Denise Bell, *Plaintiff-Appellant,* *v.* Tower Management Services, L.P. (d/b/a Sunnybrae Apartments); Barbara Perry; John Does 1-10; John Doe Corporations 1-10 *Defendants-Respondents.*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-3165-08T3 On Appeal from Superior Court of New Jersey, Mercer County, Docket No. MER-L-958-07 Sat below: Hon. Thomas W. Sumners, Jr., J.S.C.

BRIEF OF AMICUS CURIAE DEPARTMENT OF THE PUBLIC ADVOCATE OF NEW JERSEY IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICUS

The Department of the Public Advocate is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest." N.J. Stat. Ann. § 52:27EE-57. The Department's enabling statute broadly defines "public interest" as "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J. Stat. Ann. § 52:27EE-12. The ultimate and enduring mission of the Department of the Public Advocate remains the same as when it was originally created in 1974, and when the Supreme Court described it in 1980: "to provide legal voices for those muted by poverty and political impotence." Twp. of Mount Laurel v. Dep't of the Pub. Advocate, 83 N.J. 522, 535-36 (1980).

The Department has long advocated for the creation of and access to affordable housing for New Jersey's low- and moderate-income residents. The Public Advocate's role in the early Mount Laurel cases is well known. See, e.g., S. Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983); In re Twp. of Warren, 132 N.J. 1 (1993). The Department's 2007 report, Affordable Housing in New Jersey: Reviving the Promise,

available at http://www.state.nj.us/publicadvocate/public/pdf/Mt%20Laurel%20report%20FINAL-10-24-07.pdf, highlights the State's persistent affordable housing crisis and the distance that remains to be traveled to realize Mount Laurel's constitutional promise of fair and real housing opportunities for low- and moderate-income New Jersey residents.

The Public Advocate has also advocated for the rights of low-income residents to affordable housing in the context of redevelopment. See Evicted From the American Dream: The Redevelopment of Mount Holly Gardens 9-30 (2008), available at http://www.state.nj.us/publicadvocate/public/pdf/gardens_report.pdf (recommending significant increases in compensation and relocation assistance for displaced residents and advocating for the replacement of affordable housing demolished through redevelopment). And in the fall of 2008, the Department undertook a comprehensive project to defend the rights of New Jersey tenants living in foreclosed properties and to ensure that they are not displaced or made homeless by unlawful evictions. Most recently, in February 2009, the Department filed a brief in support of amendments to the Fair Housing Act and new Council on Affordable Housing (COAH) rules that extended the promise of Mount Laurel to New Jersey's poorest residents. Brief for Dep't of the Pub. Advocate as Amicus Curiae Supporting Respondents, In re Complaint of Twp. of Medford, No. 8-08 (N.J.

Council on Local Mandates Feb. 11, 2009), available at http://www.state.nj.us/publicadvocate/ public/pdf/Council%20on %20Local%20Mandates%20Brief%20Final.pdf.

Following from this long history of advocacy on behalf of New Jersey's low-income residents in search of affordable housing, the Public Advocate has a profound interest in arguing here that recipients of state rental assistance should be free from discrimination in the private rental housing market. Amicus addresses only the claim that the Defendant housing complex discriminated against Ms. Bell based on the source of her rental income (the State Rental Assistance Program); we do not address Ms. Bell's disability claim.

PRELIMINARY STATEMENT

This appeal presents two questions: first, whether the Plaintiff successfully pled a claim of disparate impact under the Law Against Discrimination (LAD), and second, whether New Jersey Law precludes a landlord from applying a blanket minimum-income test to exclude a recipient of state rental assistance.

The Complaint at issue here states a prima facie case of disparate impact. The Plaintiff, Denise Bell, asserts that she is a member of a protected class of those who pay their rent through government assistance. She further asserts that the Defendant landlord's minimum-income test excludes between

ninety-five and ninety-nine percent of the members of this protected class. These allegations are sufficient to defeat a motion to dismiss.

The trial court improperly granted the motion based on a misunderstanding of the nature of a disparate impact claim. Because the LAD does not on its face proscribe discrimination based on poverty, the trial court held that a minimum-income threshold does not violate the law. But a disparate impact claim does not depend on facial discrimination. It relies instead on the allegation that a facially neutral practice, such as a landlord's disqualification of prospective tenants based on their low incomes, excludes a disproportionate number of members of a protected class, such as recipients of rental assistance. This is precisely the Plaintiff's claim. Because this claim survives a motion to dismiss, Plaintiff should have an opportunity on remand to prove her prima facie case.

Under burden-shifting rules derived from federal civil rights law, the Defendants would then have an opportunity to prove that their denial of housing to the Plaintiff was justified by "business necessity." Although this issue should not have arisen at the motion to dismiss stage of the litigation, the trial court seems to have concluded that a business justification supported the Defendants' conduct. This was an error of law.

The State Rental Assistance Program (S-RAP) exists for the purpose of enabling low-income households to rent in the private market. The methodology for calculating the amount of a housing voucher takes into account the recipient's income and key expenses and tailors the subsidy to his or her needs. The tenant pays what the State has determined he or she can afford; the State pays the remainder directly to the landlord. A landlord should not be permitted to undermine the program by denying housing based on insufficient income to those the State has concluded can afford their reduced rental contributions. The LAD, in turn, reinforces S-RAP and protects its participants by prohibiting discrimination against voucher holders. Because Defendants' minimum-income threshold would exclude the vast majority of them, it violates the LAD. Two lines of authority, S-RAP and the LAD, thus converge to preclude a landlord from posing a minimum-income bar to keep rental assistance recipients out of residential properties.

