THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

Case No. 03-CV-73034-DT

JOYCE GRAD,

Intervening Plaintiff,

HON. ANNA DIGGS TAYLOR

v.

MAG. JUDGE WALLACE CAPEL

ROYALWOOD COOPERATIVE APARTMENTS, INC., SCHOSTAK BROTHERS & COMPANY, INC., and RICHARD A. CAIL,

Defendants.
_____/

UNITED STATES' MEMORANDUM OF LAW
IN RESPONSE TO DEFENDANTS' RENEWED MOTION
FOR JUDGMENT AS A MATTER OF LAW

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I. INTRODUCTION

Defendants Royalwood Cooperative Apartments, Inc. ("Royalwood"), Schostak Brothers & Company, Inc. ("Schostak"), and Richard Cail filed a Renewed Motion for Judgment as a Matter of Law. Defendants seek entry of judgment in their favor, and in the alternative, Royalwood seeks a new trial. Because the case was properly litigated by the parties, properly adjudicated by the Court, and properly decided by the jury, Defendants' motion should be denied. By any definition, Defendants received a fair trial in this case, and there is no plausible reason they should be given a second chance. The instant motion simply re-states the issues that have been fully and properly decided by the Court and the jury.

II. BACKGROUND

This case was filed on August 8, 2003. On October 6, 2003, Defendants Cail and Schostak filed a Motion to Dismiss, arguing inter alia, that as the property manager and property management company, they could not be held liable in this case. (Doc. # 4). On November 24, 2003, the Court denied this motion, and the parties began discovery. (Doc. # 11). On November 26, 2003, Joyce Grad filed her complaint-in-intervention. (Doc. #13). Upon the close of discovery, Defendants Cail and Schostak filed a Motion for Summary Judgment, and all three Defendants filed a separate Motion for Summary Judgment. (Doc #'s 24, 25). In both of these filings, Schostak and Cail argued that they could not be held liable under the Fair Housing Act ("FHA"), and in the latter motion, all three Defendants claimed that Intervening Plaintiff Joyce Grad was not disabled, that Defendants never "knew" Joyce Grad was disabled and that the dog she requested did not qualify as "service dog" and therefore they had no duty to grant Joyce

Grad's request for an accommodation. The issues were fully briefed, and on September 20, 2004, the Court denied both motions. (Doc. #'s 38, 39).

The case was set for trial on February 7, 2005, and on February 18, 2005, the jury returned a verdict for the United States and Joyce Grad, and awarded compensatory and punitive damages totaling $314,209.60. (Doc. # 89). Defendants have brought forward nothing new since each of these rulings that would warrant a new trial. The Court and the jury have spoken in this case, and it is time for Defendants to listen.

III. ARGUMENT

Under Rule 59 of the Federal Rules of Civil Procedure, district courts may grant a new trial in an action in which there has been a jury trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). "Judgment as a matter of law may only be granted if, when viewing the evidence in a light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party." Barnes v. City of Cincinnati, 2005 FED App. 0142P (6th Cir.), citing Gray v. Toshiba Am. Consumer Prods., Inc., 263 F.3d 595, 598 (6th Cir. 2001); see also Williams v. Nashville Network, 132 F.3d 1123, 1130-31 (6th Cir. 1997). Generally, courts will not set aside jury verdicts in the absence of "extreme circumstances," such as a case of "manifest injustice or abuse of the jury's function." 12-59 Moore's Federal Practice - Civil § 59.13. "In ruling on a Rule 59 motion, the court will search the record for evidence that could reasonably lead the jury to reach its verdict, drawing all reasonable inferences in favor of the verdict winner." Id.

In this case, Defendants have not raised even a colorable argument that this is one of those "extreme circumstances" that would warrant setting aside the jury's verdict. In fact, Defendants make no reference to Rule 59, or to the standard the Court must apply in deciding this motion. There was ample evidence to support the jury's verdict, and the Court should deny Defendants' motion for a new trial and to set aside the punitive damages award.

A. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO CONCLUDE THAT JOYCE GRAD WAS DISABLED

Defendants argue that Plaintiffs "did not produce legally adequate evidence that Joyce Grad was handicapped[1] when she made her request for an accommodation." Defs' Br., p. 4. The term "handicapped" is defined by the statute as "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h). Accompanying regulations issued by HUD[2] interpret "mental impairment" to include any "mental or psychological disorder," and "major life activities" includes "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 C.F.R. §§ 100.201 (a)(2) and (b) (2002). More than adequate evidence was admitted at trial on all these issues, as discussed below, for the jury to reach its verdict.

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[1] The FHA uses the term "handicap" instead of the more generally accepted term "disability." See 42 U.S.C. § 3602(h). Both terms, however, have the same legal meaning. Bragdon v. Abbott, 524 U.S. 624, 631 (1988), and will be used interchangeably throughout this brief.

[2] HUD is "the federal agency primarily charged with implementation and administration" of the Fair Housing Act. See Meyer v. Holley, 537 U.S. 280 (2003). Thus, regulations promulgated by HUD are entitled to deference.

1. The Evidence Showed that Joyce Grad Was Substantially Limited in the Major Life Activity of Working

In the employment setting the Supreme Court has held that in order for working to be a major life activity, the individual must be unable to work at a broad spectrum of jobs, not simply the job the individual was doing at the time a request for accommodation was made. Sutton v. United Airlines, 527 U.S. 470, 492 (1999). In this case, Joyce Grad testified that she is completely unable to work in any job, and that she was receiving Social Security Disability Income ("SSDI") because of her inability to work at the time she applied to become a member of Royalwood Cooperative Apartments. See Tr. 2/8/2005, p. 28-29; Pls' Trial Ex. 1 (Joyce Grad's Royalwood Application)(Ex. C). Joyce Grad's treating psychiatrist, Dr. Raul Guerrero, and her treating psychologist, Dr. William Barnett, also testified that she could not work as a result of her mental impairments. Tr., 2/9/2005, p. 19; Guerrero Video Dep. Tr., p. 31.

Individuals who meet the definition of disability for the purpose of receiving SSDI meet the definition of disabled under the FHA in most cases, although the reverse may not be true. See Cleveland v. Policy Mgmt. Serv's Group, 526 U.S. 795, 797 (1999). In this case, Joyce Grad's impairments fall squarely within the definition of disability under both the FHA and the Social Security Act. Tr., 2/8/2005, pp. 29, 42. Under the FHA, working is a major life activity, and there was an abundance of evidence presented at trial to support the jury's conclusion that Joyce Grad was completely unable to work at the time she requested permission to keep a small dog in her Royalwood apartment.

Defendants put forth a novel theory that working should not be considered a major life activity in the housing context because "many people are capable of using and enjoying housing even though they do not work." Defs' Br., p. 4. Defendants point to homemakers, retirees and

independently wealthy people who live on "investment income" as examples of individuals who do not work and who enjoy their homes. The reason Joyce Grad could not hold a job was because of a mental impairment, as shown by the evidence in this case. The law has set forth certain criteria for determining whether an individual is considered disabled for the purposes of the FHA, and inability to work is a way of determining whether the individual has the kind of condition that warrants federal civil rights protection. 24 C.F.R. §§ 100.201(a)(2) and (b)(2002). There is no logical connection between a disabled individual's inability to work and a wealthy person's decision not to seek employment. The former cannot work, while the latter chooses not to work. The Court should reject this argument entirely.

2. Sleeping is a Major Life Activity under the FHA and the Evidence Showed Joyce Grad Was Substantially Limited in Sleeping

Sleeping is also a major life activity, as articulated in Smith v. Chrysler Corp., 155 F. 3d 799 (6th Cir. 1998) (finding that plaintiff who suffered from narcolepsy was substantially limited in the major life activity of sleeping) and Pack v. K-Mart Corp., 166 F. 3d 1300 (10th Cir. 1999) (holding that sleeping is a major life activity), and Defendants have largely abandoned any argument to the contrary. However, Defendants argue that in order for an individual to be substantially limited in the major life activity of sleeping, the problem must affect the person's "overall health in a severe and permanent manner," and that Plaintiffs failed to present evidence that Joyce Grad was seriously affected by her sleeping problems. Dfs' Br., p. 5, citing Steele v. Thiokol Corp., 24 F.3d 1248 (10th Cir. 2001).

