

NO. A09-1616

STATE OF MINNESOTA
IN COURT OF APPEALS

Jimmie Edwards,

Appellant,

vs.

Hopkins Plaza Limited Partnership and
Stuart Management Corporation,

Respondents.

AMICUS CURAIE BRIEF OF
THE HOUSING ADVOCATES, INC.

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II. THE INTEREST OF THE AMICUS CURIAE

The Housing Advocates, Inc. is a private non-profit, tax-exempt corporation based in Cleveland, Ohio, and organized under the laws of Ohio. The mission of the organization is the promotion of equal housing opportunities, tenants' rights, and affordable housing. The Housing Advocates, Inc. provides legal assistance to victims of housing discrimination and to homeowners with complaints involving housing-related services; conducts research and educational programs on related topics to a variety of audiences, including home seekers, renters, homeowners, rental professionals, real estate agents, lenders, brokers, attorneys, insurance agents, underwriters, government officials, and others in the housing industry.

The organization has existed for over thirty-four (34) years. The corporation maintains a prominent board of civic leaders and a staff of lawyers and paralegals involved in training, education, testing, and enforcement efforts under the fair housing laws. Staff lawyers have participated in significant local and national equal housing litigation, both as counsel and amicus curiae regarding fair housing and the housing rights of the disabled: *Barker v Niles Bolton Assocs.*, Slip Copy, 2009 WL 500719; 2009 U.S. App. LEXIS 4126 (11th Cir. 2009); *Ohio Civ. Rights Comm v. Akron Metro Hous. Auth.*, 873 N.E.2d 1312 (Ohio 2007); *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039 (6th Cir. 2001); *Becket v. Our Lady of Angels Apts. Inc.*, 192 F.3d 601 (6th Cir. 1999); *Eppler v. Cleveland*,

753 N.E.2d 986 (Ohio Ct. App. 2001); *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St. 3d. 559; 692 N.E. 2d 997 *on rehearing rev'd* 82 Ohio St. 3d 359 and *Cuyahoga Metropolitan Housing Authority v. Humphries*, Fair Housing-Fair Lending Bulletin, Vol.IX, No. 5 (Cleveland Municipal Ct. 1993).

The Housing Disability Law Project was established in 1985 and has undertaken a variety of activities including conducting enforcement activities in the housing disability-rights arena in Ohio and other states. The project also provides counseling, training, and educational resources in the accessibility requirements of the Fair Housing Act to city officials, builders, developers, and architects. It has developed a Land Use Disability Enforcement Technical Assistance Program project to identify Ohio communities land use regulations or ordinances that may inhibit the development, construction, or establishment of group homes for persons with mental disabilities. The purpose of this project is to increase rental opportunities for low and moderate income persons with disabilities. This project has helped to educate and counsel individuals on restrictive land use ordinances so that barriers may be lifted, resulting in more affordable housing for the disabled population.

As Amicus in this appeal, The Housing Advocates, Inc. supports the position of the Appellant, Jimmie Edwards, as set forth in his brief. The Amicus requests that this Court reverse the holding of the District Court that Respondent

Landlord's decision not to renew the lease of Jimmie Edwards because he had a Section 8 Housing Choice Voucher to pay his rent did not violate the Minnesota Human Rights Act (MHRA).

III. STATEMENT OF THE CASE

Amicus accepts and adopts the Statement of the Case in the Appellant's brief.

IV. QUESTIONS PRESENTED

Amicus accepts and adopts the Questions Presented in the Appellant's brief.

V. STATEMENT OF FACTS

The Amicus adopts the Statement of the Facts in the Appellant's brief, but there are certain parts of the record which should be restated in light of the legal arguments raised in this brief.¹ The Appellant, Jimmie Edwards, has a disability which is the basis for him receiving Social Security Income. He had successfully lived for five years at the Hopkins Plaza apartment from 2001 to 2006 when the

¹ Acknowledgment is made of the work done on this brief by Adjunct Professor Edward G. Kramer, and the following Fair Housing Law Clinic law student interns of Cleveland-Marshall College of Law, Cleveland State University: Jeremy Samuels, Aja Brooks, Brad Eier, Candace Vickers Taylor and Sung Hoon Kim. This statement is to meet the obligations under Minn. Rules of Civil Appellate Procedure Rule 129.03 to identify the individuals responsible for drafting of this Brief. No other entity, other than the Amicus Curiae, has made any monetary contribution to the preparation or submission of the brief.

Respondents decided to arbitrarily change its policy by not accepting rental payments under the Housing Choice Voucher Program (HCVP) for one and two-bedroom units. The Respondents continued to accept the HCVP certificates for their three bedroom apartments. The Section 8 HCVP is a form of public assistance protected under the MHRA.

The Respondents described Mr. Edwards as an “excellent resident” and a “good tenant” in their own rental documents. In the same year, 2006, when the Respondents were describing him as an “excellent tenant,” they sent a notice to the Appellant stating that due to changes in the Section 8 program, they would not renew the lease. There is no dispute that his lease was not renewed because a portion of the rent was paid through his HCVP certificate.