At bottom, a blanket income disqualification is irrational as applied to voucher holders: it excludes them for having too little income to pay rents they do not in fact owe because the State covers most of the monthly bill. If a business necessity defense has any relevance in this case – and Amicus believes it does not – the burden should rest on the Defendants to prove that the prospective S-RAP tenant cannot sustain her portion of

the expenses associated with the rental, despite the contrary governmental determination that she can do so.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Denise Bell has a disability and receives federal Supplemental Security Income benefits from the Social Security Administration. (Pa20 at ¶¶ 7-8.)[1] In October 2005, she was approved for a one-bedroom tenant-based rental assistance voucher through the State Rental Assistance Program. (Pa21 at ¶ 9.) As an S-RAP recipient, Ms. Bell's rental obligation is limited to an amount the State determines she can afford based on her income and expenses; the State pays the remainder. (Pa21, 22-23 at ¶¶ 12, 19.)

In November 2005, Ms. Bell applied for a one-bedroom apartment, at $874 per month, in Yardville, New Jersey. (Pa21 at ¶ 13.) Defendant landlords Tower Management Services, L.P., and Barbara Perry rejected Ms. Bell's application because her income did not meet their minimum-income requirement of $28,000 per year. (Pa21-22, 22-3 at ¶¶ 15, 19.)

Amicus adopts the procedural history as described in Appellant's brief. Appellant's Br. at 4-6 (July 20, 2009).

[1] Citations to the appendix of the Appellant are Pa__.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT BECAUSE SHE SUFFICIENTLY PLED A VIOLATION OF THE LAW AGAINST DISCRIMINATION BASED ON DISPARATE IMPACT.

The trial court's analysis of the Plaintiff's claim demonstrated a fundamental misunderstanding of violations of the Law Against Discrimination (LAD) based on disparate impact. To state a claim of disparate impact, the Plaintiff need only assert that she is a member of a protected class and that a facially neutral policy — one that does not by its terms target a protected class — has a disparate impact on the class of which she is a member. The Plaintiff need not plead either facial discrimination or discriminatory intent. Mistakenly searching for facial discrimination, however, the trial court dismissed Ms. Bell's Complaint in part because Defendants' minimum-income policy contained no language targeting recipients of rental assistance for exclusion. Because allegations of facial discrimination are not necessary to support a claim of disparate impact, this dismissal was improper.

The court compounded this error when it considered the Defendants' business necessity defense. A business necessity defense arises only after the plaintiff has proved a prima facie case of disparate impact and the burden shifts to the defendant. Reliance on this defense is improper on a motion to dismiss for failure to state a claim because, at this stage, any such

defense is irrelevant; the plaintiff's pleading of a prima facie case is sufficient to defeat the motion.

When reviewing a motion to dismiss, the court may rely only on the complaint itself, must assume that all allegations in the pleading are true, and must afford all reasonable inferences to the plaintiff. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989); Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002). The question is not whether the plaintiff can prove the allegations in the complaint, but rather whether the facts alleged are sufficient to support the claim. Printing Mart-Morristown, 116 N.J. at 746. "This requires that the pleading be searched in depth and with liberality to determine whether a cause of action can be gleaned even from an obscure statement." Seidenberg, 348 N.J. Super. at 250. Given this standard, a "motion [to dismiss] is granted only in rare instances." Id. An appellate court reviews a motion to dismiss under "the same standard as that applied by the trial court." Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005).

Ms. Bell's Complaint withstands a motion to dismiss. A plaintiff can state a claim under the LAD by alleging disparate impact. In re Twp. of Warren, 132 N.J. at 25. The New Jersey courts rely on Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k), for the elements of a disparate

impact claim. Gerety v. Atlantic City Hilton Casino Resort, 184 N.J. 391, 400 (2005); Esposito v. Twp. of Edison, 306 N.J. Super. 280, 289-90 (App. Div. 1997). While the proofs required to establish disparate impact are described in the context of employment discrimination, they are applicable in housing discrimination cases as well. See In re Twp. of Warren, 132 N.J. at 38.

To establish a prima facie case of disparate impact, a plaintiff must show that a facially neutral policy has a significantly disproportionate or adverse impact on members of a protected class;[2] the plaintiff does not need to demonstrate a discriminatory motive or facial discrimination. Gerety, 184 N.J. at 399; see also Esposito, 306 N.J. Super. at 289-90 (citing 42 U.S.C. § 2000e-2(k)); Giammario v. Trenton Bd. of Educ., 203 N.J. Super. 356, 363 (App. Div. 1985) (plaintiffs made a prima facie case by demonstrating that a facially neutral

[2] Because every discrimination claim rests on the plaintiff's membership in a protected class, a decision in the plaintiff's favor inevitably redounds to the benefit of other members of that class. The case need not be litigated as a class action in order for the precedential effect of the decision to affect a broad public interest in non-discrimination. Tower Management overlooks this precedential effect in charging the Public Advocate with improperly seeking to revive class action allegations that the trial court dismissed. Defs.' Br. Opp. Mot. N.J. Pub. Adv. To Appear as Amicus Curiae at 16-18, 19-21 (July 22, 2009).

policy regarding a multi-tiered pay increase scale resulted in the denial of salary increases to a disproportionate number of older employees).