This is simply not the standard set forth in Steele or in any other case. Steele acknowledges that sleep is a major life activity, and relies on the statutory rubric for determining when a limitation is "substantial." Id. As described below, the Court should treat Joyce Grad's

sleep problems no differently from how it would assess any other limitation in a major life activity. There are three factors to consider when making a determination about whether someone suffers a substantial limitation in a major life activity, and they were set forth by the Court on page 24 of the Jury Instructions. They are:

(1) the nature and severity of the impairment;
(2) the expected duration of the impairment; and
(3) the permanent or long term impact, or the expected permanent or long term impact of – or resulting from – the impairment.

Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 194 (2002).[3]

In this case, Dr. Guerrero testified that Joyce Grad suffers from a severe and long-term sleep impairment which exacerbates the symptoms of her mental illness, Bipolar II. See Guerrero Video Dep. Tr. pp. 14-15, 42-44, 74-75. Indeed, Dr. Guerrero said that he has seen Joyce Grad spend two or three days in the hospital without sleeping at all, and that this is part and parcel of her Bipolar II condition. Id., pp. 42-44.

Without making even one reference to the record in this case, Defendants claim that because Joyce Grad did not have a personal caretaker or housekeeper, she was not substantially limited by her mental impairment and related sleep disorder. Nothing in the statute, regulations or case law supports such a standard for making a determination regarding disability, and for good reason. An individual can be blind, deaf or unable to walk and still live independently,

[3] Defendants cite a portion of a very short concurrence in Haynes v. Williams, 392 F.3d 478, 485-86 (D.C. Cir. 2004), apparently for the premise that an individual can be substantially limited in the major life activity of sleeping only if that person is adversely affected during her waking hours by a lack of sleep. Dfs' Br., p. 6. Whether or not this is actually the standard for evaluating "substantial impairment" is of no consequence in this case, given that there was adequate evidence presented for the jury to conclude that Joyce Grad's sleep impairment affected her mental stability. See Guerrero Video Dep. Tr. pp. 14-15, 42-44, 74-75.

without a caretaker or housekeeper. Moreover, an individual with a disability may not be able to afford to hire such a person. Indeed, the 1998 amendments to the FHA were enacted in part to ensure that individuals with disabilities have equal opportunities to live independently and "to end the unnecessary exclusion of persons with handicaps from the American mainstream," and the Court should not retreat from this noble goal. Smith & Lee Assocs., Inc. v. City of Taylor, Michigan, 102 F.3d 781, 794 (6th Cir. 1996) (citing the House Comm. on the Judiciary, Fair Housing Amendments Act of 1988, H.R. Rep. No. 711 at 18, 100th Cong., 2d Sess.).[4]

B. PLAINTIFFS PRESENTED ADEQUATE EVIDENCE FOR THE JURY TO CONCLUDE THAT DEFENDANTS KNEW OR SHOULD HAVE KNOWN OF JOYCE GRAD'S DISABILITY

Defendants argue that Plaintiffs "did not produce legally adequate evidence that Defendants had notice that Joyce Grad was handicapped when she made her request for an accommodation." Dfs' Br., p. 7. Yet, the following letter, written by Joyce Grad and sent to all three Defendants, was admitted as evidence in this case:

> **I, Joyce Grad, qualify as a person with a disability as defined by the Fair Housing Act Amendment of 1988**. *** Under the Fair Housing Act Amendments Sec. 804 (42 U.S.C. 3604(f)(3)(B)), it is unlawful discrimination to deny a person with a disability "a reasonable accommodation of an existing building rule or policy if such accommodation may be necessary to afford such person full enjoyment of the premises." Please respond in writing to my request for reasonable accommodation within ten days. I look forward to your response and appreciate your attention to this critical matter.

[4] Interestingly, in Smith & Lee, the Sixth Circuit also held that the FHA "imposes an *affirmative duty* to accommodate handicapped people," rendering Defendants' argument that they should not be required to accommodate Joyce Grad's mental impairment in the housing context completely misplaced. Smith & Lee, 102 F.3d 795 (citing City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994), aff'd, 115 S.Ct. 1776 (1995)).

