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

REPLY BRIEF OF APPELLANT ON REHEARING EN BANC

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INTRODUCTION

This appeal concerns whether the superior court erred in dismissing, as a matter of law, a tenant's defense to eviction based on her landlord's claimed violation of the Fair Housing Act, 42 U.S.C. 3601 et seq. -- specifically, its requirement that landlords "make reasonable accommodations in rules, policies, practices, or services" for tenants with physical or mental disabilities. 42 U.S.C. 3604(f)(3)(B). Accordingly, this Court is not required definitively to decide on this appeal whether the tenant, appellant Evelyn Douglas, had a mental disability that impaired her ability to maintain her apartment; or whether her request for accommodation was sufficiently timely, clear, and reasonable to entitle her to relief; or whether the accommodation would have alleviated any direct threat that she posed to other tenants. The Court need only decide whether a reasonable juror could resolve those issues in Ms. Douglas's favor. For the reasons explained below, as well as in Ms. Douglas's earlier brief and those of her amici curiae, the answer to that question is an unqualified "yes." The superior court was not justified, therefore, in taking those issues from the jury.

The appellee landlord, Kriegsfeld Corporation (Kriegsfeld), and its supporting amicus curiae, the Apartment and Office Building Association of Metropolitan Washington (AOBA), fail to advance any judicial or other authority rejecting a reasonable accommodation claim as legally deficient in circumstances similar to those here. They cite no case that holds, as did the superior court, that an individual asserting a such a claim must proffer expert psychiatric testimony to explain a diagnosis of mental illness. They cite no case that holds, as did the superior court, that a disabled tenant's request to her landlord for accommodation is untimely, as a matter of law, if it is made after the tenant has been sued for eviction. They cite no case that holds, as the superior court suggested, that a request for

accommodation is legally deficient if it is comparable in specificity to the request here. And they cite no case that holds, as the superior court held, that a landlord is excused from its obligation to make reasonable accommodation whenever the tenant, without such accommodation, would pose a threat to the health or safety of others. The weight of authority instead favors Ms. Douglas.

Even more significantly, Kriegsfeld and its amicus fail to explain how the superior court's restrictive approach to reasonable accommodation claims can be squared with the Fair Housing Act's text and broad remedial purposes. The Act does not, by its terms, require that a tenant make her request for accommodation at any particular time or with any particular degree of specificity, or that she substantiate her disability with expert medical evidence. The Act's narrow "direct threat" exception, as its legislative history makes clear, applies only if the tenant would pose a threat even after accommodation, and the superior court failed to engage in that analysis as to Ms. Douglas. There is no warrant for courts to read limitations into the Act -- to the detriment of tenants with disabilities -- that Congress did not put there. That is especially so when the federal agencies responsible for the Act's enforcement have rejected such limitations.

Although Kriegsfeld and its amicus suggest that the restrictions imposed by the superior court in this case are necessary to spare landlords "new, costly burdens" (AOBA Br. 1), that is not so. Congress already balanced the interests of landlords and disabled tenants by requiring a landlord to make only an accommodation that is "reasonable," that is "necessary" to enable a tenant "to use and enjoy a dwelling," and that is capable of alleviating any health or safety threat posed by the tenant. 42 U.S.C. 3604(f)(3)(B) and (9). Whether the accommodation requested here was, or was not, required under that standard is a

question of fact properly left to the jury on remand. If this Court were to accept the invitation of Kriegsfeld and its amicus to write additional restrictions into the law of reasonable accommodation under the Act, those restrictions would foreclose relief not only for Ms. Douglas, but also for other District residents whose physical or mental disabilities might cause them to engage in conduct giving rise to an eviction suit based on lease violations (e.g., the tenant with a hearing impairment who makes excessive noise, the tenant in a wheelchair who cannot dispose of garbage in the designated receptacle, the tenant with limited vision who keeps a service dog in violation of a "no pets" policy, and the tenant with developmental disabilities who forgets to make timely rental payments). The Court should not do so.

I. THE SUPERIOR COURT ERRED IN HOLDING THAT THE EVIDENCE OF MS. DOUGLAS'S DISABILITY WAS INSUFFICIENT AS A MATTER OF LAW

As previously explained, because this is not "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), the superior court erred in dismissing the Fair Housing Act defense before trial based on Ms. Douglas's (perceived) failure to make a prima facie showing of disability. See Appellant's Br. 18-32. There is ample evidence in the record that would permit a reasonable juror to find that Ms. Douglas had a mental impairment that affected her ability to care for her apartment: Ms. Douglas's SSI disability status; the testimony of several witnesses about her aberrant behavior, including her inappropriate appearance, prolonged living in filth, and insistence that nothing was wrong with herself or her apartment; and the opinion testimony of social-services professionals that she was suffering from mental illness and alcohol dependence that led to the unsanitary condition of her apartment.

