subpoena if the physician refused to appear voluntarily (see Rule 45, Superior Court Rules of Civil Procedure), and to elicit the requisite testimony if the physician did appear. Those obstacles could be insurmountable for many tenants with mental illness.

[6] The HUD-DOJ Joint Statement, although not a product of notice-and-comment rulemaking, is entitled to substantial deference in view of those agencies' considerable expertise in carrying out their congressional mandate to enforce the Fair Housing Act and similar statutes protecting the civil rights of persons with disabilities. Cf. Barnhart v. Walton, 535 U.S. 212, 221 (2002).

evidence of mentally retarded claimants' "exact disabilities" was unnecessary to establish their entitlement to protection under the Fair Housing Act).

The superior court thus erred in ruling that, simply because Ms. Douglas had not presented testimony from a psychiatrist, psychologist, or other expert who could explain her specific "mood disorder" diagnosis, she failed to make a prima facie showing of a "handicap" entitling her to the protections of the Fair Housing Act. Under the Act, an individual could make that showing based on testimony, such as that offered here, of social-services professionals with experience dealing with mental illness generally and with the individual specifically, as well as testimony of laypersons who have observed the individual's behavior and its manifestations.

C. Ms. Douglas Proffered Sufficient Evidence For A Jury To Conclude That She Was Entitled To The Protections Of The Fair Housing Act

The record contains ample evidence to permit a reasonable juror to find that, at the time of the events at issue, Ms. Douglas was entitled to the Fair Housing Act's protections against discrimination based on "handicap." The superior court thus erred in taking that issue from the jury.

1. A Jury Could Conclude From The Record That Ms. Douglas Had A "Mental Impairment" That "Substantially Limited" A "Major Life Activity"

The evidence in the record, viewed (as it must be, see Wilson, 721 A.2d at 596) in the light most favorable to Ms. Douglas, is sufficient to permit a reasonable juror to find that Ms. Douglas had a "mental impairment" that "substantially limit[ed]" the "major life activity" of caring for herself and her home, 42 U.S.C. 3602(h)(1). That evidence includes the following:

a. The record demonstrates aberrant behavior by Ms. Douglas that could reasonably be inferred to be the product of mental illness. The testimony of both parties' witnesses -- mental-

health expert James Sutton, social worker Damon Byrd, and property manager Deborah Reid -- established that Ms. Douglas was living in squalor that was extraordinary in its nature and its degree. For example, the witnesses testified that the entire apartment was cluttered with trash, spoiled food was exposed, urine was collected in bottles, the toilet, although functioning, was not being flushed, an "unbearable" odor "like a porta-potty" filled the air, and the area was infested with rats. See 6/17/02 Tr. 61-63 (testimony of Mr. Sutton); id. at 81-82, 89-90 (testimony of Mr. Byrd); 6/18/02 Tr. 88-90, 97, 106 (testimony of Ms. Reid). In addition, Mr. Sutton testified that, when he asked Ms. Douglas about the condition of her apartment, she replied that "she didn't see anything wrong with it." 6/17/02 Tr. 64; see id. at 69 (Mr. Sutton testifies to Ms. Douglas's statement, when asked about this lawsuit, that "Jesus is going to take care of it"); id. at 87 (Mr. Byrd testifies that Ms. Douglas was "in total denial concerning her situation"). A reasonable juror could conclude from this evidence alone that Ms. Douglas's behavior with respect to the maintenance of her apartment was so aberrant that it was more likely than not the product of a mental impairment. Indeed, the record suggests that Ms. Reid herself drew precisely that conclusion since, when Ms. Douglas visited a psychiatrist in December 2001, she stated that she did so at the direction of Ms. Reid in order to keep her apartment. See Def.'s Summ. J. Mot., Exh. 1, at 1, 5, 8 (R. 173, 178, 181); see pp. 29-30, infra (discussing perceived disability).

b. Professionals with extensive experience dealing with mental illness testified that they recognized Ms. Douglas to be mentally ill. Mr. Sutton and Mr. Byrd testified that, in the course of their employment with the District of Columbia, they interact frequently with persons who have mental illness. 6/17/02 Tr. 60-61, 77-78. Based on their professional experience as well as their multiple contacts with Ms. Douglas, Mr. Sutton and Mr. Byrd both formed the opinion that Ms. Douglas had a mental illness that affected her ability to keep her apartment in sanitary

condition. See id. at 65-66 (testimony of Mr. Sutton); id. at 85, 87 (testimony of Mr. Byrd). A reasonable juror could conclude from that opinion testimony that Ms. Douglas more likely than not was entitled to the protections of the Fair Housing Act as a person with a mental impairment that substantially limits a major life activity.

Although Mr. Sutton and Mr. Byrd are not psychiatrists or psychologists and do not make psychological diagnoses, they nonetheless have expertise in recognizing the existence of mental illness because their job responsibilities involve assessing and assisting mentally ill individuals. They were consequently able to testify authoritatively with respect to whether Ms. Douglas had a mental disability. As the federal agencies responsible for enforcing the Fair Housing Act have explained, verification of an individual's disability may come, for example, from a representative of a "a non-medical service agency" or "a peer support group," as well as from any other "reliable third party who is in a position to know about the individual's disability." HUD-DOJ Joint Statement 13-14; see, e.g., Advocacy Center, 192 F. Supp. 2d at 1347 (relying, in a Fair Housing Act suit, on the testimony of an organization's executive director that residents of its group home were "mentally retarded" with "substantial limitations in functioning"); cf. Obold v. Obold, 82 U.S. App. D.C. 268, 163 F.2d 32 (1947) (noting a trial court's discretion to admit "evidence of lay witnesses to the mental capacity of a testator").

c. The record demonstrates that Ms. Douglas was impaired by alcohol dependence. Aside from the evidence of other mental disability, there was ample evidence of Ms. Douglas's alcohol dependence, which is itself a cognizable impairment under the Fair Housing Act. See p. 20, note 4, supra. Mr. Sutton, Mr. Byrd, and Ms. Reid testified that they saw many opened liquor bottles, some empty and some partially empty, during their visits to Ms. Douglas's apartment. See 6/17/02 Tr. 65-66 (testimony of Mr. Sutton); id. at 81-82 (testimony of Mr. Byrd); 6/18/02