Pls' Trial Ex. 8 (emphasis added)(Ex. D)(Joyce Grad's November 10, 200 Letter) . Attached to this letter were letters from her treating psychologist and psychiatrist, which referred to Joyce Grad's "anxiety and depression" and "severe and debilitating depressive disorder." Id. Defendants' claim that Plaintiffs did not present adequate evidence that Joyce Grad informed them that she was a person with a disability strains credulity.[5] What Defendants really seem to be arguing is that Joyce Grad's initial letter requesting an accommodation did not include detailed information about her medical history, the precise nature of her disability, and exactly how a dog would ameliorate the effects of her impairments. But this is not required by the law, and Defendants point to no cases that suggest that the FHA requires that this information be provided at this stage of the process of determining whether a request can or must be accommodated.[6]

[5] In addition, testimony at trial revealed that Defendants fully understood Joyce Grad to be claiming to have a disability, but they chose not to believe it. For example, Royalwood Board Member Cheryl Scott testified that she read the first sentence of Joyce Grad's letter and then disregarded her claim to be disabled because "[s]he walked, she talked, she drove a car, she went to garage sales. . . ." Tr., 2/11/2005, p. 13. Royalwood Board President Barbara Nielsen testified that "[a]s I recall, I had a sense of disbelieving [she was disabled] based on things that I had observed as a resident within the co-op." Tr., 2/16/2005, p.13.

[6] Defendants appear to argue that in the *employment* context, under the ADA, an employee is required to provide the employer with medical information regarding physical limitations so the employer can evaluate whether and how to accommodate the employee in the work place. Id. But this is clearly not such a case. In the employment context, the employer has a range of evaluations to make when notified that an employee may be disabled, including whether the employee remains qualified for the position; whether the employee could pose a danger to himself or others; and what sort of accommodation can be made. See Sutton v. United Air Lines, 527 U.S. 471 (1999). Whether the ADA requires employees to provide medical documentation of the nature of an alleged impairment has no bearing on this case.

1. The Interactive Process

Defendants argue that "the Sixth Circuit has expressly held that there is no obligation [on a housing provider] to undertake an informal interactive process" upon receiving a request for an accommodation. Dfs' Br., p. 10. Defendants point to Groner v. Golden Gate Gardens Apts., 250 F.3d 1039 (6th Cir. 2001), in which the Sixth Circuit disagreed with cases such as The Corporation of the Episcopal Church in Utah v. West Valley City, 119 F.Supp.2d 1215 (D. Utah 2000), that have held the Fair Housing Act requires an "interactive process."

Groner, however, involved a completely different fact situation from the present case. There, there was no question as to whether the plaintiff was handicapped. The only issue was whether he had requested a reasonable accommodation to that handicap, and the court held that none of the requests the plaintiff made met the test of reasonableness. The "interactive process" argument which the Sixth Circuit rejected would have required the Groner defendant to go beyond considering the requests that were actually made, and to determine whether there was some other reasonable accommodation that plaintiff had not suggested.

In this case, unlike in Groner, Defendants contest whether Joyce Grad provided them with sufficient information to determine whether she was handicapped, not whether a particular accommodation was adequate, rendering their reliance on Groner misplaced. The law is very clear: if Joyce Grad clearly communicated to Defendants that she was handicapped and needed her dog for that reason, and Defendants were not certain whether her claim to be handicapped was justified, they were obligated to make an inquiry into the facts. "If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation. . . ." Jankowski Lee & Associates v. Cisneros,

91 F.3d 891, 895 (7th Cir. 1996); accord Jacobs v. Concord Village Condominium X Assoc., Inc., 2004 WL 741384 *2 (S.D. Fla. 2004).

Nothing in Jankowski Lee is inconsistent with the Sixth Circuit's holding in Groner. While it is true that the Jankowski Lee opinion speaks in terms of the housing provider's obligation to "open a dialogue," that is not the same as the "interactive process" which Groner rejected. Like Jankowski Lee, this case involves defendants who concluded, based on superficial observation without any inquiry into readily ascertainable facts, that Joyce Grad was not disabled. Unlike the plaintiff in Groner, we are not suggesting that Defendants were obligated to search for other possible accommodations that Joyce Grad did not request. Joyce Grad made only one request – to be allowed to keep a dog in her apartment – and it was up to the jury to decide if Joyce Grad's November 10, 2000 letter and attachments from her doctors were clear enough to notify Defendants that she was a person with a disability who was requesting a reasonable accommodation. Pls' Trial Ex. 8 (Ex. D).