A. Although Kriegsfeld suggests that the superior court's ruling that Ms. Douglas failed to make out a prima facie case on the existence of a disability is subject to a deferential standard of review (see Appellee's Br. 5-6), Kriegsfeld is mistaken. When, as here, a trial court finds that the evidence on an issue is insufficient to proceed to the jury, an appellate court reviews that finding de novo, viewing the evidence in the light most favorable to the party proffering it. Phillips v. District of Columbia, 714 A.2d 768, 772 (D.C. 1998).

Here, the superior court's rejection of the Fair Housing Act defense was a legal ruling on the sufficiency of evidence of disability. See 6/18/02 Tr. 8 (superior court discusses "the sufficiency or insufficiency of the evidence the defendant is prepared to present regarding [the] mental disability and its effects on the defendant's behavior"). Noting that to prevail on the defense, Ms. Douglas would have to show both that she was disabled and that the disability interfered with maintaining her apartment, the court ruled as follows:

> Now, in light of this, I have considered the testimony of James Sutton and Damon Byrd to try to determine whether, either separately or together it is sufficient or would be sufficient to establish these necessary elements, and I have concluded that it would not be. * * * I find that there is – that the evidence proffered in support of the defendant's defense is insufficient as a matter of law and that serves as [an] independent basis for excluding the defense.

6/18/02 Tr. 13-14 (emphasis added). The superior court's ruling, being addressed the sufficiency of Ms. Douglas's evidence, is subject to de novo review here. See Phillips, 714 A.2d at 772; Drevenak v. Abendschein, 773 A.2d 396, 416 (D.C. 2001).

Kriegsfeld's reliance on the standard of review applicable to trial court rulings on the qualification of expert witnesses is misplaced. See Appellee's Br. 6. The superior court did not rule that Mr. Sutton, the mental-health specialist, and Mr. Byrd, the social worker, were not qualified to give the testimony that they, in fact, gave about their observations of Ms. Douglas and their conclusions that she had a mental illness that, combined with alcohol

dependence, impaired her ability to care for her apartment. See, e.g., 6/17/02 Tr. 65-66, 85-87. Rather, the court ruled that Ms. Douglas could not make out a prima facie case without presenting some additional witness, such as a psychiatrist or clinical psychologist, with sufficient medical expertise to give additional testimony about her specific diagnosis. See, e.g., 6/18/02 Tr. 11 (superior court faults Ms. Douglas's witnesses for not being able to explain "what her diagnosis was or what the diagnosis meant"). The court thus ruled that the existing evidence, including Mr. Sutton's and Mr. Byrd's testimony, was insufficient to prove disability as a matter of law.

B. Moreover, the superior court's evidentiary sufficiency ruling rests on the incorrect legal premise that a person claiming discrimination based on mental disability under the Fair Housing Act must substantiate her condition with expert psychiatric testimony. That premise, which is reviewable de novo, is incorrect. Nothing in the text, history, or purposes of the Act imposes any such requirement. The federal agencies responsible for enforcing the Act have made clear that testimony from the individual herself or another lay person is usually sufficient to support such a claim, and 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 this inquiry." 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]; see Appellant's Br. 21-23. Kriegsfeld and its amicus cite no case, and appellant is aware of none, holding that expert testimony explaining a specific psychiatric diagnosis is essential, as a matter of law, in a case such as this one.

Contrary to Kriegsfeld's assertion (Appellee's Br. 7), American University v. District of Columbia Commission on Human Rights, 589 A.2d 416 (D.C. 1991), is not such a case. As previously explained (Appellant's Br. 30-32), American University was a case in which there was no evidence, expert or otherwise, on the critical question whether the claimant's mental illness impaired her ability to perform her job, and the claimant herself denied that she was so impaired. In concluding that a connection between the claimant's mental illness and her job performance had not been established on the facts of that case, the Court focused on the absence of "expert medical testimony or other competent evidence." Id. at 423 (emphasis added). Such language is consistent with the understanding that a layperson or a professional, such as Mr. Sutton and Mr. Byrd, with expertise in dealing with mental illness, although not in diagnosing it, may be relied upon to prove the existence of a "mental impairment which substantially limits one or more of [a] person's major life activities," 42 U.S.C. 3602(h)(1). Although the Court suggested that expert medical testimony might be required in American University to explain whether the claimant could be expected to respond successfully to her proposed course of medication and therapy, id. at 423, many cases, including this one, do not present pharmacological or similarly technical issues.