Tr. 90, 97 (testimony of Ms. Reid). In addition, Mr. Sutton testified that Ms. Douglas acknowledged to him that "she drinks vodka every day, and drink[s] several cans of beer every day," that she had alcohol on her breath when he first visited her, and that she told him on a subsequent visit that she was "continu[ing] to drink every day" even though it was causing her abdominal problems. 6/17/02 Tr. 65, 70. Mr. Byrd, in turn, testified that Ms. Douglas was intoxicated "half the time." Id. at 89. Both Mr. Sutton and Mr. Byrd opined that Ms. Douglas's alcohol dependence contributed to the unsanitary condition of her apartment. See id. at 65-66 (testimony of Mr. Sutton); id. at 85, 87, 89-90 (testimony of Mr. Byrd). A reasonable juror could conclude from the foregoing evidence that Ms. Douglas more likely than not was afflicted with alcohol dependence that, whether alone or in combination with other impairments, affected her ability to care for her apartment. See 29 C.F.R. Pt. 1630, App. § 1630.2(j) (explaining that an impairment, which may not be disabling in isolation, may be disabling in combination with other impairments).

d. The record reflects that Ms. Douglas received government assistance based on the existence of a disability. In an affidavit in support of her successful application for in forma pauperis status in this case, Ms. Douglas stated that her "total" monthly income consisted of "$531.00 from SSI Disability." Aff. In Support Of Def.'s Mot. For Leave To Proceed In Forma Pauperis 1 (R. 28).[7] Kriegsfeld has not disputed Ms. Douglas's receipt of SSI disability benefits. Nor is there any reason to suppose that the SSI disability benefits were granted for a condition unrelated to those at issue here. See 6/17/02 Tr. 66 (Mr. Sutton testifies that the only physical

[7] Ms. Douglas's requests, through counsel, for reasonable accommodation also identified her as a recipient of SSI disability benefits. Those requests are part of the record as evidence offered in support of Ms. Douglas's motion for summary judgment. See Def.'s Summ. J. Mot., Exhs. 2 and 3 (R. 184-187).

condition that Ms. Douglas acknowledged was a heart murmur). In order to qualify for SSI disability benefits, a person must have been determined to have such a "severe impairment" that she cannot do her own previous work or any other substantial gainful work that exists in the national economy, 20 C.F.R. 416.905(a) -- a standard that is stricter than the standard for determining handicap/disability under the Fair Housing Act and the Americans With Disabilities Act. See Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 797 (1999) (recognizing that a person may have a "disability" entitling her to accommodation under the Americans With Disabilities Act even if she does not have a "disability" entitling her to Social Security or SSI benefits). The expert federal agencies have thus stated that "[p]ersons who meet the definition of disability for purposes of receiving Supplemental Security Income ('SSI') or Social Security Disability insurance ('SSDI') benefits in most cases meet the definition of disability under the Fair Housing Act." HUD-DOJ Joint Statement 13 n.10; see Cobble Hill Apts., 1999 Mass. App. Div. at 167 n.4 (treating a tenant's SSI disability status as evidence of her status under Fair Housing Act as a person with a disability).

The record further establishes that Ms. Douglas was recognized to be in need of other government assistance designed for persons with a diminished capacity to care for themselves. See, e.g., Wagner v. Fair Acres Geriatric Center, 49 F.3d 1002, 1010 (3d Cir. 1995) (noting that disability for Fair Housing Act purposes may be established based on an individual's having qualified for government services made available to persons with disabilities); Cobble Hill Apts., 1999 Mass. App. Div. at 167 n.4. Mr. Byrd testified that District of Columbia's Adult Protective Services, for which he is a social worker, is charged with assisting persons who are determined to need services because they have fallen victim to exploitation, abuse, and neglect, including "self-neglect" as a result of physical or mental impairments. 6/19/02 Tr. 75-78. Mr. Byrd testified

that, in connection with his work, he visited Ms. Douglas 16 times over the course of a year. Id. at 82. Mr. Sutton also testified to his repeated efforts to persuade Ms. Douglas to seek additional assistance from public agencies in dealing with her mental-health and alcohol-dependence issues. See id. at 64-65, 66, 69, 73.

e. The record demonstrates that Ms. Douglas was diagnosed as suffering from a mental impairment and alcohol dependence. The superior court, over Kriegsfeld's objection, allowed Mr. Sutton to testify to the contents of a medical report prepared by a psychiatrist at St. Elizabeth's Hospital who examined Ms. Douglas in December 2001. See 6/17/02 Tr. 66-67. As Mr. Sutton testified, the psychiatrist diagnosed Ms. Douglas as suffering from a "mood disorder" and "alcohol dependence," and recommended that she "go to an alcohol detox program." Id. at 67 The full medical report is contained in the record as an exhibit to Ms. Douglas's motion for summary judgment. See Def.'s Summ. J. Mot., Exh. 1.

In its ruling excluding the Fair Housing Act defense, the superior court stated that, because "the psychiatrist is not a witness or has not been offered as a witness in this case," "his diagnosis would be inadmissible." 6/18/02 Tr. 11. To be sure, this Court has held that the business records exception to the hearsay rule does not extend to medical records addressing diagnoses, including diagnoses of mental illness, "involving subjective judgment or conjecture." Durant v. United States, 551 A.2d 1318, 1323-1324 (D.C. 1988). That approach has been criticized, however, as unduly restrictive. See id. at 1329-1332 (Newman, J., concurring). The more sensible approach is to permit the admission of medical diagnoses that involve subjective judgments so long as those diagnoses have "sufficient indicia of trustworthiness." Id. at 1332 (noting other jurisdictions that have adopted that approach). No question was raised by Kriegsfeld below about the trustworthiness of the psychiatrist's diagnosis of Ms. Douglas.

At a minimum, the psychiatrist's diagnosis of Ms. Douglas's mental illness and alcohol dependence, whether or not itself admissible, militated strongly against the superior court's taking the disability question from the jury in view of the other evidence in the record that was consistent with that diagnosis. The superior court thereby allowed the truth of Ms Douglas's disability -- one that the landlord had not seriously disputed -- to be ignored simply because the psychiatrist or another medical expert did not personally appear in the courtroom to explain the diagnosis.