Since 2001, Mr. Edwards had paid the same monthly rent of \$870. The Respondents also advertised their two bedroom apartments as renting for \$870. However, in June 2006, when the Appellant requested a reasonable accommodation of the Respondents to continue accepting his housing voucher, the Respondents quoted a monthly rent of \$895. The Respondents did so even though non-HCVP applicants were offered two bedroom apartments at the lower amount of \$870. Ultimately, the Respondents accepted \$875 from a tenant who was not a HCVP beneficiary as the rent for the Appellant’s former apartment.

VI. ARGUMENT

1. *The Affordable Housing Crisis Has Had A Disparate Impact On Persons With Disabilities And Other Vulnerable Groups*

Housing is a basic human need and an essential human right. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, art. 27.1 (1948). In these difficult economic times access to affordable housing has become one of the nation's most pressing issues. In 2006, more than 9 million renter households paid over 50 percent of their income for rent, leaving little remaining income for food, clothing, health care, and other essentials. <http://www.catholiccharitiesusa.org/NetCommunity/Document.Doc?id=1105>.

This crisis is amplified for persons with traditionally low incomes.

<http://www.globalissues.org/news/2009/02/05/544>. Persons with disabilities are among the poorest citizens in the United States and the most in need of government assistance to secure decent, safe, and affordable housing.

http://www.c-c-d.org/press_room/ccdhanftestfinal.htm. Hundreds of thousands of adults with mental retardation and other developmental disabilities are in desperate need of affordable housing. *Id.*

As is the case with Mr. Edwards, many persons with disabilities are unable to work and, thus, rely heavily on Supplemental Security Income (SSI), a federal income supplement available to people with limited income who are disabled, blind, or age 65 or older. This was the crisis facing Mr. Edwards when his landlord decided to discontinue its policy by refusing to renew his lease because it

was partly paid by the HCVP. Unfortunately Mr. Edwards' circumstance has become common. Over 1.4 million people with disabilities receiving SSI live in seriously substandard housing and/or pay more than 50 percent of their income for rent. *Id.*

Comparing U.S. Department of Housing and Urban Development (HUD)-established Fair Market Rents (FMR) for Minneapolis with Mr. Edwards' monthly SSI payments demonstrates that a single adult receiving and relying on SSI payments cannot afford even a one-bedroom rental anywhere in the area!
[http://www.co.hennepin.mn.us/images/HCInternet/HHandSS/Housing%20and%20Shelter/Grants%20and%20Funding/CoC/Attach%201%20\(final\).rtf](http://www.co.hennepin.mn.us/images/HCInternet/HHandSS/Housing%20and%20Shelter/Grants%20and%20Funding/CoC/Attach%201%20(final).rtf).

The national average for rents for both one-bedroom and efficiency apartments *exceeds* the entire monthly income of an individual relying solely on SSI, which compounds the existing difficulties faced by *all* disabled SSI recipients.
<http://www.tacinc.org/Docs/HH/PricedOut2006/Findings.htm>. In 2005, the average rent for a one bedroom apartment in Minneapolis was 118.3 percent of a persons SSI payment! Because SSI payments are significantly lower than the income of other prospective renters, unless persons with disabilities receive additional public assistance, like the HCVP, their ability to compete in the private housing market does not exist.

2. ***The Federal Housing Choice Voucher Program Is Intended to Promote Economic and Social Diversity and Ensure Low Income Families Have Access to Decent, Safe and Affordable Housing***

In 1974, the Congress enacted “Section 8” as part of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437 *et seq.* which “significantly enlarged” HUD's role in the creation of housing opportunities for low-income families and individuals. *Hills v. Gautreaux*, 425 U.S. 284, 303 (1976). Federal subsidy programs, such as HUD's Section 8 Housing Choice Voucher Program are designed to help to bridge the gap between low incomes and the skyrocketing cost of residential rent. Its intent is to give housing choice back to individuals with a voucher. The HCVP is administered by local Public Housing Authorities, which contract with HUD on an annual basis for funding. The funding is based on the estimated cost of vouchers *in use* plus administrative costs. *See* 24 C.F.R. § 982.102. Households participating in the HCVP contribute between 30 percent and 40 percent of their monthly income toward rent, and the voucher issued by the local Public Housing Authority covers the difference between the family's contribution and the actual rent, which must be at or below the FMR for the area.