Once a plaintiff establishes her prima facie case, the burden shifts to the defendant to rebut the discrimination claim by proving that the challenged policy is a matter of "business necessity." Giammario, 203 N.J. Super. at 363; see also Esposito, 306 N.J. Super. at 289-90 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).[3] After the defendant asserts a business necessity defense, the burden shifts back to the plaintiff to demonstrate that an alternative, non-discriminatory practice is

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[3] In disparate impact cases, such as this one, the defendant bears the burden of proof in establishing "business necessity." El v. Se. Pennsylvania Transp. Auth., 479 F.3d 232, 241 (3d Cir. 2007) ("[T]he Civil Rights Act of 1991 . . . placed back on the employer the burden of proof."); Lanning v. Se. Pennsylvania Transp. Auth., 181 F.3d 478, 487 (1999) ("As part of this codification of Griggs [v. Duke Power Co., 401 U.S. 424 (1971)], the [Civil Rights Act of 1991] made clear that both the burden of production and the burden of persuasion in establishing business necessity rest with the employer.");42 U.S.C. §§ 2000e-2(k) (respondent must "demonstrate" business necessity), 2000e(m) ("The term 'demonstrates' means meets the burdens of production and persuasion."). The Court should not confuse the Defendants' burden here with the lighter burden in disparate treatment cases. See, e.g., Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449-50 (2005) (holding that burden of production – not burden of proof – shifts to defendant once plaintiff makes a prima facie case of disparate treatment); Pasquince v. Brighton Arms Apartments, 378 N.J. Super. 588, 599-600 & n.2 (App. Div. 2005) (same).

available, and the defendant does not employ it. Esposito, 306 N.J. Super. at 289-90 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(ii)).

Ms. Bell pled sufficient facts to state an LAD claim based on disparate impact. In Pasquince v. Brighton Arms Apartments, 378 N.J. Super. 588, 595-96 (App. Div. 2005), this Court held that the LAD protects voucher holders under the federal Section 8 program, which is designed to subsidize housing for low-income tenants in the private market, see generally 42 U.S.C. § 1437f. Tenants enrolled in Section 8, like those enrolled in New Jersey's analogous State Rental Assistance Program, are protected by a provision of the LAD that forbids landlords

> [t]o refuse to . . . rent . . . or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property.

N.J. Stat. Ann. § 10:5-12(g)(4); see also Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 618-19 (1999) (holding that the predecessor to this section of the LAD, N.J. Stat. Ann. § 2A:42-100, prohibited discrimination against Section 8 tenants).[4] As

[4] Other state courts have also held that a section 8 voucher is a "source of income" within the meaning of local antidiscrimination laws. See, e.g., Montgomery County v.

(Footnote continued . . .)

an S-RAP recipient, Ms. Bell is a member of the class of people protected from discrimination based on the source of their rental income, and she so pled. (Pa24-25 at ¶¶ 31-32.) Ms. Bell also pled that Tower Management's minimum-income requirement has a disparate impact on S-RAP voucher holders because the $28,000 threshold would exclude between 95 and 99 percent of them. (Pa25-26 at ¶¶ 33-39.)

Not only did Ms. Bell sufficiently plead the elements of a disparate impact claim (Pa24-26 at ¶¶ 31-39), but the trial court found that she had pled them. The court repeated her allegation that as an S-RAP voucher holder she is a member of a class protected under the LAD. (2T5-11 to 2T5-19.)[5] The court accepted as true, as it must on a motion to dismiss, the Plaintiff's assertion that the Defendants' minimum-income test would disqualify at least 95 percent of S-RAP voucher holders. (2T7-24 to 2T8-3.) The court even acknowledged that the policy would disparately impact S-RAP voucher holders: "It's obvious that S-RAP voucher recipients may not have the appropriate income [to meet the minimum-income policy]." (2T10-19 to 2T10-

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Glenmont Hills Assocs., 936 A.2d 325 (Md. 2007); Godinez v. Sullivan-Lackey, 815 N.E.2d. 822 (Ill. App. Ct. 2004).

[5] Citations to the transcript dated February 20, 2009 are 2T__.

20.) Indeed, simply as a matter of common logic, the contention that a minimum income requirement would disproportionately affect those whom the state has already found to be eligible for an S-RAP voucher, due to limited income, seems self-evident to the point of being tautological.

Despite explicitly accepting as true the allegations in the Complaint, which sufficiently set forth the elements of a prima facie claim of disparate impact, the trial court dismissed the action for failure to state a claim. In effect, the trial court held that, because on its face the landlord's policy excludes tenants or prospective tenants based on the amount of their incomes, the policy does not discriminate based on the source of that income. (See 2T6-19 to 2T8-6.) The court relied almost exclusively on the face of the policy, noting that it nowhere explicitly stated that S-RAP voucher holders were not eligible to rent an apartment. (See 2T10-16 to 2T10-18.)[6]

As discussed above, the policy that is the focus of a disparate impact claim is by its nature facially neutral — meaning that it applies to all and does not explicitly exclude

[6] Defendants' related assertion that Ms. Bell is "requesting that this Court amend the LAD, and create a new cause of action for economic discrimination" (Defs.' Statement of the Case, Apr. 17, 2009), likewise miscontrues the basis of a disparate impact claim.