2. A Jury Could Conclude From The Record That Ms. Douglas Was "Regarded As" Having A "Mental Impairment"

The jury could also have found that Ms. Douglas was entitled to the protections of the Fair Housing Act on the separate ground that she was "regarded as" having a disability. See 42 U.S.C. 3602(h)(3). By extending coverage to persons who are "regarded as" having disabilities, the Fair Housing Act and similarly worded statutes guard against discrimination stemming from "society's accumulated myths and fears about disability and disease," which may be "as handicapping as are the physical limitations that flow from actual impairment." School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987) (discussing the "regarded as" provision of Section 504 of the Rehabilitation Act). Along with protecting people who do not have an impairment against fears and stereotyping, the "regarded as" provision protects people who do have an impairment that is recognized by others, but that is not medically documented. Such protection is particularly important for people with mental illness, whose very impairment may prevent them from recognizing that they are, in fact, impaired.

The record contains evidence that Ms. Douglas was regarded as disabled by Kriegsfeld's property manager, Ms. Reid. The medical records of Ms. Douglas's visit to the psychiatrist at St.

Elizabeth's Hospital contain her explanation as to why she was seeking assistance: "I am here because my landlord said that I have to see a doctor to keep my apartment. Mrs. Deborah Reid. If not seen by Friday 12/21/01 would be put out." Def.'s Summ. J. Mot., Exh. 1, at 1 (R. 173). That statement is reinforced by notations in Ms. Douglas's medical records that hospital personnel then contacted Ms. Reid to discuss Ms. Douglas, her behavior, and the state of her apartment. Id. at 5, 8 (R. 178, 181).[8] The record also contains evidence indicating that Ms. Douglas was regarded as disabled by Mr. Sutton and Mr. Byrd, both of whom had the opportunity to observe her on multiple occasions. In addition, whether or not the psychiatrist's diagnosis would be admissible to establish the truth of the matter asserted (i.e., that Ms. Douglas did, in fact, have a mental disability), the diagnosis still would be admissible to establish that the psychiatrist, too, regarded Ms. Douglas as impaired.

D. Nothing In This Court's Decision In American University Required Ms. Douglas To Present Expert Medical Testimony Explaining Her Diagnosis

In ruling that the evidence was insufficient to create a jury question as to whether Ms. Douglas had a disability that affected her ability to maintain her apartment, the superior court principally relied on American University v. District of Columbia Commission on Human Rights, 598 A.2d 416 (D.C. 1991). See 6/18/02 Tr. 11-13. That reliance was misplaced. American University does not hold that expert medical testimony is necessary in every case in which an individual claims to have a mental impairment that affects a major life activity. It holds only that there must be "some evidence" in such cases linking the mental disability and the need for reasonable accommodation. For the reasons explained above, Ms. Douglas proffered such

[8] The business records exception to the hearsay rule extends to objective information contained in hospital records. See Durant, 551 A.2d at 1323. Ms. Reid's statements, as reported by Ms.

evidence here. Accordingly, even if the division's decision in American University were binding on this en banc Court, which it is not, see M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971), that decision would not justify taking Ms. Douglas's Fair Housing Act defense from the jury.

In American University, the complainant, who suffered from manic-depressive syndrome, alleged that her employer had violated the District of Columbia's Human Rights Law by discharging her for poor job performance without reasonably accommodating her disability. 587 A.2d at 418. The Court rejected that claim on the ground that there was no evidence suggesting that the claimant's illness was, in fact, responsible for the deficiencies in her job performance, so that no reasonable accommodation of the disability would alleviate those deficiencies and permit her to perform the job. Id. at 423. As the Court observed, "[t]he complainant provided the only evidence of the relationship of her illness to the performance of the work, and she disclaimed any relationship," and "[n]either medical evidence nor the testimony of other witnesses was offered" to prove otherwise. Ibid. The Court rejected the Commission's finding that the complainant's deficient job performance was caused by her disability as "speculative absent expert testimony or other competent evidence to support it where the complainant specifically testifies to the contrary." Ibid.

American University thus stands only for the proposition that an individual in Ms. Douglas's position must offer some evidence of a mental impairment that requires accommodation. Nothing in that decision holds that such evidence must come from a medical expert who can explain the specifics of the individual's psychiatric diagnosis. To the contrary, the Court's emphasis in American University on the claimant's own denial of a relationship

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Douglas and by hospital personnel, are admissible as statements of a party opponent. See Harris v. United States, 834 A.2d 106, 115-118 (D.C. 2003).

between her mental illness and her job performance suggests, if anything, that sufficient evidence of such a relationship could have come from the claimant's own testimony or the testimony of laypersons who had observed her. The Court's disjunctive references to "medical evidence []or the testimony of other witnesses" and to "expert testimony or other competent evidence," 598 A.2d at 423 (emphases added), also undermine any suggestion that the Court was imposing a requirement of expert medical testimony in all cases involving mental disability.[9]

The evidence in this case easily satisfies the "some competent evidence" standard set forth in American University. Indeed, in contrast to American University, no witness ever disputed that Ms. Douglas had a mental disability that affected her ability to maintain the cleanliness of her apartment. Such a disability was adequately established by various witnesses' testimony as to Ms. Douglas's conduct, including the conditions that she allowed to exist in her apartment, by Mr. Sutton's and Mr. Byrd's assessments of Ms. Douglas based on their professional experience in dealing with individuals with mental illness, and by Ms. Douglas's eligibility for government benefits provided to people with disabilities. In the face of such evidence, the superior court erred in preventing the jury from considering Ms. Douglas's Fair Housing Act defense.

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[9] There may be some situations in which only expert medical testimony will suffice. In American University, for example, the claimant's requested accommodation was to permit her to continue working while she received treatment for her mental illness, see 598 A.2d at 420, and the Court seems to have thought that a jury would require expert medical testimony on, for example, how the claimant's mental illness would have been affected by her proposed course of "medication and therapy," id. at 423. The circumstances of this case are different because the proposed accommodation did not involve Ms. Douglas's receiving "medication and therapy" so that she would clean her apartment herself, but rather involved Ms. Douglas's remaining in her apartment while the D.C. government arranged for a contractor to keep the apartment clean even if she did not participate in that effort.

