

January 2014

# Dussault v. RRE Coach Lantern Holdings, LLC: Does Maine Recognize Disparate Impact Liability for Claims of Housing Discrimination Brought by Section 8 Recipients under Maine Law?

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### Recommended Citation

Ari B. Solotoff, *Dussault v. RRE Coach Lantern Holdings, LLC: Does Maine Recognize Disparate Impact Liability for Claims of Housing Discrimination Brought by Section 8 Recipients under Maine Law?*, 67 Me. L. Rev. 183 (2014).

Available at: <http://digitalcommons.mainerlaw.maine.edu/mlr/vol67/iss1/8>

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***DUSSAULT V. RRE COACH LANTERN HOLDINGS, LLC: DOES THE MAINE HUMAN RIGHTS ACT RECOGNIZE DISPARATE IMPACT LIABILITY FOR CLAIMS OF HOUSING DISCRIMINATION BROUGHT BY SECTION 8 RECIPIENTS UNDER MAINE LAW?***

*Ari B. Solotoff*

- I. INTRODUCTION
- II. LEGAL BACKGROUND
  - A. *Federal Fair Housing Laws & Public Assistance Housing Discrimination*
    - 1. *The Federal Fair Housing Act*
    - 2. *The Section 8 Housing Program*
    - 3. *Federal and State Law Protections for Section 8 Recipients*
  - B. *The MHRA and Maine's Fair Housing Protections for Recipients of Public Assistance*
    - 1. *Unlawful Housing Discrimination Under the MHRA*
    - 2. *The Legislative History of Sections 4582 and 4583 of the MHRA*
    - 3. *The Catir Decision*
- III. *DUSSAULT V. RRE COACH LANTERN HOLDINGS, LLC*
  - A. *Factual Background*
  - B. *Procedural History*
  - C. *Arguments on Appeal*
  - D. *Decision of the Law Court*
  - E. *The Concurrence*
  - F. *The Dissent*
- IV. ANALYSIS
  - A. *The Likely Impact of Dussault*
  - B. *The Dussault Majority Reasonably Interpreted the MHRA's Fair Housing Laws as Precluding Claims of Disparate Impact Made by Section 8 Recipients, but the Interpretation Leads to Illogical Results.*
    - 1. *The Majority Reasonably Interpreted the MHRA as Precluding Disparate Impact Claims Made by Section 8 Recipients.*
    - 2. *The Majority's Interpretation of the Public Assistance Protections Under the MHRA for Section 8 Recipients Renders the Statute a Nullity.*
  - C. *The Maine Legislature Should Amend the MHRA's Definition of Discrimination on the Basis of Status as a Public Assistance Recipient to Include Section 8 Recipients.*
- V. CONCLUSION

*DUSSAULT V. RRE COACH LANTERN HOLDINGS, LLC: DOES THE MAINE HUMAN RIGHTS ACT RECOGNIZE DISPARATE IMPACT LIABILITY FOR CLAIMS OF HOUSING DISCRIMINATION BROUGHT BY SECTION 8 RECIPIENTS UNDER MAINE LAW?*

*Ari B. Solotoff*<sup>\*</sup>

I. INTRODUCTION

In *Dussault v. RRE Coach Lantern Holdings, LLC*,<sup>1</sup> Nicole Dussault filed a complaint with the Maine Human Rights Commission (Commission) alleging a claim of unlawful housing discrimination.<sup>2</sup> Dussault asserted that when RRE Coach Lantern Holdings, LLC and Resource Real Estate Management, Inc. (collectively, Coach Lantern) refused to include a federal Section 8 Housing Choice Voucher Program<sup>3</sup> tenancy addendum<sup>4</sup> in her apartment lease, Coach Lantern discriminated against her because of her status as a public assistance

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1. 2014 ME 8, 86 A.3d. 52.

2. *Id.* ¶ 9.

3. See discussion *infra* Part II.A.2. Under the Section 8 Housing Voucher Program, low-income families receive rental subsidies in order to secure a "decent place to live." 42 U.S.C. § 1437(a) (2012). Once a Section 8 tenant selects a housing unit, and prior to executing the lease, the local housing authority verifies that the unit meets certain quality standards and that the landlord has satisfied certain requirements of the program. 24 C.F.R. §§ 982.305-306 (2014).

4. Before the lease term can begin, the landlord must execute a lease with the tenant that includes a tenancy addendum. 24 C.F.R. §§ 982.305(a)(3), (b)(1)(ii). The tenancy addendum is added word-for-word to the landlord's standard lease and sets forth: 1) the requirements of the program; and 2) the composition of the household. 24 C.F.R. § 982.308(f) (2014). In addition, the tenant has "the right to enforce the tenancy addendum against the [landlord], and the terms of the tenancy addendum shall prevail over any other provisions of the lease." *Id.* The addendum itself is four pages long and among other things, requires that the landlord: 1) maintain the unit and premises in accordance with the public housing authority's ("PHA") Housing Quality Standards; 2) not raise the rent during the term of the initial lease; 3) charge no more rent than what HUD determines is "reasonable" or the "fair market value" for the community or metropolitan area; 4) not evict a tenant for the sole reason that PHA did not pay its share of the contract rent; 5) not evict a tenant who is a victim of domestic violence based on an act of domestic violence committed against her; 6) open the premises to inspection by a PHA inspector at the beginning of the lease, upon complaint by a tenant, and after the landlord has remedied a problem identified in a prior inspection; 7) allow the PHA to not begin payments until it completes the initial inspection; and 8) notify the PHA at least sixty days prior to any rent increase. *Dussault v. RRE Coach Lantern Holdings, LLC*, 2011 Me. Super. LEXIS 226, at \*3-4 (Nov. 9, 2011); see also *Tenancy Addendum Section 8 Tenant-Based Assistance Housing Choice Voucher Program*, U.S. DEP'T OF HOUS. AND URBAN DEV. (Oct. 31, 2010), [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_11738.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11738.pdf) (providing the tenancy addendum that lists the Section 8 program requirements).

recipient.<sup>5</sup> Following an investigation and hearing, the Commission unanimously concluded that there were reasonable grounds for a belief of unlawful housing discrimination.<sup>6</sup> Dussault then brought suit in Cumberland County Superior Court.<sup>7</sup> Dussault alleged that Coach Lantern's policy of not including a Section 8 tenancy addendum in its standard lease constituted housing discrimination in violation<sup>8</sup> of the Maine Human Rights Act (MHRA).<sup>9</sup> Specifically, Dussault asserted three theories of discrimination under the Act: direct evidence,<sup>10</sup> disparate treatment,<sup>11</sup> and disparate impact.<sup>12</sup> The Superior Court granted Coach Lantern's motion for summary judgment, denied Dussault's cross-motion for summary judgment, and ultimately ruled for Coach Lantern on all three theories of discrimination.<sup>13</sup>

On appeal, the Maine Supreme Judicial Court, sitting as the Law Court, affirmed the grant of summary judgment for Coach Lantern because the Court concluded that Coach Lantern's decision not to include the Section 8 tenancy addendum did not constitute discrimination against Dussault by "refus[ing] to rent [to] or impos[ing] different terms of tenancy" on her.<sup>14</sup> After the Court determined that Dussault had failed to make out a prima facie case on her claims of direct evidence<sup>15</sup> and disparate treatment housing discrimination,<sup>16</sup> the Court held that the MHRA does "not create disparate impact liability in the context of claims of housing discrimination based on a landlord's decision not to accept the tenancy

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5. *Dussault*, 2014 ME 8, ¶ 9, 86 A.3d 52.

6. *Id.*

7. *Id.* ¶ 10.

8. 5 M.R.S.A. § 4582 (2007), *repealed* by P.L. 2011, ch. 613, §§ 11-12 (effective Sept. 1, 2012) (codified at 5 M.R.S.A. § 4581-A (2014)).

9. 5 M.R.S.A. §§ 4551-4634 (2014). *See also* discussion *infra* Part II.B.

10. *See Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (stating that a prima facie housing discrimination case requires a plaintiff to show that he or she applied for and was denied housing); *Febres v. Challengers Caribbean, Corp.*, 214 F.3d 57, 60 (1st Cir. 2000) (describing a prima facie case as the existence of actual direct evidence that a prohibited classification played a motivating part in an adverse action, subject to a defendant's burden to show that it would have made the same decision absent the proscribed factor).

11. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (describing disparate treatment liability in the employment setting as when an employer "treats some people less favorably than others" because of a protected characteristic. "Proof of discriminatory motive is critical," but can be shown by circumstantial evidence.) (citations omitted).

12. *Dussault*, 2014 ME 8, ¶ 1, 86 A.3d 52. Disparate impact liability involves a facially neutral practice that "fall[s] more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required . . ." *Hazen Paper Co.*, 507 U.S. at 609 (citation omitted). *See also* *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) (concluding that the federal Fair Housing Act prohibits actions with an unjustified disparate racial impact in the context of housing discrimination claims); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1977) (stating that disparate impact liability results from "a thoughtless housing practice" that "can be as unfair to minority rights as a willful scheme.").

13. *Id.* ¶ 10.

14. *Id.* ¶ 16. The Court explained that there is no violation of the MHRA when a landlord offers an apartment to "recipients of public assistance on the same terms as it offers apartments to other potential tenants." *Id.*

15. *Id.* ¶ 21.

16. *Id.* ¶ 23.

addendum in order to participate” in the Section 8 voucher program.<sup>17</sup> Because the Court concluded that Dussault had also failed to establish a prima facie case on her disparate impact claim, the Court did not “reach the issue of business necessity.”<sup>18</sup> Writing for the majority in the Court’s 4-3 split decision, Justice Silver reasoned that nothing in the plain language or legislative history<sup>19</sup> of the statute “mandate[s] that landlords accept terms of tenancy that are otherwise required only if the landlord chooses to participate in a voluntary federal program.”<sup>20</sup>

Concurring in the result, Justice Alexander wrote to “note that the Maine Legislature has explicitly rejected the change in the law . . . that would . . . mandate acceptance of onerous contract conditions that come with the Section 8 program . . . .”<sup>21</sup> Identifying the case as an “attempt, promoted by the Maine Human Rights Commission, to convert the Section 8 program in Maine into a compulsory program,”<sup>22</sup> Justice Alexander looked to the legislative history of section 4582 of the MHRA as evidence of the Legislature’s “specific refusal to change the housing discrimination law”<sup>23</sup> from the Law Court’s interpretation as previously set forth in *Catir v. Commissioner of the Department of Human Services*.<sup>24</sup> Justice Alexander further emphasized that the statute’s history was an “indicator of legislative intent that must be respected.”<sup>25</sup>

Writing for the dissent, Justice Levy disagreed with the majority’s conclusion that Coach Lantern did not “refuse to rent” to Dussault within the meaning of section 4582 of the MHRA.<sup>26</sup> The dissent concurred that the MHRA does not make participation in the Section 8 program mandatory for landlords.<sup>27</sup> However, the dissent asserted that the majority misconstrued the statute’s language “to refuse to rent . . . to any individual . . . primarily because of the individual’s status as [a] recipient”<sup>28</sup> as prohibiting only intentional discrimination, “and not housing decisions that have a disparate impact on such recipients.”<sup>29</sup> Therefore, as a matter of statutory construction, the dissent relied on the plain meaning,<sup>30</sup> structure,<sup>31</sup> and

17. *Id.* ¶ 29.