C. In attempting to defend the superior court's (erroneous) holding that the evidence was insufficient to enable a reasonable juror to find that Ms. Douglas had a mental impairment that affected her ability to care for her apartment, Kriegsfeld mischaracterizes Mr. Sutton's testimony in a critical respect. It is not true, as Kriegsfeld states, that "[w]ith respect to Mr. Sutton, when asked by the court whether there was a connection between the Appellant's mental disability and her failure to maintain her apartment, he said that there was no correlation." Appellee's Br. 6; see id. at 4 (citing 6/17/02 Tr. 74). In the portion of the

transcript that Kriegsfeld cites, Mr. Sutton replied "[n]o" to a quite different question: whether there was "any connection noted between [Ms. Douglas's] mood disorder and the condition of her apartment in those notes or in that report" (6/17/02 Tr. 74 (emphasis added)) -- namely, the notes and report of "the psychiatrist who met with Ms. Douglas on December 19, 2001" (id. at 73).[1] Mr. Sutton was thus testifying not about his conclusions as to whether such a connection existed, as Kriegsfeld suggests, but instead about his understanding of Ms.

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[1] Kriegsfeld's mischaracterization of the testimony is evident from a comparison of the complete interchange between the superior court and Mr. Sutton with Kriegsfeld's description of that interchange. The full interchange is as follows:

THE COURT:	I take it you've reviewed the report and the notes of the psychiatrist who met with Ms. Douglas on December 19, 2001?
A:	Yes, your Honor.
THE COURT:	Are you familiar with the report and his notes?
A:	Not completely. I just glanced through the notes there.
THE COURT:	To the best of your memory, and I suppose if you want, if it would be helpful to refresh your memory you may look at the notes if you have them, is there anything in the psychiatrist's notes or in his report, if there is a separate report, that addresses the question, whether the defendant's mood disorder is what has caused -- is or is not what has caused her to keep her apartment in the condition in which she keeps it? In other words, is there any connection noted between her mood disorder and the condition of her apartment in those notes or in that report?
A:	No, your Honor.

6/17/02 Tr. 73-74. Kriegsfeld, in contrast, omits by ellipses any reference to the psychiatrist's notes and report from its quotation of that interchange. See Appellee's Br. 4 ("When asked by the court whether the 'defendant's mood disorder ... is or is not what caused her to keep her apartment in the condition in which she keeps it? In other words, is there any connection noted between her mood disorder and the condition of her apartment ...?', Mr. Sutton responded, 'No, your honor.' (TT1: 74).").

Douglas's medical records. When, however, Mr. Sutton was asked for his own assessment, he replied that "yes," there was a relationship between Ms. Douglas's mental illness and alcohol dependence, on the one hand, and the unsanitary state of her apartment, on the other. See id. at 65-66.

Kriegsfeld does not, and cannot dispute, that Mr. Byrd testified to such a relationship as well. For example, when Mr. Byrd was asked whether, based on his experience as a social worker and his observations of Ms. Douglas, he "believe[d] that her mental problem affects her ability to maintain her life," Mr. Byrd responded "yes." 6/17/02 Tr. 85. He subsequently elaborated on his view that Ms. Douglas's combination of mental illness and alcoholism impaired her ability to keep her apartment clean. Id. at 89-90. Although Kriegsfeld suggests that the superior court might have chosen to discredit Mr. Byrd based on what it characterizes as "his wavering testimony regarding whether he was qualified to render a diagnosis" (Appellee's Br. 6), the superior court specifically "found both witnesses [i.e., Mr. Byrd and Mr. Sutton] to be totally honest and not in any way to be trying to exaggerate their qualifications" (6/17/02 Tr. 102), and there is no basis for this Court to revisit that credibility determination.