II. MS. DOUGLAS MADE A SUFFICIENT PRIMA FACIE SHOWING OF A TIMELY REQUEST FOR A REASONABLE ACCOMMODATION

The Fair Housing Act requires housing providers "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a] person [with a disability] equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B). Ms. Douglas's requested accommodation -- that the landlord forbear from eviction activities while the District of Columbia government arranged for her apartment to be maintained in sanitary condition -- is the sort of action encompassed by Section 3604(f)(3)(B). Contrary to the superior court's view, Kriegsfeld was not excused from its obligation under Section 3604(f)(3)(B) merely because Ms. Douglas's accommodation request came while the eviction case against her was already pending. As courts in other jurisdictions have recognized, so long as an individual with a disability continues to be a tenant, the landlord's duty of reasonable accommodation continues as well.

A. The Fair Housing Act's Requirement Of Reasonable Accommodation Is Designed To Be Applied Broadly And Flexibly

As the division majority recognized, the Fair Housing Act's mandate in 42 U.S.C. 3604(f)(3)(B) to make reasonable accommodations in "rules, policies, practices, or services" for tenants with disabilities is "broad enough to embrace an extraordinary variety of landlord actions." Majority Op. 17. That mandate is to be applied "with the specific goals of the [Fair Housing Act] in mind: 'to protect the right of handicapped persons to live in the residence of their choice in the community,' and 'to end the unnecessary exclusion of persons with handicaps from the American mainstream.'" Giebeler v. M&B Associates, 343 F.3d 1143, 1149 (9th Cir. 2003) (quoting City of Edmonds v. Washington State Building Code Council, 18 F.3d 802, 806 (9th Cir. 1994), aff'd sub nom. City of Edmonds v. Oxford House, 514 U.S. 725 (1995)).

The federal courts of appeals have recognized that Section 3604(f)(3)(B), by its plain language, "imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons." California Mobile Home Park, 29 F.3d at 1416 (citing H.R. Rep. 711, supra, at 25); accord Groner v. Golden Gate Gardens Apts., 250 F.3d 1039, 1044 (6th Cir. 2001). In many instances, the Fair Housing Act is not satisfied merely by a landlord's equal application of its "rules, policies, [and] practices" to all tenants, without regard to whether they have a disability. As the federal agencies charged with enforcement of the Act have explained:

> A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling.

HUD-DOJ Joint Statement 6; see H.R. Rep. No. 711, at 25 (noting that the reasonable accommodation provision "require[s] that changes be made to * * * traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling"). Accordingly, the federal courts of appeals have held that, in order to satisfy its reasonable accommodation duty under the Fair Housing Act, a landlord may be required, for example, to refrain from enforcing its "no pets" rule against a blind or deaf tenant with a service animal, see Bronk, 54 F.3d at 429; to make an exception to its "first come-first served" policy for allocating parking spaces for a tenant with a mobility impairment, see Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895-896 (7th Cir. 1996); Shapiro, 51 F.3d at 333-336; or to deviate from a policy against cosigners on a lease to accommodate a tenant who could no longer work because of AIDS, see Giebeler, 343 F.3d at 1155-1159.

The federal courts of appeals have also recognized that "satisfaction of the [Fair Housing Act's] reasonable accommodation requirement 'can and often will involve some costs'" or other burdens to the landlord. Hovsons, 89 F.3d at 1104 (quoting Shapiro, 51 F.3d at 335); accord, e.g., California Mobile Home Park, 29 F.3d at 1416 ("[T]he history of the [Fair Housing Act] clearly establishes that Congress anticipated that landlords would have to shoulder certain costs involved so long as they are not unduly burdensome."). A landlord is excused from making an otherwise necessary accommodation only if it would "pose an undue financial or administrative burden" or "constitute a fundamental alteration of [its] operations." HUD-DOJ Joint Statement 9; accord, e.g., Hovsons, 89 F.3d at 1104; California Mobile Home Park, 29 F.3d at 1416-1417.

"The reasonable accommodation inquiry is highly fact-specific, requiring case-by-case determination." California Mobile Home Park, 29 F.3d at 1418; accord, e.g., Groner, 250 F.3d at 1044; Hovsons, 89 F.3d at 1104; Bronk, 54 F.3d at 429; City Wide Assocs., 564 N.E.2d at 1005 ("Whether a tenant's proposed accommodation of a disability is 'reasonable' within the meaning of the relevant decisions is not susceptible of precise measurement."). For that reason, the inquiry is ordinarily inappropriate for resolution as a matter of law. See Janush v. Charities Housing Development Corp., 169 F. Supp. 2d 1133, 1136 (N.D. Cal. 2000).

Here, the superior court held that Ms. Douglas's request for reasonable accommodation was legally insufficient because it was made after she had been sued for possession. See 6/18/02 Tr. 7-8. The court also suggested, essentially in passing, that a request to defer eviction proceedings while a cure is attempted may not be the sort of "reasonable accommodation" contemplated by the statute and that Ms. Douglas's request for a reasonable accommodation may have been too "vague." See id. at 5. The court was mistaken in all three respects.

B. The Concept Of Reasonable Accommodation Under The Fair Housing Act Encompasses A Stay Of Eviction Proceedings While A Cure Of A Lease Violation Is Attempted

A landlord's deferring eviction proceedings to permit the correction of a disabled tenant's lease violation easily qualifies as an "accommodation[] in rules, policies, practices, or services" under 42 U.S.C. 3604(f)(3). In requesting such forbearance, the tenant is seeking a "change, exception, or adjustment" in a landlord's general "policies]" or "practices," HUD-DOJ Joint Statement -- namely, the policy or practice of prosecuting the eviction suit on its own timetable (consistent with any timing provisions of local landlord-tenant law applicable to all tenants without regard to disability status).

