Nos. 12-2096, 12-2239

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL COREY,
Petitioner/Cross-Respondent

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, OFFICE OF THE SECRETARY, ON BEHALF OF: DELORES WALKER, GREGORY WALKER, BY AND THROUGH DELORES WALKER, HIS LEGAL GUARDIAN,
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BRIEF FOR THE SECRETARY AS RESPONDENT/CROSS-PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

LEGISLATIVE HISTORY:

MISCELLANEOUS:

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STATEMENT OF JURISDICTION

Petitioner/Cross-Respondent's statement of jurisdiction is incomplete in that it lacks the basis for the agency's subject matter jurisdiction, complete citations to the statutory provisions establishing the basis for this Court's subject matter jurisdiction, and the filing dates establishing the timeliness of the petition for review.

The administrative law judge (ALJ) and the Secretary of the United States Department of Housing and Urban Development (HUD or the Secretary) had subject matter jurisdiction under 42 U.S.C. 3612(b)-(h). The ALJ issued Initial Decisions and Orders on Fair Housing Act liability and damages that the Secretary set aside on review. These decisions culminated in a Final Agency Order dated August 15, 2012, that awarded damages, assessed a civil penalty, and ordered injunctive relief. On September 7, 2012, petitioner timely sought review in this Court pursuant to 28 U.S.C. 2343 and 2344 (No. 12-2096). On October 5, 2012, the Secretary filed a cross-application for enforcement of HUD's final agency order pursuant to 42 U.S.C. 3612(j) (No. 12-2239). By order dated October 5, 2012, this Court consolidated the two actions.

This Court has jurisdiction over the two actions pursuant to 42 U.S.C. 3612(i), 28 U.S.C. 2342(6), and 42 U.S.C. 3612(j)(1). Venue properly lies in this Court pursuant to 42 U.S.C. 3612(j)(2), because the discriminatory housing practice in this case took place in Charleston, West Virginia, within this Circuit.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Secretary's determination that Michael Corey violated Sections 3604(c), 3604(f)(1), and 3604(f)(2) of the Fair Housing Act.

2. Whether the Secretary acted within his discretion in ordering $18,000 in emotional distress damages, the maximum $16,000 civil penalty, and injunctive relief.

3. Whether this Court should grant the Secretary's Cross-Application for Enforcement of the Final Agency Order.

STATEMENT OF THE CASE

1. On September 29, 2010, HUD filed a Charge of Discrimination (Charge) on behalf of Delores Walker and her brother Gregory Walker (the Walkers), against Petitioner/Cross-Respondent Michael Corey. The Charge alleged that Corey had unlawfully discriminated on the basis of disability[1] in violation of the Fair Housing Act (FHA or the Act)[2] by making facially discriminatory statements in violation of 42 U.S.C. 3604(c); by making housing unavailable because of disability in violation of 42 U.S.C. 3604(f)(1); and by imposing discriminatory terms and conditions because of disability in violation of 42 U.S.C. 3604(f)(2).

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[1] Although the Fair Housing Act uses the term "[h]andicap," see 42 U.S.C. 3602(h), this brief generally uses the term "disability" instead, in accordance with current usage.

[2] In 1988, Congress passed the Fair Housing Amendments Act, which extended protections against housing discrimination under the FHA to, among others, individuals with disabilities. For ease of reference, this brief refers to the statute under which HUD brought this action as the FHA or the Act.

J.A. 1-8.[3] The Charge further alleged that after Walker informed Corey that she would be living with her brother Gregory, who had autism and mental retardation,[4] Corey required Walker to (1) provide a note from Gregory's doctor stating that Gregory would not pose a threat to neighbors or to the subject property; (2) obtain a $1 million renter's insurance policy; and (3) assume responsibility for any damages Gregory caused to the subject property. J.A. 3-4. On November 10, 2010, Corey filed an Answer denying the charges, and arguing that he possessed an "absolute legitimate basis for refusing to rent to" Delores Walker and her brother because they failed to establish that they were financially able to rent the subject property. J.A. 9-12.

2. The ALJ assigned to the case held a hearing on November 29 and 30, 2011, pursuant to 24 C.F.R. Pt. 180. J.A. 257. Following the submission of post-hearing briefs, the ALJ issued an Initial Decision and Order on May 16, 2012 (ALJ's Initial Decision), holding that Corey did not violate the FHA. The ALJ's Initial Decision first concluded that Corey's statements, individually or collectively, did not constitute direct evidence of unlawful discrimination, but

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[3] This brief uses the following abbreviations: "J.A. ___" for the Joint Appendix; and "Br. __" for Petitioner/Cross-Respondent's opening brief filed with this Court.

[4] This brief uses the term "mental retardation" because it is the term used by the parties, but the preferred term for this condition is "intellectual disability."

rather "suggest[ed] that [Corey] wanted to first determine if Gregory's tenancy would present a threat, and if so, whether such risk might be ameliorated by a liability insurance policy." J.A. 265-268. The ALJ's Initial Decision then addressed the issue of whether Corey's statements constituted indirect evidence of an FHA violation sufficient to shift the burden to Corey to demonstrate a legitimate, nondiscriminatory basis for the statements. The ALJ determined that the Charging Party failed to prove a prima facie case of housing discrimination under Sections 3604(f)(1) and (f)(2) because the Walkers did not apply to rent the property, and were not financially qualified to rent the property. J.A. 269-273. The ALJ also found that the Charging Party failed to prove a prima facie case of a Section 3604(c) violation because Corey's request for a doctor's note − the only requirement he imposed after Walker indicated her interest in renting the subject property − was a "nondiscriminatory and reasonable request for information to determine whether Gregory Walker might be a threat to persons or property." J.A. 273-275.

3. The Charging Party petitioned the Secretary for review of the ALJ's Initial Decision. J.A. 278. On June 13, 2012, the Secretary issued an Order on Secretarial Review (June 13 Order) granting the Charging Party's Petition and setting aside the ALJ's Initial Decision. J.A. 278-286. The June 13 Order first determined that Corey's statements constituted direct evidence of a Section

3604(c) violation because they "would suggest to an ordinary listener that [Corey] held a preference or limitation against [the Walkers'] tenancy because of Mr. Walker's disability." J.A. 280-281. The June 13 Order then found that Corey's statements also constituted direct evidence of Section 3604(f)(1) and (f)(2) violations, and that Corey failed to produce the objective evidence needed to assert a direct threat defense of his conduct under Section 3604(f)(9). J.A. 281-283. Finally, the June 13 Order determined that the Charging Party proved that Corey violated Sections 3604(f)(1) and (f)(2) by indirect evidence. With regard to Section 3604(f)(1), because the discrimination in this case occurred at the outset of the application process, the Order rejected the ALJ's use of a standard that requires the Charging Party to show that the alleged victim of discrimination applied for and was qualified to rent the property. J.A. 283-285. In light of these conclusions, the Secretary remanded the proceeding to the ALJ for a determination of damages and a civil penalty. J.A. 285.