D. With respect to this issue, the question for this Court to resolve is not, as Kriegsfeld asserts, whether, "if a tenant has a very unsanitary apartment, she must have a mental illness too" (Appellee's Br. 7-8), but whether a reasonable juror might decide based on the record evidence, including evidence of the squalor in which Ms. Douglas was content to live, that she had a mental impairment that affected her ability to care for her apartment. In making that determination, a juror would be entitled to take into account the detailed factual descriptions by Mr. Sutton and Mr. Byrd -- as well as Deborah Reid, Kriegsfeld's

property manager -- concerning Ms. Douglas's highly abnormal behavior, appearance, and living conditions over an extended period of time. A juror could also take into account the opinions of Mr. Sutton and Mr. Byrd, both of whom are professionals who interact on a daily basis with mentally ill individuals, that Ms. Douglas had a mental impairment that, combined with the additional impairment of alcoholism, prevented her from keeping her apartment clean. And a juror could consider Ms. Douglas's qualification for SSI disability benefits and identification by District of Columbia authorities as a person in need of mental-health and substance-abuse services. In light of the record evidence, a reasonable juror could find Ms. Douglas to be a person with a disability within the protections of the Fair Housing Act, without the need for expert testimony explaining her specific diagnosis.[2]

II. THE SUPERIOR COURT ERRED IN HOLDING THAT MS. DOUGLAS DID NOT MAKE A LEGALLY SUFFICIENT REQUEST FOR REASONABLE ACCOMMODATION

As previously explained, Ms. Douglas's request, through counsel, for accommodation of her disability was timely, sufficient in its form, and reasonable in its substance. Or, at least, a fair-minded juror could so find. The superior court thus erred in "exclud[ing]" Ms. Douglas's Fair Housing Act defense, "as a matter of law," based on the perceived

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[2] Although, as noted above, Ms. Douglas was not required to substantiate her claim of disability with medical records or other such evidence, the records of her visit to a psychiatrist at St. Elizabeth's Hospital are part of the record of this case. Those records reflect not only a psychiatric diagnosis of mental illness (mood disorder) and alcohol dependence, but also an apparent connection between that diagnosis and the condition of Ms. Douglas's apartment. The records indicate that the psychiatrist made that diagnosis after having been informed by "the landlady" -- presumably, Ms. Reid -- that Ms. Douglas's apartment was "filthy" and "filled [with] trash & bottles filled [with] urine." Def.'s Summ. J. Mot., Exh. 1, at 5 (R. 178). As addressed in our principal brief, although existing authority treats medical records containing subjective judgments as inadmissible hearsay, that authority warrants reconsideration. See Appellant's Br. 28; see also Fed. R. Evid. 803(6) and advisory comm. note (explaining that Rule 803(6)'s hearsay exception for records of regularly conducted activities, consistent with the better reasoned case law, "specifically includes both diagnoses and opinions, in addition to acts, events, and conditions"); 30B Michael H. Graham, Federal Practice and Procedure § 7047, at 451-452 (interim ed. 2002).

"untimeliness of [her] request for accommodation." 6/18/02 Tr. 8. The court was also mistaken in its suggestion that the request was too "vague" to trigger the landlord's duty of reasonable accommodation under the Act. See id. at 4-5.[3]

A. Kriegsfeld's principal brief does not specifically defend the superior court's holding that Ms. Douglas's accommodation request was necessarily "untimel[y]" because it was made after she was sued for eviction. Nor is that holding defensible. As previously explained, the Act's protections against discrimination based on disability extend to all tenants, regardless of whether they are the subject of pending eviction proceedings. See Appellant's Br. 40-44.

Plainly, the Fair Housing Act does not permit a landlord, upon suing a disabled tenant for eviction, to discriminate against the tenant by, for example, charging her higher rent than other tenants or denying her services available to other tenants. The same is true when discrimination takes the form of a landlord's refusal of a reasonable accommodation. See 42 U.S.C. 3604(f)(3)(B) (defining "discrimination" under the Act as including "a refusal to make reasonable accommodations"). So long as the tenant remains lawfully in possession of her home, the landlord remains obligated to provide reasonable accommodations, if

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[3] The superior court's dismissal of Ms. Douglas's Fair Housing Act defense on the ground that her accommodation request was legally deficient is reviewable de novo. It is unclear whether Kriegsfeld means to suggest a more deferential standard by its reference to "the trial court's discretion to determine whether a proposed accommodation is unreasonable as a matter of law." Appellee's Br. 8. Any such suggestion would be incorrect. See Grant v. May Dep't Stores Co., 786 A.2d 580, 583 (D.C. 2001) (noting that the superior court's grant of summary judgment on the plaintiff's claim under the D.C. Human Rights Act that the defendant employer engaged in disability discrimination in refusing to provide reasonable accommodation is reviewed de novo); see also, e.g., Aka v. Washington Hosp. Center, 332 U.S. App. D.C. 256, 156 F.3d 1283, 1288 (1998) (en banc); Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 995, 966 (10th Cir. 2002); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1232, 1246 (9th Cir. 1999).

requested. Indeed, because many tenants with disabilities (especially mental ones) may not learn of their right to reasonable accommodation until after they have been sued for eviction and obtained legal assistance, the Act's purposes would be undermined by deeming untimely any accommodation request that is made after the eviction suit is filed.