The courts have repeatedly recognized that an "accommodation" under the Fair Housing Act and similar statutes may consist of a landlord's deferring eviction proceedings while the situation precipitating those proceedings is addressed. (Whether such an accommodation is "reasonable," of course, turns on the particular facts and circumstances of each case.) The Massachusetts Supreme Judicial Court, for example, sustained a trial court's ruling that a reasonable accommodation of a mentally disabled tenant, who caused disruption by throwing objects in response to voices that she perceived to be coming from the walls, would be for the landlord to "forbear from further eviction steps * * * to give [the tenant] an opportunity to pursue a program of outreach and counseling." City Wide Assocs., 564 N.E.2d at 1005. The Minnesota Court of Appeals held that a landlord violated its reasonable accommodation obligation by pursuing an eviction suit against a physically disabled tenant for failure to clean up her apartment; the court ruled that the landlord should have assisted the tenant with cleaning the apartment and could not evict her when she herself arranged for cleaning assistance after the statutory cure period. Schuett Investment Co., 386 N.W.2d at 252. And, in an eviction suit

against a mentally ill resident of a trailer park who had engaged in threatening conduct there, the same court recognized that a suitable accommodation would be for the park to "rescind[] its notice to vacate" contingent on the resident's taking his medications, remaining sober, and being monitored by his psychiatrist and case worker; the case was remanded for the trial court to make specific findings as to whether such an accommodation would "impose undue burdens on [the park] or require it to substantially modify or fundamentally alter the nature of its operations." Cornwell & Taylor, LLP v. Moore, 2000 Minn. App. LEXIS 1317, at *4-*5, *15-*17 (Minn. Ct. App. Dec. 22, 2000) (unpublished disposition).[10]

A jury could permissibly find that the proposed accommodation here -- a deferral of eviction so long as Ms. Douglas's apartment was adequately maintained with the assistance of the District of Columbia government -- was a reasonable accommodation under the Fair Housing Act. Such an accommodation cannot be said, as a matter of law, to subject Kriegsfeld to "an undue financial or administrative burden," HUD-DOJ Joint Statement 9, since the District of Columbia government, not the landlord, was to bear the costs of cleaning the apartment. Indeed,

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[10] See also, e.g., Marthon v. Maple Grove Condominium Ass'n, 101 F. Supp. 2d 1041, 1051-1052 (N.D. Ill. 2000) (ruling that disputed factual issues existed as to the reasonableness of an accommodation of a resident's Tourette's syndrome that would require a condominium to cease its threats of eviction for his Tourette's-related outbursts); Anast v. A.& R Katz Management, Inc., 956 F. Supp. 792, 801 (N.D. Ill. 1997) (observing that a reasonable accommodation of a mentally disabled tenant would have been a postponement of the eviction hearing until she "was out of the [psychiatric] hospital and able to understand the proceedings"); Housing Auth. of Bangor v. Maheux, 748 A.2d 474, 475 (Me. 2000) (noting trial court's ruling that a stay of eviction could be an appropriate accommodation if the tenant arranged for supervision of her mentally disabled son who had threatened other tenants); Cobble Hill, 1999 Mass. App. Div. at 170 (recognizing that a reasonable accommodation for a mentally and physically disabled tenant who caused excessive noise could be "staying any eviction pending an agreement to secure mental health assistance"); cf. Roe v. Housing Auth. of Boulder, 909 F. Supp. 814, 817 (D. Colo. 1995) (noting issuance of a preliminary injunction staying state court eviction proceedings against a mentally disabled tenant claiming a right to reasonable accommodation).

the accommodation, if successful, would have enabled Kriegsfeld to avoid the financial and administrative burdens of securing Ms. Douglas's eviction, cleaning the apartment on its own, and renting the apartment to a new tenant. Nor could the accommodation be said, as a matter of law, to require "a fundamental alteration of [Kriegsfeld's] operations." Ibid. It is common for tenants to enter into arrangements for apartment cleaning services. Indeed, as the amicus brief of the AARP explains, when tenants become unable so disabled that they cannot maintain their apartments in sanitary conduction, District landlords frequently welcome the provision of cleaning services through public or private agencies as an alternative to eviction.

The proposed accommodation did not, as the division dissent suggested, involve "permit[ting] demonstrably unlawful conditions * * * to continue for an indefinite period." Dissent 38. To the contrary, the accommodation involved the correction of those conditions. The record offers no basis to assume that the District of Columbia government would not have moved expeditiously to contract for cleaning service if Kriegsfeld had agreed that Ms. Douglas could remain in the apartment if it remained lease-compliant. Cf. id. at 29. Because Kriegsfeld did not respond to the request for accommodation, and thus is deemed to have denied it, see HUD-DOJ Joint Statement 11, there was no opportunity to ascertain how quickly the cure could have been effected.

The division dissent was also incorrect, both legally and factually, in suggesting that a landlord cannot violate the Fair Housing Act by refusing to accommodate a disabled tenant with a stay of eviction proceedings because such accommodation would implicate "[t]he landlord's right to judicial redress." Dissent 76. It is well-settled that one party's right to be free of invidious discrimination in violation of federal law -- including discrimination effected through court proceedings -- takes precedence over the opposing party's competing right to judicial

redress under local law. Thus, in holding that the Fourteenth Amendment was violated by state court enforcement of racially restrictive covenants, the Supreme Court rejected the argument that property owners who were parties to the covenants would be "denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements." Shelley v. Kraemer, 335 U.S. 1, 23 (1948). The Court explained that "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." Ibid. Similarly, a landlord cannot demand judicial enforcement of rights recognized under local landlord-tenant law if doing so would result in the denial of a tenant's rights under the federal Fair Housing Act to be free from discrimination based on disability. See Advocacy Center, 192 F. Supp. 2d at 1350-1351 (rejecting the argument that a homeowners association's state court suit to enforce a restrictive covenant could not be enjoined as a violation of the Fair Housing Act because the prosecution of the suit was protected First Amendment activity). As noted above (at pp. 36-37 & note 10), other courts have repeatedly recognized that a deferral of pending eviction proceedings is an appropriate accommodation under the Fair Housing Act and similar federal statutes.