3. *The Minnesota Legislature's Decision to Give Public Assistance Protected Status under the Human Rights Act Furthers the Goals of the Federal Housing Choice Voucher Program*

Although the federal Housing Act does not mandate landlord participation in the HCVP, its implementing regulations expressly provide that state and local authorities may enact laws that prohibit discrimination based on voucher recipient status. *See* 24 C.F.R. § 982.53 (d) (expressly stating that state and local laws that prohibit discrimination based on voucher recipient status are *not* preempted). This regulation reflects an understanding that discrimination against qualified prospective renters on the basis of source of income is a market distortion that undermines the structure, theory, goals and benefits of the federal government's major effort at federal rental assistance. Thus, each state legislature has the right to decide whether to provide protection to its citizens by requiring that landlords cannot discriminate against holders of housing vouchers. Accordingly, to address discrimination by landlords against HCVP recipients and to limit the affordable housing crisis in Minnesota the legislature provided protected status making it unlawful to treat HCVP holders differently than those who pay their rent with another source of income. Specifically, the MHRA prohibits a landlord from "refus[ing] to . . . rent, or lease or otherwise deny to or withhold from any person or group of persons any real property because of . . . status with regard to public assistance" Minn. Stat. § 363A.09, Subdiv. 1(1). The statute explicitly defines "public assistance" to include "rental assistance or rent supplements." § 363A.03, Subdiv. 35.

In addition to Minnesota, at least eleven other states (California, Connecticut, Maine, Massachusetts, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont, and Wisconsin); seventeen cities (including Corta Madera, California; East Palo Alto, California, Los Angeles, California; San Francisco, California; Washington, D.C.; Chicago, Illinois; Naperville, Illinois; Urbana, Illinois; Philadelphia, Pennsylvania; Grand Rapids, Michigan; Kentwood, Michigan; Minneapolis, Minnesota; St. Paul, Minnesota; St. Louis, Missouri; Hamburg, New York; and Seattle, Washington); and three counties (Howard and Montgomery Counties, Maryland and King County, Washington) have enacted legislation prohibiting housing-related source of income discrimination. Like the HCVP, the provision of the MHRA prohibiting discrimination based on public assistance is intended to ensure access to decent, safe and affordable housing for low-income families and individuals like Mr. Edwards.

4. ***Landlords Must Accept Federal Housing Vouchers as a Reasonable Accommodation Under the Minnesota Human Rights Act***

The Appellant, Mr. Edwards, must show necessity, equal opportunity, and reasonableness to establish a prima facie case for reasonable accommodation under the MHRA. *Hinneberg v. Big Stone Country Housing and Redevelopment Authority*, 706 N.W.2d 220, 226-227 (Minn. 2007). The District Court conceded the Appellant met the necessity and equal opportunity requirements. Therefore, only the reasonableness standard is being disputed.

The Respondents argue that two theories prevent Appellant from establishing reasonableness. First, they argue that the ruling of *U.S. Airways v. Bennett*, 535 U.S. 391 (2002), subjects the Appellant to a higher burden of proof regarding the “reasonableness” of his accommodation request. Second, they argue under *Hinneberg*, the accommodation subjects the Respondents to an alleged “undue hardship.”

A. Appellants are subject to the standard burden of proof

Hinneberg applied the *U.S. Airways v. Bennett* ruling to a request to use a HCVP certificate outside the jurisdiction of the public housing agency. However, the Respondents' reliance on this reasoning is in error due to factual differences between Mr. Edwards and the litigant in *U.S. Airways*.

In *U.S. Airways*, Robert Barnett, was unable to continue as a cargo-handler after suffering a back injury. He used the seniority system to transfer to a less physically demanding position. Under this system, which had been in place for decades and governed over 14,000 U.S. Air Agents, that position was still open to seniority-based employee bidding. Barnett later learned senior employees desired his position. U.S. Airways denied his accommodation request, to remain in the mailroom despite the seniority system, costing him his job. The U.S. Supreme Court recognized the seniority system's benefits depended on employees' expectation of “consistent, uniform treatment,” and noted an accommodation allowing an employee to bypass that system might undermine those expectations. *Id.* at 405. The court required the plaintiff, in this particular type of case, to show

why an exception to the employer's policy constitutes a "reasonable accommodation."

The *U.S. Airways* ruling is easily distinguished from the facts of the instant litigation. First, in the *U.S. Airways* litigation the Plaintiff asked to "have his cake and eat it too." He asked that a long-standing system he initially *benefited from*, be changed at the expense of equally deserving individuals trying to secure that same benefit. Mr. Edwards, in contrast, did not seek a benefit under the system he wanted changed. Respondents have admitted that no major differences existed between the HCVP tenants and other tenants at Hopkins Plaza. (Lisa Moe Dep. 53-54.) This admission negates any real possibility that retaining Mr. Edwards would affect non-HCVP tenants at Hopkins Plaza.

Second, the Respondents' change in their policy by refusing to accept the HCVP differed from *U.S. Airways* where a long-standing policy which had created employee expectations was being retained. In the instant case the Respondents' policy was never uniformly implemented or applied throughout the properties, affecting different dwellings at different times. The original policy, followed for several years, accepting all HCVP certificates for available dwellings. The Respondents *first refused to accept HCVP* certificates in 2006 for Hopkins Plaza's one and two bedroom apartments. Vouchers for three-bedroom apartments were still accepted by the Respondents at the time they refused Mr. Edwards's request for a reasonable accommodation. Even in 2009, some of the Respondents' other properties, four project based Section 8 apartments, and Lamplighter Village, a

market rate property similar to Hopkins Plaza, still accept HCVP certificates (Lisa Moe Dep. 59).