Kriegsfeld's amicus errs in perceiving a division of authority on the question whether a disabled tenant's right to reasonable accommodation is extinguished, as a matter of law, by the landlord's filing of an eviction suit. See AOBA Br. 8. In Josephinium Associates v. Kahli, 45 P.3d 627 (Wash. Ct. App. 2002), on which amicus relies, the court of appeals affirmed the trial judge's rejection, based on its weighing of the evidence at a bench trial, of a mentally ill tenant's reasonable accommodation defense. The defense was predicated on the landlord's failure to respond to the tenant's request -- made after she was served with an eviction notice for nonpayment of rent -- for a meeting to discuss accommodation. The court of appeals explained that the landlord had previously considered, and reasonably rejected, the tenant's proposed accommodations of a transfer to a less expensive apartment or a reduction in the rent of her existing apartment. The court noted that the landlord denied a transfer because the tenant had not kept her existing apartment in sanitary condition -- including refusing entry on numerous occasions to the cleaning and fumigation services that the landlord had arranged for her -- and the landlord understandably did not want to incur the cost of restoring a second apartment to sanitary condition. See id. at 633. The court thus held that the record supported the trial judge's conclusion that the landlord "had fulfilled its duty of reasonable accommodation by its offers of services to [the tenant]," and had no obligation to respond to the tenant's meeting request where "accommodation ha[d] been offered and ha[d] failed, but physical eviction ha[d] not yet occurred." Id. at 634. Although

the court stated that the tenant's failure to pay rent could not have been excused in that case by the landlord's subsequent failure to accommodate, the court cautioned that "[w]e do not address whether efforts to accommodate a disability may be required after an eviction notice in other circumstances; presumably, a landlord may not escape an obligation to accommodate merely by serving a notice to vacate." Ibid.

Kriegsfeld's amicus also cites, without explanation, "Example 2" in the HUD-DOJ Joint Statement (see AOBA Br. 8), which presumably is a reference to the "James X" example discussed in Ms. Douglas's principal brief (at 41). That example, however, provides no support for the superior court's holding on the timeliness of Ms. Douglas's accommodation request. In that example, the federal agencies responsible for enforcement of the Fair Housing Act recognize that a landlord is, in fact, required to provide a reasonable accommodation that is requested after the initiation of the eviction process (although only if the accommodation would alleviate any direct threat posed by the disabled individual to other tenants). See HUD-DOJ Joint Statement 5-6. Nothing in HUD-DOJ Joint Statement supports the drawing of an arbitrary distinction between accommodation requests made after service of a notice to quit, which the example recognizes to be timely, and accommodation requests made after service of a complaint for possession, as in this case. In either situation, given the time that would ordinarily be required to implement the accommodation and evaluate its success in addressing the lease violation, the usual pace of the eviction process would have to be slowed. See Appellant's Br. 42 n.11.

B. Kriegsfeld does attempt to defend the dismissal of the Fair Housing Act defense on the ground -- suggested but not ultimately relied upon by the superior court -- that Ms. Douglas's request for reasonable accommodation was vague. See Appellee's Br. 9-10. As

previously explained, however, the Act does not require that a disabled tenant's request for accommodation meet any strict standard of specificity. It is sufficient that the tenant speak in terms 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; see Cobble Hill Apts. Co. v. McLaughlin, 1999 Mass. App. Div. 166, 169 (Mass. App. Div. 1999) ("The fact that a tenant does not request a specific or suitable accommodation does not relieve a landlord from making one, particular when the tenant is handicapped by a mental disability."); Appellant's Br. 44-46.