18. *Id.* The majority disagreed with the dissent’s interpretation of 5 M.R.S.A. § 4583 (2007) as effectively compelling “Maine’s landlords to participate in a voluntary federal housing subsidy program or risk having to litigate whether their decision not to participate is based on a ‘business necessity.’” *Id.* ¶ 28.

19. *Id.* ¶ 19.

20. *Id.* ¶ 18.

21. *Id.* ¶ 31 (Alexander, J., concurring).

22. *Id.* ¶ 33. Justice Alexander asserted that the Commission was trying to “secure by judicial action an amendment to the housing discrimination laws that the Maine Legislature explicitly refused to adopt.” *Id.*

23. *Id.* ¶ 35. See also discussion *infra* Part II.B.2.

24. 543 A.2d 356 (Me. 1988). See also discussion *infra* Part II.B.3.

25. *Dussault*, 2014 ME 8, ¶ 35, 86 A.3d 52.

26. *Id.* ¶ 38 (Levy, J., dissenting).

27. *Id.*

28. 5 M.R.S.A. § 4582 (2007) *repealed by* P.L. 2011, ch. 613, §§ 11-12 (effective Sept. 1, 2012) (codified at 5 M.R.S.A. § 4581-A (2014)).

29. *Dussault*, 2014 ME 8, ¶ 44, 86 A.3d 52 (Levy, J., dissenting).

30. See *id.* ¶ 46.

31. See *id.* ¶ 47 (noting that a construction of section 4582 to include disparate impact liability is “confirmed by viewing it in conjunction with the business necessity defense established in section 4583.”).

legislative history of the statute to support its contention that disparate impact liability is available to public assistance recipients who assert claims of housing discrimination under the MHRA.<sup>32</sup> Together with the United States Supreme Court's implicit adoption of disparate impact liability in the employment setting,<sup>33</sup> the dissent concluded that the "Legislature's intent to subject claims of housing discrimination based on the receipt of public assistance payments to disparate impact analysis . . . could not be clearer."<sup>34</sup> Because Coach Lantern failed to meet its burden of showing that an actual business necessity justified its decision to refuse to include a Section 8 tenancy addendum in its lease agreements, and because Dussault's prima facie case of disparate impact discrimination went un rebutted, the dissent would have granted Dussault's motion for summary judgment and denied summary judgment for Coach Lantern.<sup>35</sup>

The majority, concurring, and dissenting opinions in *Dussault* highlight the three primary fault lines in other cases challenging the application of Section 8 to state laws that have codified housing protections for recipients of public assistance: First, courts have been asked to interpret whether Section 8 housing vouchers constitute a form of public assistance, which would consequently implicate laws protecting an individual's status as a public aid recipient.<sup>36</sup> Second, courts have confronted the question of whether participation in the federal Section 8 housing program is voluntary or mandatory for landlords.<sup>37</sup> Third, courts have taken up the question of whether Section 8 tenants may assert disparate impact claims when landlords refuse to accept the housing vouchers because of the program's administrative requirements.<sup>38</sup> Although the Supreme Court has never directly ruled on the application of the disparate impact standard to the federal Fair Housing Act,<sup>39</sup> every federal court of appeals, with the exception of the D.C. Circuit, has determined that liability exists for housing practices that have discriminatory effects.<sup>40</sup>

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32. *See id.* ¶ 48.

33. *See id.* ¶ 46 (referencing the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-36 (1971), which held that disparate impact liability is recognized by Title VII's prohibition against racially discriminatory employment tests).

34. *Id.* ¶ 48.

35. *Id.* ¶ 59.

36. *See, e.g.,* *Montgomery Cnty. v. Glenmont Hills Assocs.*, 936 A.2d 325, 333 (Md. 2007) (holding that source of income protections include Section 8 voucher holders). *But see* *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1283 (7th Cir. 1995) (holding that the Wisconsin housing protection statute does not incorporate Section 8 vouchers as a source of income).

37. *See, e.g.,* *Comm'n on Human Rights and Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 245 (Conn. 1999) (discussing in detail whether federal preemption makes participation in the Section 8 program voluntary for landlords).

38. *See* Tamica H. Daniel, Note, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L.J. 769, 788 (2010) (discussing courts which have both upheld and rejected disparate impact claims made by Section 8 recipients under the federal Fair Housing Act).

39. *See* Robert G. Schwemm & Sara K. Pratt, *Disparate Impact Under the Fair Housing Act: A Proposed Approach*, NAT'L FAIR HOUS. ALLIANCE 4 (Dec. 1, 2009), <http://www.nationalfairhousing.org/portals/33/d disparate%20impact%20analysis%20final.pdf>

40. *See id.* at 6-7. Moreover, the United States Department of Housing and Urban Development promulgated a final rule in 2013 establishing uniform standards for evaluating disparate impact claims under the FHA. *See* 24 C.F.R. § 100.500(a) (2014).

Thus, the Law Court’s decision—to hold “as a matter of law, that the MHRA, as currently established . . . does not create disparate impact liability” for housing discrimination claims made by Section 8 recipients—represents just one point on a spectrum of court decisions that have interpreted similar public assistance antidiscrimination housing statutes in other states.<sup>41</sup> Within this context, this Note considers whether the Court’s holding was a principled approach to statutory interpretation, or whether the Court hastily adopted a rule precluding disparate impact liability for claims of housing discrimination when brought by Section 8 recipients.

This Note proceeds first in Part II by reviewing the federal and state laws underlying the Court’s decision in *Dussault*. After describing the application of the MHRA to housing discrimination claims, Part II examines the legislative history of sections 4582 and 4583, as well as the Court’s previous decision in *Catir*. Part III describes the facts, procedural history, and arguments on appeal, as well as the Court’s decision and accompanying concurring and dissenting opinions. Part IV analyzes the implications of the Court’s holding and concludes that although the Court reasonably concluded that disparate impact liability is not available for Section 8 recipients under the MHRA, the Court’s construction of the MHRA was strikingly narrow in light of the statute’s purpose and was inconsistent with general principles of statutory construction. This Note closes by recommending that the Maine Legislature amend the MHRA to expressly include protections against discrimination for Section 8 recipients.

## II. LEGAL BACKGROUND

### A. Federal Fair Housing Laws & Public Assistance Housing Discrimination

#### 1. The Federal Fair Housing Act

Known today as Title VIII of the Civil Rights Act of 1968 (Title VIII),<sup>42</sup> Congress passed the federal Fair Housing Act (FHA) in order to achieve two principle goals: eliminating housing discrimination in public and private spheres and increasing the overall availability of access to housing opportunities for all Americans.<sup>43</sup> The Act was passed soon after the summer of 1967, during which time rioting and civil disturbances “rocked the central cores of many of the nation’s major cities.”<sup>44</sup> At the time, President Lyndon B. Johnson appointed a commission to “focus[] attention on the discontent of the people trapped in the nation’s ghettos,” and to examine the “problems of residential segregation and racial slum

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41. *Dussault*, 2014 ME 8, ¶ 26, 86 A.3d 52. See discussion *infra* Part II.A.3.

42. See Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (2012)).

43. See 42 U.S.C. § 3601 (2012) (stating that “[i]t is the policy of the United States to provide . . . for fair housing throughout the United States”); Kinara Flagg, Comment, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201, 229 (2011).

44. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 496 (S.D. Ohio 1976).

formation.”<sup>45</sup> As enacted, the FHA provides that “it shall be unlawful . . . [t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>46</sup> The Supreme Court has stated that the language and interpretation of Title VIII is “broad and inclusive.”<sup>47</sup> Following enactment of the FHA, Congress amended the Act to include protections based on sex,<sup>48</sup> people with disabilities, and families with children.<sup>49</sup> Although the FHA does not expressly prohibit discrimination on the basis of receipt of public assistance, a number of other federal statutes have included such protections.<sup>50</sup>

## 2. *The Section 8 Housing Program*

As a Depression-era statute, Congress enacted the United States Housing Act in 1937.<sup>51</sup> Public housing projects were the dominant form of low-income housing assistance until Congress passed the Housing and Urban Development Act of 1965.<sup>52</sup> In 1974, Congress passed the Housing and Community Development Act which created the federal fair housing program known today as Section 8.<sup>53</sup> The Section 8 program was established “[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing . . . .”<sup>54</sup> In 1987, Congress enacted a rental voucher program as part of a second Housing and Community Development Act.<sup>55</sup> It was not until 1998 that Congress merged its 1974 certificate and 1987 voucher programs into a single Housing Choice Voucher Program.<sup>56</sup>

As it currently operates, the Secretary of the Department of Housing and Urban Development (HUD) is authorized to enter into annual contracts with local

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45. *Id.* The Commission also “recognized that discrimination in housing is a major contributing factor to racial isolation in urban schools.” *Id.* at 497.

46. 42 U.S.C. § 3604(a) (2012).

47. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

48. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 728-29 (codified as amended at 42 U.S.C. §§ 3604-3606 (2012)).

49. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620 (codified as amended at 42 U.S.C. § 3604 (2012)).

50. *See* Flagg, *supra* note 43, at 216-20 (discussing statutory protections on the basis of source of income in the American Recovery and Reinvestment Act of 2009, the Low Income Housing Tax Credit program, and the Equal Credit Opportunity Act).

51. *See* *Montgomery Cnty. v. Glenmont Hills Assocs.*, 936 A.2d 325, 327 (Md. 2007) (noting that the Act’s purpose was to develop additional housing stock, create jobs, clear slums, and to provide funds for local housing agencies to build and manage public housing projects).

52. *Id.* at 328. The 1965 Act “authorized a new program under which [public housing agencies], through contracts with private owners, could lease apartment units in existing private apartment buildings and then sublease those units to current public housing tenants.” *Id.*

53. *Id.* The Section 8 name stems from an authorization to rewrite § 8 of the United States Housing Act of 1937. *Id.* at 328 n.1.

54. 42 U.S.C. § 1437f(a) (2012).

55. *See* *Glenmont Hills*, 936 A.2d at 329.