Granting Mr. Edwards' accommodation would have only modified a recent, non-uniform policy at the expense of no one. Mr. Edwards should not be subjected to a higher burden of proof since *U.S. Airways* is not applicable to his situation.

B. Respondents have failed to establish an undue hardship.

Under *Hinneberg*, undue hardship is proved by showing the accommodation would cause a financial and/or administrative burden or fundamentally alter its program. *Hinneberg*, 706 N.W.2d at 229. The Respondents have simply made the bare argument in *Hinneberg* that granting the accommodation will encourage similar individuals to request the same relief, creating an administrative burden and/or dismantling their rental policy. This argument is factually wrong and requires comparing the facts of the instance case with the facts of the litigant in *Hinneberg*.

Mr. Edwards was a long term resident at Hopkins Plaza, having lived there for five years, until the end of August 2006. During that time his \$361 Housing Choice Voucher was accepted in addition to his \$509 rent payment. Mr. Edwards requested this accommodation because Hopkins Plaza was well-suited to meet his disability-related needs. By limiting the accommodation *to the facts specified*, granting the accommodation would not have caused a large influx of similarly situated individuals asking for the same, because few would meet the criteria. In contrast, the litigant in *Hinneberg* initially wished to move to Big Stone County,

applied for a HCVP certificate, and later changed her mind. Her requested accommodation was use of Big Stone County's voucher for her housing needs in Hopkins, Minnesota, a totally different jurisdiction.

The *Hinneberg* court ruled that granting the accommodation would fundamentally alter Big Stone County's rules, creating undue hardship. These rules disqualified individuals from using the voucher outside of Big Stone County's housing jurisdiction. The court found such an accommodation would fundamentally alter the program because it would create an exception to Big Stone County's rules, draining their resources by supporting housing in another jurisdiction. For that reason, coupled with the possibility of other similarly situated non-residents asking the same accommodation, the court ruled it did create an undue hardship.

Mr. Edwards' accommodation would not have fundamentally altered Respondents' rules because the refusal to use HCVP certificates was not uniform. Stuart Management still employs individuals certified to handle HCVP housing in their other properties. (Lisa Moe Dep. 65-66). In *Lamplighter*, for example, HCVP certificates cover around 20 percent of housing. (Lisa Moe Dep. 62).

Therefore, no undue hardship exists since it is unlikely similar individuals will seek the same accommodation, and even if so, the infrastructure needed to accept housing vouchers still exists. These facts ensure the Respondents' tenant program will not be altered or unduly burdened. Furthermore, the District Court's contention on page 14 of the opinion that allowing the accommodation will

transform the use of HCVP from a voluntary to a mandatory program is also unfounded. The Appellant is not asking Hopkins Plaza to “take all” regarding the HCVP. Rather, Mr. Edwards asks that an accommodation be made, based on his specific facts, in order to “take one.”

C. Categorical exclusion of HCVP tenants offends Minnesota Public Policy.

Mr. Edwards should have been allowed to remain at Hopkins Plaza because the accommodation requested was reasonable. Mr. Edwards had lived in the same apartment for 5 years. He chose it because of its convenience. Hopkins Plaza was located close to some of his doctors’ offices, and it was a unit he felt comfortable in. This level of comfort in a residence is important for all people, but especially to the disabled. Because of his disability, Mr. Edwards had a very limited range of choices of where to live. Good, reliable tenants who happen to be disabled and receiving federal assistance should not be treated unfairly, simply because of their participation in a federal rental assistance program.

It is clear from all testimony given that Mr. Edwards was an ideal tenant. He paid his rent on time. He never caused problems with the management. He was a good neighbor and did not disturb other residents. It is wholly unreasonable for a landlord to terminate a business relationship based entirely on pretextual reasons of administrative hardship. *Lisa Moe Dep. 55-59, 65-66* (noting that there was indeed no administrative burden faced as Hopkins and Stuart Management were still involved in the HCVP after Mr. Edwards was forced out by their refusal

to renew his lease). Even in cases where legitimate business rationales may exist, the Minnesota legislature declined to authorize such a defense, as it has explicitly provided for in other circumstances. *Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396, 400 (Minn. Ct. App. 1997) *review denied* (June 11, 1997); *Northland Country Club v. Comm'r of Taxation*, 241 N.W.2d 806, 809 (Minn. 1976).

The District Court erred in determining that his request for a reasonable accommodation posed an undue hardship for the Respondent. Amicus Curiae urges this Court that strong public policy considerations dictated by the state of Minnesota supports granting Mr. Edwards request. The purpose of the HCVP is frustrated when landlords categorically restrict the access of such individuals to their housing. HCVP tenants endure a variety of adverse and discriminatory practices in finding appropriate housing. The HUD conducted a study to gauge the success of the HCVP. The HUD study highlights the difficulties voucher holders face in locating housing, and the additional problems caused by time delays before moving into an apartment.