4. On remand, the ALJ issued an Initial Decision and Order dated July 16, 2012 (ALJ's Remand Decision). J.A. 288-297. The ALJ's Remand Decision awarded Walker $5,000 in emotional distress damages, out of the $25,000 the Charging Party requested. The ALJ found that Walker suffered "significant emotional distress beyond what [was] typically expected when attempting to secure suitable rental housing," but also found that Corey did not "intentionally

den[y] [the Walkers] a rental opportunity" and his conduct "while insensitive, was not public or particularly outrageous." J.A. 290-291. The ALJ rejected the Charging Party's request for $5000 in inconvenience damages for depriving the Walkers of housing opportunities, because the evidence did not establish that the Walkers' current residence was unsuitable or unsatisfactory. J.A. 292-294. With regard to the civil penalty, the ALJ's Remand Decision analyzed the six factors set forth in 24 C.F.R. 180.671(c)(1) and determined that a civil penalty in the amount of $4000 was appropriate. The ALJ found in relevant part that "[t]he nature and circumstances of the violation in this case do not warrant the imposition of the maximum penalty" of $16,000. J.A. 294-296. Finally, the ALJ ordered Corey to provide HUD with certain information related to his rental properties, including information identifying a rental applicant's disability status, and to participate in fair housing training. J.A. 296-297.

5. Corey petitioned the Secretary for review of the ALJ's Remand Decision, asking the Secretary to vacate the June 13 Order and reinstate the ALJ's Initial Decision. J.A. 299. The Charging Party also petitioned the Secretary for review of the ALJ's Remand Decision, arguing that the ALJ erroneously minimized the Walkers' emotional distress and the evidence demonstrating the need for a

significant civil penalty.[5] J.A. 299-300. On August 15, 2012, the Secretary issued an Order on Secretarial Review (Final Agency Order) denying Corey's Petition, granting in part the Charging Party's Petition, and setting aside the ALJ's assessment of damages and civil penalty. J.A. 299-309. The Final Agency Order first denied Corey's Petition as untimely because Corey failed to file a timely Opposition to the Charging Party's Petition for Review of the ALJ's Initial Decision. J.A. 301-302. The Final Agency Order then found that Corey's conduct was intentional and egregious, and caused Walker significant emotional distress, justifying an award of $18,000 in emotional distress damages. J.A. 302-306. With regard to the civil penalty, the Secretary concluded that the maximum civil penalty of $16,000 was appropriate in light of the intentional nature of the discrimination, Corey's extensive experience as a landlord and ownership of several rental properties, and the need for deterrence of Corey and similarly situated landlords in the future. J.A. 306-308. Finally, the Final Agency Order modified the order of injunctive relief to mandate inclusion of a rental applicant's disability status only if volunteered by the applicant or otherwise known. J.A. 308.

6. On September 7, 2012, Corey filed a timely Petition for Review of the Final Agency Order in this Court, which docketed the Petition as No. 12-2096. On

[5] The Charging Party did not seek review of the ALJ's denial of inconvenience damages.

October 4, 2012, the Secretary filed a Cross-Application for Enforcement of the Final Agency Order, which is docketed as No. 12-2239. By Order dated October 5, 2012, this Court consolidated the two actions.

STATEMENT OF FACTS

Michael Corey is a landlord who, at the time of the hearing, had been in the business of managing rental properties for 15 years and owned 20 to 22 rental units. J.A. 161-162, 225. One of these properties is the subject property, a two-bedroom house located at 5215 Venable Avenue, Charleston, West Virginia. J.A. 30, 132. In April 2009, Corey advertised that the subject property was available for rent and set the monthly rent at $600. J.A. 76, 132, 145. Delores Walker responded to the advertisement and called Corey to discuss the property. J.A. 30, 132. During their conversation, Walker informed Corey that she would be living with her 48-year-old brother, Gregory Walker, for whom she has full custody and is the legal guardian, and that he has been diagnosed with autism and mental retardation.[6] J.A. 25, 28-29, 31, 100, 246-247. According to Walker, Corey immediately responded that she would need to obtain a bond to protect his property

[6] Corey claimed that he first learned that Gregory had autism and mental retardation when he met Walker in person and gave her a tour of the subject property. J.A. 133, 229-230. In his Answer to the Charge of Discrimination, however, Corey admitted that Walker told him about Gregory's disabilities in their initial phone conversation. J.A. 3, 9.

and explained that the lack of such a request in prior conversations Walker had with landlords was because "the people you're talking to do[]n't know the law."[7] J.A. 31-32, 185, 192-193. Walker testified that Corey's request made her "really furious" because she believed it was connected to Gregory's disabilities. J.A. 32.

Despite her anger, Walker made an appointment with Corey to view the subject property to see if it would be appropriate for Gregory and her, and to receive further explanation of Corey's requirements. J.A. 32-33, 194. Walker testified that Gregory has never been violent or aggressive – information that was corroborated both by her landlord and by two longtime friends – and that she told Corey that Gregory was not dangerous. J.A. 37, 65, 91, 179-180, 190, 198-199, 210, 232. Corey nevertheless believed that Gregory's disabilities would result in "a rise in liability"; indeed, he specifically mentioned at the hearing the possibility that Gregory would start a fire at the subject property that spreads to the neighboring house containing three young babies. J.A. 134, 231, 240-241. Corey held this belief despite never having met Gregory and not knowing anything about

[7] Corey admitted on cross-examination that he knows "very little" about the Fair Housing Act and does not know whether the Act protects persons with disabilities. J.A. 162.

him other than that he has autism and mental retardation.[8] J.A. 141. Corey claimed he had previously observed children with autism "flailing their arms and hollering and screaming in outrage" and "running into walls and running around the kitchen and making noise." J.A. 134. Accordingly, Corey (1) asked Walker to provide a note from Gregory's doctor confirming that Gregory's tenancy would not pose such a threat; (2) informed her that she would be required to obtain a $1 million renter's insurance policy so "if [Gregory] attacks somebody in the neighborhood[,] * * * they wouldn't hold [Corey] liable"; and (3) asked her to assume responsibility for any damages Gregory caused to the subject property, such as a fire. J.A. 37-38, 92-93. Corey wrote down these requirements on a sheet of paper Walker provided him:

> 1,000,000 Ins policy to protect land-owner from any problems that might exist due to her brother's condition
> Tenant is to sign a paper to be responsible for any damages caused by her brother
> Note from doctor about brother's condition

J.A. 261; see also J.A. 37-38, 142-143, 194, 237, 245, 250.[9]

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[8] Corey and Walker disagree as to whether Corey ever asked to meet Gregory. Compare J.A. 232 (Corey's testimony) and J.A. 102, 242 (Walker's testimony).

[9] Corey testified that he told Walker that he would require her to obtain a $1 million insurance policy only if the doctor's note indicated that Gregory posed a threat to persons or property; Walker could not recall Corey making the purchase of insurance conditional. J.A. 95, 137-138, 159, 231-232, 238, 244. The ALJ

(continued…)

As Walker was leaving, Corey asked her whether she made the $2000/month in income he deemed necessary to rent the house, and Walker replied affirmatively. J.A. 38, 76, 233, 243. Walker took a rental application and completed part of it, but did not return it to Corey for processing because she felt he would not have rented the house to her. J.A. 38-39, 75, 234, 245. She subsequently called Corey to ask him if he would accept an insurance policy of $500,000, and Corey responded that he would not accept an insurance policy with coverage of less than $1 million. J.A. 39-40, 75, 138, 201-202, 248. A week or so after he advertised the subject property, Corey rented it to Shelley Dearien and her young son, neither of whom are disabled. J.A. 106-109, 139, 158, 235. Corey did not require Dearien to submit a doctor's note showing that she and her son would not be a danger to neighbors or to the subject property, or to purchase liability