56. *See id.*



public housing agencies (PHAs),<sup>57</sup> which in turn make assistance payments to owners of existing rental units.<sup>58</sup> Historically, Section 8 provided two types of public housing assistance: project-based<sup>59</sup> and tenant-based.<sup>60</sup> The tenant-based program—also known as the Housing Choice Voucher Program—first establishes fair market rents for each region within the United States.<sup>61</sup> The local PHA then adopts a payment schedule corresponding to its rental region, which must fall within ninety percent and one hundred ten percent of the relevant fair market rent.<sup>62</sup> In order for an individual to qualify for Section 8 rental assistance, that individual must be classified as either very low income or low income.<sup>63</sup> A tenant identifies a suitable home within the reasonable rent guidelines and pays a portion of the rental cost commensurate with his or her income, typically thirty-percent of adjusted gross income.<sup>64</sup>

Before the lease is finalized, the local PHA confirms that the tenant-selected property meets HUD quality and market rate standards.<sup>65</sup> This process entails: 1) a physical inspection of the apartment by the local PHA to ensure quality compliance;<sup>66</sup> 2) confirmation that the rent falls within the established market rate;<sup>67</sup> and 3) verification that the lease conforms with HUD requirements, including incorporation of a HUD-prepared tenancy addendum setting forth the rights of the tenant and landlord.<sup>68</sup> Thus, once approved, the Section 8 collaboration between state and local PHAs and HUD provides subsidies to landlords who rent to low-income tenants.<sup>69</sup>

### 3. Federal and State Law Protections for Section 8 Recipients

Under federal law, landlords are neither expressly required to participate in the

57. See 24 C.F.R. § 5.100 (2014) (defining a public housing agency as “[a]ny State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of housing for low-income Families”).

58. 42 U.S.C. § 1437f(b) (2012).

59. See Rebecca Tracy Rotem, Note, *Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal From the Section 8 Voucher Program*, 78 FORDHAM L. REV. 1971, 1977 (2010) (describing the large-scale public building projects as “concentrating the misery and hopelessness of poverty in large, segregated projects”) (citation omitted).

60. See 42 U.S.C. § 1437f(o) (2012); 24 C.F.R. § 982.1(b) (2014).

61. 24 C.F.R. § 888.113 (2014).

62. 24 C.F.R. § 982.503(b)(1)(i) (2014).

63. See 24 C.F.R. §§ 982.201(a)-(b) (2014) (listing Section 8 income eligibility requirements).

64. See 24 C.F.R. §§ 982.503, 505, 515 (2014); see also *Housing Choice Voucher Program Guidebook*, U.S. DEP’T OF HOUS. AND URBAN DEV. 7-6, [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_11751.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11751.pdf) (last visited Nov. 8, 2014).

65. 42 U.S.C. §§ 1437f(o)(8)(A)-(B) (2012); 24 C.F.R. § 982.401 (2014). For a graphic illustration of the process by which the Section 8 program is administered, see *Housing Choice Voucher Program Guidebook*, U.S. DEP’T OF HOUS. AND URBAN DEV. 1-16, [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_11745.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11745.pdf) (last visited Sept. 12, 2014).

66. 24 C.F.R. § 982.401 (2014).

67. 24 C.F.R. § 982.507 (2014).

68. See *Montgomery Cnty. v. Glenmont Hills Assocs.*, 936 A.2d 325, 330 (Md. 2007).

69. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 12 (1993). For an overview of the delivery of statewide affordable housing programs in Maine, see Blue Ribbon Commission on Affordable Housing, Final Report to the 125th Legislature 11-13 (Feb. 2012), available at <http://www.maine.gov/legis/opla/AffordableHousingStudyprpt.pdf> [hereinafter *Blue Ribbon Report*].

Section 8 program, nor must they accept Section 8 vouchers as payment.<sup>70</sup> Instead, selection of a tenant is left to the discretion of the landlord,<sup>71</sup> subject to prohibitions against refusing to rent based on a tenant's color, religion, sex, national origin, age, familial status, or disability.<sup>72</sup> The Section 8 program, therefore, functions as a "cooperative venture" between HUD and state and local PHAs that oversee the program's daily operations.<sup>73</sup> The federal legislation and accompanying regulations, therefore, are "superimposed upon and consciously interdependent with the sub-structure of local law relating to housing."<sup>74</sup> Because the "[f]ederal statute merely creates the scheme and sets out the guidelines for the funding and implementation of the program . . . [i]t does not preclude State regulation."<sup>75</sup>

Thirteen states have adopted laws—similar in nature, but each worded slightly differently—prohibiting housing discrimination based on a tenant's source of income.<sup>76</sup> In addition, a number of local municipalities have also approved ordinances that incorporate housing discrimination protections for individuals who rely upon public assistance.<sup>77</sup> Given the lack of textual uniformity and the absence of federal legislation expressly prohibiting discrimination against Section 8 recipients,<sup>78</sup> reviewing courts have produced a wide spectrum of decisions in

70. See 24 C.F.R. § 982.302(b) (2014) (providing that "[i]f the family finds a unit, and the owner is willing to lease the unit under the program, the family may request PHA approval of the tenancy."); see also *Glenmont Hills*, 936 A.2d at 330.

71. See 42 U.S.C. § 1437f(d)(1)(A) (2012); see also Comm'n on Human Rights and Opportunities v. Sullivan Assocs., 739 A.2d 238, 245 n.22 (Conn. 1999) (emphasizing that there is "no express language in 42 U.S.C. § 1437f to the effect that landlord participation in section 8 programs is voluntary," but that those courts which have found the program to be voluntary have relied on 42 U.S.C. § 1437f(d)(1)(A) as well as the regulations under 24 C.F.R. § 982.452(b)(1) which give landlords authority to select a voucher holder and to determine rental eligibility).

72. 24 C.F.R. § 982.304 (2014).

73. *Sullivan Assocs.*, 739 A.2d at 244.

74. *Attorney Gen. v. Brown*, 511 N.E.2d 1103, 1107 (Mass. 1987) (citation omitted).

75. *Id.* at 1106.

76. See CAL. GOV'T CODE §§ 12955(a), (p)(1) (West 2014) (including a definition for "source of income"); CONN. GEN. STAT. ANN. §§ 46a-63 (3); 46a-64c (a)(1) (West 2014) (including a definition for "lawful source of income"); D.C. CODE § 2-1402.21(e) (2014) (explicitly protecting Section 8 recipients); 5 M.R.S.A. § 4581-A (2014) (protecting individuals on the basis of their "status" as recipients); MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 2014) (prohibiting discrimination against public assistance or rental subsidy recipients, or "because of any requirement of such" programs); MINN. STAT. ANN. § 363A.09(1) (West 2014) (including "status with regard to public assistance"); N.J. STAT. ANN. §§ 10:5-4, 10:5-12(g)(1) (West 2014) (precluding housing discrimination on the basis of "source of lawful income"); N.D. CENT. CODE ANN. § 14-02.4-01 (West 2014) (including "status with regard to . . . public assistance"); OKLA. STAT. ANN. tit. 25 § 1452(A)(8) (West 2014) (defining unlawful housing discrimination as refusing to consider as a "valid source of income any public assistance"); OR. REV. STAT. ANN. § 659a.421(1)(d) (West 2014) (prohibiting source of income discrimination but specifically excluding Section 8 "rent subsidy payments under 42 U.S.C. § 1437f"); UTAH CODE ANN. § 57-21-5(1) (West 2014) (prohibiting "source of income" discrimination); VT. STAT. ANN. tit. 9 § 4503(a)(1) (West 2014) (precluding discrimination "because a person is a recipient of public assistance"); WIS. STAT. ANN. § 106.50(1) (West 2014) (rendering discrimination on the basis of "lawful source of income" as unlawful).

77. See Krista Sterken, *A Different Type of Housing Crisis: Allocating Costs Fairly and Encouraging Landlord Participation in Section 8*, 43 COLUM. J.L. & SOC. PROBS. 215, 223 nn.42-44 (2009) (listing municipal ordinances with source of income housing protections).

78. See Jenna Bernstein, Note, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1415-16 (2010) (noting that since

response to parties who challenge the application of state public assistance antidiscrimination housing laws to Section 8 recipients.<sup>79</sup>

*B. The MHRA and Maine's Fair Housing Protections for Recipients of Public Assistance*

*1. Unlawful Housing Discrimination Under the MHRA*

Recognizing a “basic human right to a life with dignity,”<sup>80</sup> the Maine Legislature enacted the Maine Human Rights Act in 1971 to “prevent discrimination in employment, *housing* or access to public accommodations” on account of a protected trait.<sup>81</sup> Discrimination, as defined in the statute, “includes, without limitation, [to] segregate or separate.”<sup>82</sup> The MHRA did not originally include a prohibition against housing discrimination for public assistance recipients seeking rental property. Instead, the MHRA codified a civil right to obtain “decent housing” without fear of discrimination on the basis of the limited classifications of “race, color, religious creed, ancestry or national origin.”<sup>83</sup>

Although recipients of public assistance were not included in section 4581’s original listing of individuals entitled to “decent housing,” as of October 1, 1975, the Legislature amended section 4582 in order to add protections for recipients of public assistance.<sup>84</sup> Specifically, section 4582 provided, in relevant part, that it shall be unlawful:

For any person furnishing rental premises to refuse to rent or impose different terms of tenancy to any individual who is a *recipient of federal, state or local public assistance*, including medical assistance *and housing subsidies* solely because of such individual’s status as such recipient.<sup>85</sup>

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Congressional repeal of the “take one, take all” requirement from the Section 8 program, Congress has not imposed any new requirements on landlords).

79. *See, e.g.,* Montgomery Cnty. v. Glenmont Hills Assocs., 936 A.2d 325, 342 (Md. 2007) (holding that Glenmont Hills discriminated by refusing to rent to otherwise qualified tenants because they proposed to use Section 8 vouchers, thereby discriminating on the basis of source of income); Comm’n on Human Rights and Opportunities v. Sullivan Assocs., 739 A.2d 238, 251 (Conn. 1999) (holding that the legislature intended to require landlords to accept section 8 vouchers). *But see* Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1283 (7th Cir. 1995) (concluding that section 8 assistance does not fall within the statute prohibiting discrimination on the basis of lawful source of income); Edwards v. Hopkins Plaza Ltd. P’ship, 783 N.W.2d 171, 177-78 (Minn. Ct. App. 2010) (holding that a landlord’s refusal to continue participation in the voluntary section 8 program does not constitute unlawful status discrimination). Although not discussed by this Note, challengers have also argued that the voluntary nature of Section 8 participation under federal law preempts any mandatory protections for public assistance recipients under state law. *See, e.g.,* Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1111-12 (N.J. 1999) (reviewing the preemption argument and applicable case law); Bernstein, *supra* note 78, at 1408.

80. 5 M.R.S.A. § 4552 (2014).

81. P.L. 1971, ch. 501, § 1 (emphasis added).

82. 5 M.R.S.A. § 4553(2) (2014).

83. P.L. 1971, ch. 501, § 1. Section 4581 has since been amended to declare a civil right to be free from discrimination in housing because of an individual’s “race, color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status.” 5 M.R.S.A. § 4581 (2014).

84. P.L. 1975, ch. 151, § 1.

85. *Id.* (emphasis added).