A jury could reasonably find that the February 20, 2002, letter from Ms. Douglas's counsel to Kriegsfeld's counsel met that appropriately lenient standard. See Def.'s Summ. J. Mot., Exh. 2 (R. 184-185). The letter identifies the nature of Ms. Douglas's disability by explaining that she "suffers from a mood disorder (mental illness)" and "is an outpatient at a city operated mental health/substance abuse clinic." The letter then "request[s] a reasonable accommodation in complying with provisions of [her] lease." In the context of the pending eviction suit, a reasonable reader would understand the request to be directed to the particular "provisions" of the lease that Ms. Douglas was accused of violating, specifically those requiring the apartment to be kept in sanitary condition. The letter further states that Ms. Douglas "has no problem abiding by her lease," that she "would like to remain and seek treatment and counseling," and that "[t]he District of Columbia government has advised [counsel] that they are prepared to assist her with her problems." Although the letter does not describe the precise form of the assistance that the District government would provide, a reasonable reader could infer that the accommodation would involve Ms. Douglas's remaining in the apartment while it was brought into, and maintained in, sanitary condition

with the District government's assistance. The letter cannot plausibly be read, as Kriegsfeld suggests, as a request "to allow a tenant to live on its property in unsanitary and unhealthy conditions." Appellee's Br. 4. At a minimum, the question whether the letter (or any other exchanges that may have occurred between the parties or their counsel) adequately put Kriegsfeld on notice of Ms. Douglas's desire for accommodation is unsuitable for resolution as a matter of law.

Neither Kriegsfeld nor its amicus has identified any case holding that a similarly phrased request for accommodation was legally deficient. Of the cases that Kriegsfeld cites in connection with its assertion that "[p]arties seeking reasonable accommodations are required to state their requested accommodation in sufficient detail precisely because the Americans with Disabilities Act [sic] does not require landlords to grant every request for accommodation that is demanded by a tenant, but only those that are reasonable" (Appellee's Br. 10), none actually addresses how specific an accommodation request need be. The cases instead articulate the unexceptionable proposition that only reasonable accommodations need be provided.

Nor does Department of Housing and Urban Development v. Courthouse Square Co., HUDALJ 08-95-0321-8 (Aug. 13, 2001), on which Kriegsfeld's amicus relies, concern the degree of detail required of a request for accommodation. See AOBA Br. 3-4. Amicus focuses on the portion of that case that addressed whether, at a time well before the tenant made her accommodation request, the landlord knew or should have known of her mental illness. See Courthouse Square, slip op. 26-27.[4] Here, in contrast to Courthouse Square, the

[4] The tenant's reasonable accommodation claim was rejected principally on the ground that she had failed to request accommodation until after her eviction. See Courthouse Square, slip op. 29-31. This case does not present that factual scenario.

landlord was not left to speculate at the tenant's "specific disability," id. at 27, as Ms. Douglas's accommodation request provided Kriegsfeld with that information in its references to her "mood disorder (mental illness)" and treatment at a "mental health/substance abuse clinic."

In a more relevant administrative decision, the same judge who decided Courthouse Square found that a mentally disabled tenant had made a sufficient request for accommodation when, after being threatened with eviction for having a cat in violation of the landlord's "no pets" policy, he stated orally to the landlord's agent that "he was entitled to have a pet" because "he was a disabled person." Secretary, United States Department of Housing and Urban Development v. Dutra, HUDALJ 09-93-1753-8, slip op. 6, 12 (Nov. 12, 1996).[5] That decision reflects the understanding that a request for accommodation need not meet any rigorous requirements of form, wording, or specificity.

Of course, if Kriegsfeld believed that additional detail about Ms. Douglas's condition or her proposed accommodation was needed to evaluate her request, Kriegsfeld could have requested it. As the federal agencies responsible for enforcing the Fair Housing Act have explained, although "[a] housing provider may not ordinarily inquire as to the nature and severity of an individual's disability," a housing provider may, "in response to a request for a reasonable accommodation," request information that "(1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need

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[5] The ALJ opinions are available at www.hud.gov/offices/oalj/cases/fha (visited Oct. 15, 2004).

for the requested accommodation." HUD-DOJ Joint Statement 13. Kriegsfeld, however, did not request such information or respond in any other manner to Ms. Douglas's accommodation request.

C. As the cases cited in the parties' and amici's briefs demonstrate, the Fair Housing Act requires landlords to provide only those accommodations that are reasonable in the circumstances -- that is, "accommodations [that] do not pose an undue hardship or a substantial burden" for the landlord. Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 335 (2d Cir. 1995); accord, e.g., Cornwell & Taylor, LLP v. Moore, 2000 Minn. App. LEXIS 1317, at *4-*5 (Minn. Ct. App. Dec. 22, 2000) (unpublished disposition) (recognizing that a landlord's forbearing from eviction so long as a mentally disabled resident took his medications, remained sober, and was monitored by his psychiatrist and case worker might be a reasonable accommodation under that standard). The Act does not, therefore, require a landlord continually to make new attempts at accommodation when all previous attempts have failed through no fault of its own. See, e.g., Groner v. Golden Gate Gardens Apts., 250 F.3d 1039, 1044 (6th Cir. 2001); Josephinium Associates, 45 P.3d at 633-634. A trier of fact could permissibly find that requiring further accommodation would be unreasonable in such a case.