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(…continued)
accepted Corey's account. J.A. 261. The Secretary listed the three conditions Corey imposed without mentioning that the insurance requirement was conditional (J.A. 279, 281), indicating that he believed that the requirements Corey set forth were independent of one another. Indeed, if the doctor's note were a condition precedent to the insurance policy, it is highly unlikely that Corey would have put it last on the list of three requirements he presented to Walker. Where, as here, the Secretary and the ALJ disagree on the factual inferences to be drawn from the record, the Secretary's findings are properly subject to this Court's review. See *Morris* v. *Commodities Futures Trading Comm'n*, 980 F.2d 1289, 1293 (9th Cir. 1992). Because the Secretary's factual findings are reasonably supported by the record, they should be adopted by this Court. In any event, it does not matter whether the insurance requirement was conditional, because Corey had no justification for requesting the doctor's note on this record. See pp. 25-29, *infra*.

insurance covering the property. J.A. 109, 158. Nor did he require Dearien to meet the $2000/month income minimum he quoted to Walker, despite his deposition testimony that he does not rent to individuals who do not meet the income requirement. J.A. 124, 149, 151-152, 157, 236.

Corey's words and actions caused Walker significant emotional distress for several months. According to Walker, Corey's actions frustrated her and caused her to fear future discrimination against Gregory: "[I]f somebody else would have told me what Mr. Corey did, I probably would have [gone] off the deep end." J.A. 67. Walker further testified that she was "really mad" at Corey for thinking that her brother could harm others or their property. J.A. 67. These feelings manifested themselves in the form of sleeplessness, panic attacks, and difficulty eating and drinking. J.A. 68-69, 90. Walker's friends and her sister Joyce Bardwill corroborated her testimony concerning her physical symptoms. J.A. 186-187, 201-203, 209-210. Bardwill also testified that Walker "stopped looking for an apartment or a house * * * right after that because she thought everybody else would reject her." J.A. 201.

SUMMARY OF ARGUMENT

The Court should deny Corey's Petition for Review, and grant the Secretary's Cross-Application for Enforcement of HUD's Final Agency Order.

1. Substantial evidence supports the Secretary's determination that Corey violated the Fair Housing Act. Corey's oral and written statements to Walker constituted *direct evidence* of (1) a preference, limitation, or discrimination on the basis of disability, in violation of 42 U.S.C. 3604(c); (2) the making of a dwelling unavailable, because of disability, in violation of 42 U.S.C. 3604(f)(1); and (3) discrimination in the terms and conditions of a rental of a dwelling because of disability, in violation of 42 U.S.C. 3604(f)(2). With regard to the latter two violations, the Secretary correctly concluded that Corey failed to produce objective evidence necessary to assert a direct-threat defense pursuant to 42 U.S.C. 3604(f)(9). Substantial *indirect evidence* also supports the Secretary's finding that Corey violated Sections 3604(f)(1) and (f)(2). The prima facie case standard incorporating financial ability to accept the offer to rent that Corey cites is inapplicable here, because his discriminatory statements were made before any application process had begun.

2. Substantial evidence also supports the Secretary's factual findings underlying his award of damages, a civil penalty, and injunctive relief. Thus, the Secretary acted well within his discretion in ordering these remedies. The record fully supports the Secretary's findings that Corey's actions were intentional and outrageous, and caused Walker significant emotional distress, justifying an $18,000 award for emotional distress damages to Walker. The record also fully

supports the Secretary's findings that Corey impermissibly relied upon stereotypes and fears about individuals with autism and mental retardation; was highly culpable because of his extensive experience in managing rental properties; and should be deterred, along with similarly situated landlords, from imposing discriminatory conditions in future transactions −justifying the maximum civil penalty of $16,000. Finally, the Secretary acted well within his discretion in awarding modest injunctive relief to prevent a recurrence of the discriminatory acts in this case.

3. Because substantial evidence supports the Secretary's determinations regarding liability and relief, and the petition for review is without merit, this Court should grant the Secretary's Cross-Application for Enforcement of the Final Agency Order.

ARGUMENT

I

SUBSTANTIAL EVIDENCE SUPPORTS THE SECRETARY'S DETERMINATION THAT COREY VIOLATED SECTIONS 3604(c), 3604(f)(1), AND 3604(f)(2) OF THE FAIR HOUSING ACT

A. Standard Of Review

Pursuant to the Administrative Procedure Act, "federal courts can overturn an administrative agency's decision only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,' or 'unsupported by

substantial evidence.'" *Knox* v. *United States Dep't of Labor*, 434 F.3d 721, 723 (4th Cir. 2006) (quoting 5 U.S.C. 706(2)(A) and (E) (2005)); see also *Michael* v. *FDIC*, 687 F.3d 337, 348 (7th Cir. 2012) (quoting 5 U.S.C. 706(2)(A) as standard of review for an agency's legal determinations). An agency's factual determinations are subject to the substantial-evidence standard, which requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Almy* v. *Sebelius*, 679 F.3d 297, 301-302 (4th Cir. 2012) (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)), petition for cert. pending, No. 12-356 (filed Sept. 21, 2012). This standard mandates a "necessarily * * * limited" appellate review of such determinations: this Court "do[es] not undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the Secretary." *Id.* at 302 (quoting *Craig* v. *Chater*, 76 F.3d 585, 589 (4th Cir. 1996)).

B. Substantial Direct Evidence Supports The Secretary's Determination That Corey Violated The Fair Housing Act

The Secretary may prove a Fair Housing Act violation by showing "that a defendant had a discriminatory intent either directly, through direct or circumstantial evidence, or indirectly, through the inferential burden shifting method known as the *McDonnell Douglas* test." *Kormoczy* v. *HUD*, 53 F.3d 821, 823-824 (7th Cir. 1995). "Direct evidence is that which can be interpreted as an acknowledgment of the defendant's discriminatory intent." *Id.* at 824. "Where

direct evidence is used to show that a housing decision was made in violation of the statute, the burden shifting analysis is inapposite." *Ibid.*; see also *Pinchback* v. *Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir.) (direct evidence of discrimination is sufficient to support a finding of discrimination without resort to the *McDonnell Douglas* test), cert. denied, 498 U.S. 983 (1990). The Secretary correctly determined that substantial direct evidence establishes that Corey violated Sections 3604(c), (f)(1), and (f)(2) of the Fair Housing Act.

1. Direct Evidence Shows That Corey Violated Section 3604(c) Of The Fair Housing Act

Section 3604(c) of the Fair Housing Act prohibits oral or written statements with respect to the rental of a dwelling that indicate a "preference, limitation, or discrimination" based upon certain enumerated grounds, including disability. 42 U.S.C. 3604(c); see also 24 C.F.R. 100.75(c)(2) (prohibited statements include expressing to prospective renters or any other persons "a preference for or limitation on" any renter because of disability). To determine whether a statement violates Section 3604(c), courts ask whether "the alleged statement would suggest to an 'ordinary listener' that a person with a particular [disability] is preferred or disfavored for the housing in question." *White* v. *HUD*, 475 F.3d 898, 905-906 (7th Cir. 2007) (citation omitted); see also *United States* v. *Hunter*, 459 F.2d 205, 215 (4th Cir.) (adopting "ordinary reader" standard to determine whether advertisements violated Section 3604(c)), cert. denied, 409 U.S. 934 (1972). In

applying the "ordinary listener" standard to allegedly discriminatory statements, courts should examine context to determine "the manner in which a statement was made and the way an ordinary listener would have interpreted it." *Soules* v. *HUD*, 967 F.2d 817, 825 (2d Cir. 1992). A landlord's motivation for making the statements at issue is immaterial; discriminatory statements will violate Section 3604(c) even if the speaker had no intent to discriminate. See *Jancik* v. *HUD*, 44 F.3d 553, 556 (7th Cir. 1995).