Section 4583 was also amended in 1975 to conform with the adjustments to section 4582.<sup>86</sup> It provided, in relevant part, that:

Nothing in this Act shall be construed in any manner to prohibit or limit the exercise of the privilege of every person and the agent of any person having the right to sell, rent, lease or manage a housing accommodation to set up and enforce specifications in the selling, renting, leasing, or letting thereof . . . which are not based on race, color, sex, physical handicap, religion or country of ancestral origin, *the receipt of public assistance payments* of any prospective or actual purchaser, lessee, tenant or occupant thereof.<sup>87</sup>

In 1989, the Maine Legislature further amended section 4582, and substituted the word “primarily” for the word “solely” when evaluating the issue of causation by a landlord’s refusal to rent in connection with that individual’s status as a recipient of public assistance.<sup>88</sup>

Most recently, in 2007, the Legislature modified section 4583 of the MHRA and expressly codified for the first time a “business necessity” defense for landlords,<sup>89</sup> as well as the availability of disparate impact liability for discrimination against a protected class.<sup>90</sup> Under the current language of the Act, unless a landlord can demonstrate a business necessity justifying refusal, a landlord may not “refuse to rent or impose different terms of tenancy on any individual who is a recipient of . . . public assistance . . . primarily because of the individual’s status” as a public aid recipient.<sup>91</sup>

## 2. *The Legislative History of Sections 4582 and 4583 of the MHRA*

The Statement of Fact that accompanied the Legislature’s 1975 amendment to the unlawful housing provisions of the MHRA found that landlords who refused to rent to public assistance recipients discriminated because such “refusals to rent . . . are not made with reference to the tenant’s personal responsibility and integrity; but only on the general misapprehension that a family on public assistance is automatically an undesirable tenant.”<sup>92</sup> Moreover, the stated purpose of the bill amending the MHRA was to “enable those citizens of Maine most in need of housing to have a fair and equal chance at obtaining it.”<sup>93</sup> However, when the

86. P.L. 1975, ch. 151, § 2.

87. *Id.* (emphasis added).

88. P.L. 1989, ch. 245, § 4. In *Vance v. Speakman*, the Court reviewed the addition of the more restrictive word “solely” to the last paragraph of section 4582. 409 A.2d 1307, 1309 (Me. 1979). The Court noted, that whereas “all of the provisions of the Human Rights Act prohibit discrimination that is merely ‘because of,’” as opposed to “‘solely because of’ factors such as age, race, or sex,” in the case of landlords and extenders of credit, the legislature granted “a more restrictive test than that prevailing for employment and other forms of prohibited discrimination.” *Id.* at 1309-10.

89. 5 M.R.S.A. § 4583 (2007) (stating in relevant part that “[n]othing in this Act may be construed to prohibit or limit the exercise of the privilege of every person . . . having the right to sell, rent, lease or manage a housing accommodation to set up and enforce specifications in the selling, renting, leasing or letting . . . that are consistent with business necessity and are not based on . . . the receipt of public assistance payments by any prospective or actual purchaser, lessee, tenant, or occupant.”).

90. *See* L.D. 685, Summary (123rd Legis. 2007).

91. 5 M.R.S.A. § 4581-A(4) (2014).

92. L.D. 327, Statement of Fact (107th Legis. 1975).

93. *Id.*

Legislature next amended section 4582 of the MHRA in 2007, the Legislature explicitly rejected a section from the final bill amendment that would have prohibited a landlord from refusing to rent to or imposing different terms of tenancy on any individual “primarily because of the individual’s status as [a] recipient or because of *any requirement of such a public assistance program*.”<sup>94</sup>

In 2007, the Maine Human Rights Commission introduced L.D. 685 in order to “clarify the protections of the Act . . . and [to] prohibit unreasonable housing practices that have a disparate impact on the basis of race, color, sex, sexual orientation, physical or mental disability, religion, country of ancestral origin, familial status *or the receipt of public assistance payments*.”<sup>95</sup> The amendment, as proposed by the Maine Human Rights Commission in L.D. 685, was intended to “ensure that a housing provider cannot refuse to rent or impose different terms of tenancy because of the requirements of a public assistance program,” and was also proposed to address “a recurring problem with landlords arguing that they do not want to do paperwork or comply with other requirements of public assistance programs such as Section 8.”<sup>96</sup>

Section 2 of L.D. 685 was modeled after a similar amendment to Massachusetts law, which prohibits discrimination on the basis of receipt of public assistance.<sup>97</sup> The modification to Maine law, as proposed by the Maine Human Rights Commission, was designed to ensure that “a housing provider [could not] refuse to rent or impose different terms of tenancy because of the . . . paperwork or other program requirements” of a public assistance program.<sup>98</sup> However, at a public hearing on L.D. 685, representatives for the Maine Apartment Owners and Managers Association testified that some Section 8 requirements were “too burdensome” for landlords.<sup>99</sup>

Consistent with the Commission’s recommendation that section 4582 precluded discriminatory housing practices that have a disparate impact, the Commission also proposed an amendment to section 4583. By adding the language “consistent with business necessity” to the operation of section 4583, the Commission sought to resolve a conflict in which “a bona fide neutral practice [could not] be challenged, even if it has a disparate impact on a protected class.”<sup>100</sup> On May 29, 2007, the Judiciary Committee expressly amended L.D. 685 “by striking out all of section 2” containing the language prohibiting housing discrimination against public assistance recipients because of a program’s requirements.<sup>101</sup> All other provisions within L.D. 685, including the “business

94. L.D. 685, § 2 (123rd Legis. 2007) (emphasis added).

95. *An Act to Amend the Maine Human Rights Act: Hearing on L.D. 685 Before the Joint Standing Comm. on Judiciary*, L.D. 685 at 1-2 (123rd Legis. 2007) [hereinafter Ryan Letter] (emphasis added) (letter from Ms. Patricia Ryan, Exec. Dir. of the Maine Human Rights Comm’n.).

96. *Id.* at 2.

97. See DiLiddo v. Oxford St. Realty, Inc., 876 N.E.2d 421, 422 n.2 (Mass. 2007) (citation omitted).

98. *An Act to Amend the Maine Human Rights Act: Hearing on L.D. 685 Before the Joint Standing Comm. on Judiciary*, L.D. 685 at 1 (123rd Legis. 2007) (memorandum from Ms. Peggy Reinsch, Office of Policy and Legal Analysis).

99. *Id.*

100. Ryan Letter, *supra* note 95, at 4-5.

101. Comm. Amend. A to L.D. 685, No. S-162 (123rd Legis. 2008).

2014] DUSSAULT V. RRE COACH LANTERN HOLDINGS, LLC 195

necessity” modification of section 4583, were enacted with the exception of the change proposed by section 2.<sup>102</sup>

### 3. *The Catir Decision*

The Law Court previously interpreted the language of section 4582 of the MHRA in *Catir v. Commissioner of the Department of Human Services*.<sup>103</sup> In *Catir*, the Law Court affirmed a grant of summary judgment for a nursing home when there was “no allegation or suggestion that the nursing home refused to rent or imposed different terms of tenancy on Medicaid recipients.”<sup>104</sup> When the nursing home decided that it would no longer accept the Medicaid rate of payment or patients unable to pay the nursing home’s higher rate, several Medicaid recipients brought suit under the MHRA to enjoin the nursing home from discontinuing their services.<sup>105</sup> Although the plaintiffs alleged that section 4582 of the MHRA prohibited the nursing home from terminating services for Medicaid recipients,<sup>106</sup> the Court concluded that the nursing home refused to accept the Medicaid rate of payment and “subjected the recipients to the same terms of tenancy offered to any other individual.”<sup>107</sup> Moreover, the Court noted that fair housing access under the MHRA is “premised upon the assumption that the persons seeking the housing have the ability to pay.”<sup>108</sup>

## III. *DUSSAULT V. RRE COACH LANTERN HOLDINGS, LLC*

### A. *Factual Background*

In June 2008, Nicole Dussault and her three children found themselves homeless after Dussault’s home was foreclosed upon.<sup>109</sup> Dussault obtained a rental assistance voucher on July 14, 2008 pursuant to the Section 8 Housing Choice Voucher program administered by Avesta Housing, a nonprofit organization contracted by the Maine State Housing Authority.<sup>110</sup> On August 5, 2008, Dussault called Coach Lantern Apartments in Scarborough to inquire about renting a three-bedroom apartment that she had identified on Craigslist.<sup>111</sup> The dwelling’s rental rate was within the limits of the voucher program and the Scarborough location allowed Dussault to keep her son in the same school system he had previously attended.<sup>112</sup> The apartment complex was owned by RRE Coach Lantern Holdings, LLC.<sup>113</sup>

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102. See P.L. 2007, ch. 243.

103. 543 A.2d 356 (Me. 1988).

104. *Id.* at 357-58 (quotations omitted).

105. *Id.* at 357.

106. *Id.*

107. *Id.* at 358.

108. *Id.*

109. Brief for Appellant at 1, *Dussault v. RRE Coach Lantern Holdings, LLC*, 2014 ME 8, 86 A.3d 52 (No. CUM-11-591).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Dussault alleged that when she disclosed that she intended to use a voucher to help pay the rent, she was informed that Coach Lantern did not accept vouchers.<sup>114</sup> Dussault's Preble Street caseworker was told the same thing after calling on Dussault's behalf.<sup>115</sup> About two weeks later, Dussault called Coach Lantern again and refrained from disclosing her intent to use a voucher.<sup>116</sup> After successfully scheduling and being shown the apartment, Dussault was given and completed a rental application.<sup>117</sup> On the application, Dussault indicated that she would be using a voucher to pay the rent.<sup>118</sup> Dussault was accepted after qualifying for an apartment.<sup>119</sup>

Pursuant to federal regulations, the Avesta caseworker notified Coach Lantern that it was required to include a HUD tenancy addendum in Dussault's lease as a condition of Section 8 and in order for Dussault to use the voucher.<sup>120</sup> On September 3, 2008, Coach Lantern, through its attorney, notified Avesta Housing in writing of its "problem with the inclusion of a Tenancy Addendum with [the standard] lease."<sup>121</sup> The attorney's letter further stated that:

I wish to make it absolutely clear that my client is not refusing to rent to [Dussault] primarily because she is a recipient of public assistance, but because [t]he addendum includes more restrictive rights and obligations on the landlord th[a]n the standard lease that they use, and my client does not wish to be bound by these more restrictive obligations.<sup>122</sup>

On September 12, 2008, Avesta Housing replied by email, informing Coach Lantern that it had to include the tenancy addendum in order to rent to Dussault.<sup>123</sup>

Coach Lantern refused to attach the tenancy addendum to Dussault's lease.<sup>124</sup> Furthermore, Coach Lantern objected to seven different requirements of the addendum ranging from housing quality standards to eviction restrictions to inspection requirements.<sup>125</sup> Dussault did not rent the apartment, and ultimately found housing in South Portland because she was unable to use the voucher to rent the Coach Lantern apartment.<sup>126</sup>

### *B. Procedural History*

Dussault filed a complaint with the Maine Human Rights Commission in November 2008, alleging that Coach Lantern violated section 4582 of the MHRA and that its policy of refusing to attach the HUD tenancy addendum to her lease

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Dussault*, 2014 ME 8, ¶ 4, 86 A.3d 52.