Defendants argue in the alternative that if there is a requirement under the FHA that housing providers engage in an interactive process upon receiving a request for an accommodation, then it applies only if the individual notifies the provider of her impairments in her first contact with the provider regarding the issue. Dfs' Br., pp. 7-8. This argument is completely inapplicable to this case, where Joyce Grad informed Defendants that she was disabled, and provided letters from her doctors indicating that they would provide further information upon request. See Pls' Trial Ex. 8 (Ex. D). Defendants never asked for more information, and certainly never asked Joyce Grad to sign a release of medical information. Furthermore, according to Royalwood Board member Cheryl Scott, they did not ask for more

information because they had already concluded that she was not disabled. For example, Scott testified that "[w]e all observed her walking around the property happy as a lark, very friendly, very gregarious. What disability? How could she drive if she has a disability?" Tr., 2/11/2005, p. 13.

In the employment cases cited by Defendants to support their argument, the issue presented was whether the employees had provided their employers with adequate information regarding their impairments in the context of long-term employment relationships where the employees either refused to provide medical information upon request, or where the employees claimed that the accommodations they received were inadequate. See, e.g., Beck v. Univ. of Wisconsin Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996) (affirming the district court's dismissal of the case where the plaintiff refused to provide a medical release of information so that her employer could gather more information regarding her impairments to decide what kind of accommodation would be appropriate). Joyce Grad was under absolutely no requirement to inform Defendants that she suffered from a substantial impairment in working and sleeping when she sent her initial request for an accommodation, and there is not one statute, case or regulation that supports such a supposition. In fact, Sixth Circuit ADA decisions have not imposed any special requirement on the way an employee should inform an employer of a disability. See Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046 (6th Cir.1998) (holding that an employer has notice of the employee's disability when the employee tells the employer that he is disabled).

C. PLAINTIFFS PRESENTED ADEQUATE EVIDENCE OF THE NEXUS BETWEEN JOYCE GRAD'S IMPAIRMENTS AND HER REQUESTED ACCOMMODATION

Defendants argue that in order for an accommodation to be reasonable, there must be a nexus, or a connection, between Joyce Grad's alleged impairments and her request to keep a small dog in her Royalwood apartment. The United States has never disputed this important requirement. Where we disagree with Defendants is on the evidence introduced at trial and whether the accommodation must cure Joyce Grad, or merely ameliorate the effects of her disability.

The question of whether a requested accommodation is necessary under the Fair Housing Act includes the determination that the desired accommodation may "affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." Smith & Lee Assoc., Inc. v. City of Taylor, Michigan, 102 F.3d 781 (6th Cir. 1996) (quoting Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995)). In this case, there can be no dispute that Plaintiffs presented more than sufficient evidence for the jury to conclude that Joyce Grad's requested accommodation was reasonable and necessary for her to be able to use and enjoy her dwelling.

Joyce Grad testified that when her request for an accommodation was denied, she moved out in order to get a dog. Tr., 2/8/2005, p. 76-79. Her unrebutted testimony revealed that although she has not been cured by having a small dog in her apartment, the severity of her impairments (inability to work and sleep) has been lessened. Tr. 2/8/2005, p. 80, 98-100. She "uses" her dog to help her leave her apartment, which would be the first step towards being able to work. Id. She relies upon the dog to help her make a rapid exit from a crowded area in public if she suffers a panic attack, another requirement of re-entering the working world. Id. In the

sleep domain, Joyce Grad testified that "when I wake up with nightmares, [the dog] wake[s] me up . . . because they hear me thrashing they wake me up." Id.