The evidence amply demonstrates that Corey made oral and written statements suggesting to the "ordinary listener" that he held a preference or limitation against the Walkers' tenancy because of Gregory's disabilities. During Corey's and Walker's initial phone conversation, after Walker told Corey that Gregory had autism and mental retardation, Corey informed Walker that she would need to obtain a bond to protect his property. J.A. 31, 185, 192-193. During the in-person tour of the subject property, Corey notified Walker that she would have to satisfy the following conditions to rent the subject property: (1) a $1 million liability insurance policy so that Corey would not be held liable if Gregory attacked someone; (2) a signed document stating that she assumed responsibility for damages Gregory caused, such as a fire that burns down the subject property; and (3) a doctor's note stating that Gregory was not dangerous. J.A. 37-38, 92-93. Corey memorialized these conditions in a handwritten note that made clear the

nexus between the conditions and Gregory's disabilities:

> 1,000,000 Ins policy to protect land-owner from any problems that might exist due to her brother's condition
> Tenant is to sign a paper to be responsible for any damages caused by her brother
> Note from doctor about brother's condition

J.A. 261; see also J.A. 37-38, 142-143, 194, 237, 245, 250. Corey subsequently confirmed that these statements were the result of his fear that Gregory could harm the subject property or neighbors by starting a fire. J.A. 134, 231, 240-241. This direct evidence that Corey disfavored the Walkers as tenants because of Gregory's disabilities is clearly sufficient to support the Secretary's determination that Corey's oral and written statements setting forth discriminatory conditions for rental violated Section 3604(c). See *HUD* v. *Gruen*, HUDALJ 05-99-1375-8, 2003 WL 973495, at *4 (Feb. 27, 2003) ("Statements expressing a landlord's stereotypical beliefs about a protected group are direct evidence of that landlord's intent to discriminate against members of that group.").

Corey's initial defense to the Section 3604(c) charge is that he made the statements at issue in response to Walker's informing him of Gregory's disabilities, which he claims raised concerns about an increased liability risk. Br. 20-21. Corey fails to provide any legal support for the novel proposition that otherwise discriminatory statements are immunized from liability if they are made in response to information proffered by a potential tenant. Indeed, the Fair

Housing Act contains no defense negating Section 3604(c)'s blanket coverage of "*any* * * * statement" with respect to the rental of a dwelling that evinces a preference for or limitation against a renter based upon a protected characteristic. 42 U.S.C. 3604(c) (emphasis added). Corey's argument has no basis in law for good reason. In many instances, such as this case, the housing provider may not be aware that the aggrieved party is a member of a protected group until being informed of that fact. Precluding liability for a landlord's response, no matter how egregiously discriminatory, would gut the protections of Section 3604(c). Accordingly, Corey's statements violate the Act whether or not he made them in response to Walker's remark that her brother was disabled. See, *e.g.*, *HUD* v. *French*, HUDALJ 09-93-1710-8, 1995 WL 542098, at *2, *9 (Sept. 12, 1995) (finding respondent's statement that "we don't rent upstairs units to people with children," when notified by complainant that she would be living with infant daughter, to violate Section 3604(c)).

Corey's contention (Br. 21) that "[l]anguage regarding the responsibility for damages caused by tenants is contained in all of [his] leases" misses the point. The condition that Walker sign an acknowledgement of responsibility for any damages Gregory caused was not redundant of the responsibility-for-damages clause in the standard form lease, as the ALJ found. See J.A. 268. Instead, it was an additional pre-lease statement that Corey required in order to rent the subject property to the

Walkers, but did not require of prospective tenants who were not disabled. This requirement thus impermissibly singled Gregory out for his disabilities, based upon Corey's misguided stereotyping of individuals with autism and mental retardation.

Corey's justification (Br. 11, 21-25) of his statements as an attempt to gauge the risk Gregory would pose to the subject property is also without merit. As a threshold matter, Corey's citation (Br. 22-23) of 42 U.S.C. 3604(f)(9), the statutory provision allowing discrimination against tenants who pose a direct threat to others or their property, and the Joint Statement of HUD and the Justice Department interpreting that provision, misses the mark. By its plain terms, Section 3604(f)(9) provides a possible defense to charges under Section 3604(f), and not to charges under Section 3604(c). See 42 U.S.C. 3604(f)(9) ("Nothing in *this subsection*.") (emphasis added); *HUD* v. *Williams*, HUDALJ 02-89-0459-1, 1991 WL 442796, at *13 (Mar. 22, 1991) (interpreting Section 3604(f)(9) to provide "that nothing *in subsection (f)* 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") (emphasis added). No more persuasive is Corey's suggestion (Br. 21, 23-25) that the statements at issue were necessary after Walker did not accede to his request to meet Gregory in person, a requirement he claims to impose upon every tenant before approving a lease application. Even assuming, *arguendo*, that Corey asked Walker to meet Gregory and made this request before he made the

discriminatory statements – a matter over which there is a factual dispute, see note 8, *supra* – this request does not excuse his subsequent discriminatory statements from liability under Section 3604(c).

2. Direct Evidence Shows That Corey Violated Sections 3604(f)(1) And (f)(2) Of The Fair Housing Act

Section 3604(f)(1) of the Fair Housing Act prohibits discriminating in the rental of a dwelling, or otherwise denying or making the dwelling unavailable, because of a disability of a person intending to reside in that dwelling after it is rented or made available. As indicated above, Section 3604(f)(2) of the Act prohibits discriminating "against any person in the terms, conditions, or privileges" of a rental of a dwelling because of the disability of a person intending to reside in that dwelling after it is rented. Section 3604(f)(9) of the Act contains a limited exception to the above prohibitions on disability discrimination if renting the property to an individual would directly threaten others or their property: "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."

The record demonstrates that the oral and written statements at issue in this case both (1) made the subject property unavailable because of Gregory's disabilities; and (2) discriminated in the terms or conditions of the rental of the

subject property because of Gregory's disabilities. As noted, Corey learned that Gregory was a person with autism and mental retardation, and then imposed the following conditions upon the Walkers' tenancy of the subject property: (1) a $1 million liability insurance policy; (2) Delores Walker's assumption of responsibility for damages caused by her brother; and (3) a doctor's note. See pp. 18-19, *supra*. Corey subsequently declined Walker's counter-offer of a $500,000 insurance policy. J.A. 39-40, 75, 138, 201-202, 248. Corey admitted that he imposed these conditions because of a fear of increased liability due to Gregory's disabilities, see p. 19, *supra*, and that he did not impose the same conditions upon the nondisabled individual to whom he eventually rented the subject property (J.A. 158; see also J.A. 109). Walker stated that she did not return a completed rental application form to Corey because she believed that he would not rent the property to her. J.A. 38-39, 75, 234, 245.