anyone on the basis of membership in a protected class. Yet such a policy may discriminate nonetheless because of the disparate impact it has upon a protected class. See Gerety, 184 N.J. at 399; Giammario, 203 N.J. Super. at 362. For example, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the United States Supreme Court held that a facially neutral policy, requiring all employees to have a high school diploma or pass a standardized general intelligence test to be eligible for certain jobs, was discriminatory because of its disparate impact upon African-American applicants. Similarly, the Supreme Court struck down height and weight requirements for employment as a prison guard because of their disparate impact upon women. Dothard v. Rawlinson, 433 U.S. 321 (1977). These policies drew classifications based on the facially neutral criteria of education and physical size; nevertheless, the Court invalidated them because they excluded a disproportionate number of African-Americans and women, who are members of protected classes. Griggs, 401 U.S. at 431; Dothard, 433 U.S. at 328-31.

Likewise, here, it is not necessary that Tower Management's policy explicitly exclude prospective tenants based on their status as S-RAP voucher holders, only that the facially neutral minimum-income requirement have a disparate impact on this protected class. The trial court, however, failed to recognize that a policy that excludes tenants on its face based on the

amount of a tenant's income may also be discriminatory because it has a disparate impact on those who receive their income from a particular source, such as S-RAP.

Analyzing a statute similar to our LAD, the Connecticut Supreme Court held that a landlord's minimum-income test discriminated against voucher holders based on the source of their rental income. Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238 (Conn. 1999). "Even if the defendant demonstrably treats all rental applications the same [under the minimum-income test]," the Court reasoned, "its facially neutral conduct is not sufficient to avoid liability under the statute if such neutral conduct has a disparate impact on potential section 8 reimbursement tenants." Id. at 255. Because Ms. Bell successfully pled that Tower Management's denial of her rental application based on the amount of her income also excludes a disproportionate number of those protected tenants (including her) who derive their income from the lawful source of government assistance, the trial court erred in dismissing her Complaint.

Further demonstrating its misunderstanding of the disparate impact claim, the trial court made findings that Tower Management's minimum-income requirement was not discriminatory because it satisfied the "business necessity" test. (2T6-13 to 2T6-18.)("[New Jersey courts have] determined that a claim of

disparate impact cannot be directly related to a legitimate permissible qualification.") (emphasis added); (2T8-13 to 2T8-19.)("[T]here is nothing inappropriate or illegal or disparate in applying the business reasons [such as a minimum-income requirement] . . . [T]here's been no case law that would indicate that a minimum income standard is not an appropriate standard to be applied when considering whether to rent to a perspective [sic] tenant.") (emphases added). In the procedural context of a motion to dismiss, however, the only relevant issue is whether plaintiff's complaint has sufficiently pled a prima facie case, and it is improper to consider the merits of an anticipated affirmative defense that may arise in respondent's answer. Only after a plaintiff establishes her prima facie case does the burden shift to the defendant, who may then attempt to rebut the discrimination claim by demonstrating a legitimate business reason for the challenged policy. Giammario, 203 N.J. Super. at 363; Esposito, 306 N.J. Super. at 289-90 (quoting 42 U.S.C. § 2000e-2(k)).

In considering the "business necessity" defense, the trial court essentially acknowledged that the Plaintiff had pled a prima facie case, which in turn should have precluded a dismissal of the Complaint for failure to state a claim. And as further argued infra Part II, the trial court's application of

the business necessity defense was substantively incorrect, even if it had been procedurally appropriate to consider it.

II. THE TRIAL COURT ERRED IN ACCEPTING DEFENDANTS' ASSERTION OF "BUSINESS NECESSITY" BECAUSE NEW JERSEY LAW AND PUBLIC POLICY PRECLUDE A PRIVATE LANDLORD FROM DENYING HOUSING TO VOUCHER HOLDERS BASED ON A MINIMUM-INCOME TEST.

Under New Jersey law, a landlord is not free to exclude a prospective S-RAP tenant based on a minimum-income requirement. If private landlords were permitted to rely on a purported "business necessity" for such exclusions, the result would be to undermine the S-RAP program and to eviscerate the LAD's prohibition on discrimination against tenants who pay their rent through government vouchers. Only people with low incomes are eligible for state rental assistance, and the methodology used to calculate the value of an S-RAP voucher involves a state determination that the applicant can afford the small portion of the rent for which he or she will be responsible. A landlord should not be permitted to countermand that determination. Moreover, New Jersey courts have held that voucher holders are a protected class under state antidiscrimination laws, and Tower Management's income threshold operates to exclude virtually all S-RAP recipients. Thus, Tower Management's application of its income requirement to Ms. Bell and other voucher holders violates the LAD and flies in the face of New Jersey's

established public policy to ensure that its poorest renters will have access to private rental housing.

A. New Jersey Has a Unique and Comprehensive Commitment to Ensuring That Affordable Housing Is Available to Its Low-Income Residents.