120. Brief for Appellant, *supra* note 109, at 1.

121. *Dussault*, 2014 ME 8, ¶ 6, 86 A.3d 52.

122. *Id.*

123. *Id.*

124. *Id.* ¶ 7. See also Brief for Appellees at 5, *Dussault v. RRE Coach Lantern Holdings, LLC*, 2014 ME 8, 86 A.3d 52 (No. CUM-11-591).

125. *Dussault*, 2014 ME 8, ¶ 7, 86 A.3d 52.

126. *Id.* ¶ 8.

constituted discrimination on the basis of her status as a recipient of public assistance.<sup>127</sup> The Commission completed an investigation and unanimously concluded that reasonable grounds existed to believe that unlawful housing discrimination had occurred against Dussault because of her status as a public aid recipient.<sup>128</sup>

Dussault then filed a complaint in Superior Court to obtain declaratory relief, injunctive relief, and damages.<sup>129</sup> In response to Coach Lantern's motion for summary judgment, Dussault filed a cross-motion for summary judgment on three theories of discrimination: direct evidence, disparate treatment, and disparate impact.<sup>130</sup> The trial court granted Coach Lantern's motion for summary judgment and denied Dussault's cross-motion.<sup>131</sup> The court ruled in favor of Coach Lantern on each of the three theories of discrimination.<sup>132</sup>

The trial court first concluded that there was no direct evidence of discrimination and, therefore, declined to conduct a mixed-motives analysis.<sup>133</sup> The court next determined that Dussault failed to meet her burden to produce sufficient evidence that Coach Lantern's proffered reasons for refusing to participate in the voucher program were pretextual under the three-step burden-shifting analysis which courts apply to identify circumstantial evidence of discrimination.<sup>134</sup> Lastly, the court performed a disparate impact analysis and determined that Coach Lantern's policy of refusing to attach the HUD addendum affects public assistance recipients more harshly than those who do not intend to use vouchers, but that Coach Lantern's actions were justified by the business necessity defense.<sup>135</sup>

Dussault appealed.<sup>136</sup>

### *C. Arguments on Appeal*

On appeal, Dussault asserted three arguments: First, Dussault argued that under the plain language of the statute, receipt of a Section 8 subsidy is included in "public assistance protection."<sup>137</sup> Accordingly, Dussault asserted that Coach Lantern's refusal to include the Section 8 addendum constituted unlawful discrimination contrary to legislative intent.<sup>138</sup> Dussault also argued that the court erred in failing to defer to the prior interpretations and approach of the Maine Human Rights Commission,<sup>139</sup> and that when reading the entire statutory scheme of sections 4582 and 4583 as a whole, the Legislature's incorporation of the business

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127. *See id.* ¶ 9.

128. *Id.*

129. *Id.* ¶ 10.

130. *See id.*

131. *Id.*

132. *Id.*

133. *Id.* *See supra* note 10.

134. *Id.* *See supra* note 11.

135. *Id.* *See supra* note 12.

136. *Id.* ¶ 11.

137. Brief for Appellant, *supra* note 109, at 9.

138. *Id.* at 10.

139. *Id.* at 16.



necessity defense “ameliorates any negative inference that might be drawn from the Judiciary Committee’s election to drop” the language making it illegal housing discrimination to refuse to rent “because of any requirement of such a public assistance program.”<sup>140</sup> Dussault also argued that the trial court erred in its application of the business necessity defense<sup>141</sup> because Coach Lantern had failed to offer any “credible admissible evidence that demonstrates that any of their objections meet the business necessity standard.”<sup>142</sup>

Second, Dussault asserted that the court erred in denying summary judgment on her claim of direct evidence discrimination.<sup>143</sup> Dussault argued that Coach Lantern’s “overt refusal to sign the lease amendment is direct evidence of Defendants’ intent to discriminate.”<sup>144</sup> Because Coach Lantern admitted its willingness to rent to Dussault based on her individual characteristics,<sup>145</sup> Dussault argued that Coach Lantern had no legitimate nondiscriminatory reason for denying Dussault the opportunity to rent.<sup>146</sup> Finally, Dussault argued that Coach Lantern’s assertions of administrative burdens were not supported by sufficient and admissible record evidence.<sup>147</sup>

Coach Lantern, on the other hand, argued in response that “[t]he language of the Maine Human Rights Act (MHRA), its legislative history, and a large body of case law regarding discrimination indicate” that Section 8 participation is not mandatory.<sup>148</sup> In support of its argument, Coach Lantern asserted that the trial court “correctly concluded that Coach Lantern did not violate the MHRA because nothing in the statute, legislative history, or the law of discrimination generally requires landlords to accept less favorable terms in order to make it possible for a recipient of public assistance to rent.”<sup>149</sup> Arguing under the plain language of the statute, Coach Lantern asserted that “the statute requires nothing more than equal treatment: that landlords offer recipients of public assistance housing on the same terms and conditions they offer housing to everyone else and that they not refuse to rent to an individual because of stereotypes about welfare recipients.”<sup>150</sup> Pointing to the fact that the legislature “enacted each and every proposed amendment to the MHRA contained within L.D. 685 *except* the provision that would have made it unlawful to refuse to rent to a recipient of public assistance because of the burdens associated with the program,” Coach Lantern asserted that legislative inaction meant that the “Legislature did not want to make participation in programs such as Section 8 mandatory.”<sup>151</sup> Coach Lantern further argued that Commission decisions are not entitled to any deference because they lack precedential or persuasive

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140. *Id.* at 21-22 (emphasis omitted).

141. *Id.* at 22.

142. *Id.* at 26.

143. *Id.* at 27.

144. *Id.*

145. *Id.* at 29 (noting that Coach Lantern was not concerned with Dussault’s personal history, criminal history, past rental history, bad references, or an inability to pay the rent).

146. *Id.*

147. *Id.* at 36-37.

148. Brief for Appellees, *supra* note 124, at 2.

149. *Id.* at 6.

150. *Id.* at 8.

151. *Id.* at 14.

force.<sup>152</sup>

Coach Lantern additionally asserted that there was no evidence that “Dussault’s status as a recipient of public assistance—as opposed to burdens associated with participating in Section 8—was a motivating factor, let alone the primary factor” in Coach Lantern’s decision not to include the HUD tenancy addendum in its standard lease.<sup>153</sup> Furthermore, Coach Lantern clarified that “endeavoring to maintain as much control as possible over the terms of tenancy and not wanting to incur additional costs and burdens associated with Section 8 participation are legitimate, non-discriminatory reasons for not renting to tenants who require a Section 8 subsidy.”<sup>154</sup> Finding *Catir* to be on point, Coach Lantern stated that “[t]here is no practical difference between what the nursing home was being asked to give up in *Catir* and what Ms. Dussault contends Coach Lantern is required to give up in this case.”<sup>155</sup> In both instances, “the defendant was sued for failing to do business on terms less favorable than it did business with others.”<sup>156</sup>

Lastly, Coach Lantern distinguished its refusal to contract on more onerous terms from a “policy or practice” that has a disparate impact on recipients of public assistance.<sup>157</sup> Identifying the former as a “refusal to undertake an affirmative act, at a cost,” Coach Lantern asserted that the trial court correctly granted summary judgment on Dussault’s claim of disparate impact liability because Dussault had failed to identify any facially neutral policy or practice, and alternatively, that Coach Lantern’s actions were supported by legitimate business reasons.<sup>158</sup>

#### D. Decision of the Law Court

Justice Silver, writing for the majority, first synthesized the language of sections 4582 and 4583 to mean that “a landlord may not refuse to rent to, or impose different terms of tenancy on” a public assistance recipient unless the landlord can demonstrate a business necessity justifying refusal.<sup>159</sup> The Court further explained that the plain language of section 4582’s prohibition against “refus[al] to rent or impos[ition of] different terms of tenancy” is narrower than the broader prohibitions of housing discrimination on other protected bases under the MHRA.<sup>160</sup> After reviewing the Court’s previous holding in *Catir v. Commissioner of the Department of Human Services*,<sup>161</sup> the majority concluded that the “undisputed facts demonstrate that Coach Lantern did not ‘refuse to rent [to] or impose different terms of tenancy’ on Dussault.”<sup>162</sup> The Court noted that Coach

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152. *Id.* at 17-18.

153. *Id.* at 23.

154. *Id.* at 27.

155. *Id.* at 29.

156. *Id.*

157. *Id.* at 31.

158. *Id.* at 31-39.

159. *Dussault*, 2014 ME 8, ¶ 13, 86 A.3d 52.

160. *Id.* ¶ 14 (alterations in original) (emphasizing that to “refuse to show or refuse to sell, rent, lease, let or otherwise deny to or withhold from any individual housing accommodation because of the race or color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status of the individual” would constitute a violation of the MHRA).

161. 543 A.2d 356, 357-58 (Me. 1988).

162. *Dussault*, 2014 ME 8, ¶ 16, 86 A.3d 52 (alteration in original).

Lantern offered and was willing to rent the apartment to Dussault after learning of her status, “so long as it could do so without including the tenancy addendum.”<sup>163</sup> The Court stated that “[i]n essence, Coach Lantern offered to rent the apartment to Dussault on ‘the same terms of tenancy offered to any other individual.’”<sup>164</sup> Thus, the Court concluded that there was no violation of the MHRA because Coach Lantern was willing to offer the apartment to Dussault on the same terms that it offered apartments to other prospective tenants.<sup>165</sup>

Turning to the statute itself, the Court explained why section 4582’s language, purpose, and legislative history precluded any attempt to “read into the MHRA a mandate that landlords accept terms of tenancy that are otherwise required only if the landlord chooses to participate in a voluntary federal program.”<sup>166</sup> First, the Court stated that Coach Lantern refused to include the tenancy addendum not “primarily because of [Dussault’s] status as recipient,” but because Coach Lantern “did not wish to bind itself to the terms of the tenancy addendum.”<sup>167</sup> Second, the Court “recognize[d] the MHRA’s purpose to protect public assistance recipients’ rights to secure decent housing,” but declined to “read into the MHRA a mandate that landlords accept terms of tenancy that are otherwise required only if the landlord chooses to participate in a voluntary federal program.”<sup>168</sup> Third, the Court felt constrained by the “language that the Legislature ha[d] enacted;”<sup>169</sup> although the “Legislature ha[d] considered a bill that would have effectively required landlords to participate in the voucher program,” the Court was unwilling to “substitute [its] policy judgment for that of the Legislature.”<sup>170</sup>

Next, the Court raised and analyzed each of the three theories of unlawful discrimination asserted by Dussault in light of its preceding analysis of the MHRA.<sup>171</sup> With respect to the claim of direct evidence discrimination, the Court examined whether Dussault’s “status as a public assistance recipient was a ‘motivating factor’ in the landlord’s refusal to rent to her.”<sup>172</sup> The Court concluded that Dussault failed to make out a prima facie case of discrimination on this theory because “the undisputed facts demonstrate that, in declining to include the tenancy addendum in the lease, Coach Lantern did not ‘refuse to rent or impose different terms of tenancy’ on Dussault based primarily upon her status as a recipient of public assistance.”<sup>173</sup> In analyzing Dussault’s disparate treatment claim, the Court similarly concluded that Dussault failed to establish a prima facie case of discrimination.<sup>174</sup> Again, the Court determined that Coach Lantern’s decision was not “based primarily upon [Dussault’s] status as a recipient of public assistance.”<sup>175</sup>

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163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* ¶ 18.