This direct evidence of the conditions Corey imposed is more than adequate to show that Corey made the property unavailable to the Walkers because of Gregory's disabilities, by refusing to negotiate on non-discriminatory terms and discouraging Walker from completing the rental application, in violation of Section 3604(f)(1). See *United States* v. *Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973) (interpreting "otherwise make unavailable" language in Section 3604(a) to include "[t]he imposition of more burdensome application procedures,

of delaying tactics, and of various forms of discouragement by resident managers and rental agents"), aff'd and remanded in part, 509 F.2d 623 (9th Cir. 1975).[10] Indeed, any application by Walker would have been futile. See *Pinchback*, 907 F.2d at 1452. This direct evidence is also beyond sufficient to demonstrate discriminatory terms and conditions in the rental of the property because of Gregory's disabilities, in violation of Section 3604(f)(2). See, *e.g.*, *HUD* v. *Twinbrook Vill. Apartments*, HUDALJ 02-00-0256-8, 02-00-0257-8, 02-00-0258-8, 2001 WL 1632533, at *17-18 (Nov. 9, 2001) (landlord's requirement that tenants with disabilities obtain liability insurance and exemption of tenants without disabilities from requirement constituted direct evidence of discriminatory terms and conditions); *HUD* v. *Country Manor Apartments*, HUDALJ 05-98-1649-8, 2001 WL 1132715, at *6-7 (Sept. 20, 2001) (same).

Corey asserts (Br. 18-19) that the Charging Party may have had a mixed-motive case of intentional discrimination based upon disability, but that he is not liable under this standard because he would not have rented Walker the subject property due to her inability to meet his minimum $2000/month income requirement. In a typical mixed-motive case, the plaintiff presents direct evidence of discrimination that the defendant can rebut by "proving that it would have made

[10] Because Section 3604(a) and Section 3604(f)(1) both include the "otherwise make unavailable" language, case law interpreting the former is relevant to interpreting the latter. See note 12, *infra*.

the same decision in the absence of the discriminatory motivation." *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004), cert. dismissed, 543 U.S. 1132 (2005). Walker's ability to pay, however, could not have possibly motivated Corey's imposition of discriminatory conditions upon the Walkers' tenancy that made the rental unavailable. Corey learned of Walker's financial qualifications well *after* he imposed the discriminatory conditions, and such "after-acquired evidence" of a lawful justification for illegal discrimination cannot excuse that discrimination. See, *e.g.*, *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358-359 (1995) (stating that it would contravene the purpose of federal anti-discrimination statutes if after-acquired evidence of a lawful justification for a discriminatory action barred all relief for the earlier illegal discrimination). Indeed, Corey failed to impose the same condition upon the individual without disabilities to whom he rented the subject property and who also did not meet the income requirement (J.A. 109, 123-124, 151-152, 158), thus confirming that disability was the sole motivating factor for the actions at issue.

Under the most generous interpretation of Corey's brief, he also defends against (Br. 22-23) the Secretary's determination that direct evidence showed that he violated Sections 3604(f)(1) and (f)(2) by resort to the direct-threat defense of Section 3604(f)(9) – which he discusses in the part of his brief addressing Section 3604(c). Because Section 3604(f)(9) provides an exemption to the Fair Housing

Act's prohibition on discrimination, it must be "narrowly construed." *Bangerter* v. *Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995). To that end, such an exemption "cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents." *Ibid.*; see also *Groome Res. Ltd.* v. *Parish of Jefferson*, 234 F.3d 192, 202 (5th Cir. 2000) ("Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.") (citing H.R. Rep. No. 711, 100th Cong., 2d Sess. 29 (1988)). Individual tailoring of the exemption "requires 'objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated inferences, that the applicant will pose a direct threat to the health and safety of others.'" *United States* v. *Massachusetts Indus. Fin. Agency*, 910 F. Supp. 21, 27 (D. Mass. 1996) (quoting H.R. Rep. No. 711, 100th Cong., 2d Sess. 30 (1988)). Proof of a diagnosis alone is insufficient to justify discrimination based upon disability. See, *e.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (concerns that allowing the establishment of a group home for individuals with mental retardation would physically endanger the community were unfounded, because similar concerns attached to locating apartment and fraternity houses in the same location).

Corey does not come close to meeting this exacting standard. He admitted that he never met Gregory and did not know anything about him other than that he

had autism and mental retardation. J.A. 141. Instead, he based his fear of increased liability due to Gregory's tenancy upon asserted previous observations of children with autism "flailing their arms and hollering and screaming in outrage" and "running into walls and running around the kitchen and making noise." J.A. 134. In other words, Corey did not have *any* evidence, much less "objective evidence that is sufficiently recent as to be credible," *Massachusetts Industrial Finance Agency*, 910 F. Supp. at 27, that Gregory – a 48-year-old man – posed a direct threat to the health and safety of others. Without the required objective evidence, Corey resorted to "blanket stereotypes," *Bangerter*, 46 F.3d at 1503, about individuals with autism and mental retardation to justify the discriminatory conditions he placed upon the Walkers' tenancy. This conduct is the very type of unlawful discrimination the FHA proscribes. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988) (noting that amendments to FHA that add protections for individuals with disabilities are "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream," which "repudiate[] the use of stereotypes and ignorance, and mandate[] that persons with handicaps be considered as individuals").

To the extent that Corey is arguing (see Br. 23) that his discriminatory statements were a permissible attempt to obtain the "objective evidence" necessary to invoke Section 3604(f)(9), his argument is contrary to both the facts in this case

and the law. The relevant HUD regulation prohibits a landlord from inquiring about "the nature or severity of a handicap of" a person who intends to reside in a dwelling after it is rented. 24 C.F.R. 100.202(c). The regulation goes on to list five exceptions for inquiries that apply to *all* applicants, whether or not they have handicaps. None of these exceptions relate to whether the potential tenant poses a direct threat to persons or property. See 24 C.F.R. 100.202(c)(1)-(5). Indeed, the Joint Statement between the Justice Department and HUD Corey cites (Br. 23) to buttress his argument on this issue makes the very same point – that it is "usually unlawful" to inquire about the nature or severity of a potential tenant's disability, subject to a few exceptions for generally applicable inquiries. See Question 16, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 17, 2004) (HUD/DOJ Joint Statement), *available at* http://www.justice.gov/crt/about/hce/jointstatement_ra.php. [11] Corey's request for

[11] These legal authorities indicate that the proper course for a housing provider to determine whether a prospective tenant may be violent or destructive is to ask pertinent questions of all applicants, not just those with disabilities. See Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3245 (Jan. 23, 1989) (stating that "[a] housing provider may consider for *all* applicants, including handicapped applicants, such concerns as past rental history, violations of rules and laws, a history of disruptive, abusive, or dangerous behavior," but "may not presume that applicants with handicaps are less likely to be qualified than applicants without handicaps"); HUD/DOJ Joint Statement, Question 5, Example 1 (explaining that where a landlord knew that an applicant

(continued…)

a doctor's note stating that Gregory was not dangerous (J.A. 137) was clearly an inquiry into the nature and severity of Gregory's disabilities. The accompanying requirements that Walker purchase a $1 million liability insurance policy and take responsibility for damages Gregory caused cannot in any way be construed as a request for information. Rather, they make clear that Corey *assumed* that Gregory's disabilities were severe and rendered him dangerous. Because Corey's inquiries and directives singled the Walkers out for adverse treatment, and did not fit any of the exceptions the law allows, they were not permissible. See 24 C.F.R. 100.202(c).