In another study, the Lawyer's Committee for Better Housing details the insidious discrimination that voucher holders like Mr. Edwards face when attempting to rent a unit. Membership in a protected class, i.e. receiving public assistance, was the sole reason that Mr. Edwards' lease was not renewed. Loss of appropriate housing simply because of receiving federal rental assistance is clearly contrary to the public policies found in the MHRA section. Minn. Stat. 363A.09 Subdiv. 1(1). Just as a landlord cannot refuse to renew a lease because the tenants

are African Americans, nor can he in Minnesota treat HCVP tenants differently because of their receipt of public assistance! The holding of the District Court would put the stamp of judicial approval upon even the most blatant forms of discrimination against HCVP tenants, and render the legislature's attempts to protect HCVP tenants from discriminatory conduct void and meaningless.

i. The difficulty in finding acceptable housing for government assisted voucher holders supports granting Mr. Edwards' request

HUD conducted a study which revealed a wealth of information regarding the results of the HCVP. Study on Section 8 Voucher Success Rates (<http://www.huduser.org/Publications/pdf/sec8success.pdf>).

The summary of findings of this report indicates that voucher holders have a 69 percent success rate in using their vouchers to lease units *Id.* at 36. This rate is from 2001, while the rate in 1993 with a similar study was an 81 percent success rate. *Id.* These figures are troubling, because they indicate the increased difficulty facing HCVP certificate holders. Allowing Hopkins Plaza and Stuart Management to refuse Mr. Edwards' continued tenancy would only further restrict affordable housing for those who most desperately need to find appropriate shelter.

The study continues by noting that, no doubt due in part to refusal of places like Hopkins Plaza to accept housing choice vouchers, many people who ultimately are successful in finding placement take a long time to locate them. It took qualifying households an average of 83 days, with over a quarter of them taking more than 120 days to lease a unit. *Id.* at 37. Approval of the Request for

Lease Approval (RFLA) takes an average of 53 days. *Id.* The study attributes this problem in part to the fact that it takes a long time for tenants to find an acceptable unit that will take the HCVP. Mr. Edwards is in an even worse situation than those in this study, because he is disabled. The Hopkins Plaza apartment was one he felt comfortable in, and one he was able to enjoy limiting the impact on his daily life from his disability. The burden he faced in relocating was both arbitrary and plainly illegal on the part of the Respondents. As a matter of public policy, a tenant should not be faced with an immense undue burden simply because the landlord refuses to make a reasonable accommodation to permit him the equal opportunity to live where he can afford and chooses to reside.

ii. This Court should rule in favor of Appellant because social science corroborates the argument that voucher holders are treated unfairly and need protection of the law

The Lawyers Committee for Better Housing, Inc. recently conducted another study entitled “Locked Out: Barriers to Choice for Housing Voucher Holders.” See [Http://lcbh.org/images/2008/10/housing-voucher-barriers.pdf](http://lcbh.org/images/2008/10/housing-voucher-barriers.pdf). That study described a number of rental unit tests that were conducted by the group. Ultimately, it concluded that housing choice voucher holders routinely face source of income discrimination. The data was collected in Chicago, but is indicative of a larger problem that takes place in many cities, including Minnesota. The study discussed the difficulty that housing choice voucher holders have finding units. This situation can be even worse for someone who is disabled, because they are more limited in their choices in finding suitable shelter.

Housing is a necessity. Every person should be entitled to have shelter, a roof over their head. The government has acknowledged this by creating the HCVP to help provide monies for those who cannot afford appropriate housing on their own. It is not unreasonable to expect landlords to accept these vouchers since they could not object to a tenant paying their rent using unemployment or SSI payments to live in their apartments. Acceptance of the voucher poses no undue hardship on the landlord here, as they were participants in the program, and continue to be participants in the program at other buildings.

Further, the integrity of the HCVP is at stake here. It has been suggested that allowing Mr. Edwards to stay would lead to an exception swallowing the Hopkins Plaza rule of non-acceptance of HCVP. That argument is without merit. Allowing landlords to discriminate against people based on source of income will let them swallow the public policy instituted by the Minnesota legislature in giving public assistance protected status and compromise the purpose of the entire HCVP.

As a matter of both the MHRA and its underlying public policy, Amicus urges this Court to reverse the decision of the District Court finding that it was not a reasonable accommodation that the landlord continues permitting Jimmie Edwards rent to be paid by the HCVP. It is contrary to the purpose of the Minnesota Human Rights Act, which states that “[s]uch discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.” Minn. Stat. 363A.02 Subdiv. 1(b).