For more than thirty years, New Jersey has led the nation in efforts to secure the right to affordable housing through landmark court decisions and statutes. New Jersey courts have consistently upheld a state constitutional right to affordable housing. See, e.g., In re Twp. of Warren, 132 N.J. 1 (1993); S. Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983); S. Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151 (1975). In 1985, the Legislature supported and expanded this right with the Fair Housing Act, N.J. Stat. Ann. §§ 52:27D-301 to -329, which created the Council on Affordable Housing (COAH) to determine each municipality's affordable housing obligation and to create rules governing its fulfillment. More than a decade earlier, in 1974, the Legislature enacted the Anti-Eviction Act, N.J. Stat. Ann. §§ 2A:18-61.1 to -61.12, "to protect residential tenants from the effects of . . . a severe shortage of rental housing in this state," Harden v. Pritzert, 178 N.J. Super. 237, 240 (App. Div. 1981), by ensuring that they cannot be evicted except for certain enumerated reasons. The Legislature has also found it

necessary to protect tenants and homeowners from being discriminated against, including for the source of their income, through the Law Against Discrimination, N.J. Stat. Ann. § 10:5-12(g)(4), and its predecessor statute, N.J. Stat. Ann. § 2A:42-100.[7]

B. The Purpose of the State Rental Assistance Program Is to Ensure That New Jersey's Poorest Residents Can Afford Market-Rate Housing and Are Not Left Homeless.

S-RAP is part of New Jersey's comprehensive public policy to ensure that its low-income residents have access to affordable housing. S-RAP was created in 2004 in response to a threatened one billion dollar cut in federal Section 8 funds which would have eliminated affordable housing for thousands of New Jersey households. Savings in Housing Aid Must Be Paid Elsewhere, Home News Tribune, June 3, 2004, at A88; Action in Trenton, The Star-Ledger, Dec. 7, 2004, at 29. The bill's sponsors expressed concern that, "[d]ue to cutbacks in federal funding, the availability of Section 8 vouchers ha[d] been severely impacted" and recognized "a pressing need for a State

[7] Various New Jersey laws protect vulnerable tenant populations. See, e.g., N.J. Stat. Ann. § 52:27D-280 (Homelessness Prevention Program); N.J. Stat. Ann. § 2A:18-61.40 to -61.52 (Tenant Protection Act of 1992); N.J. Stat. Ann. § 48:2-29.31 (Tenant's Lifeline Assistance Program); N.J. Stat. Ann. § 2A:18-61.23 (Senior Citizens and Disabled Protected Tenancy Act); N.J. Stat. Ann. § 20:4-1 (Relocation Assistance Act).

rental assistance program for low income residents of our State who are on the brink of homelessness." Assembly Sponsors' Statement, A2476 (March 4, 2004). S-RAP is comparable to the federal Section 8 program but is "available only to State residents who are not currently holders of federal Section 8 vouchers." N.J. Stat. Ann. § 52:27D-287.1(a).

The program provides housing subsidies to the State's poorest and most vulnerable residents. With the exception of set-asides for senior citizens, the Department of Community Affairs (DCA) requires that seventy-five percent of applicants admitted to S-RAP be "extremely low-income families," i.e., families earning thirty percent or less of the median income in their area, as defined by HUD's annually published income guidelines. N.J. Admin. Code § 5:42-2.3(a). In the Trenton region, where Tower Management's Yardville apartment complex is located, $17,600 is thirty percent of median income for a single individual. (Pa99.) The remaining slots are reserved for families earning no more than forty percent of their area's median income. N.J. Admin. Code § 5:42-2.3(a). DCA makes its initial program eligibility determination after collecting and verifying income information from all household members to ensure that aggregate household income does not exceed the program's ceilings. See N.J. Admin. Code § 5:42-2.3(b).

S-RAP affords program participants the opportunity to enter market-rate housing that otherwise would be unattainable. As articulated in the DCA regulations, the S-RAP program seeks to "promote integration of housing by race, ethnicity, social class, disability and income." N.J. Admin. Code § 5:42-2.7 (emphases added).[8]

The methodology used to determine the amount of an S-RAP voucher involves a case-by-case assessment of what a qualified tenant is able to pay. First, the tenant's gross annual income is calculated. N.J. Admin. Code § 5:42-2.8(a)(1). Second, a deduction is allowed "for each minor dependent" and for "a head of household who is 65 and older, or disabled . . . ." N.J. Admin. Code § 5:42-2.8(a)(2),(3). DCA then divides this amount, the adjusted annual income, by twelve to arrive at the

[8] In their briefs in the trial court, and again in opposing this amicus brief, Defendants repeatedly refer to a 2003 DCA guidance document that advised landlords performing background checks that they were free to inquire about an array of matters, including the tenant's "name, social security number, past rental history including prior landlords, information on employment, income, savings, and personal and credit references." See, e.g., Defs.' Br. Opp. Mot. N.J. Pub. Advocate To Appear as Amicus Curiae at 10-11 (July 22, 2009) (quoting DCA, A Landlord's Guide to the Section 8 Program (2003). This document is no longer available from DCA or on its website. In any event, DCA's advice in this document does not constitute authorization or encouragement for landlords to exclude Section 8 tenants based on minimum-income tests.

household's adjusted monthly income. N.J. Admin. Code § 5:42-2.8(a)(4),(5).