C. Substantial Indirect Evidence Of Discriminatory Intent Also Supports The Secretary's Determination That Corey Violated Sections 3604(f)(1) And (f)(2) Of The Fair Housing Act

In addition, substantial *indirect* evidence of discriminatory intent supports the Secretary's determination that Corey violated Sections 3604(f)(1) and (f)(2) of the Fair Housing Act. Proof of FHA liability by indirect evidence generally requires application of the *McDonnell Douglas* balancing test. See *Kormoczy*, 53 F.3d at 823-824. Under this test, the plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. *McDonnell*

(…continued)
was a recovering alcoholic, he was not permitted to reject her application solely for that reason, but "could have checked this applicant's references *to the same extent and in the same manner* as he would have checked any other applicant's references") (emphasis added).

Douglas Corp. v. *Green*, 411 U.S. 792, 802 (1973). The prima facie case the plaintiff must make depends on the particular factual situation. See *id.* at 802 n.13. Once the plaintiff makes the prima facie case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action. *Id.* at 802. If the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance of the evidence that the legitimate reasons asserted by the defendant are mere pretext. See *id.* at 804.

In analyzing the Section 3604(f)(1) claim, the Secretary correctly applied the prima facie standard from *HUD* v. *Ro*, HUDALJ 03-93-0313-8, 1995 WL 326736, at *5 (June 2, 1995), and rejected the ALJ's application of the prima facie standard from *Mencer* v. *Princeton Square Apartments*, 228 F.3d 631, 634 (6th Cir. 2000). These two cases set forth different standards based upon when the alleged discrimination occurred.[12] See *McDonnell Douglas*, 411 U.S. at 802 n.13. In *Mencer*, because the defendant rejected the plaintiffs' attempt to rent their property *after reviewing their rental application and evaluating their financial stability*, the prima facie case required the plaintiffs to show, *inter alia*, that they applied for and

[12] Both *Ro* and *Mencer* addressed prima facie cases under 42 U.S.C. 3604(a), a statutory provision similarly worded to Section 3604(f)(1) that prohibits discrimination in renting based upon race, color, religion, sex, familial status, or national origin. Given the similarities in language between the two provisions, caselaw interpreting one is relevant to interpreting the other. See, *e.g.*, *Cox* v. *City of Dallas*, 430 F.3d 734, 740 & n.10 (5th Cir. 2005), cert. denied, 547 U.S. 1130 (2006).

were qualified to rent the property at issue. See 228 F.3d at 634. In *Ro*, by contrast, the respondent refused to consider renting the property to the aggrieved party *even before the application process began*, and therefore the prima facie case did not require a showing that the aggrieved party applied for and was qualified to rent the property. See 1995 WL 326736, at *3, *5. This case is factually similar to *Ro*: Corey imposed the three conditions upon the Walkers' tenancy before giving Walker a rental application and considering her financial qualifications to rent the subject property, thus deterring the Walkers from pursuing rental of the property. To establish discriminatory intent by indirect evidence, the Charging Party was therefore required to prove that (1) Gregory is a member of a protected class; (2) Walker made an inquiry about, or attempted to rent, the subject property; (3) Corey refused to negotiate the rental with Walker, or otherwise made it unavailable to her; and (4) Corey expressed a willingness to rent the subject property to an individual who is not in the same protected class as Gregory. See *Ro*, 1995 WL 326736, at *5.

The Secretary correctly determined that the record established each of the *Ro* elements, and thus established a prima facie case of discrimination under Section 3604(f)(1). First, the record indicates that Gregory has autism and mental retardation (J.A. 31), and is therefore a member of a protected class – individuals with disabilities. See 42 U.S.C. 3602(h); 24 C.F.R. 100.201(a)(2). Second,

Walker inquired about the subject property during an initial phone call with Corey, toured the property with Corey, and accepted a rental application at the conclusion of the in-person meeting. J.A. 30, 32-33, 38, 132, 194, 234, 245. Third, the record indicates that the application was conditional: Corey required Walker to purchase a $1 million liability insurance policy, and refused her counter-offer of an insurance policy for half of this amount. He also required Walker to provide a note from Gregory's doctor, and to sign a statement assuming responsibility for any damages Gregory caused. J.A. 37-40, 75, 138, 142-143, 194, 201-202, 237, 245, 248, 250. Because Corey refused to negotiate on non-discriminatory terms and discouraged Walker from completing the rental application, he made the property unavailable to the Walkers. See *Youritan Constr. Co.*, 370 F. Supp. at 648. Fourth, the record indicates that Corey rented the subject property to a person without a disability, on whom he did not impose the same conditions. J.A. 106-109, 139, 158, 235.

The Secretary also correctly determined that the record established a prima facie case of discrimination under Section 3604(f)(2). To establish a prima facie case of disparate treatment under Section 3604(f)(2), the Charging Party must show that (1) Gregory is a member of a protected class, and (2) the Walkers were subjected to terms and conditions that were less favorable than those offered to individuals outside the protected class. See *Khalil* v. *Farash Corp.*, 452 F. Supp.

2d 203, 208 (W.D.N.Y. 2006) (setting forth prima facie case of disparate treatment under Section 3604(b)).[13] As noted above, Gregory is a member of a protected class – individuals with disabilities. Because of Gregory's disabilities, Corey subjected the Walkers to three conditions to which he did not subject the individual without a disability to whom he rented the property.

To be sure, after determining that the Charging Party had established the prima facie violations of Sections 3604(f)(1) and (f)(2), the Secretary did not shift the burden back to Corey to show a "legitimate, nondiscriminatory reason" for his actions before concluding that they violated these provisions of the Act. J.A. 285. On this record, it was permissible for the Secretary to decline to do so. "Where the evidence behind the prima facie showing is strong, it may, standing alone, justify a finding of intentional discrimination." *United States* v. *Redondo-Lemos*, 27 F.3d 439, 442 (9th Cir. 1994) (applying *McDonnell Douglas* test and citing *St. Mary's Honor Ctr*. v. *Hicks*, 509 U.S. 502, 511 (1993)). In this case, the evidence supporting the Charging Party's prima facie case demonstrated that Corey imposed three conditions upon the Walkers' tenancy because of Gregory's disabilities; that

[13] As with Section 3604(f)(1) and Section 3604(a), the language of Section 3604(f)(2) is substantially similar to that of Section 3604(b), with the difference again being that the former addresses discrimination based on handicap, rather than race, color, religion, sex, familial status, or national origin. See *A Society Without A Name* v. *Virginia*, 655 F.3d 342, 350 (4th Cir. 2011), cert. denied, 132 S. Ct. 1960 (2012).

he had no basis to impose these conditions other than impermissible stereotyping, because he had never met Gregory and knew nothing about him other than that he had autism and mental retardation; and that he did not impose the same conditions upon the individual without a disability to whom he rented the property. J.A. 37-38, 92-93, 109, 134, 141, 158, 231, 240-241. Based upon these conditions, any application by Walker would have been futile. See *Pinchback*, 907 F.2d at 1452. This evidence overwhelming establishes intentional discrimination. Having rejected Corey's assertion of a direct-threat defense earlier in his order, there was no need for the Secretary to reiterate his unequivocal view that Corey's proffered justifications for his actions were based precisely and solely upon the type of unfounded speculation that the FHA condemns.