Plaintiffs also presented the report and testimony of Susan Duncan, registered nurse, who the Court qualified as an expert on the human-animal bond. Tr., 2/10/2005, p. 58. Ms. Duncan conducted a nursing evaluation and set forth her opinions regarding how the dog Joyce Grad obtained serves to lessen the effects of her disabilities. Id., p. 66; Pls' Trial Ex. 24 (Ex. J)(Susan Duncan's Expert Witness Report). Ms. Duncan testified that the dog serves as a buffer between Joyce Grad and other people, so that she can be among people without experiencing human touch. Id., pp. 71. The dog also helps Joyce Grad when she is suffering an anxiety attack by staying near her and finding an exit. Id. at 70-71.

Accordingly, there was more than adequate evidence presented to support the jury's conclusion that Joyce Grad's request was reasonable and necessary to ameliorate the effects of her disability.

D. DEFENDANTS HAD AN OBLIGATION TO GRANT THE REQUESTED ACCOMMODATION

Defendants argue that "the dog is nothing more than a pet which need not be accommodated." Dfs' Br., p. 14. Defendants' continued focus on the word "pet" accomplishes nothing in the context of this case. Courts have held that the reasonableness of an accommodation waiving a housing provider's "no-pets" policy for a psychologically disabled tenant is a fact-specific inquiry that requires a case-by-case determination. See Majors v. Housing Authority of the County of DeKalb, Georgia, 652 F.2d 454, 457-58 (5th Cir. 1981) (remanding case for a trial on whether the plaintiff's handicap requires the companionship of a dog); Janush v. Charities Housing Dev. Corp., 169 F. Supp. 2d 1133, 1136 (N.D. Calif. 2000)

(observing in a case involving an emotional support animal that whether a particular accommodation is "reasonable" is a "fact-intensive, case-specific determination"); Auburn Woods I Homeowners Assoc. v. Fair Employment and Housing Comm'n, 121 Cal. App. 4th 1578, 1595, 18 Cal. Rptr. 3d 669, 681 (Cal. App. 2004) ("the question of whether a companion animal is an appropriate and reasonable accommodation is a question of fact, not a matter of law").

The appropriate inquiry in this case was the one the Court instructed the jury to make, and that was whether the requested accommodation was reasonable and necessary for Joyce Grad to use and enjoy her Royalwood apartment. See Jury Instructions, p. 28. The jury had ample evidence to support its conclusion that the requested accommodation was necessary. The fact that Defendants continue to refer to Joyce Grad's request solely as a request for a "pet" shows how little they have listened to the facts as they have been revealed throughout the litigation of this case. Defendants have presented nothing to support a finding by the Court that the jury caused a manifest injustice or abused its function.

E. PLAINTIFFS PRESENTED ADEQUATE EVIDENCE FOR THE JURY TO CONCLUDE THAT DEFENDANTS CAIL AND SCHOSTAK WERE LIABLE FOR THEIR ROLE IN THE DISCRIMINATION IN THIS CASE

Under the Fair Housing Act, property managers may be held liable for discriminatory acts in which they participate. See, e.g., Hamad v. Woodcrest Condominium Ass'n, 328 F.3d 224, 236-37 (6th Cir. 2003) (citing to letter sent by condominium's "property manager and majority of its board of directors" as evidence sufficient to raise a triable issue as to liability under the Fair Housing Act); Jeanty v. McKey & Poague, Inc., 496 F.2d 1119, 1120-21 (7th Cir. 1974) (holding individual rental agents liable under the FHA because: "It is well established that agents will be liable for their own unlawful conduct, even where their actions were at the behest

of the principal"); United States v. Sea Winds of Marco, Inc., 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (condominium employees could be individually liable for violations of FHA).

As the Supreme Court recently observed, “The Fair Housing Act itself focuses on prohibited acts.” Meyer v. Holley, 537 U.S. 280, 285 (2003). The Act is written "in the passive voice -- banning an outcome while not saying who the actor is, or how such actors bring about the forbidden consequence.. . ." NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 298 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993). Accordingly, anyone who commits one of the acts proscribed by the statute’s substantive provisions is liable to suit, unless he or she is covered by a statutory exemption, none of which applies in this case.

Defendants repeat their argument, initially raised in their Motion to Dismiss and again in their Motion for Summary Judgment, that Defendants Cail and Schostak did not have a vote on the Royalwood Board of Directors (“the Board”), and did not have the power to overrule the Board. This is undisputed. But what Defendants fail to acknowledge is that there was a great deal of evidence presented at trial showing that Richard Cail had the power and authority to affect the outcome of the Board’s decision in this case.