167. *Id.* ¶ 17 (alteration in original) (internal quotation marks omitted).

168. *Id.* ¶ 18.

169. *Id.* ¶ 19.

170. *Id.*

171. *Id.* ¶ 20.

172. *Id.* ¶ 21.

173. *Id.*

174. *Id.* ¶ 23.

175. *Id.*

Finally, drawing on the Court's burden-shifting analysis for disparate impact claims made in the employment context, the Court concluded that "[n]othing in the language of the MHRA . . . imposes disparate impact liability on a landlord for discrimination against an individual because of the individual's status as a recipient of public assistance."<sup>176</sup> Rather than broadening the protections available to public assistance recipients, the Court viewed the business necessity defense under section 4583 as a limitation on their rights.<sup>177</sup> Finding nothing expressly in the text of the statute or its history, the Court concluded "as a matter of law, that the MHRA, as currently established by the Maine Legislature, does not create disparate impact liability" for housing discrimination claims based on a landlord's refusal to "participate in the voluntary voucher program established by Section 8."<sup>178</sup>

In closing, the majority refuted three arguments set forth in the dissenting opinion: First, the majority noted that unlike the MHRA, discrimination on the basis of an individual's status as a recipient of public assistance is not prohibited under the federal Fair Housing Act.<sup>179</sup> The Court found the dissent's reliance on the otherwise broad definition of discrimination under the FHA to be misguided as compared with the "MHRA's relatively narrow prohibition of 'refus[al] to rent or impos[ition of] different terms of tenancy'" based primarily on a person's status as a public assistance recipient.<sup>180</sup> Second, the majority criticized the dissent's interpretation of section 4583, suggesting that it would "effectively compel Maine's landlords to participate in a voluntary federal housing subsidy program or risk having to litigate whether their decision not to participate is based on a 'business necessity.'"<sup>181</sup> Given the Court's previous holding in *Catir*,<sup>182</sup> the majority was unwilling to "interpret a statute to effect" a modification of the law, absent "*clear and explicit* statutory language" demonstrating legislative intent to do so.<sup>183</sup> Thus, the majority dismissed the dissent's assertion that the Court's interpretation of the MHRA would allow "landlords to avoid liability by simply alleging business necessity rather than proving it."<sup>184</sup> Instead, the majority found it unnecessary to reach the issue of business necessity because it concluded that sections 4582 and 4583 do not authorize disparate impact liability for claims of housing discrimination in connection with a landlord's refusal to participate in the Section 8 voucher program, and therefore, Dussault had failed to make out a prima facie case of unlawful housing discrimination under the disparate impact theory.<sup>185</sup>

The Court affirmed.<sup>186</sup>

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176. *Id.* ¶ 25.

177. *Id.* ¶ 26.

178. *Id.*

179. *Id.* ¶ 27.

180. *Id.* (alteration in original).

181. *Id.* ¶ 28.

182. See *Catir v. Comm'r of Dep't of Human Servs.*, 543 A.2d 356, 358 (Me. 1988) (holding that the nursing home did not violate the MHRA when it offered Medicaid recipients "the same terms of tenancy offered to any other individual").

183. *Dussault*, 2014 ME 8, ¶ 28, 86 A.3d 52 (quoting *Caron v. Me. Sch. Admin. Dist. No. 27*, 594 A.2d 560, 563 (Me. 1991)).

184. *Id.* ¶ 29.

185. *Id.*

186. *Id.* ¶ 30.

### E. *The Concurrence*

Concurring in the result and the Court's reasoning, Justice Alexander joined the Court's opinion and wrote separately to "note that the Maine Legislature has explicitly rejected the change in the law urged by the Dissent."<sup>187</sup> Justice Alexander further emphasized that the dissent's approach "would interpret current Maine Law to mandate acceptance of onerous contract conditions" of Section 8 programs, notwithstanding the capacity of some landlords to bear the cost of demonstrating "business necessity" to avoid the contractual requirements.<sup>188</sup>

Pointing to the legislative history of section 4582, Justice Alexander noted that the provision, which would have required landlords to accept the Section 8 "contractual burdens[,] was stricken from the legislation."<sup>189</sup> As a matter of statutory construction, Justice Alexander cautioned that "when a law has been interpreted by a judicial opinion, we do not later change that interpretation absent 'clear and explicit' statutory language demonstrating legislative intent to change prior case law."<sup>190</sup>

### F. *The Dissent*

Justice Levy, writing for two other dissenting justices, agreed with two conclusions of the Court: that the MHRA does "not make participation in the Section 8 housing assistance program mandatory" and that landlords are prohibited from intentionally discriminating against public assistance recipients under the Act.<sup>191</sup> The dissent, however, concluded that the MHRA "prohibits housing practices that have a disparate impact on recipients of public assistance when such decisions are not justified by a business necessity."<sup>192</sup> Justice Levy also disagreed with the Court's conclusion that Coach Lantern did not "refuse to rent" to Dussault within the meaning of section 4582.<sup>193</sup>

The dissent first considered "whether Coach Lantern's actions exposed it to liability pursuant to the MHRA."<sup>194</sup> In determining whether Coach Lantern was liable, the dissent observed that the majority opinion relied heavily on the Law Court's previous decision in *Catir*,<sup>195</sup> "which was decided before the 'business necessity' defense was added to section 4583 in 2007."<sup>196</sup> The dissent found the *Catir* decision "inapposite to the present case for several reasons."<sup>197</sup> After distinguishing that the *Catir* "summary judgment record demonstrated that the nursing home's refusal to serve the plaintiffs as Medicaid patients was . . . based on its decision to no longer accept the Medicaid reimbursement rate," the dissent observed that there was "no reason to consider whether the nursing home's refusal

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187. *Id.* ¶ 31 (Alexander, J., concurring).

188. *Id.*

189. *Id.* ¶ 34.

190. *Id.* ¶ 36 (quoting *Caron v. Me. Sch. Admin. Dist. No. 27*, 594 A.2d 560, 563 (Me. 1991)).

191. *Id.* ¶ 38 (Levy, J., dissenting).

192. *Id.*

193. *Id.*

194. *Id.* ¶ 39.

195. 543 A.2d 356 (Me. 1988).

196. *Dussault*, 2014 ME 8, ¶ 39, 86 A.3d 52 (Levy, J., dissenting).

197. *Id.* ¶ 40.

to accept the Medicaid reimbursement rate” was justified by business necessity, because the defense was added to section 4583 over twenty years later.<sup>198</sup> Thus, the dissent observed that the issue in *Catir* did not concern a refusal to rent to Medicaid recipients, but rather a question of whether different terms of tenancy had been imposed.<sup>199</sup> In relying on *Catir* to control the outcome of the case, the dissent found that the Court had “adopt[ed] too narrow a view of what it means for a landlord to ‘refuse to rent’ to a prospective tenant.”<sup>200</sup> The dissent concluded that “regardless of the reason for its refusal, Coach Lantern ‘refused to rent’ to Dussault pursuant to the plain language of section 4582.”<sup>201</sup>

The dissent also asserted that, despite Coach Lantern’s willingness to rent to Dussault, it would only have done so if Dussault “relinquished her status as a recipient of public assistance.”<sup>202</sup> Moreover, the dissent stated that under the Court’s reading of section 4582, a landlord could refuse “to rent to a tenant based on the tenant’s protected status so long as the landlord simply asserted that it was ‘willing’ to accept the tenant should she change her status.”<sup>203</sup> Thus, under this alternative view of the facts, the dissent concluded that Coach Lantern’s actions constituted a refusal to rent to Dussault within the meaning of section 4582.<sup>204</sup>

Finally, the dissent articulated three reasons why the majority’s interpretation of the language “primarily because of” incorrectly precluded the availability of disparate impact liability for public assistance recipients.<sup>205</sup> First, the dissent asserted that the term “primarily because of” could have more than one meaning: “either (1) that the decision had a discriminatory purpose, or (2) that the decision resulted in a disparate impact on members of a protected group that was *functionally equivalent* to intentional discrimination.”<sup>206</sup> Second, the dissent reasoned that a structural interpretation of section 4582 as recognizing “a facially neutral housing practice that has a disparate impact” was consistent with the availability of a business necessity defense under section 4583, which creates a defense to liability under the MHRA for housing decisions “not based on” one of the protected classifications.<sup>207</sup> Furthermore, in evaluating the statute’s legislative history, the dissent stated that the “Legislature’s intent to subject claims of housing discrimination based on the receipt of public assistance payments to disparate impact analysis, and to permit landlords to justify their practices based on a showing of business necessity, could not be clearer.”<sup>208</sup> The dissent further refuted the concurrence’s assertion that legislative intent could be gleaned from the Judiciary Committee’s removal of section 2 from L.D. 685,<sup>209</sup> because the same Committee also expressly stated its goal of applying disparate impact liability to

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198. *Id.*

199. *Id.* ¶ 41.

200. *Id.* ¶ 42.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* ¶ 43.

205. *Id.* ¶ 44.

206. *Id.* ¶ 46.

207. *Id.* ¶ 47.

208. *Id.* ¶ 48.

209. See *supra* note 187 and accompanying text.

“unreasonable housing practices.”<sup>210</sup> Third, the dissent stated that recognition of disparate impact liability as within sections 4582 and 4583 was consistent with federal law because “every federal court of appeals but one has concluded that” the antidiscrimination provision<sup>211</sup> of the FHA “creates liability for intent-neutral disparate impact.”<sup>212</sup>

Thus, on the merits of the case, the dissent determined that Coach Lantern’s “refusal to include the HUD tenancy addendum in its leases effectively excludes one hundred percent of Section 8 recipients from renting from Coach Lantern.”<sup>213</sup> According to the dissent, when the “inexorable zero exists, the prima facie inference of discrimination becomes strong.”<sup>214</sup> The dissent observed that “[a]lthough Coach Lantern summarized the conditions of the addendum that it objects to, it failed to assert facts from which a fact-finder could determine that the conditions would interfere with any substantial, legitimate, and nondiscriminatory interest associated with its business.”<sup>215</sup> Thus, the dissent found that Coach Lantern failed to meet its burden of “showing that an actual business necessity justified its decision to refuse to include Section 8 addenda in its lease agreements.”<sup>216</sup> The dissent concluded by acknowledging that the MHRA “does not compel landlords to participate in the Section 8 housing voucher program so long as the landlord’s decision does not intentionally discriminate against, or result in a disparate impact on, recipients of public assistance.”<sup>217</sup> Given Dussault’s un rebutted prima facie case, the dissent would have vacated and remanded for entry of a judgment in Dussault’s favor.<sup>218</sup>

#### IV. ANALYSIS

##### A. *The Likely Impact of Dussault*

The Court’s holding—that Dussault failed to make out a prima facie case on each of her claims of liability and that disparate impact liability is unavailable for Section 8 recipients under the MHRA—represented a reasonable, but highly strained construction of the statute’s plain language and legislative history. The majority’s interpretation of the availability of fair housing protections for Section 8 recipients under the MHRA was particularly narrow in light of the statute’s apparent ambiguity and the majority’s explicit recognition that the MHRA’s purpose is to protect public assistance recipients’ rights to secure decent housing.<sup>219</sup>

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210. *Dussault*, 2014 ME 8, ¶ 50, 86 A.3d 52 (Levy, J., dissenting). The 2007 amendment to the MHRA expressly stated that the MHRA was amended to “prohibit unreasonable housing practices that have a disparate impact on the basis of . . . the receipt of public assistance payments.” L.D. 685, Summary (123rd Legis. 2007).