In any event, if Kriegsfeld had granted, rather than ignored, Ms. Douglas's request in February 2002 for a reasonable accommodation that would have permitted her to remain in her apartment so long as it remained clean through the efforts of the District's contractor, there is no reason to assume that Kriegsfeld's ability to obtain judicial redress would have been delayed, much less denied, if that accommodation had failed. As a consequence of Ms. Douglas's demand for a jury trial, not her assertion of a Fair Housing Act defense, the trial was scheduled to begin on June 17, 2002. By that time, if the proposed accommodation had been implemented

promptly, the parties could have had an adequate opportunity to assess its success. If, as the division dissent speculated (e.g., Dissent 70-71), Ms. Douglas would have refused to allow anyone to clean her apartment or the District government would have failed to provide cleaning services on a regular basis, the Act might not have required any further accommodation on the part of the landlord after that date. The landlord would then have been able to evict Ms. Douglas at essentially the same time that she was, in fact, evicted. Cf. Groner, 250 F.3d at 1044 (holding that, when counseling efforts to prevent disturbances by a tenant with a mental disability proved unsuccessful, the landlord did not have to extend the tenant's lease as a matter of reasonable accommodation); Josephinium Assocs., 45 P.3d at 634 (holding that a landlord was not required to attempt further accommodation before evicting a mentally disabled tenant with an unsanitary apartment when the landlord's earlier attempts to assist the tenant with housekeeping failed through no fault of the landlord). Because the landlord never even attempted a reasonable accommodation, however, there is no basis on the record to assume that the cure would not have been prompt and effective.

C. A Request For Reasonable Accommodation Is Not Too Late, As A Matter Of Law, Merely Because It Is Made After The Filing Of An Eviction Suit

The Fair Housing Act does not contain any deadline within which a person with a disability must request a reasonable accommodation. To the contrary, the Act's protections against discrimination based on disability, including a refusal to make reasonable accommodations, extend to "any buyer or renter," 42 U.S.C. 3604(f)(1), a term that encompasses a tenant who is being sued for eviction. A landlord's obligation of reasonable accommodation is not, therefore, extinguished upon its initiation of eviction proceedings against the tenant. So long as the tenant remains lawfully in possession of the dwelling, the landlord's obligations under the

Act continue to exist. Accordingly, the superior court had no authority under the Act to reject Ms. Douglas's reasonable accommodation defense, as a matter of law, based on "the timing at which [she] made her request for an accommodation * * * several months after [Kriegsfeld] served the notice to quit and instituted the lawsuit." 6/18/02 Tr. 4.

As the federal agencies charged with enforcing the Fair Housing Act and similar statutes have explained, "the Fair Housing Act does not require that a request [for reasonable accommodation] be made in a particular manner or at a particular time." HUD-DOJ Joint Statement 10 (emphasis added). One of the examples given by those agencies -- although specifically directed at the application of the "direct threat" exception in 42 U.S.C. 3604(f)(9) (see pp. 46-50, infra) -- illustrates that a tenant may make a valid request for accommodation after eviction activities are underway. The agencies offer the example of a tenant, James X, who makes threats of physical violence against other tenants, in response to which the landlord, in accordance with its "no threats" policy, issues him "a 30-day notice to quit, which is the first step in the eviction process." HUD-DOJ Joint Statement 5. Only at some point thereafter does James X, through his lawyer, inform the landlord of his mental disability and request a reasonable accommodation. Ibid. As the agencies explain, the landlord is required to grant the reasonable accommodation if (but only if) the lawyer "can provide satisfactory assurance that James X will receive appropriate counseling and periodic medication monitoring so that he will no longer pose a direct threat during his tenancy." Id. at 5-6.

A federal court of appeals has likewise recognized that liability may arise under the Fair Housing Act when a tenant notifies the landlord of his disability and requests accommodation only after the eviction process has commenced. In Radecki v. Joura, 114 F.3d 115 (8th Cir. 1997), the court of appeals rejected the landlords' argument that, because the tenant did not

inform them of his mental disability until after they had begun eviction activities, they could not be liable under the Fair Housing Act for evicting him because of his disability. The court of appeals explained that the proper focus was on whether the landlords knew of the tenant's disability on "the date [he] was actually evicted" because "the [Fair Housing Act] provides that unlawful discrimination occurs when a dwelling is 'denied' to a renter because of that renter's handicap," i.e., the date of eviction. Id. at 116. In addition, the court of appeals directed the district court on remand to consider the tenant's reasonable accommodation claim, notwithstanding that the tenant's request for accommodation was also made after the eviction process was set in motion. Id. at 117; see Housing Auth. of Bangor v. Maheux, 748 A.2d 474, 476 (Me. 2000) (quoting trial court's ruling in an eviction action against a tenant with a mentally disabled child that, "[u]ntil the writ [of eviction] is issued, * * * [the landlord] remains under an obligation of reasonable accommodation").[11]

The superior court, in holding that Ms. Douglas's request for reasonable accommodation came too late, relied on a single case, Grubb v. Wm. Calomiris Investment Corp., 588 A.2d 1144 (D.C. 1991). Grubb is inapposite. There, a division of this Court recognized that a trial court has equitable discretion whether to allow a tenant to defend a lease violation case on the ground that the violation was cured after the expiration of the 30-day period provided by the notice to quit.

[11] Neither Radecki nor the federal agencies' James X example accords any significance to whether the request for accommodation was made before or after the expiration of the 30-day cure period in the notice to quit. Nor would such a distinction comport with a statutory scheme in which the right to accommodation is to be applied flexibly and expansively to enable persons with disabilities to obtain and retain the housing of their choice. Of course, even when an accommodation of a mentally ill tenant is requested before or during the 30-day period, the success of any curative measures may not be able to be assessed until some time after that period is over. For example, implementing James X's program of "appropriate counseling and periodic medication monitoring," and then evaluating the success of that program, could be expected to extend for several months, and thus into the period for prosecuting an eviction suit.

Id. at 1147. The superior court erroneously deduced from Grubb that it had comparable discretion to disallow Ms. Douglas's Fair Housing Act defense. Grubb, however, did not involve a defense under the Fair Housing Act or any other statute that imposes a non-discretionary duty on a landlord to provide reasonable accommodation to a tenant with a disability. Nothing in Grubb gave the superior court discretion to excuse Kriegsfeld from that duty merely because Ms. Douglas's request for accommodation came after the 30-day cure period.