For example, Cail testified that as the Property Manager, he is responsible for communicating with the Board’s lawyer when legal issues arise. Tr., 2/9/2005, p. 15. He explained to the jury that if he became aware that the Board was about to do something that he believed was in violation of the law, he would seek the Board’s permission to contact its lawyer, as required by the Cooperative Management Agreement between Royalwood and Schostak. Id., and Pls’ Trial Ex. 20 (Ex. H)(Cooperative Management Agreement). He did not do so in this case. However, in a clear indication that Cail had the authority to affect the outcome of Joyce

Grad's request, he testified that "If I would have known what I know today, I probably would suggest something different to the board." Tr. 2/9/2005, p. 59.

Perhaps most striking was the answer all three Defendants provided to HUD in a letter dated March 22, 2002, wherein they explained the process for reviewing requests for reasonable accommodations. Pls' Trial Ex. 21, p. 3 (Ex. I)(Letter from Patrick Rode). The procedure states unequivocally that after the Board reviews a request for an accommodation, it "would seek the advice of its professional property manager or legal counsel, if necessary." Id. Defendant Cail was present at the Board meeting (Pls' Trial Ex. 9)(Ex. E)(Nov. 20, 2000 Board Meeting Minutes) that considered Joyce Grad's request, but not one witness articulated a legitimate reason for refusing to follow Royalwood's own policy with respect to consideration of Joyce Grad's request for an accommodation.[7]

Defendants continue to point to Marthon v. Maple Grove Condominium Ass'n, 101 F. Supp. 2d 1041 (N.D. Ill. 2000), to support this portion of their argument. However, in Marthon, the court did *not* dismiss the property manager or the property management firm with respect to alleged intentional acts of discrimination. Rather, the Marthon court dismissed the property manager and property management firm on one count where the facts showed that they were "not involved in any way" with the alleged discriminatory action. The property management firm in Marthon had been accused of evicting the plaintiffs and issuing "threats of fines and of eviction" in violation of the FHA. Marthon, 101 F. Supp.2d at 1053. Unlike our case, the

[7] The evidence also showed that Defendant Cail handled a similar request for an accommodation earlier from Royalwood member Christine Emmick, and he sent a letter to Patricia Bywater, Joyce Grad's friend, threatening to evict her if Ms. Grad visited her apartment with her dog. Pls' Trial Exs. 17C (Ex. F)(Letter to Christine Emmick); 19 (Ex. G)(Letter to Patricia Bywater); Tr. 2/9/2005, pp. 87-90, 98-104.

Marthon plaintiffs failed to produce any evidence to show that the property management firm had any role whatsoever in the eviction action, or to contradict the defendant's claim that the firm was without power to issue fines or threaten to evict the plaintiffs. Id. Accordingly, the court found that the plaintiffs failed to raise a material question of fact regarding the role of the property management firm, and it granted partial summary judgment only as to this issue. Id.

The second case Defendants cite is Sassower v. Field, 752 F. Supp. 1182 (S.D.N.Y. 1990). In Sassower, the court dismissed FHA claims against a property management company where its role in the alleged discrimination was described as "ministerial." Unlike Cail and Schostak, the Sassower management company did nothing other than transmit information between the plaintiff and the cooperative board. Sassower at 1187. Neither Marthon nor Sassower dictates that Cail and Schostak "cannot be held liable" in this case. The Court has dealt with this argument no fewer than three times before, and each time it has denied Defendants' motions. Cail and Schostak have cited nothing in the record to indicate that the jury's verdict was not supported by the facts and law in this case.

IV. CONCLUSION

For all of the reasons set forth above, in addition to further arguments advanced during oral argument, if any, the Court should deny Defendants' motion.

Respectfully submitted,
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Dated: May 18, 2005

CERTIFICATION OF SERVICE

I hereby certify that on May 18, 2005, I electronically filed the United States' Response to Defendants' Renewed Motion for Judgment as a Matter of Law with the Clerk of the Court using the Electronic Case Management System.

I further certify that I served a paper copy of this brief by First Class US Mail to the following non-ECF participants on May 18, 2005:

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