There would be no basis for this Court, however, to accept Kriegsfeld's invitation to hold, as a matter of law, that it satisfied its duty of reasonable accommodation by its unilateral choice not to file its eviction suit against Ms. Douglas as quickly as local landlord-tenant law would have allowed. See Appellee's Br. 10-12. For all that the record reflects, the pace at which Kriegsfeld proceeded was solely for its own convenience. The record does not suggest that this supposed "accommodation" was requested by Ms. Douglas or by anyone

acting on her behalf. Nor does the record suggest that Kriegsfeld communicated to Ms. Douglas that it was providing this "accommodation" to give her additional time to arrange for the cleaning of her apartment. To the contrary, Kriegsfeld's notice to quit would have communicated to Ms. Douglas that nothing could be done to preserve her tenancy after September 2001, when the 30-day cure period expired, and the complaint for possession would have reinforced that message. Ms. Douglas's own requested accommodation, in contrast, would have permitted her to remain as a tenant if, within some reasonable period after the request was granted, her apartment could be brought into compliance with the lease and thereafter remain in compliance. In any event, even if Kriegsfeld had some basis to argue that, like the landlord in Josephenium Associates, it had already done enough to accommodate its mentally disabled tenant, such an argument is appropriately directed to the jury on remand, not to this Court in the first instance.[6]

To the extent that Kriegsfeld suggests that an accommodation is unreasonable per se if it entails a landlord's "abandon[ing] its right to seek judicial relief" (Appellee's Br. 12), Kriegsfeld is mistaken. For one thing, in the various cases in which this sort of accommodation has been recognized as at least potentially available (see, e.g., Appellant's

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[6] The suggestion of Kriegsfeld's amicus that Ms. Douglas might not have been available to agree to the proposed accommodation is a red herring. See AOBA Br. 8-9. The text of the reasonable accommodation request indicates that Ms. Douglas was herself agreeable to the accommodation being proposed. Nothing in the record suggests that Ms. Douglas would not have been available in February 2002, when the request was made, or within some reasonable time thereafter for whatever additional formalities amicus believes might have been required.

It is irrelevant that Ms. Douglas did not personally appear for the trial in this case some four months later -- well after the time that Kriegsfeld, by its inaction, effectively denied the accommodation request. In any event, the record suggests that Ms. Douglas could have been consulted about an accommodation even at that late date; Mr. Sutton, for example, testified that he had visited with Ms. Douglas only two weeks before the trial. See 6/17/02 Tr. 68-70.

Br. 36-37 & n. 10), the accommodation does not require the landlord to give up its right to evict the disabled tenant forever, but merely requires the landlord to refrain from exercising that right while efforts are made to correct or prevent the tenant's lease violations. The implicit, if not explicit, understanding of those cases is that, if the lease violations persist after some reasonable period, the landlord may resume its eviction efforts without the threat of liability under the Fair Housing Act. Moreover, Kriegsfeld is wrong that imposing liability on a landlord for refusing an accommodation request that involves a stay of eviction proceedings "would strip [the landlord] of due process" by "prevent[ing] [it] from obtaining a judicial determination of whether a reasonable accommodation was, in fact, required or made." Appellee's Br. 12. A landlord, of course, retains the option of ignoring such an accommodation request, as Kriegsfeld did here, and subsequently litigating, in its eviction suit or a separate suit by the tenant, whether it thereby violated the Act and, if so, what relief the tenant is to receive.