Corey's argument on this issue confirms the correctness of the Secretary's decision. His argument consists of little more than asserting that the correct prima facie standard for Sections 3604(f)(1) and (f)(2) incorporates the financial ability to accept the offer to rent, which he claims Walker was unable to satisfy because she did not submit a completed rental application or meet his $2000/month income requirement to rent the subject property. Br. 11, 13-20. Absent from this argument is any acknowledgment that the Secretary applied the prima facie standard set forth in *Ro* that correctly did not include this factor −much less an attempt to show that the Secretary erred in this regard. See J.A. 284-285. Equally

unavailing is Corey's assertion (Br. 18) that his income requirement is a legitimate, nondiscriminatory reason for his actions that rebuts the Charging Party's prima facie case. The discriminatory conditions Corey imposed upon the Walkers' tenancy because of Gregory's disabilities in no way furthers his goal of having a tenant who makes a specified minimum income; in any event, Corey's failure to apply this requirement to the individual without a disability to whom he rented the property (J.A. 124, 149, 151-152, 157, 236), reveals that such a requirement was a pretext. Because Corey insists on asserting irrelevant straw men such as "[t]he Fair Housing Act affirmatively shows that it was not designed to guarantee housing to those unable to afford it" (Br. 14), instead of making relevant challenges to the Secretary's determination, this Court should reject his argument.

II

THE SECRETARY ACTED WITHIN HIS DISCRETION IN ORDERING $18,000 IN EMOTIONAL DISTRESS DAMAGES, THE MAXIMUM $16,000 CIVIL PENALTY, AND INJUNCTIVE RELIEF

A. Standard Of Review

Federal courts of appeals review the Secretary's award of damages, a civil penalty, and injunctive relief for abuse of discretion, and his analysis of the underlying factors relevant to the imposition of such remedies for substantial evidence. See *Morgan* v. *Secretary of Hous. & Urban Dev.*, 985 F.2d 1451, 1458 (10th Cir. 1993). This Court will not overturn an award of damages for intangible

harms, such as emotional distress, unless such an award "is grossly excessive or shocking to the conscience." *Fox* v. *General Motors Corp.*, 247 F.3d 169, 180 (4th Cir. 2001) (citation omitted).

B. The Secretary Acted Within His Discretion In Awarding Walker $18,000 In Damages For Emotional Distress

The Fair Housing Act permits an ALJ, upon finding a violation of the Act, to award "actual damages suffered by the aggrieved person." 42 U.S.C. 3612(g)(3)(A). The Act also permits the Secretary to review an ALJ's damages award and modify it. 42 U.S.C. 3612(h); 24 C.F.R. 180.675(a). Compensatory damages include damages for emotional distress caused by housing discrimination. See *United States* v. *Long*, 537 F.2d 1151, 1154 & n.8 (4th Cir. 1975), cert. denied, 429 U.S. 871 (1976). "[I]n determining whether the evidence of emotional distress is sufficient to support an award of damages, [a court] must look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused that distress." *United States* v. *Balistrieri*, 981 F.2d 916, 932 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993); see also *HUD* v. *Parker*, HUDALJ 10-E-170-FH-19, 2011 WL 5433810, at *7 (Oct. 27, 2011) ("Key factors in determining emotional distress damages are the [aggrieved party's] reaction to the discriminatory conduct and the egregiousness of the Respondents' behavior."). The direct evidence of emotional distress may take the form of the victim's testimony; medical evidence of physical symptoms of emotional distress is not

required. See *Morgan*, 985 F.2d at 1459.

The Secretary's award of $18,000 in emotional distress damages, and his setting aside of the ALJ's award of $5000 for the same, is rational and fully supported by the evidence. First, with regard to the circumstances of the act that allegedly caused Walker's distress, a reasonable mind could conclude that Corey's conduct was egregious. "[A]n intentional, particularly outrageous or public act of discrimination generally justifies a higher emotional award, because such an act will 'affect the plaintiff's sense of outrage and distress.'" *Parker*, 2011 WL 5433810, at *7 (quoting Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 25:6, at 25-35 (1990)). The evidence demonstrates that Corey's conduct was both intentional and outrageous. As the Secretary found, Corey purposefully imposed three conditions upon the Walkers' tenancy and related these conditions to the possibility of Gregory's burning down the house and attacking neighbors. J.A. 37-38, 92-93. Corey's concern about the harm Gregory might inflict upon the subject property and neighbors was baseless, as he never met Gregory and knew nothing about him other than he was diagnosed with autism and mental retardation. J.A. 141. Absent objective knowledge of any danger Gregory posed, Corey justified the discriminatory conditions based upon his asserted previous observations of children with autism running wild and screaming (J.A. 134) – precisely the type of unfounded generalizations and stereotypes of

individuals with disabilities that the Fair Housing Act is designed to combat. Accordingly, Corey's conduct was sufficiently egregious to warrant a substantial emotional distress award. See, *e.g.*, *HUD* v. *Twinbrook Vill. Apartments*, HUDALJ 02-00-0256-8, 02-00-0257-8, 02-00-0258-8, 2001 WL 1632533, at *19-21 (Nov. 9, 2001) (finding respondents' refusal to build ramp for wheelchair users unless they agreed to purchase liability insurance demonstrated "thoughtlessness and indifference," warranting substantial emotional distress award).

The evidence also showed that Corey's conduct caused Walker significant emotional distress. Walker testified that Corey's actions frustrated her and caused her to fear future discrimination against Gregory: "[I]f somebody else would have told me what Mr. Corey did, I probably would have [gone] off the deep end." J.A. 67. Walker further testified that she was "really mad" at Corey for thinking that her brother could harm others or their property. J.A. 67. This anger manifested itself in sleeplessness, panic attacks, and difficulty eating and drinking. J.A. 68-69, 90. Walker's friends and her sister corroborated her testimony on her physical symptoms, and her sister confirmed that Walker feared being rejected for housing again. J.A. 186-187, 201-203, 209-210. This testimony on the effect of Corey's discrimination against Gregory is more than sufficient to support the Secretary's award of damages to Walker for her emotional distress. See, *e.g.*, *HUD* v. *Fung*, HUDALJ 07-053-FH, 2008 WL 366380, at *13-15 (Jan. 31, 2008) (awarding

$30,000 in emotional distress damages to African-American sub-tenant who felt depressed, cried, and feared the possibility of suffering another discriminatory episode after being denied rental opportunity), aff'd, *Ho* v. *Donovan*, 569 F.3d 677 (7th Cir. 2009); *HUD* v. *Godlewski*, HUDALJ 07-034-FH, 2007 WL 4578553, at *3-6 (Dec. 21, 2007) (awarding $18,000 in emotional distress damages to aggrieved party who was "very overprotective" of her son and experienced migraines, temporary paralysis, and cold sensations after reading a "for rent" sign that stated "no kids"), corrected Dec. 27, 2007.

Without labeling it as such, Corey appears to challenge (Br. 24-25) the Secretary's award of emotional distress damages on the ground that his statements were legitimate requests designed to protect his property and minimize his liability, not derogatory comments about Gregory; therefore, any damages that Walker sustained were the result of her overreaction to his statements. This argument, which is belied by the evidence, rests upon the false premise that only explicitly insulting language can cause emotional distress. The ALJ who heard this case has previously rejected this argument, observing that "[n]othing in the Fair Housing Act or HUD regulations suggest that discriminatory conduct must be paired with open hostility." *Parker*, 2011 WL 5433810, at *8. Accordingly, HUD satisfied its burden by showing that Corey imposed discriminatory conditions on the Walkers' tenancy because of Gregory's disabilities, and that this conduct caused Walker

emotional distress. Corey's assertion that Walker overreacted to his statements is irrelevant: "Where a victim is more emotionally affected than another might be under the same circumstances, and the harm is felt more intensely, he/she deserves greater compensation for the discrimination that caused the suffering." *Godlewski*, 2007 WL 4578553, at *5.