DCA limits the tenant's rental contribution to 30% of adjusted income (25% for tenants with disabilities, such as Ms. Bell) plus any difference between DCA's "payment standard" – 100 to 110 percent of the cost of "decent and safe rental housing of a modest nature" in the area - and the market price of the rental unit. See N.J. Admin. Code §§ 5:42-1.2 (defining "[c]alculation of family share rent," "[f]air market rent," and "[p]ayment standard"), -2.8(a)(6) (describing subsidy calculations). DCA then pays directly to the landlord the difference between the tenant's required rental contribution "and either the applicable payment standard or contract rent whichever is less." N.J. Admin. Code § 5:42-2.8(a)(7); see also N.J. Admin. Code § 5:42-1.2 (defining "[h]ousing assistance payment" as "the monthly assistance payment by DCA, which is payment to the owner for rent to the owner under the family's lease.").

Thus, in calculating the value of a tenant's S-RAP voucher, DCA makes an individualized determination that a particular tenant with a verified income and certain major expenses can afford a specific rental contribution in a given apartment, with the balance paid directly to the landlord by the State.

C. The Application of a Minimum-Income Threshold to an S-RAP Voucher Holder Violates New Jersey's Law Against Discrimination and the State's Longstanding Public Policy of Ensuring That Its Poorest Residents Have Access to Affordable Housing.

New Jersey's Law Against Discrimination protects prospective tenants from discrimination when they seek rental housing. Robinson v. Branch Brook Manor Apartments, 101 N.J. Super. 117 (App. Div. 1968). Although early LAD housing cases such as Robinson dealt primarily with landlords' exclusionary practices based on race, the Legislature later proscribed discrimination based on the source of tenants' rental payments, including housing vouchers. Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602 (1999); T.K. v. Landmark W., 353 N.J. Super. 353 (Law Div. 2001), aff'd, 353 N.J. Super. 223 (App. Div. 2002).

In Franklin Tower One, the Supreme Court recognized section 8 voucher holders as a protected class and held that a landlord's refusal to accept a current tenant's voucher was unlawful discrimination based on source of income, in violation of N.J. Stat. Ann. § 2A:42-100.[9] 157 N.J. at 618-24. The Court stated:

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[9] After Franklin Tower, the Legislature incorporated the protections of N.J. Stat. Ann. § 2A:42-100 into the LAD, continuing the prohibition on discrimination in housing based on lawful source of income while ensuring stiffer statutory penalties for violators. N.J. Stat. Ann. § 10:5-12(g)(4). See

(Footnote continued . . .)

> We find it highly unlikely that the Legislature, having demonstrated its strong commitment to the protection of tenants from unjustifiable evictions, would have intended to permit the eviction of an exemplary tenant solely for the reason that the federal government has found her qualified to participate in the Section 8 housing program pursuant to which the government pays a portion of her rent.

Id. at 618.

The Court rejected the landlord's assertion that accepting Section 8 vouchers would pose a substantial administrative burden, reasoning that "[l]andlords in New Jersey are already subject to numerous regulations concerning the maintenance of their properties and relations with their tenants." Id. at 621. Furthermore, the Court sought to close a loophole that could potentially render the Section 8 program meaningless: If all landlords refused to complete Section 8 paperwork, there would be no Section 8 housing available. Id.[10]

Although no New Jersey court has directly addressed the question of whether minimum-income requirements violate the LAD

Pasquince, 378 N.J. Super. 588, 593-94 (App. Div. 2005), for a recitation of this history.

[10] See also M.T. v. Kentwood Constr. Co., 278 N.J. Super. 346 (App. Div. 1994) (affirming order that, unless and until landlord signed Section 8 documents, qualified tenant could pay only what would have been her rental contribution under Section 8, and landlord would be prohibited from evicting her for nonpayment of remainder of the rent).

when applied to voucher holders, two cases have examined the relationship between antidiscrimination protections for voucher holders and landlord screenings for "credit-worthiness."

T.K. v. Landmark W. held that an apartment complex used credit-worthiness, an otherwise acceptable screening criterion under N.J. Stat. Ann. § 2A:42-100, as a pretext to discriminate against a voucher-holding tenant. 353 N.J. Super. 353 (Law Div. 2001), aff'd, 353 N.J. Super. 223 (App. Div. 2002). The landlord did not inquire into the tenant's history of past rental payments and instead cited the existence of a small collections account related to medical expenses as justification for her automatic disqualification. Id. at 361. The complex did not use any objective formula to determine that she might not fulfill her obligations as a tenant. Id. Moreover, the Section 8 voucher covered the tenant's entire rent and a portion of her utilities. Id. at 362. On these facts, the court found the complex's decision to exclude the tenant to be arbitrary and unrelated to any real concern that she might actually default on her rental obligations. Id. at 362-63.

In contrast, this Court held in Pasquince v. Brighton Arms that defendant landlord did not violate the LAD when he denied a Section 8 tenant's rental application for lack of credit-worthiness. 378 N.J. Super. 588 (App. Div. 2005). Apparently recognizing a legal barrier that Tower Management seeks to deny

here, the landlord in Pasquince had "exempt[ed] Section 8 applicants from its minimum income requirements because it may not discriminate against such applicants based on the source of their income." Id. at 592. The landlord relied instead on the tenant's credit history, which included a prior eviction, nearly $3,000 in unpaid rent, and various other unpaid bills. Id.

Although the court rejected Mr. Pasquince's argument "that it is always arbitrary and capricious to consider a Section 8 rental applicant's credit history because the Section 8 program will be paying the large majority of the tenant's rental obligation," it did so based on the rationale that, "if the applicant has a history of not paying his or her financial obligations, it is logical and reasonable for a landlord to conclude that the applicant might avoid the rent obligation, no matter how small the amount." Id. at 598 (emphasis added). Thus, while a landlord may examine a voucher holder's credit-worthiness under the LAD, there must be a rational relationship between the tenant's credit history and the landlord's concern that the tenant will not pay the rent in order to avoid the inference that the credit screening is a pretext for discrimination based on source of income. See id. at 600.