5. ***A Landlord's Decision Not to Retain a Long Term Exemplary Tenant, Due to the Tenant's Need for a Housing Voucher, Proves the Minnesota Human Rights Act Causation Requirement***

The District Court erred in holding Appellant failed to demonstrate causation when the Respondent, Hopkins Plaza, violated the MHRA by refusing to renew Mr. Edwards' lease because of his receipt of public assistance. To demonstrate causation an Appellant must show Respondent's refusal to rent has a causal link to receiving public assistance. *Eichinger v. Imation Corp.*, No. A05-1133, 2006 Minn. App. Unpub. LEXIS 313, at 10 (Minn. Ct. App. Apr. 6, 2006) (citing *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004)). The Respondents admit the sole reason for terminating Mr. Edwards' lease is because a portion of his rent was subsidized through the HCVP (Defs.' Mem. Ex. H123: 16-25). Therefore, Respondents' refusal to rent is causally linked to the Appellant's receipt of public assistance.

The MHRA states that it is unlawful to, "refuse to rent, lease, or otherwise deny or withhold from any person or group of persons any real property because of race, sexual orientation, or status with regard to public assistance, ..." §363A.09, Subdiv.1(2). The Minnesota State Legislature intended each of the above protected categories to be given equal protection under the law.

As it would be a clear and flagrant case of discrimination to refuse to renew the lease of an African-American based on race, in the state of Minnesota it would be equally egregious to refuse to renew the lease of a tenant because of receipt of public assistance. The District court concedes that Mr. Edwards' receipt

of an housing voucher is public assistance and places Mr. Edwards in a protected class under the MHRA. Therefore, refusing to renew Mr. Edwards' lease because his rent was supplemented by the HCVP is a *per se* violation of MHRA.

Jurisdictions with similar human rights laws have found a refusal to lease to individuals solely because they are recipients of HCVPs violates those states' human rights laws. *See Montgomery County v. Glenmont Hills Assoc.*, 936 A.2d 325, 342 (Md. 2007) (finding there was a violation of a human rights ordinance when the landlord refused to rent solely because of tenants use of public assistance.); *see also Glover v. Crestwood Lake Section 1 Holding Corp.*, 746 F.Supp. 301, 309 (S.D.N.Y. 1990) (holding that landlord's refusal to accept portions of Section 8 lease constituted impermissible refusal to rent based on status as voucher holder).

Mr. Edwards was an exemplary tenant being described as an "excellent resident" and a "good tenant" by the property manager at Hopkins Plaza. (Affidavit of Tammy Schnaible, p.2. ¶ 6, 8; Ex. 13; Ex. 14). Nevertheless, in April 2006, Mr. Edwards was informed that his lease would not be renewed based on the Respondent's decision not to accept public assistance via housing vouchers in their one and two bedroom apartments. Yet, Hopkins Plaza continued to accept housing vouchers from tenants living in three-bedroom apartments! Respondents refusal to accept a housing voucher from Edwards was a *per se* violation of the MHRA based on his receipt of public assistance.

A. States May Mandate Landlord Participation in HCVP

Selection of the HCVP tenants is at the discretion of the property owner.

42 U.S.C. § 1437f(d)(1)(A); 24 C.F.R. §982.452(b)(1) (giving the landlord authority to decide suitability based on a number of criteria including, cleanliness, past criminal record, community disturbances, etc.). Under the federal regulatory scheme landlords have discretion to decide to accept HCVP tenants. *Knapp v. Eagle Prop. Mgmt.*, 54 F.3d 1272 (7th Cir. 1995). However, as has been already pointed out, the same regulatory scheme permits each state to determine whether its landlords should be precluded from discriminating against tenants holding housing vouchers. As was explained in *Franklin Tower v. N.M.*, 725 A.2d 1104 (1999):

The voluntary nature of the Section 8 Program is not at the heart of the federal scheme. The inference that the program is voluntary derives only from one section of the statute that permits landlords to screen potential tenants, and no language in that provision implies that a landlords' right to screen tenants includes the right to reject tenants solely on the basis that they qualified for government rental assistance... Nor, is there any provision that prohibits states from mandating participation.

Generally, when a state law is promulgated to promote the advancement of a federal scheme, no conflict will be found if the regulation merely enhances federal intent. *Cal. Fed. Sav. & Loan Assoc. v. Guerra, Dir. Dep't of Fair Employment & Hous.*, 479 U.S. 272, 281-82 (1987).

B. Babcock's Interpretation of the MHRA §363A.09 Confounds the Plain Meaning of the Statute

In an unreported decision, *Babcock v. BBY Chestnut Ltd. P'ship*, No. CX-03-90 2003 Minn. App. LEXIS 899 (Minn. Ct. App. July 29, 2003), the court held that a landlord had a right to refuse to participate in the HCVP. The Amicus urges that *Babcock's* rationale be rejected by this Court. Minnesota offered tax incentives for landlords who participated in the HCVP. From this the *Babcock* court concluded that the legislature intended acceptance of HCVPs was voluntary. The tenant in *Babcock* became eligible for receipt of Section 8 benefits during her tenancy. Similar to this litigation, the tenant received written notice that her lease would be terminated because the landlord did not accept housing vouchers. This letter acknowledged that the tenant's lease was terminated due to receipt of public assistance; and without further elaboration, this statement should have been a *per se* violation of the MHRA. Minn. Stat. §363.03, Subdiv. 2(1)(c) (2002) (current version at Minn. Stat. §363A.09 Subdiv. 1(3)) establishes, "a record in connection with a prospective rental, which expresses any discrimination as to status with regard to public assistance, constitutes unfair discriminatory practice...."