211. *See* 42 U.S.C. § 3604(a) (2012).

212. *Dussault*, 2014 ME 8, ¶ 52, 86 A.3d 52 (Levy, J., dissenting).

213. *Id.* ¶ 55.

214. *Id.* (citation omitted).

215. *Id.* ¶ 57.

216. *Id.* ¶ 59.

217. *Id.* ¶ 60.

218. *Id.*

219. *See* 5 M.R.S.A. § 4581; *see also supra* note 168 and accompanying text.

Fair housing advocates were likely and justifiably disappointed by the outcome of the appeal.<sup>220</sup> What's of greater concern is that the Court's holding could be cited as precedent to nullify the availability of protections under the MHRA for non-Section 8 public assistance recipients in Maine, particularly if the applicable housing subsidy or general assistance program includes administrative requirements.

What is clear is that landlords may see *Dussault* as a license to more easily deny housing opportunities to holders of Section 8 vouchers, especially in light of Maine's competitive apartment rental market.<sup>221</sup> With more than 10,000 Mainers on Section 8 waiting lists, 30,000 individuals eligible for Section 8 vouchers, and a "tight rental market" overall, "[t]here are many applicants and it's certainly making it harder on Section 8."<sup>222</sup> Thus, *Dussault* provides a decreased incentive for landlords to accept Section 8 tenants,<sup>223</sup> because landlords need only state that they would gladly rent to Section 8 tenants but for the requirements of the tenancy addendum or the program overall. This does not seem to comport with the statute's remedial purpose.<sup>224</sup>

Maine faces particularly acute housing affordability issues, with one in three renters spending more than half of their income on housing costs.<sup>225</sup> Although Maine needs approximately 56,000 affordable family rental units and 5,180 senior units to fill demand, development of new affordable rental units is often opposed by local communities fearful of adverse impacts.<sup>226</sup> At the same time, existing rental stock has declined since 2000 and affordable rental housing for the low-income population in Portland is "limited."<sup>227</sup>

When a prospective tenant has been explicitly denied housing on account of race, gender, the presence of children, or a variety of other protected classifications, the legal claim is clear and unambiguous.<sup>228</sup> Landlords, however, possess

220. Cf. *Beaulieu v. City of Lewiston*, 440 A.2d 334, 346-47 (Me. 1982) (holding that the City's automatic denial of mortgage payment assistance to those eligible for general assistance did not comport with the statutory mandate that need is the exclusive criterion for relief under the general assistance program). "Shelter purchased by its occupant is no less essential to his or her 'maintenance' than rented shelter is to the tenant. The continuing availability of that shelter is essential to the applicant's maintenance, stability, and even survival." *Id.* at 346.

221. See Tom Porter, *Section 8 Housing Cuts Affecting Maine Landlords*, MPBN.NET (Aug. 5, 2013), <https://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/5347/ItemId/29280/Default.aspx> [hereinafter *Section 8 Housing Cuts*] (reporting on the difficult situation "facing people who live, or who want to live, in federally-subsidized housing" in Maine).

222. *Id.*

223. See *id.* Other landlords assert, however, that "people living in Section 8 housing are usually good tenants, and many property owners are drawn to the prospect of having them . . . because the rent is guaranteed . . . [and] landlords have more leverage over Section 8 tenants should they misbehave." *Id.*

224. Cf. *Coker v. City of Lewiston*, 1998 ME 93, ¶ 7, 710 A.2d 909 ("Maine's general assistance statutes must be construed *liberally to effect their remedial purposes and achieve their humanitarian aims.*") (emphasis added).

225. *Blue Ribbon Report*, *supra* note 69, at 7. The Report also notes that roughly half of Maine's 148,050 renters earned less than 50% of the area median income. *Id.*

226. *Id.*

227. *Id.* at 8.

228. See 42 U.S.C. § 3604(a) (2012).



sufficient business and legal savvy to avoid such obvious distinctions.<sup>229</sup> Instead, landlords may resort to more subtle, but equally damaging forms of discrimination.<sup>230</sup> This may include discrimination on account of an individual's use of public assistance to pay the rent.<sup>231</sup> Thus, a landlord's knowledge that a prospective tenant will rely on receipt of public assistance may also stand as a proxy or pretext for discrimination because of other protected classifications.<sup>232</sup>

Those most impacted by source of income discrimination include individuals living with disabilities, single female heads of household, families with children, and members of racial minority groups.<sup>233</sup> Moreover, the impact of public assistance discrimination has long-term effects.<sup>234</sup> Despite the multiple objectives of national fair housing laws that envision communities with truly "integrated and balanced living patterns,"<sup>235</sup> a landlord's "no-voucher" policy may exacerbate the shift of low income tenants into substandard housing within impoverished neighborhoods.<sup>236</sup>

*B. The Dussault Majority Reasonably Interpreted the MHRA's Fair Housing Laws as Precluding Claims of Disparate Impact Made by Section 8 Recipients, but the Interpretation Leads to Illogical Results.*

Although the *Dussault* majority reasonably interpreted sections 4582 and 4583 as precluding disparate impact liability claims made by Section 8 recipients, its conclusion leads to illogical results. As discussed below, there are three reasons why the majority reasonably construed the MHRA's public assistance protections as precluding claims of disparate impact liability asserted by Section 8 recipients. However, under traditional canons of statutory construction in Maine, the majority's interpretation of the ambiguous statutory language leads to "absurd, illogical, or inconsistent results."<sup>237</sup>

229. See Natalie Moore, *New report reveals pervasive discrimination in housing voucher program*, WBEZ.ORG (Apr. 1, 2014), <http://www.wbez.org/news/new-report-reveals-pervasive-discrimination-housing-voucher-program-109946> (reporting on the use of trained investigators to assess fair housing practices in Chicago).

230. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468-73 (2001) (defining second generation discrimination as claims which "involve patterns of interaction among groups . . . that, over time, exclude nondominant groups," and suggesting that second generation discrimination "does not evoke the first generation's clear and vivid moral imagery—the exclusionary sign on the door or the fire hose directed at schoolchildren").

231. See Flagg, *supra* note 43, at 202 (stating that landlords commit "source of income discrimination" when they "fail to make rental units available to prospective tenants . . . because of how" the individual plans to pay the rent).

232. See *id.* ("While landlords may openly refuse prospective tenants based on their status as voucher holders or recipients of public assistance, denial in such cases may be a thinly veiled means of rejecting tenants on the basis of race, familial status or disability.").

233. See *id.* at 206.

234. See *id.* at 208 ("Where a child grows up is directly related to where he or she can go to school, and living in a low-income, racially segregated neighborhood with under-funded public schools can be a significant barrier to racial and economic integration for that family.").

235. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citation omitted).

236. See Daniel, *supra* note 38, at 783-84 (suggesting that landlords use "no-voucher" policies to prevent members of other protected classes from accessing their rental units).

237. *Coker v. City of Lewiston*, 1998 ME 93, ¶ 7, 710 A.2d 909.

2014] DUSSAULT V. RRE COACH LANTERN HOLDINGS, LLC 207

*1. The Majority Reasonably Interpreted the MHRA as Precluding Disparate Impact Claims Made by Section 8 Recipients.*

The majority's interpretation of the MHRA is justifiable on three grounds: First, the statute's plain language demonstrates that Section 8 recipients are not entitled to the same scope of protection as other classifications within the MHRA. Second, the statute's recent legislative history evidences a specific legislative intent to limit the availability of disparate impact claims to protected characteristics, and not because of the requirements of any public assistance programs. Third, a brief examination of a similar housing discrimination case from Massachusetts helps demonstrate why the majority correctly distinguished between two types of public assistance discrimination: "status-based" discrimination and "program requirements" discrimination.

In *DiLiddo v. Oxford Street Realty, Inc.*,<sup>238</sup> the Massachusetts Supreme Judicial Court interpreted a state fair housing law that prohibits landlords from discriminating against tenants who receive housing subsidies either "because the individual is such a recipient," or "because of any requirement" of the public assistance program.<sup>239</sup> The court held that the landlord's refusal to rent an apartment to a housing subsidy recipient, because of the voucher program's lease requirements, fell "squarely within the ambit of the prohibition of the statute."<sup>240</sup> The court first reviewed its previous decision in *Attorney General v. Brown*,<sup>241</sup> which distinguished between discrimination "solely" because a prospective tenant holds a housing voucher and discrimination that occurs because a landlord refuses to accept the requirements of the housing program.<sup>242</sup> The court observed that the legislature specifically amended the statutory language two years after the *Brown* decision, and "added new language making it unlawful for a landlord to discriminate against a housing subsidy recipient *either* 'because the individual is such a recipient,' *or* 'because of any requirement of such public assistance, rental assistance, or housing subsidy program.'"<sup>243</sup> Thus, the 1990 amendment to the Commonwealth's law codified two "kinds of housing discrimination that [the] court had parsed so carefully in *Brown*" as unlawful.<sup>244</sup>

Unlike the Massachusetts law at issue in *DiLiddo*, the plain language of the MHRA's fair housing provisions proscribe only "status-based" discrimination. Section 4581 of the MHRA declares a civil right to "decent housing," while guarding against discrimination on the basis of nine characteristics.<sup>245</sup> By the statute's plain language, the right of an individual to obtain housing "without discrimination because of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status" does not extend to

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238. 876 N.E.2d 421 (Mass. 2007).

239. *Id.* at 422.

240. *Id.* at 429.

241. 511 N.E.2d 1103, 1109 (Mass. 1987) (holding that a landlord's refusal to accept a Section 8 tenant because of the requirements of the Section 8 program did "not necessarily equate with discrimination 'solely' on the basis of the individual's status as a Section 8 certificate holder").

242. *DiLiddo*, 876 N.E. at 428.