It would be inconsistent with the purposes of the Fair Housing Act's reasonable accommodation provision -- providing relief from rules and policies that, strictly applied, would operate to deny housing to persons with disabilities -- to impose an arbitrary judge-made rule that any accommodation must be requested before eviction proceedings are begun. Often, tenants with disabilities will not be aware of their right to seek reasonable accommodation until after they have been sued for possession, which may be the first time that they consult with counsel (in the small percentage of such cases in which tenants even have counsel) or investigate on their own whether they have any valid defense to eviction. Many such tenants, especially those with mental disabilities, may experience particular difficulties in obtaining legal representation, ascertaining their legal rights, and otherwise navigating the landlord-tenant court processes. Indeed, an individual's mental illness may prevent her even from recognizing that she has a "mental impairment which substantially limits one or more of [her] major life activities." 42 U.S.C. 3601(h)(1); cf. 6/17/02 Tr. 64 (Mr. Sutton testifies to Ms. Douglas's denials of mental illness). To penalize such an individual for not having sought accommodation more quickly would be to deny the very existence of her illness. See generally Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1286 (7th Cir. 1996) (criticizing the lower court and the employer for treating a mentally ill employee "as though he were suffering from a minor physical

limitation and being stubborn" when, "[b]earing in mind the seriousness of his mental illness, it is evident that [his] actions [including his failure to request accommodation more promptly and clearly] were the product not of cold, calculating intellect, but of an irrational fear").

D. A Request For Reasonable Accommodation Is Sufficient If It Provides Notice That The Tenant Has A Disability And Is Seeking The Landlord's Assistance

The Fair Housing Act does not require a tenant's request for reasonable accommodation to take any particular form, to use any particular words, or to meet any rigorous standard of specificity. "An individual making a reasonable accommodation request does not need to mention the Act or to use the words 'reasonable accommodation,'" but need only "make the request in a manner that a reasonable person would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability." HUD-DOJ Joint Statement 10. Because Ms. Douglas's request to Kriegsfeld in February 2002 adequately met that standard, there is no merit to the superior court's suggestion that the request was unduly "vague." 6/18/02 Tr. 5.

Courts applying the reasonable accommodation provisions of the Fair Housing Act and similar statutes have recognized that a generally worded request for assistance in addressing the consequences of a disability is sufficient. In Cobble Hill Apartments, for example, the court rejected the landlord's argument that, because the tenant's proposed accommodation of transfer to a different building was too burdensome, the landlord had no further duty of accommodation. 1999 Mass. App. Div. at 169. The court explained that "[t]he fact that a tenant does not request a specific or suitable accommodation does not relieve a landlord from making one, particularly when the tenant is handicapped by a mental disability." Ibid.

Similarly, in an employment discrimination case under the Americans With Disabilities Act, the Seventh Circuit rejected the employer's argument that the employee failed to make a legally sufficient request for reasonable accommodation when he submitted a letter from his psychiatrist requesting that he be given a "less stressful" job "due to [his] illness and his past inability to return to work." Bultemeyer, 100 F.3d at 1282, 1285. Noting the communications challenges that may be faced by persons with mental disabilities, the court explained that, if the employee does not clearly articulate his proposed accommodation, "the employer should do what it can to help" and "make a reasonable effort to determine the appropriate accommodation." Id. at 1285-1286 (quoting 29 C.F.R. Pt. 1630, App.); see Whitbeck v. Vital Signs, Inc., 325 U.S. App. D.C. 244, 116 F.3d 588, 593 (1997) ("After an employee's request [for reasonable accommodation], both parties bear responsibility for determining what accommodation is necessary.") (quoting Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1012 (7th Cir. 1997)).

Here, in February 2002, Ms. Douglas's counsel wrote to Kriegsfeld's counsel expressly requesting a "reasonable accommodation" under "the Fair Housing Act" for Ms. Douglas's "mood disorder (mental illness)." Def.'s Summ. J. Mot., Ex. 2. The letter further noted that "[t]he District of Columbia government has advised [counsel] that they are prepared to assist [Ms. Douglas] with her problems," and that such assistance would, in counsel's view, make Ms. Douglas's request to remain in her apartment a "reasonable" one. Ibid. Although this letter, in contrast to counsel's earlier letter to DCRA, did not specifically state that the District of Columbia government's "assistance" entailed arranging for ongoing cleaning of the apartment, nothing in the Fair Housing Act or the cases applying it requires that degree of detail in a request for accommodation. In any event, even if one assumes arguendo that the landlord would not

have understood the sort of accommodation being proposed from the letter and surrounding circumstances, Kriegsfeld would have had an obligation to seek clarification. In ignoring the accommodation request and proceeding with the eviction suit, Kriegsfeld acted at its peril under the Fair Housing Act. See Jankowski Lee & Assocs., 91 F.3d at 895 ("If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.").

III. THE SUPERIOR COURT ERRED IN REJECTING THE FAIR HOUSING DEFENSE ON THE GROUND THAT MS. DOUGLAS POSED A THREAT TO OTHERS ABSENT UNCONTROVERTED EVIDENCE THAT THE PROPOSED ACCOMMODATION COULD NOT ALLEVIATE THE THREAT

The Fair Housing Act provides that its protections against discrimination on the basis of disability do not "require[] that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals." 42 U.S.C. 3604(f)(9). The superior court seized on that provision to hold, as a matter of law, that Kriegsfeld had no obligation under the Act to provide a reasonable accommodation to Ms. Douglas because she posed "a direct threat for the health and safety of others who live in the building." 6/18/02 Tr. 6-7. That ruling is erroneous. Section 3604(f)(9) requires an inquiry into whether a tenant, even after a reasonable accommodation, would be a direct threat to others. The superior court failed to engage in that inquiry.

The Fair Housing Act does not specify, in terms, whether the existence of a "direct threat" under Section 3604(f)(9) is to be determined with or without taking into account the potential for a reasonable accommodation to relieve the threat. As the Supreme Court has recognized, however, exceptions to the Act's general policy of expansive protection for persons with disabilities are "sensibly read narrowly in order to preserve the primary operation of the

policy." City of Edmonds, 514 U.S. at 731 (internal quotation marks and brackets omitted). Section 3604(f)(9) is thus appropriately "read narrowly" to apply only to individuals who would continue to pose a direct threat even after a reasonable accommodation. See Bamgerter v. Orem City Corp., 46 F.3d 1491, 1503 (10th Cir. 1995) (recognizing that Section 3604(f)(9) "should be narrowly construed"); Marthon v. Maple Grove Condominium Ass'n, 101 F. Supp. 2d 1041, 1052 n.38 (N.D. Ill. 2000) (same).