Based on the plain language of the statute, the correspondence received by Mr. Edwards is discriminatory on its face for denying renewal based on receipt of public assistance. Here, if one were to rely on *Babcock's* interpretation of §363.03 (2002), *amended by* §363A.09, it would eviscerate the plain meaning of the statute, and render the laws protection meaningless. *Id.*

Instead, this Court should follow the well reasoned opinion of the New Jersey Supreme Court in *Franklin Tower*. The New Jersey Legislature enacted a statute which provides, “[n]o person shall refuse to rent or lease any house or apartment to another because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for house or apartment.” N.J.S.A. 2A: 42-100. The issue presented on appeal was whether a landlord, who never participated in the HCVP, was prohibited from refusing to accept a tenant who becomes eligible for the voucher during their tenancy. The *Franklin Tower* court held the landlord discriminated against the tenant in violation of the New Jersey human rights law. *Id.*

New Jersey and Minnesota legislation concerning public assistance is analogous. Both legislatures created statutes that promote affordable housing and choice to vulnerable populations by adopting public assistance as a protected class. Both legislatures include receipt of HCVP voucher as a protected source of income. Ultimately, based on the plain language of the Minnesota law and the persuasive rationale in *Franklin Tower*, Mr. Edwards has demonstrated a *per se* violation and direct causation. Based on the above reasoning, Hopkins Plaza has violated the MHRA by discriminating against Mr. Edwards’ because of his receipt of public assistance requiring the District Court’s decision to be reversed.

6. ***Landlord's Demand to an Exemplary Tenant and Housing Voucher Holder of \$25 Higher Rent Than to a Non Voucher Holder is a Prima Facie Violation of the Minnesota Human Rights Act***

The facts of this case clearly establish a prima facie case of unlawful discrimination under MHRA. Because the Court below did not acknowledge the direct evidence, they applied the burden-shifting analysis from *McDonnell-Douglas Corp. v Green*, 411 U.S. 792 (1973).

To establish a prima facie case of discrimination, under *McDonnell-Douglas*, as applied to the instant case, Mr. Edwards must prove by a preponderance of the evidence four elements. In *Mencer v. Princeton Square Apartments*, the Court articulated the following elements:

A prima facie housing discrimination case is shown when the plaintiff proves: (1) that he or she is a member of a racial minority, (2) that he or she applied for and was qualified to rent or purchase certain property or housing, (3) that he or she was rejected, and (4) that the housing or rental property remained available thereafter.

Mencer v. Princeton Square Apartments, 228 F.3d 631, 634-35 (6th Cir. 2000).

Once the prima facie case is established, the burden-shifting analysis from *McDonnell-Douglas* requires the Respondents to produce a “legitimate, nondiscriminatory reason” for their actions. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). If the Respondents offer a reasonable explanation, the burden shifts back to Mr. Edwards to show that the reasons provided by Respondents were not their actual reasons, but are merely a “pretext” to disguise discriminatory motives. *Id* at 507-508.

The District Court found that Mr. Edwards, as a member of a protected class under the MHRA, clearly satisfied the first element of his prima facie case. The Court stated that Mr. Edwards did not satisfy the second or the third elements, which are that he was qualified to rent the apartment and that he was subject to any adverse action. The fourth element, that an equally qualified person did rent the apartment that was not a member of a protected class, was not discussed by the District Court, but was established in the record below.

A. Mr. Edwards satisfies the first element in proving his prima facie case as he is a protected class member under the Minnesota Human Rights Act

As correctly stated by the Court, the Mr. Edwards is a member of a protected class, as a holder of a HCVP voucher. Minnesota statutory law requires that landlords must rent to tenants who are otherwise qualified regardless of the source of the income and to deny tenancy to a recipient of public assistance cannot be tolerated. § 363A.09, Subdiv. 1(1).

B. Mr. Edwards satisfies the second element of his prima facie case because he was qualified to rent the apartment at Hopkins Plaza

The District Court stated that Mr. Edwards was not qualified to rent the apartment because of his reliance on his Housing Choice Voucher. On the contrary, Mr. Edwards is qualified to rent the apartment because of his HCVP voucher. This voucher provides him with the funds required to rent the apartment. The fact that he pays a portion and HUD pays a portion of the rent is immaterial because of Mr. Edwards' protected status. To use his status to deny him the

ability to renew his lease at Hopkins Plaza would be contrary to the plain language of the MHRA which provides that “[i]t is an unfair discriminatory practice for an owner, lessee, sublessee, assignee, or managing agent...to discriminate against any person...status with regard to public assistance...in the terms, conditions or privileges of the sale, rental or lease of any real property.” § 363A.09, Subdiv. 2(2).