243. *Id.*

244. *Id.*

245. 5 M.R.S.A. § 4581 (2014).

an individual whose status includes receipt of public assistance and housing subsidies.<sup>246</sup> Although the Maine Legislature has twice had the opportunity to add receipt of public assistance to section 4581's listing, the Legislature has not incorporated such protections into the statute's express listing of those entitled to a civil right to decent housing.<sup>247</sup> Thus, the plain language of section 4581 supports the majority's view that an individual's status as a recipient of public assistance is distinct from other forms of discrimination protected under the statute.

Similarly, the text of section 4582 makes a distinction between the nine classifications specified within section 4581<sup>248</sup> and the class of individuals who receive protections on account of their status as public assistance recipients. Whereas the former receive broader protections under the MHRA, discrimination against public aid recipients is only prohibited in the context of "refus[ing] to rent or impos[ing] different terms of tenancy . . . primarily because of the individual's status as recipient."<sup>249</sup> Thus, by the statute's plain language, the question of whether disparate impact liability is available for Section 8 recipients turns on whether an individual's "status as recipient" includes participation in the Section 8 voucher program, as well as the landlord requirements contained therein. In other words, does a landlord's refusal to affirmatively accept the requirements of Section 8 transform a landlord's willingness to rent into unlawful housing discrimination?

Finally, the legislative history of sections 4582 and 4583 is instructive and supports the majority's view that "status-based discrimination" does not open the door to a claim for disparate impact housing discrimination on the basis of receipt of Section 8 assistance. In 2007, the Judiciary Committee considered amending section 4582 to include the exact same "program-requirements" provision that Massachusetts codified in 1990 and later interpreted in *DiLiddo*.<sup>250</sup> Whereas the language as originally proposed for section 4582 would have broadened the MHRA's protections for recipients of public assistance—codifying both "status-based" and "program-requirements" discrimination—the final amendments to the MHRA dropped the latter type, and at the same time, modified the language of section 4583 to clarify the availability of a "business necessity" defense for neutral housing practices with disparate impacts on any protected class.<sup>251</sup> Thus, had the Legislature intended to extend disparate impact liability to "program-requirements"

246. *See id.*

247. *See* discussion *supra* Part II.B.2.

248. For example, section 4582 of the MHRA provided that it is unlawful housing discrimination for an individual to undertake the following actions on the basis of "race or color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status": "mak[ing] or caus[ing] to be made any written or oral inquiry"; "refus[ing] to sell, rent lease, let or otherwise deny to or withhold" a housing accommodation; "issu[ing] any advertisement . . . that indicates any preference, limitation, or specification or discrimination"; "discriminat[ing] against . . . in the price, terms, conditions or privileges of the sale, rental or lease"; "evict[ing] or attempt[ing] to evict any tenant"; "fail[ing] or refus[ing] to show . . . any accommodation . . . or to misrepresent . . . the availability or asking price . . . or to fail to communicate . . . any offer . . . made by any applicant." 5 M.R.S.A. § 4582 (2007), *repealed by* P.L. 2011, ch. 613, §§ 11-12 (effective Sept. 1, 2012) (codified at 5 M.R.S.A. § 4581-A (2014)).

249. *Id.*

250. *See* discussion *supra* Part II.B.2.

251. *See* discussion *supra* Part II B.2.

discrimination, the Legislature could have expressly included that language in section 4583. Instead, the Legislature only enacted disparate impact liability for claims of “status-based” housing discrimination, as well as claims brought because of the nine other classifications listed in section 4581.<sup>252</sup>

2. *The Majority’s Interpretation of the Public Assistance Protections Under the MHRA for Section 8 Recipients Renders the Statute a Nullity.*

The Law Court set forth the guidelines for statutory construction of general assistance statutes in *Coker v. City of Lewiston*.<sup>253</sup> When interpreting a statute, the Court first looks to the “plain meaning of the statutory language as a means of effecting the legislative intent.”<sup>254</sup> Only if the statutory language is ambiguous will the Court “examine other indicia of legislative intent, such as legislative history.”<sup>255</sup> The Court interprets the statutory scheme “from which the language arises” in order “to achieve a harmonious result.”<sup>256</sup> Finally, the Court “will not construe statutory language to effect absurd, illogical, or inconsistent results.”<sup>257</sup>

Given the 4-3 split decision of the Court,<sup>258</sup> the statutory language of section 4582, which made it unlawful to “refuse to rent or impose different terms of tenancy . . . primarily because of the individual’s *status*” as a public assistance recipient, was almost certainly ambiguous. In light of this ambiguity, the majority’s heavy reliance<sup>259</sup> on the legislature’s 2007 rejection of the program-requirements provision was inconsistent with the majority’s simultaneous recognition that the legislative intent included a desire to “protect public assistance recipients’ rights to secure decent housing.”<sup>260</sup> Moreover, had the Court looked further back to the legislative history surrounding the actual 1975 enactment (rather than lack of enactment of the 2007 amendment) of the protections against housing discrimination for recipients of public assistance, the majority could just as easily have ascertained a legislative intent to remedy “[o]ne of the largest housing problems” faced by Maine families: “discrimination by potential landlords against families receiving public assistance.”<sup>261</sup> Although the statute’s language was ambiguous, the purpose of the statute was clear: “to enable those citizens of Maine most in need of housing to have a fair and equal chance of obtaining it.”<sup>262</sup> Today, this includes participation in the most popular form of housing assistance in

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252. See discussion *supra* Part II.B.2.

253. 1998 ME 93, 710 A.2d 909.

254. *Id.* ¶ 7.

255. *Id.*

256. *Id.*

257. *Id.*

258. See *supra* note 19 and accompanying text.

259. Cf. *Covanta Maine LLC v. Pub, Utils. Comm’n*, 2012 ME 74, ¶ 12, 44 A.3d 960 (stating that as a matter of statutory construction, the Court may consider legislation subsequently enacted “in ascertaining the meaning of a term when the amendment is meant to clarify prior legislation, not alter it.”).

260. *Dussault*, 2014 ME 8, ¶ 18, 86 A.3d 52.

261. L.D. 327, Statement of Fact (107th Legis. 1975).

262. *Id.*

America.<sup>263</sup>

Despite such legislative intent, the majority's holding renders the statute a nullity and potentially leads to inconsistent results because a landlord can decline to rent to a prospective tenant any time the tenant relies on a form of housing assistance that also includes administrative requirements for the landlord. In this respect, the majority's significant reliance on *Catir*<sup>264</sup> is also misplaced because, unlike the plaintiffs in *Catir*, Section 8 recipients can afford to pay the rent.<sup>265</sup> Thus, the only remaining issue is whether a landlord can assert a business necessity for declining to rent, a provision which the majority's interpretation also makes unnecessary within the overall statutory scheme as applied to Section 8 recipients. If this is not the case, then what remains of the statute's purpose is a legislative intent to protect public assistance recipients from housing discrimination solely on account of the stereotypes or generalized bias against such recipients. Because any form of public assistance is likely to include programmatic requirements for its participants, only incompetent or unthinking landlords would fit within such a construction, leaving many low-income individuals without a fair and equal chance of obtaining decent housing.

In this regard, the dissent's assertion that Coach Lantern failed to rebut Dussault's prima facie case should have prevailed,<sup>266</sup> because a landlord who refuses to rent to a Section 8 recipient because of the program's administrative requirements should be required to demonstrate that the voluntary federal program poses burdens that are inconsistent with business necessity, and Coach Lantern made no such showing. Nevertheless, only the legislature can achieve such a result.

*C. The Maine Legislature Should Amend the MHRA's Definition of  
Discrimination on the Basis of Status as a Public Assistance  
Recipient to Include Section 8 Recipients.*

The Legislature should consider amending section 4581-A(4) of the MHRA to expressly include recipients of Section 8 vouchers.<sup>267</sup> The Section 8 program is the largest and most expansive housing subsidy program in the nation.<sup>268</sup> Accordingly, the Legislature should reflect in current law the legal reach of the housing program that most directly impacts Maine's landlords and rental population. Although

263. See Bruce Zucker & Kiren Dosanjh Zucker, *Section 8 Voucher Program: The Benefits and Pitfalls of Renting to Residential Tenants Receiving Federally Subsidized Housing*, 43 REAL ESTATE L.J. 38, 38-39 (2014) (stating that Section 8 is the "dominant form of federal housing assistance" and that over two million households participate in the program).

264. See discussion *supra* Part II.B.3.

265. See discussion *supra* Part II.B.2.

266. See discussion *supra* Part III.F.

267. See, e.g., D.C. CODE § 2-1402.21(e) (2014); OR. REV. STAT. ANN. § 659a.421(1)(d) (West 2014).

268. See *America's Rental Housing: Evolving Markets and Needs*, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV. 35 (Dec. 9, 2013), [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs\\_americas\\_rental\\_housing\\_2013\\_1\\_0.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_americas_rental_housing_2013_1_0.pdf) (identifying 2.2 million users of voucher subsidies nationwide, making Section 8 the largest federal housing assistance program).

2014] DUSSAULT V. RRE COACH LANTERN HOLDINGS, LLC 211

controversial,<sup>269</sup> doing so would bring much needed clarity and relief to an area of fair housing law likely to see increasing activity.

#### V. CONCLUSION

Section 8 tenants like Nicole Dussault were unfortunately set back by the Court's decision. Although the majority reasonably interpreted that disparate impact liability is not available for claims of Section 8 recipients brought under the MHRA because of the voluntary nature of the federally funded Section 8 housing program, the Court's approach also appeared inconsistent with general principles of statutory construction. Accordingly, the decision should be narrowly read and limited in precedential value to just precluding disparate claims brought by Section 8 recipients under the MHRA. Moreover, the Maine Legislature is in the best position to clarify the statute's broader protections and bolster its effectiveness by expressly including Section 8 coverage. Irrespective of one's beliefs concerning the efficacy of Section 8,<sup>270</sup> Maine's low-income housing population and apartment owners should be encouraged to operate transparently and know with certainty where they stand.<sup>271</sup>

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269. See Manny Fernandez, *Mayor Vetoes Bill Protecting Section 8 Tenants From Landlord Bias*, N.Y. TIMES (Mar. 1, 2008), <http://www.nytimes.com/2008/03/01/nyregion/01housing.html> (describing a New York City bill that would have made it illegal for landlords to refuse tenants who intended to pay rent using Section 8 vouchers).

270. See Evie Blad, *50 Years Later, Housing Programs' Reach is Limited*, EDUC. WEEK (Mar. 25, 2014), [http://www.edweek.org/ew/articles/2014/03/26/26wophousing\\_ep.h33.html](http://www.edweek.org/ew/articles/2014/03/26/26wophousing_ep.h33.html) (providing an in-depth review and analysis of diverse perspectives regarding the low-income housing crisis in America).

271. See Zucker & Zucker, *supra* note 263, at 45-46 ("Providing low-income families the benefit of safe, sanitary, and affordable housing while simultaneously giving private property owners the ability to earn reasonable profits" makes the Section 8 program a "successful investment for all stakeholders.").