The legislative history of the Fair Housing Act confirms that the narrower reading of the "direct threat" exception in Section 3604(f)(9) is the one intended by Congress. The House Report explains that Section 3604(f)(9) is to be applied consistently with "case law developed under Section 504 of the Rehabilitation Act of 1973," which prohibits discrimination against an "otherwise qualified individual" because of his disability. H.R. Rep. No. 711, at 28. The House Report then observes that "[h]andicapped individuals are 'otherwise qualified' if, with reasonable accommodation, they can satisfy all of the requirements for a position or services," whereas "[a]n individual is not otherwise qualified if, for example, he or she would pose a threat to the safety of others, unless such threat can be eliminated by reasonable accommodation." Ibid. (emphasis added). The underscored phrase makes clear that, in the view of the drafters of the Fair Housing Act, individuals with disabilities are outside the protections of that Act, as they are outside the protections of Section 504 of the Rehabilitation Act, only if they would pose a health or safety threat even after a reasonable accommodation.

The House Report further explains that Section 3604(f)(9) was intended to "codify" the Supreme Court's reasonable accommodation inquiry in Arline, 480 U.S. at 288. See H.R. Rep. No. 711, at 29. In Arline, an employment discrimination case under Section 504, the Court assessed whether an employee with recurring tuberculosis was "otherwise qualified" for

employment despite the potential threat presented by her disease. The Court held that, before denying employment based on an employee's condition, an employer must determine whether "any reasonable accommodation" would alleviate any risk that she posed to others. 480 U.S. at 288. The House Report explains that Section 3604(f)(9)'s "direct threat requirement incorporates the Arline standard," so that, "[i]f a reasonable accommodation could eliminate the risk, entities covered under this Act are required to engage in such accommodation pursuant to Section 6(f)(3) of the Act [i.e., 42 U.S.C. 3604(f)(3)]." H.R. Rep. No. 711, at 29

The courts have consistently recognized that the Fair Housing Act requires consideration of whether a reasonable accommodation would alleviate any danger that the tenant would otherwise pose to others. In Roe v. Sugar River Mills Associates, 820 F. Supp. 636, 637-638 (D.N.H. 1993), a seminal case on this issue, the court addressed a landlord's ability, consistent with the Fair Housing Act, to evict a mentally ill tenant who had repeatedly threatened physical violence and frightened other residents. Responding to the claim that the tenant posed a "direct threat" under the Act, the court placed the burden on the landlords "to demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize the risk [the tenant] poses to other residents * * * before they may lawfully evict him." Id. at 640. Other courts have followed that approach in addressing reasonable accommodation claims under the Act. See, e.g., Scialabba v. Sierra Blanca Condo. No. One Ass'n, 2001 U.S. Dist. LEXIS 10054, at *21 (N.D. Ill. July 11, 2001); Roe v. Housing Auth. of Boulder, 909 F. Supp. 814, 821-822 (D. Colo. 1995); Arnold Murray Constr., 621 N.W.2d at 175; Cornwell & Taylor, 2000 Minn. App LEXIS 1317, at *12, *15; Foster v. Tinnea, 705 So.2d 782, 786 (La. Ct. App. 1997); see also HUD-DOJ Joint Statement 4 ("[T]he Act does not protect an individual with a disability whose tenancy would

constitute a 'direct threat' to the health or safety of other individuals * * * unless the threat can be eliminated or significantly reduced by reasonable accommodation.") (emphasis added).

Significantly, the Sugar River court considered, and specifically rejected, the pre-accommodation "direct threat" analysis that the superior court employed in this case. The landlords in Sugar River claimed that, "if plaintiff is * * * a threat to the safety of others, then the provisions of the Act simply do not apply," so that "they need not make any effort to 'accommodate' plaintiff's handicap in an effort to minimize the threat he poses nor need they continue to offer housing to him." 820 F. Supp. at 639. The court concluded that the tenant's contrary position -- that a landlord is excused from providing a reasonable accommodation under the Act only if doing so would not adequately reduce the threat posed by the tenant -- was "both better reasoned and more consistent with the express provisions and goals of the Act." Ibid.

In this case, the superior court's "direct threat" analysis is virtually identical to the landlords' rejected argument in Sugar River. The court ruled that, because Ms. Douglas's apartment "clearly appears to constitute a direct threat," it "was not at all incumbent, as a matter of law, upon [Kriegsfeld] to provide any reasonable -- any accommodation." 6/18/02 Tr. 7. That analysis was legally incorrect. Under the Fair Housing Act, the landlord may avail itself of the "direct threat" exception only if it can show that no reasonable accommodation would alleviate whatever threat the tenant poses to others. The record is devoid of any evidence on that issue, much less the uncontroverted evidence that would permit its resolution against Ms. Douglas as a matter of law. There would consequently be no basis to affirm as harmless the superior court's erroneous application of a pre-accommodation rather than post-accommodation analysis of whether Ms. Douglas constituted a direct threat to health or safety under Section 3604(f)(9).

The understanding that Section 3604(f)(9) applies only when the landlord demonstrates that a tenant would remain a direct threat to health or safety even after a reasonable accommodation is essential to the full implementation of the Fair Housing Act. Otherwise, many disabled tenants who could, with reasonable accommodation, live in the housing of their choice at no risk to others would be denied the right to such housing. Such a result would countermand Congress's intent that "[g]eneralized perceptions about disabilities and unfounded speculations about threats to safety [be] specifically rejected as grounds to justify exclusion" of persons with disabilities from their desired housing. H.R. Rep. No. 711, at 29.

CONCLUSION

The judgment of the superior court should be reversed and the case should be remanded for a new trial at which Ms. Douglas is permitted to present her Fair Housing Act defense to the jury.

Respectfully submitted.

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STATUTORY APPENDIX

1. Section 3602 of Title 42 of the United States Code provides, in pertinent part:

Definitions

As used in this subchapter --

* * * * *

(h) "Handicap" means, with respect to a person --

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addition a controlled substance (as defined in section 802 of Title 21).

* * * * *

2. Section 3604 of Title 42 of the United States Code provides, in pertinent part:

Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful --

* * * * *

(f)(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.

(3) For purposes of this subsection, discrimination includes --

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

* * * * *

(9) 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.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief of Appellant on Rehearing En Banc to be delivered by first-class mail, postage prepaid, the 18th day of October, 2004, to:

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