C. Mr. Edwards suffered an adverse action as a result of being quoted a higher rental rate than others, which is contrary to the MHRA and satisfies the third element of his prima facie case of discrimination

The third element of the prima facie case is proven after looking at the facts, which show that Mr. Edwards was an exemplary tenant for five years who was forced out of his home because he was a participant in the HCVP. Mr. Edwards was subjected to different treatment based upon his protected status as contrasted with other non-protected potential renters. The amount of rent quoted to him was substantially higher than what was quoted and advertised to others. He was quoted a rate of \$895, while the advertised rate was \$870. Identical units to the one Mr. Edwards occupied were rented for as little as \$820.

The District Court incorrectly held that charging a member of a protected class \$25 more per month in rent was not an adverse action. However, as quoted above, the MHRA does not permit different rental terms to protected classes. *Id.* The quoting of higher rent for an apartment can be a discriminatory action, even if the apartment is not rented, as these misrepresentations serve to discourage or

deny housing to persons in the protected class. *United States v. Ballisteri*, 981 F.2d 916, 929 (7th Cir. 1992). Quoting an above market rate amount for rent is one way to discourage or deny apartments to persons in a protected class. Indeed, this was the most likely reason for the difference in rent, as Respondent was fully aware of Mr. Edwards' income and his limited ability to pay an additional \$25. The amount may be *de minimis* to some, but not to Mr. Edwards. But for the Respondent's discriminatory action with regards to Mr. Edwards' voucher, he would still have been living in his home that he had enjoyed for five years.

D. Mr. Edwards satisfies the fourth element of the prima facie case

The final element of the prima facie case that must be proved is that the apartment was given to another person, of the same level of qualifications, but not in the protected class. Although the court did not address this element, the record below shows that a more egregious situation exists. Not only did another person obtain this apartment that was no more qualified, they rented the apartment for \$870 per month, which was \$25 less than Mr. Edwards was quoted.

Therefore, the four elements of the prima facie case have been satisfied and the District Courts decision as to Count III should be vacated.

E. Respondents stated reason for the non-renewal of Mr. Edward's lease was that it was a business decision to opt out of the HCVP which was a pretext

The reason for the non-renewal of Mr. Edwards' lease was that the extra burdens of participating in the HCVP were not profitable and Hopkins Plaza opted not to continue to participate. This is a pretext for discrimination as the Respondent had very easily accommodated the administrative requirements for renting to holders of HCVP vouchers in the past, including Mr. Edwards.

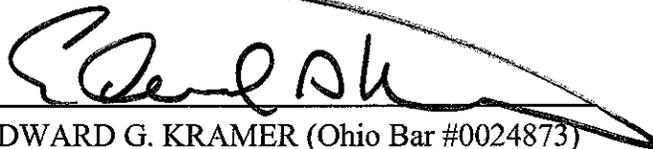
The argument that the requirements were too burdensome and it was merely a business decision to terminate their association with the HCVP is a pretext. This is not legitimate, as it does not make economic or business sense. The apartment vacated by Mr. Edwards remained vacant for a number of months, without any income generated by that apartment, and others of the same size and condition also were without tenants. This reveals that the business decision was not only a bad one, but a pretext for discrimination based upon source of income.

VII. CONCLUSION

The basis for providing protected status to all types of public assistance is to prevent the exact situation that happened to Mr. Edwards in 2006. The Respondents arbitrarily decided to change their policy of accepting HCVP for rental payments on all one and two bedroom apartments. They continued accepting such payments after not renewing Mr. Edwards' lease for their three bedroom apartments. This is a clear violation of the Minnesota Human Rights Act.

The District Court's decision should be reversed and this case remanded for a trial on damages and other appropriate equitable relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. G. Kramer', written over a horizontal line.

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CERTIFICATE OF SERVICE

Two copies of the foregoing Brief of Amicus Curiae, THE HOUSING ADVOCATES, INC was sent by U.S. mail on this 8th day of OCTOBER, 2009 to:

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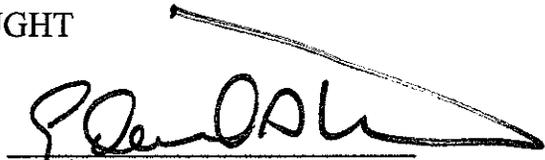
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I, EDWARD G. KRAMER, having first been duly sworn, do depose and state that:

- 1) I am counsel for the Amicus Curiae THE HOUSING ADVOCATES, INC.
- 2) The Amicus Curiae brief submitted uses Times New Roman, 13 pt. font.
- 3) The proof brief contains 6788 which is less than 7,000 words permitted under Minn. Rules of Civil Appellate Procedure Rule 132.01 subd. 3(c) based upon the computer generated word count using Word 2003 which I ran upon completion of the brief.

AFFIANT FURTHER SAYETH NAUGHT



EDWARD G. KRAMER

SWORN TO BEFORE ME and subscribed in my conscious presence on this 7th day of October, 2009.



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My Commission Has No Expiration Date
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