C. The Secretary Acted Within His Discretion In Assessing The Maximum Civil Penalty Against Corey And Injunctive Relief

The Fair Housing Act authorizes an ALJ to assess a civil penalty against a violator of the Act "to vindicate the public interest." 42 U.S.C. 3612(g)(3). The Secretary may modify the civil penalty assessed by the ALJ. 42 U.S.C. 3612(h); 24 C.F.R. 180.675(a). The Act and its implementing regulations set the maximum penalty at $16,000 for a party such as Corey who "has not been adjudged to have committed any prior discriminatory housing practice." 42 U.S.C. 3612(g)(3)(A); 24 C.F.R. 180.671(a)(1). The implementing regulations further direct the ALJ to consider the following factors in determining the proper amount of civil penalty: Whether the respondent has previously been adjudged to have committed unlawful housing discrimination; the respondent's financial resources; the nature and circumstances of the violation; the degree of the respondent's culpability; the goal of deterrence; and other factors as justice may require. 24 C.F.R. 180.671(c)(1).

The record contains substantial evidence supporting the Secretary's conclusion that the maximum civil penalty of $16,000 was warranted in this case,

and that the ALJ's award of $4000 was inadequate. With regard to the nature and circumstances of the violation, the Secretary reasonably concluded that Corey's conduct was egregious. Corey imposed discriminatory conditions upon the Walkers' tenancy because of a baseless concern that Gregory would harm the subject property and neighbors and increase Corey's liability. J.A. 134, 231, 240-241. Having never met Gregory, and knowing nothing about him other than his diagnoses of autism and mental retardation, Corey justified these conditions based upon his asserted previous observations of children with autism running wild and screaming. J.A. 134, 141. This impermissible reliance on stereotypes and fears about individuals with autism and intellectual disabilities warrants the maximum civil penalty. See, *e.g.*, *HUD* v. *Ross*, HUDALJ 01-92-0466-8, 1994 WL 326437, at *9 (July 7, 1994) (awarding maximum civil penalty where landlord refused to rent to Hispanics based upon stereotypes of their fitness as tenants); *HUD* v. *Jancik*, HUDALJ 05-91-0969-1, 1993 WL 388608, at *10 (Oct. 1, 1993) (awarding maximum civil penalty where landlord's statements included stereotypes of children), aff'd, 44 F.3d 553 (7th Cir. 1995).

The degree of culpability factor also supports the Secretary's decision. It is undisputed that Corey is an experienced landlord who, at the time of the hearing, had been in the business of managing rental properties for 15 years and owned 20 to 22 rental units. J.A. 161-162, 225. Walker testified that Corey told her in their

initial phone conversation that the law supported his request for a $1 million liability policy to protect his property. J.A. 31-32. Despite his experience and professed legal knowledge, Corey admitted that he knows "very little" about the Fair Housing Act and does not know whether the Act protects the disabled. J.A. 162. There is no excuse for someone in Corey's position to be ignorant of the law on an issue fundamental to his business. See, *e.g.*, *HUD* v. *Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990) (upholding maximum civil penalty based in part upon ALJ's observation that as a "licensed real estate broker with nearly 20 years experience, [respondent] knew or should have known that his actions were not only wrongful, but also, were unlawful"). He therefore bears a high degree of culpability for his conduct.

Finally, the goal of deterrence supports the maximum civil penalty. This factor takes into account both deterrence to the landlord found liable for violating the FHA and general deterrence to other landlords. See *Krueger* v. *Cuomo*, 115 F.3d 487, 493 (7th Cir. 1997) (affirming civil penalty where ALJ considered the need to deter petitioner and other landlords from repeating discriminatory conduct). As the Secretary found, the record demonstrates that Corey remains in the rental business. J.A. 308. Corey should be deterred from imposing, in future transactions, discriminatory conditions based upon invidious stereotypes of

individuals with intellectual disabilities. Likewise, similarly situated landlords should be put on notice that they cannot impose such conditions with impunity.

In sum, the Secretary acted well within his discretion in concluding that application of the relevant factors warranted the maximum civil penalty, even though Corey had no history of prior violations and the record contained no detailed evidence of his financial circumstances. See *Blackwell*, 908 F.2d at 873 (egregious nature of respondent's actions, high degree of culpability, and need for deterrence supported maximum civil penalty even in the absence of evidence of respondent's financial condition).

The Fair Housing Act also authorizes an ALJ to award "injunctive or other equitable relief" for a violation. 42 U.S.C. 3612(g)(3). "The primary purpose of an injunction in Fair Housing Act cases is to prevent future violations of the Act and to eliminate any possible recurrence of a discriminatory housing practice." *United States* v. *Warwick Mobile Homes Estates, Inc.*, 558 F.2d 194, 197 (4th Cir. 1977). Relevant factors in deciding whether injunctive relief is appropriate include "the bona fide intention of the party found guilty of discrimination to presently comply with the law, the effective discontinuance of the discriminatory practice(s) in question, and, in some cases, the character of past violations." *Ibid.* On remand from the Secretary's order finding liability, the ALJ ordered Corey to provide HUD with certain information related to his rental properties, including

information identifying a rental applicant's disability status, and to participate in fair housing training. J.A. 296-297. The Secretary modified this order of injunctive relief to mandate inclusion of a rental applicant's disability status only if volunteered by the applicant or otherwise known. J.A. 308. Given that Corey is still in the rental business, the Secretary was well within his discretion in ordering this modest injunctive relief to prevent a recurrence of the discriminatory acts that took place in this case.

III

THIS COURT SHOULD GRANT THE SECRETARY'S CROSS-APPLICATION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER

A. Standard Of Review

Upon the filing of an application of enforcement, this Court has discretion to "enforce such order to the extent that such order is affirmed or modified." 42 U.S.C. 3612(k)(1)(C).

B. The Secretary's Cross-Application For Enforcement Of The Final Agency Order Should Be Granted

For the reasons explained above, substantial evidence supports the Secretary's determinations of liability and relief, and the Petition for Review is without merit. This Court should therefore affirm HUD's Final Agency Order, and grant the Secretary's Cross-Application for Enforcement of the Final Agency Order. See, *e.g.*, *Astralis Condo. Ass'n* v. *HUD*, 620 F.3d 62, 70 (1st Cir. 2010)

(denying petition for review and granting cross-application for enforcement of Secretary's final order); *Ho* v. *Donovan*, 569 F.3d 677, 682-683 (7th Cir. 2009) (same).

CONCLUSION

This Court should deny the Petition for Review and grant the Secretary's Cross-Application for Enforcement of HUD's Final Agency Order.

STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary believes that the issues are adequately addressed in the briefs, the Secretary does not oppose Corey's request for oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Date: December 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2012, I electronically filed the foregoing BRIEF FOR THE SECRETARY AS RESPONDENT/CROSS-PETITIONER with the Clerk of the Court using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. I further certify that eight paper copies of the electronically filed brief were sent to the Clerk of the Court by first-class mail.

s/ Christopher C. Wang
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