D. There is likewise no merit to the suggestion of Kriegsfeld's amicus that a ruling by this Court in Ms. Douglas's favor -- i.e., one that remands the case for a new trial at which she could present her reasonable accommodation defense to the jury -- would somehow "impose on landlords, de facto, an obligation to seek appointment of a guardian for any tenant who is in violation of its lease and appears to be mentally impaired." AOBA Br. 2; see id. at 5. As a threshold matter, amicus's argument reflects the very "stereotypes and ignorance" that Congress sought to combat in the Fair Housing Act, see H.R. Rep. No. 100-711, at *18 (June 17, 1998) (reprinted in 1988 U.S.C.C.A.N. 2173, 2179), for many "mentally impaired" individuals are capable of handling with their own affairs, with or without the assistance of family members or other persons of their choice. More to the point,

a landlord has no duty under the Act to provide any reasonable accommodation unless and until the tenant affirmatively requests one. See HUD-DOJ Joint Statement 11. A landlord would not risk liability under the Act, therefore, by prosecuting an eviction suit against a tenant whom the landlord merely suspects of having a mental illness that impaired her ability to comply with her lease. It is only if the tenant then requests a reasonable accommodation, as Ms. Douglas did in this case, that the landlord might risk liability by refusing one. In the (presumably) rare instance in which the landlord has legitimate concerns about the tenant's competency -- notwithstanding her ability, on her own or through her chosen representative, to make an accommodation request -- the landlord may bring those concerns to the attention of the court presiding over the eviction case for whatever action, if any, the court deems appropriate.

III. THE SUPERIOR COURT ERRED IN HOLDING THAT THE FAIR HOUSING ACT'S "DIRECT THREAT" EXCEPTION EXCUSED KRIEGSFELD FROM ANY DUTY TO ACCOMMODATE MS. DOUGLAS

As previously explained, the superior court erred in holding that Kriegsfeld was excused, as a matter of law, from having to make any accommodation to Ms. Douglas by virtue of 42 U.S.C. 3604(f)(9), which states that a landlord need not make a dwelling available "to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals." The legislative history makes clear that Section 3604(f)(9) is a narrow exception to the Fair Housing Act's protections against discrimination based on disability -- one that applies only when, even if the landlord provided the requested reasonable accommodation, the tenant would continue to pose a "direct threat." The superior court did not analyze whether the accommodation proposed by Ms. Douglas would have alleviated any threat to health or safety posed by her apartment. And the record would not

have permitted the court to find, as a matter of law, that the apartment would remain such a threat even after accommodation.

Kriegsfeld's principal brief does not dispute that, as a general matter, Section 3604(f)(9) applies only when a tenant would pose a health or safety threat after accommodation. It argues only that the cases that articulate that understanding of Section 3604(f)(9) are distinguishable from this case on their "facts." Appellee's Br. 8. The statutory text, history, and purposes do not, however, distinguish between the threat posed by a tenant's failure to keep her apartment clean, as here, and the threat posed by a tenant's physical violence and threats of physical violence against others, as in the cases on which Kriegsfeld relies.[7] If anything, an unsanitary apartment poses a threat that is less urgent, as reflected in Kriegsfeld's choice not to proceed with this eviction suit as quickly as local law would have allowed (see pp. 15-16, supra), and thus is more amenable to attempts at reasonable accommodation.

The "direct threat" exception of Section 3604(f)(9) is Congress's response to the concern expressed by Kriegsfeld's amicus about the potential "exposure of landlords to claims of other tenants for failing to protect them from the conduct of the offending tenant." AOBA Br. 2. Amicus offers no reason to conclude that this exception -- which has consistently been understood to apply only when a threat cannot be alleviated by reasonable

[7] See, e.g., Roe v. Housing Auth. of Boulder, 909 F. Supp. 814, 816-817 (D. Colo. 1995) (mentally ill tenant engaged in several incidents of "abusive and threatening behavior," the "most serious" of which was when he "struck and injured another resident which required medical treatment including sutures"); Roe v. Sugar River Mills Assocs., 820 F. Supp. 636, 637-638 (D.N.H. 1993) (mentally ill tenant threatened other tenants with physical violence); Foster v. Tinnea, 705 So. 2d 782, 785 (La. Ct. App. 1997) (mentally ill tenant "was involved in several altercations with other tenants, including physical fights on the premises," and "[i]n one incident, he chased small children with a machete and threw a tire tool into a group of children playing on the complex playground").

accommodation -- has proved insufficient to protect landlords against such claims. In adopting that same understanding in this case, the Court would not be breaking new legal ground.[8]

CONCLUSION

For the reasons stated above and in appellant's opening brief, 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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[8] A landlord has other means at its disposal to protect its tenants against threats to their health and safety. If, for example, a tenant's mental illness poses an imminent threat to the safety of others, the District is empowered -- indeed, obligated -- to take action, including commitment to a mental facility. See D.C. Code § 21-541. In such extreme cases, the landlord's duty of reasonable accommodation does not prevent its seeking the District's intervention.