Taken together, the New Jersey cases reveal skepticism toward landlord practices (refusal to complete the necessary paper work, reliance on random credit checks that show no

relevant history of indebtedness) that threaten to disqualify all or most voucher holders without in any real way advancing the landlord's legitimate interest in prompt payment of the rent. Tower Management's enforcement of a $28,000 minimum-income requirement against voucher holders, which imposes a per se exclusion without any individualized inquiry into a particular tenant's ability to pay the rent, is just such a suspect practice.

Unlike our state courts, the Connecticut courts have squarely addressed the issue of whether a landlord's use of a minimum-income requirement is discriminatory when applied to voucher holders. Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238 (Conn. 1999) ("Sullivan I"); Comm'n on Human Rights & Opportunities v. Sullivan, 939 A.2d 541 (Conn. 2008) ("Sullivan II"). These cases stand for the proposition – which this Court should adopt as well – that a landlord cannot exclude a recipient of rental assistance based on her theoretical inability to pay rent for which she is not responsible.

In Sullivan I, the Connecticut Supreme Court held that a landlord's minimum-income requirement as applied to a Section 8 voucher holder violated a Connecticut statute that prohibited discrimination based on a renter's or prospective renter's "'lawful source of income.'" 739 A.2d at 241 n.1 (quoting Conn.

Gen. Stat. § 46a-64c(a)(1), (2)). The landlord had rejected two Section 8 voucher holders for failure to meet a $38,000 income threshold that was uniformly applied to all prospective tenants. Id. at 243, 252 n.33, 254. This income threshold "resulted, in fact, in the disqualification of all low income tenants . . . ." Id. at 252. Under the terms of Section 8, the tenants who challenged the policy would have been responsible for only a fraction of the total rent ($11 and $64, respectively), with the balance paid directly to the landlord by the local housing authority. Id. at 243 nn.9, 11.

Unlike New Jersey's Law Against Discrimination, the Connecticut statute contained an express exception permitting landlords to reject tenants "'solely on the basis of insufficient income.'" Id. at 252 (quoting Conn. Gen. Stat. § 46a-64c(b)(5)). The question before the court, therefore, was whether the landlord had license to set whatever income threshold he deemed "sufficient." The court rejected such uncritical deference to the landlord's "business judgment." Id. at 254. Having noted that Section 8 exists "'for the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing,'" id. at 244 (quoting 42 U.S.C. § 1437f(a)), the court remarked that the companion antidiscrimination section functions "to prevent low income families from being 'rejected or denied a full and equal

opportunity for . . . public accommodation'" based on their payment of rent through Section 8 assistance, id. at 253 (quoting legislative history of Connecticut statute). These dual purposes would be thoroughly subverted if "landlords [had] carte blanche authority to define the term 'insufficient income' so as to qualify for the exception . . . . Such a construction would swallow the statute whole and render it meaningless." Id. at 253. Thus blanket minimum-income tests, such as the $38,000 threshold at issue in Sullivan I or the $28,000 threshold at issue here, violate the prohibition on discrimination in rental housing based on the source of the tenant's income.

The Connecticut court still faced the task, however, of interpreting the meaning of the "insufficient income" exception in its state statute. The court considered the conclusion that, "because section 8 rental assistance payments are calculated with the expectation that the prospective tenant will have sufficient remaining income to cover the tenant's personal share of the rent, that tenant's income never will fall within the 'insufficient income' exception." Id. at 253. Yet this holding would have required the court to read the exception "out of the statute under the very circumstances in which the statute, ab initio, is most likely to apply." Id. at 254. Abjuring this course as inconsistent with legislative intent, the court instead construed the exception narrowly:

> [T]he exception affords a landlord an opportunity to determine whether, presumably for reasons extrinsic to the section 8 housing assistance calculations, a potential tenant lacks sufficient income to give the landlord reasonable assurance that the tenant's portion of the stipulated rental will be paid promptly and that the tenant will undertake to meet the other obligations implied in the tenancy.

Id. The court emphasized that the landlord would bear "the burden of proving its eligibility for the exception" by way of a "specific fact-bound" inquiry into the tenants' capacity to pay their portions of the expenses associated with the rentals. Id. at 255.

In Sullivan II, the Connecticut Supreme Court again considered whether the same defendant could refuse to rent to a Section 8 tenant because she failed to meet an income test that had by then appreciated to $40,000. 939 A.2d at 546. The Court reaffirmed its holding in Sullivan I:

> The objective definition of sufficient income that the defendants urge, however, is not legitimate because, as we explained in Sullivan I, it does not comport with the antidiscriminatory purpose of [the statute]. The mere fact that the defendants apply their discriminatory standards consistently by enforcing an objective formula that bears no relation to a prospective section 8 tenant's personal share of the periodic rent does not render those standards legitimate.

Sullivan II, 939 A.2d at 553.

In New Jersey, as in Connecticut, the law prevents landlords from applying minimum-income tests to exclude tenants who receive assistance, tailored to their needs, through either the Section 8 program or its state analogue, S-RAP. Whether the income test excludes 100% of voucher holders, as in Sullivan I, 739 A.2d at 252, or 95-99%, as is alleged and to be presumed true here, (Pa25-26 at ¶¶ 33-39), such thresholds undermine the remedial purpose of rental assistance and violate the antidiscrimination law.

Indeed, the logic supporting this conclusion follows inexorably from the New Jersey Supreme Court decision that first secured protection for voucher holders under the antidiscrimination law. In Franklin Tower One, the Court reasoned that, "[t]o permit a landlord to decline participation in the Section 8 program in order to avoid the 'bureaucracy' of the program would create the risk that '[i]f all landlords . . . did not want to "fill out the forms" then there would be no Section 8 housing available.'" 157 N.J. at 621 (quoting Templeton Arms v. Feins, 220 N.J. Super. 1, 9 (App. Div. 1987)). Likewise here, if all landlords set income thresholds near or above the eligibility level for S-RAP, tenants who receive assistance would be denied entrée into the very same private rental market that the program was designed to open to them. N.J. Admin. Code § 5:42-2.7 ("The State Rental Assistance

Program shall promote integration of housing by race, ethnicity, social class, disability and income."); see also 42 U.S.C. § 1437f(a) (Section 8 exists "[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing. . . ."). The closing of so many doors would, in turn, "violate[] both the letter and the spirit" of the LAD's proscription on discrimination based on a tenant's source of income. Franklin Tower One, 157 N.J. at 618. For these reasons, Defendant Tower Management cannot be permitted to exclude Ms. Bell or other voucher holders because their income is lower than the blanket threshold it has established.[11]

As in the Connecticut cases, however, the question remains whether the landlord should be permitted to make any inquiry into the sufficiency of a voucher holder's income. Unlike the Connecticut statute, our LAD contains no express exception authorizing landlords to exclude tenants based on insufficient

[11] This Court's approval of a credit-check on voucher holders in Pasquince, 378 N.J. Super. at 599, does not signal the permissibility of the blanket income disqualification at issue here. A credit-worthiness evaluation involves an individual assessment of the tenant's past rental payment history to determine whether the tenant is a financial risk to the landlord. Id. at 598. In contrast, a $28,000 income threshold presumptively excludes nearly all voucher holders without any inquiry into whether they can afford the small portion of the rent they would owe under S-RAP methodology.

income. Amicus therefore respectfully suggests that, consistent with our own new Jersey statute, the governmental determination of what the S-RAP tenant can afford should be dispositive. That determination is based on a careful assessment of the tenant's income and primary expenses. See N.J. Admin. Code § 5:42-2.8 (defining the methodology for calculating individual subsidies). Our LAD does not give landlords discretion to skirt the Legislature's prohibition on discrimination against voucher-holders by second-guessing the governmental determination of how much rent they can afford. Because by definition virtually all those who are deemed eligible by the State for S-RAP vouchers will fail to meet a landlord's minimum income test, the minimum income test as applied to S-RAP voucher holders amounts to per se discrimination.

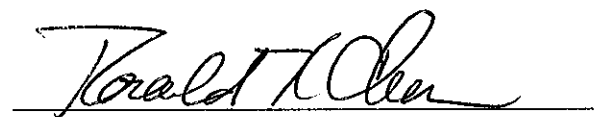
Even in the absence of express statutory authority to consider a voucher holder's income, however, Tower Management and other landlords may argue that some type of income screen is justified as a "business necessity." Again, Amicus counsels against this end-run around S-RAP's purpose and methodology. If the Court countenances the possibility of a "business necessity" defense in this context, however, it should instruct the trial court on the appropriate limits of such a defense. Sullivan I is the best guide: the landlord should bear the burden of proving that the tenant's income is insufficient to support

whatever portion of the rent she would owe under the S-RAP calculation and other expenses associated with the tenancy. See Sullivan I, 739 A.2d at 254-56. This evidentiary standard cannot eliminate the inherent conflict: the landlord would set out to show that the tenant lacks the financial means to sustain the tenancy even though the State had made a prior determination that she could do so with support from S-RAP. Still, an individualized showing, exploring the "prospective tenant's ability to meet his or her personal rental obligations," Sullivan II, 939 A.2d at 551, hews closer to the governing law than a blanket disqualification based on a minimum-income test ever can.

CONCLUSION

For these reasons, Amicus respectfully asks this Court to reverse the dismissal of the Complaint and to remand for further proceedings consistent with its opinion.

Respectfully submitted,



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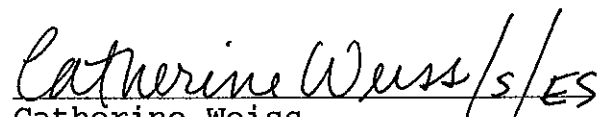

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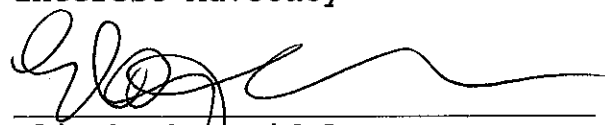

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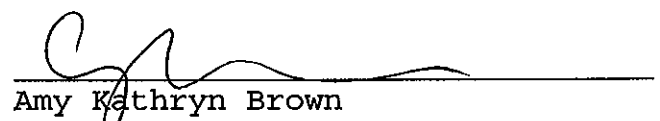

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Dated: August 7, 2009